



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

DECISIONS FILED  
DECEMBER 30, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

**995**

**CA 08-00930**

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

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GRIFFITH OIL COMPANY, INC., BIG FLATS  
REALTY, INC., AND E. PHILLIP SAUNDERS,  
AS TRUSTEE, PLAINTIFFS-APPELLANTS,

V

ORDER

NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PA., DEFENDANT-RESPONDENT,  
ET AL., DEFENDANTS.  
(APPEAL NO. 1.)

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KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), AND LAW  
OFFICES OF BETH ZARO GREEN, BROOKLYN, FOR DEFENDANT-RESPONDENT.

WILEY REIN LLP, WASHINGTON, D.C., CHAMBERLAIN D'AMANDA OPPENHEIMER &  
GREENFIELD LLP, ROCHESTER (K. WADE EATON OF COUNSEL), FOR COMPLEX  
INSURANCE CLAIMS LITIGATION ASSOCIATION, AMICUS CURIAE.

ANDERSON KILL & OLICK, P.C., NEW YORK CITY (JOHN G. NEVIUS OF  
COUNSEL), FOR UNITED POLICYHOLDERS, AMICUS CURIAE.

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Appeal from a judgment (denominated order) of the Supreme Court,  
Monroe County (Harold L. Galloway, J.), entered March 26, 2008 in a  
declaratory judgment action. The judgment granted the motion of  
defendant National Union Fire Insurance Company of Pittsburgh, Pa. for  
partial summary judgment and denied that part of the cross motion of  
plaintiffs for summary judgment.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**996**

**CA 08-02656**

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

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GRIFFITH OIL COMPANY, INC., BIG FLATS  
REALTY, INC., AND E. PHILLIP SAUNDERS,  
AS TRUSTEE, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PA., DEFENDANT-RESPONDENT,  
ET AL., DEFENDANTS.  
(APPEAL NO. 2.)

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KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), AND LAW  
OFFICES OF BETH ZARO GREEN, BROOKLYN, FOR DEFENDANT-RESPONDENT.

WILEY REIN LLP, WASHINGTON, D.C., CHAMBERLAIN D'AMANDA OPPENHEIMER &  
GREENFIELD LLP, ROCHESTER (K. WADE EATON OF COUNSEL), FOR COMPLEX  
INSURANCE CLAIMS LITIGATION ASSOCIATION, AMICUS CURIAE.

ANDERSON KILL & OLICK, P.C., NEW YORK CITY (JOHN G. NEVIUS OF  
COUNSEL), FOR UNITED POLICYHOLDERS, AMICUS CURIAE.

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Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered July 17, 2008 in a declaratory judgment action. The judgment, insofar as appealed from, upon reargument granted the motion of defendant National Union Fire Insurance Company of Pittsburgh, Pa. for partial summary judgment and denied that part of the cross motion of plaintiffs for summary judgment.

It is hereby ORDERED that the judgment insofar as appealed from is reversed on the law without costs, the motion of defendant National Union Fire Insurance Company of Pittsburgh, Pa. is denied, the declaration is vacated, the cross motion is granted in part, and judgment is granted in favor of plaintiffs as follows:

It is ADJUDGED and DECLARED that defendant National Union Fire Insurance Company of Pittsburgh, Pa. is obligated to indemnify plaintiffs in the underlying actions and the proceeding commenced by the United States Environmental Protection Agency.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration that defendant-respondent (hereafter, defendant) is obligated to indemnify them in underlying actions, and a proceeding brought against them in connection with a spur pipeline oil leak in Steuben County (see e.g. *Steuben Contr. v Griffith Oil Co.*, 283 AD2d 1008). We conclude that Supreme Court erred in granting the motion of defendant for partial summary judgment seeking a declaration that it is not obligated to indemnify plaintiffs under its policy with respect to the action commenced in Steuben County as well as a proceeding commenced by the United States Environmental Protection Agency (EPA). We note in addition that it appears on the record before us that the court granted relief beyond that sought by defendant by declaring that it also is not obligated to indemnify plaintiffs with respect to any "underlying property damage lawsuits regarding oil leaks from the Spur Pipeline." We instead conclude that the court should have granted that part of plaintiffs' cross motion for summary judgment seeking a declaration that defendant is obligated to indemnify them in the underlying actions and the proceeding commenced by the EPA, inasmuch as they established that the exception to the pollution exclusion clause in the policy is applicable herein, and defendant failed to raise an issue of fact sufficient to defeat that part of the cross motion (cf. *Griffith Oil Co., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 15 AD3d 982, 984).

It is undisputed that the oil leak constitutes pollution and that the policy excludes coverage for property damage caused by a pollutant. The policy further provides, however, that the exclusionary clause does not apply to any property damage "that may arise out of the 'products completed operations hazard' for . . . [t]he sale, storage and/or transportation of fuels." "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . , and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267). Plaintiffs established that the fuel in the spur pipeline was either being transported or stored. We note with respect to the term "products completed operations hazard" that such term typically defines an exclusion of coverage. Indeed, that term typically refers to an exclusion of coverage for damages caused by a product that was manufactured at or sold from the insured's premises and was then released into the stream of commerce where the injury occurred (see *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 176; *Logan's Silo Sales & Serv. v Nationwide Mut. Fire Ins. Co.*, 185 AD2d 651; *Associated Mut. Ins. Coop. v Bader*, 10 Misc 3d 1028). The term is also used to exclude coverage in connection with work performed by the insured that caused injury after the work was completed (see *Berger Bros. Elec. Motors, Inc. v New Amsterdam Cas. Co.*, 293 NY 523, 527). Here, however, the term "products completed operations hazard" defines coverage rather than an exclusion of coverage.

The policy defines the term "products completed operations hazard" in relevant part as " 'property damage' occurring away from premises you own or rent and arising out of 'your product' . . . except: [p]roducts that are still in your physical possession."

Here, it is undisputed that the property damage occurred "away from premises" owned by plaintiffs and that the property damage arose as a result of fuel purchased by plaintiffs that leaked either while it was transported to plaintiffs' facility or stored in the spur awaiting transportation. Thus, we conclude that the property damage arose out of plaintiffs' product. The court erred in determining that the word "still" in the context of the phrase "still in your physical possession" required that the product have been sent into the stream of commerce from plaintiffs' facility in order to construe the policy as providing coverage. Thus, according to the court's interpretation, there would be coverage only in the event that the damage resulting from pollution occurred while plaintiffs were in the process of transporting it from the facility, after having received it. The policy, however, does not support that interpretation inasmuch as it does not specify that the damage resulting from the pollution must have occurred after the product was released from plaintiffs' facility into the stream of commerce (*cf. Associated Mut. Ins. Coop.*, 10 Misc 3d at 1030). Rather, the phrase "still in your physical possession" excludes coverage for damage from pollution that occurs on the insured's premises. Even assuming, *arguendo*, that the term "still" renders the clause ambiguous, we conclude that it must be read in favor of providing coverage, based on the well-settled principle that any ambiguity must be construed in favor of the insured (*see White*, 9 NY3d at 267).

Thus, although we conclude that the pollution exclusion applies based upon the unambiguous terms of the policy, we further conclude that the exception to that exclusion applies because the damage occurred away from premises owned by plaintiffs and was caused by plaintiffs' product during the storage or transportation of fuel.

All concur except HURLBUTT AND PERADOTTO, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. In our view, Supreme Court properly determined that the commercial general liability policy issued by defendant-respondent does not cover plaintiffs for property damage caused by an oil leak from a spur pipeline through which plaintiff Griffith Oil Company, Inc. (Griffith), a petroleum distributor, received oil from its supplier. As the majority recognizes, the policy excludes coverage for property damage caused by a pollutant, *i.e.*, the oil spill, unless an exception to the exclusion applies. In this case, an exception to the exclusion would apply in the event that the property damage arose out of a "products completed operations hazard." That term, as defined in the policy, includes property damage "occurring away from [the insured's] premises and arising out of '[the insured's] product' . . . except . . . [p]roducts that are still in [the insured's] physical possession." The insured's "product" is defined in relevant part as "[a]ny goods or products . . . manufactured, sold, handled, distributed or disposed of by" the insured. It is undisputed that the oil that leaked from the spur pipeline had not yet come into Griffith's possession, but was awaiting delivery.

In *Frontier Insulation Contrs. v Merchants Mut. Ins. Co.* (91 NY2d 169), the Court of Appeals noted in addressing a product-hazard

exclusion that "[t]he distinct risk of loss occasioned by a defect in the insured's product, which manifests itself only after the insured has relinquished control of the product and at a location away from the insured's normal business premises, is covered by the purchase of separate 'products hazard' coverage" (*id.* at 176). Thus, product-hazard insurance is intended to cover "events that occur after [the] insured's product is placed in the stream of commerce" (*id.*). Here, inasmuch as the oil was spilled before it ever came into the possession of Griffith, it had not been placed in the stream of commerce, nor was it "manufactured, sold, handled, distributed or disposed of" by Griffith. We thus agree with the court that the pollution exclusion applies, and we would affirm.

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

1038

CA 09-00355

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

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DONNA LEE SCHMITZ, AS EXECUTOR OF THE GOODS,  
CHATTELS AND CREDITS OF ROBERT J. SCHMITZ,  
DECEASED, PLAINTIFF-RESPONDENT,

V

ORDER

CALDWELL & COOK, INC., DEFENDANT-RESPONDENT,  
BEAM MACK SALES & SERVICE, INC., DOING BUSINESS  
AS CONWAY GMC VOLVO TRUCK DIVISION,  
DEFENDANT-APPELLANT,  
ET AL., DEFENDANT.

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CALDWELL & COOK, INC., ET AL., THIRD-PARTY  
PLAINTIFFS,

V

MATTHEWS AND FIELDS OF HENRIETTA, INC.,  
THIRD-PARTY DEFENDANT-RESPONDENT.

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DONALD A.W. SMITH, P.C., PITTSFORD, (DONALD A.W. SMITH OF COUNSEL) FOR  
DEFENDANT-APPELLANT.

E. MICHAEL COOK, P.C., ROCHESTER, (E. MICHAEL COOK OF COUNSEL) FOR  
PLAINTIFF-RESPONDENT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

DAVIDSON & O'MARA, PC, ELMIRA (RANSOM P. REYNOLDS, JR., OF COUNSEL),  
FOR THIRD-PARTY DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP (MELISSA A. FOTI OF COUNSEL), FOR  
DEFENDANT.

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Appeal from an order and judgment (one paper) of the Supreme  
Court, Monroe County (Evelyn Frazee, J.), entered July 20, 2008 in a  
wrongful death action. The order and judgment, insofar as appealed  
from, denied the motion of defendant Beam Mack Sales & Service, Inc.,  
doing business as Conway GMC Volvo Truck Division, for summary  
judgment dismissing the amended complaint and cross claims against it.

Now, upon the stipulation of discontinuance signed by the  
attorneys for the parties on July 10, September 28, October 10,

November 9 and November 24, 2009 and filed in the Monroe County  
Clerk's Office on November 30, 2009,

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1056

CA 09-00035

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

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MORGAN T. PALMER, PLAINTIFF-APPELLANT,

V

ORDER

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

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DINARDO & METSCHL, P.C., WILLIAMSVILLE (DANIEL R. METSCHL OF COUNSEL),  
FOR PLAINTIFF-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (MICHELLE PARKER OF COUNSEL),  
FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered January 14, 2008 in an action pursuant to the Federal Employers' Liability Act. The order, insofar as appealed from, denied in part plaintiff's 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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1057

CA 09-00148

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

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MORGAN T. PALMER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

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

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DINARDO & METSCHL, P.C., WILLIAMSVILLE (DANIEL R. METSCHL OF COUNSEL),  
FOR PLAINTIFF-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (MICHELLE PARKER OF COUNSEL),  
FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered April 1, 2008 in an action pursuant to the Federal Employers' Liability Act. The judgment, after a jury trial, awarded plaintiff damages for past loss of earnings and past pain and suffering.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting that part of the motion to set aside the verdict with respect to damages for future pain and suffering and setting aside that part of the verdict and as modified the judgment is affirmed without costs, and a new trial is granted on damages for future pain and suffering only unless defendant, within 20 days of service of the order of this Court with notice of entry, stipulates to increase the award of damages for future pain and suffering to \$250,000, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

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 his leg became entangled in a chain and he fell from a freight train operated by defendant, his employer. Following a jury trial, the jury rendered a verdict finding defendant 20% liable for the accident and awarding plaintiff damages in the total amount of \$207,000, but awarding no damages for future pain and suffering or future lost wages. We agree with plaintiff that Supreme Court erred in denying that part of his post-trial motion to set aside the verdict with respect to damages for future pain and suffering. We conclude on the record before us that the jury's failure to award any damages for future pain and suffering was " 'so grossly and palpably inadequate as to shock the [judicial] conscience' " (*Matter of Brooklyn Navy Yard Asbestos Litigation*, 971

F2d 831, 853), "the applicable federal standard of review for damages awards in FELA cases" (*Cruz v Long Is. R.R. Co.*, 22 AD3d 451, 454, *lv denied* 6 NY3d 703; *see Hotaling v CSX Transp.*, 5 AD3d 964, 970). Plaintiff presented uncontroverted medical evidence that his ankle injury resulted in a permanent partial disability that will continue to cause him pain and that he is likely to develop painful arthritis in the future. Plaintiff also testified that he is no longer able to participate in recreational activities that he enjoyed prior to the accident because of his ankle injury (*see Simmons v Dendis Constr.*, 270 AD2d 919, 920). Based on that evidence, we conclude that an award of \$250,000 for plaintiff's future pain and suffering is the minimum amount the jury could have awarded as a matter of law based on the evidence at trial (*see generally Orlikowski v Cornerstone Community Fed. Credit Union*, 55 AD3d 1245, 1248). We therefore modify the judgment accordingly, and we grant a new trial on damages for future pain and suffering only unless defendant, within 20 days of service of the order of this Court with notice of entry, stipulates to increase the award of damages for future pain and suffering to \$250,000, in which event the judgment is modified accordingly. We further conclude, however, that the court properly denied that part of plaintiff's post-trial motion with respect to damages for future loss of earnings. Contrary to plaintiff's contention, we conclude that, "considering all of the relevant factors and circumstances in this case, it was reasonable for the jury to have [awarded no damages for future loss of earnings]. The verdict [with respect thereto] does not shock our conscience" (*Schneider v National R.R. Passenger Corp.*, 987 F2d 132, 137-138).

Plaintiff contends that the court erred in admitting in evidence defendant's safety rule book in its entirety because the rules therein imposed a higher standard of care than the applicable standard of reasonable care. Plaintiff failed to object to the admission of the book on that ground, however, and he thus failed to preserve his contention for our review (*see CPLR 5501 [a] [3]; Gunnarson v State of New York*, 95 AD2d 797). Plaintiff also failed to preserve for our review his contention that the court failed to give a proper jury instruction with respect to the applicability of defendant's safety rules, inasmuch as he failed to request such an instruction (*see generally Schlesinger v City of New York*, 30 AD3d 400; *Givens v Rochester City School Dist.*, 294 AD2d 898).

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

1086

CA 09-00017

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

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YASMIN KABIR, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

COUNTY OF MONROE, MONROE COUNTY SHERIFF DEPARTMENT, KNOWN OR UNKNOWN MEMBERS OF MONROE COUNTY SHERIFF DEPARTMENT AND SUPERVISORY PERSONNEL, MONROE COUNTY SHERIFF PATRICK M. O'FLYNN, AND JOHN DIDOMENICO, INDIVIDUALLY AND AS A MONROE COUNTY DEPUTY SHERIFF, DEFENDANTS-RESPONDENTS.

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BRENNA, BRENNA & BOYCE, PLLC, ROCHESTER (ROBERT L. BRENNA, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (HOWARD A. STARK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 30, 2008 in a personal injury action. The order, insofar as appealed from, granted those parts of defendants' motion seeking summary judgment dismissing the complaint against defendant County of Monroe and dismissing the amended complaint and denied plaintiff's cross motion seeking partial summary judgment with respect to liability.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, those parts of the motion seeking summary judgment dismissing the complaint against defendant County of Monroe and dismissing the amended complaint are denied, the complaint against defendant County of Monroe and the amended complaint are reinstated and the cross motion is granted.

Memorandum: Plaintiff commenced these two actions to recover damages for injuries she allegedly sustained when the vehicle she was driving was struck from behind by a vehicle driven by defendant John DiDomenico, a Monroe County Deputy Sheriff (hereafter, Deputy). Defendants moved for summary judgment dismissing the complaint and the amended complaint, inter alia, on the ground that as a matter of law the Deputy was not driving with reckless disregard for the safety of others pursuant to Vehicle and Traffic Law § 1104 (e). Plaintiff cross-moved for partial summary judgment with respect to liability, contending that the Deputy was not entitled to qualified immunity under section 1104 (e) because he was not operating a "police vehicle"

within the meaning of section 1104 (c) and was not engaged in an "emergency operation" within the meaning of Vehicle and Traffic Law §§ 114-b and 1104 (a) at the time of the collision. Supreme Court erred in granting those parts of defendants' motion seeking summary judgment dismissing the complaint against defendant County of Monroe (County) and dismissing the amended complaint and in denying plaintiff's cross motion seeking partial summary judgment on the issue of liability.

The accident occurred when the Deputy received a dispatch to respond to a burglary and looked down at his mobile data terminal to ascertain the location of the burglarized premises. When he looked back up two to three seconds later, he observed that traffic was moving very slowly through the intersection that he was approaching. The Deputy immediately applied his brakes, but he was unable to avoid a rear-end collision with plaintiff's vehicle. Even assuming that the Deputy was involved in an emergency operation at the time of the collision (see Vehicle and Traffic Law §§ 114-b, 1104 [a]), we conclude that the "reckless disregard" standard of liability contained in section 1104 (e) is not applicable to this action because the Deputy's conduct did not fall within any of the four categories of privileged activity set forth in section 1104 (b).

Vehicle and Traffic Law § 1104 (a) provides that the driver of an authorized emergency vehicle involved in an emergency operation "may exercise the privileges set forth in this section, but subject to the conditions herein stated." The statute then goes on to list in subdivision (b) those privileges that the driver of an authorized emergency vehicle may exercise, i.e., the driver may (1) stop, stand or park regardless of the provisions of the Vehicle and Traffic Law; (2) proceed past a steady or flashing red light or stop sign after slowing down to ensure the safe operation of the vehicle; (3) exceed the maximum speed limits so long as he or she does not endanger life or property; and (4) disregard regulations concerning directions of movements or turning. Subdivision (e) of the statute, which exempts the driver of an authorized emergency vehicle from liability for ordinary negligence relating to his or her operation of that vehicle, specifically relates back to subdivision (b). Thus, subdivision (e) states that "[t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his [or her] reckless disregard for the safety of others" (emphasis added). The "foregoing provisions" referred to in the statute are the four categories of privileged activity set forth in section 1104 (b).

Therefore, in accordance with a plain reading of Vehicle and Traffic Law § 1104, the driver of an emergency vehicle who is engaged in an emergency operation may operate his or her vehicle in violation of the provisions of the Vehicle and Traffic Law so long as his or her conduct falls within one of the four categories of privileged conduct listed in subdivision (b), with two conditions. Despite the fact that the driver is privileged from having to comply with the Vehicle and Traffic Law in the four situations set forth above, he or she (1) nevertheless must operate the vehicle with due regard for the safety

of others, and (2) nevertheless is liable for any injuries or consequences caused by his or her reckless disregard for the safety of others when operating the vehicle. In effect, the statute exempts a driver whose operation of an emergency vehicle falls within the four categories of subdivision (b) from the consequences of his or her ordinary negligence, rendering him or her liable only for conduct constituting the higher standard of reckless disregard for the safety of others.

Even assuming that the Deputy in this case was involved in an emergency operation at the time of the accident, we conclude that his conduct did not fall within any of the four categories of privileged conduct set forth in subdivision (b). The Deputy was merely traveling in a normal stream of traffic, driving well within the speed limit and in the proper lane of the roadway. Thus, the liability exemption contained in subdivision (e) never became applicable.

The dissent faults our analysis of Vehicle and Traffic Law § 1104 with respect to this case on several grounds. First, the dissent concludes that plaintiff for the first time in his reply brief raised the issue whether the exemption set forth in subdivision (e) applies because the Deputy's conduct did not fall within any of the four categories of subdivision (b). Thus, the dissent concludes that the issue is not properly before us. We disagree. Following defendants' assertion of the Vehicle and Traffic Law § 1104 (e) exemption, plaintiff cross-moved for partial summary judgment contending, *inter alia*, that the issue before the court primarily concerned the applicability of Vehicle and Traffic Law § 1104 (e). Thus, defendants were on notice that the applicability of the exemption to the case was in issue. A determination of that issue necessarily involves an examination of the circumstances under which the exemption applies, which in turn necessitates an analysis of the statutory scheme of Vehicle and Traffic Law § 1104. It consequently is difficult to see how the defense was "blind sided." Indeed, defendants' assertion of the exemption in itself was sufficient to require an analysis of the statutory scheme of Vehicle and Traffic Law § 1104, inasmuch as it would be impossible to determine whether the Deputy was exempt from liability for ordinary negligence without an analysis of the applicability of that exemption.

The dissent further faults our analysis on the ground that it allegedly is unsupported by a plain reading of the statute. In our view, it is the dissent's analysis that is unsupported by a plain reading of the statute. According to the dissent, the four categories of conduct set forth in subdivision (b) excuse a driver engaged in the emergency operation of an authorized emergency vehicle from being charged with a traffic violation or from being subject to civil liability based solely on those four categories of conduct. Thus, the dissent in effect interprets the exemption of subdivision (e) as standing separate and apart from the remainder of the statute. However, the statute is not drafted in that fashion. Subdivision (a) expressly requires that the various subdivisions of the statute be read in conjunction with each other. That subdivision refers to the privileges that the driver of an authorized emergency vehicle involved

in an emergency operation enjoys, which privileges are "set forth in this section." Those privileges are then enumerated in subdivision (b). Subdivision (a) further provides that those privileges are "subject to the conditions herein stated." After listing in subdivision (b) the four categories of privileged conduct, the statute goes on to set forth the conditions to which subdivision (a) refers, and the exemption of subdivision (e) is only one of those conditions. Subdivision (e) specifically relates back to the "foregoing provisions" of the statute, and provides that "such provisions" do not protect the driver from the consequences of his reckless disregard for the safety of others. Thus, a plain reading of the statute is that subdivision (e) is a condition placed upon the exercise of the privileges afforded to a driver set forth in subdivision (b). The dissent's conclusion that the exemption covers any and all activity of the driver of an authorized emergency vehicle engaged in an emergency operation disregards the express language of the statute. Had the Legislature intended Vehicle and Traffic Law § 1104 to apply to all of the rules of the road without limitation to the four categories of section 1104 (b), it would have drafted the statute accordingly. Significantly, the Legislature did so in Vehicle and Traffic Law § 1103, which exempts all persons and vehicles "while actually engaged in work on a highway" from the Vehicle and Traffic Law provisions, except for those provisions relating to driving while intoxicated offenses. As the Court of Appeals wrote, " '[w]e have recognized that meaning and effect should be given to every word of a statute' " (*Criscione v City of New York*, 97 NY2d 152).

The dissent further faults our interpretation of the statute as being illogical. According to the dissent, the Legislature could not have intended that a driver engaging in less culpable conduct such as that involved in this case would be subject to liability under an ordinary negligence standard while a driver engaged in more culpable conduct, such as speeding, would be excused from ordinary negligence. We do not agree with the dissent that such a statutory scheme is illogical. As the dissent recognizes, the purpose of the exemption is to afford operators of emergency vehicles the freedom to perform their duties when responding to an emergency situation, unhampered by the rules of the road (*see Saarinen v Kerr*, 84 NY2d 494, 497). The four categories of privileged conduct that the statute in effect excuses from ordinary negligence constitute conduct that is essential to such an emergency response. If the driver of an emergency vehicle is engaged in "normal" driving, i.e., driving falling outside the four categories of section 1104 (b), there is no reason to excuse him or her from "normal" standards of negligence. Thus, the legislative scheme underlying the reason for the statute's enactment is not unreasonable, as the dissent contends.

Finally, we cannot agree with the dissent to the extent that it suggests that *Saarinen* and *Criscione* endorse the application of the reckless disregard standard any time that the driver of an authorized emergency vehicle is involved in an emergency operation. The Court of Appeals in *Saarinen* discussed and determined the appropriate standard of liability pursuant to Vehicle and Traffic Law § 1104 (e), but it did not state that the reckless disregard standard was applicable in

every situation in which the driver of an authorized emergency vehicle was involved in an emergency operation. In *Saarinen*, the police officer's conduct fell squarely within one of the four categories of subdivision (b), inasmuch as the officer was driving in excess of the speed limit when the accident occurred. We find it significant that the Court of Appeals, when referring to Vehicle and Traffic Law § 1104 (e), stated that "[t]his statute establishes the standard for determining an officer's civil liability for damages resulting from the *privileged* operation of an emergency vehicle" (*id.* at 500 [emphasis added]). There was no issue in *Saarinen* concerning the *applicability* of the exemption in subdivision (e) but, rather, the issue concerned the *standard* for determining liability pursuant to that exemption.

In *Criscione*, the Court addressed the issue of whether an officer who was responding to a dispatch was involved in an "emergency operation." The officer characterized the dispatch as a nonemergency call, and neither activated his siren or lights nor increased his speed. He was, however, traveling in excess of the posted speed limit. The Court determined that, despite the officer's own characterization of the dispatch, he was involved in an emergency operation within the meaning of Vehicle and Traffic Law § 1104, so that the reckless disregard standard of liability applied. Because the officer's conduct fell within one of the four categories of privileged activity of section 1104 (b) (Vehicle and Traffic Law § 1104 [b] [3]), the Court had no reason to determine the standard of liability for conduct falling outside those four categories.

In this case, as previously noted, the Deputy's conduct did not fall within any of the four categories of privileged conduct contained in subdivision (b). The Deputy did not unlawfully park or stand, proceed past a steady red light or other similar traffic control device, exceed the maximum speed limit or disregard regulations concerning directions of movement or turning (see Vehicle and Traffic Law § 1104 [b] [1] - [4]). Thus, the reckless disregard standard of subdivision (e) is not applicable. Instead, the applicable standard for determining liability is the standard of ordinary negligence. Defendants did not establish their entitlement to summary judgment dismissing the complaint against the County and dismissing the amended complaint as a matter of law pursuant to the ordinary negligence standard of liability. It is well settled that a rear-end collision with a vehicle in stop-and-go traffic creates a *prima facie* case of negligence with respect to the operator of the rear vehicle, and that partial summary judgment on liability in favor of the person whose vehicle was rear-ended is appropriate in the absence of a nonnegligent explanation for the accident (see *Emil Norsic & Son, Inc. v L.P. Transp., Inc.*, 30 AD3d 368; *Mullen v Rigor*, 8 AD3d 104; see also *Mustafaj v Driscoll*, 5 AD3d 138, 139). Here, in support of their motion, defendants failed to provide a nonnegligent explanation for the rear-end collision, while plaintiff met her burden in support of her cross motion seeking partial summary judgment on the issue of liability by submitting evidence establishing as a matter of law that the vehicle driven by her was rear-ended by the vehicle driven by the Deputy. The court therefore erred in granting those parts of

defendants' motion seeking summary judgment dismissing the complaint against the County and dismissing the amended complaint and in denying plaintiff's cross motion (see *Jumandeo v Franks*, 56 AD3d 614; *Shelton v Rivera*, 286 AD2d 587; *Chiaia v Bostic*, 279 AD2d 495).

Finally, we reject defendants' contention that the applicable statute of limitations for this action is CPLR 215 (1), i.e., one year. We have previously determined that the three-year statute of limitations set forth in CPLR 214 (5) applies in such actions (see *Smelts v O'Hara*, 302 AD2d 948).

All concur except MARTOCHE and PERADOTTO, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm because we do not agree with the majority's conclusion that the "reckless disregard" standard of liability is not applicable to this action (see Vehicle and Traffic Law § 1104 [e]).

On the afternoon of September 20, 2004, defendant John DiDomenico, a Monroe County Deputy Sheriff (hereafter, Deputy), was on routine patrol in a marked police vehicle when he received a radio dispatch to respond to a report of a stolen vehicle in Henrietta. While the Deputy was responding to that dispatch, he received a second radio dispatch requesting that a backup unit assist another deputy in responding to a burglary on Leo Road, also in Henrietta. The burglary was classified as a "priority one" call, which is the highest priority classification. The Deputy acknowledged receipt of the request for assistance and advised the police dispatcher by radio that he would respond to the request for backup for the burglary before he responded to the stolen vehicle report. A red dispatch signal then flashed on the mobile data terminal (MDT) located inside the Deputy's vehicle. The Deputy touched the MDT screen to view the job card, which displays additional information concerning a dispatch, including the address of the incident and nearby cross streets. Because the Deputy was not familiar with the location of Leo Road, he looked down at the screen for approximately two to three seconds to view the cross streets. The Deputy was traveling below the speed limit at that time. When the Deputy looked back up at the road, he noticed that the traffic in front of him had slowed down. He applied the brakes of his vehicle, but he was unable to bring the vehicle to a complete stop before re-entending the vehicle driven by plaintiff.

On these facts, the majority concludes that the Deputy is not entitled to the heightened standard of liability afforded to drivers of authorized emergency vehicles under Vehicle and Traffic Law § 1104 (e), i.e., the reckless disregard standard, as opposed to that of ordinary negligence. We cannot agree with the majority. The Deputy was operating an "authorized emergency vehicle" within the meaning of Vehicle and Traffic Law § 101 and was engaged in an "emergency operation" within the meaning of Vehicle and Traffic Law §§ 114-b and 1104 (a) at the time of the collision. Thus, in our view, the Deputy is entitled to the benefits of Vehicle and Traffic Law § 1104, including the protection from civil liability in the absence of conduct demonstrating reckless disregard for the safety of others (§ 1104 [e]; see *Criscione v City of New York*, 97 NY2d 152, 158).

Initially, we note that the contention upon which the majority relies in its decision - i.e., that the reckless disregard standard of liability contained in Vehicle and Traffic Law § 1104 (e) does not apply to this action because the Deputy's conduct did not fall within any of the four categories of privileged conduct set forth in section 1104 (b) - was not raised by plaintiff in Supreme Court. Indeed, that contention was raised for the first time in plaintiff's reply brief and thus is not properly before us (see *Matter of State of New York v Zimmer* [appeal No. 4], 63 AD3d 1563; *Turner v Canale*, 15 AD3d 960, lv denied 5 NY3d 702), inasmuch as neither defendants nor the motion court were afforded the opportunity to address it. In the motion court, plaintiff contended that the Deputy was not entitled to qualified immunity under section 1104 (e) for two reasons only: (1) that the Deputy's road patrol car was not a "police vehicle" within the meaning of section 1104 (c), and (2) that the Deputy was not engaged in an "emergency operation" at the time of the accident. It is beyond dispute that the purpose of the preservation rule is to enable an opposing party to respond to a particular argument and to enable the court deciding the matter in the first instance to address the argument. As the Court of Appeals recently reiterated, "[w]e are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made" (*Misicki v Caradonna*, 12 NY3d 511, 519).

With respect to the merits, the majority assumes only for the sake of argument that the Deputy was engaged in an "emergency operation" at the time of the collision (see Vehicle and Traffic Law §§ 114-b, 1104 [a]). In our view, however, there is no question that the Deputy was engaged in an emergency operation at the time of the accident. "Prevailing case law leaves no doubt that a police officer in a patrol vehicle responding to a police call or dispatch is engaged in an emergency operation within the meaning of Vehicle and Traffic Law § 114-b" (*O'Banner v County of Sullivan*, 16 AD3d 950, 952; see § 114-b [defining "emergency operation" as the operation "of an authorized emergency vehicle, when such vehicle is . . . responding to" a police call]; *Criscione*, 97 NY2d at 157-158; *Hughes v Chiera*, 4 AD3d 872). Indeed, as we wrote in *Allen v Town of Amherst* (8 AD3d 996, 997), "all police officers in patrol vehicles responding to police calls are involved in an emergency operation within the meaning of Vehicle and Traffic Law § 114-b." At the time of the accident, the Deputy was operating a patrol vehicle and was responding to a police dispatch concerning a potential burglary in progress. He was therefore involved in an "emergency operation" within the meaning of the statute (see *id.*).

We further respectfully disagree with the conclusion of the majority that the reckless disregard standard of liability is limited to conduct falling within the "four categories of privileged activity set forth in section 1104 (b)." In our view, the majority's conclusion is unsupported by a plain reading of the statute and runs contrary to the legislative purpose of section 1104. Vehicle and Traffic Law § 1104 (a) provides that "[t]he driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but subject to the

conditions herein stated." Section 1104 (b) provides that the driver of an authorized emergency vehicle may engage in certain conduct that would otherwise constitute a violation of the Vehicle and Traffic Law including, inter alia, proceeding past a red light or stop sign without coming to a complete stop, exceeding the maximum speed limit, and driving the wrong way down a street. Finally, section 1104 (e) states generally that "[t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others."

As is clear from the terms of Vehicle and Traffic Law § 1104, read as a whole, section 1104 (b) does not exempt a driver of an emergency vehicle from liability when engaged in the conduct set forth therein; rather, that subdivision gives statutory permission to engage in such conduct. As a consequence, a police officer who is speeding or drives through a red light while responding to an emergency may not be charged with a traffic violation and is not subject to civil liability on that basis alone (see *Saarinen v Kerr*, 84 NY2d 494, 503; *Turini v County of Suffolk*, 8 AD3d 260, 262, lv denied 3 NY3d 611; *Herod v Mele*, 62 AD3d 1269, 1270). The statute does not expressly provide, nor in our view can it be fairly implied therefrom, that engaging in conduct other than that enumerated in section 1104 (b) automatically subjects a police officer to an ordinary negligence standard. To the contrary, the exemption from liability is contained in section 1104 (e) (see *Saarinen*, 84 NY2d at 497), and it is for any conduct that does not rise to the level of recklessness (see *Criscione*, 97 NY2d at 158), regardless of whether such conduct is expressly privileged by section 1104 (b).

In our view, the construction of Vehicle and Traffic Law § 1104 endorsed by the majority undermines the legislative purpose of the statute, "i.e., affording operators of emergency vehicles the freedom to perform their duties unhampered by the normal rules of the road" (*Saarinen*, 84 NY2d at 502; see also *Ayers v O'Brien*, \_\_\_ NY3d \_\_\_ [Dec. 17, 2009]), and would thus lead to an unintended and undesirable result. As the Court of Appeals explained in *Saarinen*,

"use of the undemanding ordinary negligence test . . . would lead to judicial 'second guessing' of the many split-second decisions that are made in the field under highly pressured conditions. Further, the possibility of incurring civil liability for what amounts to a mere failure of judgment could deter emergency personnel from acting decisively and taking calculated risks in order to save life or property or to apprehend miscreants. The 'reckless disregard' test, which requires a showing of more than a momentary judgment lapse, is better suited to the legislative goal of encouraging emergency personnel to act swiftly and resolutely while at the same time protecting the public's safety to

the extent practicable" (*id.*).

That reasoning applies with equal force to the facts of this case. Under the majority's construction of the statute, the conduct of the Deputy would be measured according to the reckless disregard standard of liability had he been speeding or had he collided with plaintiff's vehicle while running a red light or a stop sign. By stark contrast, however, the majority's construction of the statute renders his comparatively less culpable conduct - i.e., taking his eyes off the road for a matter of seconds to ascertain the location of the burglarized premises - subject to liability under an ordinary negligence standard. Such a construction cannot be what the Legislature intended in enacting the statute. It is axiomatic that statutes are to be "given a reasonable construction, it being presumed that a reasonable result was intended by the Legislature" (McKinney's Cons Laws of NY, Book 1, Statutes § 143), and that "[t]he primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature" (§ 92 [a]).<sup>1</sup>

Significantly, New York courts - including the Court of Appeals - have not limited the application of the reckless disregard standard to cases that involve the conduct listed in section 1104 (b) and, in fact, have applied that heightened standard to cases involving facts similar to the case at bar (*see e.g. Szczerbiak v Pilat*, 90 NY2d 553, 557 [applying reckless disregard standard where police officer struck the plaintiffs' decedent while glancing down momentarily to activate his emergency lights and headlights]; *O'Banner*, 16 AD3d at 952 [deputy's actions properly measured according to reckless disregard standard where deputy, who was not speeding, collided with a vehicle after looking over his shoulder in an attempt to identify a passing vehicle]; *Hughes*, 4 AD3d 872 [applying reckless disregard standard where collision occurred while police officer looked down to replace his microphone after responding to a radio dispatch]; *see also Martin v Miller*, 255 AD2d 816, 817 [plaintiffs contended that the "reckless disregard" standard did not apply because the officer was not speeding and the use of his lights constituted an unprivileged violation of Vehicle and Traffic Law § 375 (3) and that contention was rejected by court]).

Moreover, this Court has consistently held that the only conditions that must be present in order to apply the reckless disregard standard of liability under section 1104 (e) are that the officer is operating an authorized emergency vehicle and that he or

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<sup>1</sup>We note that the majority's construction of the statute will also lead to the presumably unintended result that operators of snow plows and road crew vehicles are exempt from all rules of the road and their liability limited to reckless conduct (*see Vehicle and Traffic Law § 1103 [b]; Riley v County of Broome*, 95 NY2d 455, 459-461), while operators of authorized emergency vehicles who arguably serve a greater public purpose will be entitled to the protection of section 1104 (e) only in situations in which they engage in the conduct specified in section 1104 (b).

she is engaged in an emergency operation (see e.g. *Herod*, 62 AD3d at 1270; *Yerdon v County of Oswego*, 43 AD3d 1437; *Sierk v Frazon*, 32 AD3d 1153, 1155; *Palmer v City of Syracuse*, 13 AD3d 1229; *Hughes*, 4 AD3d 872). Other courts have similarly interpreted the statute (see e.g. *Gonyea v County of Saratoga*, 23 AD3d 790 [3d Dept]; *Rodriguez v Incorporated Vil. of Freeport*, 21 AD3d 1024 [2d Dept]). Plaintiff has not cited, nor have we found, a single case restricting the application of section 1104 (e) to cases involving conduct that falls within the four categories of privileged activity set forth in section 1104 (b). We see no reason to depart from well-settled case law in order to carve out an exception to the applicability of the reckless disregard standard of liability under the facts of this case.

We thus conclude that, inasmuch as the accident occurred while the Deputy was operating a police vehicle and while he was engaged in an emergency operation, his conduct should be measured according to the reckless disregard standard of liability set forth in section 1104 (e), not ordinary negligence (see Vehicle and Traffic Law § 1104 [a], [e]; see generally *Herod*, 62 AD3d at 1270). Even in the event that it can be said that the Deputy was negligent in briefly taking his eyes off the road to ascertain the location of the burglarized premises, that " 'momentary judgment lapse' [would] not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach" (*Szczerbiak*, 90 NY2d at 557). We therefore would affirm the order.

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

**1104**

**CA 08-02182**

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

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ALAN J. HERDZIK, INDIVIDUALLY AND AS PARENT  
AND NATURAL GUARDIAN OF SCOTT HERDZIK,  
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

TOM CHOJNACKI AND CHERYL CHOJNACKI,  
INDIVIDUALLY, DEFENDANTS-RESPONDENTS,  
JAMES LOMMER, SR. AND MARIA LOMMER,  
INDIVIDUALLY,  
DEFENDANTS-RESPONDENTS-APPELLANTS,  
ET AL., DEFENDANTS.

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JAMES LOMMER, SR., ET AL.,  
THIRD-PARTY PLAINTIFFS,

V

HOWARD MICHEL AND COLLEEN MICHEL, INDIVIDUALLY  
AND AS PARENTS AND NATURAL GUARDIANS OF JUSTIN  
MICHEL, AND JUSTIN MICHEL, THIRD-PARTY  
DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 1.)

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CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ARTHUR A. HERDZIK OF  
COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (LEO T. FABRIZI OF COUNSEL),  
FOR DEFENDANTS-RESPONDENTS.

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS-APPELLANTS.

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Appeal and cross appeal from an order of the Supreme Court, Erie  
County (Gerald J. Whalen, J.), entered May 15, 2008 in a personal  
injury action. The order, inter alia, denied the cross motion of  
plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is  
unanimously modified on the law by denying in part the motion of  
defendants Tom Chojnacki and Cheryl Chojnacki, individually and as  
parents and natural guardians of Derek Chojnacki, and Derek Chojnacki  
and reinstating the complaint against defendants Tom Chojnacki and  
Cheryl Chojnacki, individually, and by granting that part of the cross

motion for partial summary judgment on the issue of negligence and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action, individually and on behalf of his son, Scott, seeking damages for injuries sustained by Scott when he was struck by a paintball pellet. As against defendants Tom Chojnacki and Cheryl Chojnacki (defendant parents), plaintiff alleged that they provided the paintball gun used by defendant Derek Chojnacki, their son, that caused Scott's injuries. Plaintiff alleged that defendant parents violated Penal Law § 265.10 (5) and that their son violated Penal Law § 265.05. Plaintiff further alleged that defendants James Lommer, Sr. and Maria Lommer, the owners of the property where the incident occurred (defendant property owners), were liable for failure to exercise reasonable care and permitting an untrained individual to use a dangerous instrumentality that constituted an unreasonable risk to others. Plaintiff in addition alleged that defendant property owners and their two sons, who participated in the paintball game, committed statutory violations. Defendant property owners and their sons in turn commenced a third-party action against Justin Michel, who also participated in the paintball game, and his parents.

