
*SUPREME COURT OF THE STATE OF NEW YORK*

*APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT*

DECISIONS FILED

APRIL 24, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, DEPUTY CLERK

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**9**

**KA 07-01853**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE SLATER, DEFENDANT-APPELLANT.

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

TERRENCE SLATER, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered August 14, 2007. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree, and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). The record establishes that, prior to trial, a potential witness for the defense indicated that she would invoke the Fifth Amendment in the event that defendant called her to testify. Defendant asked County Court to instruct the jury that he wished to call that person to testify on his behalf and that he should not be penalized by her failure to do so. We reject the contention of defendant that the court erred in refusing to charge the jury in accordance with his request. Rather, we conclude that the court properly gave a neutral instruction to the jury concerning that witness, i.e., that it was not to draw any inference from her failure to testify (*see People v Tatro*, 53 AD3d 781, 786-787, *lv denied* 11 NY3d 835; *see generally People v Thomas*, 51 NY2d 466, 472-473). Defendant failed to preserve for our review the contention in his pro se supplemental brief that the affidavit of that witness should have been admitted in evidence as a declaration against penal interest inasmuch as defendant never sought to introduce the affidavit in

evidence (*see* CPL 470.05 [2]), 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]).

Even assuming, arguendo, that defendant is correct that the court erred in its *Molineux* ruling, we conclude that the error is harmless (*see People v Laws*, 27 AD3d 1116, *lv denied* 7 NY3d 763; *see generally People v Crimmins*, 36 NY2d 230, 241-242). We reject defendant's further contention that the court erred in imposing consecutive sentences for criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree. "[T]he sale and possession charges involved separate and distinct acts, allowing imposition of consecutive sentences upon conviction" (*People v Farga*, 180 AD2d 484, 485, *lv denied* 80 NY2d 830; *see People v Johnson*, 286 AD2d 929, 930, *lv denied* 97 NY2d 756; *People v Watson*, 242 AD2d 924, 925, *lv denied* 91 NY2d 899). The further contention of defendant that he was improperly penalized for exercising his right to a trial is not preserved for our review (*see People v Griffin*, 48 AD3d 1233, 1236-1237, *lv denied* 10 NY3d 840; *People v Irrizarry*, 37 AD3d 1082, 1083, *lv denied* 8 NY3d 946). In any event, we conclude that the sentence imposed "was not the product of vindictiveness" (*People v Thompson*, 299 AD2d 889, 890, *lv denied* 99 NY2d 585; *see Irrizarry*, 37 AD3d at 1083). The contention of defendant in his pro se supplemental brief that the court erred in denying his request for new counsel based on an alleged conflict of interest is based on matters dehors the record, and thus it is not reviewable on direct appeal (*see generally People v Scott*, ___ AD3d ___ [Mar. 20, 2009]). Insofar as the further contention of defendant in his pro se supplemental brief that he received ineffective assistance of counsel is also based on matters dehors the record, it is not reviewable on direct appeal (*see People v Martina*, 48 AD3d 1271, 1272-1273, *lv denied* 10 NY3d 961; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849), and we conclude on the record before us that defendant's contention is otherwise without merit (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**26**

**KA 07-01628**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BONIFACIO PEREZ-RAMIREZ, DEFENDANT-APPELLANT.

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GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 19, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**139**

**CA 08-01810**

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

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JERRY A. WIELBON, PLAINTIFF-RESPONDENT,

V ORDER

CHARLES R. PETRUS, RENT-A-CENTER EAST, INC.,
AND CITI CAPITAL COMMERCIAL LEASING CORPORATION,
FORMERLY KNOWN AS ASSOCIATES LEASING, INC.,
DEFENDANTS-APPELLANTS.
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(AND A THIRD-PARTY ACTION.)

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SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO (STEPHEN P. BROOKS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN FROMEN, BUFFALO (FREDERICK G. ATTEA, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PETRONE & PETRONE, P.C., BUFFALO (JAMES H. COSGRIFF, III, OF COUNSEL), FOR THIRD-PARTY DEFENDANT.

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Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 31, 2007 in a personal injury action. The order denied the motion of defendants for leave to amend the answer.

Now, upon the stipulation to vacate the order appealed from signed by the attorneys for the parties on January 10, 20 and 27, 2009 and the order of Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 25, 2009 vacating said order,

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**194**

**KA 07-01135**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN M. BOOTH, DEFENDANT-APPELLANT.

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SCACCIA LAW FIRM, SYRACUSE (DANTE M. SCACCIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered May 11, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the third degree and criminal mischief in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed, and the matter is remitted to Ontario County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the third degree (Penal Law § 120.00 [1]) and criminal mischief in the fourth degree (§ 145.00 [1]), defendant contends that the conviction of criminal mischief is not supported by legally sufficient evidence. By making only a general motion for a trial order of dismissal, defendant failed to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention lacks merit. "[W]here, as here, a perpetrator damages the very property used to assault his [or her] victim, he [or she] may be presumed to intend the natural consequences of his [or her] acts and may thus be found guilty of criminal mischief" (*Matter of Carlos M.*, 32 AD3d 686, 687).

We reject the further contention of defendant that he was subjected to a de facto arrest without probable cause when he was detained by the police and that County Court erred in refusing to suppress the fruits of that alleged arrest. Contrary to the contention of defendant, he was not subjected to a de facto arrest before the showup identification by the victim, but instead was merely detained. Indeed, in conducting the showup identification, "the police diligently pursued a minimally intrusive means of investigation likely to confirm or dispel suspicion quickly, during which time it was necessary to detain the defendant" (*People v Hicks*, 68 NY2d 234,

242; *see People v Owens*, 39 AD3d 1260, 1261, *lv denied* 9 NY3d 849).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**228.2**

**CA 08-02161**

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

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ANNE HUNOLD, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ANNE COOK, DECEASED, AND JEROLD COOK, DERIVATIVELY, PLAINTIFFS-RESPONDENTS,

V ORDER

COMMUNITY GENERAL HOSPITAL OF GREATER SYRACUSE, ET AL., DEFENDANTS, CHAG ANESTHESIA, P.C., SCOTT REIZUN, M.D., ADAM WARNIKEN, C.R.N.A., AND MICHAEL TAMUL, M.D., DEFENDANTS-APPELLANTS.

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NEW YORK STATE DEPARTMENT OF HEALTH, APPELLANT.
(APPEAL NO. 2.)

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BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR APPELLANT.

SIDNEY P. COMINSKY TRIAL LAWYERS, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeals from an order of the Supreme Court, Onondaga County (John C. Cherundolo, J.), entered October 10, 2008. The order denied the motion of the New York State Department of Health and the cross motion of defendants Chag Anesthesia, P.C., Scott Reizun, M.D., Adam Warniken, C.R.N.A., and Michael Tamul, M.D. seeking, inter alia, to vacate the order in appeal No. 1.

It is hereby ORDERED that said appeals are unanimously dismissed without costs as moot (*see Hunold v Community Gen. Hosp. of Greater Syracuse* [appeal No. 1], ___ AD3d ___ [Apr. 24, 2009]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**249**

**TP 08-00988**

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

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IN THE MATTER OF SHERWOOD TERRACE APARTMENTS
AND DENNIS HANKINSON, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
KUMIKI GIBSON, COMMISSIONER, NEW YORK STATE
DIVISION OF HUMAN RIGHTS, RESPONDENTS-PETITIONERS.
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CAROL A. GOSTOMSKI AND HOUSING OPPORTUNITIES
MADE EQUAL, INC., RESPONDENTS.

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JAMES D. HARTT, ROCHESTER, FOR PETITIONERS-RESPONDENTS.

CAROLINE J. DOWNEY, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR RESPONDENTS-PETITIONERS.

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Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court for the Fourth Judicial Department by order of the Supreme Court, Erie County [Kevin M. Dillon, J.], entered March 5, 2008) to annul a determination of respondent-petitioner Kumiki Gibson, Commissioner, New York State Division of Human Rights. The determination found that petitioners-respondents had engaged in an unlawful discriminatory practice with respect to housing.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, the cross petition is granted, and petitioners-respondents are directed to pay respondent Carol A. Gostomski the sum of $4,381.75 for economic damages, with interest at the rate of 9% per annum, commencing July 2006, and the sums of $8,000 for mental anguish and humiliation, $4,000 for her children’s mental anguish and humiliation, and $10,000 for punitive damages, with interest at the rate of 9% per annum, commencing November 15, 2007; to pay respondent Housing Opportunities Made Equal, Inc. the sum of $2,596 for economic damages, with interest at the rate of 9% per annum, commencing May 2006, and the sum of $8,000 for punitive damages, with interest at the rate of 9% per annum, commencing November 15, 2007; and to pay the Comptroller of the State of New York the sum of $8,000 for a civil fine and penalty, with interest at the rate of 9% per annum, commencing November 15, 2007.

Memorandum: Petitioners-respondents (petitioners) commenced this proceeding pursuant to Executive Law § 298 seeking to annul the

determination of respondent-petitioner Kumiki Gibson, Commissioner of the New York State Division of Human Rights (Commissioner), that they unlawfully discriminated against respondent Carol A. Gostomski (complainant) by refusing to permit her to rent an apartment after learning that she had two children, then ages six and eight (*see* § 296 [5] [a] [1]). Contrary to the contentions of petitioners, we conclude that the determination that they discriminated against complainant and her children based on familial status is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180; *Matter of Woehrling v New York State Div. of Human Rights*, 56 AD3d 1304, 1305; *Matter of Matteo v New York State Div. of Human Rights*, 306 AD2d 484, 485), and that the awards of compensatory damages to complainant and her children should not be disturbed (*see 300 Gramatan Ave. Assoc.*, 45 NY2d at 184; *Matter of New York State Div. of Human Rights v Gruzdaitis*, 265 AD2d 904). In addition, the Commissioner properly exercised her discretion in awarding economic damages to respondent Housing Opportunities Made Equal, Inc. (HOME) for resources expended by HOME in investigating complainant's allegations against petitioners (*see* § 297 [4] [c] [iii]; *Havens Realty Corp. v Coleman*, 455 US 363, 376; *Mixon v Grinker*, 157 AD2d 423, 426-427). Finally, we conclude that the awards of punitive damages to complainant and HOME are "supported by the evidence and [are] authorized by Executive Law § 297 (4) (c) (iv) as a deterrent against housing discrimination" (*Woehrling*, 56 AD3d at 1305; *see Matteo*, 306 AD2d at 485; *Matter of Van Cleff Realty v New York State Div. of Human Rights*, 216 AD2d 306, 307).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**285**

**KA 07-02056**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

DANIEL J. BALLMAN, DEFENDANT-APPELLANT.

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

DANIEL J. BALLMAN, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (NICHOLAS J. EVANOVICH, KIRK S. HAZEN, OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered September 28, 2007. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated as a felony.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, count one of the indictment is dismissed without prejudice to the People to re-present any appropriate charges under that count to another grand jury, count two of the indictment is reinstated, and the matter is remitted to Ontario County Court for further proceedings on count two of the indictment.

Opinion by PINE, J.:

I

In this appeal from a judgment convicting him following a plea of guilty of felony driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]), defendant raises, inter alia, an issue of first impression in contending that his 1999 out-of-state conviction was improperly used to elevate his DWI offense from a misdemeanor to a felony. For the reasons that follow, we agree.

II

Specifically, defendant contends that out-of-state convictions occurring before November 1, 2006 cannot be used as predicate offenses to elevate DWI charges from misdemeanors to felonies. Thus, he contends that the facts alleged in the indictment, as amplified by the prosecutor's special information (*see* CPL 200.60 [2]), fail to charge him with the crime of felony DWI. We note at the outset that, because

defendant is challenging the facial sufficiency of the accusatory instrument, that challenge is not forfeited by his plea of guilty (*see generally People v Lucas*, 11 NY3d 218, 220; *People v Taylor*, 65 NY2d 1, 5).

III

In 2006 the Legislature amended Vehicle and Traffic Law § 1192 (8) to permit the use of out-of-state convictions to elevate New York DWI offenses to felonies. That statute provides:

> "Effect of prior out-of-state conviction. A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of a violation of this section for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to [section 1193 (2)] of this article; provided, however, that such conduct, had it occurred in this state, would have constituted a misdemeanor or felony violation of any of the provisions of this section. Provided, however, that if such conduct, had it occurred in this state, would have constituted a violation of any provisions of this section which are not misdemeanor or felony offenses, then such conduct shall be deemed to be a prior conviction of a violation of [section 1192 (1)] . . . ."

The amendments to section 1192 (8) took effect on November 1, 2006 (L 2006, ch 231, § 3), and the enabling language of the Act to amend that portion of the Vehicle and Traffic Law provided, in relevant part:

> "The provisions of [section 1192 (8)], as it existed prior to the amendment made by section one of this act, shall apply only to convictions occurring on or after November 29, 1985 through and including October 31, 2006 and provided, further, that the provisions of [section 1192 (8)] as amended by section one of this act shall apply only to convictions occurring on or after November 1, 2006" (L 2006, ch 231, § 2).

Defendant contends that the "convictions" to which section two of chapter 231 refers are out-of-state convictions and thus contends that the People may not use his 1999 out-of-state conviction to elevate his New York DWI charge to a felony. The People, on the other hand, contend that section two "should be read as referring to a defendant's now *subsequent* NY-DWI conviction." We agree with the People and defendant that section two of chapter 231 is ambiguous and, therefore, we look to the legislative history to determine the "convictions" to which the section refers (*see generally* McKinney's Cons Laws of NY,

Book 1, Statutes § 125).

Before 1985 the Vehicle and Traffic Law contained no provisions concerning out-of-state convictions for operating a motor vehicle while under the influence of alcohol or drugs. In that year, the Legislature enacted section 1192 (former [7]), which provided that a prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs would be deemed to be a prior conviction of driving while ability impaired for purposes of, inter alia, determining penalties to be imposed, provided that such conduct, had it occurred in New York, would constitute a violation of any of the provisions of section 1192 (*see* L 1985, ch 694). Section two of chapter 694 provided that it would take effect on the 120th day "next succeeding the date on which it shall have become a law *and shall apply to out-of-state convictions occurring on or after such date*" (L 1985, ch 694, § 2 [emphasis added]; *see* Mem in Support, Bill Jacket, L 1985, ch 694, at 5-6; Mem of Commr of Dept of Motor Vehicles, Bill Jacket, L 1985, ch 694, at 15). The 120th day next succeeding the date on which it became a law was November 29, 1985.

In 1988 the Legislature recodified all provisions relating to alcohol and drug-related driving offenses to consolidate them into one article (*see* Sponsor's Mem, Bill Jacket, L 1988, ch 47, at 8). Vehicle and Traffic Law § 1192 (former [7]) became section 1192 (6), and it remained virtually unchanged with one exception. The date restriction previously included in the 1985 Act, chapter 694, was added to the language of the statute and was changed to read that "[t]his subdivision shall only apply to convictions occurring on or after November [29, 1985]." The words "out-of-state" were removed and the date of November 29, 1985 was substituted for the "120th day" language. In 1990 section 1192 (6) became section 1192 (8) (*see* L 1990, ch 173, § 62), and remained unchanged until the 2006 amendment.

As noted above, when Vehicle and Traffic Law § 1192 (8) was amended in 2006, it removed the date restrictions from the statute itself and instead placed them in section 2 of the Act, which provided that the amendments would apply only to "convictions occurring on or after November 1, 2006." As with the 1988 recodification, the words "out-of-state" do not precede the word "convictions" when discussing the convictions to which the amendments will apply. Based on the legislative history of Vehicle and Traffic Law § 1192 (8), we conclude that the convictions to which that section refers are in fact the predicate, out-of-state convictions, and that such out-of-state convictions occurring before November 1, 2006 may not be used to elevate a misdemeanor DWI offense committed in New York to a felony. Thus, we agree with defendant that his 1999 out-of-state conviction cannot be used to elevate his New York misdemeanor to a felony.

IV

We next address defendant's remaining contentions. Although defendant contends in his pro se supplemental brief that County Court abused its discretion in prohibiting him from driving as a condition of bail, "[t]he challenge by defendant to the court's bail order is

not properly before us inasmuch as no appeal lies from a court's securing order" (*People v MacLean*, 48 AD3d 1215, 1217, *lv denied* 10 NY3d 866, 11 NY3d 790). In any event, the judgment of conviction renders the contention moot (*see People v Tatis-Duran*, 300 AD2d 84).

We reject the further contention of defendant in his main brief that he was arrested without probable cause and thus that all evidence obtained after his arrest should have been suppressed. The record of the suppression hearing establishes that defendant voluntarily drove to the police station at 3:00 A.M. to pick up another person who had been charged with DWI. By way of a security camera, a police officer observed defendant park his vehicle in a restricted parking space. Once defendant entered the police station, the officer detected a strong odor of an alcoholic beverage and noticed that defendant had watery eyes and that his speech was slurred. When asked if he had been drinking, defendant admitted that he had consumed "a lot of beers." The officer then informed defendant that he was under investigation for DWI and placed him in an unlocked conference room while the officer, who was alone at the police station, called for assistance. During that time, defendant left the conference room and ran out of the police station. The officer pursued defendant and "yelled to" him to stop running. The officer then caught defendant, handcuffed him, and transported him in a police cruiser back to the station. The handcuffs were removed, and defendant failed several field sobriety tests that he was asked to perform. Defendant at that point was placed under arrest for DWI.

We conclude that, up until the point that defendant failed the field sobriety tests, he was in custody pursuant to an investigatory detention. The officer's "observation of defendant's physical condition justified detaining [defendant] for the limited purpose of investigating whether he was operating his motor vehicle while under the influence of alcohol" (*People v Hasenflue*, 252 AD2d 829, 830, *lv denied* 92 NY2d 982) and, contrary to defendant's contention, the pursuit and forcible detention of defendant did not constitute a de facto arrest (*see e.g. People v McCoy*, 46 AD3d 1348, 1348-1349, *lv denied* 10 NY3d 813; *People v Galloway*, 40 AD3d 240, *lv denied* 9 NY3d 844). "[T]he police diligently pursued a minimally intrusive means of investigation likely to confirm or dispel suspicion quickly, during which time it was necessary to detain the defendant" (*People v Hicks*, 68 NY2d 234, 242; *see People v Owens*, 39 AD3d 1260, 1261, *lv denied* 9 NY3d 849).

In view of our determination concerning Vehicle and Traffic Law § 1192 (8), we need not address defendant's remaining contentions.

Accordingly, we conclude that the judgment should be reversed, defendant's plea of guilty vacated, count one of the indictment dismissed without prejudice to the People to re-present any appropriate charges under that count to another grand jury, count two of the indictment reinstated, and the matter remitted to County Court for further proceedings on count two of the indictment.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**308**

**KA 07-02591**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TERRELL J. GROOVER, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 21, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**318**

**CA 08-01917**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

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CHARLES J. BAILEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN DALY AND RUTH ANN DALY,
DEFENDANTS-RESPONDENTS.

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LAW OFFICES OF MICHAEL G. DWYER, PLLC, WILLIAMSVILLE (MICHAEL G. DWYER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered November 19, 2007 in a personal injury action. The order denied the motion of plaintiff to set aside the jury verdict and for a new trial on liability.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the verdict is set aside and a new trial is granted on liability.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped on ice on a walkway at defendants' residence while he was assisting defendant John Daly in carrying a large window into the residence at approximately 9:15 P.M. We agree with plaintiff that Supreme Court erred in denying his post-trial motion to set aside the jury verdict and for a new trial on liability. The jury found that defendants were negligent but that their negligence was not a substantial factor in causing plaintiff's injuries. We note at the outset that plaintiff does not contend on appeal that Supreme Court erred in refusing to grant the alternative relief sought in his motion, i.e., judgment notwithstanding the verdict, and any issue with respect to the denial of that relief is deemed abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

The evidence presented at trial established that only part of the walkway had been cleared of snow and ice and that there were in fact patches of ice covering part of the walkway. We agree with plaintiff that, under the circumstances presented, the issues of negligence and proximate cause are "so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Lebron v Said*, 51 AD3d 1384, 1385 [internal quotation marks omitted]; *see Nash v Fitzgerald*, 14 AD3d 850, 851; *cf. Schermerhorn v*

*Warfield*, 213 AD2d 877, 878). We therefore reverse the order, grant plaintiff's motion, set aside the verdict and grant a new trial on liability.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**337**

**CA 08-02168**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

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KIMBERLY A. SMITH AND LARRY J. SMITH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CARRIE EMMA BESANCENEY, DEFENDANT-APPELLANT.

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BURGIO, KITA & CURVIN, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF ROBERT H. PERK, BUFFALO (ROBERT H. PERK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered June 5, 2008 in a personal injury action. The order, insofar as appealed from, denied in part defendant's 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 granted in its entirety and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Kimberly A. Smith (plaintiff) when the vehicle she was operating was rear-ended by a vehicle owned and operated by defendant. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Supreme Court granted the motion with respect to the permanent loss of use and 90/180 categories of serious injury and denied the motion with respect to the permanent consequential limitation of use and significant limitation of use categories. We conclude that the court should have granted the motion in its entirety.

At the outset, we conclude that defendant's contention concerning the failure of plaintiffs to allege in their bill of particulars that plaintiff suffered a serious injury under the permanent consequential limitation of use category is not properly before us. Defendant failed to challenge the sufficiency of the bill of particulars, and "[a]n issue may not be raised for the first time on appeal . . . where it 'could have been obviated or cured by factual showings or legal countersteps' in the trial court" (*Oram v Capone*, 206 AD2d 839, 840, quoting *Telaro v Telaro*, 25 NY2d 433, 439, *rearg denied* 26 NY2d 751; *see Lowe's Home Ctrs., Inc. v Beachy's Equip. Co., Inc.*, 49 AD3d 1213,

1214-1215, *lv denied* 10 NY3d 715). Here, plaintiffs could have cured that alleged deficiency by moving for leave to amend the bill of particulars.

We further conclude that defendant met her burden of establishing that plaintiff's alleged psychological injury does not constitute a serious injury under the permanent consequential limitation of use or significant limitation of use category. Although " 'a causally-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury' " (*Brandt-Miller v McArdle*, 21 AD3d 1152, 1153; *see Taranto v McCaffrey*, 40 AD3d 626, 627; *see also Cushing v Seemann*, 247 AD2d 891, 892), defendant nevertheless met her burden with respect to plaintiff's alleged psychological injury by submitting, inter alia, the affirmation and the report of the physician who examined plaintiff at defendant's request (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In opposition to the motion, plaintiffs submitted the affirmations of two of plaintiff's treating physicians that failed to set forth the manner in which plaintiff's alleged psychological injury was related to the accident (*see Kristel v Mitchell*, 270 AD2d 598, 599; *see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351).

We reach the same conclusion with respect to plaintiff's alleged physical injuries under the permanent consequential limitation of use and significant limitation of use categories. "For [those] two statutory categories, [the Court of Appeals has] held that [w]hether a limitation of use or function is significant or consequential (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure*, 98 NY2d at 353 [internal quotation marks omitted]; *see Beaton v Jones*, 50 AD3d 1500, 1501). Defendant met her initial burden with respect to those two categories. In opposition to the motion, plaintiffs submitted only one physician's affirmation that contained a substantive discussion of plaintiff's alleged physical injuries sustained in the accident. Although that physician set forth certain objective findings, including a quantification of plaintiff's loss of range of thoracic motion and the positive Tinel's sign in plaintiff's left wrist (*see Moore v Gawel*, 37 AD3d 1158; *Mancuso v Collins*, 32 AD3d 1325; *Jones v Fraser*, 265 AD2d 773, 774-775; *Booker v Miller*, 258 AD2d 783, 784-785), he failed to address the manner in which plaintiff's physical injuries were causally related to the accident in light of the past medical history of plaintiff, including the two motor vehicle accidents in which she had been involved prior to the accident in question, as well as a subsequent minor collision (*see Anania v Verdgeline*, 45 AD3d 1473; *McCarthy v Bellamy*, 39 AD3d 1166).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**342**

**CA 08-01901**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

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IN THE MATTER OF ANTHONY J. MACULA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION, GENESEO CENTRAL SCHOOL
DISTRICT, AND TIMOTHY HAYES, SUPERINTENDENT,
GENESEO CENTRAL SCHOOL DISTRICT,
RESPONDENTS-RESPONDENTS.

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ANTHONY J. MACULA, PETITIONER-APPELLANT PRO SE.

WAYNE A. VANDER BYL, WILLIAMSON, FOR RESPONDENTS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered June 11, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Supreme Court, Livingston County, for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination denying his request to "tabl[e] access to Geneseo Central School [hereafter, School] to conduct truth-in and counter-military recruitment speech," and to provide the opportunity to present information concerning alternative career opportunities. Petitioner appeals from a judgment dismissing the petition. We conclude, however, that the record on appeal lacks sufficient information to enable a court to determine whether the determination was arbitrary and capricious or whether petitioner's constitutional rights were violated. We note in particular that the record lacks evidence concerning what, if any, criteria respondents employ in determining who may present information at career days held at the School, as well as a specific description of the information that petitioner sought to present at the School with respect to career alternatives to military service. Consequently, "[t]he matter must be remitted for further development of the record (much, if not all, of which may be feasible by stipulated facts and documents . . .)" (*Matter of Bryant v Board of Educ., Chenango Forks Cent. School Dist.*, 21 AD3d 1134, 1138). We therefore reverse the judgment, reinstate the petition and remit the matter to Supreme Court for further proceedings

consistent with our decision.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**351**

**CAF 08-01760**

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

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IN THE MATTER OF BREANNA R., GIOVANNA R. AND GIULIANNA R.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ERIK R., RESPONDENT-RESPONDENT.

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CHARLES D. HALVORSEN, ESQ., LAW GUARDIAN, APPELLANT.

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DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), APPELLANT PRO SE.

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

BENJAMIN J. BONARIGO, P.L.L.C., BATAVIA (BENJAMIN J. BONARIGO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered July 30, 2008 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and facts without costs, the petition is granted, Breanna R. and Giovanna R. are found to be abused children as defined in Family Court Act § 1012 (e) (iii) and Giulianna R. is found to be a neglected child as defined in Family Court Act § 1012 (f) (i) (B), and the matter is remitted to Family Court, Erie County, for a dispositional hearing in accordance with the following Memorandum: Petitioner commenced this proceeding alleging, inter alia, that respondent father sexually abused his three children. At the fact-finding hearing, petitioner presented evidence that the two oldest children made out-of-court statements to a child protective services (CPS) caseworker employed by petitioner and that one of those children also made similar statements to a clinical social worker who counseled those children. In addition, petitioner presented validation testimony from a licensed psychologist who investigated the allegations of sexual abuse, interviewed the two oldest children and the parents, consulted petitioner’s records and conducted psychological testing of the parents. The psychologist testified that, based on his experience, the protocol for assessment of child sexual abuse and the results of the psychological testing, the two oldest children had been sexually abused by the father.