Third-party defendants thereafter moved for summary judgment dismissing the third-party complaint, and defendant parents and their son and defendant property owners and their sons moved for summary judgment dismissing the complaint in the main action against them. Plaintiff cross-moved for partial summary judgment on the issues of negligence and proximate cause, i.e., liability, against defendant parents and defendant property owners. The moving defendants as well as third-party defendants asserted that Scott assumed the risk that he would be struck by a paintball because that was "the object of the game," thus asserting that plaintiff was barred from recovery based on the doctrine of primary assumption of the risk.

With respect to the order in appeal No. 1, Supreme Court concluded that neither defendant parents nor third-party defendants provided paintball equipment to Scott, and that the equipment was provided "solely by" defendant property owners. The court further concluded that there was no evidence in the record to indicate that any of the children did anything "other than play paint ball in the proper manner." The court, however, also concluded that there was an issue of fact whether Scott appreciated the nature of the risks associated with playing paintball while wearing the allegedly loose and improper goggles provided by defendant property owners. The court in addition found that there was an issue of fact whether the proximate cause of the accident was the nature of the goggles provided by defendant property owners. The court thus denied that part of the motion of defendant property owners in their individual capacity but granted it insofar as the complaint was asserted against them in their capacity as parents and against their sons. The court, however, granted the motions of defendant parents and their son and third-party defendants.

With respect to plaintiff's cross motion, also addressed in the

order in appeal No. 1, the court determined that there was no evidence that defendant property owners provided the gun or the ammunition that was used to shoot Scott and, with respect to defendant parents, there was no proof "that the gun used by [their son] was propelled by a spring or air," thus implicitly determining that Penal Law § 265.05 is inapplicable. The court therefore denied plaintiff's cross motion for partial summary judgment in its entirety.

Following the issuance of the order in appeal No. 1, a trial on liability was held involving only plaintiff and defendant property owners in their individual capacity. The jury found that defendant property owners were not negligent and thus returned a verdict in their favor. In appeal No. 2, plaintiff appeals from the judgment entered upon that jury verdict.

We agree with plaintiff in appeal No. 1 that the court erred in denying that part of plaintiff's cross motion for partial summary judgment on the issue of negligence against defendant parents in their individual capacity. Preliminarily, we note that the court erred in implicitly concluding that a paintball gun does not fall within the scope of Penal Law § 265.05 based on its statement that plaintiff did not offer "any proof that the gun used by [the son of defendant parents] was propelled by a spring or air" (see *DiSilvestro v Samler*, 32 AD3d 987). It is undisputed that a paintball gun uses "spring or air" as the propelling force within the meaning of Penal Law § 265.05, which prohibits the unlawful possession of weapons by persons under 16. There is no question that defendant parents provided their son with a paintball gun and that their son was at that time under the age of 16. Therefore, defendant parents violated Penal Law § 265.10 (5), which provides in relevant part that "[a]ny person who disposes of any of the weapons . . . specified in section 265.05 to any other person under the age of sixteen years is guilty of a class A misdemeanor." We agree with plaintiff that, under those circumstances, the court erred in denying that part of plaintiff's cross motion for partial summary judgment on the issue of negligence against defendant parents in their individual capacity. The court thus also erred in granting that part of the motion of defendant parents for summary judgment dismissing the complaint against them in their individual capacity. Purchasing and then giving a paintball gun to an underage child violates Penal Law § 265.10 (5) and constitutes negligence per se (see *DiSilvestro*, 32 AD3d at 988-989; see generally *Elliot v City of New York*, 95 NY2d 730, 734). We therefore modify the order accordingly.

We further note that Penal Law § 265.10 (5) proscribes providing "weapons, instruments, appliances or substances specified in section 265.05 to any other person" under the age of 16 years and that Penal Law § 265.05 specifies that it is unlawful for a person under the age of 16 to possess "any loaded or blank cartridges or ammunition therefor," i.e., for the instruments or weapons set forth in the statute. Thus, pursuant to Penal Law § 265.10 (5), it is unlawful to provide ammunition for a paintball gun to a person under the age of 16. We thus further conclude that the court erred in denying that part of plaintiff's cross motion for partial summary judgment on negligence against defendant property owners in their individual

capacity based on their violation of Penal Law § 265.10 (5), because the record establishes that they provided some of the ammunition that was used by the participants in the game. The evidence before the court in the context of the motions and cross motion established that several of the boys brought ammunition that was shared collectively and that neither plaintiff's son nor the son of defendant parents was able to identify who brought the pellet that the son of defendant parents used to shoot plaintiff's son. We therefore further modify the order accordingly. We note that we are affirming those parts of the order in appeal No. 1 denying plaintiff's cross motion with respect to proximate cause.

Based on our determination in appeal No. 1 that the issue of negligence was not properly before the jury, we reverse the judgment in appeal No. 2 and grant a new trial on the issue of proximate cause only. In light of our determination granting a new trial, we address plaintiff's contention in appeal No. 2 that the court erred in refusing to charge the jury on the appropriate standard of care owed by defendant property owners to plaintiff's son. Nevertheless, we reject that contention, inasmuch as we conclude that the court properly refused to charge PJI 2:114, concerning the duties of property owners (*cf. Lasek v Miller*, 306 AD2d 835). The court also properly refused to give three charges derived from PJI 2:24, concerning the common law standard of care for a voluntarily assumed duty. There is no evidence in the record that there was an improvident use of the paintball gun, and thus there is no basis for those three charges based on a duty voluntarily assumed by defendant property owners to plaintiff's son (*see generally Nolechek v Gesuale*, 46 NY2d 332, 338).

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

1105

CA 08-02183

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

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ALAN J. HERDZIK, INDIVIDUALLY AND AS PARENT  
AND NATURAL GUARDIAN OF SCOTT HERDZIK,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JAMES LOMMER, SR. AND MARIA LOMMER,  
DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 2.)

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CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ARTHUR A. HERDZIK OF  
COUNSEL), FOR PLAINTIFF-APPELLANT.

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from a judgment of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered August 28, 2008 in a personal injury action. The judgment dismissed the complaint against defendants 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, the complaint against defendants is reinstated and a new trial is granted on the issue of proximate cause only.

Same Memorandum as in *Herdzik v Chojnacki* ([appeal No. 1] \_\_\_\_ AD3d \_\_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1220

CA 09-00696

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

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CLIFFORD B. PHILIPS, ET AL., PLAINTIFFS,

V

ORDER

DAVID C. ELLSWORTH, ET AL., DEFENDANTS.

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JARROD W. SMITH, ESQ., P.L.L.C., APPELLANT;

MEVEC & COGNETTI, RESPONDENT.

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HARRIS & PANELS, SYRACUSE (MICHAEL W. HARRIS OF COUNSEL), FOR APPELLANT.

MEVEC & COGNETTI, SYRACUSE (RALPH A. COGNETTI OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered July 1, 2008. The order, insofar as appealed from, awarded attorney's fees in the amount of \$13,166.44 to Mevec & Cognetti.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1228.2**

**CAF 09-00117**

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

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IN THE MATTER OF RICHELIS S.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RICHARD S., RESPONDENT-RESPONDENT.

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CHARLES D. HALVORSEN, ESQ., ATTORNEY FOR  
THE CHILD, APPELLANT.

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

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

THOMAS R. LOCHNER, WILLIAMSVILLE, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 7, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order dismissed the petition seeking to revoke a suspended judgment and to terminate respondent's parental rights.

It is hereby ORDERED that the order so appealed from is reversed on the law and facts without costs, the petition is granted, the guardianship and custody of the child are committed to petitioner and the matter is remitted to Family Court, Erie County, for the initial freed child permanency hearing to be commenced within 30 days of the date of entry of the order of this Court.

Memorandum: In this proceeding, the attorney for the child appeals from an order that dismissed the petition seeking revocation of a suspended judgment and termination of the parental rights of respondent father with respect to the subject child. We agree with the attorney for the child and petitioner, Erie County Department of Social Services (DSS), that Family Court erred in dismissing the petition and should have freed the child for adoption. We note at the outset that the father contends that the petition was properly dismissed because DSS failed to comply with 22 NYCRR 205.50 (d) (1) and thus that the court did not acquire personal jurisdiction over him. Indeed, the father is correct that DSS should have filed a motion or an order to show cause rather than a summons with notice and petition. The father raised that contention for the first time in a

post-hearing memorandum of law and thus waived it, inasmuch as he already had participated in the proceedings (see generally *Matter of El-Sheemy v El-Sheemy*, 35 AD3d 738). In any event, any error is harmless because the father received the requisite notice.

Turning to the merits, we conclude that DSS established by a preponderance of the evidence that the father violated the conditions of the suspended judgment (see *Matter of Seandell L.*, 57 AD3d 1511, *lv denied* 12 NY3d 708; *Matter of Amber AA.*, 301 AD2d 694, 696). The record establishes that the father did not contact the psychologist with whom he was directed to meet for three months and failed to secure housing sufficient to promote and maintain a healthy environment for the child. Moreover, the father could not recall what type of special educational services or treatment the child received, and he did not know the nature of the disability for which the child was receiving treatment.

We further conclude that the court should have terminated the father's parental rights and freed the child for adoption. The hearing on the issue whether the father violated the terms of the suspended judgment " 'was part of the dispositional phase of this [permanent neglect] proceeding' " (*Matter of Robert T.*, 270 AD2d 961, 961, *lv denied* 95 NY2d 758), and " 'the order of disposition shall be made . . . solely on the basis of the best interests of the child' " (*Matter of Saboor C.*, 303 AD2d 1022, 1023, quoting Family Ct Act § 631). Here, although the court did not revoke the suspended judgment and thus did not engage in a best interests analysis, the record is sufficient for this Court to determine the best interests of the child (see *Matter of Brian C.*, 32 AD3d 1224, 1225, *lv denied* 7 NY3d 717). "In the exercise of our independent power of factual review" (*id.*), we find that the evidence at the hearing established that terminating the father's parental rights and freeing the child for adoption is in the child's best interests (see *Matter of Lionel Burton W.*, 30 AD3d 355). The evidence at the hearing established that attempts to reunite the child with the father resulted in psychological trauma to the child. Moreover, a court-appointed special advocate who observed the child failed to see any signs of affection between the father and the child, and strongly opposed reunification. Consequently, we agree with the attorney for the child that the court erred in dismissing the petition seeking to revoke the suspended judgment and to terminate the father's parental rights, and should have found that terminating the father's parental rights and freeing the child for adoption is in the child's best interests (see generally *Matter of Christopher J.*, 60 AD3d 1402; *Matter of Seandell L.*, 57 AD3d 1511, *lv denied* 12 NY3d 708; *Matter of Michael D.H.*, 56 AD3d 1269).

All concur except SMITH, J.P., and CARNI, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent inasmuch as we disagree with our colleagues that petitioner, Erie County Department of Social Services (DSS), established by a preponderance of the evidence that respondent father violated the conditions of the suspended judgment. We therefore would affirm the order. Pursuant to the terms of the suspended judgment, the father

was required to "obtain and maintain adequate housing in preparation for the child to be returned home." A permanency planner for DSS testified that the father's residence "was an appropriate home," and Family Court in turn determined that the father had "secured a stable home environment for his family," including the child who is the subject of this proceeding. The court, with its direct access to the parties, was in the best position to evaluate their testimony, character and sincerity, and thus the court's determination is entitled to great deference (see *Matter of Christyn Ann D.*, 26 AD3d 491, 492-493). Here, the court determined that the bond of the child with her foster mother was the result of "[DSS] and [its] subcontracted agency not encouraging or sustaining the bond between [the father] and his daughter." Under these circumstances, we agree with the court that the diminished bond between the father and the child does not provide a basis to determine that it is in the best interests of the child to terminate the father's parental rights. The Court of Appeals has strongly cautioned against comparing a child's emotional ties that naturally develop with a foster parent to the emotional ties between a child and his or her biological parent (see *Matter of Michael B.*, 80 NY2d 299, 313). Stated another way, "[t]o use the period during which a child lives with a foster family, and emotional ties that naturally eventuate, as a ground for comparing the biological parent with the foster parent undermines the very objective of voluntary foster care as a resource for parents in temporary crisis, who are then at risk of losing their children once a bond arises with the foster families" (*id.*). In our view, the majority's determination is founded upon that which the Court of Appeals has cautioned against.

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

**1244**

**CA 08-02551**

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

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IN THE MATTER OF JOHN R. SCHIENER, AS PRESIDENT  
OF CONCERNED CITIZENS OF SARDINIA,  
PETITIONER-RESPONDENT,

V

ORDER

TOWN OF SARDINIA, RESPONDENT-APPELLANT,  
ET AL., RESPONDENTS.

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DIFILIPPO & FLAHERTY, P.C., EAST AURORA (ANTHONY DIFILIPPO, III, OF  
COUNSEL), FOR RESPONDENT-APPELLANT.

BLAIR & ROACH, LLP, TONAWANDA (J. MICHAEL LENNON OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

HARRIS BEACH, PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR  
RESPONDENTS WASTE MANAGEMENT OF NEW YORK, LLC AND WASTE MANAGEMENT OF  
NEW JERSEY, INC.

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Appeal from a judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered February 25, 2008 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on October 20, 2009 and filed in the Erie County Clerk's Office on December 1, 2009,

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1246**

**CA 09-00711**

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

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IN THE MATTER OF VIOLA DICKINSON,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

RICHARD F. DAINES, M.D., COMMISSIONER,  
NEW YORK STATE DEPARTMENT OF HEALTH,  
RESPONDENT-APPELLANT,  
ET AL., RESPONDENT.

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

WOODS OVIATT GILMAN LLP, ROCHESTER (RENÉ H. REIXACH OF COUNSEL), AND  
STEPHEN J. MCMAHON, CAMILLUS, FOR PETITIONER-RESPONDENT.

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered December 3, 2008 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul an "Amended Decision after Fair Hearing" (hereafter, amended determination) of respondent Commissioner of the New York State Department of Health (DOH) denying her application for Medicaid coverage on the ground that it was issued more than 90 days after her request for a fair hearing. We conclude that Supreme Court erred in granting the petition.

The record establishes that petitioner's initial application for Medicaid was denied, and that petitioner requested a fair hearing on June 14, 2007. The fair hearing was held 91 days later, and a determination granting petitioner's application was issued 99 days following the fair hearing. On February 4, 2008, 45 days after issuance of that determination, the Onondaga County Department of Social Services (DSS) requested "reconsideration" of the determination. One month after the request, an amended determination denying the application was issued. In granting the petition, the court concluded that DOH was required to take "final administrative action" within the 90-day period set forth in subdivision (a) of 18 NYCRR 358-6.4. That was error, inasmuch as DOH had the power to

review the initial determination beyond the 90-day period set forth in the regulation in question.

As a general rule, where an agency is directed by the Legislature to take action within a specific time frame, "such [time frame] will be considered directory, absent evidence that such requirements were intended by the Legislature as a limitation on the authority of the body or officer" (*Matter of City of New York v Novello*, 65 AD3d 112, 116; see *Matter of Grossman v Rankin*, 43 NY2d 493, 501). Where, however, legislation providing for an administrative determination explicitly prescribes the time frame for making a determination and provides that the agency is required to act within the specified time frame, there is "an unmistakable limitation on the [agency's] authority to act" beyond that time frame (*Novello*, 65 AD3d at 116). Here, Social Services Law § 364, the statute directing DOH to "establish[] and maintain[] standards for medical care and eligibility," does not mandate any time frame for "making final administrative determinations and issuing final decisions concerning such matters" (§ 364 [2] [h]). Indeed, the statute expresses no legislative intent that the failure of DOH to act within the regulatory time frame will deprive the agency of the power to act. We therefore conclude that the 90-day period in the regulation in question does not reflect a legislative intent to deprive DOH of the power to act on petitioner's Medicaid application based on the failure of DOH to take final administrative action on the application within 90 days. Thus, DOH retained the power to act on petitioner's application beyond the 90-day period set forth in the regulation in question (*cf. Novello*, 65 AD3d at 116-117).

We reject the court's conclusion that it was unreasonable for DOH to seek review of the initial determination 45 days after the determination was issued. The regulations contain no prescribed time period for seeking such review, and we conclude that 45 days is a reasonable time period in which DOH is entitled to seek "review [of] an issued fair hearing decision" (18 NYCRR 358-6.6 [a] [1]; *cf. Gomolisky v Davis*, 716 NE2d 970 [Ind]). We thus agree with DOH that the amended determination was properly issued pursuant to 18 NYCRR 358-6.6 (a).

We recognize that, as noted by the dissent, there are circumstances in which public assistance determinations must be made promptly (see generally *Goldberg v Kelly*, 397 US 254, 264). The Medicaid application here, however, involves no such exigent circumstances (see generally 18 NYCRR 360-2.4 [c]). If such exigent circumstances had been present, petitioner would have been entitled to priority with respect to the hearing and determination (see 18 NYCRR 358-3.2 [b] [9]).

Finally, we reject petitioner's contention that DSS was required to take an appeal from the judgment in order to avoid being bound by the initial determination. In light of our conclusion that the amended determination was properly issued, DSS is bound by that amended determination (see 18 NYCRR 358-6.6 [a]).

All concur except GREEN AND GORSKI, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent, and would affirm the judgment. The conclusion of the majority that the time limitation set forth in 18 NYCRR 358-6.4 (a) should not be considered mandatory stems from its belief that the regulation reflects only administrative intent, not legislative intent. The Legislature, however, enacted Social Services Law § 364 "[t]o assure that the medical care and services rendered pursuant to this title are of the highest quality and are available to all who are in need." In order to implement that policy, the statute authorizes the New York State Department of Health (DOH) to "mak[e] policy, rules and regulations for maintaining a system of hearings for applicants and recipients of medical assistance adversely affected by the actions of the department or social service districts and for making final administrative determinations and issuing final decisions concerning such matters" (§ 364 [2] [h]). Here, the regulation in question provides that "definitive and final administrative action must be taken promptly" (18 NYCRR 358-6.4 [a]), thus ensuring that services are available *when* they are in fact needed. Notably, 18 NYCRR 358-6.4 applies not only to Medicaid determinations, as in the instant case, but it also applies to household benefits such as food assistance and home energy assistance, as well as to protective services for children and adults (see 18 NYCRR 358-1.1, 358-2.20). Timely definitive and final resolutions of questions of eligibility for such programs are imperative inasmuch as "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he [or she] waits" (*Goldberg v Kelly*, 397 US 254, 264). We therefore conclude that the plain language of the regulation itself, i.e., the affirmative directive that "definitive and final administrative action must be taken promptly," with the further directive that such action must "in no event [be taken] more than 90 days from the date of the request for a fair hearing," necessitates the conclusion that the regulation imposes a mandatory time limitation upon the Commissioner of DOH (respondent) (18 NYCRR 358-6.4 [a]; see *Matter of City of New York v Novello*, 65 AD3d 112, 116). Further, we believe that the 90-day limitation applies regardless of whether a recipient is also entitled to priority under 18 NYCRR 358-3.2.

Even assuming, *arguendo*, that the time limitation in 18 NYCRR 358-6.4 (a) may be deemed discretionary, we conclude that respondent nevertheless is "not permit[ted] . . . to ignore completely the specific [administrative] provisions for timely action" (*State Div. of Human Rights v Rinas*, 42 AD2d 388, 390). In our view, respondent's determination to amend the initial determination following a fair hearing more than eight months after petitioner requested the fair hearing is an abuse of any discretion afforded by the regulation in question. We consider the delay unconscionable, as well as contrary to both the legislative and administrative intent (see *generally*

Social Services Law § 364; 18 NYCRR 358-6.4 [a]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1249**

**CA 09-00847**

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

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MICHAEL AQUINO, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL HIGGINS, DEFENDANT,  
JOHN HIGGINS AND HEATHER HIGGINS,  
DEFENDANTS-APPELLANTS-RESPONDENTS.

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DENNIS J. BISCHOF, LLC, WILLIAMSVILLE (DENNIS J. BISCHOF OF COUNSEL),  
FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered February 20, 2009. The order and judgment granted in part and denied in part the motion of defendants John Higgins and Heather Higgins for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is modified on the law by granting in its entirety the motion of defendants John Higgins and Heather Higgins and dismissing the complaint against them and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while he was a passenger in a vehicle that was driven by then 19-year-old defendant Michael Higgins and was owned by his parents (hereafter, defendant parents). We conclude that Supreme Court erred in denying that part of the motion of defendant parents seeking summary judgment dismissing the fourth cause of action, and we therefore modify the order and judgment by granting in its entirety their motion for summary judgment and dismissing the complaint against them. Plaintiff alleged in the fourth cause of action that defendant parents were negligent because they failed to ensure that plaintiff, who was a minor at the time of the accident, had a safe means of returning home from the party hosted by them, in light of their knowledge that alcohol had been consumed by guests at the party.

The record establishes that defendant parents permitted their daughter to host a party at their residence following a high school dinner dance and that defendant father expressly told his daughter that defendant parents would not permit any alcohol to be served. The

record further establishes that defendant parents provided food, soda and water for the daughter's guests. Although defendant parents observed the guests arrive, they did not observe anyone take alcohol into the basement where the party was held. Defendant parents were not aware that there was alcohol present at the party until defendant mother entered the basement at the end of the party and observed approximately 12 beer cans. Defendant father suspected that his son, defendant Michael Higgins, had been drinking, and he escorted his son to the son's bedroom and instructed the son to go to bed. Meanwhile, defendant mother asked the guests whether anyone needed a ride home, but no one accepted the offer. Defendant parents had each observed the guests after discovering the alcohol, and they each testified at their depositions that none of the guests appeared to be intoxicated. Plaintiff, however, presented the deposition testimony of other guests who testified that plaintiff appeared to be intoxicated. Defendant parents were unaware that their son had left the house to drive plaintiff and another person home until they were notified of the accident that is the subject of this action.

In denying that part of the motion seeking summary judgment dismissing the fourth cause of action, the court determined that there is an issue of fact whether defendant parents provided adequate supervision for the guests at their daughter's party. Plaintiff contended in opposition to that part of the motion that defendant parents were negligent in failing to ensure that the guests had adequate transportation home.

In order to establish a prima facie case of negligence against defendant parents, plaintiff must demonstrate that they owed a duty to him; that the duty was breached; and that he was injured as a result of that breach of duty (see *Mary A. Z.Z. v Blasen*, 284 AD2d 773, 774). We conclude that defendant parents met their initial burden of establishing that they were not negligent and that plaintiff failed to raise an issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Although it is of course well established that a landowner may be liable for injuries caused by an intoxicated guest on the landowner's property, or in an area under the landowner's control (see *D'Amico v Christie*, 71 NY2d 76, 85), here, plaintiff was injured in a vehicle driven by defendant son on a public road, 5 to 10 minutes from defendant parents' home (see *Lombart v Chambery*, 19 AD3d 1110, 1111). In *Lombart*, the defendant grandmother permitted alcohol to be served to individuals under the legal drinking age, including the plaintiff, and we concluded that the claim against the defendant grandmother was properly dismissed inasmuch as the plaintiff was injured in an accident "miles away" from defendant's property (*id.*).

In a case involving a minor plaintiff, the Second Department determined that the defendants were not liable for injuries sustained by the plaintiff, who was struck by a vehicle after leaving a party at the defendants' home (*Rudden v Bernstein*, 61 AD3d 736). The party was attended by 13- and 14-year-old children who had consumed alcohol during the party on property that was near the defendants' property (*id.* at 738). The defendant parents in that case became aware that

children were intoxicated before the children left the party. The Second Department noted, however, that the defendant parents did not serve alcohol and that the defendant mother observed the plaintiff and other children walk toward a vehicle parked on the roadway, when in fact the plaintiff and another child walked home, at which time the plaintiff was struck by a vehicle.

Although a person other than a parent has a duty to use reasonable care to protect an infant over whom that person has assumed temporary custody or control (see *Appell v Mandel*, 296 AD2d 514), such a person is not an insurer of the safety of that infant (see *Moreno v Weiner*, 39 AD3d 830, 831, *lv denied* 9 NY3d 807). Here, defendant parents reasonably believed that alcohol would not be served at the party (*cf. Lombart*, 19 AD3d at 1110-1111) and, upon discovering that alcohol had been served, observed the guests and believed that none of them was intoxicated (*cf. Rudden*, 61 AD3d at 737). Furthermore, defendant mother ascertained that none of the guests needed a ride home. Thus, we conclude that defendant parents satisfied their duty to provide adequate supervision for the guests at the party while the guests were under their control (see generally *id.* at 738; *Moreno*, 39 AD3d at 831). That duty does not extend to an area not within the control of defendant parents (see *Rudden*, 61 AD3d at 738; *Lombart*, 19 AD3d at 1111).

All concur except GREEN AND GORSKI, JJ., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part. Although we do not agree with the reasoning of Supreme Court in denying that part of the motion of defendant parents seeking summary judgment dismissing the fourth cause of action, we nevertheless agree with plaintiff that the court properly denied that part of the motion. In our view, there is an issue of fact with respect to the alleged negligence of defendant parents, i.e., whether they adequately ensured that plaintiff, who was a minor at the time of the accident, had a safe means of returning home from the party hosted by them, in light of their knowledge that alcohol had been consumed by guests at the party (*cf. Rudden v Bernstein*, 61 AD3d 736, 738; see generally *Moreno v Weiner*, 39 AD3d 830). In *Rudden*, a case cited by the majority, the Second Department concluded that the defendant parents were not liable for the injuries sustained by a minor who attended a party at their home because, inter alia, the alcohol was not consumed on their premises and the accident occurred after the intoxicated minor "left their property, apparently in the company of his friends and a responsible adult who was driving them home" (*id.* at 738 [emphasis added]). Here, there is evidence in the record that a significant amount of alcohol had been brought to the party by 10 or more different guests, that the alcohol was consumed on the premises, that defendant parents became aware of the alcohol prior to plaintiff's departure from the party, and that plaintiff was visibly intoxicated when he left the premises after 1:00 A.M. Unlike in *Rudden*, however, defendant parents in this case did not observe plaintiff leave in the company of a responsible adult. Thus, contrary to the conclusion of the majority, we believe that under the facts of this case defendant parents had a duty of care to ensure that

plaintiff had a safe means of transportation from their premises. We therefore would affirm.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1256**

**KA 07-01886**

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TOUSSAINT DAVIS, ALSO KNOWN AS JOHN T. HEALY,  
ALSO KNOWN AS TOUSSAINT MARTIN,  
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 (STEVEN G. COX OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered April 19, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, robbery in the first degree (12 counts) and robbery in the second degree (six counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that all sentences shall run concurrently with respect to each other and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of one count of murder in the second degree (Penal Law § 125.25 [3]), 12 counts of robbery in the first degree (§ 160.15 [1], [2]) and six counts of robbery in the second degree (§ 160.10 [1]). We reject defendant's contention that County Court erred in refusing to dismiss the indictment based on the fact that a sitting supreme court justice served as the foreperson of the grand jury. A grand jury is "impaneled by a superior court and constitut[es] a part of such court" (CPL 190.05), but a superior court is defined as "[t]he supreme court" or "[a] county court," rather than as a single entity comprised of individual justices or judges (CPL 10.10 [2]). Thus, contrary to defendant's contention, it cannot be said that every supreme court justice is "a part of" every grand jury impaneled throughout the state (CPL 190.05). We conclude that the supreme court justice who served as the grand jury foreperson was not required to recuse herself because the record establishes that she was not a part of the superior court that impaneled the grand jury herein. We further reject defendant's contention that the participation of a sitting supreme court justice on a grand jury was improper. The

Legislature repealed Judiciary Law § 511 (4), which listed "a judge of the unified court system" as a person disqualified from serving as a juror. It is within the province of the Legislature to modify, "within constitutional limits . . . , the scope of the [g]rand [j]ury's power, as well as the rules governing its formation" (*People v Williams*, 73 NY2d 84, 88). To the extent that defendant challenges the constitutionality of the repeal of Judiciary Law § 511 (4), that challenge is not properly before us in the absence of any indication in the record that the Attorney General was given the requisite notice of that challenge (see Executive Law § 71 [1]; *People v Schaurer*, 32 AD3d 1241). Even assuming, arguendo, that such notice was provided, we would nevertheless conclude that defendant has not articulated a cognizable basis for that challenge and thus has failed to meet his burden of "surmount[ing] the presumption of constitutionality accorded to legislative [action] by proof beyond a reasonable doubt" (*St. Joseph Hosp. of Cheektowaga v Novello*, 43 AD3d 139, 143, appeal dismissed 9 NY3d 988, lv denied 10 NY3d 702 [internal quotation marks omitted]; see generally *Matter of Moran Towing Corp. v Urbach*, 99 NY2d 443, 448).

We reject defendant's contention that the court erred in refusing to dismiss the indictment pursuant to CPL 210.20 (1) (c) on the ground that the grand jury proceeding was defective. Inasmuch as the grand jury foreperson was qualified to serve as a juror pursuant to Judiciary Law §§ 500 and 510, as well as CPL 190.20 (2) (b), we conclude that the grand jury was not "illegally constituted" and therefore was not defective pursuant to CPL 210.35 (1). Defendant's further contention that the grand jury proceeding was defective pursuant to CPL 210.35 (5) lacks merit because defendant failed to meet his burden of establishing "the existence of defects impairing the integrity of the [g]rand [j]ury proceeding and giving rise to a possibility of prejudice" (*People v Santmyer*, 255 AD2d 871, 871-872, lv denied 93 NY2d 902).

In addition, we reject defendant's contention that the court erred in instructing the jury with respect to the "immediate flight" element of murder in the second degree (Penal Law § 125.25 [3]). The court properly instructed the jury that it could consider "any . . . evidence presented during the trial that [it found] relevant on the issue of immediate flight," and the court did not determine as a matter of law that any police custody or arrest of defendant prior to the murder was irrelevant (*cf. People v Irby*, 47 NY2d 894, 895; see generally *People v Gladman*, 41 NY2d 123, 129). Defendant's contention that the court erred in admitting in evidence a glove found on the floor of a patrol vehicle after defendant's arrest and transport to the police station is also without merit. "Where, as here, the circumstances provide reasonable assurances of the identity and unchanged condition of the evidence, any deficiencies in the chain of custody go to the weight of the evidence and not its admissibility" (*People v Witherspoon*, 66 AD3d 1456, 1459 [internal quotation marks omitted]; see *People v Hawkins*, 11 NY3d 484, 494).

We agree with defendant, however, that the court erred in failing

to direct that all sentences shall run concurrently with respect to each other, and we therefore modify the judgment accordingly. The sentences imposed on the counts of robbery in the first and second degrees must run concurrently with the sentence imposed on the count of felony murder because the indictment did not specify which of the robbery counts served as the predicate for the felony murder count (see *People v Parks*, 95 NY2d 811, 814-815; *People v Parton*, 26 AD3d 868, 870, *lv denied* 7 NY3d 760). Further, the sentences imposed on the 18 robbery counts must run concurrently because the robberies were committed through the same act or omission (see Penal Law § 70.25 [2]; *Parton*, 26 AD3d at 869-870). In view of our determination, we do not address defendant's remaining contention.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1279**

**CAF 08-01933**

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

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IN THE MATTER OF MARY LOUISE COAN,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS N. THOMPSON, RESPONDENT-APPELLANT.

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BARNEY & AFFRONTI, LLP, ROCHESTER (BRIAN J. BARNEY OF COUNSEL), FOR  
RESPONDENT-APPELLANT.

SIEGEL, KELLEHER & KAHN, LLP, BUFFALO (STEVEN G. WISEMAN OF COUNSEL),  
FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Monroe County (Marilyn L. O'Connor, J.), entered December 11, 2007 in a proceeding pursuant to Family Court Act article 4. The order, among other things, ordered respondent to pay his share of the uninsured medical expenses for the parties' child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount awarded for uninsured medical expenses and providing that respondent shall pay his share of those expenses incurred on or after July 14, 2005 and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Monroe County, for a hearing in accordance with the following Memorandum: Family Court properly ordered respondent father to pay his share of the uninsured medical expenses for the parties' child directly to the child's health care providers (see Family Ct Act § 413 [1] [c] [former (5)]). We agree with the father, however, that the court erred in ordering him to pay uninsured medical expenses incurred prior to July 14, 2005, the date on which the order directing him to pay his share of the uninsured medical expenses was entered. We therefore modify the order accordingly.

The father further contends that the child's uninsured medical treatment was unnecessary and that the cost of the treatment was unreasonably high. Although we conclude that the father is entitled to a hearing to determine the reasonable cost of the uninsured medical expenses, we further conclude that he is not entitled to a hearing on the issue whether the treatment itself was unnecessary (see Family Ct Act § 413 [1] [c] [former (5)]; *Bruder v Aggen*, 244 AD2d 797, 799). We therefore remit the matter to Family Court for a hearing to determine the reasonable cost of those uninsured medical expenses

incurred on or after July 14, 2005.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1287**

**CA 09-01005**

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

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JAMES R. LAHEY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KATHRYN E. LAHEY, DEFENDANT-RESPONDENT.

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MEGGESTO, CROSSETT & VALERINO, LLP, SYRACUSE (JAMES A. MEGGESTO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (HARLAN B. GINGOLD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an amended order of the Supreme Court, Onondaga County (Martha Walsh Hood, A.J.), entered August 5, 2008 in a divorce action. The amended order, among other things, ordered that, pursuant to the parties' separation agreement, plaintiff shall provide defendant with \$300 per month for her lifetime.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by vacating the second, third and fourth ordering paragraphs and as modified the amended order is affirmed without costs, and the matter is remitted to Supreme Court, Onondaga County, for a hearing in accordance with the following Memorandum: In 2004 the parties entered into an Opting Out Agreement (Agreement) that was incorporated but not merged into their divorce judgment. Pursuant to paragraph 15 of the Agreement, defendant would receive payments of \$250 per month for 24 months and then \$300 per month "for her lifetime," as her share of the equitable distribution of plaintiff's retirement benefits. The record establishes that, when the Agreement was executed, defendant was aware that plaintiff was collecting his retirement benefits and that he had made an irrevocable election that did not provide survivorship benefits to defendant. In 2005 Supreme Court (Murphy, J.) denied that part of the motion of defendant "for an order compelling the Plaintiff to obtain either life insurance or an annuity sufficient in amount" to secure the \$300 lifetime monthly payment of defendant in the event that plaintiff predeceased her. In 2006 defendant moved for, inter alia, the same relief, and Supreme Court (Hood, J.) denied the motion on the ground that the 2005 order denying that part of defendant's prior motion previously determined the issue on the merits.

Defendant thereafter moved for leave to renew the 2006 motion pursuant to CPLR 2221 (e). We conclude that the court properly deemed defendant's third motion as a motion for leave to reargue despite

defendant's characterization of the motion as one for leave to renew (see *DiCienzo v Niagara Falls Urban Renewal Agency*, 63 AD3d 1663), and we further conclude that the court properly granted the third motion insofar as it sought leave to reargue. The record establishes that, by the 2005 order, the court (Murphy, J.) determined that it had insufficient information to address the merits of the 2005 motion and denied it " 'without prejudice to renew.' " Thus, the court properly granted leave to reargue inasmuch as it " 'mistakenly arrived at its earlier decision' " denying defendant's 2006 motion on the ground that the 2005 order determined the issue on the merits (*Davis v Firman*, 53 AD3d 1101, 1102; see *Gaeta v Kosek*, 273 AD2d 801).

The court, however, erred upon reargument in summarily granting the relief sought by defendant in the 2006 motion. The Agreement is ambiguous with respect to the intent of the parties in the event that defendant survives plaintiff. Indeed, the issue whether the parties intended that defendant would continue to receive payments for her lifetime or only until the retirement benefits terminated upon plaintiff's death cannot be resolved as a matter of law by reference to the Agreement (see *Finkelstein v Tainiter*, 264 AD2d 587, 588). Rather, "[r]esolution by a fact finder is required where, as here, interpretation of [an agreement] is susceptible to varying reasonable interpretations and intent must be gleaned from disputed evidence or from inferences outside the written words" (*Time Warner Entertainment Co. v Brustowsky*, 221 AD2d 268). We therefore modify the amended order accordingly, and we remit the matter to Supreme Court for a hearing to determine the intent of the parties with respect to paragraph 15 of the Agreement.

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

**1310**

**CA 09-01008**

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

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NORMAN G. HARTLOFF, PLAINTIFF-APPELLANT,

V

ORDER

LORIGO, LLC, DEFENDANT-RESPONDENT.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRIAN A. MACDONALD OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered December 4, 2008 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the complaint.

Now, upon reading and filing the stipulation to withdraw appeal signed by the attorneys for the parties on October 20, 2009,

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1313**

**CA 09-00966**

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

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TRACY DEMMIN, PLAINTIFF-RESPONDENT,

V

ORDER

STANLEY SMIECH, JOHN W. HAENLE, IV, AS  
ADMINISTRATOR OF THE ESTATE OF JOHN W.  
HAENLE, III, DECEASED, DEFENDANTS-RESPONDENTS,  
AND NEWSPAPER HOLDINGS, INC., DEFENDANT-APPELLANT.

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DAMON & MOREY LLP, BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (RICHARD A. NICOTRA OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

HAGELIN KENT LLC, BUFFALO (JOHN E. ABEEL OF COUNSEL), FOR  
DEFENDANT-RESPONDENT STANLEY SMIECH.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR  
DEFENDANT-RESPONDENT JOHN W. HAENLE, IV, AS ADMINISTRATOR OF THE  
ESTATE OF JOHN W. HAENLE, III, DECEASED.

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Appeal from an order of the Supreme Court, Niagara County (Ralph  
A. Boniello, III, J.), entered March 20, 2009 in a personal injury  
action. The order denied the motion of defendant Newspaper Holdings,  
Inc. for summary judgment.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1332**

**CA 09-00309**

PRESENT: MARTOCHE, J.P., PERADOTTO, GREEN, AND PINE, JJ.

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EMERGENCY ENCLOSURES, INC.,  
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

NATIONAL FIRE ADJUSTMENT CO., INC.,  
DEFENDANT-APPELLANT,  
AND MASTER CARE RESTORATION, INC.,  
DEFENDANT-RESPONDENT.  
(APPEAL NO. 1.)

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LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (PAUL L. LECLAIR OF  
COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

FIX SPINDELMAN BROVITZ & GOLDMAN, P.C., FAIRPORT (ROY Z. ROTENBERG OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

E. ROBERT FUSSELL P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeals from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered May 13, 2008. The order granted the motion of defendant Master Care Restoration, Inc. to dismiss the complaint against it, denied plaintiff's cross motion for leave to amend the complaint, granted plaintiff's motion to dismiss the counterclaim, and denied the cross motion of defendant National Fire Adjustment Co., Inc. for leave to amend the counterclaim.

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

Memorandum: Plaintiff commenced this action alleging, inter alia, that defendants, Master Care Restoration, Inc. (Master Care) and National Fire Adjustment Co., Inc. (NFA), conspired to injure plaintiff's business prospects and to interfere with plaintiff's contractual relationships. Plaintiff is in the business of securing, cleaning and repairing property damaged as a result of fire or weather-related disasters. Master Care is a competing provider of such services, and NFA is a firm that assists individuals and companies with fire losses in negotiations with their insurers. Plaintiff asserted nine causes of action for, inter alia, prima facie tort, tortious interference with business opportunity, unfair competition, injurious falsehood and defamation. It attached several documents to the complaint, including a letter sent by Master Care to

the Monroe County Executive indicating that an unnamed competitor was claiming an affiliation with local fire departments in order to gain an unfair advantage in accessing fire scenes and soliciting clients. Plaintiff also attached a brochure distributed by Master Care that refers to a " 'board-up guy,' " who, according to Master Care, overcharges for emergency enclosure services. NFA asserted a counterclaim for defamation, alleging that plaintiff willfully and maliciously sent a copy of the complaint, which contains false information, to a local newspaper for the purpose of damaging NFA's reputation and business.

By the order in appeal No. 1, Supreme Court granted the motion of Master Care to dismiss the complaint against it pursuant to CPLR 3211 (a) (7); denied plaintiff's cross motion for leave to amend the complaint; granted plaintiff's motion to dismiss the counterclaim; and denied NFA's cross motion for leave to amend the counterclaim.

Contrary to plaintiff's contention in appeal No. 1, Supreme Court properly granted Master Care's motion. With respect to the cause of action for prima facie tort, insofar as it is asserted against Master Care, and the cause of action for injurious falsehood, asserted only against Master Care, we conclude that plaintiff failed to plead special damages with sufficient particularity, an essential element of both causes of action (see *Epifani v Johnson*, 65 AD3d 224, 233; *L.W.C. Agency v St. Paul Fire & Mar. Ins. Co.*, 125 AD2d 371, 373). "In pleading special damages, actual losses must be identified and causally related to the alleged tortious act" (*L.W.C. Agency*, 125 AD2d at 373; see *Ginsberg v Ginsberg*, 84 AD2d 573, 574). "[G]eneral allegations of lost sales from unidentified lost customers are insufficient" (*DiSanto v Forsyth*, 258 AD2d 497, 498), and plaintiff failed to plead the requisite causal relationship between the alleged special damages and any specific action by Master Care (see *Smukler v 12 Lofts Realty*, 156 AD2d 161, 163, *lv denied* 76 NY2d 701). With respect to the prima facie tort cause of action, plaintiff also failed to allege that "a disinterested malevolence to injure plaintiff constitute[d] the sole motivation for [Master Care's] otherwise lawful conduct" (*Great Am. Trucking Co. v Swiech*, 267 AD2d 1068, 1069 [internal quotation marks omitted]; see *Backus v Planned Parenthood of Finger Lakes*, 161 AD2d 1116, 1117).

With respect to the cause of action for tortious interference with business opportunity, asserted only against Master Care, plaintiff alleged that Master Care's letter to the Monroe County Executive disparaged plaintiff and interfered with prospective contractual relationships. "Where . . . the alleged interference was with prospective contractual relationships, rather than existing contracts, 'a plaintiff must show that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff or by means that were unlawful or improper' " (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 577). According to the allegations in the complaint, Master Care was plaintiff's competitor, and we thus conclude therefrom that the distribution of the letter by Master Care was intended, at least in part, to advance its competing business interests. Inasmuch as Master

Care's actions "cannot be characterized as 'solely malicious,' " and Master Care did not employ wrongful means, i.e., " 'fraudulent representations, threats, or a violation of a duty of fidelity owed to the plaintiff by reason of a confidential relationship,' " we conclude that plaintiff failed to state a cause of action for tortious interference with business opportunity (*Out of Box Promotions*, 55 AD3d at 577; see *Fantaco Enters. v Iavarone*, 161 AD2d 875, 877).

Plaintiff also failed to state a cause of action against Master Care for a violation of General Business Law § 349. The gravamen of the complaint is not consumer injury or harm to the public interest but, rather, harm to plaintiff's business (see *Gucci America, Inc. v Duty Free Apparel, Ltd.*, 277 F Supp 2d 269, 273), and plaintiff failed to allege actual injury (see *Smith v Chase Manhattan Bank, USA*, 293 AD2d 598, 599). In addition, the bare allegations set forth in the cause of action for unfair competition, insofar as it is asserted against Master Care, lack the requisite elements to support such a cause of action (see *Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203, *lv denied* 688 NYS2d 372).

In the cause of action for defamation, asserted only against Master Care, plaintiff failed to set forth the allegedly defamatory statements in the complaint (see CPLR 3016 [a]; see also *Keeler v Galaxy Communications, LP*, 39 AD3d 1202). Although plaintiff alleged in a conclusory manner that defamatory statements were included in the letter sent by Master Care to the Monroe County Executive and in its brochure, plaintiff failed to sufficiently allege that the letter and brochure, which did not name plaintiff, were " 'of and concerning' " plaintiff (*Jackson v Quinn*, 187 AD2d 1040, 1041, *lv denied* 81 NY2d 706; see *Lenz Hardware v Wilson*, 263 AD2d 632, 633, *affd* 94 NY2d 913). Moreover, it is well settled that "[a] person's statements of opinion are constitutionally protected" (*Boulos v Newman*, 302 AD2d 932, 932), and "[m]ere allegations, rather than objective statements of fact, are not actionable" (*id.* at 933). Thus, even assuming, arguendo, that the "competitor[]" referenced in the letter and the " 'board-up guy' " referenced in the brochure pertain to plaintiff, we conclude that the statements constitute "nonactionable opinion" (*id.* at 933).

Inasmuch as plaintiff failed to state a cause of action with respect to any of the aforementioned causes of action against Master Care, the cause of action for conspiracy based on the same facts and allegations, insofar as it is asserted against Master Care, was also properly dismissed (see *Duane v Prescott*, 134 AD2d 560, 561, *lv denied* 72 NY2d 801). Further, we conclude that the cause of action for injunctive relief, insofar as it is asserted against Master Care, was properly dismissed. "[T]here is no basis for injunctive relief" inasmuch as plaintiff has failed to state any cause of action against Master Care (*Matter of Davis v Dinkins*, 206 AD2d 365, 368, *lv denied* 85 NY2d 804).

Contrary to the further contention of plaintiff in appeal No. 1, the court did not abuse its discretion in denying its cross motion for leave to amend the complaint. "Although leave to amend should be

freely granted, it is properly denied where the proposed amendment[s are] lacking in merit" (*Manufacturers & Traders Trust Co. v Reliance Ins. Co.*, 8 AD3d 1000, 1001). Plaintiff's proposed amendments included additional references to the letter sent by Master Care to the Monroe County Executive and additional references to its brochure. Both the letter and the brochure, however, were attached to the original complaint, and the court determined, even in view of the letter and brochure, that Master Care established its entitlement to judgment as a matter of law dismissing the complaint against it (see generally *New Hampshire Ins. Co. v Bartha*, 51 AD3d 480, 481, *lv dismissed in part and denied in part* 11 NY3d 771).

We reject the contention of NFA in appeal No. 1 that the court erred in granting plaintiff's motion to dismiss NFA's counterclaim for defamation based on plaintiff's alleged submission of the complaint to a local newspaper. Pursuant to Civil Rights Law § 74, "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding . . . ." The protection afforded by the statute "extends not only to a transcript of the proceeding itself, but also to any pleading made within the course of the proceeding" (*Branca v Mayesh*, 101 AD2d 872, 873, *affd* 63 NY2d 994; see also *Lacher v Engel*, 33 AD3d 10, 17). Contrary to NFA's contention, the counterclaim does not fit within the exception to the statute set forth in *Williams v Williams* (23 NY2d 592, 598-599), inasmuch as NFA failed to allege that the action was commenced solely for the purpose of defaming it (see *Branca*, 101 AD2d at 873).

We further conclude in appeal No. 1 that the court properly denied the cross motion of NFA for leave to amend its counterclaim. In support of its cross motion, NFA failed to allege that the proposed amendments were based on new facts or that it was unaware of those facts when it asserted the counterclaim (see *Smith v Bessen*, 161 AD2d 847, 848-849; *Axelrod v Axelrod*, 106 AD2d 913).

In appeal No. 2, NFA contends that the court erred in denying its motion for summary judgment dismissing the complaint against it. In support of that contention, NFA relies on a statement by the court in its order in appeal No. 1 that it was "not convinced that plaintiff . . . has demonstrated any actionable conduct directed against it by either defendant." NFA contends, based on that statement, that its motion in appeal No. 2 should have been granted based on the doctrine of law of the case. We reject that contention. The doctrine of law of the case "applies only to issues that have been judicially determined" (*Edgewater Constr. Co., Inc. v 81 & 3 of Watertown, Inc.* [appeal No. 2], 24 AD3d 1229, 1231) and "to the same question in the same case" (*Tillman v Women's Christian Assn. Hosp.*, 272 AD2d 979, 980 [internal quotation marks omitted]). Here, the issues presented by NFA's motion were not "judicially determined" by the court in the order in appeal No. 1 (*Edgewater Constr. Co., Inc.*, 24 AD3d at 1231).

We conclude that NFA failed to establish its entitlement to judgment as a matter of law with respect to the causes of action

against it, with the exception of the cause of action for conspiracy, insofar as it is asserted against NFA. The court dismissed the complaint against Master Care, including the conspiracy cause of action, and " '[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort' " (*Transit Mgt., LLC v Watson Indus., Inc.*, 23 AD3d 1152, 1155-1156, quoting *Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969). Master Care is no longer a defendant in this action, and thus no cause of action for civil conspiracy lies against NFA (*see id.*). We therefore modify the judgment and order in appeal No. 2 accordingly.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1333

CA 09-00311

PRESENT: MARTOCHE, J.P., PERADOTTO, GREEN, AND PINE, JJ.

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EMERGENCY ENCLOSURES, INC.,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NATIONAL FIRE ADJUSTMENT CO., INC.,  
DEFENDANT-APPELLANT,  
ET AL., DEFENDANT.  
(APPEAL NO. 2.)

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FIX SPINDELMAN BROVITZ & GOLDMAN, P.C., FAIRPORT (ROY Z. ROTENBERG OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (PAUL L. LECLAIR OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered November 10, 2008. The judgment and order denied the motion of defendant National Fire Adjustment Co., Inc. for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the judgment and order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the eighth cause of action against defendant National Fire Adjustment Co., Inc. and as modified the judgment and order is affirmed without costs.

Same Memorandum as in *Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1335

**CA 08-00939**

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

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STEPHEN D. SALISBURY, JR. AND CHRISTINE K.  
DANNIBLE, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

JONELLE K. CHRISTIAN, ANTHONY M. CHRISTIAN  
AND CENTRAL NATIONAL BANK, DEFENDANTS-APPELLANTS.  
(APPEAL NO. 1.)

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SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS JONELLE K. CHRISTIAN AND ANTHONY M. CHRISTIAN.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), FOR  
DEFENDANT-APPELLANT CENTRAL NATIONAL BANK.

BOTTAR LEONE, PLLC, SYRACUSE (ANTHONY S. BOTTAR OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

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Appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered March 31, 2008 in a personal injury action. The order denied defendants' motions to set aside the jury verdict in part.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion for a directed verdict is denied, the motions to set aside the verdict in part are granted, the verdict is set aside in part, and a new trial is granted on the issues of causation and damages with respect to plaintiff Christine K. Dannible.

Memorandum: Plaintiffs commenced two actions seeking damages for injuries they sustained when the motorcycle they were riding was rear-ended by a vehicle operated by Jonelle K. Christian and leased by Anthony M. Christian (hereafter, Christian defendants) from defendant Central National Bank (CNB). Plaintiffs thereafter moved to consolidate the actions, for partial summary judgment on liability, and for dismissal of various affirmative defenses. Supreme Court granted that part of plaintiffs' motion for consolidation and the court, inter alia, granted that part of the motion only with respect to partial summary judgment on negligence rather than liability. The matter proceeded to trial on the issue of damages with respect to plaintiff Stephen D. Salisbury, Jr. and on the issues of causation and damages with respect to Christine K. Dannible (plaintiff). At the close of proof, the court granted plaintiffs' motion for a directed

verdict on the issue of causation with respect to plaintiff, and the jury thereafter returned a verdict awarding plaintiffs damages. The Christian defendants moved to set aside the verdict with respect to plaintiff in the interest of justice, and CNB filed a "cross-motion" also seeking to set aside the verdict with respect to plaintiff. By the order in appeal No. 1, the court denied the motion and "cross-motion." CNB thereafter moved for a collateral source hearing and, by the order in appeal No. 2, the court, inter alia, stayed "all collateral source proceedings" pending the resolution of the appeals taken from the order in appeal No. 1. The appeals were consolidated by this Court.

We agree with the Christian defendants in appeal No. 1 that the court erred in denying their motion to set aside the verdict with respect to plaintiff based on its error in granting plaintiffs' motion for a directed verdict on causation with respect to plaintiff (see *Blanchard v Lifegear, Inc.*, 45 AD3d 1258, 1259-1260; see generally *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381). First, there were conflicting expert medical opinions presented at trial on the issue whether plaintiff's injuries were caused by the accident, and thus the issue of causation raised credibility issues for the jury (see *Barton v Youmans*, 24 AD3d 1192; *Tracy v Rapesovska*, 4 AD3d 856; *Tanner v Tundo*, 309 AD2d 1244). Second, plaintiff's credibility was also an issue for the jury. Significantly, the evidence presented at trial established that plaintiff failed to inform her expert treating physicians that she had suffered similar complaints before the accident, and she gave inconsistent versions of the accident. "A jury is not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony and/or the facts disclosed on cross-examination . . . . Indeed, a jury is at liberty to reject an expert's opinion if it finds the facts to be different from those which formed the basis for the opinion or if, after careful consideration of all the evidence in the case, it disagrees with the opinion" (*Zapata v Dagostino*, 265 AD2d 324, 325; see *Quigg v Murphy*, 37 AD3d 1191, 1193; PJI 1:90). In addition, a plaintiff may of course be impeached by his or her own testimony (see *Ashby v Mullin*, 56 AD3d 588; *Holmberg v Traverse*, 213 AD2d 924, 926). We further agree with CNB that the court erred in denying its motion, improperly denominated a "cross motion" (see *Barrett v Watkins*, 52 AD3d 1000, 1003 n 1), to set aside the verdict with respect to plaintiff based on the court's error in granting plaintiffs' motion for a directed verdict on causation with respect to plaintiff, despite the fact that the "cross motion" was untimely (see CPLR 4405; *Casey v Slattery*, 213 AD2d 890, 891). The liability of CNB is vicarious and thus is inseparable from the liability of the Christian defendants (see generally *Lakewood Constr. Co. v Brody* [appeal No. 1], 1 AD3d 1007, 1009; *Beesimer v Albany Ave./Rte. 9 Realty*, 216 AD2d 853, 855-856).

Finally, we conclude with respect to the order in appeal No. 2 that the court did not improvidently exercise its discretion in granting a stay of the collateral source proceedings pending resolution of the appeals taken from the order in appeal No. 1 (see

CPLR 2201; *Britt v Buffalo Mun. Hous. Auth.*, 63 AD3d 1593; *Asher v Abbott Labs.*, 307 AD2d 211).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1336

CA 09-00438

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

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STEPHEN D. SALISBURY, JR. AND CHRISTINE K.  
DANNIBLE, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

JONELLE K. CHRISTIAN, ANTHONY M. CHRISTIAN  
AND CENTRAL NATIONAL BANK, DEFENDANTS-APPELLANTS.  
(APPEAL NO. 2.)

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SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS JONELLE K. CHRISTIAN AND ANTHONY M. CHRISTIAN.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), FOR  
DEFENDANT-APPELLANT CENTRAL NATIONAL BANK.

BOTTAR & LEONE, PLLC, SYRACUSE (ANTHONY S. BOTTAR OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

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Appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 20, 2008 in a personal injury action. The order, insofar as appealed from, granted a stay of the collateral source proceedings pending resolution of the appeals taken from the order in appeal No. 1.

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

Same Memorandum as in *Salisbury v Christian* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1345**

**KA 06-03244**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER M. KALEN, 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 (Frank P. Geraci, Jr., J.), rendered September 27, 2006. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child (two counts).

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 two counts of endangering the welfare of a child (Penal Law § 260.10 [1]). Viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although an acquittal with respect to those counts "would not have been unreasonable, upon weighing the probative value and force of the conflicting testimony and the inferences to be drawn therefrom," we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*People v Kuykendall*, 43 AD3d 493, 495, *lv denied* 9 NY3d 1007; *see generally Bleakley*, 69 NY2d at 495). Indeed, defendant was acquitted of one count each of criminal sexual act in the third degree (§ 130.40 [2]) and endangering the welfare of a child, and two counts of sexual abuse in the third degree (§ 130.55). We accord great deference to the jury's credibility determinations, "which obviously reflect[] at least [the jury's] uncertainty concerning much of the complainant[s'] testimony [with respect to] the . . . crimes of which defendant was acquitted. However, the jury was entitled to credit some of [their] testimony while discounting other aspects" (*Kuykendall*, 43 AD3d at 495; *see People v Reed*, 40 NY2d 204, 208). We see no basis to disturb the jury's determination that defendant knowingly engaged in conduct that was likely to be harmful to the physical, mental or moral welfare of

the 15- and 16-year-old complainants, including his discussion of both the pornography industry and his genitals with the complainants (see § 260.10 [1]). Finally, we conclude that the issue whether the complainants were actually harmed by defendant's conduct is irrelevant with respect to the counts of endangering the welfare of a child (see *People v Simmons*, 92 NY2d 829, 830).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1350**

**CA 09-00306**

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

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ROBERTA A. KANE, INDIVIDUALLY AND AS PARENT  
AND NATURAL GUARDIAN FOR SARAH ANNE KANE,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

UTICA FIRST INSURANCE COMPANY, ALLIED CLAIM  
SERVICES, INC., AND ENVIRO-CARE, INC.,  
DEFENDANTS-RESPONDENTS.

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RICHARD J. LIPPES & ASSOCIATES, BUFFALO (GREGG S. MAXWELL OF COUNSEL),  
FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER G. FLOREALE OF COUNSEL),  
FOR DEFENDANTS-RESPONDENTS UTICA FIRST INSURANCE COMPANY AND ALLIED  
CLAIM SERVICES, INC.

HISCOCK & BARCLAY, LLP, ROCHESTER (SCOTT P. ROGOFF OF COUNSEL), FOR  
DEFENDANT-RESPONDENT ENVIRO-CARE, INC.

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Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered April 4, 2008 in a personal injury action. The order granted the motion of defendants to preclude plaintiff from offering expert proof and to dismiss the amended complaint.

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

Memorandum: Plaintiff commenced this action, individually and on behalf of her daughter, seeking damages for injuries sustained by plaintiff and her daughter as a result of their alleged exposure to toxic mold in their home resulting from the activity of defendant Allied Claim Services, Inc. (ACS), the claim representative of defendant Utica First Insurance Company (Utica), and defendant Enviro-Care, Inc. (Enviro-Care). Plaintiff had contacted her insurer, Utica, upon discovering that there was mold growth in her home, and ACS and Enviro-Care investigated the claim and performed work in plaintiff's home to alleviate the growth of the mold. According to plaintiff, the work performed contributed to an increased level of contamination. Upon receiving Utica's denial of her claim, plaintiff commenced this action asserting causes of action for breach of contract against Utica and negligence against all three defendants, and she sought punitive damages.

As the result of a preliminary conference, Supreme Court issued a scheduling order that required the exchange of expert witness disclosure "30 days before trial." The trial was scheduled for March 24, 2008. Prior to that date, Enviro-Care moved for an order pursuant to CPLR 3126 (2) and (3) seeking to preclude plaintiff from offering expert proof and seeking dismissal of the amended complaint against it, and the remaining two defendants joined in the motion, thereby seeking dismissal of the amended complaint in its entirety. According to Enviro-Care, the court had issued two subsequent orders, the first directing plaintiff to serve expert disclosure by December 12, 2007 and the second directing her to serve expert disclosure no later than December 31, 2007. The record, however, does not contain any such orders (*see generally* 22 NYCRR 202.12 [d]). Plaintiff served her expert disclosure on February 18, 2008.

We conclude that the court erred in granting the motion. The only discovery order in the record required expert disclosure 30 days before trial. Here, the trial was scheduled for March 24, 2008 and, as noted, plaintiff served her expert disclosure on February 18, 2008. Defendants otherwise made no showing that plaintiff refused to obey an order to disclose or willfully failed to disclose any information (*see* CPLR 3126). Thus, because plaintiff's disclosure was timely under the only scheduling order in place, there was no basis for the imposition of any sanction under CPLR 3126 and thus no basis for dismissal of the amended complaint (*see generally Green v Kingdom Garage Corp.*, 34 AD3d 1373).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1355**

**CA 08-01317**

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

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MICHAEL P. BORZILLIERI, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DOUGLAS G. JONES, DEFENDANT-RESPONDENT.

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THE LAW OFFICE OF KENNETH P. BERNAS, BUFFALO (KENNETH P. BERNAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered May 15, 2008 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when the vehicle in which he was a passenger collided with a vehicle operated by defendant. Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Defendant met his initial burden on the motion by submitting evidence establishing that plaintiff did not sustain a serious injury under the four categories alleged by plaintiff in the complaint, as amplified by the bill of particulars, i.e., fracture, permanent consequential limitation of use, significant limitation of use and 90/180-day categories (*see Charley v Goss*, 54 AD3d 569, 570-571, *affd* 12 NY3d 750). In support of his motion, defendant submitted the affirmation and report of a physician specializing in neurology who, upon examining plaintiff at defendant's request, observed various ranges of motion and performed a number of objective tests (*see id.*). The physician reviewed plaintiff's medical records and concluded that plaintiff's CT scan revealed lumbar disc bulges that were without clinical significance and that the accident resulted in a lumbar strain involving transient complaints of pain without any objective findings.

In opposition to the motion, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d

557, 562). Plaintiff submitted a CT scan report indicating that he sustained "[d]isc protrusions and/or herniations at multiple levels" and the affidavit and records of his chiropractor demonstrating that he experienced pain, tenderness, and loss of motion. Plaintiff did not begin treatment with his chiropractor until approximately 16 months following the accident, and the range of motion tests were performed by his chiropractor approximately 19 months after the accident. Plaintiff thus failed to submit any evidence that his limited range of motion was contemporaneous with the accident (see *Jimenez v Rojas*, 26 AD3d 256). "Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommells v Perez*, 4 NY3d 566, 574).

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

All concur except FAHEY, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part and would modify the order by denying defendant's motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the fracture category of serious injury within the meaning of Insurance Law § 5102 (d). In support of his motion, defendant submitted a report that addressed a CT scan performed after the accident, indicating that plaintiff had spondylolysis at L5-S1. Spondylolysis, which is defined as the "[b]reaking down or degeneration of a vertebra" (Am Jur Proof of Facts 3d, Attorney's Illustrated Medical Dictionary S58), has been characterized as a fracture, and thus evidence of an injury of that nature raises a triable issue of fact whether plaintiff sustained a serious injury under the fracture category (see *Bethea v Pacheco Auto Collision*, 207 AD2d 424). The opinion of defendant's expert that the spondylolysis is unrelated to the accident is speculative and unsupported by any evidentiary foundation (see *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544). Consequently, in my view, defendant failed to meet his burden on that part of the motion with respect to the fracture category of serious injury (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1364**

**CA 09-00836**

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

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IN THE MATTER OF THE JUDICIAL SETTLEMENT OF  
THE SECOND INTERMEDIATE ACCOUNT OF THE CHASE  
MANHATTAN BANK (SUCCESSOR BY MERGER TO THE  
CHASE LINCOLN FIRST BANK, N.A., SUCCESSOR IN  
INTEREST TO LINCOLN FIRST BANK OF ROCHESTER,  
FORMERLY KNOWN AS LINCOLN ROCHESTER TRUST  
COMPANY), AS TRUSTEE OF THE TRUST FOR THE  
BENEFIT OF BLANCHE D. HUNTER (WHO DIED  
DECEMBER 29, 1972) AND MARGARET H. DODGE  
UNDER "FIFTH" OF THE WILL OF CHARLES G.  
DUMONT, DECEASED, PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

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UNIVERSITY OF ROCHESTER AND AMERICAN RED  
CROSS, OBJECTANTS-APPELLANTS.

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WILLIAMS & WILLIAMS, ROCHESTER (MITCHELL T. WILLIAMS OF COUNSEL), FOR  
OBJECTANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (PAUL J. YESAWICH, III, OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

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Appeal from an order of the Surrogate's Court, Monroe County  
(Edmund A. Calvaruso, S.), entered July 21, 2008. The order granted  
the petition for reimbursement of attorneys' fees, disbursements and  
expenses in the amount of \$1,159,794.86.

It is hereby ORDERED that the order so appealed from is  
unanimously modified on the law by reducing the total reimbursement  
award to petitioner for attorneys' fees, disbursements and expenses to  
\$350,000 and as modified the order is affirmed without costs.

Memorandum: In a prior appeal, we reversed that part of a  
judgment in which Surrogate's Court granted the objections to the  
superseding account filed by petitioner (trustee) and imposed a  
surcharge plus interest and commissions based upon its determination  
that the trustee should have divested itself of a concentration of  
stock of Eastman Kodak Company on or before January 31, 1974 (*Matter  
of Chase Manhattan Bank*, 26 AD3d 824, 827-828, lv denied 7 NY3d 824,  
922). In the instant appeal, objectants appeal from a subsequent  
order of the Surrogate granting the petition of the trustee for  
reimbursement of attorneys' fees, disbursements and expenses  
associated with its defense to the objections to its superseding  
account and the appeal from the Surrogate's order imposing the  
surcharge. In determining the proper amount of reimbursement sought

by a trustee for those items, a Surrogate should consider the "time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained" (*Matter of Potts*, 213 App Div 59, 62, *affd* 241 NY 593; *see Matter of Freeman*, 34 NY2d 1, 9). Here, we conclude that the Surrogate properly considered those factors, with the exception of "the amount involved" (*Potts*, 213 App Div at 62). The Surrogate ordered that the trustee was to be reimbursed from the trust for its attorneys' fees, disbursements and expenses in excess of \$1.1 million, which constitutes approximately 40% of the corpus of the trust. "If the size of the estate is limited, compensation to a [trustee's attorneys] may be less than what the services would otherwise command" (*Matter of Martin*, 21 AD2d 646, 647, *affd* 16 NY2d 594; *see Matter of Kaufmann*, 26 AD2d 818, *affd* 23 NY2d 700; *Matter of McCranor*, 176 AD2d 1026, 1027). We therefore modify the order by reducing the total reimbursement award to the trustee to \$350,000 (*see generally McCranor*, 176 AD2d at 1027).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1365**

**CA 09-00977**

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

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IN THE MATTER OF MARK A. MATTESON,  
PETITIONER-APPELLANT,

V

ORDER

NEWFANE CENTRAL SCHOOL DISTRICT BOARD OF  
EDUCATION, RESPONDENT-RESPONDENT.

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JAMES R. SANDNER, LATHAM (FREDERICK K. REICH OF COUNSEL), FOR  
PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (KARL W. KRISTOFF OF COUNSEL), FOR  
RESPONDENT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Niagara County  
(Richard C. Kloch, Sr., A.J.), entered July 7, 2008 in a proceeding  
pursuant to CPLR article 78. The judgment dismissed the petition for  
legal fees and expenses pursuant to Education Law § 3028.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1368

CA 09-00523

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

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ROBERT J. PELC, DOING BUSINESS AS  
RITE JOBS PERFORMED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

F. STEVEN BERG AND SANDRA BERG,  
DEFENDANTS-RESPONDENTS.

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RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (DANIEL E. SARZYNSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an amended judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered July 10, 2008 in an action for, inter alia, breach of contract. The amended judgment awarded defendants money damages after a nonjury trial.

It is hereby ORDERED that the amended judgment so appealed from is unanimously modified on the law by vacating the award of damages with respect to the third counterclaim and dismissing that counterclaim and as modified the amended judgment is affirmed without costs.

Memorandum: Defendants hired plaintiff to perform construction work on their home, which had sustained water damage when a pipe froze and burst while they were in Florida. Defendants became dissatisfied with plaintiff's work and refused to approve further insurance payments to plaintiff, whereupon plaintiff filed a notice of mechanic's lien pursuant to article 2 of the Lien Law and ceased working on the home. Supreme Court granted defendants' motion seeking to discharge the lien and placed the amount in dispute in escrow. Plaintiff then commenced this action for, inter alia, breach of contract and, in their answer, defendants asserted four counterclaims. Following a bench trial, the court dismissed the amended complaint and granted judgment in favor of defendants on their second through fourth counterclaims for, respectively, the amount of damages incurred by defendants in correcting plaintiff's negligent workmanship, plaintiff's slander of title based on malicious and fraudulent statements made by plaintiff in support of the mechanic's lien and, inter alia, the amount of damages incurred by defendants in discharging the "willfully exaggerated Notice Under Mechanic's Lien Law." As limited by his brief, plaintiff challenges only those parts

of the amended judgment awarding defendants judgment on the three counterclaims.

Addressing first the fourth counterclaim, we reject plaintiff's contention that the court applied the wrong standard in determining whether plaintiff had willfully exaggerated the amount of the mechanic's lien. The record establishes that the court applied the correct standard, i.e., whether there was a deliberate and intentional exaggeration of the lien amount (see *J. Sackaris & Sons, Inc. v Terra Firma Constr. Mgt. & Gen. Contr., LLC*, 14 AD3d 538, 541, lv denied 4 NY3d 878; *Barden & Robeson Corp. v Czyz*, 245 AD2d 599, 601), rather than merely a genuine mistake or a disagreement concerning the terms of the contract (see *Goodman v Del-Sa-Co Foods*, 15 NY2d 191, 194-196; *Fidelity N.Y. v Kensington-Johnson Corp.*, 234 AD2d 263; *Collins v Peckham Rd. Corp.*, 18 AD2d 860, 861). The court thus properly considered whether plaintiff acted in bad faith in asserting the lien amount (see generally *P. J. Panzeca, Inc. v Alizio*, 52 AD2d 919). We further conclude that the record supports the court's determination that plaintiff willfully exaggerated the amount of the lien.

We reject plaintiff's further contention that the court erred in awarding attorney's fees sought with respect to the three counterclaims in question. "[I]t is well settled that 'a trial court is in the best position to determine those factors integral to fixing [attorney's] fees . . . and, absent an abuse of discretion, the trial court's determination will not be disturbed' " (*Matter of Connolly v Chenot*, 293 AD2d 854, 855; see *542 E. 14th St. LLC v Lee*, 66 AD3d 18; *Harris Bay Yacht Club v Harris*, 230 AD2d 931, 934). We perceive no abuse of discretion in this case. The court properly awarded attorney's fees only for the attorney's representation of defendants in defending against and securing the discharge of the mechanic's lien, rather than for the attorney's representation of defendants in obtaining affirmative relief. Even assuming, arguendo, that we agree with defendants that the award of attorney's fees must be determined by calculating the percentage of the total lien amount that constitutes willful exaggeration and applying that percentage to the total amount of attorney's fees incurred (see *A & E Plumbing v Budoff*, 66 AD2d 455, 457; *Grimpel v Hochman*, 74 Misc 2d 39, 49), we conclude that the award of attorney's fees here was proper because the total amount of the mechanic's lien was the result of willful exaggeration.

With respect to the second counterclaim, seeking damages incurred by defendants in correcting plaintiff's negligent workmanship, we conclude that the award of damages is supported by the record. With respect to the third counterclaim, for slander of title, we agree with plaintiff that the evidence does not support the court's award of damages. Defendants failed to meet their burden of establishing that plaintiff made "a communication falsely casting doubt on the validity of . . . title, . . . reasonably calculated to cause harm, and . . . resulting in special damages" (*Fink v Shawangunk Conservancy, Inc.*, 15 AD3d 754, 756; see *39 Coll. Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 455; *Brown v Bethlehem Terrace Assoc.*, 136 AD2d 222, 224). The notice of mechanic's lien filed by plaintiff merely constituted

notification of plaintiff's claim against the property and did not constitute a false communication (see generally *Alexander v Scott*, 286 AD2d 692; *Sopher v Martin*, 243 AD2d 459, 461-462; *35-45 May Assoc. v Mayloc Assoc.*, 162 AD2d 389). In addition, defendants have alleged only general damages, and the pleading of special damages is a prerequisite for slander of title (see *Kruger v Industrial Rehabilitation Corp.*, 8 AD2d 29, 33, *affd* 7 NY2d 958; *Carnival Co. v Metro-Goldwyn-Mayer*, 23 AD2d 75, 77; *Glaser v Kaplan*, 5 AD2d 829). We therefore modify the amended judgment accordingly.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1387

**CAF 08-01244**

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

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IN THE MATTER OF LAKICIA M. HUGHES,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LIONEL L. DAVIS, RESPONDENT-RESPONDENT.

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

CHRISTOPHER J. BRECHTEL, LAW GUARDIAN, BUFFALO, FOR SHAKA D.

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Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered April 29, 2008 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion and dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Family Court, Erie County, for further proceedings on the petition.

Memorandum: Upon her return from active military duty, petitioner mother filed a petition seeking to modify a prior order of custody. Family Court granted respondent father's motion to dismiss the petition without conducting a hearing based on its determination that the mother had "failed to show a change of circumstances." We conclude, based on the recent enactment of Family Court Act § 651 (f), that the petition should be reinstated.

It is well settled that, in seeking to modify an existing order of custody, "[t]he petitioner must make a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody order should be modified" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418 [internal quotation marks omitted]). Pursuant to Family Court Act § 651 (f) (3), "the return of the parent from active military service, deployment or temporary assignment shall be considered a substantial change in circumstances. Upon the request of either parent, the court shall determine on the basis of the child's best interests whether the custody judgment or order previously in effect should be modified" (see Domestic Relations Law § 75-1 [3]; § 240 [1] [a-2] [3]). Here, the mother alleged that she had returned from active military duty and thus made a sufficient evidentiary showing of a substantial change in circumstances (see

*generally Di Fiore, 2 AD3d 1417).*

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1389**

**CA 09-00879**

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

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IN THE MATTER OF ALBERT P. MCLIESH, JR.,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF WESTERN, ET AL., RESPONDENTS,  
JAMES MARQUETTE AND JOAN MARQUETTE,  
RESPONDENTS-APPELLANTS.

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

ARMOND J. FESTINE, UTICA, FOR PETITIONER-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered January 26, 2009 in a proceeding pursuant to CPLR article 78. The judgment granted the petition and directed respondent Town of Western Zoning Board of Appeals to issue an area variance to petitioner.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the second decretal paragraph and as modified the judgment is affirmed without costs, and the matter is remitted to respondent Town of Western Zoning Board of Appeals for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of respondent Town of Western Zoning Board of Appeals (ZBA) denying his application for an area variance to construct a detached garage on his residential property. Respondents-appellants (hereafter, respondents), the owners of a parcel of property adjacent to petitioner's property, appeal from a judgment granting the petition and directing the ZBA to issue the area variance. Contrary to respondents' contention, the ZBA's interpretation of the Town of Western Zoning Ordinance (Zoning Ordinance) had no rational basis and was arbitrary and capricious, and we thus agree with Supreme Court that the ZBA's determination to deny petitioner's application for an area variance must be annulled (see *Matter of Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 902, lv denied 5 NY3d 713; *Matter of W.K.J. Young Group v Zoning Bd. of Appeals of Vil. of Lancaster*, 16 AD3d 1021; see generally *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-232).

Pursuant to section 10 (A) of the Zoning Ordinance, "[r]egulations governing lot area and lot width, front, side and rear yards[,] building coverage and building height are specified in Appendix 'A,' subject to the additional standards of this Ordinance." Section 11 of the Zoning Ordinance is entitled "Additional Area, Height and Other Regulations," and subdivision (L) (3) provides the setback requirements for accessory buildings that are not attached to principal buildings, which differ from those set forth in Appendix A. The ZBA determined, however, that the setback requirements set forth in Appendix A applied to accessory buildings, including petitioner's garage.

"Although a zoning board's interpretation of a zoning ordinance is entitled to deference, its interpretation is not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court" (*Matter of North White Auto v Clem*, 229 AD2d 393, 394 [internal quotation marks omitted]; see *Matter of Turner v Andersen*, 50 AD3d 1562; *Matter of Exxon Corp. v Board of Stds. & Appeals of City of N.Y.*, 128 AD2d 289, 296, lv denied 70 NY2d 614). It is well settled that a zoning ordinance must be interpreted to give effect to all of its provisions, and an interpretation that nullifies any provision of an ordinance is irrational and unreasonable (see *Matter of Veysey v Zoning Bd. of Appeals of City of Glens Falls*, 154 AD2d 819, 821, lv denied 75 NY2d 708; *Matter of Briar Hill Lanes v Town of Ossining Zoning Bd. of Appeals*, 142 AD2d 578, 581; see generally McKinney's Cons Laws of NY, Book 1, Statutes § 98 [a]). Here, the ZBA's interpretation of the Zoning Ordinance nullifies the existence of section 11 (L) (3) thereof. Also, we conclude that the ZBA's determination that any hardship suffered by petitioners was self-created is arbitrary and capricious (*cf. Matter of Ifrah v Utschig*, 98 NY2d 304, 309; *Matter of DiPaolo v Zoning Bd. of Appeals of Town/Vil. of Harrison*, 62 AD3d 792, 793).

Nevertheless, we conclude that the court erred in directing the ZBA to issue the area variance, and we therefore modify the judgment accordingly. Rather, under the circumstances of this case, the court should have remitted the matter to the ZBA for a de novo determination of petitioner's application pursuant to Town Law § 267-b (3), utilizing the setback requirements set forth in section 11 (L) (3) of the Zoning Ordinance. We have considered respondents' remaining contentions and conclude that they are without merit.

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

**1394**

**CA 08-01301**

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

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IN THE MATTER OF THE STATE OF NEW YORK,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KARL MUENCH, AN INMATE IN THE CUSTODY OF  
NEW YORK STATE DEPARTMENT OF CORRECTIONAL  
SERVICES, RESPONDENT-APPELLANT.

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J. SCOTT PORTER, SENECA FALLS, FOR RESPONDENT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered May 8, 2008 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility designated by the Commissioner of Mental Health based upon a jury finding that respondent is a detained sex offender with a mental abnormality that, inter alia, predisposes him to commit further sex offenses.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Oneida County, for a reconstruction hearing in accordance with the following Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 committing him to a secure treatment facility designated by the Commissioner of Mental Health based upon a jury finding that he is a detained sex offender with a mental abnormality that, inter alia, predisposes him to commit further sex offenses. We agree with respondent that his challenge to the alleged discharge of prospective jurors outside the presence of the trial judge implicates his fundamental right to a jury trial (*see generally People v Toliver*, 89 NY2d 843, 844-845), and that preservation therefore is not required because his challenge concerns a potential " 'mode of proceedings' " error (*People v Kelly*, 5 NY3d 116, 119). The record before us, however, is insufficient to enable us to review that challenge. Although the record contains references to jury questionnaires, it does not include the jury questionnaires at issue. The record also fails to establish whether any prospective jurors were in fact discharged pursuant to the allegedly improper procedure and, if so, who authorized the procedure and who actually discharged them. Consequently, we are unable to determine whether Supreme Court erred in " 'relinquish[ing] control over the proceedings' " by permitting

the allegedly improper procedure (*People v Bosa*, 60 AD3d 571, 573, *lv denied* 12 NY3d 923, quoting *Toliver*, 89 NY2d at 844), or whether the "procedure was an effective screening device and a proper exercise of discretion" by the court (*People v Boozer*, 298 AD2d 261, *lv denied* 99 NY2d 555; see *People v McGhee*, 4 AD3d 485, 486, *lv denied* 2 NY3d 803). We therefore hold the case, reserve decision and remit the matter to Supreme Court for a reconstruction hearing to determine the contents of the jury questionnaires, whether any prospective jurors were discharged pursuant to the allegedly improper procedure and, if so, who authorized the procedure and discharged them.

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

**1397**

**CA 08-02595**

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

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WILLIAM GUSTAFSON, AS ADMINISTRATOR D.B.N.,  
OF THE ESTATE OF BRUCE G. GUSTAFSON, DECEASED,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PAUL C. DIPPERT, D.O., ET AL., DEFENDANTS,  
AND ANDREW J. STANSBERRY, R.P.A.,  
DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered October 14, 2008 in a medical malpractice action. The order denied the cross motion of defendant Andrew J. Stansberry, R.P.A. to disqualify a certain law firm from representing plaintiff.

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

Memorandum: In appeal No. 1, defendant Andrew J. Stansberry, R.P.A. appeals from an order denying his cross motion to disqualify the law firm of Lipsitz Green Scime Cambria LLP (Lipsitz Green) from representing plaintiff in this medical malpractice action based upon an alleged conflict of interest. We affirm. Stansberry "failed to meet [his] burden of making 'a clear showing that disqualification [was] warranted' " (*Lake v Kaleida Health*, 60 AD3d 1469, 1470). In support of his contention that he is a current client of Lipsitz Green, Stansberry alleged in a conclusory manner that he was represented by Lipsitz Green for "many years." In addition, he submitted evidence establishing that an attorney from Lipsitz Green represented him in a family court matter in 1998 and that he made a single telephone call to that attorney in late 2007 or early 2008. Such slim evidence and "generalized allegations . . . are insufficient to justify disqualification" (*Jamaica Pub. Serv. Co. v AIU Ins. Co.*, 92 NY2d 631, 638). Although Stansberry established that he was in fact a former client of Lipsitz Green, he failed "to establish that the issues in the present litigation are identical to or essentially the same as those in the prior representation or that [Lipsitz Green]

received specific, confidential information substantially related to the present litigation" (*Sgromo v St. Joseph's Hosp. Health Ctr.*, 245 AD2d 1096, 1097). In any event, Stansberry knew or should have known of the facts underlying the alleged conflict of interest approximately four years before he made his cross motion, and " 'to allow disqualification at this advanced stage of [the] litigation would severely prejudice [plaintiff]' " (*Lake*, 60 AD3d at 1470).

Contrary to Stansberry's further contention, Supreme Court properly refused to conduct a hearing on the cross motion inasmuch as "mere conclusory assertions that there is a conflict of interest are insufficient to warrant a hearing" (*Olmoz v Town of Fishkill*, 258 AD2d 447, 448). The court also properly refused to consider an ex parte affidavit submitted by Stansberry for in camera review (see generally *Jamaica Pub. Serv. Co.*, 92 NY2d at 637-638). We note that, although a party may rebut the presumption that an entire firm must be disqualified based on a single attorney's possession of confidential client information (see *Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 617), such rebuttal is impossible if the party was not permitted access to the evidence of the alleged conflict of interest.

With respect to the order in appeal No. 2, Stansberry and Jeffrey P. Steinig, M.D. (collectively, defendants) have not addressed any issues concerning that order in their brief on appeal. Thus, we deem any such issues abandoned (see *Matter of Ronnie P.*, 63 AD3d 1527; *Ciesinski v Town of Aurora*, 202 AD2d 984).