Family Court dismissed the petition. The court concluded that the validation testimony was not convincing, that the accounts of sexual abuse by the two oldest children were inconsistent, and that their knowledge of sexual matters could be attributed to factors other than sexual abuse by the father.

"Notwithstanding the deference that we must accord to the court's findings," we conclude that the out-of-court statements of the two oldest children describing incidents of sexual abuse by the father were sufficiently corroborated and that the record, viewed as a whole, supports a finding of abuse (*Matter of Heather P.*, 233 AD2d 912, 913; *see generally Matter of Nicole V.*, 71 NY2d 112, 117-119). We find that the disclosures of sexual abuse by those children were corroborated by the testimony of petitioner's validation expert (*see Matter of Elizabeth G.*, 255 AD2d 1010, 1011-1012, *lv dismissed* 93 NY2d 848, *lv denied* 93 NY2d 814; *Matter of Jessica DD.*, 234 AD2d 785, 786, *lv denied* 89 NY2d 812; *Heather P.*, 233 AD2d at 913), as well as the testimony of the CPS caseworker (*see Matter of Richard SS.*, 29 AD3d 1118, 1122-1123). Contrary to the court's conclusion, moreover, we find that the testimony at the hearing was credible and persuasive. In addition, the allegations of sexual abuse were further corroborated by the fact that the two oldest children had age-inappropriate knowledge of sexual matters (*see Matter of Briana A.*, 50 AD3d 1560), the cross-corroborating accounts of those children with respect to the details of the father's conduct and the setting for that conduct (*see Elizabeth G.*, 255 AD2d at 1012), and the behaviors exhibited by one of those children that were consistent with having been sexually abused (*see id.*; *Jessica DD.*, 234 AD2d at 786). We therefore conclude that a preponderance of the evidence at the hearing supports a finding of abuse with respect to the two oldest children and a derivative finding of neglect with respect to the youngest child (*see Matter of Joshua QQ.*, 290 AD2d 842, 843-844; *Matter of New York City Dept. of Social Servs. v Carmen J.*, 209 AD2d 525, 527). We remit the matter to Family Court for a dispositional hearing before a different judge.

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

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

**353**

**CAF 08-00741**

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

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IN THE MATTER OF JEFFREY JOSEPH PLACIDI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DIANA LYNN SLEIERTIN, RESPONDENT-RESPONDENT.

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ALDERMAN AND ALDERMAN, SYRACUSE (DAVID S. TAMBER OF COUNSEL), FOR PETITIONER-APPELLANT.

ALI, PAPPAS & COX, P.C., SYRACUSE (P. DOUGLAS DODD OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Onondaga County (George M. Raus, R.), entered October 12, 2007 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of petitioner to vacate an order modifying a prior custody order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the order entered June 25, 2007 is vacated, and the matter is remitted to Family Court, Onondaga County, for a new hearing in accordance with the following Memorandum: Petitioner father commenced this proceeding seeking to modify a prior custody order, and respondent mother cross-petitioned to modify that order. The Referee terminated the hearing during the father's presentation of evidence and conducted an off-the-record conference with the parties concerning a potential settlement. The Referee never resumed the hearing and, following additional settlement negotiations, the Referee directed the parties and the Law Guardian to submit proposed orders to him. The father objected to the Law Guardian's proposed order on the ground that the parties had not stipulated to the substantive content of the decretal paragraphs. By order entered June 25, 2007, the Referee adopted the Law Guardian's proposed order and thereby modified the prior custody order.

We agree with the father that the Referee erred in denying his subsequent motion to vacate the June 25, 2007 order. In support of the motion, the father established that neither he nor his attorney consented to the terms of the order (*see Christopher v Christopher*, 41 AD3d 1305), and "[t]he record provides no basis for concluding that an enforceable stipulation of settlement was entered into between the parties" (*Matter of Hicks v Schoetz*, 261 AD2d 944, 944; *see also Stern v Stern*, 273 AD2d 298). Contrary to the contention of the mother, the Referee erred in terminating the hearing before the father had

completed the presentation of his case and the mother was afforded an opportunity to present evidence. Although "[n]o hearing is required upon a custody petition when the [Referee] possesses sufficient information to make a comprehensive assessment of the best interests of the child[]" (*Matter of Van Orman v Van Orman*, 19 AD3d 1167, 1168; *see Matter of Christina M.M. v Shondell R.B.*, 48 AD3d 1202), that was not the case when the Referee terminated the hearing. We therefore reverse the order, grant the motion, vacate the June 25, 2007 order, and remit the matter to Family Court for a new hearing before a different adjudicator.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**359**

**CA 08-02044**

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

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AMANDA S. KILMER AND PAMELA J. KILMER,
INDIVIDUALLY AND AS MOTHER AND NATURAL
GUARDIAN OF AMANDA S. KILMER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF PORTER, SUIT-KOTE CORPORATION,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

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LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR DEFENDANT-APPELLANT TOWN OF PORTER.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JEFFREY F. BAASE OF COUNSEL), FOR DEFENDANT-APPELLANT SUIT-KOTE CORPORATION.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeals from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered April 30, 2008 in a personal injury action. The order denied the motion of defendant Suit-Kote Corporation and the cross motion of defendant Town of Porter for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion and dismissing the amended complaint and cross claim against defendant Suit-Kote Corporation and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Amanda S. Kilmer when she lost control of the vehicle she was operating on a road that had been resurfaced with oil and stone by defendant Suit-Kote Corporation (Suit-Kote) two days before the accident. According to plaintiffs, the road was in a dangerous condition because of the presence of excess loose stones and the absence of appropriate warning and traffic control signs. Suit-Kote moved and defendant Town of Porter (Town) cross-moved for summary judgment dismissing the amended complaint and respective cross claims against them.

Addressing first the Town's cross motion, we conclude that Supreme Court properly denied the cross motion. Even assuming, arguendo, that the Town met its initial burden, we conclude that

plaintiffs "raised a triable issue of fact whether the Town created a dangerous condition by failing to remove loose stones" from the road in a timely manner following the oil and stone resurfacing (*Scharick v Reeves*, 13 AD3d 1131, 1132-1133). In addition, plaintiffs raised a triable issue of fact whether the Town was negligent in failing to post adequate signage to reduce the speed limit on the road in accordance with New York State Department of Transportation specifications (*see generally Bailey v State of New York*, 161 AD2d 912, 913).

We further conclude, however, that the court erred in denying Suit-Kote's motion, and we therefore modify the order accordingly. Suit-Kote met its initial burden by submitting evidence "demonstrating that [the road] was resurfaced in accordance with normal procedures[] and that the road was safe for traffic after the process was completed. In opposition, the plaintiffs made no effort to quantify the amount of loose [stones] and offered no expert testimony that the resurfacing was not performed properly" (*Magoloff v Town of Smithtown*, 256 AD2d 315, 315; *cf. Carlson v Town of Mina*, 31 AD3d 1176, 1177-1178). Thus, plaintiffs failed to raise a triable issue of fact whether Suit-Kote was negligent (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**363**

**CA 08-01273**

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

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LAURA L. CAMPOPIANO AND THOMAS CAMPOPIANO,
INDIVIDUALLY AND AS HUSBAND AND WIFE,
PLAINTIFFS-RESPONDENTS,

V ORDER

PAUL J. VOLCKO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

CELLINO & BARNES, P.C., ROCHESTER (CHARLES F. BURKWIT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered September 18, 2007 in a personal injury action. The order, among other things, granted in part plaintiffs' motion to set aside the jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**365**

**CA 08-01720**

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

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LAURA L. CAMPOPIANO AND THOMAS CAMPOPIANO,
INDIVIDUALLY AND AS HUSBAND AND WIFE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

PAUL J. VOLCKO, DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 2.)

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BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREEN OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

CELLINO & BARNES, P.C., ROCHESTER (CHARLES F. BURKWIT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

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Appeal and cross appeal from a judgment of the Supreme Court, Monroe County (William P. Polito, J.), entered July 11, 2008 in a personal injury action. The judgment awarded plaintiff Laura L. Campopiano money damages upon a jury verdict.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Laura L. Campopiano (plaintiff) when the vehicle she was driving collided with a vehicle driven by defendant. Defendant conceded that the accident resulted from his negligence, and a jury trial was held on the issues of serious injury and damages. The jury found that plaintiff sustained a serious injury only under the 90/180 category rather than under all three categories of serious injury alleged by plaintiffs and awarded damages only for past loss of earnings in the amount of $4,500. Supreme Court (Polito, J.) granted that part of plaintiffs' post-trial motion to set aside the verdict as against the weight of the evidence and for a new trial with respect to the jury's failure to find that plaintiff sustained a serious injury under the remaining two categories alleged and with respect to the amount of damages awarded for past loss of earnings as well as the failure to award any other categories of damages. Plaintiffs also sought to set aside the verdict based on juror misconduct, and Justice Polito granted defendant's cross motion seeking recusal of the court with respect to that part of plaintiffs' post-trial motion. That part of the post-trial motion subsequently was denied by Supreme Court (Rosenbaum, J.). Following a retrial, the jury found that plaintiff sustained a serious injury under one of the two remaining categories

and awarded total damages in the amount of $545,000.

We note at the outset that, although plaintiffs appealed from the order denying that part of their post-trial motion to set aside the verdict in part on the ground of juror misconduct rather than from the judgment in which that order was subsumed (*see Doyle v City of Buffalo* [appeal No. 3], 56 AD3d 1134, 1135, *amended on rearg* 59 AD3d 1107), we exercise our discretion to treat plaintiffs' notice of appeal as valid and deem the appeal as taken from the judgment (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *see also* CPLR 5520 [c]). We agree with plaintiffs that the court (Rosenbaum, J.) erred in denying that part of their motion without conducting a hearing. Plaintiffs submitted evidence in support of the motion establishing that, following the first trial, a juror discussed her jury service with the court (Polito, J.) and stated that she enjoyed that service, "except for the last two hours when she had to obtain a light box so she could read [plaintiff's] MRIs to the jury due to her medical expertise as a respiratory therapist." In opposition to the motion, defendant submitted an affidavit from that juror in which she asserted that she requested a light box during deliberations but did not hold herself out as an expert or interpret the diagnostic films for the other jurors. We conclude that a hearing is required on the issue whether the juror improperly undertook the role of an expert juror who provided "personal specialized assessments not within the common ken of juror experience and knowledge . . . concerning a material issue in the case" (*People v Maragh*, 94 NY2d 569, 574; *see People v Scerbo*, 59 AD3d 1066). We therefore hold the case, reserve decision and remit the matter to Supreme Court (Rosenbaum, J.) for a hearing on that issue (*see generally People v Saxton*, 32 AD3d 1286, 1287).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**376**

**KA 04-00219**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH CINTRON, DEFENDANT-APPELLANT.

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MATTHEW D. NAFUS, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JESSICA BIRKAHN HOUSEL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered November 20, 2003. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the first degree, criminal possession of a controlled substance in the second degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, criminal sale of a controlled substance in the first degree (Penal Law § 220.43 [1]).

We reject the contention of defendant that he was denied a fair trial by the People's failure to turn over *Rosario* material in a timely manner. The People are not required to produce records that are not in their possession and that " 'neither [the People] nor the courts of this State could gain access to without the consent of the appropriate Federal agency' " (*People v Frazier*, 233 AD2d 896, 898).

Defendant made only a general motion for a trial order of dismissal and thus 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 lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**386**

**CA 08-02173**

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

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ELAINE F. BONDS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LAIDLAW TRANSIT, INC. AND RICHARD WILLIAMS,
DEFENDANTS-APPELLANTS.

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THE LONG FIRM, LLP, BUFFALO (WILLIAM A. LONG OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (MICHAEL J. COOPER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 16, 2008 in a personal injury action. The order granted plaintiff's motion to set aside the jury verdict and for a new trial.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part, reinstating the verdict on damages and providing that the new trial is on liability only and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries she sustained in a motor vehicle accident when a school bus owned by defendant Laidlaw Transit, Inc. and operated by defendant Richard Williams collided with her vehicle in her lane of travel at an intersection. The lane of travel of the school bus was controlled by a stop sign. Following a trial, the jury found that plaintiff was 90% responsible for the accident, and that Williams was 10% responsible. Defendants appeal from an order granting plaintiff's post-trial motion to set aside the verdict in its entirety as against the weight of the evidence and for a new trial.

We conclude that Supreme Court properly granted that part of plaintiff's motion with respect to liability, inasmuch as we conclude that "the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict on liability] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *see American Linen Supply Co. v M.W.S. Enters., Inc.*, 6 AD3d 1079, *lv dismissed* 3 NY3d 702; *Nordhauser v New York City Health & Hosps. Corp.*, 176 AD2d 787, 789).

Here, Williams testified at trial that he was looking at his

right side view mirror during the entire course of his right-hand turn into plaintiff's lane of travel; he never observed plaintiff's vehicle at any time until after the collision; and the path of his turn resulted in the school bus entering plaintiff's lane of travel. We thus conclude that "the evidence does not fairly support the jury's apportionment of liability" of 90% to plaintiff (*Kesnig v Kaufmann*, 29 AD3d 956, 957).

We conclude, however, that the court erred in granting that part of plaintiff's post-trial motion with respect to damages, and we therefore modify the order accordingly. Whether the injuries sustained by plaintiff were causally related to the accident or to a preexisting condition was sharply disputed at trial, and we conclude on the record before us that the jury's verdict on damages is supported by a fair interpretation of the evidence (*see McEwen v Akron Fire Co.*, 251 AD2d 1044; *Matter of Siegel v County of Monroe*, 207 AD2d 959). Although there was conflicting medical testimony presented at trial, there was ample evidence that plaintiff suffered from preexisting cervical disc disease at multiple levels to support the jury's verdict on damages (*see Vaval v NYRAC, Inc.*, 31 AD3d 438, *lv dismissed* 8 NY3d 1020, *rearg denied* 9 NY3d 937).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**387**

**CA 08-01659**

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

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DAVID CANAZZI, PLAINTIFF-RESPONDENT,

V ORDER

CSX TRANSPORTATION, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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MAYER BROWN LLP, WASHINGTON, D.C. (JACK L. WILSON, OF THE WASHINGTON, D.C. AND MISSISSIPPI BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND ANSPACH MEEKS ELLENBERGER LLP, BUFFALO, FOR DEFENDANT-APPELLANT.

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (JOHN F. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered February 7, 2008 in a personal injury action. The order granted plaintiff's motion, set aside the jury verdict in part, directed that judgment be entered in favor of plaintiff on the issue of causation, and granted a new trial on comparative negligence and damages.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Pressley v DePalma*, 39 AD3d 732, 733; *see also* CPLR 5501 [a] [1], [2]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**388**

**CA 08-01660**

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

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DAVID CANAZZI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CSX TRANSPORTATION, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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MAYER BROWN LLP, WASHINGTON, D.C. (JACK L. WILSON, OF THE WASHINGTON, D.C. AND MISSISSIPPI BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND ANSPACH MEEKS ELLENBERGER LLP, BUFFALO, FOR DEFENDANT-APPELLANT.

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (JOHN F. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Drury, J.), entered February 21, 2008 in a personal injury action. The judgment was entered in favor of plaintiff and against defendant on negligence following a jury trial.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the verdict is set aside in its entirety, and a new trial is granted on liability and damages.

Memorandum: Plaintiff commenced this action pursuant to the Federal Employers' Liability Act ([FELA] 45 USC § 51 *et seq.*) seeking damages for injuries he sustained when he was struck by a moving train during the course of his employment with defendant. Following a trial, the jury returned a verdict in favor of defendant, finding that defendant was negligent but that its negligence was not a proximate cause of plaintiff's injuries. We reject defendant's contention that Supreme Court erred in granting that part of plaintiff's post-trial motion to set aside the verdict on causation as against the weight of the evidence. Pursuant to FELA, the issue of causation turns on whether defendant's " 'negligence played any part, even the slightest,' in contributing to [plaintiff's] injury" (*Smith v National R.R. Passenger Corp.*, 856 F2d 467, 469, quoting *Rogers v Missouri Pac. R.R. Co.*, 352 US 500, 506; *see also Hotaling v CSX Transp.*, 5 AD3d 964, 967-968). Here, the evidence established that plaintiff was struck at night by an unilluminated, unreflective black tank car moving quietly on a track adjacent to the one on which plaintiff was working. Neither the crew of the train on which plaintiff was a conductor nor the crew of the train that struck plaintiff was warned of train movement on an adjacent track, and defendant's yardmaster

conceded that the failure to provide such a warning was an anomaly. The evidence also established that the debris on the walkway between the two tracks where plaintiff was working was a common hazard in the railroad yard and that plaintiff crossed the track on which he was struck in an effort to avoid the debris. We thus conclude that "the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [internal quotation marks omitted]).

We agree with defendant, however, that the court erred in directing that judgment be entered in favor of plaintiff on the issue of causation. "A determination setting aside a jury verdict as against the weight of the evidence 'results only in a new trial and does not deprive the parties of their right to ultimately have all disputed issues of fact resolved by a jury' " (*Rogers v DiChristina*, 195 AD2d 1061, 1062). We therefore reverse the judgment, set aside the verdict in its entirety, and grant a new trial on liability and damages. In light of our determination, we need not address defendant's remaining contention.

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**392**

**KA 07-00821**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENRY SCOTT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

HENRY SCOTT, DEFENDANT-APPELLANT PRO SE.

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

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Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered April 3, 2007. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, rape in the first degree, sexual abuse in the second degree, sexual abuse in the third degree, criminal sale of marihuana in the fifth degree, unlawfully dealing with a child in the first degree (two counts), and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of rape in the first degree and dismissing count two of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, predatory sexual assault against a child (Penal Law § 130.96) and rape in the first degree (§ 130.35 [4]). Defendant failed to preserve for our review his contention that the conviction of predatory sexual assault against a child and rape in the first degree is not supported by legally sufficient evidence inasmuch as he moved for a trial order of dismissal on a ground different from that raised on appeal (*see People v Gray*, 86 NY2d 10, 19). In any event, defendant's present contention, that the evidence with respect to those crimes is legally insufficient because the age of the victim was established solely by her own testimony, lacks merit. The age of the victim was established by her unambiguous testimony, and it is well settled that "[a] person is competent to testify as to his [or her] own age" (*People v Bessette*, 169 AD2d 876, 877, *lv denied* 77 NY2d 992; *see People v Bolden*, 194 AD2d 834, 835, *lv denied* 82 NY2d 714). Defendant further contends in his main and pro

se supplemental briefs that the verdict is against the weight of the evidence. We reject that contention. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to credit the testimony of the victim with respect to her age (*see generally id.*).

We agree with defendant, however, that the part of the judgment convicting him of rape in the first degree under Penal Law § 130.35 (4) must be reversed and count two of the indictment dismissed because it is an inclusory concurrent count of predatory sexual assault against a child. We therefore modify the judgment accordingly.

Pursuant to CPL 300.30 (4), concurrent counts are inclusory when the offense charged in one is greater than that charged in the other and when the latter is a lesser offense included within the greater (*see People v Miller*, 6 NY3d 295, 300). To establish that an offense is a lesser included offense, "it must be shown that . . . in all circumstances, not only in those presented in the particular case, it is impossible to commit the greater crime without concomitantly, by the same conduct, committing the lesser offense. That established, the defendant must then show that there is a reasonable view of the evidence in the particular case that would support a finding that he committed the lesser offense but not the greater" (*People v Glover*, 57 NY2d 61, 63). The first requirement concerns only "the subdivision which the particular act or omission referred to in the indictment brings into play" (*People v Green*, 56 NY2d 427, 431, *rearg denied* 57 NY2d 775). Here, the predatory sexual assault count charged rape in the first degree as one of its elements and, as charged in the indictment, the elements of the predatory sexual assault with respect to rape in the first degree are precisely those required for rape in the first degree under Penal Law § 130.35 (4). Thus, it was impossible for defendant to commit predatory sexual assault against a child without, by the same conduct, committing rape in the first degree, thereby rendering rape in the first degree an inclusory concurrent count of predatory sexual assault against a child.

We have examined the remaining contentions of defendant in his pro se supplemental brief and conclude that none requires reversal.

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**393**

**KA 07-00913**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HENRY SCOTT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

HENRY SCOTT, DEFENDANT-APPELLANT PRO SE.

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

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Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered April 3, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**395**

**KA 08-00861**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NORMAN C. SONBERG, DEFENDANT-APPELLANT.

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DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered March 14, 2008. The judgment convicted defendant, upon his plea of guilty, of sexual abuse 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 upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [1]), defendant contends that County Court abused its discretion in denying his motion to withdraw his plea on the ground that it was not voluntarily, knowingly and intelligently entered because he was mentally incompetent at that time. We reject defendant's contention. Although the record establishes that defendant was being treated for medical conditions with prescription medications, "[t]here was not the slightest indication that defendant was uninformed, confused or incompetent" when he entered the plea (*People v Alexander*, 97 NY2d 482, 486; *see People v Nudd*, 53 AD3d 1115, *lv denied* 11 NY3d 834). Indeed, when the court asked defendant whether the medication he was taking affected his ability to think clearly, defendant responded in the negative. The court also asked defendant whether he had sufficient time to discuss the matter with his attorney and whether he was in good physical and mental condition, and defendant responded in the affirmative. Even if we were to credit the contention of defendant that he had taken the wrong medication on the day he entered his plea, we nevertheless would conclude on the record before us that he was not thereby "so stripped . . . of orientation or cognition that he lacked the capacity to plead

guilty" (*Alexander*, 97 NY2d at 486).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**406**

**CA 08-02057**

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

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JOHN J. WARREN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAWRENCE R. ELLIS, III, WILLIAM CARL ELLIS, CHRISTINE A. KAPAKOS AND LILLIAN D. ELLIS, AS TRUSTEES UNDER THE WILL OF LAWRENCE R. ELLIS, JR., DATED DECEMBER 23, 1986, THE TRUST UNDER THE WILL OF LAWRENCE R. ELLIS, JR., DATED DECEMBER 23, 1986, FINGER LAKES BOOK COMPANY AND ALL ABOUT BOOKS, LLC, DEFENDANTS-RESPONDENTS.

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HANCOCK & ESTABROOK, LLP, SYRACUSE (ZACHARY MATTISON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAWRENCE M. RUBIN, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS LAWRENCE R. ELLIS, III, WILLIAM CARL ELLIS, CHRISTINE A. KAPAKOS AND LILLIAN D. ELLIS, AS TRUSTEES UNDER THE WILL OF LAWRENCE R. ELLIS, JR., DATED DECEMBER 23, 1986, AND THE TRUST UNDER THE WILL OF LAWRENCE R. ELLIS, JR., DATED DECEMBER 23, 1986.

UNDERBERG & KESSLER LLP, ROCHESTER (ELIZABETH A. CORDELLO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS FINGER LAKES BOOK COMPANY AND ALL ABOUT BOOKS, LLC.

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Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered January 8, 2008 in a personal injury action. The order granted the motions of defendants for summary judgment dismissing the amended complaint and denied plaintiff’s cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendants Finger Lakes Book Company and All About Books, LLC and reinstating the amended complaint against those defendants and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when an 8-inch by 12-inch piece of concrete stair fell out from beneath his feet as he descended a staircase at a warehouse owned by trustees under the will of Lawrence R. Ellis, Jr., and the trust under that will (collectively, owners), and leased by defendants Finger Lakes Book Company and All About Books, LLC

(collectively, tenants). Supreme Court granted the motions of the owners and the tenants for summary judgment dismissing the amended complaint against them, and denied plaintiff's cross motion for summary judgment. We conclude that the court erred in granting the motion of the tenants, and we therefore modify the order accordingly. We note at the outset that, in view of our decision that the tenants are not entitled to summary judgment dismissing the amended complaint against them, we need not address plaintiff's contention concerning the alleged mislabeling of the motion of the tenants as a cross motion.

Addressing first the motion of the tenants, we conclude that they failed to meet their initial burden on the motion because they failed to establish that they did not create or have actual or constructive notice of the allegedly defective stairs (*see generally Wesolek v Jumping Cow Enters., Inc*., 51 AD3d 1376, 1377). In support of their motion, they submitted the deposition testimony of plaintiff in which he testified that, on the day of his accident, he walked up and down the stairs six times without incident and neither observed nor registered a complaint with respect to any breaks or problems with the stairs. They also submitted the deposition testimony of an individual who has an ownership interest in defendant All About Books, LLC, which in turn owns defendant Finger Lakes Book Company, that plaintiff's accident was the only incident that he could recall that involved a piece of the stair breaking off. Those submissions fail to establish the tenants' entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562; *Wesolek*, 51 AD3d at 1377).

We further conclude, however, that the court properly granted the motion of the owners for summary judgment dismissing the complaint against them inasmuch as by their submissions in support of their motion they established their entitlement to judgment as a matter of law (*see generally Wesolek*, 51 AD3d at 1377), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562). Contrary to plaintiff's contention, the doctrine of res ipsa loquitur does not apply to this case with respect to the owners. Indeed, the record does not support plaintiff's allegation that the owners' control of the concrete stairs at the warehouse was "sufficiently exclusive 'to fairly rule out the chance that the defect . . . was caused by some agency other than [the owners'] negligence' " (*Chini v Wendcentral Corp.*, 262 AD2d 940, *lv denied* 94 NY2d 752, quoting *Dermatossian v New York City Tr. Auth*., 67 NY2d 219, 228).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**407**

**CA 08-02029**

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

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VILLAGE OF SPRINGVILLE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WALTER F. REYNOLDS, III, DEFENDANT,
ARGONAUT INSURANCE COMPANY, ALSO KNOWN AS
ARGONAUT GROUP, INC., AND U.S. SPECIALTY
INSURANCE COMPANY, DEFENDANTS-APPELLANTS.

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GOLDBERG SEGALLA LLP, BUFFALO (DANIEL W. GERBER OF COUNSEL), FOR DEFENDANT-APPELLANT ARGONAUT INSURANCE COMPANY, ALSO KNOWN AS ARGONAUT GROUP, INC.

FELDMAN, KIEFFER & HERMAN, LLP, BUFFALO (STEPHEN M. SORRELS OF COUNSEL), FOR DEFENDANT-APPELLANT U.S. SPECIALTY INSURANCE COMPANY.

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeals from a judgment (denominated order) of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered January 4, 2008 in a declaratory judgment action. The judgment, inter alia, granted the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying plaintiff's cross motion in part and vacating the declarations with respect to defendant Argonaut Insurance Company, also known as Argonaut Group, Inc., and the award of costs and attorneys' fees, and by granting the motion and granting judgment in favor of that defendant as follows:

> It is ADJUDGED and DECLARED that defendant Argonaut Insurance Company, also known as Argonaut Group, Inc., is not obligated to defend or indemnify plaintiff in the underlying action,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a declaration that defendants Argonaut Insurance Company, also known as Argonaut Group, Inc. (Argonaut), and U.S. Specialty Insurance Company (USSIC) are each obligated to defend and indemnify it in the underlying action commenced by defendant Walter F. Reynolds, III (Reynolds) in federal court. We conclude that Supreme Court properly

granted that part of plaintiff's cross motion seeking summary judgment declaring that USSIC is obligated to defend plaintiff in the underlying action but erred in granting those parts of plaintiff's cross motion seeking that relief with respect to Argonaut and seeking costs and attorneys' fees from Argonaut. We further conclude that the court erred in denying the motion of Argonaut for summary judgment declaring that it is not obligated to defend or indemnify plaintiff in the underlying action. We therefore modify the judgment accordingly.

Reynolds was the owner of a building that housed his residence and a tavern/restaurant. The building was damaged by a fire, and plaintiff directed the demolition of the building the day after the fire. Reynolds thereafter commenced the underlying action in federal court seeking damages for the loss of the property and violation of various constitutional rights. Plaintiff commenced this action following the disclaimer of coverage by both Argonaut, the commercial liability carrier, and USSIC, the nonprofit organization liability carrier.

In viewing the loss from the point of view of plaintiff, the insured (*see Miller v Continental Ins. Co.*, 40 NY2d 675, 677), we agree with Argonaut that plaintiff failed to establish that the loss was caused by an occurrence, which is defined by the policy as an accident. "A duty to defend is triggered by the allegations contained in the underlying complaint" (*BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714). Here, the complaint in the underlying action alleges that the decision by plaintiff to demolish the building and the demolition itself were intentional (*see generally Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137). Although "[a]ccidental results [and unintended damages] can flow from intentional acts . . ., when the damages alleged in the [underlying] complaint 'are the intended result which flows directly and immediately from [the insured's] intentional act, rather than arising out of a chain of unintended though foreseeable events that occurred after the intentional act', there is no accident, and therefore, no coverage" (*Salimbene v Merchants Mut. Ins. Co.*, 217 AD2d 991, 994; *cf. Automobile Ins. Co. of Hartford*, 7 NY3d at 137-138). We conclude on the record before us that there was no accident and thus no coverage with respect to Argonaut (*see generally Salimbene*, 217 AD2d at 994). Inasmuch as plaintiff commenced the instant declaratory judgment action and did not incur costs and attorneys' fees "defending against [an] insurer's action" (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597; *see Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21-22), we conclude that the court erred in granting that part of plaintiff's cross motion seeking costs and attorneys' fees.

We reject the contention of USSIC that the loss falls within two exclusions contained in its policy, i.e., the exclusion for, inter alia, the destruction of tangible property and the exclusion for wrongful acts on the part of the insured, including acts that are dishonest, malicious, fraudulent "or otherwise intended to cause damage or injury to persons or property." In addition to alleging damage to the property, the complaint in the underlying action alleges the violation of various constitutional rights, including the denial

of due process, the violation of the right to free speech, and the denial of equal protection rights. We conclude that plaintiff met its initial burden on its cross motion, and USSIC failed to raise an issue of fact whether "the allegations of the complaint cast that pleading solely and entirely within the policy exclusions" (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137 [internal quotation marks omitted]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Thus, the court properly granted that part of plaintiff's cross motion for summary judgment declaring that USSIC is obligated to defend plaintiff in the underlying action.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**417**

**KA 07-01695**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE J. FISH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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MARK D. FUNK, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 11, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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 Jefferson County Court for resentencing.

Memorandum: In each appeal, defendant appeals from a judgment revoking the sentence of probation imposed upon his respective convictions of burglary in the third degree (Penal Law § 140.20) and sentencing him to a term of imprisonment. We reject defendant's contention that the sentence in each appeal is unduly harsh or severe. We conclude, however, that there are discrepancies between the sentencing minutes and the certificates of conviction that cannot be resolved by this Court's request for amended certificates of conviction. Specifically, the record indicates that defendant was resentenced on only one of the two convictions of burglary in the third degree, but the two certificates of conviction in the record indicate that defendant was resentenced to a term of imprisonment in appeal No. 1 and to a term of imprisonment in appeal No. 2, to run concurrently with the sentence imposed in appeal No. 1. We therefore modify the judgment in each appeal by vacating the sentence, and we remit the matters to County Court for resentencing (*see People v Barnum*, 53 AD3d 1054; *People v Ingram*, 263 AD2d 959).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**418**

**KA 07-01696**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE J. FISH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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MARK D. FUNK, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 11, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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 Jefferson County Court for resentencing.

Same Memorandum as in *People v Fish* ([appeal No. 1] ___ AD3d ___ [Apr. 24, 2009]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**419**

**KA 08-00691**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHELBY HOLCOMB, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 22, 2007. 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 affirmed.

Same Memorandum as in *People v Holcomb* ([appeal No. 2] ___ AD3d ___ [Apr. 24, 2009]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**420**

**KA 08-00693**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHELBY HOLCOMB, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 22, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and criminal possession of stolen property in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed for criminal possession of stolen property in the third degree and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing on count five of the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (§ 140.30 [2]) and criminal possession of stolen property in the third degree (§ 165.50). Contrary to defendant's contention in both appeals, the record establishes that County Court " 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Glasper*, 46 AD3d 1401, 1401, *lv denied* 10 NY3d 863; *cf. People v Kemp*, 255 AD2d 397). The valid waiver by defendant of the right to appeal with respect to each plea encompasses his challenge to the severity of the sentence in each appeal (*see generally People v Lopez,* 6 NY3d 248, 256).

The contention of defendant in appeal No. 2 that the sentence is illegal, however, survives his waiver of the right to appeal (*see People v Callahan*, 80 NY2d 273, 280). As the People correctly concede, the court erred in sentencing defendant to a determinate term of incarceration for criminal possession of stolen property in the

third degree, a class D felony, inasmuch as Penal Law § 70.00 (1) requires the imposition of an indeterminate sentence, absent certain exceptions that are not present here. We therefore modify the judgment in appeal No. 2 by vacating the sentence imposed for criminal possession of stolen property in the third degree, and we remit the matter to County Court for resentencing on that count of the indictment.

Finally, we note that the certificate of conviction in appeal No. 2 transposes the sentences imposed for burglary in the first degree and criminal possession of stolen property in the third degree, and it must therefore be amended to reflect the appropriate sentences (*see generally People v Martinez*, 37 AD3d 1099, 1100, *lv denied* 8 NY3d 947).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**421**

**KA 08-00694**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHELBY HOLCOMB, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES 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 Erie County Court (Michael L. D'Amico, J.), rendered August 22, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**429**

**CA 08-02146**

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

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VALERIE GROELL, AS NATURAL PARENT AND GUARDIAN
OF FRANK GROELL, JR., A MINOR,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RITA T. GROELL, DEFENDANT,
AND FRANK GROELL, SR., DEFENDANT-RESPONDENT.

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FRANK FALZONE, BUFFALO, FOR PLAINTIFF-APPELLANT.

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Appeal from a judgment of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered April 30, 2008 in a personal injury action. The default judgment awarded plaintiff money damages against defendant Frank Groell, Sr. following an inquest on damages.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by increasing the award of damages for past pain and suffering to $100,000 and by awarding $50,000 for future pain and suffering and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action on behalf of her son seeking damages for injuries sustained by him when he was bitten in the face by a dog owned by his father, Frank Groell, Sr. (defendant). After defendant defaulted, Supreme Court conducted an inquest on damages and directed the entry of a default judgment against defendant in the amount of $60,000. We agree with plaintiff that the award deviates materially from what would be reasonable compensation (*see generally* CPLR 5501 [c]). Plaintiff's son was falling asleep when he was attacked by the dog, which placed its lower jaw into the mouth of plaintiff's son and locked its upper jaw onto the bridge of the son's nose. Plaintiff's son received over 40 stitches and has a 3.5 to 4 centimeter permanent scar that cannot be fully corrected by plastic surgery. Plaintiff's son described the pain as excruciating and, at the time of the inquest on damages, continued to experience pain in damp weather and in connection with certain facial movements. Plaintiff's son also chipped a tooth as a result of the attack, and he has become socially withdrawn as a result of his permanent scar. We conclude that the award of damages should be increased to $100,000 for past pain and suffering and that $50,000 should be awarded for future pain and suffering, and we therefore modify the judgment accordingly (*see Aversa v Bartlett*, 11 AD3d 941; *Olsen v City of Schenectady*, 214

AD2d 869; *Shurgan v Tedesco*, 179 AD2d 805).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**430**

**CA 08-02061**

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

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IN THE MATTER OF GMAC INSURANCE COMPANY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROCKIE JONES, JR., RESPONDENT-RESPONDENT.
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NOVA CASUALTY COMPANY, PROPOSED ADDITIONAL
RESPONDENT-RESPONDENT,
ET AL., PROPOSED ADDITIONAL RESPONDENT.

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CASCONE & KLUEPFEL LLP, BUFFALO (MICHAEL C. LANCER OF COUNSEL), FOR PETITIONER-APPELLANT.

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

BAXTER SMITH TASSAN & SHAPIRO, P.C., BUFFALO (LOUIS B. DINGELDEY, JR., OF COUNSEL), FOR PROPOSED ADDITIONAL RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 13, 2008 in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, denied in part the petition seeking, inter alia, a permanent stay of arbitration of respondent's claim for uninsured motorist benefits.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking, inter alia, a permanent stay of arbitration of a claim by respondent for uninsured motorist (UM) coverage. Respondent was injured on July 3, 2006 when the vehicle he was operating collided with a vehicle owned by "proposed additional respondent" Jesse Willoughby. At that time, respondent was insured by petitioner with UM coverage of $25,000 per person, and Willoughby was insured by "proposed additional respondent" Nova Casualty Company (Nova). Nova, however, did not learn of the accident until January 8, 2008, when it received a letter from respondent's attorney concerning the accident. On January 14, 2008, Nova sent a letter to Willoughby indicating that there was a "coverage question" based on his "failure to report an accident and cooperate in the investigation." The letter further stated that Nova would continue to handle the claim but that it reserved its right to disclaim coverage. Thereafter, Nova

attempted to locate Willoughby to allow him to explain his failure to notify Nova of the claim. Nova's efforts included sending a letter to Willoughby's last known address, which was returned as undeliverable; calling Willoughby at several of his last known telephone numbers; calling Willoughby's sister, who stated that she had not had contact with Willoughby since April 2007; calling Willoughby's neighbors at Willoughby's known addresses; physically attempting to contact Willoughby at four known addresses; sending letters to Willoughby at his sister's address; attempting to obtain a copy of the police report from the accident; and corresponding with respondent's attorney in an attempt to obtain additional information concerning Willoughby. Despite those efforts, Nova never received a response from Willoughby, and it disclaimed coverage on February 21, 2008. Respondent then requested UM arbitration with petitioner, alleging that Willoughby's vehicle was an "uninsured vehicle" pursuant to the terms of respondent's policy.

Petitioner contends that Supreme Court erred in denying those parts of the petition seeking a permanent stay of arbitration and a "framed issue hearing regarding the issue of coverage on the offending vehicle" because Nova failed to meet its burden of establishing that it validly disclaimed coverage for Willoughby. We reject that contention. We conclude that Nova established as a matter of law that its disclaimer of coverage was valid, based on the 18-month delay between the date of the accident and the date on which Nova received notice of the claim (*see generally Doe Fund, Inc. v Royal Indem. Co.*, 34 AD3d 399).

Contrary to petitioner's further contention, the delay of 44 days between the date on which Nova received notice of the claim and the date on which it notified Willoughby of the disclaimer did not render its disclaimer of coverage untimely. It is well settled that, "[i]n order to effectively disclaim liability or deny coverage . . . under an automobile liability insurance policy, an insurer must 'give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage' " (*Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029, *rearg denied* 47 NY2d 951). "[A]n insurer's explanation [for a delay in notifying the insured of a disclaimer] is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay" (*First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 69). "However, an insurer's delay in notifying the insured of a disclaimer may be excused when the insurer conducts an 'investigation into issues affecting [its] decision whether to disclaim coverage' . . . In that case, the burden is on the insurer to demonstrate that its delay was reasonably related to its completion of a thorough and diligent investigation" (*Tully Constr. Co., Inc. v TIG Ins. Co.*, 43 AD3d 1150, 1152-1153, quoting *First Fin. Ins. Co.*, 1 NY3d at 69).

We conclude that Nova's efforts constituted an "investigation into issues affecting [Nova's] decision whether to disclaim coverage" (*First Fin. Ins. Co.*, 1 NY3d at 69; *see generally Tully Constr. Co., Inc.*, 43 AD3d at 1153; *Sirius Am. Ins. Co. v TGC Constr. Corp.*, 37

AD3d 818, 819). Nova therefore established a reasonable excuse for the delay as a matter of law, and there was no reason to conduct a "framed issue hearing" with respect to Nova's disclaimer. The fact that Nova knew on January 8, 2008 that the claim involved an accident that occurred on July 3, 2006 "did not make it 'readily apparent' that it had the right to disclaim coverage" (*Ace Packing Co., Inc. v Campbell Solberg Assoc., Inc.*, 41 AD3d 12, 15). "Only an investigation of the type ordered by [Nova] would yield [information that it] needed in order to make a good faith decision regarding disclaimer" (*id.*; *see Norfolk & Dedham Mut. Fire. Ins. Co. v Petrizzi*, 121 AD2d 276, 278, *lv denied* 68 NY2d 611).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**434**

**CA 08-01393**

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

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CROCODILE BAR, INC., DOING BUSINESS AS
CROCODILE BAR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DRYDEN MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

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BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (BRIAN SUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John A. Michalek, J.), entered February 22, 2008 in a declaratory judgment action. The judgment, inter alia, granted the motion of plaintiff for summary judgment declaring that defendant Dryden Mutual Insurance Company is obligated to defend and indemnify plaintiff in three underlying actions.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that defendant Dryden Mutual Insurance Company (Dryden) is obligated to defend and indemnify it in three underlying personal injury actions. Supreme Court properly granted plaintiff's motion for summary judgment with respect to, inter alia, that declaration on the ground that Dryden failed to provide a timely disclaimer of coverage (*see* Insurance Law § 3420 [d]; *Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-190). "[A] timely disclaimer [of coverage] pursuant to Insurance Law § 3420 (d) is required [where, as here,] a claim falls within the coverage terms but is denied based on a policy exclusion" (*Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-649; *see Worcester*, 95 NY2d at 188-190; *Penn-America Group v Zoobar, Inc.*, 305 AD2d 1116, 1117, *lv denied* 100 NY2d 511). "[O]nce the insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage, it must notify the policyholder in writing as soon as is reasonably possible" (*First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66; *see Republic Franklin Ins. Co. v Pistilli*, 16 AD3d 477, 479; *Squires v Robert Marini Bldrs.*, 293 AD2d 808, 810, *lv denied* 99 NY2d 502). Here, Dryden's claims

adjuster was aware when he received the claim on November 10, 2005 that the claim was excluded from the policy, and Dryden failed to establish that its 62-day delay was "reasonably related to the completion of a necessary, thorough, and diligent investigation" (*Quincy Mut. Fire Ins. Co. v Uribe*, 45 AD3d 661, 662; *see First Fin. Ins. Co.*, 1 NY3d at 70; *Morath v New York Cent. Mut. Fire Ins. Co.*, 49 AD3d 1245).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**436**

**CA 08-02193**

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

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LEONARD M. ENGLERT AND YVONNE ENGLERT,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GERALD W. SCHAFFER, JR., ESQ., STEVEN BARNES, ESQ., INDIVIDUALLY AND DOING BUSINESS AS THE BARNES FIRM, AS SUCCESSORS IN INTEREST TO CELLINO & BARNES, AND ROSS CELLINO, INDIVIDUALLY AND AS A PARTNER IN THE LAW FIRM OF CELLINO & BARNES, DEFENDANTS-APPELLANTS.

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MARK R. UBA, WILLIAMSVILLE, FOR DEFENDANTS-APPELLANTS.

BURKE AND BURKE, ROCHESTER (PATRICK J. BURKE OF COUNSEL), AND S. ROBERT WILLIAMS, PLLC, SYRACUSE, FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered December 4, 2007 in a legal malpractice action. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion to dismiss the first, second, fourth and fifth causes of action and the claim for punitive damages and dismissing those causes of action and that claim and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this legal malpractice action seeking damages for, inter alia, unjust enrichment and fraud as a result of defendants' representation of them in a personal injury action. Supreme Court granted that part of defendants' motion to dismiss the complaint only with respect to the sixth cause of action and denied those parts of the motion with respect to the first through fifth causes of action. At the outset, we reject plaintiffs' contention that the motion was premature because there were discoverable facts in defendants' sole possession. "[P]laintiff[s have] not established that additional discovery would disclose facts essential to justify opposition to defendant[s'] motion" (*Gillies v National Fire Ins. Co. of Hartford*, 56 AD3d 1236, 1238, *lv denied* 12 NY3d 702 [internal quotation marks omitted]).

We agree with defendants that the court erred in denying those parts of their motion to dismiss the first and second causes of

action, for unjust enrichment, inasmuch as the valid written retainer agreement precludes plaintiffs from recovering under that theory (*see generally Production Prods. Co. v Vision Corp.*, 270 AD2d 922, 923). We further conclude that the court erred in denying that part of the motion to dismiss the fourth cause of action alleging, inter alia, that defendants improperly withheld settlement funds. The issue of the parties' rights with respect to the settlement funds was previously settled by a federal court order, and thus that cause of action is barred by the doctrine of res judicata. Plaintiffs may not now relitigate that issue " 'even if based upon [a] different theor[y] or if seeking a different remedy' " (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347, quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357). We also agree with defendants that the court erred in denying that part of the motion to dismiss the fifth cause of action, seeking treble damages pursuant to Judiciary Law § 487, inasmuch as plaintiffs do not allege that defendants engaged in conduct that was sufficiently egregious to support such a cause of action. Similarly, the court erred in denying that part of the motion with respect to the claim for punitive damages because plaintiffs failed to "allege conduct that was directed to the general public or that evinced the requisite 'high degree of moral turpitude' or 'wanton dishonesty' " (*Williams v Coppola*, 23 AD3d 1012, 1013, *lv dismissed* 7 NY3d 741, quoting *Walker v Sheldon*, 10 NY2d 401, 405).

Contrary to defendants' remaining contention, however, the court properly denied that part of the motion to dismiss the third cause of action, for breach of fiduciary duty, inasmuch as plaintiffs stated a cause of action with respect thereto (*see generally Jackson v Mills*, 269 AD2d 200). We therefore modify the order by granting those parts of defendants' motion to dismiss the first, second, fourth and fifth causes of action and the claim for punitive damages and dismissing those causes of action and that claim.

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**443**

**KA 07-01786**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANCE P. SCULLY, DEFENDANT-APPELLANT.

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FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ESTHER COHEN LEE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (MATTHEW P. WORTH OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered February 23, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the fourth degree, criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree and unlawful possession of marihuana.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed for unlawful possession of marihuana and as modified the judgment is affirmed, and the matter is remitted to Oneida County Court for resentencing on count five of the indictment.

Memorandum: Defendant appeals from a judgment convicting him in absentia following a jury trial of criminal possession of a weapon in the fourth degree (Penal Law former § 265.01 [1]), criminal possession of a controlled substance in the third degree (§ 220.16 [1]), criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]) and unlawful possession of marihuana (§ 221.05). The conviction of criminal possession of a controlled substance in the third and fifth degrees arises from cocaine that was seized, pursuant to the execution of a search warrant, from an apartment leased by defendant. The police also seized a handgun from defendant's person during the execution of the search warrant. Contrary to the contention of defendant, County Court properly determined that he failed to establish that he has standing to challenge the basis for the issuance of the search warrant. "At a suppression hearing, a defendant has the burden of establishing standing by demonstrating a personal legitimate expectation of privacy" (*People v Whitfield*, 81 NY2d 904, 905-906; *see generally People v Wesley*, 73 NY2d 351). Although defendant was entitled to meet that burden by relying on the People's evidence (*see People v Burton*, 6 NY3d 584, 588-589; *People v Gonzalez*, 68 NY2d 950),

he failed to do so, and his moving papers were devoid of any allegation that he had an expectation of privacy in the apartment. We note in addition that defendant challenged only the probable cause for the search warrant, and his expectation of privacy with respect to his person did not automatically establish standing to challenge the search of premises pursuant to a search warrant (*see Burton*, 6 NY3d at 590-591).

Defendant failed to preserve for our review his contention that the court erred in failing to repeat in its final jury instructions an instruction concerning defendant's absence at the trial (*see generally People v Carr*, 59 AD3d 945; *People v Dallas*, 58 AD3d 1019, 1020-1021), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant similarly failed to preserve for our review his contention that the court erred in sua sponte instructing the jury not to draw any inference from defendant's failure to testify (*see People v Robinson*, 1 AD3d 985, 986, *lv denied* 1 NY3d 633, 2 NY3d 805). In any event, we conclude that, under the circumstances of this case, the court did not abuse its discretion in giving that instruction (*see People v Vereen*, 45 NY2d 856; *People v Rodriguez*, 220 AD2d 208, 209, *lv denied* 87 NY2d 977; *People v Goins*, 215 AD2d 111, *lv denied* 86 NY2d 735).

Defendant also failed to preserve for our review his contention that the testimony of the three police witnesses that, in their experience, the amount of cocaine found in the apartment was inconsistent with personal use constituted improper opinion testimony (*see* CPL 470.05 [2]), as well as his contention that the court erred in failing to give limiting instructions concerning that testimony (*see id.*). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

As the People properly concede, however, the court erred in imposing a term of incarceration of 15 days on count five of the indictment, charging defendant with unlawful possession of marihuana. Because there was no evidence that defendant had committed any prior Penal Law article 220 or 221 offenses within the preceding three years, the court was entitled only to impose a fine on that count, and the maximum fine that could be imposed was $100 (*see* § 221.05). We therefore modify the judgment by vacating the sentence imposed for unlawful possession of marihuana, and we remit the matter to County Court for resentencing on count five of the indictment. Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**448**

**CAF 08-00264**

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

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IN THE MATTER OF JOSH M.

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ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LLOYD M., RESPONDENT-APPELLANT.

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CONVERSE & MORELL, LLP, PALMYRA (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN W. PARK, COUNTY ATTORNEY, CANANDAIGUA (HOLLY A. ADAMS OF COUNSEL), FOR PETITIONER-RESPONDENT.

MARYBETH D. BARNET, LAW GUARDIAN, CANANDAIGUA, FOR JOSH M.

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Appeal from an order of the Family Court, Ontario County (Craig J. Doran, J.), entered January 4, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by remitting the matter to Family Court, Ontario County, for further proceedings in accordance with the memorandum and as modified the order is affirmed without costs.

Memorandum: Respondent father appeals from an order terminating his parental rights pursuant to Social Services Law § 384-b (4) (c) on the ground of mental retardation. We conclude that petitioner established by clear and convincing evidence that the father is "presently and for the foreseeable future unable, by reason of . . . mental retardation, to provide proper and adequate care for [his] child" (*id.*; *see* § 384-b [6] [b]; *Matter of Adam NN.*, 33 AD3d 1187, 1188, *lv denied* 8 NY3d 802; *Matter of Michael F.*, 16 AD3d 1116). Petitioner presented the testimony of a psychologist and a psychiatrist who each testified that the father is mildly mentally retarded, which is a life-long condition, and that his mental retardation rendered him incapable of providing proper and adequate care for his child, who has developmental disabilities. The father presented no evidence to the contrary (*see Matter of Donald W.*, 17 AD3d 728, 729, *lv denied* 5 NY3d 705; *Matter of Lisa Marie S.*, 304 AD2d 762, *lv denied* 100 NY2d 508, *lv dismissed* 100 NY2d 575).

We agree with the father, however, that Family Court erred in failing to determine whether post-termination contact with the father

is in the best interests of the child. After the court issued its written decision finding that the father is by reason of his mental retardation unable to care for his child, both the court and the Law Guardian expressed their belief that post-termination contact might be appropriate. The court urged the parties to come to an agreement pursuant to which the father would conditionally surrender his parental rights and some form of continued contact would be arranged. The parties were unable to come to such an agreement, however, and the father refused to agree to a conditional surrender of his parental rights. The court then ordered that the father's parental rights were terminated without itself determining whether post-termination contact was in the child's best interests. We conclude that the court erred in conditioning post-termination contact on the parties' ability to reach an agreement with respect to the terms of that contact and on the agreement of the father to a conditional surrender of his parental rights. Instead, the court itself should have determined whether post-termination contact was in the child's best interests. We therefore modify the order by remitting the matter to Family Court to determine that issue, following a further hearing if necessary (*see generally Matter of Kahlil S.*, 35 AD3d 1164, *lv dismissed* 8 NY3d 977; *Matter of Thomas B.*, 35 AD3d 1289, *lv dismissed* 8 NY3d 936).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**452**

**CA 08-02062**

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

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DR. JOHN CHONG-HWAN WEE, PLAINTIFF-RESPONDENT,

V ORDER

UNITED MEMORIAL MEDICAL CENTER, BARBARA HANCOCK, STEVEN BUFFA, LORI GOERGEN AND ROSANN LOWDER, DEFENDANTS-APPELLANTS.

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KEVIN A. RICOTTA, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (JOHN VISCO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DR. JOHN CHONG-HWAN WEE, PLAINTIFF-RESPONDENT PRO SE.

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Appeal from an order of the Supreme Court, Genesee County (Mark H. Dadd, A.J.), entered January 31, 2008 in a medical malpractice action. The order, insofar as appealed from, denied in part defendants' motion to dismiss the complaint.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**453**

**CA 07-02464**

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

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PATRICIA WILSON, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 111995.)

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ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHARLES E. LUPIA, SYRACUSE, FOR CLAIMANT-RESPONDENT.

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Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered October 22, 2007 in a personal injury action. The order denied the motion of defendant to dismiss the claim.

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

Memorandum: Claimant commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell while she was an inmate in a correctional facility. We agree with defendant that the Court of Claims erred in denying its motion to dismiss the claim based on claimant's failure to include required information in the notice of intention to file a claim. Court of Claims Act § 10 (3) provides in relevant part that a claimant seeking to recover damages for personal injuries caused by the negligence of a New York State officer or employee must file and serve a notice of claim or a notice of intention to file a claim within 90 days after the claim accrues. Pursuant to Court of Claims Act § 11 (b), the claim or notice of intention to file a claim "shall state the time when and place where such claim arose, the nature of same, [and] the items of damage or injuries claimed to have been sustained . . . ." The requirements in section 11 (b) are "substantive conditions upon the State's waiver of sovereign immunity" (*Lepkowski v State of New York*, 1 NY3d 201, 207), and noncompliance renders a claim "jurisdictionally defective for nonconformity" (*id.* at 209; *see Kolnacki v State of New York*, 8 NY3d 277, 281, *rearg denied* 8 NY3d 994). Furthermore, "a lack of prejudice to the State is an immaterial factor" (*Byrne v State of New York*, 104 AD2d 782, 784, *lv denied* 64 NY2d 607). Here, the notice of intention to file a claim is jurisdictionally defective inasmuch as it fails to state both a year in which the injury allegedly occurred and a particular road or place on such road where claimant allegedly fell,

thereby failing to "state the time when and place where such claim arose" (§ 11 [b]; *see Sega v State of New York*, 246 AD2d 753, *lv denied* 92 NY2d 805; *Cobin v State of New York*, 234 AD2d 498, 499, *lv dismissed* 90 NY2d 925, *rearg denied* 91 NY2d 849). We agree with defendant that "[t]he vague and contradictory description of the accident scene in claimant's initial submissions made it impossible for [defendant] to determine the situs of claimant's fall, having been described by claimant as occurring both [in the draft processing area] and on [a sheet of ice that was covering the entire ROAD AREA] somewhere between [her] cellblock and [the draft processing area]" (*Riefler v State of New York*, 228 AD2d 1000, 1001).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**454**

**CA 08-01394**

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

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JOHN H. RING, III, AS TRUSTEE OF THE CHAPTER 7
BANKRUPTCY ESTATE OF ERIC GIERLINGER, ET AL.,
PLAINTIFFS,

V ORDER

JEFFREY BUSH, ALSO KNOWN AS JEFF BUSH,
DEFENDANT.