Finally, with respect to the order in appeal No. 3, defendants contend that the court, in settling the record on appeal in appeal Nos. 1 and 2, erred in excluding Stansberry's ex parte affidavit. We reject that contention. The court did not read the affidavit before it ruled on Stansberry's cross motion to disqualify Lipsitz Green, and thus the affidavit was not a document "upon which the . . . order [in appeal No. 1] was founded" (CPLR 5526; see also 22 NYCRR 1000.4 [a] [2]). Also contrary to defendants' contention in appeal No. 3, the 1998 retainer agreement between Stansberry and Lipsitz Green was properly included in the record on appeal because it is undisputed that the retainer agreement was accurately described for the court during an oral argument for which no stenographic record was made and the order denying Stansberry's cross motion lists the retainer agreement as one of the documents considered by the court in deciding the cross motion (see CPLR 5526; see also 22 NYCRR 1000.4 [a] [2]).

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

**1398.1**

**CA 09-01543**

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

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WILLIAM GUSTAFSON, AS ADMINISTRATOR D.B.N.,  
OF THE ESTATE OF BRUCE G. GUSTAFSON, DECEASED,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PAUL C. DIPPERT, D.O., ET AL., DEFENDANTS,  
ANDREW J. STANSBERRY, R.P.A.  
AND JEFFREY P. STEINIG, M.D.,  
DEFENDANTS-APPELLANTS.  
(APPEAL NO. 3.)

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GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered April 14, 2009 in a medical malpractice action. The order settled the record on appeal.

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

Same Memorandum as in *Gustafson v Dippert* ([appeal No. 1] \_\_\_\_ AD3d \_\_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1398

CA 08-02596

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

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WILLIAM GUSTAFSON, AS ADMINISTRATOR D.B.N.,  
OF THE ESTATE OF BRUCE G. GUSTAFSON, DECEASED,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PAUL C. DIPPERT, D.O., ET AL., DEFENDANTS,  
ANDREW J. STANSBERRY, R.P.A.  
AND JEFFREY P. STEINIG, M.D.,  
DEFENDANTS-APPELLANTS.  
(APPEAL NO. 2.)

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GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered November 20, 2008 in a medical malpractice action. The order directed the oral examination before trial of defendants Andrew J. Stansberry, R.P.A. and Jeffrey D. Steinig, M.D.

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

Same Memorandum as in *Gustafson v Dippert* ([appeal No. 1] \_\_\_\_ AD3d \_\_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1416**

**CA 09-00221**

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

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JOHN O'DONNELL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ROBERT FERGUSON, INDIVIDUALLY AND AS CHIEF OF POLICE OF TOWN OF EVANS, ROBERT R. CATALINO, II, INDIVIDUALLY AND AS SUPERVISOR OF TOWN OF EVANS, AND THOMAS A. PARTRIDGE, THOMAS A. CSATI, KAREN C. ERICKSON AND JOSEPH GOVENETTIO, INDIVIDUALLY AND AS MEMBERS OF TOWN BOARD OF TOWN OF EVANS, DEFENDANTS-RESPONDENTS.

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CHIACCHIA & FLEMING, LLP, HAMBURG (CHRISTEN ARCHER PIERROT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 24, 2008. The order denied the motion of plaintiff for, inter alia, permission to present certain evidence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and permitting plaintiff to present evidence that defendant Robert Ferguson admitted during his deposition that plaintiff was employed as a part-time police officer by the Town of Evans and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a former police officer employed by the Town of Evans, commenced this action alleging that his employment was terminated in violation of his constitutional rights of free speech and due process, and in violation of Labor Law § 201-d. On a prior appeal, we dismissed the petition in a related CPLR article 78 proceeding upon our determination that plaintiff, the petitioner therein, was a special police officer pursuant to Town Law § 158, and not a part-time police officer entitled to the protections afforded by Town Law § 155 (*Matter of O'Donnell v Ferguson*, 273 AD2d 905, lv denied 96 NY2d 701). Plaintiff thereafter commenced this action and, on a prior appeal, we determined that Supreme Court erred in granting defendants' motion for summary judgment dismissing the amended complaint (*O'Donnell v Ferguson*, 23 AD3d 1005). Prior to the commencement of trial, the parties appeared before the court for "oral argument," whereupon plaintiff moved, inter alia, for permission to

present evidence that he had been employed as a part-time police officer at the time of his termination, based upon new evidence that he discovered after our prior determination that he was a special police officer in the appeal from the judgment in the CPLR article 78 proceeding. The court denied plaintiff's motion based on our determination in that prior appeal.

As a preliminary matter, we note that the parties have attached to their briefs material containing information that cannot be considered on appeal inasmuch as that material is not contained in the record on appeal (*see Matter of Avon Nursing Home v Axelrod*, 195 AD2d 1046, 1047, *affd* 83 NY2d 977). Nevertheless, the record on appeal contains an excerpt from the deposition of defendant Robert Ferguson, taken following the 2000 appeal, in which he admits that plaintiff was employed as a part-time police officer by the Town of Evans. Although we recognize that Supreme Court has broad discretion to rule on the admissibility of evidence (*see Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1132, *lv denied* 11 NY3d 708), our determination in 2000 that plaintiff was a special police officer was based upon our interpretation of Town Law §§ 155 and 158 as applied to the facts presented to us at that time. We thus conclude that the court abused its discretion in refusing to permit plaintiff to present evidence of Ferguson's subsequent testimony to the contrary. We therefore modify the order accordingly. We note that the court otherwise did not abuse its discretion with respect to the remainder of plaintiff's motion.

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

1435

CAF 09-00872

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

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IN THE MATTER OF DAVID L. STABLEY,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

PHYLLIS A. CACI-STABLEY, RESPONDENT-APPELLANT.

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JOSEPH F. GERVASE, JR., BUFFALO, FOR RESPONDENT-APPELLANT.

CHRISTOPHER A. JOHNSON, LOCKPORT, FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered February 6, 2009 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, denied the objection of petitioner to the order of the Support Magistrate.

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

Memorandum: Petitioner father commenced this proceeding pursuant to Family Court Act article 4 seeking an order directing respondent mother to pay child support for the parties' daughter. The mother appeals from an order adopting the previous findings and decision of Family Court (Szczur, J.), which determined that the daughter is not emancipated, and denying the mother's objection to the Support Magistrate's order that, inter alia, directed the mother to pay child support to the father. We affirm. Contrary to the mother's contention, we conclude that the court properly determined that the parties' daughter did not emancipate herself. The evidence in the record before us establishes that the parties' daughter is a college student who is supported by her parents, and that she relocated from the mother's residence to the father's residence with the permission of the father. The record further establishes that, although the mother did not want her daughter to relocate to the father's residence, the mother eventually acquiesced with respect to the move. "[A] child moving from one parent's home to the other parent's home does not constitute emancipation where, as here, the child is neither self-supporting nor independent of all parental control," i.e., the daughter did not become independent of her parents' control inasmuch as the father expressly permitted her to move in with him and the mother "acquiesced" with respect thereto (*Winnert-Marzinek v Winnert*, 291 AD2d 921, 921; see *Matter of Burns v Ross*, 19 AD3d 801, 802; see also *Matter of Bogin v Goodrich*, 265 AD2d 779, 781; see generally *Matter of Alice C. v Bernard G. C.*, 193 AD2d 97, 105).

We have reviewed the mother's remaining contentions and conclude that they are lacking in merit.

All concur except MARTOCHE, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent and would reverse the order inasmuch as I cannot agree with the majority that the parties' daughter did not emancipate herself by moving out of respondent mother's home and into petitioner father's home. In support of the its conclusion that the daughter was not emancipated, the majority relies on our decision in *Winnert-Marzinek v Winnert* (291 AD2d 921, 921), in which we concluded that a child who moves from one parent's home to the other parent's home is not emancipated where "the child is neither self-supporting nor independent of all parental control." The decision in that case, however, does not indicate why the child left the custodial parent's home. In my view, the majority's conclusion is belied by well-settled case law establishing that "a parent's obligation to support a child until he or she reaches age 21 . . . may be suspended where the child, although not financially self sufficient, abandons the parent's home without sufficient cause and withdraws from the parent's control, refusing to comply with reasonable parental demands, under the doctrine of constructive emancipation" (*Matter of Donnelly v Donnelly*, 14 AD3d 811, 812; see *Matter of Roe v Doe*, 29 NY2d 188, 193; *Matter of Ontario County Dept. of Social Servs. v Gail K.*, 269 AD2d 847, lv denied 95 NY2d 760).

The facts of this case are closely analogous to *Donnelly*, where the child moved out of the mother's home and into the father's home in order to avoid the mother's household rules, which according to the Third Department's decision were "virtually unrefuted" to be reasonable and legitimate (*id.* at 812). In that case, the Third Department concluded that, although the child remained under the control of one parent, he chose to " 'deliberately flout' . . . [the mother's] legitimate mandates and voluntarily abandon [her] home to avoid her parental discipline and control, [and thereby] forfeited the right to support from her" (*id.* at 813). Thus, contrary to the majority's conclusion, a child may be constructively emancipated even when the child moves from the home of one parent to the other parent's home, where the child is of employable age and voluntarily abandons the home of the custodial parent against the will of that parent, for the purpose of avoiding parental discipline and control (see *id.* at 812).

In my view, this is clearly a case of constructive emancipation from the custodial parent. At the time of the hearing, the daughter was 18 years old, and she was a full-time college student with a part-time job. The record contains ample, undisputed evidence that the daughter's decision to leave the mother's home was voluntary and was instigated by the mother's insistence that the daughter follow what can only be described as entirely legitimate and reasonable household rules. When the daughter was questioned at the hearing by the mother's attorney whether she voluntarily moved out of her mother's house because she wanted "to be free of any control that [her] mother attempted to exercise over [her], the daughter responded in the

affirmative." Specifically, the daughter conceded that one of the reasons that she moved out of her mother's home was that her mother "set conditions with respect to sleep overs." In addition, the daughter admitted that, although she was indeed able to comply with the conditions imposed by her mother, she "didn't like" them. Also, the daughter responded in the affirmative when the mother's attorney asked whether she "didn't like the fact that [her] mother questioned [her] about who [she was] going out with or where [she was] going or how [she was] getting around from place to place." According to the testimony of the daughter, she "didn't think that [she] should have to answer all those questions." Furthermore, the record establishes that the mother was surprised when her daughter left and she did not "consent to her leaving." Contrary to the statement of the majority, the mother did not acquiesce in the change of residence. Rather, the record establishes that the mother believed that it was "hopeless" to ask her daughter to reconsider. In light of the mother's testimony, I conclude that the daughter moved out of the mother's home voluntarily, without the mother's permission, and for the purpose of avoiding discipline and control (see *Donnelly*, 14 AD3d at 812-813).

The majority's decision effectively allows an 18-year-old individual who is capable of being self-supporting to overrule a court's child support determination. Indeed, unless there is a showing that a parent receiving child support has acted in a manner contrary to the best interests of the child or is otherwise unfit, thus rendering the child's move to the other parent's home not truly voluntary, I would not require the prior custodial parent to pay child support to the present custodial parent when the child has constructively, without justifiable cause, emancipated himself or herself from the control of the prior custodial parent. I therefore would reverse the order, grant the mother's objection to the Support Magistrate's order, and dismiss the petition.

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

**1440**

**CA 08-02618**

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

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CLAUDIA S. JOHNSON,  
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

LARRY C. JOHNSON, DEFENDANT-APPELLANT-RESPONDENT.  
(APPEAL NO. 1.)

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BOUVIER PARTNERSHIP, LLP, EAST AURORA (ROGER T. DAVISON OF COUNSEL),  
FOR DEFENDANT-APPELLANT-RESPONDENT.

OFFERMANN, CASSANO, GRECO, SLISZ & ADAMS, LLP, BUFFALO (CHARLES A.  
MESSINA OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

MARY ANNE CONNELL, LAW GUARDIAN, BUFFALO, FOR ELIZABETH C.J. AND  
CHRISTIANA G.J.

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Appeal and cross appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered March 26, 2008 in a divorce action. The judgment, inter alia, granted plaintiff a divorce and custody of the parties' children.

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

Memorandum: In appeal No. 1, defendant appeals and plaintiff cross-appeals from a judgment granting plaintiff a divorce and custody of the parties' children, ordering defendant to pay support, and dividing the marital property. In appeal No. 2, defendant appeals from an order awarding attorney's fees to plaintiff.

Addressing first appeal No. 2, we conclude that Supreme Court did not abuse its discretion in awarding plaintiff attorney's fees (see generally *Bushorr v Bushorr*, 129 AD2d 989). The remainder of our decision concerns the judgment in appeal No. 1. We conclude with respect thereto that the court did not abuse its discretion in declining to award maintenance to plaintiff, given the respective financial positions of the parties (see generally *Mayle v Mayle*, 299 AD2d 869). Also contrary to the contention of plaintiff, the court did not fail to decide her motion to hold defendant in contempt based on his failure to comply with a temporary child support order and his failure to provide health insurance coverage for the children as of

September 1, 2007. The failure to rule on a motion is deemed a denial thereof (see *Brown v U.S. Vanadium Corp.*, 198 AD2d 863), and we conclude in any event that the court did not abuse its discretion in implicitly denying the motion (see generally *Di Filippo v Di Filippo*, 300 AD2d 1003, 1004). We also conclude that the court did not err in declining to impute income to defendant in calculating child support. Given defendant's employment history, financial statement and testimony at trial, it cannot be said that defendant reduced his resources or income in order to reduce or avoid his child support obligation (see Domestic Relations Law § 240 [1-b] [b] [5] [v]; see also *Matter of Monroe County Support Collection Unit v Wills*, 21 AD3d 1331, 1331-1332, lv denied 6 NY3d 705).

The court erred, however, in failing to determine the disposition of real and personal property in Idaho, where defendant had relocated. We therefore modify the judgment in appeal No. 1 by remitting the matter to Supreme Court to determine the disposition of the property in Idaho (see *Curry v Curry*, 254 AD2d 448, 449). While a divorce court in one state has no in rem jurisdiction over out-of-state real property and thus " 'does not have the power directly to affect, by means of its decree, the title to real property situated in another state' " (*Kindler v Kindler*, 60 AD2d 753, 754), a court with personal jurisdiction over the parties has "equity jurisdiction over their rights with respect to foreign realty" (*Ralske v Ralske*, 85 AD2d 598, 599, appeal dismissed 56 NY2d 644). Here, the court had personal jurisdiction over the parties and thus had equity jurisdiction over their rights to the property but failed to exercise that jurisdiction. Indeed, although the judgment addressed the Idaho property, the court did not in fact exercise its equity jurisdiction over the Idaho property by determining the respective rights of the parties concerning that property.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1441**

**CA 08-02619**

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

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CLAUDIA S. JOHNSON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

LARRY C. JOHNSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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BOUVIER PARTNERSHIP, LLP, EAST AURORA (ROGER T. DAVISON OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

OFFERMANN, CASSANO, GRECO, SLISZ & ADAMS, LLP, BUFFALO (CHARLES A.  
MESSINA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

MARY ANNE CONNELL, LAW GUARDIAN, BUFFALO, FOR ELIZABETH C.J. AND  
CHRISTIANA G.J.

---

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered April 28, 2008 in a divorce action. The order awarded attorney's fees to plaintiff.

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

Same Memorandum as in *Johnson v Johnson* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1444**

**CA 08-01930**

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

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IN THE MATTER OF ANDREW ROBINSON,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

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

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KAREN MURTAGH-MONKS, BUFFALO (KRIN FLAHERTY OF COUNSEL), FOR  
PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF  
COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Shirley Troutman, A.J.), entered June 26, 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 modified on the law by granting the petition in part, annulling those parts of the determination finding that petitioner violated inmate rules 100.10 (7 NYCRR 270.2 [B] [1] [i]) and 104.11 (7 NYCRR 270.2 [B] [5] [ii]) and by vacating the recommended loss of good time and as modified the judgment is affirmed without costs, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner appeals from a judgment dismissing his petition in which he sought to annul the determination finding that he violated various inmate rules. We note at the outset that, at the commencement of the Tier III hearing, petitioner pleaded guilty to violating inmate rule 104.13, creating a disturbance (7 NYCRR 270.2 [B] [5] [iv]), and we therefore do not address that charge. Petitioner also was charged with violating inmate rule 100.10, assaulting an inmate (7 NYCRR 270.2 [B] [1] [i]); inmate rule 104.11, engaging in violent conduct (7 NYCRR 270.2 [B] [5] [ii]); and inmate rule 107.10, interfering with an employee (7 NYCRR 270.2 [B] [8] [i]). Before the hearing was conducted, petitioner had requested that the victim of the purported assault be called as a witness. Although the employee assistant form in the record before us indicates that the witness refused to testify, no witness refusal form was signed and no reason for the refusal to testify was set forth on the employee assistant form. At the hearing, petitioner again requested that the victim be called as a witness. At the request of the Hearing

Officer, a correction officer asked the witness whether he would testify. The correction officer reported to the Hearing Officer that the witness refused to testify, but the correction officer provided no reason for the refusal nor is there any indication in the record that the witness was asked why he refused to testify.

We agree with petitioner that the Hearing Officer's failure to make any attempt to ascertain the reason for the refusal of the witness to testify violated petitioner's rights under 7 NYCRR 254.5 (a) (see e.g. *Matter of Barnes v LeFevre*, 69 NY2d 649, 650; *Matter of Alvarez v Goord*, 30 AD3d 118; *Matter of Martinez v Goord*, 15 AD3d 737, 738). "Under the circumstances presented here, where petitioner does not dispute that the evidence in the record was sufficient to sustain the determination, the appropriate remedy is to remit the matter for a new hearing in which petitioner should be provided with the reason for the witness's refusal to testify" (*Martinez*, 15 AD3d at 738; see *Alvarez*, 30 AD3d at 120-121). As noted, petitioner pleaded guilty to the charge of creating a disturbance and we therefore confirm the determination with respect to that charge. We also confirm the determination with respect to the charge of interfering with an employee inasmuch as that conduct occurred after the assault, and we agree with respondent that the witness would not have had relevant testimony to offer on that charge. We therefore modify the judgment by granting the petition in part, annulling those parts of the determination finding that petitioner violated inmate rules 100.10 and 104.11 and by vacating the recommended loss of good time, and we remit the matter to respondent for a new hearing on the remaining two charges and for reconsideration of the recommended loss of good time.

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

**1445**

**KA 07-02326**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARREN BRADBERRY, DEFENDANT-APPELLANT.

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SHIRLEY A. GORMAN, ALBION, 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 October 11, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and burglary 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 rape in the first degree (Penal Law § 130.35 [1]) and burglary in the second degree (§ 140.25 [2]). The victim alleged that in 1997 a man broke into her apartment, placed a pillowcase over her head while she was asleep, and demanded drugs. She further alleged that the perpetrator raped her when she told him that she had no drugs or money. The victim never saw the face of the perpetrator, nor did she recognize his voice. The police gathered evidence, including seminal material, but they had no eyewitnesses and were unable to identify the perpetrator. Using funding from a 2004 grant that enabled laboratories to process DNA evidence from unsolved crimes, the Niagara County crime laboratory forwarded the evidence in this case to the Erie County Public Safety Laboratory for DNA testing. A DNA profile of the perpetrator was obtained and submitted to the Combined DNA Index System (CODIS) for comparison, but no match was found at that time. Defendant was convicted of manslaughter in an unrelated case in 2005, however, and a DNA sample upon his conviction was submitted to CODIS (*see generally* Executive Law § 995-c). The DNA profile from the crimes in this case matched the sample of defendant's DNA that was submitted to CODIS, and defendant was then indicted for and convicted of the instant crimes.

Defendant waived his contention that the statute of limitations expired due to the delay between the commission of the crime and the commencement of the action (*see People v Mills*, 1 NY3d 269, 274;

*People v Blake*, 121 App Div 613, *affd* 193 NY 616; *People v Austin*, 63 App Div 382, *affd* 170 NY 585). In any event, we conclude that defendant's contention lacks merit. The delay was attributable to the lack of a DNA sample from defendant to compare with the DNA sample found at the rape and burglary scene, and the People did not obtain DNA material from defendant until after his sentencing on the 2005 manslaughter conviction. Consequently, defendant's identity was unknown until that time, and the limitations period was therefore tolled pursuant to CPL 30.10 (4) (a) for five of the years between the commission of the crime and the discovery of defendant's identity (see *People v Seda*, 93 NY2d 307, 311). That statute applies to the facts in this case, when the police "have not identified the perpetrator at all and thus cannot determine where he or she is" (*id.*). When that five-year period is added to the five-year limitations period in effect in 1997 with respect to the instant felony charges (see CPL 30.10 [2] [former (b)]), the prosecution was timely. Defendant's further contention that County Court erred in deciding the statute of limitations issue without first conducting a hearing is without merit. Where, as here, the evidence before the court is sufficient to establish that the statute of limitations is tolled, there is no need for a hearing on the issue (see *People v Rolle*, 59 AD3d 169, *lv denied* 12 NY3d 920).

Defendant also failed to preserve for our review his further contention that he was denied due process, i.e., his constitutional right to a speedy trial, by the delay in commencing the prosecution (see *People v Denis*, 276 AD2d 237, 246-247, *lv denied* 96 NY2d 782, 861; see generally *People v Charache*, 32 AD3d 1345, *affd* 9 NY3d 829; *People v Malave*, 52 AD3d 1313, 1315, *lv denied* 11 NY3d 790). In any event, that contention also is without merit. In determining whether defendant's constitutional right to a speedy trial was violated by an undue delay in commencing a prosecution, a court must evaluate "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*People v Taranovich*, 37 NY2d 442, 445). Here, although there is no question that there was a lengthy delay, we note that the reason for the delay was that the crimes were committed before the institution of CODIS and the police did not have a sample of defendant's DNA to which evidence from the crime could be compared until defendant was convicted of the subsequent crime of manslaughter, resulting in the entry of his DNA profile in CODIS. Furthermore, the instant charges can only be described as serious; defendant was not incarcerated on the instant charges prior to his indictment; and defendant failed to establish that his defense was impaired by the delay in prosecution (see *id.*).

We reject the contention of defendant that he was denied effective assistance of counsel based upon counsel's failure to move to dismiss the indictment on the grounds that the statute of limitations had expired or that his right to due process, i.e., his constitutional right to a speedy trial, was violated by the delay in

commencing the prosecution. "There can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702) and, as previously discussed, there was no statute of limitations or due process violation.

Contrary to defendant's further contentions, the evidence is legally sufficient to support the conviction (see generally *People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Defendant failed to preserve for our review his remaining contention concerning the court's consideration of a pretrial delay issue in the absence of a motion to dismiss (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]).

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

**1452**

**CA 09-00798**

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

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GARY M. DISCHIAVI AND LINDA DISCHIAVI,  
PLAINTIFFS-APPELLANTS,

V

ORDER

WILLIAM S. CALLI, ROBERT CALLI, HERBERT CULLY,  
CALLI, CALLI AND CULLY, CALLI, CALLI AND CULLY,  
L.L.P., CALLI AND CALLI, L.P., ANDREW S.  
KOWALCZYK, JOSEPH STEPHEN DEERY, JR., THOMAS S.  
SOJA, AND CALLI, KOWALCZYK, TOLLES, DEERY AND  
SOJA, DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 1.)

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LUIBRAND LAW FIRM, PLLC, LATHAM (KEVIN A. LUIBRAND OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

KERNAN AND KERNAN, P.C., UTICA (LEIGHTON R. BURNS OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS WILLIAM S. CALLI, CALLI, CALLI AND CULLY,  
L.L.P., AND CALLI AND CALLI, L.P.

HISCOCK & BARCLAY, LLP, SYRACUSE (KEVIN M. HAYDEN OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS ROBERT CALLI, HERBERT CULLY, AND CALLI, CALLI  
AND CULLY.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHELLE M. WESTERMAN  
OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ANDREW S. KOWALCZYK, JOSEPH  
STEPHEN DEERY, JR., AND CALLI, KOWALCZYK, TOLLES, DEERY AND SOJA.

GETNICK LIVINGSTON ATKINSON GIGLIOTTI & PRIORE, LLP, UTICA (PATRICK G.  
RADEL OF COUNSEL), FOR DEFENDANT-RESPONDENT THOMAS S. SOJA.

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Appeal from an order of the Supreme Court, Oneida County (Michael  
E. Daley, J.), entered November 21, 2008. The order granted the  
motions and cross motion of defendants for, inter alia, summary  
judgment.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1453**

**CA 09-00801**

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

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GARY M. DISCHIAVI AND LINDA DISCHIAVI,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

WILLIAM S. CALLI, CALLI, CALLI AND CULLY,  
L.L.P., CALLI AND CALLI, L.P.,  
DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANTS.  
(APPEAL NO. 2.)

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LUIBRAND LAW FIRM, PLLC, LATHAM (KEVIN A. LUIBRAND OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

KERNAN AND KERNAN, P.C., UTICA (LEIGHTON R. BURNS OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

---

Appeal from a judgment of the Supreme Court, Oneida County (Michael E. Daley, J.), entered November 21, 2008. The judgment dismissed the complaint against defendants William S. Calli, Calli, Calli and Cully, L.L.P., and Calli and Calli, L.P.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motions are denied in part and the complaint against defendants William S. Calli, Calli, Calli and Cully, L.L.P., and Calli and Calli, L.P. is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for breach of contract, legal malpractice, fraud, breach of fiduciary duty and negligence. According to plaintiffs, defendants represented them with respect to personal injury and medical malpractice claims and failed to commence actions on their behalf in a timely manner. Plaintiffs further allege that defendants misrepresented the status of their claims. In appeal Nos. 2 through 5, plaintiffs appeal from judgments granting those parts of defendants' motions and cross motion seeking summary judgment dismissing the complaint on the ground that plaintiffs lack the legal capacity to sue with respect to all of the causes of action because they failed to disclose those causes of action as assets in their bankruptcy proceeding (*see generally Whelan v Longo*, 7 NY3d 821; *Dynamics Corp. of Am. v Marine Midland Bank-N.Y.*, 69 NY2d 191, 196-197).

With respect to the judgments in appeal Nos. 2 through 5, we conclude that the court erred in granting those parts of the motions

and cross motion seeking summary judgment dismissing the complaint on the ground that plaintiffs lacked legal capacity to sue. Defendants met their initial burdens in part by establishing that plaintiffs failed to include any of their causes of action against defendants in their schedule of assets for their bankruptcy proceeding, that the causes of action for breach of contract, legal malpractice, breach of fiduciary duty and negligence accrued prior to the commencement of the bankruptcy proceeding, and that plaintiffs obtained a discharge in bankruptcy (see *Wright v Meyers & Spencer, LLP*, 46 AD3d 805; *Nationwide Assoc., Inc. v Epstein*, 24 AD3d 738; see also *Whelan v Longo*, 23 AD3d 459, *affd* 7 NY3d 821). Defendants failed, however, to demonstrate that plaintiffs "knew or should have known of" those causes of action against defendants prior to commencing the bankruptcy proceeding (*Dynamics Corp. of Am.*, 69 NY2d at 197; see *R. Della Realty Corp. v Block 6222 Constr. Corp.*, 65 AD3d 1323). Defendants also failed to establish that the fraud cause of action accrued prior to commencement of the bankruptcy proceeding (*cf. Wright*, 46 AD3d 805).

In appeal Nos. 3 and 4, defendant Thomas S. Soja and defendants Andrew S. Kowalczyk, Joseph Stephen Deery, Jr. and Calli, Kowalczyk, Tolles, Deery and Soja (collectively, CKTDS defendants) respectively contend, as an alternative ground for affirmance (see generally *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), that they are not liable for the conduct of defendant Robert Calli because they terminated their association with him prior to his acts and omissions in question. Those defendants, however, did not seek summary judgment dismissing the complaint against them on that ground, and we may not "search the record and grant summary judgment on an issue not raised" in Soja's motion or the CKTDS defendants' cross motion (*Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73, 82). The CKTDS defendants further contend in appeal No. 4, as a second alternative ground for affirmance, that the court should have granted their cross motion seeking summary judgment dismissing the breach of contract, fraud, breach of fiduciary duty and negligence causes of action against them on the ground that they are duplicative of the legal malpractice cause of action. We agree with the CKTDS defendants with respect to the causes of action against them for breach of contract (see *Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 1083, *lv denied* 6 NY3d 701), breach of fiduciary duty (see *InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152) and negligence (see *Turner v Irving Finkelstein & Meirowitz, LLP*, 61 AD3d 849). We reject their contention with respect to the fraud cause of action, however, inasmuch as plaintiffs have alleged that the fraud "caused additional damages, separate and distinct from those generated by the alleged malpractice" (*Tasseff v Nussbaumer & Clarke*, 298 AD2d 877, 878). We therefore modify the judgment in appeal No. 4 by denying the cross motion of the CKTDS defendants in part and reinstating the causes of action for legal malpractice and fraud against them.

The CKTDS defendants further contend in appeal No. 4, as a third alternative ground for affirmance, that the court should have granted their cross motion seeking summary judgment dismissing the complaint

on the ground that each of the causes of action is time-barred. Based on our determination that the breach of contract, breach of fiduciary duty and negligence causes of action are duplicative of the legal malpractice cause of action, we address that contention only with respect to the two remaining causes of action against them, i.e., for legal malpractice and fraud. With respect to the legal malpractice cause of action, there is a triable issue of fact whether plaintiffs are entitled to the toll provided by the continuous representation doctrine (see generally *Glamm v Allen*, 57 NY2d 87, 94). With respect to the fraud cause of action, there is a triable issue of fact whether plaintiffs could have, with reasonable diligence, discovered the alleged fraud more than two years prior to commencement of this action (see CPLR 203 [g]; CPLR 213 [8]).

Finally, we reject the further contention of the CKTDS defendants in appeal No. 4 that plaintiffs' allegations of fraud are insufficient to support the claim against them for punitive damages (see generally *Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 884; *Smith v Ameriquest Mtge. Co.*, 60 AD3d 1037, 1040).

We have considered the parties' remaining contentions and conclude that they are either moot in light of our determination or lacking in merit.

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

**1454**

**CA 09-00802**

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

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GARY M. DISCHIAVI AND LINDA DISCHIAVI,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

WILLIAM S. CALLI, ET AL., DEFENDANTS,  
AND THOMAS S. SOJA, DEFENDANT-RESPONDENT.  
(APPEAL NO. 3.)

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LUIBRAND LAW FIRM, PLLC, LATHAM (KEVIN A. LUIBRAND OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

GETNICK LIVINGSTON ATKINSON GIGLIOTTI & PRIORE, LLP, UTICA (PATRICK G.  
RADEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Oneida County  
(Michael E. Daley, J.), entered November 25, 2008. The judgment  
dismissed the complaint against defendant Thomas S. Soja.

It is hereby ORDERED that the judgment so appealed from is  
unanimously reversed on the law without costs, the motion is denied in  
part and the complaint against defendant Thomas S. Soja is reinstated.

Same Memorandum as in *Dischiavi v Calli* ([appeal No. 2] \_\_\_ AD3d  
\_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1455**

**CA 09-00803**

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

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GARY M. DISCHIAVI AND LINDA DISCHIAVI,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

WILLIAM S. CALLI, ET AL., DEFENDANTS,  
ANDREW S. KOWALCZYK, JOSEPH STEPHEN DEERY, JR.,  
AND CALLI, KOWALCZYK, TOLLES, DEERY AND SOJA,  
DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 4.)

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LUIBRAND LAW FIRM, PLLC, LATHAM (KEVIN A. LUIBRAND OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHELLE M. WESTERMAN  
OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from a judgment of the Supreme Court, Oneida County  
(Michael E. Daley, J.), entered December 26, 2008. The judgment  
dismissed the complaint against defendants Andrew S. Kowalczyk, Joseph  
Stephen Deery, Jr., and Calli, Kowalczyk, Tolles, Deery and Soja.

It is hereby ORDERED that the judgment so appealed from is  
unanimously modified on the law by denying the cross motion in part  
and reinstating the second and third causes of action against  
defendants Andrew S. Kowalczyk, Joseph Stephen Deery, Jr., and Calli,  
Kowalczyk, Tolles, Deery and Soja and as modified the judgment is  
affirmed without costs.

Same Memorandum as in *Dischiavi v Calli* ([appeal No. 2] \_\_\_ AD3d  
\_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1456**

**CA 09-00804**

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

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GARY M. DISCHIAVI AND LINDA DISCHIAVI,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

WILLIAM S. CALLI, ET AL., DEFENDANTS,  
ROBERT CALLI, HERBERT CULLY, AND CALLI,  
CALLI AND CULLY, DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 5.)

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LUIBRAND LAW FIRM, PLLC, LATHAM (KEVIN A. LUIBRAND OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (KEVIN M. HAYDEN OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

---

Appeal from a judgment of the Supreme Court, Oneida County  
(Michael E. Daley, J.), entered January 12, 2009. The judgment  
dismissed the complaint against defendants Robert Calli, Herbert  
Cully, and Calli, Calli and Cully.

It is hereby ORDERED that the judgment so appealed from is  
unanimously reversed on the law without costs, the motion is denied in  
part and the complaint against defendants Robert Calli, Herbert Cully,  
and Calli, Calli and Cully is reinstated.

Same Memorandum as in *Dischiavi v Calli* ([appeal No. 2] \_\_\_ AD3d  
\_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1457**

**CA 09-00329**

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

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STEPHEN SZCZESNIAK AND MARGARET SZCZESNIAK,  
PLAINTIFFS-RESPONDENTS,

V

ORDER

MARK WHITFORD, DEFENDANT-APPELLANT,  
AND MARK HAWKINS, DEFENDANT-RESPONDENT.

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LAW OFFICES OF EPSTEIN & HARTFORD, NORTH SYRACUSE (SHEILA FINN  
SCHWEDES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MERKEL & MERKEL, ROCHESTER (DAVID A. MERKEL OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (CHRISTOPHER  
PUSATERI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Livingston County  
(Dennis S. Cohen, A.J.), entered July 21, 2008. The order, insofar as  
appealed from, denied the motion of defendant Mark Whitford 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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1458**

**CA 08-02265**

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

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LT PROPCO, LLC, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CAROUSEL CENTER COMPANY, L.P. AND CITY OF  
SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
DEFENDANTS-RESPONDENTS.  
(ACTION NO. 1.)

---

LORD & TAYLOR CAROUSEL, INC.,  
PLAINTIFF-APPELLANT,

V

CAROUSEL CENTER COMPANY, L.P. AND CITY OF  
SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
DEFENDANTS-RESPONDENTS.  
(ACTION NO. 2.)

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IN THE MATTER OF THE APPLICATION OF CITY  
OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
PETITIONER-RESPONDENT,  
TO ACQUIRE CERTAIN INTERESTS IN THE CAROUSEL  
CENTER SITE, WHICH SITE IS GENERALLY IDENTIFIED  
AS 1 CAROUSEL CENTER DRIVE (LOT 11K), SBL NO.  
114-02-05.6; 304 HIAWATHA BOULEVARD W. REAR  
(LOT 11B), SBL NO. 114-02-05.2 IN THE CITY OF  
SYRACUSE, NEW YORK, WHICH PARCELS COMPRISE A  
PORTION OF THE SITE FOR THE PHASED PUBLIC  
PROJECT KNOWN AS DESTINY USA.

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LORD & TAYLOR CAROUSEL, INC.,  
RESPONDENT-APPELLANT.  
(PROCEEDING NO. 1.)  
(APPEAL NO. 1.)

---

HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS AND RESPONDENT-APPELLANT.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (KEVIN G. ROE OF  
COUNSEL), FOR DEFENDANT-RESPONDENT CAROUSEL CENTER COMPANY, L.P.

HISCOCK & BARCLAY, LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR  
DEFENDANT-RESPONDENT AND PETITIONER-RESPONDENT CITY OF SYRACUSE  
INDUSTRIAL DEVELOPMENT AGENCY.

---

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered August 7, 2008. The order, among other things, conditionally granted the motion of defendants in action Nos. 1 and 2 seeking to dismiss the EDPL article 5 proceeding unless plaintiff LT Propco, LLC join certain indispensable or necessary parties.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating those parts providing that LT Propco, LLC join certain indispensable or necessary parties and by providing in the third ordering paragraph that the motion is denied and as modified the order is affirmed without costs.

Memorandum: LT Propco, LLC, the plaintiff in action No. 1, and Lord & Taylor Carousel, Inc., the plaintiff in action No. 2 and the respondent in proceeding No. 1 pursuant to EDPL article 5 (collectively, plaintiffs), appeal from an order that, inter alia, conditionally granted the motion of defendants in action Nos. 1 and 2 seeking to dismiss the EDPL article 5 proceeding unless LT Propco, LLC joined its mortgagees as necessary parties therein (*LT Propco, LLC v Carousel Ctr. Co. LP*, 20 Misc 3d 1124[A], 2008 NY Slip Op 51598[U]). We agree with plaintiffs that the mortgagees are not necessary parties to the EDPL article 5 proceeding at issue (*see generally* CPLR 1001, 1003), and we therefore modify the order accordingly. Because New York operates under a lien theory as opposed to a title theory with respect to mortgages, "the language used in the assignment instrument itself is not determinative of what rights are actually transferred" (*Dream Team Assoc., LLC v Broadway City, LLC*, 2003 NY Slip Op 50894[U], \*6; *see Mooney v Byrne*, 163 NY 86, 91, *rearg denied* 164 NY 585; *Leonia Bank v Kouri*, 3 AD3d 213, 216-217; *Ganbaum v Rockwood Realty Corp.*, 62 Misc 2d 391, 395). Here, upon reviewing the assignment agreement between LT Propco, LLC and its mortgagees as a whole, we conclude that it is clear therefrom that the assignment of any rights to the mortgagees was for the purpose of securing the repayment of debt owed (*see generally Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1459**

**CA 08-02266**

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

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LT PROPCO, LLC, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CAROUSEL CENTER COMPANY, L.P. AND CITY OF  
SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
DEFENDANTS-RESPONDENTS.  
(ACTION NO. 1.)

---

LORD & TAYLOR CAROUSEL, INC.,  
PLAINTIFF-APPELLANT,

V

CAROUSEL CENTER COMPANY, L.P. AND CITY OF  
SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
DEFENDANTS-RESPONDENTS.  
(ACTION NO. 2.)

---

KAUFMANN'S CAROUSEL, INC.,  
PLAINTIFF-APPELLANT,

V

CAROUSEL CENTER COMPANY, L.P. AND CITY OF  
SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
DEFENDANTS-RESPONDENTS.  
(ACTION NO. 3.)

---

IN THE MATTER OF THE APPLICATION OF CITY  
OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
PETITIONER-RESPONDENT,  
TO ACQUIRE CERTAIN INTERESTS IN THE CAROUSEL  
CENTER SITE, WHICH SITE IS GENERALLY IDENTIFIED  
AS 1 CAROUSEL CENTER DRIVE (LOT 11K), SBL NO.  
114-02-05.6; 304 HIAWATHA BOULEVARD W. REAR  
(LOT 11B), SBL NO. 114-02-05.2 IN THE CITY OF  
SYRACUSE, NEW YORK, WHICH PARCELS COMPRISE A  
PORTION OF THE SITE FOR THE PHASED PUBLIC  
PROJECT KNOWN AS DESTINY USA.

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LORD & TAYLOR CAROUSEL, INC.,  
RESPONDENT-APPELLANT.  
(PROCEEDING NO. 1.)

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IN THE MATTER OF THE APPLICATION OF CITY

OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
PETITIONER-RESPONDENT,  
TO ACQUIRE CERTAIN INTERESTS IN THE CAROUSEL  
CENTER SITE, WHICH SITE IS GENERALLY IDENTIFIED  
AS 1 CAROUSEL CENTER DRIVE (LOT 11K), SBL NO.  
114-02-05.6; 304 HIAWATHA BOULEVARD W. REAR  
(LOT 11B), SBL NO. 114-02-05.2 IN THE CITY OF  
SYRACUSE, NEW YORK, WHICH PARCELS COMPRISE A  
PORTION OF THE SITE FOR THE PHASED PUBLIC  
PROJECT KNOWN AS DESTINY USA.

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KAUFMANN'S CAROUSEL, INC.,  
RESPONDENT-APPELLANT.  
(PROCEEDING NO. 2.)  
(APPEAL NO. 2.)

---

HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS AND RESPONDENTS-APPELLANTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (KEVIN G. ROE OF  
COUNSEL), FOR DEFENDANT-RESPONDENT CAROUSEL CENTER COMPANY, L.P.

HISCOCK & BARCLAY, LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR  
DEFENDANT-RESPONDENT AND PETITIONER-RESPONDENT CITY OF SYRACUSE  
INDUSTRIAL DEVELOPMENT AGENCY.

-----  
Appeal from an order of the Supreme Court, Onondaga County (John  
C. Cherundolo, A.J.), entered August 7, 2008. The order, among other  
things, dismissed the complaints of plaintiffs LT Propco, LLC and  
Kaufmann's Carousel, Inc.

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

Same Memorandum as in *LT Propco, LLC v Carousel Ctr. Co., L.P.*  
([appeal No. 3] \_\_\_ AD3d \_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1460**

**CA 09-00002**

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

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LT PROPCO, LLC, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CAROUSEL CENTER COMPANY, L.P. AND CITY OF  
SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
DEFENDANTS-RESPONDENTS.  
(ACTION NO. 1.)