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JEFFREY BUSH, ALSO KNOWN AS JEFF BUSH,
THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT,

V

TOWN OF GAINESVILLE, THIRD-PARTY
DEFENDANT-RESPONDENT,
AND VILLAGE OF WARSAW, THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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BROWN & KELLY, LLP, BUFFALO (MARK J. SCHAEFER OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

LIPPMAN O'CONNOR, BUFFALO (CHRISTOPHER M. DUGGAN OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, BUFFALO (BRIAN SUTTER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered January 21, 2008 in a personal injury action. The order denied the motions of third-party defendants for summary judgment dismissing the third-party complaint.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**455**

**CA 08-01395**

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

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JOHN H. RING, III, AS TRUSTEE OF THE CHAPTER 7 BANKRUPTCY ESTATE OF ERIC GIERLINGER, ET AL., PLAINTIFFS,

V ORDER

JEFFREY BUSH, ALSO KNOWN AS JEFF BUSH, DEFENDANT.

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JEFFREY BUSH, ALSO KNOWN AS JEFF BUSH, THIRD-PARTY PLAINTIFF-APPELLANT,

V

TOWN OF GAINESVILLE AND VILLAGE OF WARSAW, THIRD-PARTY DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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BROWN & KELLY, LLP, BUFFALO (MARK J. SCHAEFER OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

LIPPMAN O'CONNOR, BUFFALO (CHRISTOPHER M. DUGGAN OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT TOWN OF GAINESVILLE.

SUGARMAN LAW FIRM, LLP, BUFFALO (BRIAN SUTTER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT VILLAGE OF WARSAW.

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Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered February 20, 2008 in a personal injury action. The order amended the order entered January 21, 2008 by providing that the motions of third-party defendants for summary judgment dismissing the third-party complaint are denied without prejudice.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**456**

**CA 08-00708**

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

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DENNIS PUTNAM AND LEANNE PUTNAM,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF STEUBEN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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DAVIDSON & O'MARA, P.C., ELMIRA (DONALD S. THOMSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DADD AND NELSON PLLC, ATTICA (ERIC T. DADD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from a judgment of the Supreme Court, Steuben County (Matthew A. Rosenbaum, J.), entered December 31, 2007 in an action for malicious prosecution. The judgment, entered upon a jury verdict, awarded plaintiffs money damages, costs and attorney's fees against defendant.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment entered upon a jury verdict in favor of plaintiffs on their cause of action for malicious prosecution. In appeal No. 2, defendant appeals and plaintiffs cross-appeal from an order granting that part of defendant's postjudgment motion seeking to set aside the award of damages and granting a new trial on damages. We agree with plaintiffs that Supreme Court should have denied defendant's postjudgment motion in its entirety, and we therefore modify the order accordingly.

With respect to defendant's appeal, we conclude that the court properly denied that part of defendant's postjudgment motion to set aside the verdict on liability. The elements of a cause of action for malicious prosecution are "(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice" (*Broughton v State of New York*, 37 NY2d 451, 457, *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929; *see Oakley v City of Rochester*, 71 AD2d 15, 18, *affd* 51 NY2d 908). "The continuation of a criminal proceeding without probable cause may support a cause of action for malicious prosecution" (*Kemp v Lynch*, 275 AD2d 1024, 1026). In

establishing the element of actual malice, "a plaintiff need not demonstrate the defendant's intent to do him or her personal harm, but need only show a reckless or grossly negligent disregard for his or her rights" (*Ramos v City of New York*, 285 AD2d 284, 300). Actual malice may be inferred from the facts and circumstances of the case, i.e., "something other than a desire [on the part of the defendant] to see the ends of justice served" (*Nardelli v Stamberg*, 44 NY2d 500, 502; *see Ramos*, 285 AD2d at 300).

According to the evidence presented at trial, Dennis Putnam (plaintiff) was arrested and charged with falsifying business records in the first degree (Penal Law § 175.10). At the criminal trial that preceded the instant civil trial, he was tried on a reduced charge of offering a false instrument for filing in the second degree (§ 175.30) and was acquitted. Disputed issues at the instant civil trial were whether defendant initiated the criminal prosecution and whether there was malice on its part. There was evidence before the jury, however, that two of defendant's employees asked the Sheriff and the Assistant District Attorney to conduct a criminal investigation into allegedly fraudulent lunch receipts submitted by plaintiff rather than to approach plaintiff's supervisor, as was the usual practice. There was also evidence that those two employees were unaware of the policy and practice of workers in the Department of Social Services concerning the submission of receipts for reimbursement and that, had they approached plaintiff's supervisor, she would have informed them that plaintiff's handwritten receipts were proper and routinely accepted. The jury could thus rationally find that defendant's employees showed a reckless disregard for plaintiff's rights both by initiating the criminal prosecution and by allowing it to continue when they either knew or should have known that there was no probable cause for that prosecution. Defendant thus failed to establish that "the preponderance of the evidence in favor of [it] is so great that the verdict could not have been reached upon any fair interpretation of the evidence" (*Dannick v County of Onondaga*, 191 AD2d 963, 964).

With respect to plaintiffs' cross appeal, we agree with plaintiffs that the court erred in granting that part of defendant's postjudgment motion with respect to the award of damages. "Generally, a plaintiff in a malicious prosecution action may recover damages for the direct, natural and proximate results of the criminal prosecution, including those for suffering arrest and imprisonment, injury to reputation and character, injury to health, well-being and feelings, and counsel fees and expenses in defending the criminal prosecution" (*Burlett v County of Saratoga*, 111 AD2d 426, 427; *see Loeb v Teitelbaum*, 77 AD2d 92, 105, *order amended* 80 AD2d 838; PJI 3:50). Here, the court granted that part of defendant's postjudgment motion to set aside the award of damages based on its determination that the award may have been attributable to the tort of false arrest. Damages for malicious prosecution are recoverable for injuries caused by an arrest and imprisonment (*see Halberstadt v New York Life Ins. Co.*, 194 NY 1, 7; *Sheldon v Carpenter*, 4 NY 579, 580) and, where there are causes of action for both false arrest and malicious prosecution, the court must instruct the jury not to make a duplicate award of damages (*see Papa v City of*

*New York*, 194 AD2d 527, 530-531, *lv dismissed* 82 NY2d 918; 2 NY PJI2d 3:50, at 476 [2009]; *see generally Broughton*, 37 NY2d at 459). That was not a concern here, however, inasmuch as there was no cause of action for false arrest. We have considered defendant's remaining contentions concerning the award of damages and conclude that they are without merit.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**457**

**CA 08-00709**

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

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DENNIS PUTNAM AND LEANNE PUTNAM,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF STEUBEN,
DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 2.)

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DAVIDSON & O'MARA, P.C., ELMIRA (DONALD S. THOMSON OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

DADD AND NELSON PLLC, ATTICA (ERIC T. DADD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

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Appeal and cross appeal from an order of the Supreme Court, Steuben County (Matthew A. Rosenbaum, J.), entered March 13, 2008. The order, among other things, granted in part defendant's postjudgment motion to set aside the jury verdict.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety and reinstating the award of damages and as modified the order is affirmed without costs.

Same Memorandum as in *Putnam v County of Steuben* ([appeal No. 1] ___ AD3d ___ [Apr. 24, 2009]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**473**

**CAF 07-02445**

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

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IN THE MATTER OF ISAIAH H.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ISHTAR G., RESPONDENT-APPELLANT.

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ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR ISAIAH H.

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Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 15, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order found that respondent permanently neglected her child and terminated respondent's parental rights.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, petitioner's motion is denied, and the matter is remitted to Family Court, Erie County, for a hearing on the petition.

Memorandum: Family Court erred in granting petitioner's motion for a default order finding that respondent mother permanently neglected her son and thereafter, following a dispositional hearing, terminating her parental rights with respect to him pursuant to Social Services Law § 384-b. The mother's failure to appear at the fact-finding hearing on the issue of permanent neglect "does not automatically constitute a default," in view of the fact that the attorney for the mother appeared on her behalf and requested an adjournment (*Matter of David A.A. v Maryann A.*, 41 AD3d 1300, 1300; *Matter of Shemeco D.*, 265 AD2d 860). "A party who is represented at a scheduled court appearance by an attorney has not failed to appear" (*Matter of Sales v Gisendaner*, 272 AD2d 997, 997).

We therefore reverse the order, deny petitioner's motion, and remit the matter to Family Court for a hearing on the petition.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**479**

**CA 08-02204**

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

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JAMES M. BAKER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD J. MURASKI AND LEIGH D. MURASKI,
DEFENDANTS-RESPONDENTS.

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LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 17, 2008 in a personal injury action. The order, insofar as appealed from, granted in part the motion of defendants for summary judgment and dismissed the second through fourth causes of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety and the second through fourth causes of action are reinstated.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell while resurfacing the roof of a house owned by defendants. Supreme Court granted defendants' motion for summary judgment in part, dismissing the Labor Law causes of action. We conclude that the court should have denied defendants' motion in its entirety.

We agree with plaintiff that the court erred in concluding as a matter of law that plaintiff was not a protected worker under the Labor Law. Rather, there is a triable issue of fact on the record before us whether plaintiff was employed within the meaning of the Labor Law, i.e., whether he was "permitted or suffered to work" on the roof and received monetary compensation therefor (§ 2 [7]; *see Smith v Torre*, 247 AD2d 896; *cf. Stringer v Musacchia*, 11 NY3d 212, 216-217). Contrary to the contention of defendants, the determination of the Workers' Compensation Board that plaintiff was not employed by them is not entitled to collateral estoppel effect. Defendants failed to establish identity of issue, a necessary element of collateral estoppel, in view of the differing definitions of "employee," "employer" and "employed" in Labor Law § 2 (5) through (7) and those

of “employer,” “employee” and “employment” in Workers’ Compensation Law § 201 (4) through (6) (*see Matter of Bartenders Unlimited [Commissioner of Labor]*, 289 AD2d 785, 786-787, *lv denied* 98 NY2d 601; *Alejandro v Riportella*, 250 AD2d 556, 557; *Emmi v Emmi*, 186 AD2d 1025; *cf. Lee v Jones*, 230 AD2d 435, 438, *lv denied* 91 NY2d 802). In addition, the Workers’ Compensation Judge made no finding of fact with respect to the issue of payment by defendants for the work performed by plaintiff at their residence (*see generally Matter of Engel v Calgon Corp.*, 114 AD2d 108, 110-111, *affd* 69 NY2d 753, *rearg denied* 70 NY2d 748; *cf. Lee*, 230 AD2d at 438).

We further agree with plaintiff that the court erred in determining with respect to Labor Law § 240 (1) and § 241 (6) that defendants are entitled as a matter of law to the exemption from liability for “owners of one and two-family dwellings who contract for but do not direct or control the work” (§ 240 [1]; *see* § 241). There are issues of fact whether defendant husband, an experienced roofer who was working with plaintiff at the time of the accident, directed or controlled plaintiff’s work (*see Masters v Celestian*, 21 AD3d 1426, 1427; *Ennis v Hayes*, 152 AD2d 914, 915). “Whether an owner’s conduct amounts to directing or controlling the work depends upon the degree of supervision exercised over the method and manner in which the work is performed” (*Ennis*, 152 AD2d at 915), and on the record before us there are issues of fact with respect to defendant husband’s degree of supervision over plaintiff’s work.

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**494**

**CAF 08-00973**

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

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IN THE MATTER OF JONATHAN M.,
RESPONDENT-RESPONDENT.
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ERIE COUNTY ATTORNEY, PETITIONER-APPELLANT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

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

SHEILA SULLIVAN DICKINSON, LAW GUARDIAN, BUFFALO, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered January 9, 2008 in a proceeding pursuant to Family Court Act article 3. The order dismissed the petition.

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

Memorandum: These consolidated appeals arise from four juvenile delinquency petitions pursuant to Family Court Act article 3 alleging, inter alia, that respondents committed acts that, if committed by adults, would constitute the crime of assault in the third degree (Penal Law § 120.00 [1], [2]). Two respondents moved to dismiss the respective petitions against them, and the two remaining respondents joined in those motions. Family Court denied those parts of the motions with respect to the charge of assault in the third degree. New petitions were later filed against two respondents also alleging, inter alia, that they committed acts that, if committed by adults, would constitute the crime of assault in the third degree. After the matter was assigned to a different Family Court judge, one respondent orally moved for leave to renew his motion to dismiss with respect to the assault charge, and the remaining respondents joined in the motion. The court granted leave to renew and, upon renewal, granted the motions based on the legal insufficiency of the allegations with respect to that crime.

We agree with petitioner that the court violated the doctrine of law of the case in dismissing the petitions. That doctrine “is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned” (*Martin v City of Cohoes*, 37 NY2d 162, 165, *rearg denied* 37 NY2d 817). Thus, “ ‘a Judge may not review or overrule an order of another Judge

of co-ordinate jurisdiction in the same action or proceeding' " (*Matter of Cellamare v Lakeman*, 36 AD3d 905, 905, *appeal dismissed* 8 NY3d 975; *see Anderson v Anderson*, 5 AD3d 1105), as was done in these proceedings. Nevertheless, this Court is not bound by the doctrine of law of the case because that doctrine "does not prohibit appellate review of a subordinate court's order" (*Frankel v Frankel*, 158 AD2d 750, 751; *see Cellamare*, 36 AD3d at 906; *Latture v Smith*, 304 AD2d 534), and we affirm the orders on appeal upon our review of the sufficiency of the petitions pursuant to Family Court Act § 311.2.

The failure to comply with Family Court Act § 311.2 is a "nonwaivable jurisdictional defect that can be raised at any stage of the proceeding[s]" (*Matter of Neftali D.*, 85 NY2d 631, 637; *see Matter of Wesley M.*, 83 NY2d 898, 899; *Matter of Rodney J.*, 83 NY2d 503, 507). Family Court Act § 311.2 provides in relevant part that "a petition is sufficient on its face when . . . non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof." Assault in the third degree as charged in the petitions requires the infliction of physical injury (*see* Penal Law § 120.00 [1], [2]), and physical injury is defined as "impairment of physical condition or substantial pain" (§ 10.00 [9]). Here, petitioner failed to submit the requisite non-hearsay allegations that respondents inflicted physical injury inasmuch as the petitions and supporting documents do not contain non-hearsay allegations that either victim sustained substantial pain or impairment of physical condition. The petitions therefore were properly dismissed on the ground that they are defective (*see* Family Ct Act § 315.1 [a]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**495**

**CAF 08-00974**

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

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IN THE MATTER OF JOSHUA M.,
RESPONDENT-RESPONDENT.
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ERIE COUNTY ATTORNEY, PETITIONER-APPELLANT.
(APPEAL NO. 2.)

MEMORANDUM AND ORDER

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

MARY ANNE CONNELL, LAW GUARDIAN, BUFFALO, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered January 9, 2008 in a proceeding pursuant to Family Court Act article 3. The order dismissed the petition.

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

Same Memorandum as in *Matter of Jonathan M.* (___ AD3d ___ [Apr. 24, 2009]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**496**

**CAF 08-00975**

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

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IN THE MATTER OF CONNOR C.,
RESPONDENT-RESPONDENT.
---------- MEMORANDUM AND ORDER
ERIE COUNTY ATTORNEY, PETITIONER-APPELLANT.
(APPEAL NO. 3.)

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

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

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Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered March 12, 2008 in a proceeding pursuant to Family Court Act article 3. The order, insofar as appealed from, dismissed the charge of assault in the third degree.

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

Same Memorandum as in *Matter of Jonathan M.* (___ AD3d ___ [Apr. 24, 2009]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**497**

**CAF 08-00976**

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

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IN THE MATTER OF VINCENT D.,
RESPONDENT-RESPONDENT.
---------- MEMORANDUM AND ORDER
ERIE COUNTY ATTORNEY, PETITIONER-APPELLANT.
(APPEAL NO. 4.)

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

GIOVANNI GENOVESE, LAW GUARDIAN, BUFFALO, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered March 12, 2008 in a proceeding pursuant to Family Court Act article 3. The order, insofar as appealed from, dismissed the charge of assault in the third degree.

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

Same Memorandum as in *Matter of Jonathan M.* (___ AD3d ___ [Apr. 24, 2009]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**499**

**CA 08-01420**

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

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KARLA R. GREEN, PLAINTIFF-APPELLANT,

V ORDER

PASSENGER BUS CORPORATION, ET AL., DEFENDANTS,
GREYHOUND LINES, INC. AND ALLEN SIMMONS,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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CELLINO & BARNES, P.C., BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (GABRIELLE MARDANY HOPE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 3, 2007 in a personal injury action. The order denied the motion of plaintiff for leave to amend the complaint to add claims for punitive damages against defendants Greyhound Lines, Inc. and Allen Simmons.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**500**

**CA 08-01421**

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

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KARLA R. GREEN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PASSENGER BUS CORPORATION, ADIRONDACK TRAILWAYS, INC., GREYHOUND LINES, INC. AND ALLEN SIMMONS, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

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CELLINO & BARNES, P.C., BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (GABRIELLE MARDANY HOPE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from a judgment of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 22, 2008 in a personal injury action. The judgment awarded costs and disbursements to defendants upon a verdict of no cause of action.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the bus on which she was a passenger collided with a concrete barrier. Following a trial, the jury returned a verdict in favor of defendants. We conclude that Supreme Court properly denied plaintiff's pretrial motion for leave to amend the complaint to include claims for punitive damages against defendant Allen Simmons and his employer, defendant Greyhound Lines, Inc. (Greyhound). "Generally, [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court" (*Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198, *amended on rearg* 41 AD3d 1324 [internal quotation marks omitted]; *see* CPLR 3025 [b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). Here, however, the evidence submitted by plaintiff was insufficient to support her allegation that there was the requisite willful or wanton negligence or recklessness on the part of Simmons to warrant an award of punitive damages (*see generally Buckholz v Maple Garden Apts., LLC*, 38 AD3d 584). Further, punitive damages are warranted against an employer only where it "has authorized, participated in, consented to or

ratified the conduct [of its employee] giving rise to such damages, or deliberately retained the unfit [employee]" (*Loughry v Lincoln First Bank*, 67 NY2d 369, 378), and plaintiff submitted no such evidence to support an award of punitive damages with respect to Greyhound.

Plaintiff further contends that the court abused its discretion in allowing defendants' attorney to cross-examine her with respect to her receipt of welfare benefits and thus that a new trial is required. We reject that contention. "It is well settled that the permissible scope of cross-examination lies within the sound discretion of the trial court . . . [and] that direct . . . examination may open the door to certain collateral matters [that] would otherwise be inadmissible" (*Gutierrez v City of New York*, 205 AD2d 425, 427). Here, plaintiff's counsel elicited incomplete and misleading testimony from plaintiff during direct examination with respect to her work history and thus opened the door for the cross-examination of defendants' attorney concerning plaintiff's receipt of welfare benefits (*cf. id.*).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

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

**503**

**CA 08-01604**

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

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DANIEL CHAMBERLAIN, PLAINTIFF-APPELLANT,

V ORDER

LARISSA DUNDON AND MICHAEL P. DUNDON,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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FARACI LANGE, LLP, ROCHESTER (CAROL A. MCKENNA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF MARY A. BJORK, ROCHESTER (THOMAS P. DURKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered November 7, 2007 in a personal injury action. The order denied the motion of plaintiff for an adjournment of the trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**504**

**CA 08-01606**

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

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DANIEL CHAMBERLAIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LARISSA DUNDON AND MICHAEL P. DUNDON,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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FARACI LANGE, LLP, ROCHESTER (CAROL A. MCKENNA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF MARY A. BJORK, ROCHESTER (THOMAS P. DURKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from a judgment of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered December 4, 2007 in a personal injury action. The judgment awarded defendants costs and disbursements upon a verdict of no cause of action.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was bitten by defendants' dog. We agree with plaintiff that Supreme Court abused its discretion in denying his motion for an adjournment of the trial to enable him to secure the attendance of a witness. "It is an abuse of discretion to deny a[n adjournment] where the [motion] complies with every requirement of the law and is not made merely for delay, where the evidence is material and where the need for a[n adjournment] does not result from the failure to exercise due diligence" (*Balogh v H.R.B. Caterers*, 88 AD2d 136, 141; *see Matter of Buscaglia v Ruh*, 140 AD2d 996, 997). Here, the proposed testimony of the witness in question was material to the issue of defendants' prior knowledge of the dog's vicious propensities, and the absence of the witness did not result from a lack of due diligence on the part of plaintiff inasmuch as he properly subpoenaed the witness (*see generally Balogh*, 88 AD2d at 140-141). Indeed, plaintiff learned only one week prior to the trial that the witness was not able to return to the country in time for the scheduled trial date because of a family emergency (*cf. Harper v Han Chang*, 267 AD2d 1011, 1012). We further note that the requested adjournment would have resulted in a delay of only nine days, and there is no indication in the record before us that the delay would

have prejudiced defendants (*see Buscaglia*, 140 AD2d at 997).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

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

**505**

**CA 08-01607**

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

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DANIEL CHAMBERLAIN, PLAINTIFF-APPELLANT,

V ORDER

LARISSA DUNDON AND MICHAEL P. DUNDON,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

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FARACI LANGE, LLP, ROCHESTER (CAROL A. MCKENNA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF MARY A. BJORK, ROCHESTER (THOMAS P. DURKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered April 2, 2008 in a personal injury action. The order denied the motion of plaintiff for a new trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Wall v Shepard*, 53 AD3d 1050; *see also* CPLR 5501 [a] [2]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**507**

**CA 08-02129**

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

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IN THE MATTER OF JANET EVELYN DORSEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HERKIMER COUNTY COMMUNITY COLLEGE,
RESPONDENT-APPELLANT.

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ROEMER WALLENS & MINEAUX, LLP, ALBANY (EARL T. REDDING OF COUNSEL), FOR RESPONDENT-APPELLANT.

DAVID G. GOLDBAS, UTICA, FOR PETITIONER-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered July 29, 2008 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, denied the motion of respondent to dismiss the petition.

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

Memorandum: Petitioner, an employee of respondent, commenced this proceeding seeking, inter alia, a hearing with respect to allegations of misconduct asserted against her by another employee and seeking to annul the suspension of her employment. Petitioner was not a permanent employee of respondent but, rather, she worked pursuant to a series of annual and biyearly appointments. The reappointment of petitioner was based on an evaluation of her performance, and respondent neither guaranteed employment for the duration of the terms nor relinquished its right to terminate petitioner. We agree with respondent that Supreme Court erred in denying its motion to dismiss the petition. Here, petitioner was in effect an at-will employee, and respondent was entitled to suspend or dismiss her from employment without a hearing and without a statement of reasons in the absence of proof that the suspension or dismissal was for a constitutionally impermissible purpose or contrary to statutory or decisional law (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 305; *Matter of Oset v Can/Am Youth Servs.*, 212 AD2d 887, 888). Petitioner made no such showing here, and there is no provision in respondent's employee handbook that prohibits respondent from suspending an employee without first conducting a hearing (*see generally Matter of Oset*, 212 AD2d at 888).

In view of our determination, we do not address respondent's remaining contentions.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**514**

**KA 07-02568**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TIMOTHY GINOCCHETTI, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 16, 2007. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**515**

**KA 08-00359**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAKILA M. HALL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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MARCEL J. LAJOY, ALBANY, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (TRAVIS J. BARRY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered April 23, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**516**

**KA 08-00360**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAKILA M. HALL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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MARCEL J. LAJOY, ALBANY, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (TRAVIS J. BARRY OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered April 23, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**517**

**KA 08-01191**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JONATHAN CORDEIRO, ALSO KNOWN AS JONATHAN CORDIERO, ALSO KNOWN AS JONATHAN H. CORDEIRO, DEFENDANT-APPELLANT.

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GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 29, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**518**

**KA 06-01049**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FRANKLIN M. FLOYD, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Stephen K. Lindley, A.J.), rendered January 20, 2006. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**520**

**KA 07-01858**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESHUN WEATHERSBY, DEFENDANT-APPELLANT.

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

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

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Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered August 14, 2007. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court erred in determining that the People established by clear and convincing evidence that he should be assessed 10 points under the risk factor based upon the recency of a prior felony offense. We reject that contention. Pursuant to the commentary to the risk assessment guidelines, 10 points should be assessed under that risk factor "if an offender has a prior felony or sex crime within three years of the instant offense. This three-year period should be measured without regard to the time during which the offender was incarcerated or civilly committed. It is an offender's behavior during his time at liberty that is relevant in assessing his likelihood to reoffend" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 14 [2006]; *see People v Marrero*, 52 AD3d 797, 798). The instant offense was committed on October 6, 2001, and defendant was convicted of a felony offense on September 2, 1998, more than three years earlier. The case summary establishes, however, that defendant was sentenced to three separate periods of incarceration during the time period between the prior conviction and the date of the instant offense. Although the People failed to present evidence establishing precisely how much of that period defendant was actually incarcerated, they presented evidence establishing that defendant was sentenced to a term of incarceration

of six months upon his violation of probation with respect to the prior felony, as well as two terms of incarceration of 180 days and 90 days, respectively, for misdemeanor convictions. Thus, we conclude that the People established by clear and convincing evidence that defendant was incarcerated for sufficient periods to reduce the time between the conviction for the prior offense and the date of the instant offense to within the requisite three-year period (*cf. Marrero*, 52 AD3d at 799; *People v Pendelton*, 50 AD3d 659, *lv denied* 11 NY3d 702).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**521**

**KA 04-00104**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT H. WILLIAMS, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), rendered November 6, 2003. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [former (a)]), defendant contends that he was denied his right to a fair trial because the prosecutor knowingly elicited testimony from the victim that was false and misleading. Defendant failed to preserve that contention for our review (*see People v Cooper*, 219 AD2d 426, 433, *affd* 90 NY2d 292; *People v Jordan*, 181 AD2d 745, 746-747, *lv denied* 80 NY2d 833) and, in any event, that contention lacks merit. Although we agree with defendant that a prosecutor has a duty to correct trial testimony if he or she knows that it is false (*see People v Savvides*, 1 NY2d 554, 556-557; *People v Hendricks*, 2 AD3d 1450, *lv denied* 2 NY3d 762), we conclude that the prosecutor here did not in fact elicit false testimony from the victim. We reject the further contention of defendant that Supreme Court erred in refusing to allow him to cross-examine the victim with respect to her sexual history pursuant to the Rape Shield Law (*see* CPL 60.42). " 'Evidence of the victim's . . . sexual conduct did not fall within any of the exceptions set forth in CPL 60.42 (1) through (4)' " (*People v Wright*, 37 AD3d 1142, *lv denied* 8 NY3d 951), and we cannot say that the court abused its discretion in refusing to apply the exception set forth in CPL 60.42 (5) (*see People v White*, 261 AD2d

653, 655-656, *lv denied* 93 NY2d 1029).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**522**

**KA 08-00009**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

EDWARD R. STEIN, DEFENDANT-APPELLANT.

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AUDREY BARON DUNNING, HERKIMER, FOR DEFENDANT-APPELLANT.

EDWARD R. STEIN, DEFENDANT-APPELLANT PRO SE.

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

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Appeal from an order of the Herkimer County Court (Patrick L. Kirk, J.), entered November 30, 2007. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Opinion by GREEN, J.: Defendant was convicted upon his plea of guilty of criminal sexual act in the second degree (Penal Law § 130.45 [1]) as the result of his admitted sexual conduct with a 14-year-old girl. He was sentenced to a term of incarceration and, upon his anticipated release, the Board of Examiners of Sex Offenders (Board) prepared a Risk Assessment Instrument (RAI). Based upon the total risk factor score of 85 on the RAI, defendant was presumptively classified as a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). All of the points were assessed under the category of "CURRENT OFFENSE(S)" and included 25 points under risk factor 2, "Sexual Contact with Victim," 20 points under risk factor 4, "Duration of Offense Conduct with Victim," 20 points under risk factor 5, "Age of Victim," and 20 points under risk factor 7, "Relationship Between Offender and Victim." The Board did not find that any overrides were applicable, nor did it recommend a departure from defendant's presumptive level two classification.

At the SORA hearing, the People agreed with the Board's assessment and asked County Court to determine that defendant is a level two risk. Defendant, however, challenged the assessment of 20

points under risk factor 7, "Relationship Between Offender and Victim," on the ground that his relationship with the victim was not that of a "[s]tranger or established for purpose of victimizing or professional relationship," as set forth in the RAI. In its case summary, the Board indicated that points were assessed under that risk factor because the victim was defendant's foster child and the offense arose from the "abuse of a professional relationship." At the SORA hearing, the People adopted the Board's position with respect to that risk factor.

The court agreed that points were properly assessed under risk factor 7, but not on the ground that defendant abused his professional relationship with the victim. Rather, the court agreed with defendant that such a professional relationship was lacking, but the court nevertheless concluded that 20 points were appropriately assessed under risk factor 7 because the evidence demonstrated that defendant established his foster parent relationship with the victim for the purpose of victimizing her.

We conclude that none of the grounds for assessing points under risk factor 7 applies under the circumstances of this case and that defendant's risk factor score must therefore be reduced by 20 points.

The Risk Assessment Guidelines and Commentary provide some limited guidance with respect to the interpretation and application of risk factor 7:

> "The guidelines assess 20 points if the offender's crime (i) was directed at a stranger *or* a person with whom a relationship had been established or promoted for the primary purpose of victimization *or* (ii) arose in the context of a professional or avocational relationship between the offender and the victim and was an abuse of such relationship" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [Guidelines], at 12 [2006] [emphasis added]).

Thus, risk factor 7 may apply in three distinct situations. The first, where the crime is directed at a stranger, clearly does not apply here (*see People v Geier*, 56 AD3d 539, 540; *see also People v McGraw*, 24 AD3d 525, 526; *cf. People v Milton*, 55 AD3d 1073). The court found that the facts came within the second scenario, i.e., the relationship was "established or promoted for the primary purpose of victimization" (Guidelines, at 12). In our view, however, the record lacks clear and convincing evidence to support that conclusion. Statements by defendant and the victim to the police indicate only that the victim is the foster child of defendant and his wife and that the victim began living in their foster home approximately three months before defendant initiated a course of sexual conduct against her. Prior to the current offense, defendant had no criminal record, and there is no evidence that he sexually victimized a child in the

past (*cf. People v Marinconz*, 178 Misc 2d 30, 37). In addition, there is no evidence that would support an inference that defendant became a foster parent in order to gain access to children for the purpose of sexually abusing them (*cf. People v Carlton*, 307 AD2d 763, 764; *Marinconz*, 178 Misc 2d at 37), or that he established his relationship with the victim "for the primary purpose of victimization" (Guidelines, at 12; *see People v Terdeman*, 175 Misc 2d 379, 384; *cf. People v Mollenkopf*, 54 AD3d 1136, 1137; *People v Grosfeld*, 35 AD3d 692, 693).

The People contend that the Board properly assessed 20 points against defendant under the third scenario set forth under risk factor 7, i.e., where the crime arose out of a professional relationship between defendant and the victim (*see generally People v Thomas*, 300 AD2d 379, *lv denied* 100 NY2d 502). We reject that contention. To conclude that the relationship between a foster parent and a foster child is a professional relationship is to distort the nature of that relationship and to ignore the policy served by recognition of this risk factor.

Social Services Law § 371 (19) defines " '[f]oster parent' " as "any person with whom a child, in the care, custody or guardianship of an authorized agency, is placed for temporary or long-term care . . . ." Neither that simple definition nor the detailed requirements for certification or approval as a foster parent support the conclusion that the foster care relationship is a professional one or that a foster parent is a professional for purposes of risk factor 7 (*see generally* 18 NYCRR parts 427, 443). The qualities necessary for a foster parent are not those generally associated with a professional, i.e., "extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards" (*Chase Scientific Research v NIA Group*, 96 NY2d 20, 29). Rather, "the foster parent-child relationship is . . . intended to provide the child with the benefits of a family setting" (*People ex rel. Ninesling v Nassau County Dept. of Social Servs.*, 46 NY2d 382, 387, *rearg denied* 46 NY2d 836). In short, the foster parent's role is familial, not professional.

In the Guidelines, the Board explicitly distinguishes "cases where the relationship is other than that of a stranger or professional," which are encompassed by risk factor 7, from those cases in which the relationship is "familial," which are not encompassed by that risk factor (Guidelines, at 12 n 8; *see Terdeman*, 175 Misc 2d at 385). The Guidelines generally exclude from this risk factor "[a]n uncle who offends against his niece," while including a person from whom a victim has sought professional care, such as a dentist (Guidelines, at 12). Defendant's foster parent relationship with the victim more closely resembles that of an uncle than that of a dentist. The Guidelines further note that the distinction between familial and professional relationships is not based upon the gravity of the crime or the harm to the victim. Here, defendant abused and

exploited his relationship with a foster child whose care and protection were entrusted to him. His violation of that relationship of trust and confidence was likely more destructive than that of "[a] dentist who sexually abuses [a] patient while the patient is anesthetized," although the former relationship "fall[s] squarely within" risk factor 7 (*id.*). Nevertheless, the public safety concerns triggered by intra-familial offenders and professionals are different. "[T]here is a heightened concern for public safety and need for community notification" (*id.*) when the offender directs the crime "at persons . . . who have sought out his [or her] professional care" (*id.* n 8), and that is not the situation here.

We therefore conclude that defendant was improperly assessed 20 points under risk factor 7. Reducing his risk factor score by 20 points changes his presumptive classification to a level one risk, and the People have not sought an override or a departure from the presumptive classification (*see* Correction Law § 168-n [3]). Accordingly, we conclude that the order should be modified by determining that defendant is a level one risk pursuant to SORA.

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**523**

**KA 08-02092**

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

RICHARD L. COLEMAN, DEFENDANT-RESPONDENT.

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JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered January 16, 2008. The order granted the CPL 440.10 motion of defendant and vacated the judgment convicting defendant of, inter alia, burglary in the first degree.

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

Memorandum: The People appeal from an order granting defendant's CPL 440.10 motion and vacating the judgment convicting defendant upon his plea of guilty of, inter alia, burglary in the first degree (Penal Law § 140.30 [3]). We conclude that County Court properly vacated the judgment on the ground that defendant was not advised prior to entering his plea that he would be subject to a period of postrelease supervision (*see People v Catu*, 4 NY3d 242, 244-245; *People v Powless*, 46 AD3d 1350). Inasmuch as the court did not impose a period of postrelease supervision at the time of sentencing and defendant was unaware of its imposition until after his direct appeal was decided, we reject the People's contention that the motion is barred by CPL 440.10 (2) (c) (*see Powless*, 46 AD3d 1350).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**525**

**CAF 08-01358**

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

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IN THE MATTER OF LANIQUE J. TAYLOR,
PETITIONER-APPELLANT,

V ORDER

LINDSEY L. GROFFENBERG AND WENDY SULOWSKI,
RESPONDENTS-RESPONDENTS.

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DEBRA D. WILSON, LOCKPORT, FOR PETITIONER-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (MELISSA A. CAVAGNARO OF COUNSEL), FOR RESPONDENT-RESPONDENT WENDY SULOWSKI.

STEPHEN C. KENNEDY, LAW GUARDIAN, LOCKPORT, FOR ALEYNA T.

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Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered April 18, 2008 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of a prior order of visitation.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**527**

**CA 08-02449**

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

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IN THE MATTER OF JOSEPH J. JULICHER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, TOWN OF TONAWANDA POLICE DEPARTMENT, AND LAWRENCE A. HOFFMAN, III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING CHIEF OF POLICE, RESPONDENTS-APPELLANTS.

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BOND, SCHOENECK & KING, PLLC, BUFFALO (JAMES J. ROONEY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (CHRISTEN A. PIERROT OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered September 10, 2008 in a proceeding pursuant to CPLR article 78. The judgment denied respondents' motion to dismiss the petition, granted the petition and annulled the determination terminating petitioner's employment.

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

Memorandum: Respondents appeal from a judgment in this CPLR article 78 proceeding granting the petition seeking, inter alia, to annul the determination terminating petitioner's employment. We reverse. "[W]here[, as here], a collective bargaining agreement requires that a particular dispute be resolved pursuant to a grievance procedure, an employee's failure to grieve will constitute a failure to exhaust [administrative remedies], thereby precluding relief under CPLR article 78" (*Matter of Barrera v Frontier Cent. School Dist.*, 227 AD2d 890, 891; *see Matter of Plummer v Klepak*, 48 NY2d 486, 489-490, *cert denied* 445 US 952; *Matter of Hall v Town of Henderson*, 17 AD3d 981, 982, *lv denied* 5 NY3d 714). Here, petitioner commenced the grievance and arbitration procedure pursuant to the collective bargaining agreement between the parties, but failed to complete the procedure before commencing this proceeding, and thus he failed to exhaust his administrative remedies.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**530**

**CA 08-01476**

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

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STEPHEN MYERS AND ELIZABETH MYERS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WILLIAM R. MACCREA, DOLORES J. ZIMMERMAN MACCREA, KEVIN MACCREA, RORY MACCREA, DEBRA MACCREA, COLIN MACCREA AND ALEX MACCREA,
DEFENDANTS-RESPONDENTS.

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SHULTS AND SHULTS, HORNELL (DAVID A. SHULTS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WAGNER & HART, LLP, OLEAN (JANINE C. FODOR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WILLIAM R. MACCREA, DOLORES J. ZIMMERMAN MACCREA, KEVIN MACCREA, RORY MACCREA, DEBRA MACCREA AND ALEX MACCREA.

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Appeal from an order of the Supreme Court, Allegany County (Mark H. Dadd, A.J.), entered July 23, 2007. The order granted the motions of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Stephen Myers (plaintiff) when he fell from his bicycle upon colliding with one of two dogs that ran into the road adjacent to property owned jointly by five of the seven defendants. Although plaintiff has no memory of the accident, his son was riding his bicycle approximately five yards behind plaintiff at that time, and he testified at his deposition that the dogs ran into the road in front of plaintiff's bicycle. The two dogs fit the general description of dogs owned, respectively, by defendants Rory MacCrea and Debra MacCrea and defendant Colin MacCrea, their son. Contrary to plaintiffs' contention, Supreme Court properly granted the motions of defendants seeking summary judgment dismissing the complaint. Defendants met their initial burden by submitting evidence establishing that they lacked actual or constructive knowledge that either of the two dogs had a propensity to interfere with traffic on the road (*see Roberts v Joller*, 39 AD3d 1224; *Alia v Fiorina*, 39 AD3d 1068, 1069; *see generally Collier v Zambito*, 1 NY3d 444, 446-447). The evidence submitted by plaintiffs establishing that defendants' dogs were permitted to run loose on the 100-acre farm is insufficient to raise a triable issue of fact whether defendants had prior

knowledge that either dog had a propensity to interfere with traffic (*see Alia*, 39 AD3d at 1069; *see generally Roberts*, 39 AD3d 1224). The statement of defendant Dolores J. Zimmerman MacCrea to an investigator retained by plaintiff that the accident was caused by defendant Colin MacCrea's dog and the statement of defendant Debra MacCrea either to plaintiff wife or to plaintiffs' son that the dogs were "trouble" when they were together are also insufficient to raise a triable issue of fact whether the dogs had a propensity to interfere with traffic (*see generally Zuckerman v City of New* York, 49 NY2d 557, 562).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**531**

**CAF 08-01062**

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

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IN THE MATTER OF DENNIS R. GAUSS,
PETITIONER-APPELLANT,

V ORDER

JENNIFER L. GAUSS, RESPONDENT-RESPONDENT.
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IN THE MATTER OF JENNIFER L. GAUSS,
PETITIONER-RESPONDENT,

V

DENNIS R. GAUSS, RESPONDENT-APPELLANT.

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BRENDAN O'DONNELL, INTERLAKEN, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

DAVID G. WALLACE, BATH, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

CHRISTINE M. VALKENBURGH, LAW GUARDIAN, BATH, FOR LYDIA G.

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Appeal from an order of the Family Court, Steuben County (Marianne Furfure, J.), entered April 8, 2008 in a proceeding pursuant to Family Court Act article 6. The order modified a prior order of custody and visitation.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**532**

**CA 08-02317**

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

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JOHN V. RIBIS, PLAINTIFF-APPELLANT,

V ORDER

EAST IRONDEQUOIT CENTRAL SCHOOL DISTRICT,
SUSAN K. ALLEN AND KATHLEEN F. CALLON,
DEFENDANTS-RESPONDENTS.

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REDEN & O'DONNELL, LLP, BUFFALO (JOSEPH E. O'DONNELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (MILES G. LAWLOR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 17, 2008. The order, inter alia, granted the cross motion of defendants for summary judgment and dismissed the complaint.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**535**

**CA 08-01820**

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

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IN THE MATTER OF JOHN F. ABRAMS, SUSAN JAGOSH, ROSALYN REYNOLDS, DEBORAH WASHINGTON, ELLIS WOODS, LUANN-JOY WOODS AND JAMES T. SANDORO, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO ZONING BOARD OF APPEALS, BYRON J. BROWN, IN HIS CAPACITY AS MAYOR OF CITY OF BUFFALO, RICHARD TOBE, IN HIS CAPACITY AS COMMISSIONER OF CITY OF BUFFALO, DEPARTMENT OF ECONOMIC DEVELOPMENT, PERMIT AND INSPECTION SERVICES, CITY OF BUFFALO PLANNING BOARD, AND ELLICOTT GROUP, LLC, RESPONDENTS-RESPONDENTS.

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THE KNOER GROUP, PLLC, BUFFALO (RICHARD E. STANTON OF COUNSEL), FOR PETITIONERS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (ADAM S. WALTERS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CITY OF BUFFALO ZONING BOARD OF APPEALS AND CITY OF BUFFALO PLANNING BOARD.

HARTER SECREST & EMERY LLP, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT ELLICOTT GROUP, LLC.

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Appeal from a judgment (denominated judgment and order) of the Supreme Court, Erie County (James H. Dillon, J.), entered August 5, 2008 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition.

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

Memorandum: Petitioners appeal from a judgment in this CPLR article 78 proceeding dismissing their petition seeking, inter alia, to annul the determination granting the application of respondent Ellicott Group, LLC (Ellicott) for a use variance to convert a parcel in a primarily residential zoning district into a commercial parking lot. We affirm. We note at the outset that we reject the contention of Ellicott that the appeal is moot based on petitioners' failure to proceed with the appeal until after the construction of the parking lot was completed. "[T]he rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*Matter of Hearst*

*Corp. v Clyne*, 50 NY2d 707, 714).

We reject petitioners' contention, however, that respondent City of Buffalo Zoning Board of Appeals (ZBA) lacked jurisdiction to grant Ellicott's application. The ZBA has the authority to grant a use variance pursuant to the City of Buffalo Code § 511-125 (C) and, contrary to petitioners' further contention, the ZBA did not intrude upon the authority of the City of Buffalo's Common Council by "destroy[ing] the general scheme" of the zoning law (*Matter of Clark v Board of Zoning Appeals of Town of Hempstead*, 301 NY 86, 91, *rearg denied* 301 NY 681, *cert denied* 340 US 933).

We reject petitioners' contention that the determination to grant the use variance lacks a rational basis and is not supported by substantial evidence (*see generally Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613). Ellicott met its burden of demonstrating "that applicable zoning regulations and restrictions have caused unnecessary hardship," i.e., that it could not realize a reasonable return with respect to the property, that the hardship was unique, that the variance would not alter the essential character of the neighborhood, and that the hardship was not self-created (General City Law § 81-b [3] [b]). We further conclude that the ZBA complied with the requirements of article 8 of the Environmental Conservation Law (State Environmental Quality Review Act) in issuing a negative declaration. The ZBA properly "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**537**

**KA 08-00562**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

COLIN MOAR, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, J.), rendered March 3, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree (two counts).

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**538**

**KA 06-02148**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BILLY G. WILLIAMS, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 5, 2006. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, petit larceny, criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant contends that County Court's response to a question from the jury during deliberations was improper. Defendant agreed to the court's proposed response, however, and thus waived his present contention (*see generally People v Barner*, 30 AD3d 1091, *lv denied* 7 NY3d 809; *People v Hicks*, 12 AD3d 1044, *lv denied* 4 NY3d 799). We reject the further contention of defendant that he was denied the right to effective assistance of counsel based on the failure of defense counsel to challenge the legal sufficiency of the evidence on specific grounds and to make certain objections. Rather, viewing defense counsel's representation as a whole, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**539**

**KA 07-02058**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY E. LANDO, JR., DEFENDANT-APPELLANT.

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

TIMOTHY E. LANDO, JR., DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered October 25, 2006. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [1]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that his plea was coerced (*see People v Russell*, 55 AD3d 1314, *lv denied* 11 NY3d 930). In any event, that contention lacks merit. Although County Court impressed upon defendant the potential sentence to which he was exposed in the event of a conviction following a trial, the decision whether to either plead guilty or to proceed to trial nevertheless remained with defendant (*see People v Hamilton*, 45 AD3d 1396, *lv denied* 10 NY3d 765). The challenges by defendant in his pro se supplemental brief with respect to the severity of the sentence and the court's suppression ruling are encompassed by his valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 256; *People v Kemp*, 94 NY2d 831, 833). Finally, the two remaining contentions raised by defendant in his pro se supplemental brief are based on information outside the record on appeal and thus are properly raised by way of a motion pursuant to CPL article 440 (*see People v Barnes*, 56 AD3d 1171, 1171-1172).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**540**

**KAH 08-00868**

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

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CHARLES W. WAID, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN LEMPKE, SUPERINTENDENT, FIVE POINTS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

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Appeal from a judgment (denominated order) of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered February 28, 2008 in a proceeding pursuant to CPLR article 70. The judgment denied the petition for a writ of habeas corpus.

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

Memorandum: We agree with the reasoning of Supreme Court in determining that petitioner is not entitled to habeas corpus relief. We add only that petitioner has not addressed the issue whether he exhausted his administrative remedies before seeking a writ of habeas corpus, and the record does not enable us to discern whether he in fact did so. Even assuming, arguendo, that petitioner exhausted his administrative remedies, we nevertheless conclude that he is not entitled to the relief sought because the period of his reincarceration is authorized by Penal Law § 70.45 (1).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**543**

**KA 08-02419**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN R. MORRICE, DEFENDANT-APPELLANT.

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MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered January 4, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and grand larceny in the third degree (§ 155.35). Contrary to defendant's contention, County Court properly admitted in evidence an audiotape of a telephone conversation between defendant and the main prosecution witness despite the fact that the beginning of the audiotape was inaudible (*see People v Rivera*, 257 AD2d 172, 178, *affd* 94 NY2d 908; *People v Cleveland*, 273 AD2d 787, 788, *lv denied* 95 NY2d 864). In addition, we conclude that the prosecutor laid a proper foundation for the admission of the audiotape in evidence (*see generally People v Ely*, 68 NY2d 520, 527-528), and that he properly characterized the contents of the audiotape during his cross-examination of defense witnesses and on summation. Although we agree with defendant that certain statements by the prosecutor during the grand jury proceeding were improper, we conclude that the exceptional remedy of dismissal of the indictment is not warranted (*see generally People v Huston*, 88 NY2d 400, 409).

We agree with defendant, however, that he was deprived of a fair trial based on prosecutorial misconduct during the trial. Although defendant failed to preserve for our review his contention with respect to certain alleged instances of prosecutorial misconduct (*see* CPL 470.05 [2]), we nevertheless exercise our power to review

defendant's contention with respect to those instances as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). During the direct examination of the main prosecution witness, the prosecutor asked the witness if she was "getting anything in return for [her] cooperation of telling the truth," and she responded "[n]ot at all." In fact, that witness was an accomplice and had received transactional immunity in exchange for her testimony before the grand jury (*see* CPL 50.10 [1]; 190.40 [2]). The prosecutor had an obligation to correct the misstatement of that witness but failed to do so (*see People v Novoa*, 70 NY2d 490, 496-498; *People v Hendricks*, 2 AD3d 1450, 1451, *lv denied* 2 NY3d 762; *People v Potter*, 254 AD2d 831, 832), and he compounded his misconduct in failing to correct the misstatement by telling the jury during summation that the witness was "getting nothing out of having testified in this case."

The prosecutor also engaged in misconduct when he questioned a police detective on direct examination with respect to defendant's invocation of the right to counsel (*see People v Nicholas*, 286 AD2d 861, 862, *affd* 98 NY2d 749; *see also People v Beers*, 302 AD2d 898, *lv denied* 99 NY2d 652). It is well settled that "the People may not elicit testimony concerning defendant's . . . invocation of the right to counsel" (*Nicholas*, 286 AD2d at 862). The prosecutor here, however, elicited such testimony not once, but twice, and also commented on defendant's invocation of the right to counsel during summation (*see generally People v Romero*, 54 AD3d 781, *lv denied* 11 NY3d 930). In addition, the prosecutor engaged in misconduct when he questioned defendant on cross-examination concerning his discussion of the case with his attorney during a recess.

The prosecutor further engaged in misconduct when he asked a defense witness on cross-examination whether she had ever been arrested for a crime. When the witness responded that she had never been convicted of a crime, the prosecutor asked, "Did you hear my question. Have you ever been arrested for a crime?" The witness responded in the affirmative, whereupon the prosecutor asked her what the crime was for which she was arrested. "Impeachment of a witness by evidence or inquiry as to prior arrests or charges is clearly improper. The mere fact that a person has been previously charged or accused has no probative value" (*People v Cook*, 37 NY2d 591, 596). The prosecutor also engaged in misconduct when he questioned that witness concerning whether her boyfriend was currently incarcerated, and he exceeded the bounds of legitimate advocacy during summation by characterizing defendant as a liar (*see People v Fiori*, 262 AD2d 1081; *People v Bonilla*, 170 AD2d 945, *lv denied* 77 NY2d 904). Indeed, the prosecutor told the jury that defendant "just concocted a story now to try to deceive you" (*see Fiori*, 262 AD2d 1081).

Although "[r]eversal is an ill-suited remedy for prosecutorial misconduct" (*People v Galloway*, 54 NY2d 396, 401), it is nevertheless mandated when the conduct of the prosecutor "has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law. In measuring whether substantial prejudice has occurred, one must look at the severity and frequency of the

conduct, whether the court took appropriate action to dilute the effect of that conduct, and whether review of the evidence indicates that without the conduct the same result would undoubtedly have been reached" (*People v Mott*, 94 AD2d 415, 419). Upon our review of the prosecutor's misconduct in this case, we agree with defendant that reversal is required.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**544**

**KA 05-00504**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY A. MONTANO, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered January 20, 2005. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [1]). Contrary to the contention of defendant, Supreme Court properly denied his request for an intoxication charge. Such a charge "should be given if there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis" (*People v Perry*, 61 NY2d 849, 850). Here, there was no such evidence, i.e., there was no evidence " 'concerning the number of drinks consumed by defendant; the time period during which he may have consumed them; whether the drinks contained alcohol; or the physical effects, if any, that the consumption of alcohol may have had on defendant's behavior or mental state' " (*People v Shaw*, 8 AD3d 1106, 1107, *lv denied* 3 NY3d 681).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**550**

**TP 08-02412**

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

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IN THE MATTER OF NEW YORK STATE DIVISION OF HUMAN RIGHTS, ON THE COMPLAINT OF CHANON DARROW ABRAMS, PETITIONER,

V ORDER

JAMES VOLLERTSEN, RESPONDENT.

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

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Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wayne County [Dennis M. Kehoe, A.J.], entered March 3, 2008) to enforce a determination of the Commissioner of the New York State Division of Human Rights.

It is hereby ORDERED that the petition is unanimously granted without costs, and respondent is directed to pay complainant the sum of $15,000 for mental anguish and humiliation, together with interest at the rate of 9% per annum, commencing March 31, 2006.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**552**

**TP 08-02335**

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

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IN THE MATTER OF THOMAS LOZADA, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF PAROLE, RESPONDENT.

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THOMAS LOZADA, PETITIONER PRO SE.

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

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered November 10, 2008) to annul a determination. The determination revoked petitioner's release to parole supervision.

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 of the Administrative Law Judge (ALJ) revoking his release to parole supervision based upon his refusal to continue his participation in a drug treatment campus program. According to petitioner, his medical records would have supported his refusal, and the ALJ therefore erred in failing to consider those records before issuing her determination. We note that petitioner did not present the records at the final parole revocation hearing or request an adjournment to enable him to submit them, and he thus failed to preserve his contention for our review (*see Matter of Stanbridge v Hammock*, 55 NY2d 661, 663; *Matter of Boyd v Travis*, 6 AD3d 1237; *Matter of Kirk v Hammock*, 119 AD2d 851, 853-854).