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LORD & TAYLOR CAROUSEL, INC.,  
PLAINTIFF-APPELLANT,

V

CAROUSEL CENTER COMPANY, L.P. AND CITY OF  
SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
DEFENDANTS-RESPONDENTS.  
(ACTION NO. 2.)

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KAUFMANN'S CAROUSEL, INC.,  
PLAINTIFF-APPELLANT,

V

CAROUSEL CENTER COMPANY, L.P. AND CITY OF  
SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
DEFENDANTS-RESPONDENTS.  
(ACTION NO. 3.)

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IN THE MATTER OF THE APPLICATION OF CITY  
OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
PETITIONER-RESPONDENT,  
TO ACQUIRE CERTAIN INTERESTS IN THE CAROUSEL  
CENTER SITE, WHICH SITE IS GENERALLY IDENTIFIED  
AS 1 CAROUSEL CENTER DRIVE (LOT 11K), SBL NO.  
114-02-05.6; 304 HIAWATHA BOULEVARD W. REAR  
(LOT 11B), SBL NO. 114-02-05.2 IN THE CITY OF  
SYRACUSE, NEW YORK, WHICH PARCELS COMPRISE A  
PORTION OF THE SITE FOR THE PHASED PUBLIC  
PROJECT KNOWN AS DESTINY USA.

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LORD & TAYLOR CAROUSEL, INC.,  
RESPONDENT-APPELLANT.  
(PROCEEDING NO. 1.)

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IN THE MATTER OF THE APPLICATION OF CITY

OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
PETITIONER-RESPONDENT,  
TO ACQUIRE CERTAIN INTERESTS IN THE CAROUSEL  
CENTER SITE, WHICH SITE IS GENERALLY IDENTIFIED  
AS 1 CAROUSEL CENTER DRIVE (LOT 11K), SBL NO.  
114-02-05.6; 304 HIAWATHA BOULEVARD W. REAR  
(LOT 11B), SBL NO. 114-02-05.2 IN THE CITY OF  
SYRACUSE, NEW YORK, WHICH PARCELS COMPRISE A  
PORTION OF THE SITE FOR THE PHASED PUBLIC  
PROJECT KNOWN AS DESTINY USA.

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KAUFMANN'S CAROUSEL, INC.,  
RESPONDENT-APPELLANT.  
(PROCEEDING NO. 2.)  
(APPEAL NO. 3.)

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HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS AND RESPONDENTS-APPELLANTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (KEVIN G. ROE OF  
COUNSEL), FOR DEFENDANT-RESPONDENT CAROUSEL CENTER COMPANY, L.P.

HISCOCK & BARCLAY, LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR  
DEFENDANT-RESPONDENT AND PETITIONER-RESPONDENT CITY OF SYRACUSE  
INDUSTRIAL DEVELOPMENT AGENCY.

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Appeal from a judgment (denominated order and judgment) of the  
Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered  
December 11, 2008. The judgment, among other things, declared the  
obligations of the parties.

It is hereby ORDERED that said appeal from the judgment insofar  
as it denied leave to reargue is unanimously dismissed (*see Empire  
Ins. Co. v Food City*, 167 AD2d 983, 984) and the judgment is otherwise  
affirmed without costs.

Memorandum: These appeals are the latest in a series stemming  
from the condemnation by defendant-petitioner Syracuse Industrial  
Development Agency (SIDA) in an EDPL article 4 proceeding of certain  
leasehold interests of plaintiff-respondent Kaufmann's Carousel, Inc.  
(Kaufmann's) and plaintiff-respondent Lord & Taylor Carousel, Inc.  
(Lord & Taylor), among others (*Matter of City of Syracuse Indus. Dev.  
Agency [J.C. Penney Corp., Inc.-Carousel Ctr. Co., L.P.]*, 32 AD3d  
1332, *lv denied* 7 NY3d 714, *cert denied* 550 US 918; *Matter of  
Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d  
292, *lv denied* 99 NY2d 508). In 1991 Kaufmann's and Lord & Taylor  
entered into a series of agreements with Pyramid Companies (Pyramid)  
establishing long-term leases with Pyramid to operate retail  
department stores as anchor tenants at the Carousel Center shopping  
mall (Carousel Center). Among those agreements is a Construction,  
Operation and Reciprocal Easement Agreement (REA) that governs, inter

alia, the parties' rights and responsibilities with respect to common areas, including the right of Kaufmann's and Lord & Taylor to the parking area surrounding their respective stores, and the parties' respective real estate tax obligations. Lord & Taylor's interest in its Carousel Center store has since been assigned to plaintiff LT Propco, LLC (LT Propco), and Pyramid's interests with respect to the contracts at issue, including the REA, have been assigned to defendant Carousel Center Company, L.P. (Carousel Company).

LT Propco and Kaufmann's (hereafter, plaintiffs) each commenced actions against Carousel Company and SIDA asserting 15 causes of action in which they sought declarations that, inter alia, they either have no obligation to pay to Carousel Company amounts serving as contributions to a payment in lieu of taxes (PILOT) agreement or that any such obligation is limited, and that they have the right to terminate the REA as a result of SIDA's prior condemnation.

As relevant on appeal, by the order in appeal No. 2 Supreme Court granted defendants' motions seeking to dismiss plaintiffs' complaints in their entirety, whereupon those plaintiffs moved for leave to reargue with respect to three of their causes of action. By the judgment in appeal No. 3, the court granted the motion in part and made several declarations with respect to, inter alia, the obligations of plaintiffs to make PILOT payments and their ability to terminate the REA. We conclude that the declarations were properly made.

We reject the contention of plaintiffs that REA § 18 (1) (c) required Carousel Company to obtain their consent prior to entering into a 2005 PILOT agreement. REA § 18.1 (c) states that "[Carousel Company] shall not make any agreement with the taxing authority . . . without the agreement of the Major Party whose Parcel is the subject [of], or is affected by," the agreement. That section, however, when read in the context of article 18 of the REA, applies when there is no PILOT agreement governing real estate tax obligations for the relevant parcels. Instead, section 18.1 (b) of the REA applies when any PILOT agreement exists, and that section does not contain language limiting the ability of Carousel Company to negotiate for or enter into PILOT agreements. Further, SIDA acquired in the condemnation proceeding "[a]ny rights which restrict or otherwise adversely affect in any way any contemplated SIDA payment-in-lieu-of-tax ('PILOT') or financing structure for DestiNY USA, including without limitation, any restriction on the amount required to be paid as a PILOT." Because Carousel Company was not obligated to obtain plaintiffs' consent prior to entering into a new 2005 PILOT agreement, plaintiffs are not entitled to a declaration that they have no obligation to contribute to payments pursuant to that PILOT agreement based on Carousel Company's failure to do so. Thus, the court properly declared that plaintiffs remained obligated to make contributions to PILOT payments in accordance with the REA, even if the amount of such contributions exceeds the amounts previously paid. Additionally, because the current PILOT agreement separates the existent Carousel Center from any expansion parcels, there was no need for the court to declare a new formula by which the parties should calculate plaintiffs' PILOT

contributions (*see generally DiFrancesco v County of Rockland*, 41 AD3d 530, 532, *appeal dismissed* 9 NY3d 953).

Plaintiffs further contend that they were entitled to a declaration that conditions currently existed that would permit them to terminate the REA pursuant to section 17.4 of that agreement. We reject that contention. Although we conclude that the court erred in determining that the termination right set forth in section 17.4 is dependent upon the parking requirement easement in REA § 11.1, we nevertheless conclude that the court properly declared that "conditions do not exist for [p]laintiff[s] to terminate the REA . . . and that [p]laintiff[s] currently may not exercise that right." Plaintiffs' allegations that planned construction will result in a parking reduction sufficient to trigger the termination right in section 17.4 are speculative, whereas section 17.4 contemplates an actual deprivation of parking availability in order to become operative.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1461**

**CA 09-00001**

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

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IN THE MATTER OF THE APPLICATION OF CITY  
OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
PETITIONER-RESPONDENT,  
TO ACQUIRE CERTAIN INTERESTS IN THE CAROUSEL  
CENTER SITE, WHICH SITE IS GENERALLY IDENTIFIED  
AS 1 CAROUSEL CENTER DRIVE (LOT 11K), SBL NO.  
114-02-05.6; 304 HIAWATHA BOULEVARD W. REAR  
(LOT 11B), SBL NO. 114-02-05.2 IN THE CITY OF  
SYRACUSE, NEW YORK, WHICH PARCELS COMPRISE A  
PORTION OF THE SITE FOR THE PHASED PUBLIC  
PROJECT KNOWN AS DESTINY USA.

ORDER

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LORD & TAYLOR CAROUSEL, INC.,  
RESPONDENT-APPELLANT.  
(PROCEEDING NO. 1.)  
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IN THE MATTER OF THE APPLICATION OF CITY  
OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY,  
PETITIONER-RESPONDENT,  
TO ACQUIRE CERTAIN INTERESTS IN THE CAROUSEL  
CENTER SITE, WHICH SITE IS GENERALLY IDENTIFIED  
AS 1 CAROUSEL CENTER DRIVE (LOT 11K), SBL NO.  
114-02-05.6; 304 HIAWATHA BOULEVARD W. REAR  
(LOT 11B), SBL NO. 114-02-05.2 IN THE CITY OF  
SYRACUSE, NEW YORK, WHICH PARCELS COMPRISE A  
PORTION OF THE SITE FOR THE PHASED PUBLIC  
PROJECT KNOWN AS DESTINY USA.

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KAUFMANN'S CAROUSEL, INC.,  
RESPONDENT-APPELLANT.  
(PROCEEDING NO. 2.)  
(APPEAL NO. 4.)  
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HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR  
RESPONDENTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme  
Court, Onondaga County (John C. Cherundolo, A.J.), entered December  
23, 2008. The order and judgment, among other things, granted the  
motion of Carousel Center Company, L.P., joined by petitioner, to  
release a previously posted undertaking.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1467**

**KA 08-01123**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

IBRIEL SUMTER, 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 (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered November 15, 2007. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

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 two counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant failed to preserve for our review his contention that County Court should have suppressed the in-court identifications of him by three police investigators based on the insufficiency of the CPL 710.30 notice (*see People v Robinson*, 28 AD3d 1126, 1129, *lv denied* 7 NY3d 794; *People v Topolski*, 28 AD3d 1159, 1161, *lv dismissed* 6 NY3d 898, *lv denied* 7 NY3d 764, 795). In any event, that contention is without merit. The CPL 710.30 notice set forth the date of the identification proceeding, the location where it occurred and the manner of identification, and we thus conclude that the notice was sufficient "to facilitate . . . defendant's opportunity to challenge" that identification proceeding (*People v Lopez*, 84 NY2d 425, 428; *see People v Del Valle*, 234 AD2d 634, 635, *lv denied* 89 NY2d 1010; *People v Mayers*, 233 AD2d 407, *lv denied* 89 NY2d 944). There is no support in the record for defendant's further contention that multiple identification proceedings occurred in this case.

We agree with defendant, however, that the court erred in admitting in evidence testimony concerning the seizure of \$1,027 in cash from defendant at the time of his arrest, as well as the cash

itself. Defendant was arrested over one month after the drug sales that were the basis for the charges against him, and the People failed to establish a relationship between that cash and the charges in question. We thus conclude that defendant's possession of the cash was "too remote to the issue of [defendant's] intent to sell drugs to outweigh the potential for prejudice inherent in the admission of evidence which invited the jury to speculate that defendant had previously sold drugs" (*People v Corbitt*, 221 AD2d 809, 810). Nevertheless, we conclude that the error is harmless. The evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Finally, the sentence is not unduly harsh or severe.

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

**1468**

**KA 08-01887**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

EPHRIAM HUNTER, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 9, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1469**

**KA 08-01886**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

EPHRIAM HUNTER, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 9, 2007. 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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1470**

**KA 08-01112**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

COLLIS B. MADDOX, DEFENDANT-APPELLANT.

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FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (RAY A. KYLES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered May 11, 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 (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1471**

**KA 08-02635**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRYON K. RUSS, DEFENDANT-APPELLANT.

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ROBERT TUCKER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

BRYON K. RUSS, DEFENDANT-APPELLANT PRO SE.

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

---

Appeal from a resentence of the Ontario County Court (William F. Kocher, J.), rendered November 13, 2008. Defendant was resentenced upon his conviction of robbery in the first degree (two counts), assault in the first degree, and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the resentence so appealed from is unanimously modified on the law by vacating the directive that the sentences shall run consecutively to the sentence imposed by Wayne County Court and as modified the resentence is affirmed.

Memorandum: Defendant was convicted upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [2]), and he appeals from the resentence on that conviction. Ontario County Court (Harvey, J.) sentenced defendant to concurrent determinate terms of imprisonment on each count (*People v Russ*, 292 AD2d 862, lv denied 98 NY2d 713, 99 NY2d 539), but failed to state that it was imposing an additional period of postrelease supervision with respect to each count, as required by Penal Law § 70.45 (1). Defendant thereafter moved to set aside the sentence as illegal pursuant to CPL 440.20 (1) and, with the consent of the People, County Court (Kocher, J.) resentenced defendant to the originally imposed determinate sentences of imprisonment with no postrelease supervision, pursuant to Penal Law § 70.85. We agree with defendant that the court at resentencing erred in directing that the sentences shall run consecutively to a sentence imposed by Wayne County Court subsequent to the conviction in Ontario County. "The power of a court of original jurisdiction to review a sentence is narrowly limited by case law and statute" (*People v Tavano*, 67 AD2d 1090, 1091; see generally CPL 430.10). In resentencing defendant pursuant to Penal Law § 70.85, the court had no authority to direct that the sentences run either concurrently with or consecutively to the sentence imposed by Wayne County Court. We

therefore modify the resentence accordingly. We have considered the contentions of defendant in his pro se supplemental brief and conclude that they are lacking in merit.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1472**

**KA 08-01890**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CHRISTOPHER ERON, DEFENDANT-APPELLANT.

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

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

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Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered August 11, 2008. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1473**

**KA 06-03284**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROYAL C. CARMICHAEL, 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.

---

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 2, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon 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 modified on the law by reversing that part convicting defendant of criminal possession of a weapon in the third degree and dismissing count seven of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [former (1)]). We agree with defendant that the evidence is legally insufficient to support his conviction of criminal possession of a weapon in the third degree (*see generally People v Bleakley*, 69 NY2d 490, 495), and we therefore modify the judgment accordingly. That count concerned defendant's alleged possession of a firearm approximately four days after the victim was murdered. Following defendant's arrest on that date, the police asked defendant to disclose the location of the weapon he used in the crime. Defendant replied that the gun was in a safe located on a closet shelf in his mother's bedroom and that he lived in his mother's house. Defendant gave the police an incorrect combination to the safe, and the police were able to open it only after defendant's mother retrieved the correct combination from a slip of paper in her purse. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is no valid line of reasoning and permissible inferences to support the conclusion that defendant exercised dominion and control over the safe, the

bedroom in which the safe was located, or his mother, and thus the evidence is legally insufficient to establish that defendant was in constructive possession of the firearm on the date of his arrest (see *People v Manini*, 79 NY2d 561, 573-574; *People v Edwards*, 39 AD3d 1078, 1079; cf. *People v Ortiz*, 61 AD3d 779, lv denied 13 NY3d 748; see generally *Bleakley*, 69 NY2d at 495).

We reject the further contention of defendant that the evidence is legally insufficient to support his conviction of murder in the second degree (see generally *id.*). Viewing the evidence in light of the elements of that crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we also reject defendant's contention that the verdict with respect thereto is against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

Contrary to the contention of defendant, we conclude that Supreme Court properly denied his motion pursuant to CPL 330.30 (2) seeking to set aside the verdict based on juror misconduct. In order to prevail on that motion, defendant was required to establish "by a preponderance of the evidence that improper conduct by a juror prejudiced a substantial right of" defendant (*People v McDonald*, 40 AD3d 1125, lv denied 9 NY3d 878; see *People v Brown*, 278 AD2d 920, lv denied 96 NY2d 781; *People v Adams*, 278 AD2d 920, 920-921, lv denied 96 NY2d 825; see generally *People v Irizarry*, 83 NY2d 557, 561). The juror in question conducted internet research on the issue whether the gunshot wound was a close contact wound or one inflicted from a distance. At the hearing conducted on the motion, however, the juror testified that his research disclosed no information that was helpful to him, that he remained confused about the issue even after conducting his research, and that he consequently based his verdict only on the evidence presented at the trial. We note in addition that the only juror with knowledge of the other juror's internet research testified at the hearing that he had made a determination concerning whether the gunshot wound was a close contact wound or one inflicted from a distance before learning of the internet research, that the internet research did not affect either his decision on that issue or his verdict, and that he arrived at his verdict based on the evidence presented at the trial.

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

**1474**

**KAH 09-00208**

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

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
MICHAEL ROBINSON, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN  
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

---

CHARLES A. MARANGOLA, MORAVIA, FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL),  
FOR RESPONDENT-RESPONDENT.

---

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered October 29, 2008. The judgment dismissed the petition for a writ of habeas corpus.

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

Memorandum: Supreme Court properly dismissed the petition for a writ of habeas corpus. "The contention of petitioner that he is entitled to immediate release because the indictment was jurisdictionally defective could have been raised on direct appeal or by way of a CPL article 440 motion, and thus habeas corpus relief does not lie" (*People ex rel. Lewis v Graham*, 57 AD3d 1508, 1508-1509, lv denied 12 NY3d 705). Petitioner's remaining contentions also could have been raised on direct appeal or by way of a CPL article 440 motion, and thus habeas corpus relief is unavailable (*see generally People ex rel. Lanfair v Corcoran*, 60 AD3d 1351, lv denied 12 NY3d 714; *People ex rel. Mills v Poole*, 55 AD3d 1289, lv denied 11 NY3d 712).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1476**

**CA 08-02191**

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

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KEITH LONG, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CELLINO & BARNES, P.C., THE BARNES FIRM, P.C.,  
STEPHEN E. BARNES, ESQ., RICHARD J. BARNES, ESQ.,  
AND ROSS M. CELLINO, JR., ESQ.,  
DEFENDANTS-RESPONDENTS.

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COLLINS & MAXWELL, L.L.P., BUFFALO (LUKE A. BROWN 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 (Diane Y. Devlin, J.), entered September 16, 2008 in a legal malpractice action. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this legal malpractice action seeking, inter alia, damages resulting from the conceded negligence of defendants in representing him in the underlying action by failing to commence the action against the proper parties in a timely manner. Supreme Court erred in denying plaintiff's motion seeking partial summary judgment on the first cause of action against defendants insofar as it is based upon the loss of a viable Labor Law 240 (1) claim in the underlying action. We note that, on a prior appeal, we affirmed an order granting, inter alia, those parts of the cross motion of defendants seeking summary judgment dismissing the second and third causes of action against them (*Long v Cellino & Barnes, P.C.*, 59 AD3d 1062). We agree with plaintiff that he met his burden of establishing that he would have prevailed on the Labor Law § 240 (1) claim in the underlying action but for defendants' negligence (see generally *McKenna v Forsyth & Forsyth*, 280 AD2d 79, 81, lv denied 96 NY2d 720). In support of his motion, plaintiff established that he was injured by a fall from an elevated work site and that the absence of appropriate safety devices was a proximate cause of his injuries (see *Ewing v ADF Constr. Corp.*, 16 AD3d 1085, 1086). Defendants failed to raise a triable issue of fact in opposition to the motion

(see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to defendants' contention, the nondelegable duty imposed upon the owner and general contractor under section 240 (1) " 'is not met merely by providing safety instructions or by making other safety devices available, but by furnishing, placing and operating such devices so as to give [a worker] proper protection' " (*Haystrand v County of Ontario*, 207 AD2d 978; see *Heath v Soloff Constr.*, 107 AD2d 507, 512).

Finally, defendants contend that, despite their failure to cross appeal, we should exercise our power to grant their instant cross motion seeking summary judgment dismissing the first cause of action against them (see generally *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-111). In view of our determination with respect to plaintiff's appeal, we reject that contention.

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

**1477**

**CA 09-00590**

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

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IN THE MATTER OF JOHN WALSH  
AND AUDRA WALSH, PETITIONERS-RESPONDENTS,

V

ORDER

TOWN OF ALLEGANY, RESPONDENT-APPELLANT.  
(PROCEEDING NO. 1.)

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IN THE MATTER OF JOHN WALSH  
AND AUDRA WALSH, PETITIONERS-RESPONDENTS,

V

ASSESSOR OF TOWN OF ALLEGANY  
AND BOARD OF ASSESSMENT REVIEW, TOWN OF  
ALLEGANY, RESPONDENTS-APPELLANTS.  
(PROCEEDING NO. 2.)

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WENDY A. TUTTLE, ALLEGANY, FOR RESPONDENTS-APPELLANTS.

LAW OFFICES OF J. MICHAEL SHANE, ALLEGANY (J. MICHAEL SHANE OF  
COUNSEL), FOR PETITIONERS-RESPONDENTS.

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Appeal from a judgment of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered December 9, 2008 in proceedings pursuant to CPLR article 78. The judgment, among other things, reduced the assessment on a parcel of real property owned by petitioners in the Town of Allegany.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1479**

**CA 09-01116**

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

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MICHAEL BROWN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ROME UP & RUNNING, INC., DEFENDANT-RESPONDENT.

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LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered March 16, 2009 in a personal injury action. The order, insofar as appealed from, granted that part of defendant's motion for summary judgment dismissing the first cause of action, for negligence.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part and the first cause of action is reinstated.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained when he fell from a ladder while working in a building owned by defendant. Defendant moved for summary judgment dismissing the complaint, and plaintiff thereafter withdrew the Labor Law causes of action. We agree with plaintiff that Supreme Court erred in granting that part of the motion seeking summary judgment dismissing the remaining cause of action, for negligence.

It is well settled that "New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition" (*Tagle v Jakob*, 97 NY2d 165, 168). The status of a person on the property as a contractor, visitor or trespasser is no longer dispositive (*see id.*; *Basso v Miller*, 40 NY2d 233, 241). "The duty of a landowner to maintain its property in a safe condition extends to persons whose presence is reasonably foreseeable by the landowner" (*Sirface v County of Erie*, 55 AD3d 1401, 1401-1402, *lv dismissed* 12 NY3d 797). Here, plaintiff entered into a contract with defendant and the City of Rome requiring that he enter the building and occasionally examine its roof. "Questions concerning foreseeability . . . are generally questions for the jury" (*Prystajko v Western N.Y. Pub. Broadcasting Assn.*, 57 AD3d 1401, 1403 [internal

quotation marks omitted]; see *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784) and, contrary to the contention of defendant, it failed to establish as a matter of law that plaintiff's use of the roof hatch was not foreseeable (see *Sirface*, 55 AD3d 1401).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1481**

**CA 09-00357**

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

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KESSEL BRENT CORPORATION AND CHRISTOPHER C.  
VESCERA, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

BENDERSON PROPERTY DEVELOPMENT, INC.,  
DEFENDANT-RESPONDENT.

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RICHARD E. KAPLAN, UTICA, FOR PLAINTIFFS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JOHN J. HENRY OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (John W. Grow, J.), entered November 20, 2008 in a breach of contract action. The order and judgment awarded defendant attorneys' fees and costs incurred in the defense of plaintiffs' prior appeals in this action.

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

Memorandum: Supreme Court properly granted defendant's motion seeking an award of attorneys' fees and costs incurred in the defense of plaintiffs' prior appeals in this action for breach of the parties' purchase and sale agreement (agreement). The agreement provided that, in an action to interpret or enforce its terms, "the prevailing party shall be entitled to be awarded its reasonable attorneys' fees through all appeals in addition to other costs and disbursements allowed by law, including those incurred on appeal." Defendant was the prevailing party in the prior appeals and is thus entitled to recover its attorneys' fees and costs incurred in the defense thereof (see *John T. Nothnagle, Inc. v Chiarello*, 66 AD3d 1524). We reject plaintiffs' contention that defendant should have moved for such relief in this Court or in the Court of Appeals (see *DiFilippo v DiFilippo*, 286 AD2d 869). Plaintiffs' further contention that defendant was required to amend its answer in order to seek the instant relief is raised for the first time on this appeal and thus is not properly before us (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1482**

**CA 09-01183**

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

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PLP, II LP, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION, DEFENDANT-RESPONDENT.

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HARTER SECREST & EMERY LLP, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL),  
FOR PLAINTIFF-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered August 13, 2008 in a declaratory judgment action. The judgment granted the motion of defendant to dismiss the complaint.

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

Memorandum: Supreme Court properly granted defendant's motion seeking to dismiss the complaint in this declaratory judgment action on the ground that plaintiff failed to exhaust its administrative remedies (*see generally Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57). In February 2008, defendant served plaintiff with an administrative "Notice of Hearing and Complaint" seeking, inter alia, an order from defendant's Commissioner pursuant to 6 NYCRR part 622 finding that plaintiff had violated a prior Order on Consent/Stipulation and 6 NYCRR part 505 by removing trees from a National Protective Feature Area. Prior to a hearing or the issuance of an order from defendant's Commissioner pursuant to 6 NYCRR part 622, plaintiff commenced this action seeking a declaration that its removal of the trees was not a regulated activity requiring a permit from defendant pursuant to 6 NYCRR part 505. Plaintiff contends that it was not required to exhaust its administrative remedies before commencing the declaratory judgment action on the ground that it would have been futile to do so in this case. We reject that contention (*see generally Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 140). The issue whether the removal of trees by plaintiff "materially alter[ed] the condition of land" such that it constituted a "[r]egulated activity" within the meaning of 6 NYCRR 505.2 (hh) and thus required a permit pursuant to 6 NYCRR 505.5 (a) should have been determined by defendant's Commissioner

prior to judicial intervention (*cf. id.* at 143; see generally *New York Inst. for Educ. of Blind v United Fedn. of Teachers' Comm. for N.Y. Inst. for Educ. of Blind*, 83 AD2d 390, 402-403, *affd* 57 NY2d 982; *Watergate II Apts.*, 46 NY2d at 57).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1484**

**CA 09-01477**

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

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DAVID CONNORS, PLAINTIFF-APPELLANT,

V

ORDER

JON E. GRAY, CHRISTINA M. GRAY, GERALD BUSS,  
DIANA BUSS, DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANTS.

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HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

PHETERSON, STERN, CALABRESE, NEILANS & SPATORICO, LLP, ROCHESTER  
(DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GERALD  
BUSS AND DIANA BUSS.

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Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered October 15, 2008. The order, insofar as appealed from, denied plaintiff's motion for partial 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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1486**

**CA 09-01351**

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

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JOANNE M. DEGEORGE, PLAINTIFF-RESPONDENT,

V

ORDER

MATTHEW F. BAUMAN, DEFENDANT-APPELLANT.

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LAW OFFICES OF DANIEL GUARASCI, WILLIAMSVILLE (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANDELMAN, WITKOWICZ & LEVITSKY, ROCHESTER (STEVEN M. WITKOWICZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Erie County Court (Michael L. D'Amico, J.), entered August 21, 2008. The order affirmed an order of the Buffalo City Court (Kevin J. Keane, J.), entered November 21, 2007, which had denied defendant's motion to dismiss the complaint due to plaintiff's spoliation of evidence.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see *Ellingsworth v City of Watertown*, 113 AD2d 1013, 1014).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1487**

**TP 09-01362**

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

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IN THE MATTER OF LAURENCE L. KEENAN, PETITIONER,

V

ORDER

APPEALS BOARD OF ADMINISTRATIVE ADJUDICATION  
BUREAU, NEW YORK STATE DEPARTMENT OF MOTOR  
VEHICLES AND COMMISSIONER OF NEW YORK STATE  
DEPARTMENT OF MOTOR VEHICLES, RESPONDENTS.

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DARWEESH, LEWIS, KELLY & VON DOHLEN, LLP, ROCHESTER (HERBERT J. LEWIS  
OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL),  
FOR RESPONDENTS.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Evelyn Frazee, J.], entered June 29, 2009) to review a determination of respondents. The determination revoked petitioner's driver's license.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1489**

**KA 08-02217**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARK DANIELS, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered October 11, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted robbery 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 attempted robbery in the third degree (Penal Law §§ 110.00, 160.05). As the People correctly concede, the waiver by defendant of the right to appeal was invalid because County Court erroneously informed him that, by pleading guilty, he was forfeiting the right to seek appellate review with respect to the propriety of the court's denial of his suppression motion (*cf. People v Kemp*, 94 NY2d 831, 833). The right to challenge a suppression ruling on appeal is not among the rights automatically forfeited upon a plea of guilty (*see* CPL 710.70 [2]; *People v Williams*, 59 AD3d 339, 341, *lv denied* 12 NY3d 861). Inasmuch as the court improperly conflated the rights automatically forfeited by operation of law as the consequence of a guilty plea with those rights voluntarily relinquished as the consequence of a waiver of the right to appeal, defendant's waiver of the right to appeal also is invalid (*see People v Lopez*, 6 NY3d 248, 256-257; *People v Moorer*, 63 AD3d 1590; *People v Cain*, 29 AD3d 1157).

Nevertheless, we conclude that the court properly denied defendant's motion to suppress the physical evidence seized by the police from defendant's vehicle. The record of the suppression hearing establishes that the police were authorized to search defendant's vehicle incident to defendant's lawful arrest because it was "reasonable to believe that evidence of the offense of arrest

might be found in the vehicle" (*Arizona v Gant*, \_\_\_ US \_\_\_, \_\_\_, 129 S Ct 1710, 1714). Defendant was arrested shortly after the robbery was reported, following a police chase. It was thus reasonable for the police to believe that evidence of the robbery might be found in defendant's vehicle. There is no merit to the further contention of defendant that he received ineffective assistance of counsel based on defense counsel's failure to object to the admission of the evidence at the suppression hearing. Defense counsel made a pretrial motion to suppress the evidence obtained from the search of defendant's vehicle and extensively cross-examined the People's witnesses at the suppression hearing. Thus the record, viewed as a whole, reflects that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

We further reject the contention of defendant that he should have received the minimum indeterminate sentence of 1½ to 3 years allegedly promised by the prosecutor as part of the plea agreement. There is no evidence in the record of any such sentencing promise and, indeed, the record reflects that the court advised defendant prior to the plea colloquy that it would not promise to impose the minimum sentence. Finally, the sentence is not unduly harsh or severe.

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

**1490**

**KA 08-01979**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JUSTIN B.R., DEFENDANT-APPELLANT.

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

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

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Appeal from an adjudication of the Supreme Court, Erie County (M. William Boller, A.J.), rendered August 13, 2008. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1491**

**KA 08-02002**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFREY M. KEARNS, DEFENDANT-APPELLANT.

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

SUSAN H. LINDENMUTH, DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

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Appeal from an order of the Yates County Court (W. Patrick Falvey, J.), entered August 12, 2008. The order determined 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 modified in the exercise of discretion by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing 25 points against him under risk factor 2, for sexual contact with the victim, and 15 points against him under risk factor 12, for refusal of treatment. We conclude that the court properly determined that defendant was a presumptive level three risk but improvidently exercised its discretion in refusing to grant him a downward departure from that risk level. With respect to risk factor 2, we conclude that the sworn statements and the grand jury testimony of one of the two victims constituted reliable hearsay (*see People v Parker*, 62 AD3d 1195, 1196, *lv denied* 13 NY3d 704), and that the People thereby established by clear and convincing evidence that defendant engaged in sexual intercourse with that victim to support the assessment of 25 points under risk factor 2 (*see* Correction Law § 168-n [3]; *People v Ensell*, 49 AD3d 1301, *lv denied* 10 NY3d 715).

With respect to risk factor 12, it is undisputed that defendant refused to participate in sex offender treatment while he was incarcerated, but he contends that his refusal was based on the advice of defense counsel to refrain from participation. According to defendant, his appeal from the judgment of conviction was pending when the treatment was offered and, in the event of reversal on appeal and a subsequent new trial on all counts of the indictment, his

participation in treatment would have required him to make admissions against his interest, in violation of his Fifth Amendment privilege against self-incrimination. We note in addition that the risk assessment guidelines do not contain exceptions with respect to a defendant's reasons for refusing to participate in treatment (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 16 [2006]).

We thus agree with defendant that the court improvidently exercised its discretion in determining that defendant was not entitled to a downward departure from his presumptive risk level. We therefore substitute our own discretion, " 'even in the absence of an abuse [of discretion],' " and we modify the order by determining that defendant is a level two risk (*People v Smith*, 30 AD3d 1070, 1071, quoting *Matter of Von Bulow*, 63 NY2d 221, 224; see *People v Brewer*, 63 AD3d 1604). In our view, "there is clear and convincing evidence of special circumstances to warrant a downward departure from the presumptive risk level" (*Brewer*, 63 AD3d at 1605; see *Smith*, 30 AD3d at 1071). The professionals who evaluated defendant all concluded that defendant was not a sexual predator, that he did not have abnormal sexual tendencies, and that he was not a threat to himself or others. In addition, we agree with defendant that he was faced with a "Hobson's choice" when deciding whether to participate in treatment. We thus conclude on the record before us "that there are . . . mitigating factor[s] of a kind or to a degree, not otherwise adequately taken into account by the guidelines" (*People v Santiago*, 20 AD3d 885, 886 [internal quotation marks omitted]; see *Smith*, 30 AD3d at 1071; Risk Assessment Guidelines and Commentary, at 4).

Contrary to the final contention of defendant, we conclude that he received meaningful representation at the SORA hearing (see generally *People v Baldi*, 54 NY2d 137, 147; *People v Reid*, 59 AD3d 158, lv denied 12 NY3d 708).

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

**1492**

**KA 08-01894**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JONATHON M. PATTON, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

---

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered August 11, 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 (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1493**

**KA 08-00979**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN NICOL, DEFENDANT-APPELLANT.

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

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

---

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered March 28, 2008 pursuant to the 2005 Drug Law Reform Act. The order, inter alia, granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and imposed a new sentence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting those parts vacating the sentence imposed June 15, 2004 and imposing a new sentence and as modified the order is affirmed, the sentence imposed February 26, 2008 is vacated, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and imposing a determinate term of imprisonment of seven years plus a five-year period of postrelease supervision. We previously reversed the sentence imposed following defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DRLA-2 (*People v Nicol*, 48 AD3d 1067).

We reject defendant's contention that the new sentence is harsh and excessive. We further conclude that the court upon remittal properly set forth in its decision the reasons for the new sentence (see *People v Boatman*, 53 AD3d 1053), and thus properly exercised its discretion in determining the length of the new sentence (see generally *People v Newton*, 48 AD3d 115, 119-120). We reject defendant's further contention that the new sentence was unauthorized as a matter of law, inasmuch as the new sentence falls within the

sentencing range of Penal Law § 70.71 (3) (b) (ii).

For the reasons set forth in our decision in *People v Graves* (66 AD3d 1513), however, we conclude that the court erred in imposing the new sentence without first affording defendant the opportunity to appeal from the order specifying the new sentence that the court would impose and to withdraw his application for resentencing following our determination of that appeal. We therefore modify the order by deleting those parts vacating the original sentence and imposing a new sentence, vacate the new sentence imposed, and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *Boatman*, 53 AD3d at 1054).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1494**

**KA 07-02178**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH F. SANDERSON, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered September 10, 2007. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree (two counts), sexual abuse 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of criminal sexual abuse in the first degree (Penal Law § 130.50 [3]), sexual abuse in the first degree (§ 130.65 [3]), and endangering the welfare of a child (§ 260.10 [1]). We conclude that County Court properly denied the motion of defendant to suppress his statement to the police. "A statement is not involuntary unless [a] defendant's will has been overborne so that the statement was not the product of essentially free and unconstrained choice" (*People v Richardson*, 202 AD2d 958, 958, lv denied 83 NY2d 914). The evidence at the *Huntley* hearing establishes that defendant voluntarily arranged to go to the police station to speak with an investigator about the allegations against him. Defendant and the investigator met in an unsecured office and spoke for approximately 15 to 20 minutes and, at the conclusion of their meeting, defendant left the station with his wife. Thus, "[t]he circumstances of the [meeting] were noncustodial and nonthreatening" (*id.* at 959; see *People v Borden*, 39 AD3d 1242, lv denied 9 NY3d 873, 959).

Defendant's further contention that the court erred in failing to charge the jury on the issue of the voluntariness of defendant's statement is unpreserved for our review (see CPL 470.05 [2]). Although defendant testified during the trial that his statement was

involuntary (see CPL 710.70 [3]), he did not object when the statement was admitted in evidence, he failed to request a charge on the voluntariness of the statement, and he did not object to the charge as given (see *People v Cefaro*, 23 NY2d 283, 288-289; *People v Congelosi*, 266 AD2d 930, 930-931, *lv denied* 95 NY2d 794). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Defendant also failed to preserve for our review his contention that the conduct of a juror deprived him of the right to a fair trial and an impartial jury, inasmuch as defendant did not object to the court's inquiry of that juror, seek to discharge the juror, or move for a mistrial on that ground (see *People v Wright*, 16 AD3d 1113, *lv denied* 4 NY3d 857). In any event, " 'there is no basis to conclude that the juror in question should have been discharged as grossly unqualified' " (*id.* at 1114; see CPL 270.35 [1]; *People v Buchholz*, 23 AD3d 1093, 1094, *lv denied* 6 NY3d 846).

We further conclude that, contrary to defendant's contention, the evidence is legally sufficient to support the conviction of endangering the welfare of a child with respect to the older of the two victims. Although the jury found defendant not guilty of any sexual misconduct involving that victim, Penal Law § 260.10 (1) is "broadly written and imposes criminal sanction for the mere 'likelihood' of harm" (*People v Johnson*, 95 NY2d 368, 372). Here, viewing the facts in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), we conclude that a rational jury could have found that defendant "knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of [the] child" (§ 260.10 [1]), based on testimony that, inter alia, defendant attempted to kiss the victim while he was alone with her.

Moreover, 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). Although an acquittal would not have been unreasonable in light of the fact that the credibility of one of the victims was challenged at trial and defendant recanted his prior confession (see generally *Danielson*, 9 NY3d at 349), we afford " 'deference to the jury's superior opportunity to assess the witnesses' credibility' " (*People v Marshall*, 65 AD3d 710, 712), and we conclude that the jury did not fail to give the evidence the weight it should be accorded (see generally *Bleakley*, 69 NY2d at 495).

Finally, although defendant had no prior criminal history, we conclude that the sentence is not unduly harsh or severe, particularly in view of the nature of the crimes, the ages of the victims, and the failure of defendant to accept responsibility for his actions.

We have considered defendant's remaining contentions and conclude

that they are without merit.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1495**

**KA 08-01046**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PRESTON M. LAGASSE, DEFENDANT-APPELLANT.

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STEVEN D. SESSLER, GENESEO, 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 (William F. Kocher, J.), rendered April 18, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the surcharge to 5% of the amount of restitution ordered and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). We reject the contention of defendant that he was not eligible for the initial period of interim probation supervision imposed by County Court (see CPL 390.30 [6]), inasmuch as he was a second felony offender. At the time of the entry of the plea, the court had not "found, pursuant to the provisions of the criminal procedure law," that defendant was a second felony offender (Penal Law § 70.06 [2]).

Contrary to defendant's further contention, the court did not err in calculating the amount of restitution. That amount was a condition of the plea bargain, and defendant specifically agreed to that amount during the plea allocution (see *People v Hannan*, 303 AD2d 765). As the People correctly concede, however, the court erred in imposing a 10% surcharge on the amount of restitution ordered and instead should have imposed a surcharge of 5% (see Penal Law § 60.27 [8]; *People v Viehdeffer*, 288 AD2d 860), and we therefore modify the judgment accordingly. Finally, we reject defendant's challenge to the severity of the sentence.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1497**

**CA 09-00669**

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

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TODD A. TOWN AND SANDRA TOWN,  
PLAINTIFFS-APPELLANTS,

V

ORDER

NINA C. SIDDIYAHYA, ET AL., DEFENDANTS,  
AND LAKE SHORE PAVING, INC.,  
DEFENDANT-RESPONDENT.  
(APPEAL NO. 1.)

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CAMPBELL & SHELTON LLP, EDEN (R. COLIN CAMPBELL OF COUNSEL), AND  
JEFFREY FREEDMAN ATTORNEYS AT LAW, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeals from an order of the Supreme Court, Chautauqua County  
(Paula L. Feroleto, J.), entered January 5, 2009 in a personal injury  
action. The order granted the motion of defendant Lake Shore Paving,  
Inc. for summary judgment.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1498**

**CA 09-00670**

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

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TODD A. TOWN AND SANDRA TOWN,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

NINA C. SIDDIYAHYA, ET AL., DEFENDANTS,  
AND LAKE SHORE PAVING, INC.,  
DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

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CAMPBELL & SHELTON LLP, EDEN (R. COLIN CAMPBELL OF COUNSEL), AND  
JEFFREY FREEDMAN ATTORNEYS AT LAW, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeals from an order of the Supreme Court, Chautauqua County (Paula L. Feroletto, J.), entered February 3, 2009 in a personal injury action. The order, insofar as appealed from, upon reargument adhered to the court's prior decision granting the motion of defendant Lake Shore Paving, Inc. for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Lake Shore Paving, Inc. is denied and the amended complaint against that defendant is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries they sustained when the vehicle driven by plaintiff husband in which plaintiff wife was a passenger was rear-ended by another vehicle while plaintiffs were entering the parking lot of a supermarket. At the time of the collision, Lake Shore Paving, Inc. (defendant) had placed construction cones around a newly patched area of pavement in the parking lot's entrance lane. Supreme Court granted the motion of plaintiffs for leave to reargue their opposition to the prior motion of defendant for summary judgment dismissing the amended complaint against it, and we conclude that the court upon reargument erred in adhering to its prior decision granting defendant's motion. Defendant failed to establish as a matter of law that its allegedly negligent placement of the construction cones was not a proximate cause of the collision (*see Sheffer v Critoph*, 13 AD3d 1185, 1186-1187; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendant submitted excerpts from the deposition testimony of plaintiff husband wherein he testified that the construction cones

were not visible from the roadway, before he entered the parking lot, and that he was unable to come to a complete stop prior to being rear-ended by the other vehicle (see *Sheffer*, 13 AD3d at 1186-1187; cf. *Robinson v Day*, 265 AD2d 916, 917-918). Thus, by its own submissions, defendant raised a triable issue of fact whether its conduct "set into motion an eminently foreseeable chain of events that resulted in a collision between plaintiff[s'] vehicle and [another] vehicle" (*Murtagh v Beachy*, 6 AD3d 786, 788). Even assuming, arguendo, that defendant established its entitlement to judgment as a matter of law, we conclude that plaintiffs raised a triable issue of fact whether defendant was negligent in partially obstructing an entrance to the parking lot of the supermarket while it was open for business, in violation of defendant's company practices, and whether such violation of defendant's company practices was a proximate cause of the accident (see generally *Trimarco v Klein*, 56 NY2d 98, 105-106; *Miller v Long Is. R.R.*, 212 AD2d 515, 516).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1500**

**CA 08-02389**

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

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GEORGE EAGAN GINTHER, PLAINTIFF-APPELLANT,

V

ORDER

GREGORY P. PHOTIADIS, ESQ., CHARLES C.  
RITTER, JR., ESQ. AND DUKE, HOLZMAN,  
YAEGER & PHOTIADIS, LLP,  
DEFENDANTS-RESPONDENTS.

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GEORGE EAGAN GINTHER, PLAINTIFF-APPELLANT PRO SE.

LAW OFFICES OF ROBERT G. WALSH, P.C., BUFFALO (ROBERT G. WALSH OF  
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered January 14, 2008 in a legal malpractice action. The order, inter alia, granted the motion of defendants for summary judgment dismissing the complaint as time-barred.

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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1501**

**CA 09-01222**

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

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ROSWELL PARK CANCER INSTITUTE CORPORATION,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SODEXO AMERICA, LLC, FORMERLY KNOWN AS  
SODEXHO AMERICA, LLC, SODEXO OPERATIONS, LLC,  
FORMERLY KNOWN AS SODEXHO OPERATIONS, LLC,  
AND SODEXO MANAGEMENT, INC., FORMERLY KNOWN  
AS SODEXHO MANAGEMENT, INC.,  
DEFENDANTS-RESPONDENTS.

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PHILLIPS LYTTLE LLP, BUFFALO (WILLIAM J. BRENNAN OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

COOLEY MANION JONES LLP, BOSTON, MASSACHUSETTS (ELLEN M. BATES OF  
COUNSEL), AND BENDER, CRAWFORD & BENDER, LLP, BUFFALO, FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered April 8, 2009 in a breach of contract action. The order, insofar as appealed from, denied in part the motion of plaintiff to compel disclosure.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, defendants' alleged breach of a contract pursuant to which defendants were to provide certain design and construction services for plaintiff. During the course of discovery, plaintiff moved pursuant to CPLR 3124 to compel disclosure, seeking an order directing defendants to produce 146 documents for an in camera review by Supreme Court. Defendants had refused to produce those documents based on their assertion that the documents in question were protected by the attorney-client privilege, constituted attorney work product or were produced in anticipation of litigation. The withheld documents consist of e-mail communications and attachments thereto. Following an in camera review, the court determined that defendants were required to produce 49 of the documents, some of which were to be partially redacted. On appeal, plaintiff challenges those parts of the court's determination with respect to 32 of the documents in the group of documents characterized by the court as Exhibit "A" to its decision. The authors of those documents were not attorneys, nor were

they sent to attorneys or copied to attorneys. Plaintiff also challenges 14 of the documents in the group of documents characterized by the court as Exhibit "B." Those documents indicate that defendants' in-house counsel was copied in as a recipient. We affirm.

It is well settled that a court is vested with broad discretion to control discovery and that the court's determination of discovery issues should be disturbed only upon a showing of clear abuse of discretion (see *J.G. v Zachman*, 34 AD3d 1277, 1278; *Cerasaro v Cerasaro*, 9 AD3d 663). "[W]hether a particular document is or is not protected [by the attorney-client privilege, the attorney work product privilege or as material prepared in anticipation of litigation] is necessarily a fact-specific determination . . . , most often requiring in camera review" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 378; see *Baliva v State Farm Mut. Auto. Ins. Co.*, 275 AD2d 1030). We perceive no abuse of discretion in this case.

Here, in response to plaintiff's document production demands, defendants produced a comprehensive "Privilege Log," setting forth the names of the author of each document in the "Privilege Log," the persons to whom each document was sent, the date on which each document was sent and a description of each document. Defendants' in-house counsel submitted an affidavit in which he described his participation in the fact-gathering process that was incident to his provision of legal advice to defendants, as opposed to business advice, in response to the difficulties encountered by defendants with respect to the projects in question and in satisfying plaintiff's concerns. While a court is not bound by the conclusory characterizations of in-house counsel that his or her involvement was for the purpose of rendering legal advice, we perceive no justification for disregarding the contents of the affidavit submitted by in-house counsel describing his involvement as constituting legal rather than business advice (see *Spectrum Sys. Intl. Corp.*, 78 NY2d at 380; *New York Times Newspaper Div. of N.Y. Times Co. v Lehrer McGovern Bovis*, 300 AD2d 169, 171). Defendants' in-house counsel further stated in his affidavit that in December 2005 he had a conversation with a high-ranking member of defendants' management team and requested that defendants' employees assemble information concerning the status of the project for use in his legal analysis concerning defendants' potential liability. "[T]here is nothing in the law governing attorney-client privilege that precludes the privilege from attaching to client communications made in response to oral requests by attorneys" (*New York Times Newspaper Div. of N.Y. Times Co.*, 300 AD2d at 172). The same reasoning applies when counsel asks high level corporate officers to have lower level officers or assistants gather facts and information incident to the provision of legal advice (see *Orbit One Communications v Numerex Corp.*, 255 FRD 98, 104 [SD NY]).

In any event, upon our own in camera review of the documents in question, as well as the undisputed facts in the record, we conclude that defendants established that 31 of the 32 documents in Exhibit "A" challenged by plaintiff on appeal were created as part of in-house counsel's fact-gathering process and investigation that formed the basis for in-house counsel's legal advice and legal services (see

*Spectrum Sys. Intl. Corp.*, 78 NY2d at 379). We further conclude that 13 of the 14 documents in Exhibit "B" challenged by plaintiff on appeal are not subject to disclosure inasmuch as they constitute privileged attorney-client communications. Finally, with respect to the two remaining documents challenged by plaintiff on appeal, i.e., document 19 in Exhibit "A" and document 8 in Exhibit "B," we conclude that they were not subject to disclosure because they were prepared in anticipation of litigation (see CPLR 3101 [d] [2]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1502

CA 08-00789

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

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IN THE MATTER OF MITCHELL KALWASINSKI,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE  
DEPARTMENT OF CORRECTIONAL SERVICES,  
RESPONDENT-RESPONDENT.  
(APPEAL NO. 1.)

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MITCHELL KALWASINSKI, PETITIONER-APPELLANT PRO SE.

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

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Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered March 26, 2008 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, dismissed the petition in part.

It is hereby ORDERED that said appeal from the judgment insofar as it concerned grievance Nos. A-50776-06, A-50902-06, A-50921-06, A-50926-06, A-51084-06, and A-51199-06 is unanimously dismissed and the judgment is otherwise affirmed without costs.

Memorandum: These consolidated appeals arise from two judgments that collectively dismissed a single petition in a proceeding pursuant to CPLR article 78. In appeal No. 1, petitioner appeals from a judgment that dismissed those parts of the petition in which he sought to annul the determinations of the Central Office Review Committee of the Department of Correctional Services concerning 10 separate grievances. Upon our review of the record, we conclude that petitioner failed to demonstrate that the denial of four of those grievances, concerning the purported confiscation of his legal papers (grievance No. A-50949-06), reduction in time to be served in the special housing unit (grievance Nos. A-50903-06, A-51003-06) and the conduct of his correction counselor (grievance No. A-51332-06), were affected by an error of law or were arbitrary and capricious (see *Matter of Bryant v Brunelle*, 284 AD2d 936; see also *Matter of Wilson v State of N.Y. Dept. of Correctional Servs.*, 261 AD2d 670, appeal dismissed 93 NY2d 1039).

The contentions of petitioner concerning the remaining six grievances are based upon challenges to the conditions of his

incarceration at Attica Correctional Facility, but petitioner has since been transferred to another correctional facility. He therefore is no longer aggrieved with respect to the determinations concerning those six grievances, and his appeal from the judgment in appeal No. 1 insofar as it concerned those grievances is moot (*see Matter of McKenna v Goord*, 245 AD2d 1074, 1075, *lv denied* 91 NY2d 812; *see also Matter of Parrilla v Donelli*, 25 AD3d 1046).

In appeal No. 2, petitioner appeals from a judgment dismissing the remaining part of the petition, which challenged the accuracy of respondent's institutional records. Contrary to petitioner's contention, Supreme Court properly dismissed that part of the petition because petitioner failed to exhaust his administrative remedies with respect to the accuracy of those records (*see* 7 NYCRR 5.52; *Matter of Dickens v Irvin*, 214 AD2d 1006, 1006-1007).

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

1503

CA 09-00965

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

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IN THE MATTER OF MITCHELL KALWASINSKI,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE  
DEPARTMENT OF CORRECTIONAL SERVICES,  
RESPONDENT-RESPONDENT.  
(APPEAL NO. 2.)

---

MITCHELL KALWASINSKI, PETITIONER-APPELLANT PRO SE.

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

---

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered October 9, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition in its entirety.

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

Same Memorandum as in *Matter of Kalwasinski v Fischer* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1504**

**CA 09-01270**

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

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FRANK A. BERSANI, M.D.,  
PLAINTIFF-RESPONDENT-APPELLANT,

V

ORDER

TEXACO, INC., DEFENDANT-APPELLANT-RESPONDENT.

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WOODS OVIATT GILMAN LLP, ROCHESTER (GRETA K. KOLCON OF COUNSEL), FOR  
DEFENDANT-APPELLANT-RESPONDENT.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA  
(RICHARD PERTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court,  
Onondaga County (Deborah H. Karalunas, J.), entered February 20, 2009.  
The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that said cross appeal is unanimously  
dismissed (*see Matter of El-Roh Realty Corp.*, 55 AD3d 1431, 1434;  
*Pramco III, LLC v Partners Trust Bank*, 52 AD3d 1224, 1225; *see also*  
CPLR 5511) and the order is otherwise affirmed without costs for  
reasons stated at Supreme Court.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1505**

**CA 09-01221**

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

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HOUSEHOLD FINANCE REALTY CORPORATION OF  
NEW YORK, PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID W. ROBINSON, INDIVIDUALLY AND AS  
ADMINISTRATOR OF THE ESTATE OF  
SANDRA F. ROBINSON, DECEASED,  
DEFENDANT-RESPONDENT-APPELLANT.

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PHILLIPS LYTTLE LLP, BUFFALO (CYNTHIA L. THOMPSON OF COUNSEL), FOR  
PLAINTIFF-APPELLANT-RESPONDENT.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (K. WADE  
EATON OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

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Appeal and cross appeal from a judgment of the Supreme Court,  
Monroe County (Evelyn Frazee, J.), entered September 9, 2008. The  
judgment granted plaintiff's motion to dismiss the counterclaims and  
granted defendant's motion to dismiss the complaint.

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

Memorandum: We affirm the judgment insofar as it granted  
plaintiff's motion to dismiss the counterclaims for reasons stated in  
the decision at Supreme Court dated July 14, 2008. We also affirm the  
judgment insofar as it granted defendant's motion to dismiss the  
complaint as a sanction pursuant to CPLR 3126. Defendant met his  
initial burden by establishing that plaintiff engaged in willful,  
contumacious or bad faith conduct by failing to comply with a court  
order concerning outstanding discovery demands, thereby shifting the  
burden to plaintiff to offer a reasonable excuse for its  
noncompliance, and plaintiff failed to meet that burden (*see Hill v  
Oberoi*, 13 AD3d 1095).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1506**

**CA 09-01354**

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

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HOME THERAPY EQUIPMENT, INC.,  
PLAINTIFF-RESPONDENT,

V

ORDER

BRENDA LEE HART, DEFENDANT-APPELLANT,  
ET AL., DEFENDANT.

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O'CONNELL AND ARONOWITZ, ALBANY (JEFFREY J. SHERRIN OF COUNSEL), FOR  
DEFENDANT-APPELLANT AND DEFENDANT.

DAMON MOREY LLP, BUFFALO (STEPHEN M. O'NEILL OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered May 14, 2009. The order, insofar as appealed from, granted in part plaintiff's motion seeking a preliminary injunction to enforce a restrictive covenant contained in an employment agreement.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on November 16 and 19, 2009,

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1507

CA 09-01377

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

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MASSA CONSTRUCTION, INC., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GEORGE M. BUNK, P.E., P.C., AND GEORGE M. BUNK,  
INDIVIDUALLY, DEFENDANTS-RESPONDENTS.

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LINDENFELD LAW FIRM, P.C., CAZENOVIA (HARRIS LINDENFELD OF COUNSEL),  
FOR PLAINTIFF-APPELLANT.

THOMAS P. HUGHES, NEW HARTFORD, FOR DEFENDANTS-RESPONDENTS.

---

Appeal from a judgment of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered December 23, 2008. The judgment granted the motion of defendants for summary judgment and dismissed the amended complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first cause of action and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action alleging that defendants tortiously interfered with its agreement with the New York State Thruway Authority and made defamatory statements concerning both plaintiff's competence to perform and actual performance of the agreement, thereby damaging plaintiff's reputation. We conclude that Supreme Court properly granted that part of defendants' motion for summary judgment dismissing the defamation cause of action in the amended complaint based on plaintiff's failure to comply with the pleading requirements set forth in CPLR 3016 (a), i.e., plaintiff's failure to set forth in the amended complaint the time, place and manner of the allegedly defamatory communications (*see Dillon v City of New York*, 261 AD2d 34, 40). "[M]erely paraphrasing [the allegedly defamatory] statements' " and failing to include the entire statement or publication requires dismissal of that cause of action (*Scalise v Herkimer, Fulton, Hamilton & Otsego County BOCES*, 16 AD3d 1059, 1060; *see Keeler v Galaxy Communications, LP*, 39 AD3d 1202).

We agree with plaintiff, however, that the court erred in granting that part of defendants' motion for summary judgment dismissing the cause of action for tortious interference with contract. Although defendants met their initial burden, plaintiff raised triable issues of fact whether defendants acted in bad faith

and committed "independent torts or predatory acts directed at" plaintiff for their own pecuniary gain (*BIB Constr. Co. v City of Poughkeepsie*, 204 AD2d 947, 948; *cf. First Am. Commercial Bancorp, Inc. v Saatchi & Saatchi Rowland, Inc.*, 55 AD3d 1264, 1266-1267, *lv denied in part and dismissed in part* 12 NY3d 829). We therefore modify the judgment accordingly.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1508

CA 08-00785

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

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IN THE MATTER OF MITCHELL KALWASINSKI,  
PETITIONER-APPELLANT,

V

ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE  
DEPARTMENT OF CORRECTIONAL SERVICES,  
RESPONDENT-RESPONDENT.  
(APPEAL NO. 3.)

---

MITCHELL KALWASINSKI, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF  
COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered March 24, 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 for reasons stated in the decision at Supreme Court.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1509**

**TP 09-01111**

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

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IN THE MATTER OF RICHARD KLIM, PETITIONER,

V

ORDER

NEW YORK STATE EXECUTIVE DEPARTMENT DIVISION  
OF PAROLE, ATTENTION: EXECUTIVE DIRECTOR,  
RESPONDENT.

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PAUL J. VACCA, JR., ROCHESTER, FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF  
COUNSEL), FOR RESPONDENT.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [William P. Polito, J.], entered June 1, 2009) to review a determination of respondent. 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.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1510**

**TP 09-01247**

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

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IN THE MATTER OF JASON BERMUDEZ, PETITIONER,

V

ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS  
CORRECTIONAL FACILITY, RESPONDENT.

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JASON BERMUDEZ, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO 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, Erie County [Russell P. Buscaglia, A.J.], entered June 16, 2009) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1511**

**TP 09-00013**

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

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IN THE MATTER OF JOHN NAVAREZ, PETITIONER,

V

ORDER

SIBATU KHAHAIFA, SUPERINTENDENT, ORLEANS  
CORRECTIONAL FACILITY, RESPONDENT.

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JOHN NAVAREZ, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO 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, Orleans County [James H. Dillon, J.], entered December 31, 2008) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1512**

**KA 07-00826**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VANG KHAMMONIVANG, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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

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

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Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered August 9, 2006. The judgment convicted defendant, upon his plea of guilty, of felony driving while intoxicated.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of one count of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of use of a child in a sexual performance (Penal Law § 263.05) and possessing a sexual performance by a child (§ 263.16). Addressing first the judgment in appeal No. 2, we conclude that defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution by failing to move to withdraw the plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665; *People v Moorer*, 63 AD3d 1590). Contrary to defendant's contention, this case does not fall within the narrow exception to the preservation requirement (*see People v Toxey*, 86 NY2d 725, 726, *rearg denied* 86 NY2d 839; *Lopez*, 71 NY2d at 666; *People v Lacey*, 49 AD3d 1259, *lv denied* 10 NY3d 936).

In view of our determination affirming the judgment in appeal No. 2, we reject defendant's contention that the judgment in appeal No. 1 must be reversed on the ground that he pleaded guilty in appeal No. 1 based on the promise that the sentence in appeal No. 1 would run concurrently with the sentence in appeal No. 2 (*cf. People v*

*Fuggazzatto*, 62 NY2d 862).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1513**

**KA 06-01615**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EUGENE D. TAYLOR, 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 (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered April 6, 2006. The judgment convicted defendant, upon a jury verdict, of grand larceny 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 grand larceny in the fourth degree (Penal Law § 155.30 [4]). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that defendant stole property that "consist[ed] of a credit card or debit card" (§ 155.30 [4]). In addition, viewing the evidence in light of the elements of the crime of grand larceny as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to the contention of defendant, he was not deprived of his right to a fair trial based on prosecutorial misconduct. The prosecutor's description of the defense theory as an attempt to "distract" or "mislead" the jury with "conjecture, theorizing, [and] hypothesizing" was within the wide rhetorical bounds afforded to the prosecutor (*see People v Allen*, 121 AD2d 453, 454, *affd* 69 NY2d 915; *People v Lynch*, 60 AD3d 1479, 1480-1481, *lv denied* 12 NY3d 926). "The [remaining] challenged remarks generally constituted fair comment on the evidence and [the] reasonable inferences to be drawn therefrom, and [in any event] were responsive to defense arguments" (*People v Sunter*, 57 AD3d 226, 227, *lv denied* 12 NY3d 762).

We reject the further contention of defendant that the People presented evidence that defendant committed more than one act of grand

larceny and that the jury therefore may have convicted defendant of an unindicted crime. Grand larceny in the fourth degree is a crime that, pursuant to the express statutory language, may be committed by alternate means of stealing a credit card or a debit card (see Penal Law § 155.30 [4]; see generally *People v Giordano*, 296 AD2d 714, 715-716, *lv denied* 99 NY2d 582). Here, the indictment charged defendant with one count of grand larceny, and the People presented evidence of a single act of grand larceny involving one MasterCard that functioned as both a credit card and a debit card. Thus, there is no possibility that the jury may have convicted defendant of an unindicted crime.

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

**1514**

**KA 08-00326**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH J. MARVIN, JR., DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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

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 (Frederick G. Reed, J.), rendered February 14, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree and criminal mischief in the fourth degree.

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

Memorandum: In these consolidated appeals, defendant appeals from judgments convicting him upon his pleas of guilty of, inter alia, two counts of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to the contention of defendant in each appeal, County Court properly refused to suppress his written statement to the police. The record of the suppression hearing supports the court's determination that the waiver by defendant of his *Miranda* rights was knowing, voluntary and intelligent. Although defendant contends that he was intoxicated at the time he waived those rights, there is no indication in the record of the suppression hearing that he " 'was intoxicated to the degree of mania, or of being unable to understand the meaning of his statements' " (*People v Schompert*, 19 NY2d 300, 305, cert denied 389 US 874; see *People v Lake*, 45 AD3d 1409, 1410, lv denied 10 NY3d 767).

In each appeal, defendant failed to preserve for our review his further contentions that his plea was not knowingly, voluntarily and intelligently entered (see *People v Johnson*, 60 AD3d 1496, 1496, lv denied 12 NY3d 926), and that the plea allocution was factually insufficient (see *People v Lopez*, 71 NY2d 662, 665; *People v Tapscott*, 302 AD2d 918). There is no indication in the record that the narrow exception to the preservation doctrine applies herein (see *Lopez*, 71 NY2d at 666). By failing to request a hearing or otherwise challenge

the amount of restitution ordered at sentencing, defendant also failed to preserve for our review his contention in appeal No. 1 with respect to the restitution ordered (see *People v Melino*, 52 AD3d 1054, 1056, *lv denied* 11 NY3d 791). We decline to exercise our power to review defendant's contention with respect to the restitution ordered as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Finally, the sentence imposed in each appeal is not unduly harsh or severe.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1515**

**KA 08-00327**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH J. MARVIN, JR., DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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

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

---

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered February 14, 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 Marvin* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1516**

**KA 08-00328**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH J. MARVIN, JR., DEFENDANT-APPELLANT.  
(APPEAL NO. 3.)

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

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

---

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered February 14, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Same Memorandum as in *People v Marvin* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1518**

**KA 08-00342**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PHILIP L. MURPHY, JR., DEFENDANT-APPELLANT.

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CHRISTINE M. COOK, SYRACUSE, 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 February 8, 2008. The judgment convicted defendant, upon a jury verdict, 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 a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [1]), defendant contends that County Court penalized him for exercising his right to trial. We reject that contention. " '[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial' " (*People v Chappelle*, 14 AD3d 728, 729, *lv denied* 5 NY3d 786), and there is no indication in the record that the court was vindictive in sentencing defendant (*see People v Griffin*, 48 AD3d 1233, 1237, *lv denied* 10 NY3d 840). We reject the further contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to pursue an intoxication defense, inasmuch as there was "a paucity of evidence that defendant exhibited significant signs of intoxication or that his mental state was affected by alcohol" (*People v Van Ness*, 43 AD3d 553, 555, *lv denied* 9 NY3d 965).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1519**

**KA 07-00828**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VANG KHAMMONIVANG, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

---

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

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

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Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered August 9, 2006. The judgment convicted defendant, upon his plea of guilty, of use of a child in a sexual performance and possessing a sexual performance by a child.

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

Same Memorandum as in *People v Khammonivang* ([appeal No. 1] \_\_\_\_ AD3d \_\_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1520

**KA 08-02221**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROGER P. ZULIANI, DEFENDANT-APPELLANT.

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

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

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Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered September 15, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree and driving while intoxicated.

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 criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [1]) and driving while intoxicated (Vehicle and Traffic Law § 1192 [3]). The record establishes that defendant knowingly, intelligently, and voluntarily waived his right to appeal, and that valid waiver encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256; *People v Hidalgo*, 91 NY2d 733, 737), as well as his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665; *People v Bailey*, 49 AD3d 1258, *lv denied* 10 NY3d 932).

Although the contention of defendant that his plea was not voluntarily, knowingly, and intelligently entered survives his waiver of the right to appeal, defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see People v Harris*, 269 AD2d 839). We reject defendant's contention that this is one of those rare cases in which the exception to the preservation requirement applies (*see Lopez*, 71 NY2d at 666). After defendant advised County Court that he had taken prescription pain medication, the court conducted an inquiry that "was sufficient to ensure that the plea was voluntary," and defendant advised the court that he was thinking clearly and understood the proceedings (*People v Brown*, 305 AD2d 1068, 1069, *lv denied* 100 NY2d 579).

Defendant further contends that he received ineffective assistance of counsel based on defense counsel's failure to request an adjournment until defendant was no longer taking pain medication. That contention survives the guilty plea and the valid waiver of the right to appeal "only to the extent that defendant contends that his plea was infected by the alleged ineffective assistance" (*People v Nieves*, 299 AD2d 888, 889, *lv denied* 99 NY2d 631; *see People v Kapp*, 59 AD3d 973, *lv denied* 12 NY3d 818), and we conclude that defendant's contention is lacking in merit. "[D]efendant receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404; *see Nieves*, 299 AD2d 888).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1521

**CAF 08-02240**

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

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IN THE MATTER OF IRIS L.H., PETITIONER,

V

ORDER

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,  
DAIRYN I.O., RESPONDENTS-RESPONDENTS,  
AND NESTOR H., RESPONDENT-APPELLANT.  
(APPEAL NO. 1.)

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF  
COUNSEL), FOR RESPONDENT-RESPONDENT ONONDAGA COUNTY DEPARTMENT OF  
SOCIAL SERVICES.

KELLY M. CORBETT, LAW GUARDIAN, FAYETTEVILLE, FOR NESTOR H.O.

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Appeal from an order of the Family Court, Onondaga County (Martha  
E. Mulroy, J.), entered July 21, 2008 in a proceeding pursuant to  
Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed  
without costs (*see Matter of Rivera v Perez*, 299 AD2d 944; *see also*  
CPLR 5511).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1522**

**CAF 08-02195**

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

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IN THE MATTER OF NESTOR H.O.

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ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAIRYN O., RESPONDENT,  
AND NESTOR H., RESPONDENT-APPELLANT.  
(APPEAL NO. 2.)

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

KELLY M. CORBETT, LAW GUARDIAN, FAYETTEVILLE, FOR NESTOR H.O.

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Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered October 8, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, terminated the parental rights of respondent Nestor H. on the ground of permanent neglect and freed his son for adoption.

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

Memorandum: Respondent father appeals from an order terminating his parental rights pursuant to Social Services Law § 384-b on the ground of permanent neglect and freeing his son for adoption. By virtue of the father's admission of permanent neglect, petitioner, Onondaga County Department of Social Services, was not required to establish that it made diligent efforts to reunite the father with his son (*see Matter of Aidan D.*, 58 AD3d 906, 908). Further, once permanent neglect has been established, "[a]n order of disposition shall be made . . . solely on the basis of the best interests of the child, and there shall be no presumption that such interests will be promoted by any particular disposition" (Family Ct Act § 631). Thus, contrary to the father's contention, "[a] blood relative does not take precedence over a prospective adoptive parent selected by the authorized agency" (*Matter of Deborah F. v Matika G.*, 50 AD3d 1213, 1215). Finally, the further contention of the father that Family Court erred in failing to issue a suspended judgment is unreserved for our review, inasmuch as he failed to request that the court issue such a judgment (*see Matter of Shadazia W.*, 48 AD3d 1058; *Matter of*

*Charles B.*, 46 AD3d 1430, 1431, *lv denied* 10 NY3d 705).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1527**

**CAF 09-00238**

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

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IN THE MATTER OF JAMES R. DART,  
PETITIONER-RESPONDENT,

V

ORDER

MARION G. WOOLMAN, RESPONDENT-APPELLANT.

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KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT.

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

SUSAN B. MARRIS, LAW GUARDIAN, MANLIUS, FOR VICTORIA S.D.

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Appeal from an order of the Family Court, Onondaga County (George M. Raus, R.), entered December 19, 2008 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted the petition seeking modification of an order of custody and visitation.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1530

CA 09-00439

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

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IN THE MATTER OF THE APPLICATION OF DONALD  
SAWYER, PH.D., EXECUTIVE DIRECTOR OF CENTRAL  
NEW YORK PSYCHIATRIC CENTER,  
PETITIONER-RESPONDENT,  
FOR AN ORDER AUTHORIZING THE INVOLUNTARY  
TREATMENT OF R.G., A PATIENT AT  
CENTRAL NEW YORK PSYCHIATRIC CENTER,  
RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA  
(JASON D. FLEMMA OF COUNSEL), FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE S. MERESON OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Anthony F. Sheehan, J.), entered October 22, 2008. The order granted the petition to administer antipsychotic medication to respondent over his objection.

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

Memorandum: Petitioner commenced this proceeding seeking, inter alia, to administer antipsychotic medication to respondent over his objection pursuant to the parens patriae power of the State of New York (*see Matter of William S.*, 31 AD3d 567, 568; *see generally Rivers v Katz*, 67 NY2d 485, 496-498, *rearg denied* 68 NY2d 808). We conclude that Supreme Court properly granted the petition. Contrary to respondent's contention, petitioner met his burden of establishing by clear and convincing evidence that respondent lacked "the capacity to make a reasoned decision with respect to proposed treatment" (*Rivers*, 67 NY2d at 497; *cf. Matter of Joseph O.*, 245 AD2d 856, 857-858). Here, "[t]he uncontroverted expert testimony [established] that respondent suffers from a debilitating mental illness which he himself fails to perceive, a conclusion borne out by respondent's own testimony" (*Matter of McConnell*, 147 AD2d 881, 882, *appeal dismissed and lv denied* 74 NY2d 759; *see Matter of Eleanor R. v South Oaks Hosp.*, 123 AD2d 460, *lv denied* 69 NY2d 602). Even assuming, arguendo, that the reports of respondent's behavior while in prison that were contained in respondent's medical file constituted impermissible hearsay, we conclude that petitioner's expert witness properly considered them in forming her opinion inasmuch as the reports included information "of a kind accepted in the profession as reliable

in forming a professional opinion" (*People v Sugden*, 35 NY2d 453, 460; see *People v Angelo*, 88 NY2d 217, 222). Further, under the circumstances of this case, the court did not abuse its discretion in limiting respondent's cross-examination of petitioner's expert witness (see generally *Matter of Simone D.*, 9 NY3d 828).

Contrary to the further contention of respondent, the proposed treatment was "narrowly tailored to give substantive effect to [his] liberty interest" (*Rivers*, 67 NY2d at 497). The order provides that petitioner's authority to administer medication to respondent over his objection is limited to the single course of treatment proposed by petitioner, i.e., antipsychotic medication, and is conditioned upon the continued incapacity of respondent to make a reasoned decision concerning his treatment. In any event, petitioner's authority to administer the medication will terminate one year after respondent returns to a correctional facility. Further, the record establishes that the court considered "all relevant circumstances, including [respondent's] best interests, the benefits to be gained from the [proposed] treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments" (*id.* at 497-498).

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

**1531**

**CA 08-01916**

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

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JOSEPH J. ARIENO, EVA M. NASIADKA,  
PAMELA K. LARKIN-HAYES, KATHLEEN WRIGHT-BLAKE,  
MARGARET ELLIS-POLK, PAMELA L. ERVIN,  
ARNOLD M. LABARBERA, AND TODD E. EGGERT,  
PLAINTIFFS-APPELLANTS,

V

ORDER

SWB FUNERAL SERVICES, INC., DOING BUSINESS AS  
PROFETTA FUNERAL HOME CHAPEL, SCOTT W. BATIER,  
DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANTS.

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CHARLIP LAW GROUP, LC, HOLLYWOOD, FLORIDA (DAVID H. CHARLIP OF  
COUNSEL), AND REDMOND & PARRINELLO, LLP, ROCHESTER, FOR  
PLAINTIFFS-APPELLANTS.

LANDMAN CORSKI BALLAINE & FORD, P.C., NEW YORK CITY (WILLIAM G.  
BALLAINE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered May 12, 2008. The order, insofar as appealed from, granted the motion of defendants SWB Funeral Services, Inc., doing business as Profetta Funeral Home Chapel, and Scott W. Batier 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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1534**

**CA 08-01706**

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

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DAWN RAWSON, MOTHER AND NATURAL GUARDIAN OF  
MATTHEW D. FURLONG, JR., CLAIMANT-APPELLANT,

V

ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.  
(CLAIM NO. 105379.)

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HARRIS & PANELS, SYRACUSE (MICHAEL W. HARRIS OF COUNSEL), AND JOHN M.  
MURPHY, PHOENIX, FOR CLAIMANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Court of Claims (Diane L.  
Fitzpatrick, J.), entered July 16, 2008. The judgment dismissed the  
claim following a trial.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1536**

**KA 08-00655**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

GILBERT ADAMS, DEFENDANT-APPELLANT.

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

GILBERT ADAMS, DEFENDANT-APPELLANT PRO SE.

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

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Appeal from a resentence of the Erie County Court (Debra L. Givens, A.J.), rendered February 14, 2008. Defendant was resentenced upon his conviction of burglary in the third degree and criminal contempt in the first degree.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1537**

**KA 08-02014**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BEVERLY J. READING, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 3, 2008. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the crime victim assistance fee and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [4]). We note at the outset that we agree with defendant that her waiver of the right to appeal is invalid "inasmuch as the record fails to 'establish that [she] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Hendrix*, 62 AD3d 1261, 1262, *lv denied* 12 NY3d 925, quoting *People v Lopez*, 6 NY3d 248, 256). Thus, her contention that Supreme Court erred in imposing a crime victim assistance fee because she had paid restitution in full at the time of sentencing is not encompassed by that invalid waiver. Although defendant failed to preserve her contention for our review (*see generally People v King*, 57 AD3d 1495; *People v Saladeen*, 12 AD3d 1179, 1180-1181, *lv denied* 4 NY3d 767), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]; Saladeen*, 12 AD2d at 1180-1181; *see also People v Ramos*, 60 AD3d 1317, 1317-1318, *lv denied* 12 NY3d 928). A defendant shall not be required to pay a crime victim assistance fee where, as here, he or she has paid restitution (*see Penal Law § 60.35 [6]; People v Quinones*, 95 NY2d 349, 352), and we therefore modify the

judgment accordingly.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1538**

**KA 08-02080**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

WALTER T. DABROWSKI, JR., 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 (William J. Watson, A.J.), rendered June 20, 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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1539**

**KA 08-01430**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DANIEL HARTRICH, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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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 (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 4, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1540**

**KA 09-00840**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DANIEL HARTRICH, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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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 (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 4, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1541**

**KA 08-02108**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ERIC T. SYKES, 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 (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered September 2, 2008. 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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1542**

**KA 08-02011**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS W. STORY, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 17, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, grand larceny in the third degree, criminal possession of stolen property in the third degree, and unauthorized use of a vehicle in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that the evidence is not legally sufficient to support the conviction because there was inadequate corroboration of the testimony of the accomplices. Defendant failed to preserve that contention for our review by failing to move for a trial order of dismissal on that ground (see *People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit because the corroboration required by CPL 60.22 (1) was provided by evidence that defendant's fingerprints were found on both the interior and exterior of the stolen vehicle (see *People v Dawson*, 160 AD2d 719, lv denied 76 NY2d 733; see also *People v McCann*, 202 AD2d 968, affd 85 NY2d 951; *People v Seals*, 247 AD2d 349, lv denied 92 NY2d 860). "Once the statutory minimum pursuant to CPL 60.22 (1) was met, it was for the jurors to decide whether the corroborating [evidence] satisfied them that the accomplices were telling the truth" (*People v Pierce*, 303 AD2d 966, 966, lv denied 100 NY2d 565). 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).

Contrary to defendant's further contention, we conclude that the

evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct on summation (*see People v Searles*, 28 AD3d 1205, *lv denied* 7 NY3d 817), 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]).

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

**1544**

**KA 08-00536**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARLOS E. GUEVARA, 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 11, 2008. The judgment convicted defendant, upon his plea of guilty, of vehicular manslaughter in the first degree and driving while intoxicated, a class D felony.

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 vehicular manslaughter in the first degree (Penal Law § 125.13 [2] [b]) and felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (ii)]). We reject the contention of defendant that County Court erred in denying his request for access to the People's records that were available to the Probation Department in its preparation of the presentence report. In support of his request, defendant alleged that he sought equal access "to insure that any possible inaccuracies or misrepresentations . . . are addressed prior to sentencing." Contrary to defendant's contention, however, we conclude that the sentencing satisfied the requirements of due process, i.e., "that the information [upon which] the sentencing court relie[d] . . . [was] 'reliable and accurate' " and that defendant had an opportunity to respond to that information (*People v Hansen*, 99 NY2d 339, 345; see *People v Outley*, 80 NY2d 702, 712; *People v Clark*, 61 AD3d 1179, 1181, lv denied 12 NY3d 924; see generally *People v Perry*, 36 NY2d 114, 119). Indeed, defendant did not assert at sentencing that the court relied on misinformation or materially untrue assumptions in sentencing him (see *Hansen*, 99 NY2d at 346), and he was given the opportunity to contest the information in the presentence report, either by submitting his own presentence memorandum (see CPL 390.40 [1]), or by making a statement at sentencing (see CPL 380.50 [1]). Finally, the

sentence is not unduly harsh or severe.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1545

**KAH 09-00235**

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

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
GREGORY HILL, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

GREGORY J. KAIDEN, SUPERINTENDENT, GOWANDA  
CORRECTIONAL FACILITY, GEORGE B. ALEXANDER,  
CHAIRMAN, NEW YORK STATE DIVISION OF PAROLE,  
AND ANDREW M. CUOMO, NEW YORK STATE ATTORNEY  
GENERAL, RESPONDENTS-RESPONDENTS.

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KEVIN J. BAUER, ALBANY, FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF  
COUNSEL), FOR RESPONDENTS-RESPONDENTS.

---

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered August 21, 2008. The judgment dismissed the petition for a writ of habeas corpus.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition in this habeas corpus proceeding. We agree with petitioner that Supreme Court (Townsend, J.) erred in converting the habeas corpus proceeding into one pursuant to CPLR article 78 inasmuch as "the sole basis for petitioner's continued incarceration is the determination of the [Board of Parole (Board)] to revoke petitioner's parole" (*Matter of Zientek v Herbert*, 199 AD2d 1075, 1076; see *People ex rel. Smith v Mantello*, 167 AD2d 912). Nevertheless, we conclude on the merits that Supreme Court (Burns, J.) properly dismissed the petition. "It is well settled that any recommendation made by the [Administrative Law Judge (ALJ)] is advisory in nature and that the ultimate authority to reincarcerate petitioner and fix a date for his release lies with the Board" (*Matter of Folks v Alexander*, 58 AD3d 1038, 1039). The statement by the Board with respect to its reasons for modifying the recommended penalty of the ALJ is sufficient to comply with 9 NYCRR 8005.20 (e) and "to meet the requirements of due process" (*People ex rel. Hacker v New York State Div. of Parole*, 228 AD2d 849, 851, *lv denied* 88 NY2d 809). The Board's modification of the ALJ's recommended penalty, i.e., that petitioner be incarcerated for 36 months rather than the 12 months recommended by the ALJ, "is not 'clearly disproportionate to the offense and completely

inequitable in light of the surrounding circumstances' " (*Matter of Lord v State of N.Y. Exec. Dept. Bd./Div. of Parole*, 263 AD2d 945, 946, lv denied 94 NY2d 753, rearg denied 95 NY2d 826, quoting *Kostika v Cuomo*, 41 NY2d 673, 676). Petitioner failed to preserve for our review his contention that the retroactive application of the 1997 amendments to 9 NYCRR 8005.20 (c) violates the prohibition against ex post facto laws and thus is unconstitutional (see generally *People v Lyday*, 241 AD2d 950). In any event, that contention is without merit (see US Const, art I, § 10 [1]; *Matter of Boddie v Alexander*, 65 AD3d 1446; *Matter of Suce v Taylor*, 37 AD3d 886, lv denied 9 NY3d 803).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1546**

**CAF 08-02154**

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

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IN THE MATTER OF DEON M.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

VERNON B., RESPONDENT-APPELLANT.

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CHARLES J. GREENBERG, 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 DEON M.

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Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered August 20, 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 reversed on the law without costs and the matter is remitted to Family Court, Erie County, for a new hearing.

Memorandum: Respondent father appeals from an order finding that he permanently neglected his son and terminating his parental rights with respect to his son. We agree with the father that reversal is required because Family Court deprived him of his fundamental right to counsel. On the scheduled date of the fact-finding hearing, the father appeared with his assigned counsel. The father's attorney advised the court that the father "no longer wishe[d] for [him] to proceed as [the father's] attorney." The court responded, "[t]hen I hope he went to law school while he was locked up in jail because you have a trial today . . . ." When the father attempted to speak, the court cut him off after he had spoken only five words, and the court stated, "[t]oo bad. I'm not adjourning it." The court then granted the motion of the father's attorney to withdraw as counsel for the father, whereupon the court stated that the father could "retain himself then." The court conducted the fact-finding hearing, and the father did not cross-examine the single witness presented by petitioner, nor did he call any witnesses.