We reject petitioner's further contention that the determination is not supported by substantial evidence. "[I]t is well settled that a determination to revoke parole will be confirmed if the procedural requirements were followed and there is evidence [that], if credited, would support such determination" (*Matter of Layne v New York State Bd. of Parole*, 256 AD2d 990, 992, *lv dismissed* 93 NY2d 886, *rearg denied* 93 NY2d 1000; *see Matter of Johnson v Alexander*, 59 AD3d 977). Here, respondent's witness and petitioner testified that petitioner refused to participate in the program despite the fact that medical staff had not disqualified him or given him a "medical relief." In the absence of petitioner's medical records, the testimony of

petitioner that he was physically unable to participate "merely presented a credibility issue that the ALJ was entitled to resolve against petitioner" (*Johnson*, 59 AD3d at 978).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**553**

**CA 08-02349**

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

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SUSAN L. KAGELS AND DAVID KAGELS,
PLAINTIFFS-RESPONDENTS,

V ORDER

LEWISTON RECREATIONAL CENTER, DOING BUSINESS
AS FRONTIER BOWLING CENTER, DEFENDANT-APPELLANT.

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BURDEN, GULISANO & HICKEY, LLC, BUFFALO (PHILIP M. GULISANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 11, 2008 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**554**

**CA 08-02289**

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

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MICHAEL A. PREGO AND LORI J. PREGO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DAVID GUTCHESS, DEFENDANT,
AND TOAN T. HELMER, DEFENDANT-RESPONDENT.

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BOYLE & ANDERSON, P.C., AUBURN (STACY L. TAMBURRINO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

DAVID A. LOFTUS, SKANEATELES, FOR DEFENDANT-RESPONDENT.

---

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered August 1, 2008. The order, insofar as appealed from, denied the motion of plaintiffs for summary judgment and granted the cross motion of defendant Toan T. Helmer for leave to amend her answer.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, a determination that they have an easement over or contiguous to a parcel owned by defendant David Gutchess and a separate parcel owned by Toan T. Helmer (defendant). As limited by their brief, plaintiffs appeal from an order insofar as it denied that part of their motion for summary judgment on the complaint and granted the cross motion of defendant for leave to amend her answer. We affirm.

With respect to plaintiffs' motion, plaintiffs failed to meet their initial burden of establishing that the relevant deeds included the easement at issue (*see O'Brien v Bocchino*, 13 AD3d 1055, 1056). "Generally, 'a deed conveyed by a common grantor to a dominant landowner does *not* form part of the chain of title to the servient land retained by the common grantor' . . . Thus, an owner of a servient estate will be bound only if the encumbrance is recorded in his or her chain of title" (*Russell v Perrone*, 301 AD2d 835, 836, *amended* 1 AD3d 789). Furthermore, "[i]t is not enough if the encumbrance is recorded in the chain of title of the dominant estate; it *must* be found in the servient estate's chain of title for that landowner to be bound" (*Puchalski v Wedemeyer*, 185 AD2d 563, 565). Here, plaintiffs failed to establish that the purported easement was recorded in the chains of title of defendants' servient estates and

that the easement in plaintiffs' deed accurately reflected the original easement as set forth in the deed that created the easement.

Contrary to the further contention of plaintiffs, Supreme Court did not abuse its discretion in granting the cross motion of defendant for leave to amend her answer. "Generally, [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Anderson v Nottingham Vil. Homeowner's Assn., Inc*., 37 AD3d 1195, 1198, *amended on rearg* 41 AD3d 1324 [internal quotation marks omitted]; *see* CPLR 3025 [b]). The evidence submitted by defendant in support of the cross motion established that her proposed additional defense that the easement was extinguished by adverse possession was not patently without merit (*see generally Spiegel v Ferraro*, 73 NY2d 622, 625-626; *Koudellou v Sakalis*, 29 AD3d 640, 641; *Zeledon v MacGillivray*, 263 AD2d 904, 905), and plaintiffs failed to identify any prejudice arising from the proposed amendment.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**560**

**KA 05-02650**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WONDELL MITCHELL, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Stephen K. Lindley, A.J.), rendered October 17, 2005. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**561**

**KA 08-01017**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

COURTNEY D. SISTRUNK, DEFENDANT-APPELLANT.

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DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered April 7, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**562**

**KA 06-03119**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY WHITE, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 19, 2006. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]). Defendant's waiver of the right to appeal was knowing and voluntary (*see People v Lopez*, 6 NY3d 248, 256; *People v Seaberg*, 74 NY2d 1, 11), and that valid waiver encompasses defendant's challenges to the severity of the sentence (*see Lopez*, 6 NY3d at 256) and the factual sufficiency of the plea allocution (*see People v Spikes*, 28 AD3d 1101, *lv denied* 7 NY3d 818; *People v Bland*, 27 AD3d 1052, *lv denied* 6 NY3d 892). We note, however, that Supreme Court's suppression ruling was expressly excluded from defendant's waiver of the right to appeal (*see generally People v Kemp*, 94 NY2d 831, 833), and thus defendant's challenge to the suppression ruling is properly before us. Nevertheless, we reject that challenge. Defendant contends that the identification of him by two witnesses should have been suppressed because the photo arrays from which the identifications were made were unduly suggestive. Although there are slight differences between defendant's hair, including defendant's facial hair, and the hair of the other persons depicted in the photo arrays, the physical characteristics of defendant and the other persons depicted were otherwise sufficiently similar. Thus, it cannot be said that the viewer's attention was " 'drawn to defendant's photo in such a way as to indicate that the police were urging a particular selection' " (*People v Kirkland*, 49 AD3d 1260, 1261, *lv denied* 10 NY3d 958, 961). We reject defendant's further contention that the police

should have included another person's photograph in the photo arrays based on the fact that the victim had indicated in an earlier identification procedure that he was "70 percent" sure that the other person was involved in the robbery. The police had obtained information subsequent to that earlier identification that eliminated that person as a suspect, and the police are not required to include a photograph of a person who has been ruled out as a suspect (*see People v Hakeem*, 210 AD2d 16, *lv denied* 85 NY2d 971, 87 NY2d 900; *People v Woodward*, 156 AD2d 196, *lv denied* 75 NY2d 926).

We further reject the contention of defendant that his plea was not voluntarily entered and that the court therefore erred in denying his motion to withdraw his plea. The record establishes that the plea was voluntarily entered, and there are no statements in the plea allocution that cast doubt upon defendant's guilt (*see People v Seeber*, 4 NY3d 780, 781-782; *People v Worthy*, 46 AD3d 1382, *lv denied* 10 NY3d 773).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**564**

**KA 08-02489**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRELL ZEIGLER, DEFENDANT-APPELLANT.

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PAUL G. DELL, BUFFALO (BENJAMIN D. MOSKEL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 16, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress the handgun seized by the police from his person. We reject that contention. Following an anonymous telephone call stating that three black males with certain physical characteristics and wearing white T-shirts were carrying guns in a specified area, a police officer responded to the scene. That officer observed three black males matching the description provided by the anonymous caller and asked them to approach his vehicle and to show their hands to him. One of the individuals immediately fled, while reaching toward his waistband. Shortly thereafter, defendant and the third individual fled. Officers pursued the three men and, after apprehending defendant, they recovered a handgun from his waistband.

Even assuming, arguendo, that defendant preserved for our review his contention that the officer's verbal command to defendant to approach the police vehicle and to show his hands to the officer constituted an illegal seizure, we reject that contention. That verbal command did not result in a significant interruption of defendant's liberty of movement (*see Brown v State of New York*, 45 AD3d 15, 24-25, *lv denied* 9 NY3d 815; *People v Jenkins*, 209 AD2d 164, 165). Contrary to the further contention of defendant, the fact that he and his companions did not comply with the officer's verbal

command, coupled with the fact that one of defendant's companions fled the scene while reaching toward his waistband, provided the police with reasonable suspicion that defendant and his companions were in possession of guns and justified their pursuit of defendant (*see People v Moore*, 6 NY3d 496, 500-501). "It is quite apparent to an experienced police officer, and indeed it may almost be considered common knowledge, that a handgun is often carried in the waistband" (*People v Benjamin*, 51 NY2d 267, 271). Finally, contrary to defendant's contention, the observations of the officer corroborated the anonymous caller's description of the suspects as well as the caller's claim that at least one of the suspects was carrying a gun (*cf. Moore*, 6 NY3d at 499-500).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**565**

**KA 07-01850**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON A. PEPSON, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered July 6, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and criminal possession of stolen property in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the third degree (Penal Law § 140.20) and criminal possession of stolen property in the fourth degree (§ 165.45 [1]). We reject defendant's contention that County Court erred in allowing the People to call a witness to testify on their behalf when they knew or should have known that the witness would not provide testimony that was favorable to the prosecution. The record establishes that the prosecutor did not " 'call[] the witness solely or primarily in order to impeach the witness and thereby place otherwise inadmissible evidence before the jury' " (*People v Mitchell*, 57 AD3d 1308, 1310).

Contrary to defendant's further contention, when the evidence is viewed in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the burglary conviction is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The testimony of the People's witnesses that was favorable to the prosecution was not incredible as a matter of law (*see People v Jackson*, 57 AD3d 1463). Also contrary to defendant's contention, the evidence is legally sufficient to establish that the value of the stolen property exceeds the statutory minimum of $1,000 (*see generally Bleakley*, 69 NY2d at 495). The testimony of the victim properly included his "basis of knowledge of value . . . and . . . the condition of the stolen property . . . [so] that the jury ha[d] a reasonable basis for inferring, rather than

speculating, that the value of the property exceeded the statutory threshold" (*People v Sheehy*, 274 AD2d 844, 845, *lv denied* 95 NY2d 938; *see People v Alexander*, 41 AD3d 1200, 1201, *lv denied* 9 NY3d 920). Defendant's remaining contentions are not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**566**

**KA 04-00639**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES M. SALAMONE, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered February 2, 2004. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in refusing to suppress physical evidence seized from him and statements made by him to the police because the police lacked probable cause to arrest him. We reject that contention. The police were justified in forcibly stopping defendant based upon reasonable suspicion that he had committed a crime, inasmuch as defendant matched the description of the suspect in a stabbing incident and was observed as he fled from the scene of the crime in the same direction as the reported suspect (*see People v Martinez*, 80 NY2d 444, 447; *People v Cantor*, 36 NY2d 106, 112-113). Upon stopping defendant, the officers confirmed that defendant matched the description of the reported suspect and, following a brief detention, they also confirmed that his vehicle had been left unattended at the scene of the crime. The police then had probable cause for defendant's arrest (*see People v Nicodemus*, 247 AD2d 833, 835-836). In view of our determination that defendant was in fact arrested, we do not address his contention that he was subjected to a de facto arrest.

Defendant further contends that the statements made by him during the police interrogation were involuntary on the ground that he allegedly was deprived of food for over 10 hours and was not allowed to sleep despite the fact that he had been awake for 26 hours. Defendant failed to preserve that contention for our review (*see*

*generally People v Miller*, 43 AD3d 1381, 1382, *lv denied* 9 NY3d 1036) and, in any event, it is without merit. The record establishes that defendant was provided with cigarettes and water, and there is no evidence that he was denied food or the opportunity to sleep during the period of detention and interrogation (*People v Towndrow*, 236 AD2d 821, *lv denied* 89 NY2d 1016; *cf. People v Anderson*, 42 NY2d 35).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**568**

**CAF 08-01200**

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

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IN THE MATTER OF WILLIAM BURCZYNSKI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STEPHANIE RODGERS, RESPONDENT-RESPONDENT.

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ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

JEFFREY C. MANNILLO, LAW GUARDIAN, BUFFALO, FOR ANDREW B.

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Appeal from an order of the Family Court, Erie County (Craig D. Hannah, A.J.), entered May 8, 2008 in a proceeding pursuant to Family Court Act article 6. The order denied the petition seeking to modify a prior order of custody and visitation.

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

Memorandum: Petitioner father appeals from an order that denied his petition seeking to modify a prior order of custody and visitation by providing him with unsupervised home visitation with the parties' child. Contrary to the contention of the father and the Law Guardian, the record supports Family Court's determination that the best interests of the child would be served by the continuation of supervised visitation (*see Matter of Hall v Porter*, 52 AD3d 1289).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**569**

**CAF 08-00426**

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

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IN THE MATTER OF LEAH S., GABRIEL S., SAMI S., AND BABY T.

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

ORLEANS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

JESSICA T., RESPONDENT-APPELLANT.

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THOMAS N. MARTIN, ROCHESTER, FOR RESPONDENT-APPELLANT.

DAVID C. SCHUBEL, COUNTY ATTORNEY, ALBION (JAMES D. BELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

KATHLEEN M. CONTRINO, LAW GUARDIAN, NORTH TONAWANDA, FOR LEAH S., GABRIEL S., SAMI S., AND BABY T.

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Appeal from an order of the Family Court, Orleans County (James P. Punch, J.), entered February 6, 2008 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, ordered that visitation shall occur only if petitioner deemed it appropriate.

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

Memorandum: On appeal from an order of fact-finding and disposition finding that respondent mother abused her children and ordering, inter alia, that visitation between the mother and three of her children "shall occur only if the [petitioner] deems it appropriate and as outlined in the companion Article 6 Custody Order," the mother's sole contention is that Family Court improperly delegated to petitioner its authority to determine whether visitation was appropriate. While we agree with the mother with respect to the merits of her contention (*see Matter of Hameed v Alatawaneh*, 19 AD3d 1135; *Matter of Battista v Battista*, 294 AD2d 941; *Wills v Wills*, 283 AD2d 1023), we conclude that, because the order on appeal has expired, this appeal is moot (*see e.g. Matter of Julia R.*, 52 AD3d 1310, *lv denied* 11 NY3d 709; *Matter of Abbi M.*, 37 AD3d 1084; *Matter of Michael G.*, 300 AD2d 1144).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**570**

**CAF 08-02418**

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

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IN THE MATTER OF BRANDON H.W.,
RESPONDENT-APPELLANT.
---------- ORDER
WAYNE COUNTY PRESENTMENT AGENCY,
PETITIONER-RESPONDENT.

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ROBERT A. DINIERI, LAW GUARDIAN, CLYDE, FOR RESPONDENT-APPELLANT.

DANIEL M. WYNER, COUNTY ATTORNEY, LYONS (DANIEL C. CONNORS OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered September 12, 2008 in a proceeding pursuant to Family Court Act article 3. The order, among other things, adjudged that respondent is a juvenile delinquent.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**571**

**TP 08-02167**

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

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IN THE MATTER OF HYGEIA OF NEW YORK, INC. AND EUGENE A. CARCONE, PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF LABOR AND M. PATRICIA SMITH, COMMISSIONER, NEW YORK STATE DEPARTMENT OF LABOR, RESPONDENTS.

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ANTHONY J. LAFACHE, UTICA, FOR PETITIONERS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF COUNSEL), FOR RESPONDENTS.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Herkimer County [Michael E. Daley, J.], entered October 8, 2008) to annul a determination of respondent M. Patricia Smith, Commissioner, New York State Department of Labor. The determination, among other things, revoked the asbestos handling license of petitioner Hygeia of New York, Inc. for a period of two years.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination that, inter alia, revoked the asbestos handling license of petitioner Hygeia of New York, Inc. (Hygeia) for a two-year period. Contrary to the contention of petitioners, we conclude that the determination is supported by substantial evidence (*see Matter of Aria Contr. Corp. v McGowan*, 256 AD2d 1204; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). Hygeia was hired by the Rome City School District (School District) to perform monitoring services for an asbestos abatement project. Although Hygeia's president, petitioner Eugene A. Carcone, was aware that the abatement subcontractor had violated part 56 of the Industrial Code (12 NYCRR part 56) involving the removal of asbestos, Hygeia nevertheless issued a report to the School District indicating that the asbestos abatement project was completed in accordance with all applicable laws. In light of the express purpose of part 56 to "reduce the risks to the public associated with the exposure to asbestos" (12 NYCRR 56-1.2 [b]), the Hearing Officer properly determined that the act of falsely

reporting to the School District that the asbestos abatement project was in compliance with all applicable laws was an adequate basis for the revocation of Hygeia's asbestos handling license for two years (*see* Labor Law § 909 [2]).

We further conclude that, in light of the serious nature of the violation, the two-year license revocation is not so disproportionate to the offense as to be shocking to one's sense of fairness (*see Aria Contr. Corp.*, 256 AD2d 1204). Finally, contrary to petitioners' contention, "it was not improper for the fact-finding determination to be made by a person who did not preside at the . . . hearing . . . and petitioner[s were] not deprived of due process thereby" (*Matter of Theresa G. v Johnson*, 26 AD3d 726, 727 [internal quotation marks omitted]).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**573**

**CA 08-02339**

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

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WALTER OSTROWSKI AND ARLENE M. COLLINS, INDIVIDUALLY, AND ARLENE M. COLLINS, AS ADMINISTRATRIX OF THE ESTATE OF SEAN CHRISTOPHER OSTROWSKI, DECEASED, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

THOMAS C. BALDI, ET AL., DEFENDANTS, AND TOWN OF WEST SENECA, DEFENDANT-RESPONDENT.

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

LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered February 13, 2008 in a wrongful death action. The order, insofar as appealed from, granted the motion of defendant Town of West Seneca for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiffs commenced this action seeking damages for the wrongful death and conscious pain and suffering of their son (decedent), who was killed while snow tubing down a hill. The accident occurred when decedent failed to stop at the bottom of the hill and was struck by a truck on Indian Church Road. Supreme Court properly granted the motion of defendant Town of West Seneca (Town) seeking summary judgment dismissing the complaint against it. The Town met its initial burden by establishing that it had no duty with respect to Indian Church Road, which it did not own, control or maintain (*see Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 675, *rearg denied* 93 NY2d 1042; *Ossmer v Bates*, 97 AD2d 871). The Town further established that it did not owe decedent any duty to maintain the hill in question because it did not own, occupy or control that property (*see Battaglia v Town of Bethlehem*, 46 AD3d 1151, 1154; *Ajlouny v Town of Huntington*, 184 AD2d 486, 487). The evidence submitted by plaintiffs in opposition to the motion establishing that the Town undertook actions that it had no legal obligation to perform by erecting barriers at the bottom of the hill following the accident

is insufficient to raise a triable issue of fact whether the Town owed a duty to decedent at the time of the accident (*see generally Castiglione v Village of Ellenville*, 291 AD2d 769, 770-771, *lv denied* 98 NY2d 604).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**574**

**CA 08-01939**

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

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PAUL A. WZONTEK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

A&L, INC., DEFENDANT-APPELLANT.

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RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (LISA A. COPPOLA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered September 15, 2008 in a personal injury action. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment on liability on the Labor Law § 240 (1) cause of action and denied defendant's cross motion to dismiss the complaint.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell while climbing a ladder during a bridge reconstruction project. Defendant was the general contractor on the project. Plaintiff moved for partial summary judgment on liability on the Labor Law § 240 (1) cause of action, and defendant cross-moved to dismiss the complaint based on, inter alia, plaintiff's failure to comply with discovery orders and discovery demands. We agree with defendant that Supreme Court erred in granting plaintiff's motion, but we conclude that the court properly denied defendant's cross motion. We therefore modify the order accordingly.

As defendant correctly contends, the evidence submitted by plaintiff in support of his motion raises a triable issue of fact whether his actions were the sole proximate cause of his injuries inasmuch as that evidence establishes that there were adequate safety devices available at the job site and that plaintiff chose not to use them (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554; *Montgomery v Federal Express Corp.*, 4 NY3d 805).

With respect to defendant's cross motion, we note that the record

establishes that plaintiff's attorneys repeatedly failed to comply with reasonable discovery requests and court-ordered discovery and that one of plaintiff's attorneys acted improperly during plaintiff's deposition. Nevertheless, we conclude that the court neither abused nor improvidently exercised its discretion in determining that such conduct did not warrant the ultimate sanction of dismissal (*see Optic Plus Enters., Ltd. v Bausch & Lomb Inc.*, 37 AD3d 1185, 1186-1187; *Andruszewski v Cantello*, 247 AD2d 876). Inasmuch as plaintiff's attorneys ultimately complied with all discovery requests and orders, the prejudice to defendant was remediable and dismissal is not appropriate (*see generally Lipin v Bender*, 84 NY2d 562, 572, *rearg denied* 84 NY2d 1027).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**575**

**CA 08-02315**

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

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DAVID EVANS, SR., PLAINTIFF-RESPONDENT,

V ORDER

JEFFREY A. STRICKLER, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

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LAW OFFICES OF LAWRENCE M. RUBIN, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (JOHN W. LOONEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered June 3, 2008 in a personal injury action. The order denied the motion of defendant Jeffrey A. Strickler for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 21, 2009, and filed in the Erie County Clerk’s Office on February 3, 2009,

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**576**

**CA 08-01734**

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

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SUKEERTI BHATT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NATIONWIDE MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

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MURA & STORM, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR DEFENDANT-APPELLANT.

LONGSTREET & BERRY, LLP, SYRACUSE (MARTHA BERRY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered January 11, 2008. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking to recover supplemental uninsured/underinsured motorist (SUM) benefits under an automobile insurance policy issued to her by defendant. Under the SUM endorsement, plaintiff was required to give defendant notice of a claim "[a]s soon as practicable." Plaintiff promptly notified defendant of the motor vehicle accident, which occurred on May 22, 2000, and she filed a claim for no-fault benefits on July 20, 2000. On April 7, 2003, plaintiff gave defendant notice of her claim under the SUM endorsement. Defendant disclaimed coverage on the ground that plaintiff failed to provide timely notice of the SUM claim.

We conclude that Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. "[W]here an insured previously gives timely notice of the accident, the carrier must establish that it is prejudiced by a late notice of SUM claim before it may properly disclaim coverage" (*Rekemeyer v State Farm Mut. Auto. Ins. Co.*, 4 NY3d 468, 476). Here, it is undisputed that plaintiff timely notified defendant of the accident and, shortly thereafter, filed a claim for no-fault benefits. Defendant failed to establish that it was prejudiced by plaintiff's delay in providing notice of the SUM claim (*see id.* at 475-476).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**577**

**CA 08-01825**

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

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DAVID C. DUFF, TAMARA A. DUFF AND PATRICIA A. COX, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROBIN E. FOSTER, ET AL., DEFENDANTS, CHRIS M. KRUKOWSKI AND LAURA J. FULLER, DEFENDANTS-RESPONDENTS.

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MICHAEL A. CASTLE, HERKIMER, FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA KLUCSIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered May 29, 2008 in a personal injury action. The order granted the motion of defendants Chris M. Krukowski and Laura J. Fuller for summary judgment dismissing the amended complaint and cross claims against them.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries they sustained in a motor vehicle accident. Tamara A. Duff (plaintiff) was operating a vehicle in which the remaining plaintiffs were passengers, and a vehicle owned by defendant Laura J. Fuller and operated by defendant Chris M. Krukowski was traveling behind the vehicle operated by plaintiff. Krukowski's vehicle, in turn, was followed by a vehicle operated by defendant Stephanie L. Foster. As plaintiff signaled a left-hand turn and slowed down in order to complete that turn, Krukowski passed the vehicle operated by plaintiff on the right, driving partially onto the right shoulder of the road in order to do so. At that time, the vehicle operated by Foster rear-ended the vehicle operated by plaintiff as she was attempting to complete the left-hand turn. Supreme Court properly granted the motion of Krukowski and Fuller for summary judgment dismissing the amended complaint and all cross claims against them. Those defendants met their initial burden by establishing that Krukowski was able to maneuver his vehicle past the vehicle operated by plaintiff without striking that vehicle and that the injuries sustained by plaintiffs resulted from the rear-end collision with the vehicle operated by Foster. " 'Under the circumstances, any alleged negligence on the part of [Krukowski and Fuller] was not a proximate cause of

plaintiff[s'] injuries' " (*Princess v Pohl*, 38 AD3d 1323, 1323, *lv denied* 9 NY3d 802).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**578**

**CA 08-02435**

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

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JAMES KORTHAS AND CHRISTINE KORTHAS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

U.S. FOODSERVICE, INC., DOING BUSINESS AS
U.S. FOODSERVICE OF BUFFALO, INC.,
DEFENDANT-APPELLANT.

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HISCOCK & BARCLAY, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered July 7, 2008 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by James Korthas (plaintiff) when he slipped and fell on an icy walkway leading to the receiving office at defendant's warehouse facility. Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint on the ground that there was a storm in progress at the time of the accident. Defendant failed to meet its burden of establishing as a matter of law that "plaintiff's injuries [were] sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter" (*Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735). We do not consider the affidavit of defendant's expert meteorologist in determining whether defendant met its initial burden because that affidavit was submitted in reply to the affidavit of plaintiffs' expert meteorologist (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**579**

**KA 06-00272**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHARLES HUBBARD, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered November 18, 2005. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**580**

**KA 08-00627**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WALTER MATTHIS, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 3, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**581**

**KA 08-01013**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SEAN BENTON, DEFENDANT-APPELLANT.

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DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered April 4, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**582**

**KA 08-00651**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL VERSE, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered February 25, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]). Contrary to the contention of defendant, the record of the plea colloquy establishes that he knowingly, intelligently and voluntarily waived his right to appeal (*see People v Dean*, 48 AD3d 1244, *lv denied* 10 NY3d 839). Supreme Court was " 'not required to engage in any particular litany' in order to obtain a valid waiver of the right to appeal" (*People v Tantao*, 41 AD3d 1274, 1275, *lv denied* 9 NY3d 882, quoting *People v Moissett*, 76 NY2d 909, 910). The valid waiver by defendant of the right to appeal encompasses his challenge to the court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833; *Dean*, 48 AD3d at 1245).