Pursuant to Family Court Act § 262 (a) (iii), a respondent in a proceeding pursuant to Family Court Act article 6 "has the right to the assistance of counsel . . . The deprivation of a party's

fundamental right to counsel is a denial of due process and requires reversal, without regard to the merits of the unrepresented party's position" (*Matter of Evan F.*, 29 AD3d 905, 906; see *Matter of Casey N.*, 59 AD3d 625, 627, lv denied 12 NY3d 710; *Matter of David VV.*, 25 AD3d 882, 883-884). Although a party may proceed pro se, "[a] court's decision to permit a party who is entitled to counsel to proceed pro se must be supported by a showing on the record of a knowing, voluntary and intelligent waiver of [the right to counsel]" (*David VV.*, 25 AD3d at 884; see *Casey N.*, 59 AD3d at 627; *Matter of Kristin R.H. v Robert E.H.*, 48 AD3d 1278; *Evan F.*, 29 AD3d at 907). In order for the court to ensure that the waiver of the right to counsel is valid, "the court must conduct a 'searching inquiry' of [the] party . . . [, and] there must be a showing that the party 'was aware of the dangers and disadvantages of proceeding without counsel' " (*Casey N.*, 59 AD3d at 627; see *Kristin R.H.*, 48 AD3d at 1279).

Where, as here, the court fails to conduct a searching inquiry, reversal is required (see e.g. *Casey N.*, 59 AD3d at 629-630; *Kristin R.H.*, 48 AD3d at 1279; *Evan F.*, 29 AD3d at 907; *David VV.*, 25 AD3d at 884-885; cf. *Matter of Isiah FF.*, 41 AD3d 900, 901-902; *Matter of Anthony K.*, 11 AD3d 748, 749-750). We therefore reverse the order and remit the matter to Family Court for a new hearing.

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

**1547**

**CAF 08-02475**

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

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IN THE MATTER OF LASHANTA M.R.C.

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CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL  
SERVICES, PETITIONER-RESPONDENT;

ORDER

TIMOTHY C., RESPONDENT-APPELLANT.

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LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-APPELLANT.

THOMAS A. DOREY, MAYVILLE, FOR PETITIONER-RESPONDENT.

SHERRY A. BJORK, LAW GUARDIAN, FREWSBURG, FOR LASHANTA M.R.C.

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Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered November 12, 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 affirmed without costs.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1548**

**CAF 08-02189**

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

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IN THE MATTER OF FRANCES ADNEY,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

HERBERT J. MORTON, III, RESPONDENT-RESPONDENT.

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ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-APPELLANT.

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

CHRISTOPHER J. BRECHTEL, LAW GUARDIAN, BUFFALO, FOR GOLDIE M.

MARY E. GIALLANZA, LAW GUARDIAN, BUFFALO, FOR HERBERT M., IV.

DAVID S. KELLY, LAW GUARDIAN, KENMORE, FOR MATTHEW M.

---

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 12, 2008 in a proceeding pursuant to Domestic Relations Law article 5-A. The order granted the petition for enforcement of an order of custody and visitation.

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

Memorandum: This appeal by petitioner mother from an order entered upon her stipulation in open court must be dismissed. "No appeal lies from an order entered upon the parties' consent" (*Matter of Cherilyn P.*, 192 AD2d 1084, lv denied 82 NY2d 652; see *Matter of Desmond S.*, 285 AD2d 994, lv dismissed 97 NY2d 693).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1549**

**CAF 08-01180, CAF 08-01423**

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

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IN THE MATTER OF ASHLEY L.C., CHRISTEN N.C.  
AND ZACHARIAH J.C.

MEMORANDUM AND ORDER

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ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

JAMES L.C. AND DIANNE L.M.,  
RESPONDENTS-APPELLANTS.

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EDWARD J. DEGNAN, CANISTEO, FOR RESPONDENT-APPELLANT JAMES L.C.

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT DIANNE L.M.

THOMAS A. MINER, COUNTY ATTORNEY, BELMONT (NORA K. CARNES OF COUNSEL),  
FOR PETITIONER-RESPONDENT.

DAVID C. BRAUTIGAM, LAW GUARDIAN, HOUGHTON, FOR ASHLEY L.C. AND  
CHRISTEN N.C.

DAVID E. CODDINGTON, LAW GUARDIAN, HORNELL, FOR ZACHARIAH J.C.

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Appeals from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered May 27, 2008 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed respondents' children in the care and custody of petitioner.

It is hereby ORDERED that said appeal from the order insofar as it concerned placement is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Respondent parents appeal from an order that, inter alia, adjudicated their children to be neglected based upon their admission of neglect and placed the children in the care and custody of petitioner. We dismiss as moot respondent mother's appeal from the order insofar as it concerned the placement of the children inasmuch as the placement has expired (*see Matter of Julia R.*, 52 AD3d 1310, 1311, *lv denied* 11 NY3d 709; *Matter of Abbi M.*, 37 AD3d 1084). The mother's remaining contention concerning the order is without merit. Respondent father contends on appeal that he received ineffective assistance of counsel. That contention lacks merit, because the record before us in fact establishes that he received meaningful representation (*see Matter of Derrick C.*, 52 AD3d 1325, 1326, *lv denied* 11 NY3d 705; *Matter of Christopher W.*, 42 AD3d 692, 693). The

father failed to preserve for our review his remaining contention, i.e., that he was denied procedural due process, including notice (see generally *Matter of Vanessa S.*, 20 AD3d 924; *Matter of Longo v Wright*, 19 AD3d 1078, 1078-1079; *Matter of Jamel Isaiah R.*, 18 AD3d 558), and in any event that contention is without merit.

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

1550

**CA 09-01521**

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

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DAVID S. BRODERICK, AS ADMINISTRATOR OF THE  
ESTATE OF CATHERINE L. JOHNSON, DECEASED,  
PLAINTIFF-RESPONDENT,

V

ORDER

JAGDISH M. TRIVEDI, M.D., JOHN C.  
CHRISTODOULIDES, M.D. AND MT. ST. MARY'S  
HOSPITAL AND HEALTH CENTER,  
DEFENDANTS-APPELLANTS.

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ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS JAGDISH M. TRIVEDI, M.D. AND JOHN  
C. CHRISTODOULIDES, M.D.

RICOTTA & VISCO, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (BRETT GLIOSCA  
OF COUNSEL), FOR DEFENDANT-APPELLANT MT. ST. MARY'S HOSPITAL AND  
HEALTH CENTER.

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeals from an order of the Supreme Court, Niagara County (Frank  
Caruso, J.), entered November 7, 2008 in a medical malpractice action.  
The order granted the motion of plaintiff for leave to amend the  
complaint to add a wrongful death cause of action.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1551**

**CA 09-00415**

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

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DENNIS RADDER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CSX TRANSPORTATION, INC., DEFENDANT-APPELLANT.

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MAYER BROWN LLP, WASHINGTON, D.C. (CARL J. SUMMERS OF COUNSEL), AND ANSPACH MEEKS ELLENBERGER LLP, BUFFALO, FOR DEFENDANT-APPELLANT.

LAW OFFICES OF KANTOR & GODWIN, PLLC, WILLIAMSVILLE (ROBERT W. GODWIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment (denominated judgment and order) of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered November 18, 2008 in an action pursuant to the Federal Employers' Liability Act. The judgment awarded plaintiff money damages upon a jury verdict.

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

Memorandum: Plaintiff commenced this action pursuant to the Federal Employers' Liability Act ([FELA] 45 USC § 51 *et seq.*) seeking damages for injuries he sustained during the course of his employment with defendant, CSX Transportation, Inc. (CSX). Plaintiff retained the law firm of Kantor & Godwin, PLLC (K&G) to represent him in the action. While plaintiff's action was pending, a second CSX employee, William Pauley, was injured at work and he too retained K&G to represent him in a personal injury action against CSX. Shortly before plaintiff's action went to trial and without notice to or the consent of CSX, K&G interviewed Pauley concerning plaintiff's case. During the course of that interview, Pauley disclosed to K&G, as he previously had disclosed to the attorneys for CSX, that on the day of plaintiff's accident he had forged an inspection report related to the piece of equipment that had caused plaintiff's injuries. Before Pauley was called as a witness at trial, CSX moved to preclude his testimony, contending that K&G had violated the attorney Disciplinary Rules then in effect by interviewing Pauley. Supreme Court denied that motion, as well as a subsequent motion for a mistrial and the post-trial motion of CSX seeking a new trial and, *inter alia*, suppression of the information that allegedly was improperly obtained by plaintiff's attorneys. The jury returned a verdict in favor of plaintiff, awarding him damages of, *inter alia*, \$550,000 for past pain and suffering and \$1 million for future pain and suffering, to cover a

period of 24.1 years. The court granted that part of the post-trial motion of CSX to set aside the award for future pain and suffering and, upon the stipulation of plaintiff, the court reduced that award to \$650,000.

CSX contends on appeal that K&G violated former DR 7-104 (a) (1) (22 NYCRR 1200.35 [a] [1]) and former DR 5-105 (b) through (d) (22 NYCRR 1200.24 [b] - [d]), and that those violations warranted suppression of the information improperly obtained by plaintiff's attorneys. We reject that contention. Generally, "absent some constitutional, statutory, or decisional authority mandating the suppression of otherwise valid evidence, such evidence will be admissible [in a civil action] even if procured by unethical means" (*Heimanson v Farkas*, 292 AD2d 421, 422; see *Nordhauser v New York Health & Hosps. Corp.*, 176 AD2d 787, 791; see generally *Sackler v Sackler*, 15 NY2d 40, 43-44). Here, there is no constitutional, statutory or case law authority mandating the suppression of Pauley's otherwise valid testimony, and thus the only basis for suppression of that testimony would be CPLR 3103 (c), which permits the suppression of "any disclosure under [article 31 that] has been improperly or irregularly obtained so that a substantial right of a party is prejudiced . . . ."

Contrary to the contention of plaintiff, our review is not limited to whether the court abused its discretion. It is well settled that, where discretionary determinations concerning discovery and CPLR article 31 are at issue, this Court "is vested with the same power and discretion as [Supreme Court, and thus] the Appellate Division may also substitute its own discretion even in the absence of abuse" (*Brady v Ottaway Newspapers*, 63 NY2d 1031, 1032 [emphasis added]; see *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745). Here, however, we conclude that there was neither an abuse nor an improvident exercise of discretion.

Former DR 7-104 (a) provided in relevant part that, "[d]uring the course of the representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized to do so." We conclude that, at the time of plaintiff's accident, Pauley was an employee deemed to be a party represented by the attorneys for CSX (see *Niesig v Team I*, 76 NY2d 363, 374), but that at the time he was interviewed by K&G he was not. Indeed, by then, Pauley was no longer an employee of CSX (see *Muriel Siebert & Co., Inc. v Intuit Inc.*, 8 NY3d 506, 511; see also Labor Law § 2 [5]). When he was interviewed by K&G, Pauley had been on long-term illness status for over three years, he was receiving disability benefits instead of wages, and his benefits were being paid by the Railroad Retirement Board, not by CSX (*cf. Rostocki v Consolidated Rail Corp.*, 19 F3d 104, 106).

Based on our determination that Pauley was not a current employee of CSX when he was interviewed by K&G, we conclude that there was no violation of former DR 7-104 (a) (1), and thus there is no need to

address plaintiff's contention that the interview was otherwise authorized by FELA (see 45 USC § 60).

CSX further contends that K&G violated former DR 5-105 (b) through (d) because it was representing two clients with differing interests. We reject that contention as well. When K&G initially began to represent both plaintiff and Pauley, there was no apparent conflict. After Pauley disclosed that he forged a document that was critical to plaintiff's case, however, K&G was placed in a position in which it was required to impugn Pauley's credibility in order to strengthen plaintiff's case. Doing so necessarily affected the credibility of Pauley in his own personal injury action. "[A]ttorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests" (*Greene v Greene*, 47 NY2d 447, 451). Nevertheless, even assuming that K&G had an impermissible conflict of interest, we conclude that any breach of duty would be to K&G's clients (see e.g. *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 9-10), and the remedy for the breach of that duty would be an award of damages to the clients (see *id.* at 10; see also *Tabner v Drake*, 9 AD3d 606, 610), or disqualification of counsel (see e.g. *Greene*, 47 NY2d at 450; *Applehead Pictures LLC v Perelman*, 55 AD3d 348). Neither remedy was sought in this action.

In any event, even assuming that there was evidence that was "improperly or irregularly obtained," we conclude that no substantial right of CSX was prejudiced (CPLR 3103 [c]). The evidence of Pauley's forgery was previously known to the attorneys for CSX, it was not privileged and it could have been exposed in the normal course of discovery (see e.g. *Levy v Grandone*, 8 AD3d 630, *lv dismissed* 5 NY3d 746, 850; *Gutierrez v Dudock*, 276 AD2d 746; *cf. Lipin v Bender*, 84 NY2d 562, 568-569, *rearg denied* 84 NY2d 1027). Thus, the court properly denied the motions of CSX to preclude Pauley's testimony, to declare a mistrial, and to set aside the verdict and for a new trial in which the improperly obtained evidence would be suppressed.

CSX further contends that the award of damages for past and future pain and suffering should be reduced because they "deviate[] materially from what would be reasonable compensation" (CPLR 5501 [c]). As plaintiff correctly contends, however, the appropriate standard for determining whether an award of damages should be reduced is the federal standard, which provides that jury awards should not be disturbed unless they "are so excessive as to shock [the] judicial conscience" (*Hotaling v CSX Transp.*, 5 AD3d 964, 970 [internal quotation marks omitted]; see *Palmer v CSX Transp. Inc.* [appeal No. 2], \_\_\_ AD3d \_\_\_ [Dec. 30, 2009]; *Cruz v Long Is. R.R. Co.*, 22 AD3d 451, 454, *lv denied* 6 NY3d 703; *Poole v Consolidated Rail Corp.*, 242 AD2d 966, 967-968, *lv denied* 91 NY2d 908).

Based on our review of awards in cases involving similar injuries (see *Hotaling*, 5 AD3d at 970; *Nairn v National R.R. Passenger Corp.*, 837 F2d 565, 568), we conclude that the award of \$550,000 for past pain and suffering, which is intended to cover a period of four years,

does not shock the judicial conscience (see e.g. *Baez v New York City Tr. Auth.*, 15 AD3d 309; *Cabezas v City of New York*, 303 AD2d 307; *Bernstein v Red Apple Supermarkets*, 227 AD2d 264, lv dismissed 89 NY2d 961, 1030; *Guillory v Nautilus Real Estate*, 208 AD2d 336, appeal dismissed and lv denied 86 NY2d 881). Nor does the award of \$650,000 for future pain and suffering, which is intended to cover a period of 24.1 years, shock the judicial conscience when compared to cases involving similar injuries (see e.g. *Guillory*, 208 AD2d 336; *Van Deusen v Norton Co.*, 204 AD2d 867).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1552**

**CA 09-01402**

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

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M&T BANK CORPORATION, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

GEMSTONE CDO VII, LTD., ET AL., DEFENDANTS,  
DEUTSCHE BANK SECURITIES, INC., HBK  
INVESTMENTS, LP, HBK PARTNERS II LP, AND HBK  
MANAGEMENT LLC, DEFENDANTS-APPELLANTS.

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MILBANK, TWEED, HADLEY & MCCLOY LLP, NEW YORK CITY (THOMAS A. ARENA OF  
COUNSEL), FOR DEFENDANT-APPELLANT DEUTSCHE BANK SECURITIES, INC.

JONES DAY, NEW YORK CITY (JAYANT W. TAMBE OF COUNSEL), AND WEBSTER  
SZANYI LLP, BUFFALO, FOR DEFENDANTS-APPELLANTS HBK INVESTMENTS, LP,  
HBK PARTNERS II LP, AND HBK MANAGEMENT LLC.

KORNSTEIN VEISZ WEXLER & POLLARD, LLP, NEW YORK CITY (DANIEL J.  
KORNSTEIN OF COUNSEL), AND HODGSON RUSS, BUFFALO, FOR  
PLAINTIFF-RESPONDENT.

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Appeals from an order of the Supreme Court, Erie County (John M. Curran, J.), entered in May 12, 2009. The order, insofar as appealed from, denied in part the motion of defendants Deutsche Bank Securities, Inc. and Deutsche Bank AG seeking dismissal of the complaint against defendant Deutsche Bank Securities, Inc. and denied in part the motion of defendants HBK Investments, LP, HBK Partners II LP, and HBK Management LLC seeking dismissal of the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendants Deutsche Bank Securities, Inc. and Deutsche Bank AG seeking dismissal of the third, fifth and sixth causes of action against defendant Deutsche Bank Securities, Inc. and dismissing those causes of action against that defendant and by granting those parts of the motion of defendants HBK Investments, LP, HBK Partners II LP, and HBK Management LLC seeking dismissal of the first cause of action against them insofar as that cause of action is based upon alleged oral misrepresentations made after February 21, 2007 and dismissal of the third and fourth causes of action against them and dismissing the first cause of action to that extent against those defendants and dismissing the third and fourth causes of action against those defendants and as modified the order is affirmed without costs.

Memorandum: Defendant Deutsche Bank Securities, Inc. (DBSI) contends on appeal that Supreme Court erred in denying that part of the motion of DBSI and Deutsche Bank AG (DBAG) seeking dismissal of the complaint against DBSI, and defendants HBK Investments LP, HBK Partners II LP, and HBK Management LLC (collectively, HBK defendants) contend on appeal that the court erred in denying their motion seeking dismissal of the complaint against them. We conclude that the court should have granted those parts of the motion of DBSI and DBAG with respect to the third, fifth and sixth causes of action against DBSI. In addition, we conclude that the court should have granted those parts of the motion of the HBK defendants with respect to the first cause of action insofar as that cause of action is based upon alleged oral misrepresentations made after February 21, 2007, as well as with respect to the third and fourth causes of action. We therefore modify the order accordingly.

Plaintiff commenced this action against eight defendants seeking to recoup damages in excess of the \$82 million it invested in purchasing certain notes that were part of a collateralized debt obligation (CDO) known as the Gemstone CDO VII (hereafter, Gemstone CDO). Those notes were sold to plaintiff by DBSI, which in turn entered into a collateral management agreement with the HBK defendants requiring that those defendants oversee the collateral underlying the notes.

Prior to February 21, 2007, plaintiff was in communication with both DBSI and the HBK defendants and had received both written and oral information concerning the notes. The written information, including a "Preliminary Offering Circular" and "Debt Investor Presentation," contained numerous disclaimers and advised plaintiff to perform its own due diligence. The notes were comprised of multiple classes or "tranches," i.e., A-1a, A-1b, A-2, B, C, D, and E, pursuant to which each class was subordinate to the class of notes preceding it. Investors purchasing debt in a higher class received greater security but lower interest, while those purchasing debt in a lower class received less security but higher interest. Each class was further distinguished by ratings from Standard & Poor's Ratings Services (S&P) and Moody's Investors Service, Inc. (collectively, Rating Agencies), and the higher classes received higher ratings from the Rating Agencies.

In early 2007, plaintiff contacted DBSI seeking to invest in a mortgage-backed CDO and, on February 21, 2007, plaintiff purchased \$42 million in Class A-2 notes and \$40 million in Class B notes. On March 15, 2007, the Gemstone CDO offering closed. That same day, plaintiff received a final "Offering Circular" that contained, inter alia, numerous disclosures and disclaimers related to all of the notes purchased by plaintiff.

As of July 2007, S&P had placed the Gemstone CDO notes on credit watch for potential downgrades and, by December 2007, plaintiff established the market value of its notes at \$1.87 million, which constituted more than a 95% loss to plaintiff. Thereafter, plaintiff

commenced this action asserting 12 causes of action. The causes of action relevant to this appeal are the first cause of action, for common-law fraud insofar as it is asserted against DBSI and the HBK defendants; the third cause of action, for negligent misrepresentation insofar as it is asserted against DBSI and the HBK defendants; the fourth cause of action, for breach of fiduciary duty insofar as it is asserted against the HBK defendants; the fifth cause of action, for aiding and abetting a breach of fiduciary duty insofar as it is asserted against DBSI; the sixth cause of action, for breach of contract insofar as it is asserted against DBSI; the ninth cause of action, for rescission based on fraud asserted only against DBSI; and the 11th cause of action, for mutual mistake also asserted only against DBSI.

We conclude that the court properly denied that part of the motion of DBSI with respect to the first cause of action inasmuch as the complaint sufficiently alleges fraudulent nondisclosure with respect to DBSI (*see generally Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492; *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 286). We further conclude, however, that the court should have granted that part of the motion of the HBK defendants insofar as the first cause of action is based upon alleged oral misrepresentations made by their employee after February 21, 2007, the date of plaintiff's purchase of the notes. Plaintiff could not have purchased the notes based on those alleged oral misrepresentations, and thus plaintiff has omitted a necessary allegation for the first cause of action, i.e., that the alleged oral misrepresentations "induced plaintiff to engage in the transaction in question" (*Water St. Leasehold LLC v Deloitte & Touche LLP*, 19 AD3d 183, 185, *lv denied* 6 NY3d 706). Nevertheless, we conclude that the complaint sufficiently alleges fraudulent nondisclosure against the HBK defendants based on their alleged failure to disclose, prior to February 21, 2007, that they had decreased their level of screening and due diligence undertaken to ensure the security of the collateral underlying the notes and that they had withheld certain relevant information from the Rating Agencies (*see generally Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559; *Pludeman*, 10 NY3d at 491-492).

We agree with DBSI that the court erred in denying those parts of its motion seeking dismissal of the third and fifth causes of action against it, and we agree with the HBK defendants that the court erred in denying those parts of their motion seeking dismissal of the third and fourth causes of action against them. Essential to each of those causes of action is the existence of a special relationship of trust or confidence and there is no such special relationship in this case, particularly in light of the facts that the parties had no relationship prior to this arms-length transaction and that offering circulars contained the various limitations and disclaimers (*see generally Wright v Selle*, 27 AD3d 1065, 1066-1067; *330 Acquisition Co. v Regency Sav. Bank*, 306 AD2d 154; *Societe Nationale d'Exploitation Industrielle des Tabacs et Allumettes v Salomon Bros. Intl.*, 251 AD2d 137, *lv denied* 95 NY2d 762). We further note that a party's "unique or special expertise" alone is insufficient to create an issue of fact

concerning the existence of a special relationship (*Kimmell v Schaefer*, 89 NY2d 257, 264).

We further agree with DBSI that the court erred in denying that part of its motion seeking dismissal of the sixth cause of action against it. Plaintiff was required to set forth in that cause of action, for breach of contract, " 'the provisions of the contract upon which the claim is based' " (*Valley Cadillac Corp. v Dick*, 238 AD2d 894), and failed to set forth any such provision.

We have considered the remaining contentions of DBSI and the HBK defendants and conclude that they are without merit.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1553

**CA 08-02423**

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

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ROBERT C. TESTERMAN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RACHEL L. ZIELINSKI, ET AL., DEFENDANTS,  
AND DANIEL D. BIGELOW, AS EXECUTOR OF THE ESTATE  
OF TENNY C. BIGELOW, DECEASED, AND DANIEL D.  
BIGELOW, AS ADMINISTRATOR C.T.A. OF THE ESTATE  
OF DOUGLAS L. BIGELOW, DECEASED,  
DEFENDANT-RESPONDENT.  
(APPEAL NO. 1.)

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HERSCHEL GELBER, LLC, AMHERST (HERSCHEL GELBER OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Chautauqua County (John T. Ward, A.J.), entered August 11, 2008 in a personal injury action. The order granted the motion of defendant Daniel D. Bigelow, as executor of the estate of Tenny C. Bigelow, deceased, and Daniel D. Bigelow, as administrator C.T.A. of the estate of Douglas L. Bigelow, deceased, for summary judgment dismissing the amended complaint and cross claim against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the amended complaint and cross claim against defendant Daniel D. Bigelow, as executor of the estate of Tenny C. Bigelow, deceased, and Daniel D. Bigelow, as administrator C.T.A. of the estate of Douglas L. Bigelow, deceased, are reinstated.

Memorandum: Robert C. Testerman, the plaintiff in appeal Nos. 1 and 2, commenced the personal injury action at issue therein seeking damages for injuries he sustained when the pickup truck in which he was a passenger collided with a vehicle operated by Tenny C. Bigelow and owned by Tenny Bigelow and Douglas L. Bigelow. Daniel D. Bigelow, the plaintiff in appeal No. 3, commenced the wrongful death action at issue therein as executor of Tenny Bigelow's estate and as administrator C.T.A. of Douglas Bigelow's estate. The pickup truck in which Testerman was a passenger was owned by his employer, Pisa Electrical Construction & Manufacturing, Inc. (Pisa), and was operated by Rachel L. Zielinski, both of whom are defendants in both actions.

The evidence in the record before us establishes that the collision occurred when Zielinski drove Pisa's pickup truck through a stop sign and into an intersection, whereupon the Bigelow vehicle collided with the pickup truck. In appeal No. 1, Testerman appeals from an order granting the motion of Daniel Bigelow for summary judgment dismissing the amended complaint and cross claim in the personal injury action against him. In appeal No. 2, Testerman appeals from an order that, inter alia, granted the motion of Pisa for summary judgment dismissing the amended complaint in the personal injury action against it. In appeal No. 3, Pisa and Zielinski appeal from an order granting Daniel Bigelow's motion for partial summary judgment on liability in the wrongful death action.

Addressing first the order in appeal No. 2, we reject the contention of Testerman that Supreme Court erred in granting Pisa's motion in the personal injury action. "Generally, the sole remedy of an employee[, i.e., Testerman,] injured in the course of employment against his . . . employer is recovery under the Workers' Compensation Law" (*Constantine v Premier Cab Corp.*, 295 AD2d 303, 303; see § 11). "Inasmuch as [Pisa is] statutorily immune from suit, as a result of the 'exclusive remedy' provision of [the] Workers' Compensation Law . . ., [Pisa] cannot be held vicariously liable as owner[]" of the pickup truck pursuant to Vehicle and Traffic Law § 388 (*Allen v Blum*, 232 AD2d 591, 592; see *Hill v State of New York*, 157 Misc 2d 109, 112, *affd* 209 AD2d 1007).

We agree with Testerman in appeal No. 1, however, that the court erred in granting Daniel Bigelow's motion in the personal injury action. "To meet his initial burden on the motion, [Daniel Bigelow] had to establish both that [Zielinski's] vehicle 'suddenly entered the lane where [Tenny Bigelow] was operating [her vehicle] in a lawful and prudent manner and that there was nothing [she] could have done to avoid the collision' " (*Fratangelo v Benson*, 294 AD2d 880, 881; see *Richards v Bartholomew*, 60 AD3d 1405; see also *Dorr v Farnham*, 57 AD3d 1404, 1405-1406). Although Tenny Bigelow "was entitled to anticipate that [Zielinski] would obey the traffic laws that required her to yield the right-of-way to [Tenny's vehicle] . . ., [Daniel Bigelow] failed to establish that [Tenny] used the requisite reasonable care when proceeding into the intersection . . . [He] thus failed to meet [his] initial burden on the motion because [he] failed to establish that the sole proximate cause of the accident was [Zielinski's] failure to yield the [right-of-way] to [Tenny's vehicle]" (*Dorr*, 57 AD3d at 1405-1406 [internal quotation marks omitted]). We therefore reverse the order in appeal No. 1, deny the motion and reinstate the amended complaint and cross claim against Daniel Bigelow.

With respect to the order in appeal No. 3, we conclude that the court erred in granting Daniel Bigelow's motion for partial summary judgment on the issue of liability in the wrongful death action, for the same reasons as those set forth with respect to the order in appeal No. 1. We therefore reverse the order in appeal No. 3 and deny the motion.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1554**

**CA 08-02498**

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

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ROBERT C. TESTERMAN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RACHEL L. ZIELINSKI, ET AL., DEFENDANTS,  
AND PISA ELECTRICAL CONSTRUCTION &  
MANUFACTURING, INC., DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

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HERSCHEL GELBER, LLC, AMHERST (HERSCHEL GELBER OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Chautauqua County  
(John T. Ward, A.J.), entered October 31, 2008 in a personal injury  
action. The order, among other things, granted the motion of  
defendant Pisa Electrical Construction & Manufacturing, Inc. for  
summary judgment dismissing the amended complaint against it.

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

Same Memorandum as in *Testerman v Zielinski* ([appeal No. 1] \_\_\_\_  
AD3d \_\_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1555**

**CA 08-02500**

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

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DANIEL D. BIGELOW, AS EXECUTOR OF THE ESTATE  
OF TENNY C. BIGELOW, DECEASED, AND DANIEL D.  
BIGELOW, AS ADMINISTRATOR C.T.A. OF THE ESTATE  
OF DOUGLAS L. BIGELOW, DECEASED,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

RACHEL L. ZIELINSKI AND PISA ELECTRICAL  
CONSTRUCTION & MANUFACTURING, INC.,  
DEFENDANTS-APPELLANTS.  
(APPEAL NO. 3.)

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CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Chautauqua County  
(John T. Ward, A.J.), entered September 19, 2008 in a wrongful death  
action. The order granted plaintiff's motion for partial summary  
judgment on liability.

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

Same Memorandum as in *Testerman v Zielinski* ([appeal No. 1] \_\_\_\_  
AD3d \_\_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1556**

**CA 09-01433**

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

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IN THE MATTER OF MICHAEL G. CARUSO,  
PETITIONER-RESPONDENT,

V

ORDER

VILLAGE OF KENMORE, VILLAGE OF KENMORE  
POLICE DEPARTMENT, KATHLEEN P. JOHNSON,  
CLERK/TREASURER, PATRICK MANG, MAYOR,  
AND SALVATORE MUSCARELLA, KATHERINE  
BESTINE, PAUL P. CATALANO, AND R. TIMOTHY  
MCCARTHY, TRUSTEES, RESPONDENTS-APPELLANTS.

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BOND, SCHOENECK & KING, PLLC, BUFFALO (ROBERT A. DOREN OF COUNSEL),  
FOR RESPONDENTS-APPELLANTS.

LAW OFFICE OF WILLIAM E. GRANDE, KENMORE (WILLIAM E. GRANDE OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court,  
Erie County (Patrick H. NeMoyer, J.), entered January 14, 2009 in a  
proceeding pursuant to CPLR article 78. The judgment granted the  
petition.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1557**

**CA 09-01224**

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

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FRANCIS G. FINCH, JR., AND SHIRLEY I. FINCH,  
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

RYDER TRUCK RENTAL, INC., AND RYDER TRUCK  
RENTAL AND LEASING, DEFENDANTS-RESPONDENTS.

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FESSENDEN, LAUMER & DEANGELO, JAMESTOWN (MARY B. SCHILLER OF COUNSEL),  
FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (JEFFREY J. SIGNOR OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered January 8, 2009 in a personal injury action. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Francis G. Finch, Jr. (plaintiff) when he fell during the course of his employment as a delivery truck driver. Plaintiff's employer leased its delivery trucks and trailers from defendants and, pursuant to their "Truck Lease and Service Agreement" (Agreement), defendants agreed to provide maintenance and repairs for those vehicles. The trailer attached to the delivery truck that plaintiff was driving on the day of the accident had a refrigerated compartment that was accessed through a side door. At his first stop, plaintiff observed that the pull-out steps to the side door were broken and, after receiving instructions from his employer to continue with his deliveries, plaintiff used a wheeled handcart as a makeshift ladder to gain access to the side door. On his fourth stop, plaintiff fell while descending from the refrigerated compartment, using the handcart.

Supreme Court erred in granting defendants' motion seeking summary judgment dismissing the complaint. According to plaintiffs, defendants had prior notice of the "dangerous disrepair" of the pull-out steps on the trailer used by plaintiff and breached their duty to repair or replace them. Defendants' own submissions in support of the

motion raised triable issues of fact whether defendants had notice of the dangerous condition of the pull-out steps (see generally *Seivert v Kingpin Enters., Inc.*, 55 AD3d 1406, 1407; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532). In addition, defendants failed to establish as a matter of law that plaintiff's conduct in using the handcart as a ladder was "unforeseeable or of such a character as to constitute a superseding cause absolving them from potential liability" (*Mazzio v Highland Homeowners Assn. & Condos*, 63 AD3d 1015, 1016). Finally, the contention of defendants that they owed no duty to plaintiff under the Agreement is raised for the first time on appeal and thus is not properly before us (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1558**

**CA 07-02154**

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

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IN THE MATTER OF THE ESTATE OF JAMES E.  
KRAFT, DECEASED.

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SHIRLEY KRAFT, VOLUNTARY ADMINISTRATRIX OF  
THE ESTATE OF JAMES KRAFT, DECEASED,  
PETITIONER-APPELLANT;

ORDER

BRENDA KRAFT, OBJECTANT-RESPONDENT.

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DREW & DREW, LLP, BUFFALO (DEAN A. DREW OF COUNSEL), FOR  
PETITIONER-APPELLANT.

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Appeal from an order of the Surrogate's Court, Cattaraugus County  
(Larry M. Himelein, S.), entered September 19, 2007. The order,  
insofar as appealed from, denied petitioner's claim for certain  
disbursements and awarded petitioner \$1,000 in attorney's fees.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1559**

**TP 09-01009**

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

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IN THE MATTER OF SCOTT ADELINE, PETITIONER,

V

ORDER

DAVID UNGER, SUPERINTENDENT, WYOMING  
CORRECTIONAL FACILITY, RESPONDENT.

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JILLIAN S. HARRINGTON, NEW YORK CITY, FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS 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, Wyoming County [Mark H. Dadd, A.J.], entered May 13, 2008) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1560**

**KA 08-02229**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RICKY L. PREDMORE, JR., DEFENDANT-APPELLANT.

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CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

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 (Thomas G. Leone, J.), rendered August 7, 2008. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the second degree (Penal Law § 155.40 [1]), defendant contends that County Court violated the plea agreement by ordering him to pay restitution. Defendant failed to preserve that contention for our review by failing to object to the imposition of restitution (*see generally People v Lovett*, 8 AD3d 1007, *lv denied* 3 NY3d 673, 677). Defendant also failed to preserve for our review his further contention that the court improperly imposed an enhanced sentence by ordering him to pay restitution inasmuch as he failed "to object to the enhanced sentence or to move to withdraw the plea on that ground" (*id.* at 1008). 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]*). The sentence is not unduly harsh or severe.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1562**

**KA 09-01355**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM M. PROCANICK, DEFENDANT-APPELLANT.

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

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (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 29, 2008. 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 affirmed.

Memorandum: Defendant appeals 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]). We reject the contention of defendant that he was denied his right to present a defense when County Court precluded him from presenting character evidence. In his offer of proof, defendant failed to demonstrate that the evidence related to a character trait that was relevant to the charges (*see People v Spicola*, 61 AD3d 1434, 1435; *see generally People v Greany*, 185 AD2d 376, 376-377, *lv denied* 80 NY2d 1027). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant further contends that reversal is required based upon prosecutorial misconduct. With respect to the single instance of alleged misconduct that is 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). We decline to exercise our power to review defendant's contention with respect to the remaining instances of alleged misconduct as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). "Contrary to

defendant's further contention, neither defense counsel's failure to object to the alleged instances of prosecutorial misconduct nor any of defense counsel's other alleged shortcomings constituted ineffective assistance of counsel" (*People v McCray*, 66 AD3d 1338, 1339). Finally, the sentence is not unduly harsh or severe.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1564**

**KA 08-01370**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

STEPHEN LE, DEFENDANT-APPELLANT.

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KEVIN J. BAUER, ALBANY, 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 (Russell P. Buscaglia, A.J.), rendered October 18, 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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1565

**KA 05-01871**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JESUS O. MARTINEZ, DEFENDANT-APPELLANT.

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WILLIAM G. PIXLEY, ROCHESTER, 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 Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered May 17, 2005. The judgment convicted defendant, upon a jury verdict, of sodomy in the first degree (three counts) and sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of sodomy in the first degree (Penal Law former § 130.50 [3]) and one count of sexual abuse in the first degree (§ 130.65 [3]). Defendant failed to preserve for our review his contention that he was denied a fair trial based on cumulative error, i.e., the admission in evidence of testimony concerning child sexual abuse accommodation syndrome and the prosecutor's reference to that testimony on summation, which allegedly constituted prosecutorial misconduct (see CPL 470.05 [2]). In any event, defendant's contention lacks merit. The testimony of the expert was properly admitted because he testified only in general terms with respect to the reasons for a child's failure to report incidents of sexual abuse immediately, and he did not render an opinion on the issue whether the victims in this case were in fact sexually abused (see *People v Carroll*, 95 NY2d 375, 387; *People v Bassett*, 55 AD3d 1434, 1436-1437, lv denied 11 NY3d 922; *People v Herington*, 11 AD3d 931, lv denied 4 NY3d 799). Inasmuch as the testimony was properly admitted, the prosecutor's comments on summation concerning that testimony constituted fair comment on the evidence (see generally *People v Tolliver*, 267 AD2d 1007, lv denied 94 NY2d 908).

Defendant further contends that Supreme Court erred in refusing to suppress his statement to the police because the People failed to establish at the suppression hearing that he was properly advised of

his *Miranda* rights. We reject that contention. According to the evidence presented at the suppression hearing, the police officer who administered the *Miranda* warnings to defendant "was sufficiently trained and experienced in speaking and writing the Spanish language to enable him to properly advise the defendant of his *Miranda* rights" (*People v Turcios-Umana*, 153 AD2d 707, 707, *lv denied* 75 NY2d 777; see *People v Restrepo-Velez*, 156 AD2d 488, 489). The officer testified that he has spoken Spanish for his entire life, and he testified with respect to the English translation of the Spanish *Miranda* warnings that were administered to defendant. The translation establishes that the *Miranda* warnings in Spanish were substantively the same as those in English (see *People v Castillo*, 277 AD2d 129, 130, *lv denied* 96 NY2d 757; *People v Jordan*, 110 AD2d 855).

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

**1569**

**CA 08-02127**

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

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THERESA HALLER, ADMINISTRATRIX OF THE  
ESTATE OF JEAN DIEJOIA, DECEASED,  
PLAINTIFF-APPELLANT,

V

ORDER

GERALD M. GACIOCH, M.D., CYNTHIA R.  
REDDECK, M.D., AND ROCHESTER  
CARDIOPULMONARY GROUP, P.C.,  
DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 1.)

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CARL L. FEINSTOCK, ROCHESTER, FOR PLAINTIFF-APPELLANT.

BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL 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 18, 2008 in a medical malpractice action. The order denied plaintiff's motion to set aside the jury verdict in part.

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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1570

CA 08-02612

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

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THERESA HALLER, ADMINISTRATRIX OF THE  
ESTATE OF JEAN DIEJOIA, DECEASED,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GERALD M. GACIOCH, M.D., CYNTHIA R.  
REDDECK, M.D., AND ROCHESTER  
CARDIOPULMONARY GROUP, P.C.,  
DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 2.)

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CARL L. FEINSTOCK, ROCHESTER, FOR PLAINTIFF-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 12, 2008 in a medical malpractice action. The judgment in favor of defendants and against plaintiff was entered upon a jury verdict of no cause of action.

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

Memorandum: Plaintiff appeals from a judgment entered upon a jury verdict finding that, although defendant Gerald M. Gacioch, M.D. was negligent in leaving a cardiac sheath in plaintiff's decedent without administering systemic anticoagulation medication, that negligence was not a substantial factor in causing decedent's injuries. On appeal, plaintiff contends that Supreme Court erred in refusing to permit the prior testimony of her expert adduced at a *Frey* hearing to be read to the jury pursuant to CPLR 4517 (a) (4). We reject plaintiff's contention, because that testimony does not constitute "prior trial testimony" within the meaning of CPLR 4517 (a) (4). In addition, plaintiff failed to object to the verdict as inconsistent before the jury was discharged and thus failed to preserve for our review her present contention with respect to the alleged inconsistency of the verdict (*see Lahren v Boehmer Transp. Corp.*, 49 AD3d 1186, 1188), despite having raised that objection in a post-trial motion (*see generally Barry v Manglass*, 55 NY2d 803, 806,

*rearg denied* 55 NY2d 1039).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1571

CA 09-01290

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

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IN THE MATTER OF THE ARBITRATION BETWEEN FIA  
CARD SERVICES, N.A., FORMERLY KNOWN AS MBNA  
AMERICA BANK, N.A., PETITIONER-APPELLANT,

MEMORANDUM AND ORDER

AND

JENNIFER POLLEY, RESPONDENT-RESPONDENT.

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MANN BRACKEN, LLP, ROCHESTER (PATRICIA A. BLAIR OF COUNSEL), FOR  
PETITIONER-APPELLANT.

JENNIFER POLLEY, RESPONDENT-RESPONDENT PRO SE.

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Appeal from an order of the Supreme Court, Herkimer County  
(Michael E. Daley, J.), entered April 7, 2009 in a proceeding pursuant  
to CPLR article 75. The order dismissed the petition to confirm an  
arbitration award.

It is hereby ORDERED that the order so appealed from is  
unanimously reversed on the law without costs, the petition is granted  
and the arbitration award is confirmed.