We reject the further contention of defendant that the court's determination that he is a persistent violent felony offender was based upon inadmissible evidence. Pursuant to CPL 400.22, the certificate of the Acting Superintendent of the Elmira Correctional Facility with the seal of the New York State Department of Correctional Services is prima facie evidence of defendant's length of imprisonment and date of discharge with respect to the convictions set forth in the certificate.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**583**

**KA 06-03246**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIE B. SANDERS, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Stephen K. Lindley, A.J.), rendered October 18, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**585**

**KA 07-02579**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY P. FORTINO, JR., DEFENDANT-APPELLANT.

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CARL M. DARNALL, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered August 3, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), burglary in the second degree (two counts), and burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of murder in the second degree (Penal Law § 125.25 [1], [3]) and burglary in the second degree (§ 140.25 [1] [b], [c]), and one count of burglary in the third degree (§ 140.20). We reject defendant's contention that reversal is required based upon prosecutorial misconduct. "With respect to the instances of alleged prosecutorial misconduct that are preserved for our review, we conclude that 'the conduct of the prosecutor was not so egregious or prejudicial as to deny defendant his right to a fair trial' " (*People v Mastowski*, 26 AD3d 744, 746, *lv denied* 6 NY3d 850, 7 NY3d 815, quoting *People v Dexter*, 259 AD2d 952, 954, *affd* 94 NY2d 847; *see People v Diaz*, 52 AD3d 1230, *lv denied* 11 NY3d 831). Defendant failed to preserve for our review his contention with respect to the remaining instances of alleged prosecutorial misconduct during summation (*see* CPL 470.05 [2]; *Diaz*, 52 AD3d at 1231), and we decline to exercise our power to review those instances of alleged prosecutorial misconduct as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also failed to preserve for our review his contention that County Court failed to conduct an adequate inquiry to determine if a juror was grossly unqualified to serve (*see People v Haynes*, 35 AD3d 1212, 1213, *lv denied* 8 NY3d 946). In any event, that contention is without merit. The record establishes that the court's inquiry

revealed that the juror had only a "limited exchange" with another person and that the exchange did not render her grossly unqualified to serve (*People v Griffin*, 41 AD3d 1285, 1286, *lv denied* 9 NY3d 923, 990; *see* CPL 270.35 [1]). Defendant also failed to preserve for our review his contention that the court erred in failing to instruct the jury that a certain witness was an accomplice as a matter of law, thus requiring corroboration of her testimony (*see People v Argentina*, 27 AD3d 569, *lv denied* 7 NY3d 751; *see also People v Taylor*, 57 AD3d 1518). In any event, the failure of the court to give that instruction is of no moment, inasmuch as the testimony of the witness was in fact amply corroborated (*see People v Smith-Merced*, 50 AD3d 259, *lv denied* 10 NY3d 939; *People v Cody*, 190 AD2d 684, 685, *lv denied* 81 NY2d 969). Contrary to defendant's contention, the court properly refused to suppress a statement made by defendant after he invoked his right to counsel. The record of the suppression hearing establishes that the statement was spontaneous and not in response to police interrogation or the functional equivalent thereof (*see People v Murphy*, 51 AD3d 1057, 1057-1058, *lv denied* 11 NY3d 792; *People v Maye*, 18 AD3d 1026, 1028, *lv denied* 5 NY3d 808; *People v Folger*, 292 AD2d 841, *lv denied* 98 NY2d 675). Finally, we reject the further contention of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**586**

**KAH 08-00398**

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

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.
TROY ALEXANDER, PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE DIVISION OF PAROLE,
RESPONDENT-RESPONDENT.

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CHRISTINE M. COOK, SYRACUSE, FOR PETITIONER-APPELLANT.

TROY ALEXANDER, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered December 7, 2007 in a habeas corpus proceeding. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see People ex rel. Kendricks v Smith*, 52 AD2d 1090).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**592**

**CA 08-01325**

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

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LM PROPERTY AND CASUALTY COMPANY, INC., AS SUCCESSOR TO PRUDENTIAL FINANCIAL, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS L. EVANS, AS ADMINISTRATOR OF THE ESTATE OF ISAAC A. EVANS, DECEASED, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

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LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (JOHN N. PHILIPPS, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Rose H. Sconiers, J.), entered May 15, 2008 in a declaratory judgment action. The judgment, insofar as appealed from, granted the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking a declaration that it is not obligated to defend or indemnify defendant Matthew Graber in an underlying wrongful death action commenced by Douglas L. Evans (defendant), as administrator of decedent's estate. Decedent was killed when his motor vehicle collided with a vehicle that was owned and operated by Graber. At the time of the accident, Graber's vehicle was insured under a policy issued by United Services Automobile Association, and Graber was also listed as a "licensed operator" on a policy issued to his mother and step-father by plaintiff's predecessor in interest, Prudential Financial, Inc. The declarations page of the Prudential policy listed two covered vehicles for which premiums were paid: a 2000 Pontiac Bonneville sedan and a 2001 Chevrolet S10 pickup truck. Pursuant to Part 3 of that policy, entitled "If You Injure Others or Damage Their Property," coverage was extended to "all cars for which a premium charge for this coverage is shown on the Declarations Page."

We conclude that Supreme Court properly granted plaintiff's cross motion for summary judgment on the complaint, in effect issuing a

declaration that the Prudential policy did not provide coverage for Graber in the accident. Plaintiff established as a matter of law that Graber's 1999 Chevrolet Blazer is not a covered vehicle under the clear and unambiguous terms of the Prudential policy (*see Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, *rearg denied* 46 NY2d 940). In opposition, defendant failed to raise a triable issue of fact sufficient to defeat the cross motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to defendant's contention, the appearance of Graber's name on the Prudential policy did not provide Graber with coverage in the subject accident. Such an interpretation of the policy would create "an added source of indemnification [that] had never been contracted for and for which no premium had ever been paid" (*Zappone v Home Ins. Co.*, 55 NY2d 131, 137).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**593**

**CA 08-02340**

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

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METAL GOODS AND MANUFACTURERS INSURANCE TRUST FUND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ADVENT TOOL & MOLD, INC., WEST FALLS MACHINE, INC., PRECISION MFG., INC., ET AL., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

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LAW OFFICE OF BRUCE S. ZEFTEL, BUFFALO (BRUCE S. ZEFTEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (KENNETH R. KIRBY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ADVENT TOOL & MOLD, INC., BLACKSTONE BUSINESS ENTERPRISES, INC., COASTEL CABLE TOOLS INTL. CORP., DOWCRAFT CORPORATION, EASTMAN MACHINE COMPANY, INC. (INCORRECTLY SUED HEREIN AS EASTMAN MACHINE CO., INC.), EMIL VON DUNGEN, INC., GEM SCREW MACHINE COMPANY, GREAT LAKES PRESSED STEEL CORPORATION, HARTMAN ENTERPRISES, INC., HEBELER CORPORATION, J.D. COUSINS, INC., MANITOBA CORPORATION, MILL MAX MANUFACTURING CORP., NUTALL GEAR, LLC AND RILEY GEAR CORPORATION.

E. PETER PFAFF, EAST AURORA, FOR DEFENDANTS-RESPONDENTS WEST FALLS MACHINE, INC. AND PRECISION MFG., INC.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR NEW YORK STATE WORKERS' COMPENSATION BOARD, AMICUS CURIAE.

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Appeal from an order of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered February 6, 2008. The order, inter alia, granted the cross motion of defendants West Falls Machine, Inc. and Precision Mfg., Inc. for summary judgment.

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

Memorandum: Plaintiff, a group self-insurance trust fund created pursuant to Workers' Compensation Law § 50 (3-a), commenced this action seeking to collect assessments made against, inter alia, defendants-respondents (hereafter, defendants), former members of plaintiff. Supreme Court granted the cross motion of defendants West Falls Machine, Inc. and Precision Mfg., Inc. for summary judgment dismissing the complaint against them and the cross motion of the

remaining defendants for partial summary judgment on their first counterclaim, seeking a determination that they are not liable for the assessments. We affirm.

Pursuant to its "Agreement and Declaration of Trust" (trust agreement), plaintiff was authorized to collect "an additional payment by the Employers in the form of a rate increase[,] which rate increase shall be sufficient to make up any deficiency" in the event that the trust was underfunded. The 14 defendants who were no longer members of plaintiff at the time the assessments in question were made met their initial burden on their cross motions by establishing that they were not "Employers" within the meaning of the trust agreement. The three defendants who were active members of plaintiff at the time the assessments were made also met their initial burden by establishing that they were not liable for the assessments (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Even assuming, arguendo, that the term "rate increase" in the trust agreement includes retroactive assessments, we conclude that the assessments here were levied against only a certain class of plaintiff's members, i.e., those who were members from 1993 to 2001 and had loss ratios greater than 30%, and such unequal treatment was not authorized by the unambiguous terms of the trust agreement. We reject plaintiff's contention that the court erred in considering a letter from the president of plaintiff's third-party administrator inasmuch as the record establishes that the court based its determination entirely on the unambiguous terms of the trust agreement.

We further conclude that plaintiff failed to raise a triable issue of fact in opposition to the cross motions (*see generally id.*). Contrary to plaintiff's contention, defendants were not liable for the assessments pursuant to the Workers' Compensation Law or its corresponding regulations with respect to group self-insurance (*see* 12 NYCRR 317.1 *et seq.*). Pursuant to 12 NYCRR 317.9 (b) (7), an underfunded "group self-insurer may be required to immediately levy an assessment upon the group members . . . in order to make up the deficiency" at the discretion of the chair of the Workers' Compensation Board (Board). Here, the Board determined that plaintiff was underfunded, but it did not require such assessments to be levied as one of the remedial conditions imposed upon plaintiff.

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**595**

**CA 08-02442**

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

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DAVID SIEDLECKI AND BARBARA SIEDLECKI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT.

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CANTOR, LUKASIK, DOLCE & PANEPINTO, P.C., BUFFALO (SEAN COONEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ALISA A. LUKASIEWICZ, CORPORATION COUNSEL, BUFFALO (BRENDAN R. MEHAFFY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 29, 2008 in a personal injury action. The order denied the motion of plaintiffs for partial summary judgment on liability on the Labor Law § 240 (1) cause of action.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by David Siedlecki (plaintiff) when he fell while descending a scaffold. Plaintiff's work entailed moving the scaffold while a plasterer and painter worked on the ceiling of an auditorium. Plaster dust had accumulated on the frame of the scaffold and, during his descent from the scaffold, plaintiff's foot slipped on a rung and plaintiff fell to the ground. Supreme Court erred in denying plaintiffs' motion for partial summary judgment on liability on the Labor Law § 240 (1) cause of action. Plaintiffs established that defendant "breach[ed] the statutory duty under section 240 (1) to provide [him] with adequate safety devices, and [that] this breach . . . proximately cause[d plaintiff's] injuries" (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554). In support of the motion, plaintiffs submitted an affidavit in which plaintiff stated that the absence of a ladder placed alongside the scaffold forced him to descend the scaffold using the frame, which had become slippery from the plaster dust. Although the scaffold did not collapse, slip, or otherwise malfunction, it "did not provide proper protection to plaintiff by itself, without the use of additional precautionary devices or measures" (*Smith v Fayetteville-Manlius Cent. School Dist.*, 32 AD3d 1253, 1254). Defendant submitted no evidence in opposition to the motion and therefore failed to raise a triable issue of fact to defeat

the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**599**

**KA 07-00130**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL L. BRAYER, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered October 27, 2006. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**600**

**KA 08-01147**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ADAM ALWARDT, ALSO KNOWN AS ADAM A. ALWARDT,
DEFENDANT-APPELLANT.

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GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (MELISSA L. CIANFRINI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 10, 2008. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**601**

**KA 08-00654**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGG SPONBURGH, DEFENDANT-APPELLANT.

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GREGG SPONBURGH, DEFENDANT-APPELLANT PRO SE.

JOHN H. CRANDALL, SR., DISTRICT ATTORNEY, HERKIMER (JEFFREY S. CARPENTER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered September 19, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts), vehicular assault in the second degree (four counts) and misdemeanor driving while intoxicated (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [4]) and four counts of vehicular assault in the second degree (§ 120.03 [1]). Defendant failed to preserve for our review his contentions that certain counts of the indictment are duplicitous and that other counts are multiplicitous (*see* CPL 470.05 [2]; *People v D'Eredita*, 302 AD2d 925, 925-926, *lv denied* 99 NY2d 654), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant further contends that the evidence is legally insufficient to support the conviction of one count of assault and two counts of vehicular assault with respect to one of the victims because the People failed to establish that the victim in question sustained a serious physical injury. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). The record establishes that the victim in question sustained a "protracted impairment of health" as a result of the collision inasmuch as his shoulder injury limits his range of motion and causes constant pain (Penal Law § 10.00 [10]; *see People v Diaz*, 254 AD2d 36, *lv denied* 92 NY2d 1031).

Defendant failed to preserve for our review his further contention that the People failed to establish that he acted recklessly and thus that the conviction of assault with respect to both victims is not supported by legally sufficient evidence inasmuch

as he failed to make a motion for a trial order of dismissal that was specifically directed at that alleged error (*see People v Gray*, 86 NY2d 10, 19; *People v Hryckewicz*, 221 AD2d 990, *lv denied* 88 NY2d 849). Finally, the contention of defendant that he was denied effective assistance of counsel is raised for the first time in his reply brief and therefore is not properly before us (*see generally People v Williams*, 292 AD2d 843, *lv denied* 98 NY2d 703).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**602**

**KA 07-01593**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMERON GRADY, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered June 11, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of, inter alia, driving while intoxicated (Vehicle and Traffic Law § 1192 [3]) and sentencing him to an indeterminate term of imprisonment. "County Court's determination resolving witness credibility must be accorded 'great weight' " (*People v Cruz*, 35 AD3d 898, 899, *lv denied* 8 NY3d 845), and we conclude that the People established by a preponderance of the evidence that defendant violated the conditions of his probation (*see People v Bergman*, 56 AD3d 1225).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**603**

**KA 04-02006**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN D. MAJOR, DEFENDANT-APPELLANT.

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EOANNOU, LANA & D'AMICO, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Ronald H. Tills, A.J.), rendered August 20, 2004. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (three counts), robbery in the first degree, attempted robbery in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, three counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of robbery in the first degree (§ 160.15 [2]). Contrary to the contention of defendant, Supreme Court properly refused to sever count seven of the indictment, charging defendant with criminal solicitation in the second degree (Penal Law § 100.10). That count was properly joined pursuant to CPL 200.20 (2) (b) because evidence that defendant sought assistance in finding and killing the murder victim, who was a witness to the other offenses charged, was material and admissible as evidence-in-chief in establishing defendant's consciousness of guilt with respect to those other offenses (*see People v Bongarzone*, 69 NY2d 892, 895). "[O]nce the offenses were properly joined, the court lacked the statutory authority to sever" (*People v Cornell*, 17 AD3d 1010, 1011, *lv denied* 5 NY3d 805; *see People v Lee*, 56 AD3d 1192, 1193, *lv denied* 11 NY3d 926). Defendant failed to preserve for our review his contention that the court erred in its instruction to the jury after dismissing count seven of the indictment (*see* CPL 470.05 [2]). In addition, he failed to object to the court's *Sandoval* ruling on the grounds now raised on appeal and thus failed to preserve his contention with respect to the court's *Sandoval* ruling for our review (*see id.*). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see*

CPL 470.15 [6] [a]). Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**604**

**KA 05-02390**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD C. STAPLES, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered September 14, 2005. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree, rape in the first degree, sexual abuse in the first degree (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal sexual act in the first degree (Penal Law § 130.50 [3]) and rape in the first degree (§ 130.35 [3]). We reject the contention of defendant that the testimony of the People's expert concerning the initial failure of the victim to identify defendant as the perpetrator and her hesitancy to disclose the abuse constituted improper bolstering (*see People v Donk*, 259 AD2d 1018, *lv denied* 93 NY2d 924; *People v DeLong*, 206 AD2d 914, 915). The expert's testimony was properly "admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand" (*People v Carroll*, 95 NY2d 375, 387). We reject the further contention of defendant that his right of confrontation was violated when County Court allowed a pediatrician and a physician's assistant to testify concerning the results of medical tests performed in hospital laboratories inasmuch as those results were not "testimonial" (*People v Freycinet*, 11 NY3d 38, 41; *see generally People v Rawlins*, 10 NY3d 136, 158-160). Finally, viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v*

*Bleakley*, 69 NY2d 490, 495).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**605**

**KA 04-01401**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL W. ADAMS, DEFENDANT-APPELLANT.

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

DARRELL W. ADAMS, DEFENDANT-APPELLANT PRO SE.

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

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Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered June 8, 2004. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends in his main and pro se supplemental briefs that he was denied a fair trial by prosecutorial misconduct. Defendant failed to preserve that contention for our review and, in any event, the alleged instances of misconduct did not result in substantial prejudice to defendant such that he was denied a fair trial (*see People v Russell*, 50 AD3d 1569, 1570, *lv denied* 10 NY3d 939; *People v Wilson*, 34 AD3d 1276, *lv denied* 8 NY3d 886). Defendant also failed to preserve for our review the contention in his main brief that County Court abused its discretion in failing to appoint standby counsel to assist him in his pro se capacity at trial (*see* CPL 470.05 [2]). In any event, that contention is also without merit. A defendant does not have the right to the assistance of an attorney while proceeding pro se (*see People v Mirenda*, 57 NY2d 261, 264), and it cannot be said that the court's failure to appoint standby counsel was an abuse of discretion (*see id.* at 266; *People v Bedard*, 265 AD2d 886, *lv denied* 94 NY2d 860).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**606**

**KA 05-01857**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANA R. BRADFORD, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered April 7, 2005. The judgment convicted defendant, upon a jury verdict, of rape in the third degree (four counts) and endangering the welfare of a child (six counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the orders of protection and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, four counts of rape in the third degree (Penal Law § 130.25 [2]), defendant contends that County Court erred in refusing to suppress statements that he made to the police as the fruit of an illegal arrest. We agree with defendant that he was arrested without probable cause (*see generally People v Carrasquillo*, 54 NY2d 248, 254; *People v Nicodemus*, 247 AD2d 833, 835-836, *lv denied* 92 NY2d 858), and thus that his arrest was illegal. Nevertheless, we conclude on the record before us that defendant's statements "were sufficiently attenuated from the illegal arrest to be purged of the taint created by the illegality" (*People v Russell*, 269 AD2d 771, 772). The inculpatory statements in question were not made until several hours after the arrest, during which time defendant twice waived his *Miranda* rights (*see People v Conyers*, 68 NY2d 982, 983-984; *People v Cooke*, 299 AD2d 419, 420, *lv denied* 99 NY2d 627). We note in addition that defendant was advised during that time period, before he made the statements, that the victims of the crimes had implicated him (*see Cooke*, 299 AD2d at 420). We conclude that "the actions of the police were not so egregious as to warrant suppression" (*Russell*, 269 AD2d at 772).

Defendant further contends that reversal is required because he

may have been convicted of an unindicted rape. We note at the outset that defendant's failure to preserve that contention for our review is of no moment. Preservation is not required inasmuch as "[t]he right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable" (*People v Rubin*, 101 AD2d 71, 77, *lv denied* 63 NY2d 711; *see People v Watkins*, 300 AD2d 1070, 1071, *lv denied* 99 NY2d 659). Nevertheless, we reject that contention. Although the rape victim testified with respect to more than four incidents involving defendant that may constitute the crime of rape in the third degree, the court's "charge to the jury eliminated any 'danger that the jury convicted defendant of an unindicted act' " (*People v Gerstner*, 270 AD2d 837, 838; *see People v Caballero*, 23 AD3d 1031, 1032, *lv denied* 6 NY3d 846; *cf. People v McNab*, 167 AD2d 858). Although we agree with defendant that the court erred in refusing to strike testimony concerning uncharged acts of rape in the third degree by defendant (*see generally People v Ventimiglia*, 52 NY2d 350, 359-360), we conclude that the error is harmless (*see People v Schrader,* 251 AD2d 1032, 1033, *lv denied* 92 NY2d 882; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

We further agree with defendant that the court erred in setting the durations of the orders of protection without taking into account the jail time credit to which he is entitled (*see People v Stone*, 49 AD3d 1314, *lv denied* 10 NY3d 965; *People v Fomby*, 42 AD3d 894, 896). Although defendant raises that contention for the first time on appeal and thus has failed to preserve it for our review (*see People v Nieves*, 2 NY3d 310, 315-317), we nonetheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We therefore modify the judgment by amending the orders of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify in each order of protection an expiration date in accordance with CPL 530.13 (former [4]), the version of the statute in effect when the judgment was rendered on April 7, 2005.

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**607**

**CA 08-01542**

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

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IN THE MATTER OF JOHN D. JUSTICE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL E. HUDSON, JUDGE OF THE NEW YORK
STATE COURT OF CLAIMS, AND THE STATE OF NEW
YORK, RESPONDENTS-RESPONDENTS.

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JOHN D. JUSTICE, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered May 23, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to prohibit respondent, a Court of Claims judge, from adjourning his motions and the State of New York's cross motions pending in petitioner's action in the Court of Claims. Supreme Court properly dismissed the petition. "[T]he petition alleges merely an . . . abuse of discretion that does not constitute the kind of abuse or perversion of a court's jurisdiction as would warrant the issuance of a writ of prohibition" (*Matter of Tyler v Forma*, 231 AD2d 891, 892; *see People ex rel. Patrick v Fitzgerald*, 73 App Div 339, 345).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**611**

**CA 08-00913**

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

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BUSINESS LOAN CENTER, INC., PLAINTIFF-APPELLANT,

V ORDER

GREG WAGNER, ALSO KNOWN AS GREG D. WAGNER, HEIR OF THE ESTATE OF ROBERT F. WAGNER, DECEASED, ET AL., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(ACTION NO. 1.)

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BUSINESS LOAN CENTER, INC., PLAINTIFF-APPELLANT,

V

THE ROBERT F. WAGNER REVOCABLE TRUST, DEFENDANT-RESPONDENT, ET AL., DEFENDANT.
(ACTION NO. 2.)

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BUCHANAN INGERSOLL & ROONEY PC, BUFFALO (ANDREW J. ROMANOW OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ANTHONY J. VILLANI, P.C., LYONS (ANTHONY J. VILLANI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order and judgment (one paper) of the Supreme Court, Wayne County (Renee Forgensi Minarik, A.J.), entered October 26, 2007 in foreclosure actions. The order and judgment, among other things, dismissed all claims asserted by plaintiff against defendants-respondents in action Nos. 1 and 2 following a nonjury trial.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**613**

**CA 08-02124**

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

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IN THE MATTER OF RESIDENTS INVOLVED IN COMMUNITY ACTION (RICA), DANIEL BEYER AND DANIEL O'BRIEN, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN/VILLAGE OF LOWVILLE PLANNING BOARD AND MJL CRUSHING, LLC, RESPONDENTS-RESPONDENTS.

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SCOTT F. CHATFIELD, MARIETTA, FOR PETITIONERS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, UTICA (RAYMOND A. MEIER OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN/VILLAGE OF LOWVILLE PLANNING BOARD.

THOMAS P. HUGHES, NEW HARTFORD, FOR RESPONDENT-RESPONDENT MJL CRUSHING, LLC.

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Lewis County (Joseph D. McGuire, J.), entered April 30, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this proceeding pursuant to CPLR article 78 challenging the determination of respondent Town/Village of Lowville Planning Board (Board) approving the application of respondent MJL Crushing, LLC (MJL) for a special use permit to place a limestone mining operation in an agricultural zone. Supreme Court properly dismissed the petition. "The classification of a particular use as permitted in a zoning district is 'tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood' " (*Matter of Twin City Recycling Corp. v Yevoli*, 90 NY2d 1000, 1002, quoting *Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243). Contrary to petitioners' contention, the record supports the Board's determination that MJL demonstrated that the proposed mining operation is in conformance with the standards imposed by Article XII of the Town Code of the Town of Lowville with respect to special use permits, and we thus conclude that the application was properly granted (*cf. Matter of Schadow v Wilson*, 191 AD2d 53, 57; *see generally Matter of Boyer v Davenport*,

304 AD2d 1028, *appeal dismissed and lv denied* 100 NY2d 601).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**616**

**KA 08-00244**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL HERNANDEZ, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered January 9, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed as moot (*see People v Griffin*, 239 AD2d 936).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**617**

**KA 05-01172**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR J. SEGURA, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered May 14, 2004. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance 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 criminal sale of a controlled substance in the second degree (Penal Law § 220.41 [1]), defendant contends that he was denied his right to an attorney of his own choosing when County Court removed his attorney based on a conflict of interest. According to defendant, the court failed to conduct a sufficient inquiry before determining that he could not be represented by an attorney who also represented another individual in connection with a separate, but related, indictment. We reject that contention. The inquiry conducted by the court established that the other individual was charged with conspiracy and that one of the overt acts alleged in that indictment was the sale by this defendant of a controlled substance to an undercover officer. We agree with the court that "the attorney could not represent both defendant and another criminal defendant against whom defendant was a potential prosecution witness" (*People v Jones*, 2 AD3d 1397, 1398, *lv denied* 2 NY3d 742, 746). We therefore conclude that the court conducted a sufficient inquiry and properly determined that " 'continued representation of defendant by [the] attorney would create an actual conflict of interest' " (*People v Rufus*, 56 AD3d 1175, 1175, *lv denied* 11 NY3d 930).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**618**

**KA 08-00322**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MERRISA A. MCGILL, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 22, 2008. The judgment convicted defendant, upon her plea of guilty, of vehicular assault in the first degree and driving while intoxicated.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**620**

**KA 08-01034**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WAYNE A. TABB, DEFENDANT-APPELLANT.

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DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered February 21, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**623**

**KA 06-01243**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD R. HANKERSON, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered October 12, 2005. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]). We agree with defendant that his waiver of the right to appeal is invalid. A single reference by the prosecutor to defendant's agreement to waive that right does not constitute " 'an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Braswell*, 49 AD3d 1190, 1191, *lv denied* 10 NY3d 860). Although the invalid waiver of the right to appeal thus does not encompass defendant's further contention that County Court erred in refusing to suppress identification testimony, we nevertheless reject that contention. The People met their initial burden of establishing the reasonableness of the police conduct with respect to the showup identification procedures, and defendant failed to establish that those procedures were unduly suggestive (*see People v Jackson*, 98 NY2d 555, 559; *People v Morgan*, 302 AD2d 983, 984, *lv denied* 99 NY2d 631).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**625**

**CA 08-02499**

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

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JANET K. HOLLINGSWORTH, AS LIMITED ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF ROBERT J. HOLLINGSWORTH, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

BRUCE CAPAN, MATCO TOOLS CORPORATION, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

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RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, ROCHESTER (JOSEPH A. REGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered June 28, 2008 in a wrongful death action. The order denied the motion of defendants Bruce Capan and Matco Tools Corporation for summary judgment.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**638**

**KA 06-01723**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOVAN FULTON, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 30, 2006. The judgment convicted defendant, upon a jury verdict, of menacing in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of menacing in the second degree (Penal Law § 120.14 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The testimony of the People's witnesses was not " 'so unworthy of belief as to be incredible as a matter of law' " (*People v Woods*, 26 AD3d 818, 819, *lv denied* 7 NY3d 756, 765; *see People v Ogborn*, 57 AD3d 1430), and we see no reason to disturb the jury's resolution of credibility issues (*see generally Bleakley*, 69 NY2d at 495).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**639**

**KA 08-01041**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIE K. PARKER, DEFENDANT-APPELLANT.

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DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered January 7, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**640**

**KA 08-00522**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAMARA D. CLARK, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

TAMARA D. CLARK, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN N. BAUERSFELD OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered January 8, 2008. The judgment convicted defendant, upon her plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a plea of guilty, of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). We reject the contention of defendant in her main brief that County Court abused its discretion in denying her motion to withdraw her guilty plea, as well as the contention in her pro se supplemental brief that the plea was involuntarily entered. There is no " 'evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Pillich*, 48 AD3d 1061, *lv denied* 11 NY3d 793; *see* CPL 220.60 [3]), nor is there any indication in the record before us that the plea was not voluntarily entered (*see People v Seeber*, 4 NY3d 780, 781-782; *People v Phillips*, 56 AD3d 1163). Defendant failed to preserve for our review her contention in her main brief that the sentence constitutes cruel and unusual punishment (*see People v Santilli*, 16 AD3d 1056, 1057), as well as the contention in her pro se supplemental brief that the court erred in imposing an enhanced sentence when she failed to appear at sentencing (*see People v Brooks*, 59 AD3d 999). Those contentions are without merit in any event. The sentence does not constitute cruel and unusual punishment (*see People v Holmquist*, 5 AD3d 1041, *lv denied* 2 NY3d 800; *see generally People v Thompson*, 83 NY2d 477, 482-483), and the court warned defendant that, if she failed to appear at sentencing, the court would no longer be bound by the agreed-upon sentence and would instead impose the maximum sentence

allowed (*see People v Winship*, 26 AD3d 768, *lv denied* 6 NY3d 899; *see generally People v Bush*, 30 AD3d 1078, *lv denied* 7 NY3d 785).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**641**

**KA 06-03039**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SPARTACUS BROWN, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MATTHEW H. JAMES OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered September 19, 2006. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion to set aside the verdict in part is granted, the verdict is set aside in part and a new trial is granted on counts two and three of the indictment.

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]), defendant contends that County Court erred in denying his motion to set aside the verdict in part pursuant to CPL 330.30 on the ground that he was denied effective assistance of counsel. We agree. The motion was based on defense counsel's failure to object to the admission in evidence of the victim's medical records, which contained information concerning prior allegations of sexual abuse against defendant. Under the circumstances of this case, that failure alone constitutes ineffective assistance of counsel because it was "so 'egregious and prejudicial' as to deprive [the] defendant of his constitutional right" to a fair trial (*People v Turner*, 5 NY3d 476, 480). Contrary to the People's contention, the statement of defense counsel in response to a question by the court concerning the CPL 330.30 motion did not establish that his failure to object to the admission of such prejudicial information was part of a legitimate trial strategy (*cf. People v Pierce*, 303 AD2d 966, 966-967, *lv denied* 100 NY2d 565).

Based on our resolution of this issue, we see no need to reach

defendant’s remaining contention.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**642**

**KA 98-05446**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SANTO GONZALEZ, DEFENDANT-APPELLANT.

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SANTO GONZALEZ, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

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Appeal, by permission of a Justice of the Appellate Divison of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Joseph S. Forma, J.), entered February 23, 1998. The order denied the motion of defendant pursuant to CPL 440.20 to vacate the sentence imposed upon his conviction of, inter alia, attempted murder in the first degree.

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

Memorandum: Defendant appeals from an order that denied his motion pursuant to CPL 440.20 seeking to vacate the sentence imposed upon his conviction of, inter alia, attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]). We previously affirmed the judgment of conviction upon defendant's appeal therefrom (*People v Gonzalez*, 145 AD2d 900, *lv denied* 73 NY2d 1015). We reject defendant's contention that the sentence was "unauthorized, illegally imposed or otherwise invalid as a matter of law" (CPL 440.20 [1]). Contrary to the contention of defendant, the imposition of consecutive sentences for his conviction of attempted murder and burglary in the second degree (Penal Law § 140.25 [1] [a]) was proper (*see People v Brathwaite*, 63 NY2d 839, 842-843; *cf.* Penal Law § 70.25 [2]). We further conclude that defendant was properly adjudicated a second felony offender. Even assuming, arguendo, that the People failed to comply with CPL 400.21, we conclude that strict compliance with the statute was not required inasmuch as defendant received reasonable notice of the accusations against him and was provided an opportunity to be heard with respect to those accusations during the persistent felony offender proceeding (*see People v Bouyea*, 64 NY2d 1140, 1142; *People v Sampson*, 30 AD3d 623, 623-624, *lv denied* 7 NY3d 817).

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**643**

**KA 07-01624**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROLLIE V. COLLINS, DEFENDANT-APPELLANT.

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

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

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Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered March 7, 2007. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**644**

**KA 08-00218**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY MILLER, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered January 14, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and making a punishable false written statement.

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

Memorandum: On appeal from a judgment convicting him of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in admitting in evidence the grand jury testimony and out-of-court statements of two witnesses following a *Sirois* hearing (*see Matter of Holtzman v Hellenbrand*, 92 AD2d 405). We reject that contention. The People established that the witnesses were unavailable based on the misconduct of individuals acting on defendant's behalf, with defendant's acquiescence (*see People v Major*, 251 AD2d 999, *lv denied* 92 NY2d 927). Indeed, we further note that the People presented circumstantial evidence that threats made to the witnesses were in fact made at defendant's request (*see People v Washington*, 34 AD3d 1193). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence with respect to the murder count (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the People presented evidence establishing the elements of identity and intent with respect to that count (*see People v Nieves*, 15 AD3d 868; *People v Pagan*, 12 AD3d 1143, *lv denied* 4 NY3d 766). We have considered defendant's remaining contentions and conclude that

they are without merit.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**646**

**CAF 07-02303**

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

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IN THE MATTER OF MEREDITH S.F.

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ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

RAYMOND F., RESPONDENT-APPELLANT.

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TULLY RINCKEY PLLC, ALBANY (MATHEW B. TULLY OF COUNSEL), FOR RESPONDENT-APPELLANT.

DANIEL J. GUINEY, COUNTY ATTORNEY, BELMONT (LESLIE J. HAGGSTROM OF COUNSEL), FOR PETITIONER-RESPONDENT.

DAVID E. CODDINGTON, LAW GUARDIAN, HORNELL, FOR MEREDITH S.F.

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Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered October 15, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: On appeal from an order terminating his parental rights with respect to his daughter on the ground of permanent neglect, respondent father contends that Family Court erred in finding that his daughter was permanently neglected. We reject that contention. Petitioner established that, despite its diligent efforts to encourage and strengthen the relationship between the father and his daughter, the father failed during the period specified in Social Services Law § 384-b (7) (a) to maintain contact with her or to plan for her future although physically and financially able to do so (*see id.*; *Matter of Sheila G.*, 61 NY2d 368, 373; *Matter of Alyshia M.R.*, 53 AD3d 1060, *lv denied* 11 NY3d 707; *Matter of Kyle K.*, 49 AD3d 1333, *lv denied* 10 NY3d 715).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**648**

**CA 08-02314**

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

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IN THE MATTER OF DDR ORCHARD PARK, LLC,
PETITIONER-APPELLANT,

V ORDER

ASSESSOR OF TOWN OF ORCHARD PARK, TOWN OF
ORCHARD PARK, RESPONDENTS-RESPONDENTS,
AND ORCHARD PARK CENTRAL SCHOOL DISTRICT,
INTERVENOR-RESPONDENT.

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

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (JOEL R. KURTZHALTS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), FOR INTERVENOR-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered December 21, 2007 in a proceeding pursuant to RPTL article 7. The order, insofar as appealed from, denied in part the petitions.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**650**

**CA 08-02429**

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

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KEVIN E. WHITCOMBE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

REBECCA PHILLIPS AND ROSEMARY PHILLIPS,
DEFENDANTS-RESPONDENTS.

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MICHAEL J. KIEFFER, ROCHESTER, FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAWRENCE M. RUBIN, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 8, 2008 in a personal injury action. The order denied the motion of plaintiff for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when a vehicle operated by Rebecca Phillips (defendant) collided with the motorcycle operated by plaintiff. We agree with plaintiff that Supreme Court erred in denying his motion for partial summary judgment on the issue of liability. In support of his motion, plaintiff established that he was operating his motorcycle in the curb side lane of a four-lane roadway, that he was traveling at or below the speed limit, and that "all of a sudden" defendant's vehicle exited a parking lot into his lane of traffic and struck his motorcycle. Defendant testified at her deposition that she saw plaintiff for the first time when she had already begun to pull out into the roadway and that she drove into the roadway despite the fact that her vision of the roadway was obscured by a legally parked vehicle. Plaintiff thus established that defendant was negligent as a matter of law in failing to see that which she should have seen (*see Miller v Richardson*, 48 AD3d 1298, 1300, *lv denied* 11 NY3d 710; *Stiles v County of Dutchess*, 278 AD2d 304; *see also Kornacki v Kornacki* [appeal No. 2], 280 AD2d 981, 981-982), and that the sole proximate cause of the accident was defendant's failure to yield the right of way to plaintiff (*see* Vehicle and Traffic Law § 1143; *Miller*, 48 AD3d

at 1300; *Wallace v Kuhn*, 23 AD3d 1042, 1043).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**655**

**CA 08-02387**

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

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SHANNON NOLAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ONONDAGA COUNTY AND ONCENTER COMPLEX,
DEFENDANTS-APPELLANTS.

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SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHELLE WESTERMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GERMAIN & GERMAIN, LLP, SYRACUSE (JOHN J. MARZOCCHI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), dated February 11, 2008 in a personal injury action. The order denied defendants' motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she tripped and fell in an arena owned by defendants. According to plaintiff, she tripped over a ramp that protruded into the aisle where she was walking. Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint inasmuch as defendants failed to meet their initial burden of establishing that the ramp was not a proximate cause of plaintiff's fall (*see Hunley v University of Rochester Strong Mem. Hosp.*, 294 AD2d 923; *Dodge v City of Hornell Indus. Dev. Agency*, 286 AD2d 902). Contrary to the contention of defendants, the testimony of plaintiff at a hearing pursuant to General Municipal Law § 50-h that she does not specifically recall tripping over the ramp and acknowledging that she might have fallen for a reason unrelated to the ramp is insufficient to establish their entitlement to judgment as a matter of law (*see Hunley*, 294 AD2d 923; *Dodge*, 286 AD2d 902; *cf. McGill v United Parcel Serv., Inc.*, 53 AD3d 1077). In any event, plaintiff raised a triable issue of fact in opposition to the motion by submitting evidence establishing that she fell in the immediate vicinity of the protruding ramp, thereby rendering any other potential cause of her fall "sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Artessa v City of Utica*, 23 AD3d 1148, 1148; *see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744; *see also Foreman v Coyne Textile Servs. of Buffalo*, 284 AD2d

912). We have considered defendants' remaining contention and conclude that it is lacking in merit.

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**656**

**CA 08-02506**

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

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JOSEPH SELVA AND KATHERINE SELVA,
PLAINTIFFS-RESPONDENTS,

V ORDER

MEDELINE AMBRUS LILLIE, M.D., ET AL.,
DEFENDANTS,
AND SYLVIA REGALLA, M.D., DEFENDANT-APPELLANT.

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DAMON & MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANT-APPELLANT.

NAPOLI BERN RIPKA, LLP, NEW YORK CITY (DENISE A. RUBIN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered July 2, 2008 in a medical malpractice action. The order denied the motion of defendant Sylvia Regalla, M.D. for summary judgment.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**660**

**KA 08-00141**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MASSEY, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered December 7, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject the contention of defendant that the evidence is legally insufficient to disprove his justification defense (*see generally People v Danielson*, 9 NY3d 342, 349). Although in his statement to the police defendant asserted that the victim brandished a knife during the altercation and thus may have died from self-inflicted wounds, three eyewitnesses testified to the contrary. We thus conclude with respect to legal sufficiency that the People met their burden of disproving defendant's justification defense beyond a reasonable doubt, i.e., they presented legally sufficient evidence establishing that the victim did not brandish the knife during the altercation and that defendant's use of deadly force was not justified (*see* Penal Law § 25.00 [1]; *see generally Danielson*, 9 NY3d at 349). We further conclude that the jury "did not fail to give the evidence the weight it should be accorded in rejecting defendant's justification defense" and thus that the verdict is not against the weight of the evidence in that respect (*People v Wolf*, 16 AD3d 1167; *see generally People v Bleakley*, 69 NY2d 490, 495). " '[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which saw and heard the witnesses' " (*People v Sorrentino*, 12 AD3d 1197, 1197-1198, *lv denied* 4 NY3d 748).

Contrary to the further contention of defendant, the evidence is legally sufficient to establish his intent to kill the victim. Such intent "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). Here, "[d]efendant's homicidal intent could be inferred from evidence that defendant plunged a knife deep into the victim's chest, in the direction and close vicinity of vital organs" (*People v Dones*, 279 AD2d 366, 366, *lv denied* 96 NY2d 799). In addition, viewing the evidence in light of the elements of the crime of murder as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict with respect to the element of intent is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Contrary to defendant's further contention, Supreme Court properly admitted in evidence the victim's identification of defendant and the statement of the victim that he had been stabbed under the excited utterance exception to the hearsay rule (*see People v Johnson*, 1 NY3d 302, 306; *People v Cotto*, 92 NY2d 68, 78-79). In any event, the identification and statement were admissible hearsay under the present sense impression exception (*see People v Brown*, 80 NY2d 729, 732). Defendant failed to preserve for our review his contention that the court's ultimate *Sandoval* ruling constitutes an abuse of discretion (*see People v Robles*, 38 AD3d 1294, 1295, *lv denied* 8 NY3d 990), and in any event that contention is without merit (*see generally People v Williams*, 56 NY2d 236, 238-239). Finally, the sentence is not unduly harsh or severe.

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**661**

**KA 08-02336**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL SPICOLA, DEFENDANT-APPELLANT.

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LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ROGER W. WILCOX, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 9, 2007. The judgment convicted defendant, upon a jury verdict, of sodomy in the first degree (six counts), sexual abuse in the first degree (three counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of six counts of sodomy in the first degree (Penal Law former § 130.50 [3]), three counts of sexual abuse in the first degree (§ 130.65 [3]) and one count of endangering the welfare of a child (§ 260.10 [1]). We reject defendant's contentions that County Court erred in admitting expert testimony concerning child sex abuse accommodation syndrome (*see People v Carroll*, 95 NY2d 375, 387; *People v Miles*, 294 AD2d 930, *lv denied* 98 NY2d 678), as well as statements made by the victim concerning the incidents at issue to a nurse practitioner that were relevant to the victim's diagnosis and treatment (*see People v White*, 306 AD2d 886, *lv denied* 100 NY2d 625). Contrary to defendant's further contention, "[t]he court properly precluded defendant from introducing evidence concerning his reputation for truth and veracity, because that evidence did not relate to a trait involved in the charges of . . . sodomy, sexual abuse or endangering the welfare of a child" (*People v Fanning*, 209 AD2d 978, 978, *lv denied* 85 NY2d 908; *see People v Renner*, 269 AD2d 843, 844).

Defendant failed to preserve for our review his challenge to the court's preliminary jury instructions (*see* CPL 470.05 [2]; *People v Giddens*, 202 AD2d 976, *lv denied* 83 NY2d 871), and we decline to exercise our power to review that challenge as a matter of discretion

in the interest of justice (*see* CPL 470.15 [6] [a]). Considering all of the relevant circumstances, we conclude that the time frames set forth in the indictment were sufficiently specific to enable defendant to prepare a defense (*see People v Furlong*, 4 AD3d 839, 840-841, *lv denied* 2 NY3d 739; *see generally People v Watt*, 81 NY2d 772, 774-775). We reject the contention of defendant that defense counsel was ineffective in failing to preserve certain contentions for our review. " 'Deprivation of appellate review . . . does not per se establish ineffective assistance of counsel' . . . but, rather, a defendant must also show that his or her contention would be meritorious on appellate review," and defendant failed to make that showing (*People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and according great deference to the jury's resolution of credibility issues, we conclude that the verdict is not contrary to the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The general motion by defendant for a trial order of dismissal at the close of proof did not preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). Finally, the sentence is not unduly harsh or severe.

Entered: April 24, 2009 Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**664**

**CA 08-02450**

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

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JOHN BOLENDER, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF NICHOLAS BOLENDER, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOPS MARKETS, LLC, DEFENDANT-APPELLANT.

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DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF KENNETH P. BERNAS, PLLC, WEST SENECA (KENNETH P. BERNAS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered March 4, 2008 in a negligence action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action, individually and on behalf of his son, seeking damages for injuries sustained by his son when he ingested allegedly tainted ground beef sold by defendant. Contrary to the contention of defendant, Supreme Court properly denied its motion for summary judgment dismissing the complaint. Even assuming, arguendo, that defendant met its initial burden on the motion, we conclude that plaintiff raised a triable issue of fact by submitting evidence establishing that his son suffered from E. coli poisoning as a result of ingesting ground beef sold by defendant (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**668**

**CA 08-00462**

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

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FREDERICK R. HAWKES, PLAINTIFF-RESPONDENT,

V ORDER

BONNIE M. HAWKES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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KUSTELL LAW GROUP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGG S. MAXWELL, BUFFALO, FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered November 29, 2007 in a divorce action. The judgment, among other things, distributed the marital assets.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**669**

**CA 08-01723**

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

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FREDERICK R. HAWKES, PLAINTIFF-RESPONDENT,

V ORDER

BONNIE M. HAWKES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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KUSTELL LAW GROUP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGG S. MAXWELL, BUFFALO, FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered July 29, 2008 in a divorce action. The order, insofar as appealed from, denied defendant's application for counsel fees and maintenance.

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

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**670**

**CA 08-02076**

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

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FREDERICK R. HAWKES, PLAINTIFF-RESPONDENT,

V ORDER

BONNIE M. HAWKES, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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KUSTELL LAW GROUP, BUFFALO (CARL B. KUSTELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGG S. MAXWELL, BUFFALO, FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered September 10, 2008 in a divorce action. The order, among other things, denied defendant's request to reopen the previous denial of defendant's application for maintenance.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Mergl v Mergl*, 19 AD3d 1146, 1147).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

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

**672**

**CAF 08-02324**

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

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IN THE MATTER OF JOSHUA SEYLER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SARA HASFURTER, RESPONDENT-APPELLANT.

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LOTEMPIO & BROWN, P.C., BUFFALO (RACHEL M. KRANITZ OF COUNSEL), FOR RESPONDENT-APPELLANT.

FRANCINE E. MODICA, TONAWANDA, FOR PETITIONER-RESPONDENT.

MARY E. GIALLANZA, LAW GUARDIAN, BUFFALO, FOR KOBIE S.

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Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered February 8, 2008 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition of respondent seeking permission for the parties' son to relocate with her to another state.

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

Memorandum: Respondent mother appeals from an order that dismissed her petition seeking permission for the parties' son to relocate with her to Texas. We affirm. A parent seeking such permission has the burden of demonstrating by a preponderance of the evidence that the proposed relocation is in the child's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 741). We conclude that Family Court properly considered the relevant factors set forth in *Tropea* in dismissing the petition. Those factors include the mother's failure to establish that the lives of the mother and the child "may be enhanced economically, emotionally and educationally [to any degree] by the move," and the mother's failure to establish that the child's relationship with petitioner father would be preserved despite the proposed relocation (*id.* at 741; *cf. Matter of Scialdo v Cook*, 53 AD3d 1090, 1092).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**674**

**CAF 07-02228**

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

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IN THE MATTER OF DEMARIO J., DESHAWN L., RAKIM S., AND RENIYA S.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHELLE S., RESPONDENT-APPELLANT.

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JEFFREY M. HARRINGTON, LACKAWANNA, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR DEMARIO J., DESHAWN L., RAKIM S., AND RENIYA S.

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Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered November 2, 2007 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, terminated the parental rights of respondent.

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

Memorandum: Respondent mother appeals from an order of dispostion granting the petition seeking revocation of a suspended judgment and termination of her parental rights with respect to four of her children. We reject the mother's contention that Family Court erred in refusing to extend the suspended judgment pursuant to Family Court Act § 633 (b). "The suspended judgment, having already been extended six months, was properly revoked where [the mother] admittedly failed to comply with its terms" (*Matter of Robert Calvin R.*, 59 AD3d 265, 266). In addition, the mother failed to demonstrate that "exceptional circumstances" required extension of the suspended judgment (§ 633 [b]; *see Matter of Lourdes O.*, 52 AD3d 203).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court

**MOTION NO. (225/89) KA 02-00347. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL RHYMES, DEFENDANT-APPELLANT. --** Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, CARNI, GREEN, AND PINE, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (690/06) KA 05-01050. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES KIRSCH, DEFENDANT-APPELLANT. --** Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, GREEN, PINE, AND GORSKI, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (1125/07) KA 06-01069. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN E. AKIN, DEFENDANT-APPELLANT. --** Motion for reargument and leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, GREEN, AND PINE, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (1330/08) CA 08-00835. -- IN THE MATTER OF LIGHTHOUSE POINTE PROPERTY ASSOCIATES LLC, PETITIONER-RESPONDENT, V NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, ALEXANDER B. GRANNIS, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AND DALE A. DESNOYERS, DIRECTOR, DIVISION OF ENVIRONMENTAL REMEDIATION, RESPONDENTS-APPELLANTS. --** Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND GREEN, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (1359/08) CA 08-01079. -- WESTFIELD FAMILY PHYSICIANS, P.C.,**

**DRS. DONALD F. BRAUTIGAM, GARY E. EGGLESTON, MARK R. HAGEN, TIMOTHY A. GORMAN, TIMOTHY M. KITCHEN, KRISTOPHER N. HARTWIG, AND BRUCE A. BARKER, AND ROBERT BERKE, M.D., DOING BUSINESS AS FAMILY HEALTH SERVICES, PLAINTIFFS-RESPONDENTS, V HEALTHNOW NEW YORK, INC., DEFENDANT-APPELLANT. --** Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, AND PINE, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (1501/08) TP 08-01491. -- IN THE MATTER OF PAUL HANSON, PETITIONER, V A. LABRIOLA, DEPUTY SUPERINTENDENT OF SECURITY, ORLEANS CORRECTIONAL FACILITY, RESPONDENT. (APPEAL NO. 2.) --** Motion for leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., SMITH, FAHEY, AND PINE, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (1513/08) CA 07-01431. -- IN THE MATTER OF JAMES E. PENNINGTON, PETITIONER-APPELLANT, V JAMES WOYTASH, MD, DDS, ERIE COUNTY MEDICAL EXAMINER, RESPONDENT-RESPONDENT. --** Motion for reargument denied. PRESENT: MARTOCHE, J.P., SMITH, FAHEY, AND PINE, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (1523/08) TP 08-01413. -- IN THE MATTER OF NEW YORK STATE DIVISION OF HUMAN RIGHTS, PETITIONER, V VILLAGE PLAZA FAMILY RESTAURANT, INC., CHRIS VOTIS, AS AIDER AND ABETTOR, AND CHRIS VOTIS, ALSO KNOWN AS CHRIS VOTSIS, INDIVIDUALLY, RESPONDENTS. --** Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PINE, AND GORSKI, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (1618/08) CA 08-01388. -- PATRICIA KNIERY, INDIVIDUALLY AND AS**

**ADMINISTRATRIX OF THE ESTATE OF MICHAEL KNIERY, DECEASED, PLAINTIFF-RESPONDENT, V COTTRELL, INC., DEFENDANT-APPELLANT, ET AL., DEFENDANTS. --** Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, GREEN, AND GORSKI, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (1636/08) CA 08-00955. -- IN THE MATTER OF COUNTRY SIDE SAND & GRAVEL INC., PETITIONER-APPELLANT, V TOWN OF POMFRET ZONING BOARD OF APPEALS AND TOWN OF POMFRET, RESPONDENTS-RESPONDENTS. --** Motion for leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (1658/08) CA 08-01419. -- CATARACT SPORTS & ENTERTAINMENT GROUP, LLC, ET AL., PLAINTIFFS, V ESSEX INSURANCE COMPANY, DEFENDANT-RESPONDENT, FRANK STRANGIO, MERRIE CAROLE STRANGIO, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. --** Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., SMITH, CENTRA, GREEN, AND PINE, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (55/09) KA 06-03548. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GERRI L. BUNNELL, DEFENDANT-APPELLANT. --** Motion for reargument granted to the extent that the appeal should be added to the calendar for the May 2009 Term of Court for counsel to address the question whether County Court erred in delegating its responsibility to conduct the restitution hearing to its court attorney. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, AND GORSKI, JJ. (Filed Apr. 7, 2009.)

**MOTION NO. (117/09) CA 08-01401. -- LISA HINCKLEY, INDIVIDUALLY, AND AS WIFE OF JOHN HINCKLEY, DECEASED, AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN HINCKLEY, DECEASED, PLAINTIFF-APPELLANT, V CSX TRANSPORTATION, INC., DEFENDANT-RESPONDENT, ET AL., DEFENDANT. --** Motion for reargument or clarification denied. PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (155/09) CA 08-01631. -- JACK A. CARDINELL, PLAINTIFF-APPELLANT, V CHERUNDOLO, BOTTAR & LEONE, P.C., AND EDWARD S. LEONE, DEFENDANTS-RESPONDENTS. --** Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (162.1/09) TP 08-01484. -- IN THE MATTER OF PAUL HANSON, PETITIONER, V A. LABRIOLA, DEPUTY SUPERINTENDENT FOR SECURITY, ORLEANS CORRECTIONAL FACILITY, RESPONDENT. --** Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Apr. 24, 2009.)

**MOTION NO. (193/09) KA 07-00774. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MILTON LEE, DEFENDANT-APPELLANT. --** Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ. (Filed Apr. 24, 2009.)

**KA 07-01512. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MURRAY G. BELL, JR., DEFENDANT-APPELLANT. --** Judgment unanimously affirmed.

Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, William F. Kocher, J. - Driving While Intoxicated). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND GORSKI, JJ. (Filed Apr. 24, 2009.)

**KA 08-00099. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHELTIERE BROOKS, DEFENDANT-APPELLANT. --** Order unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Monroe County Court, John J. Connell, J. - 2005 Drug Law Reform Act). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND GORSKI, JJ. (Filed Apr. 24, 2009.)

**KA 05-02522. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERTIUS LOVETT, DEFENDANT-APPELLANT. --** Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Monroe County, Stephen R. Sirkin, A.J. - Criminal Possession Stolen Property, 3rd Degree). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND GORSKI, JJ. (Filed Apr. 24, 2009.)

**KA 05-02521. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERTIUS LOVETT, DEFENDANT-APPELLANT. --** Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Monroe County, Stephen R. Sirkin, A.J. - Assault, 2nd Degree). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND GORSKI, JJ. (Filed Apr. 24, 2009.)

**KAH 08-00682. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. MATTHEW JOHN SPILLMAN, PETITIONER-APPELLANT, V MALCOLM R. CULLY, SUPERINTENDENT, LIVINGSTON CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. --** Appeal dismissed without costs as moot. Counsel's motion to be relieved of assignment granted. (Appeal from Judgment of Supreme Court, Livingston County, Robert B. Wiggins, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND GORSKI, JJ. (Filed Apr. 24, 2009.)

**KA 08-01504. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HERBERT L. THOMAS, DEFENDANT-APPELLANT. --** Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Wyoming County Court, James R. Griffith, J. - Attempted Promoting Prison Contraband, 1st Degree). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND GORSKI, JJ. (Filed Apr. 24, 2009.)