Memorandum: Petitioner commenced this proceeding pursuant to  
CPLR article 75 to confirm an arbitration award that directed  
respondent to pay petitioner \$14,926.28 for an outstanding credit card  
balance. Supreme Court erred in dismissing the petition and instead  
should have granted the petition and confirmed the award. Pursuant to  
CPLR 7510, "[t]he court *shall* confirm an award upon application of a  
party made within one year after its delivery to [it], unless the  
award is vacated or modified upon a ground specified in section 7511"  
(emphasis added). Contrary to respondent's contention, petitioner  
"established that a binding written agreement to arbitrate was in  
effect between the parties" (*Matter of Fodor v MBNA Am. Bank, N.A.*, 34  
AD3d 473, 474). The record establishes that petitioner sent the  
credit card agreement containing the arbitration provision to  
respondent, and we conclude that the use by respondent of the credit  
card constituted her consent to comply with the agreement (see  
*Tsadilas v Providian Natl. Bank*, 13 AD3d 190, *lv denied* 5 NY3d 702;  
*Feder v Fortunoff, Inc.*, 114 AD2d 399). "Because there is no basis in  
[the] record to vacate or modify the arbitrator's award, it must be  
confirmed" (*Matter of New York Cent. Mut. Fire Ins. Co. v State Farm*

*Ins. Cos.*, 234 AD2d 995, 995).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1574**

**CA 09-01306**

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

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IN THE MATTER OF BRYANT HUTCHERSON,  
CLAIMANT-RESPONDENT,

V

ORDER

ROCHESTER CITY SCHOOL DISTRICT,  
RESPONDENT-APPELLANT.

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CHARLES G. JOHNSON, ROCHESTER (MICHAEL E. DAVIS OF COUNSEL), FOR  
RESPONDENT-APPELLANT.

FITZSIMMONS, NUNN, FITZSIMMONS & PLUKAS, LLP, ROCHESTER (RICHARD A.  
PLUKAS OF COUNSEL), FOR CLAIMANT-RESPONDENT.

---

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered September 16, 2008. The order granted the application of claimant for leave to serve a late notice of claim.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on November 11, 2009, and filed in the Monroe County Clerk's Office on December 4, 2009,

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1575**

**CA 09-01197**

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

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IN THE MATTER OF MICHAEL J. MONILE AND PARKER  
ROBBINS, LLC, PETITIONERS-RESPONDENTS,

V

ORDER

NEW YORK STATE LIQUOR AUTHORITY DIVISION OF  
ALCOHOLIC BEVERAGE CONTROL, RESPONDENT-APPELLANT.

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THOMAS J. DONOHUE, NEW YORK STATE LIQUOR AUTHORITY, ALBANY (MARK D.  
FRERING OF COUNSEL), FOR RESPONDENT-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF  
COUNSEL), FOR PETITIONERS-RESPONDENTS.

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Appeal from a judgment of the Supreme Court, Erie County (Timothy  
J. Walker, A.J.), entered March 2, 2009 in a proceeding pursuant to  
CPLR article 78. The judgment granted the petition.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1581**

**KA 09-00174**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ROBERTA E. KLINE, 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.

---

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 23, 2008. The judgment convicted defendant, upon her plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1582**

**KA 08-02126**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MATTHEW YOUNG, DEFENDANT-APPELLANT.

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

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

---

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered September 25, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the first degree (two counts) 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 two counts of assault in the first degree (Penal Law § 120.10 [1], [2]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject the contention of defendant that the stop of his vehicle was illegal and thus that County Court erred in refusing to suppress as the fruit of an illegal stop statements that he made to the police as well as his shoes that were seized by the police. The police had reasonable suspicion to stop the vehicle that defendant was driving based on the description of the vehicle that was broadcast over the police radio, the proximity of the vehicle to the area where the assault had occurred, and the light traffic conditions (*see People v Van Every*, 1 AD3d 977, 978-979, *lv denied* 1 NY3d 602; *People v Berry*, 306 AD2d 623, 623-624, *lv denied* 100 NY2d 618).

Defendant further contends that the statements that he made while in two police vehicles were obtained in violation of his right to counsel and thus that the court erred in refusing to suppress those statements. We reject that contention as well. The statements of defendant while using his cell phone were spontaneous inasmuch as "they were in no way the product of an 'interrogation environment [, i.e.,]' . . . the result of 'express questioning or its functional equivalent' " (*People v Stoesser*, 53 NY2d 648, 650; *see People v Harris*, 57 NY2d 335, 342, *cert denied* 460 US 1047). Further,

defendant's statement to an officer in the vehicle was also spontaneous (see *People v Clabeaux*, 277 AD2d 988, lv denied 96 NY2d 781).

We reject defendant's contention that the testimony of a police investigator rendered the indictment defective. It cannot be said that the testimony of the investigator impaired the integrity of the grand jury proceedings (see generally *People v Huston*, 88 NY2d 400, 409) and, in particular, the testimony concerning blood evidence was not improper because even "[l]ay witnesses are competent to identify blood from its appearance" (*People v Rusho*, 291 AD2d 855, 856, lv denied 98 NY2d 680). Defendant failed to preserve for our review his challenge to the court's ultimate *Sandoval* ruling (see *People v Alston*, 27 AD3d 1141, lv denied 6 NY3d 892), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Finally, we conclude that the court properly determined that defendant's self-serving statement was inadmissible (see *People v Oliphant*, 201 AD2d 590, lv denied 83 NY2d 875), and that the sentence is not unduly harsh or severe.

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

**1583**

**KA 07-00622**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JEFFREY W. CLARK, 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 Monroe County Court (Patricia D. Marks, J.), rendered October 23, 2006. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1584**

**KA 07-01330**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

LESTER L. LAMPLEY, JR., 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 (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered September 27, 2006. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1585**

**KA 07-02429**

PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND CARNI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AHMIR COLE, DEFENDANT-APPELLANT.

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JEREMY D. SCHWARTZ, BUFFALO, FOR DEFENDANT-APPELLANT.

AHMIR COLE, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered November 8, 2007. The judgment convicted defendant, upon two jury verdicts, of murder in the first degree (two counts), attempted robbery in the first degree, robbery in the first degree (four counts), criminal possession of a weapon in the second degree (three counts), attempted murder in the second degree, assault in the second degree, criminal possession of a controlled substance in the seventh degree, criminal possession of a weapon in the third degree, and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon two verdicts, following two jury trials, of various crimes that include two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]), occurring at Tony's Ranch House, and one count of attempted murder in the second degree (§§ 110.00, 125.25 [1]), occurring at the Groove Nightclub. He also was convicted of, inter alia, four counts of robbery in the first degree (§ 160.15 [1], [2]), three counts of criminal possession of a weapon in the second degree (§ 265.03 [former (2)]) and one count each of criminal possession of a weapon in the third degree (§ 265.02 [former (4)]), criminal possession of a controlled substance in the seventh degree (§ 220.03), and attempted robbery in the first degree (§§ 110.00, 160.15 [2]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence with respect to the two counts of murder at Tony's Ranch House and the count of attempted murder at the Groove Nightclub,

and with respect to the crimes relating to the incident at the Kenmore Store (see generally *People v Bleakley*, 69 NY2d 490, 495). We further conclude that the evidence is legally sufficient to support the conviction with respect to the Kenmore Store crimes (see generally *id.*). The admissions of defendant to his girlfriend concerning his involvement in the Kenmore Store crimes corroborated the testimony of defendant's accomplice (see CPL 60.22 [1]; *People v Pierce*, 303 AD2d 966, *lv denied* 100 NY2d 565).

Contrary to the further contention of defendant, we conclude that County Court properly denied his motion seeking to sever the drug possession count from the count of criminal possession of a weapon in the third degree, inasmuch as the cocaine and gun possession were part of the same criminal transaction at the time of defendant's arrest on May 29, 2006 (see CPL 200.20 [2] [a]). In addition, based on the evidence that the same weapon was used in the incidents at Tony's Ranch House and the Groove Nightclub, we conclude that the "chain of joinder" was then properly extended to the robbery, murder and attempted murder counts arising out of those incidents (CPL 200.20 [2] [d]). With respect to the conviction of two counts of murder in the first degree, defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as the People did not offer proof of his age (see *People v Kleinhans*, 236 AD2d 790, 791, *lv denied* 89 NY2d 1096; see generally *People v Gray*, 86 NY2d 10, 19). Defendant failed to move for a trial order of dismissal with respect to those counts that was " 'specifically directed' at the alleged error" (*Gray*, 86 NY2d at 19).

We have considered the remaining contentions in defendant's pro se supplemental brief, and we conclude that they are either unpreserved or without merit.

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

**1586**

**KA 06-02628**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JAMES T. TAMBURRINO, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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IRVING COHEN, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered June 6, 2006. The judgment convicted defendant, upon a jury verdict, of use of a child in a sexual performance, attempted use of a child in a sexual performance, possessing a sexual performance by a child and endangering the welfare of a child (two counts).

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1587**

**KA 08-00997**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JAMES T. TAMBURRINO, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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IRVING COHEN, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

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

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Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Oneida County Court (Michael L. Dwyer, J.), entered April 14, 2008. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of use of a child in a sexual performance, attempted use of a child in a sexual performance, possessing a sexual performance by a child and endangering the welfare of a child (two counts).

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1588

**KA 08-00862**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH T. LOMBARDI, DEFENDANT-APPELLANT.

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

JOSEPH T. LOMBARDI, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (NEAL P. MCCLELLAND OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered March 7, 2008. The judgment convicted defendant, upon a jury verdict, of felony driving while ability impaired by drugs 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: On appeal from a judgment convicting him upon a jury verdict of felony driving while ability impaired by drugs (Vehicle and Traffic Law § 1192 [4]; § 1193 [1] [c] [former (i)]) and criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03), defendant contends that he was denied a fair trial based on prosecutorial misconduct. Defendant preserved his contention for our review only with respect to one comment on cross-examination and two comments on summation, and we conclude that those comments were not so egregious as to deny defendant a fair trial (*see People v Rivera*, 281 AD2d 927, *lv denied* 96 NY2d 906). Furthermore, County Court sustained defendant's objections to those comments and issued curative instructions that the jury is presumed to have followed (*see id.*). Defendant failed to preserve for our review his contention with respect to the remaining instances of alleged prosecutorial misconduct on summation (*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]).

Defendant also failed to preserve for our review his contention that the court penalized him for exercising his right to trial by imposing a harsher sentence than that included in the pretrial plea offer (*see People v Griffin*, 48 AD3d 1233, 1236-1237, *lv denied* 10

NY3d 840; *People v Tannis*, 36 AD3d 635, *lv denied* 8 NY3d 927). In any event, that contention is without merit. " '[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial' " (*People v Chappelle*, 14 AD3d 728, 729, *lv denied* 5 NY3d 786), and there is no evidence in the record that the sentencing court was vindictive (*see Tannis*, 36 AD3d 635). The sentence is not unduly harsh or severe. We have considered the remaining contentions of defendant in his main brief and conclude that they are without merit.

Finally, defendant failed to preserve for our review his contention in his pro se supplemental brief that the conviction is not supported by legally sufficient evidence inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495).

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

**1589**

**KAH 08-01858**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
ANTHONY SMITH, PETITIONER-APPELLANT,

V

ORDER

NEW YORK STATE DIVISION OF PAROLE,  
RESPONDENT-RESPONDENT.

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CHRISTINE M. COOK, SYRACUSE, FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF  
COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered July 16, 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 for reasons stated in the decision at Supreme Court.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1590

**CAF 08-02593**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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IN THE MATTER OF GIOVANNI K.

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ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAWN K., RESPONDENT-APPELLANT.

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PAUL A. NORTON, CLINTON, FOR RESPONDENT-APPELLANT.

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

WILLIAM L. KOSLOSKY, LAW GUARDIAN, UTICA, FOR GIOVANNI K.

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Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered December 10, 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 affirmed without costs.

Memorandum: Respondent mother appeals from an order revoking a suspended judgment pursuant to Family Court Act § 633 and terminating her parental rights with respect to her son who is the subject of this proceeding. Contrary to the mother's contention, petitioner established by a preponderance of the evidence that the mother violated the terms and conditions of the suspended judgment (*see Matter of Dennis A.*, 64 AD3d 1191, 1192), and that termination of her parental rights was in the child's best interests (*see Matter of Aaron S.*, 15 AD3d 585; *Matter of Jillian D.*, 307 AD2d 311, 312, *lv denied* 1 NY3d 505). "More than mere participation in the programs offered by petitioner is required. Rather, [a]t a minimum, a parent is required to address and overcome the specific personal and familial problems which initially endangered or proved harmful to the child[ ], and which may in the future endanger or possibly harm the child[ ]" (*Matter of Bert M.*, 50 AD3d 1509, 1510, *lv denied* 11 NY3d 704 [internal quotation marks omitted]). "Although the mother participated in the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715). The remaining contentions of the mother, i.e., that petitioner failed to provide services as required under the suspended judgment and that her due process rights were violated, are unreserved for our review

and in any event are without merit (see *Bert M.*, 50 AD3d at 1510; *Matter of Paige v Paige*, 50 AD3d 1542; *Matter of Jessica J.*, 44 AD3d 1132, 1134; *Matter of Adams H.*, 28 AD3d 213, 214).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1591

CAF 08-01927

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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IN THE MATTER OF TAMERA LINN,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

CLIFTON WILSON, RESPONDENT-APPELLANT.

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NATHANIEL L. BARONE, II, JAMESTOWN, FOR RESPONDENT-APPELLANT.

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

GERALD M. DRISCOLL, LAW GUARDIAN, OLEAN, FOR MARCUS W.

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Appeal from an order of the Family Court, Cattaraugus County (Lynn L. Hartley, J.H.O.), entered August 29, 2008 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner permission for the parties' child to relocate with her to another state.

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

Memorandum: Respondent father appeals from an order that, inter alia, granted the petition to modify a prior order of custody and visitation by granting petitioner mother permission for the parties' child to relocate with her to Alabama. We reject the father's contention that Family Court abused its discretion in failing to direct that the mother be examined by a psychiatrist or psychologist (see Family Ct Act § 251 [a]). " '[T]he decision whether to direct [such an] evaluation in a child custody dispute is within the sound discretion of the court' " (*Matter of Kubista v Kubista*, 11 AD3d 743, 745). The father failed to meet his burden of squarely placing the need for such an evaluation before the court, and the record does not otherwise provide a basis for the conclusion that such an evaluation is necessary (see *Matter of Heintz v Heintz*, 275 AD2d 971; *Matter of Peters v Peters*, 260 AD2d 952). Although the mother admitted that she had been diagnosed with bipolar disorder, the record establishes that she consistently maintained a drug treatment regimen for nearly 20 years and was under the care of a family physician. The father, on the other hand, did not submit any evidence that the mother's mental health condition was poorly maintained or unregulated.

We further conclude that the court properly granted the

mother's petition based upon the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741). The mother met her burden of establishing by a preponderance of the evidence that the proposed relocation would be in the best interests of the child (see *Matter of Scialdo v Cook*, 53 AD3d 1090, 1092). The mother has been the primary caretaker of the child since his birth (see *id.*), and the father has not consistently exercised the visitation to which he was entitled under the prior order. Indeed, the court found the testimony of the father concerning his actual time spent with the child to be "vague and evasive."

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

**1592**

**CAF 08-02590**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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IN THE MATTER OF NATASHA L. PERKINS,  
PETITIONER-RESPONDENT,

V

ORDER

CURTIS WATSON, SR., RESPONDENT-APPELLANT.

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

MARY R. HUMPHREY, NEW HARTFORD, FOR PETITIONER-RESPONDENT.

PETER J. DIGIORGIO, JR., LAW GUARDIAN, UTICA, FOR CHUCQUAN C.W.

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Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered October 22, 2008 in a proceeding pursuant to Family Court Act article 8. The order of protection directed respondent to observe certain conditions of behavior.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1593

CAF 09-00621

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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IN THE MATTER OF ANDREA M. SMITH,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JACK B. NATALI, SR., RESPONDENT-RESPONDENT.

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PALOMA A. CAPANNA, PENFIELD, FOR PETITIONER-APPELLANT.

JOHN W. GRAHAM, WATERTOWN, FOR RESPONDENT-RESPONDENT.

SETH B. BUCHMAN, LAW GUARDIAN, THREE MILE BAY, FOR JACK N., JR.

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Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, J.), entered March 18, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, dismissed the petition seeking custody of the parties' child.

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

Memorandum: Petitioner mother appeals from an order dismissing her petition seeking custody of her child. We reject her contention that Family Court's determination lacks a sound and substantial basis in the record and thus that the court should have granted her petition (*see Matter of Harrington v Harrington*, 63 AD3d 1618, *lv denied* 13 NY3d 705). Although there is some evidence in the record that respondent father actively interfered with the mother's relationship with the child (*see Matter of Irwin v Neyland*, 213 AD2d 773, 774), other factors support the court's determination and we accord great deference to that determination (*see Matter of Thayer v Ennis*, 292 AD2d 824, 825). The record does not support the further contention of the mother that she did not receive effective assistance of counsel (*see generally Matter of Howard v McLoughlin*, 64 AD3d 1147). We note in particular that there was extensive cross-examination of the parties, and that the court had issued decisions with respect to previous petitions by both parties and thus was familiar with the circumstances of the case.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1594**

**CA 09-00867**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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STATE FARM FIRE & CASUALTY COMPANY AS SUBROGEE  
OF CAROL D. ROBINSON, PLAINTIFF-RESPONDENT,

V

ORDER

GRIFFITH ENERGY, INC., DEFENDANT-APPELLANT.

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

SCOTT AND GILBERT, LLP, CANANDAIGUA (JOHN J. GILBERT OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Ontario County (Craig  
J. Doran, A.J.), entered January 29, 2009. The order, inter alia,  
denied the motion of defendant for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal  
signed by the attorneys for the parties on December 3, 2009,

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1595**

**CA 09-01393**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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AURORA MEDICAL GROUP, P.C., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TIFFANY GENEWICK, M.D., DEFENDANT-APPELLANT.

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SIEGEL, KELLEHER & KAHN, LLP, BUFFALO (ROSS S. GELBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MC GEE & GELMAN, BUFFALO (JENNIFER L. FRIEDMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered February 13, 2009 in a breach of contract action. The order granted the motion of plaintiff for leave to serve a second amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, breach of its employment contract with defendant. We conclude that Supreme Court properly granted plaintiff's motion seeking leave to serve a second amended complaint. "[G]enerally, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment[s are] not patently lacking in merit . . . , and the decision whether to grant leave to amend a [pleading] is committed to the sound discretion of the court" (*Tag Mech. Sys., Inc. v V.I.P. Structures, Inc.*, 63 AD3d 1504, 1505 [internal quotation marks omitted]; see CPLR 3025 [b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). Contrary to defendant's contentions, the proposed amendments "are based upon the same transactions and occurrences as the claims asserted in the first amended complaint and are not time-barred" (*Maxon v Franklin Traffic Serv.*, 261 AD2d 830, 830).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1596

CA 09-01403

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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PAUL ROWLAND, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

WILMORITE, INC., DEFENDANT-RESPONDENT.

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HANDELMAN, WITKOWICZ & LEVITSKY, ROCHESTER (STEVEN B. LEVITSKY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAWRENCE M. RUBIN, BUFFALO (JENNIFER S. ADAMS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

---

Appeal from an order of the Supreme Court, Monroe County (David M. Barry, J.), entered September 22, 2008 in a personal injury action. The order, inter alia, granted 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 alleging, as limited by his brief on appeal, that defendant's violation of Labor Law § 240 (1) caused him to fall from a ladder while performing electrical work at a mall. Supreme Court properly granted defendant's motion for summary judgment dismissing the amended complaint. We reject plaintiff's contention that defendant, the construction manager on the project, was liable pursuant to Labor Law § 240 (1) as an agent of the mall's owner, Great Eastern Mall, LP (Great Eastern). "Defendant established as a matter of law that it was not an agent of the owner because the owner had not delegated to it the authority to supervise and control plaintiff's work" (*Phillips v Wilmorite, Inc.*, 281 AD2d 945, 946; see *Bateman v Walbridge Aldinger Co.*, 299 AD2d 834, 835, lv denied 100 NY2d 502), and plaintiff failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

We reject the further contention of plaintiff that the motion was premature because he had not completed discovery. Plaintiff "failed to demonstrate that facts essential to oppose the motion were in [defendant's] exclusive knowledge and possession and could be obtained by discovery" (*Franklin v Dormitory Auth. of State of N.Y.*, 291 AD2d 854, 854). The record establishes that plaintiff had ample opportunity for discovery prior to the motion and, in any event, "[a] mere hope that somehow plaintiff[] will uncover evidence that will prove [his] case is not sufficient to defeat a motion for summary

judgment" (*Babcock v Allan*, 115 AD2d 297, 298).

Contrary to the contention of plaintiff, the court properly denied that part of his cross motion seeking leave to amend the amended complaint by adding Great Eastern as a defendant. Because the statute of limitations had expired with respect to plaintiff's proposed claims against Great Eastern, plaintiff would be permitted to add Great Eastern as a defendant only if he could establish the applicability of the relation back doctrine (see CPLR 203 [b]; *Buran v Coupal*, 87 NY2d 173, 177-178). Here, plaintiff failed to establish the second of the three prongs of that doctrine, i.e., that defendant and Great Eastern were united in interest such that Great Eastern could be charged with notice of the action and thus would not be prejudiced in maintaining a defense on the merits (see *Mongardi v BJ's Wholesale Club, Inc.*, 45 AD3d 1149, 1150). To demonstrate unity of interest, plaintiff had to establish that defendant and Great Eastern could be held vicariously liable for each other's acts (see *id.* at 1151). In support of his cross motion, however, plaintiff submitted the contract between defendant and Great Eastern as well as the deposition testimony of an agent of defendant establishing that the two corporations were not vicariously liable for each other's acts. Thus, plaintiff by his own submissions defeated his entitlement to the relief sought with respect to that part of his cross motion.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1597**

**CA 09-00549**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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DOMINIC DECICCO AND GERARD DECICCO,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-APPELLANT.

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RORY A. MCMAHON, CORPORATION COUNSEL, SYRACUSE (PAMELA R. EISENBERG OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

DOMINIC DECICCO AND GERARD DECICCO, PLAINTIFFS-RESPONDENTS PRO SE.

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Appeal from an order of the Supreme Court, Onondaga County  
(Donald A. Greenwood, J.), entered May 21, 2008. The order denied the  
motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiffs commenced this action on March 20, 2008  
seeking damages resulting from an incident on December 20, 2006, in  
which firefighters employed by defendant broke down the door to  
plaintiffs' residence while responding to a report of a fire.  
Defendant moved to dismiss the complaint on the ground that the action  
was commenced one year and 91 days after the date of the incident, and  
thus it is time-barred by one day, pursuant to General Municipal Law §  
50-i (1). Supreme Court denied the motion on the ground that February  
29, 2008 could not be counted pursuant to General Construction Law §  
58, and thus that the action is not time-barred. We reverse.

Pursuant to General Municipal Law § 50-i (1), a plaintiff has  
"one year *and* ninety days" in which to commence an action "after the  
happening of the event" (emphasis added). We agree with defendant  
that, pursuant to the plain language of the statute, the one-year  
period must be counted first, followed by the 90-day period (*see*  
*generally Matter of Antine v City of New York*, 14 Misc 3d 161, 173).  
Inasmuch as the 90-day period is considered independently, it is not  
governed by General Construction Law § 58, which defines the term  
"year" in a statute. Rather, the 90-day period is governed by General  
Construction Law § 20, which requires a calculation of the "number of  
calendar days exclusive of the calendar day from which the reckoning  
is made." Here, the action was commenced one year and 91 days after

December 20, 2006, and thus it is time-barred.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1598**

**CA 09-00557**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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IN THE MATTER OF DAVID DUDAS,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

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

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DAVID DUDAS, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS OF  
COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court,  
Wyoming County (Mark H. Dadd, A.J.), entered February 11, 2009 in a  
proceeding pursuant to CPLR article 78. The judgment granted the  
motion of respondent to dismiss the petition.

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

Memorandum: As Supreme Court properly determined in this CPLR  
article 78 proceeding seeking to annul the determination that  
petitioner should participate in a sex offender treatment program,  
petitioner failed to exhaust his administrative remedies before  
commencing this proceeding. Thus, the court properly dismissed the  
petition (*see Matter of Muniz v David*, 16 AD3d 939, 939-940).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1599**

**CA 09-00808**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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THE PARK COUNTRY CLUB OF BUFFALO, INC.,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWER INSURANCE COMPANY OF NEW YORK,  
DEFENDANT-APPELLANT.

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

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL),  
FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 20, 2009. The order, insofar as appealed from, granted plaintiff's motion for partial summary judgment on the first cause of action and denied in part defendant's cross motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action contending, inter alia, that defendant was required pursuant to the terms of its insurance contract with plaintiff to pay for the damages incurred to sand traps located on its property caused by flooding and to pay for plaintiff's loss of business income. Defendant appeals from an order that granted plaintiff's motion for partial summary judgment on the first cause of action, seeking damages with respect to the sand traps, and denied those parts of defendant's cross motion for summary judgment dismissing the first cause of action as well as the second cause of action, seeking damages for the loss of business income. We affirm.

Contrary to defendant's contention, we conclude that Supreme Court properly granted plaintiff's motion. " 'The construction and effect of a contract of insurance is a question of law to be determined by the court where[, as here,] there is no occasion to resort to extrinsic proof' " (*Topor v Erie Ins. Co.*, 28 AD3d 1199, 1200) and, "[w]here an insurance policy is clear and unambiguous, it must be enforced as written" (*Woods v General Accident Ins.*, 292 AD2d 802, 802). We note in addition that " '[a]n insured seeking to recover for a loss under an insurance policy has the burden of proving

that a loss occurred and also that the loss was a covered event within the terms of the policy' " (*Gongolewski v Travelers Ins. Co.*, 252 AD2d 569, 569, *lv denied* 92 NY2d 815; see *Fernandes v Allstate Ins. Co.*, 305 AD2d 1065). We agree with the court that plaintiff met that burden with respect to the first cause of action (*cf. Topor*, 28 AD3d at 1200), and defendant failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

The evidence submitted by plaintiff in support of its motion established that its sand traps were damaged by flooding. Section (A) (1) (e) of the Security for Golf Courses - Golf Course Grounds and Outdoor Property Endorsement in the insurance policy specifically modified section A (1) of the policy to include golf course sand traps within "Covered Property," and the Flood Endorsement specifically indicated that defendant would pay for damages to "Covered Property" caused by flood or surface waters. We agree with the court that the only reasonable interpretation of those endorsements is that the policy covers flood damage to plaintiff's sand traps, and we thus conclude that the court also properly denied defendant's cross motion with respect to the second cause of action, for loss of business income.

Finally, we reject defendant's further contention that the court erred in considering an affidavit submitted by plaintiff in its reply papers in support of the motion. A court may consider evidence submitted for the first time in reply papers where, as here, the opposing party had an opportunity to respond and submit papers in surreply (see *Hoffman v Kessler*, 28 AD3d 718; see also *Fiore v Oakwood Plaza Shopping Ctr.*, 164 AD2d 737, 739, *affd* 78 NY2d 572, *rearg denied* 79 NY2d 916, *cert denied* 506 US 823).

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

**1600**

**TP 09-01245**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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IN THE MATTER OF RHONDA MANGUS, PETITIONER,

V

MEMORANDUM AND ORDER

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES  
AND NEW YORK STATE OFFICE OF CHILDREN AND  
FAMILY SERVICES, RESPONDENTS.

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LAW OFFICES OF ANTHONY S. PECORARO, WILLIAMSVILLE (ANTHONY S. PECORARO  
OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF  
COUNSEL), FOR RESPONDENT NEW YORK STATE OFFICE OF CHILDREN AND  
FAMILY SERVICES.

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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, Niagara County [Ralph A. Boniello, III, J.], entered June 17, 2009) to review a determination of respondent New York State Office of Children and Family Services. The determination denied the request of petitioner to amend to unfounded an indicated report of child maltreatment with respect to her son, maintained in the New York State Central Register of Child Abuse and Maltreatment, and to seal that amended report.

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

Memorandum: Petitioner contends that the New York State Office of Children and Family Services (respondent) erred in refusing to amend to unfounded an indicated report of child maltreatment with respect to her son, maintained in the New York State Central Register of Child Abuse and Maltreatment, and to seal that amended report. We reject that contention. " 'At an administrative expungement hearing, a report of child . . . maltreatment must be established by a fair preponderance of the evidence' " (*Matter of Saporito v Carrion*, 66 AD3d 912, 912). " 'Our review . . . is limited to whether the determination was supported by substantial evidence in the record on the petitioner[']s application for expungement' " (*id.*; see *Matter of Hattie G. v Monroe County Dept. of Social Servs.*, 48 AD3d 1292, 1293). We conclude on the record before us that respondent's determination that respondent Niagara County Department of Social Services established by a fair preponderance of the evidence at the fair hearing that petitioner maltreated the subject child is supported by

substantial evidence (see *Hattie G.*, 48 AD3d at 1293; see generally *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182). Contrary to the further contention of petitioner, who proceeded pro se at the fair hearing, she was not entitled to assigned counsel at the hearing and thus her contention with respect to the denial of due process based on the lack of representation lacks merit (see generally *Matter of Brown v Lavine*, 37 NY2d 317).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1601.1**

**CA 09-00775**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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DOUGLAS P. MCCLINTIC, PLAINTIFF-RESPONDENT,

V

ORDER

CSX TRANSPORTATION, INC., DEFENDANT-APPELLANT.

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ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (MICHELLE PARKER OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered January 7, 2009 in a personal injury action. The order, among other things, granted plaintiff's motion for partial summary judgment.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1601**

**TP 09-01267**

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, AND CARNI, JJ.

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IN THE MATTER OF JAMES LANGLER, PETITIONER,

V

MEMORANDUM AND ORDER

COUNTY OF CAYUGA AND DAVID S. GOULD, SHERIFF,  
CAYUGA COUNTY, RESPONDENTS.

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

OFFICE OF MATTHEW R. FLETCHER, CAYUGA (RANDY J. RAY 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, Cayuga County [William P. Polito, J.], entered July 31, 2008) to annul a determination of respondent County of Cayuga. The determination found petitioner guilty of disciplinary charges and terminated his employment as a lieutenant for the Cayuga County Sheriff's Department.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding petitioner guilty of charge III and by vacating the penalty and as modified the determination is confirmed without costs, and the matter is remitted to respondent County of Cayuga for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination finding him guilty of disciplinary charges and terminating his employment as a lieutenant for the Cayuga County Sheriff's Department following a hearing pursuant to Civil Service Law § 75. We reject petitioner's contention that charge II is time-barred pursuant to Civil Service Law § 75 (4). The misconduct set forth in that charge "would, if proved in a court of appropriate jurisdiction, constitute a crime," and thus the charge is not subject to the limitations period set forth in section 75 (4) (see Penal Law § 195.00 [1]). We reject petitioner's further contention that the misconduct set forth in charge V does not constitute one or more violations of Civil Service Law § 107. Charge V alleges that the misconduct described in the first four charges violated Civil Service Law § 107, and we conclude that each of those charges sufficiently alleges a violation of section 107 (4).

Judicial review of an administrative determination following a

hearing required by law is limited to whether the determination is supported by substantial evidence (see CPLR 7803 [4]; *Matter of Guerrero v Scopetta*, 53 AD3d 615; *Matter of D'Alessandro v West Hempstead Fire Dist.*, 53 AD3d 576, 577). Substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; see *Matter of Lundy v City of Oswego*, 59 AD3d 954). Here, we agree with petitioner that the determination with respect to charge III, alleging that he altered a departmental shift schedule in retaliation for the support by members of that department for a political opponent of the incumbent sheriff, is not supported by substantial evidence, and we therefore modify the determination accordingly. There is no evidence in the record demonstrating that the schedule change was motivated by a desire to retaliate for political reasons (see generally *Matter of Barhite v Village of Medina*, 23 AD3d 1114, 1115). We further conclude, however, that the determination with respect to charges I, II, IV and V is supported by substantial evidence.

Inasmuch as a single penalty was imposed and the record does not establish any relation between the charges and the penalty, we further modify the determination by vacating the penalty. We remit the matter to respondent County of Cayuga for imposition of an appropriate penalty on the remaining charges.

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

**1603**

**KA 08-02675**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

TOMELL T. BREWER, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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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 (Matthew J. Murphy, III, J.), rendered November 24, 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 (*see People v Lococo*, 92 NY2d 825, 827).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1604**

**KA 08-02674**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

TOMELL T. BREWER, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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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.

---

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered November 24, 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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1605**

**KA 09-00078**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

GENE D. HENRY, DEFENDANT-APPELLANT.

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CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (DIANE M. ADSIT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered December 4, 2008. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1612**

**CAF 09-00313**

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

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IN THE MATTER OF LISA A. SCROGER,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JERRY K. SCROGER, RESPONDENT-APPELLANT.

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

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered January 9, 2009 in a proceeding pursuant to Family Court Act article 8. The order of protection directed respondent to observe certain conditions of behavior.

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

Memorandum: Respondent husband appeals from an order in this proceeding pursuant to Family Court Act article 8 determining that he committed the family offenses of disorderly conduct and criminal mischief against petitioner wife. Contrary to the husband's contention, the wife established by a preponderance of the evidence that the husband engaged in acts constituting those crimes (*see Matter of Harrington v Harrington*, 63 AD3d 1618, 1619, lv denied 13 NY3d 705; *Matter of Danielle S. v Larry R.S.*, 41 AD3d 1188). Family Court's assessment of the credibility of the witnesses is entitled to great weight, and the court was entitled to credit the testimony of the wife over that of the husband (*see Danielle S.*, 41 AD3d at 1189; *Matter of Arlene E. v Ralph E.*, 17 AD3d 1104).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1619

CA 09-00826

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

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KENNETH POKORSKI, CHRISTINE E. DODDS,  
DAVID DALE, AND CATHERINE E. DODDS, BY  
HER PARENT/GUARDIAN CHRISTINE E. DODDS,  
PLAINTIFFS-APPELLANTS,

V

ORDER

GANNETT CO., INC., WGRZ TV, MARIA SISTI,  
RICH KELLMAN, ELLEN CROOK, LYNN DIXON, AND  
ROBYN YOUNG, DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 1.)

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MICHAEL W. RICKARD, II, WILLIAMSVILLE, FOR PLAINTIFFS-APPELLANTS  
KENNETH POKORSKI, CHRISTINE E. DODDS, AND CATHERINE E. DODDS, BY HER  
PARENT/GUARDIAN CHRISTINE E. DODDS, AND DAVID DALE, PLAINTIFF-  
APPELLANT PRO SE.

NIXON PEABODY LLP, WASHINGTON, D.C. (LESLIE PAUL MACHADO OF COUNSEL),  
FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered April 24, 2008 in an action for, inter alia, libel. The order, insofar as appealed from, granted in part the motion of defendants Gannett Co., Inc. and WGRZ TV 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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1620

CA 09-00956

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

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KENNETH POKORSKI, CHRISTINE E. DODDS,  
DAVID DALE, AND CATHERINE E. DODDS, BY  
HER PARENT/GUARDIAN CHRISTINE E. DODDS,  
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

ORDER

GANNETT CO., INC., WGRZ TV,  
DEFENDANTS-RESPONDENTS-APPELLANTS,  
MARIA SISTI, RICH KELLMAN, ELLEN CROOK,  
LYNN DIXON, AND ROBYN YOUNG,  
DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 2.)

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MICHAEL W. RICKARD, II, WILLIAMSVILLE, FOR PLAINTIFFS-APPELLANTS-  
RESPONDENTS KENNETH POKORSKI, CHRISTINE E. DODDS, AND CATHERINE E.  
DODDS, BY HER PARENT/GUARDIAN CHRISTINE E. DODDS, AND DAVID DALE,  
PLAINTIFF-APPELLANT-RESPONDENT PRO SE.

NIXON PEABODY LLP, WASHINGTON, D.C. (LESLIE PAUL MACHADO OF COUNSEL),  
FOR DEFENDANTS-RESPONDENTS-APPELLANTS AND DEFENDANTS-RESPONDENTS.

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Appeal and cross appeal from an order and judgment (one paper) of  
the Supreme Court, Erie County (Joseph D. Mintz, J.), entered October  
15, 2008 in an action for, inter alia, libel. The order and judgment,  
inter alia, granted the motion of defendants Gannett Co., Inc. and  
WGRZ TV to dismiss the amended complaint in its entirety.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1625

**KA 08-01207**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS J. DRAKE, JR., 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 (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 16, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and menacing in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of assault in the second degree (Penal Law § 120.05 [2]) and two counts of menacing in the second degree (§ 120.14 [1]). Contrary to the contention of defendant, County Court properly denied his motion to set aside the verdict pursuant to CPL 330.30 (2) based on juror misconduct. In support of that contention, defendant asserts that one of the jurors voted guilty based on the verbal aggression of other jurors. Defendant's contention, however, "do[es] not raise a 'question of outside influence but, rather, [defendant] seeks to impeach the verdict by delving into the tenor of the jury's deliberative processes' " (*People v Gerecke*, 34 AD3d 1260, 1262, lv denied 7 NY3d 925, 927). We reject the further contention of defendant that the court erred in denying his request for a circumstantial evidence charge inasmuch as the assault count was supported by direct evidence that defendant struck the victim with a dangerous instrument rather than with his fist (see generally *People v Daddona*, 81 NY2d 990, 992). Finally, the sentence is not unduly harsh or severe.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1626

**KA 07-00033**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PHILLIP K. DYKES, 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.

---

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 14, 2005. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, robbery in the second degree and criminal impersonation in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Great deference is accorded to the jury's resolution of credibility issues . . ., and it cannot be said herein that the jury failed to give the evidence the weight it should be accorded" (*People v McKinnon*, 15 AD3d 842, 842, lv denied 4 NY3d 888).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1627**

**KA 08-02187**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL E. HANNIG, DEFENDANT-APPELLANT.

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CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 4, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal mischief 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 mischief in the third degree (Penal Law § 145.05 [2]). We note at the outset that defendant's release to parole supervision does not render moot defendant's contention that the sentence is unduly harsh or severe because defendant " 'remains under the control of the Parole Board until his sentence has terminated' " (*People v Rowell*, 5 AD3d 1073, 1074, *lv denied* 2 NY3d 806; *see also People v Brown*, 39 AD3d 1021). We nevertheless reject defendant's contention with respect to the severity of the sentence. Defendant failed to preserve for our review his challenge to the amount of restitution imposed by failing to request a hearing or to object to the amount of restitution (*see People v Horne*, 97 NY2d 404, 414 n 3; *People v Lovett*, 8 AD3d 1007, *lv denied* 3 NY3d 673, 677), 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]*).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1628

**KA 05-01294**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID K. GREEN, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (John J. Brunetti, A.J.), rendered May 6, 2005. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that the police lacked probable cause to arrest him and that Supreme Court therefore erred in refusing to suppress his oral and written statements to the police as well as certain tangible evidence seized as the result of that allegedly unlawful arrest. We reject that contention. Here, the victims provided the police with a description of the two perpetrators and the escape vehicle driven by a third individual. Based on a radio dispatch containing that information, an officer detained a vehicle near the scene of the robbery matching the description of the escape vehicle and containing three individuals. The driver of the vehicle informed the officer that he and the two other occupants had just left the bar outside of which the robbery had occurred, and police officers observed items matching the description of the stolen property on the ground next to the passenger side door and in the front seat of the vehicle in question. We thus conclude that the police had probable cause to arrest defendant, i.e., they had "knowledge of facts and circumstances 'sufficient to support a reasonable belief that an offense has been or is being committed' " (*People v Maldonado*, 86 NY2d 631, 635), even before the showup identification of defendant by one of the victims had taken place (*see generally People v Davis*, 48 AD3d 1120, 1122, *lv denied* 10 NY3d 957).

We reject defendant's further contention that the verdict with respect to the first count of the indictment is against the weight of the evidence. Viewing the evidence in light of the elements of the crime in the first count of the indictment as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Defendant failed to preserve for our review his contention that he was denied a fair trial by alleged prosecutorial misconduct on summation (see *People v Bones*, 50 AD3d 1527, *lv denied* 10 NY3d 956), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1630**

**KA 07-02570**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYMOND T. TOWNSEND, DEFENDANT-APPELLANT.

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LINDA M. CAMPBELL, SYRACUSE, 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 August 13, 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.

Memorandum: We affirm for reasons stated in the decision at County Court dated May 22, 2007. We add only that, to the extent that the contention of defendant that he was denied effective assistance of counsel survives the plea (see *People v Santos*, 37 AD3d 1141, lv denied 8 NY3d 950), it is without merit (see generally *People v Ford*, 86 NY2d 397, 404).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1631**

**KA 09-00392**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

TONY WEAVER, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered January 6, 2009. The judgment convicted defendant, upon a jury verdict, of resisting arrest and disorderly conduct (two counts).

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1632

**KA 07-00129**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN GREEN, 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 (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Dennis M. Kehoe, A.J.), rendered October 27, 2006. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that Supreme Court's charge to the jury on the issue of recent exclusive possession of stolen property, which was taken verbatim from the Criminal Jury Instructions (see CJI2d[NY] Possession: Recent, Exclusive), was improper. We reject that contention. The victim testified that defendant stole the victim's vehicle and cellular telephone at gunpoint, while defendant testified that the victim had loaned his property to defendant. Defendant was apprehended shortly after exiting the victim's vehicle and was found in possession of the victim's cellular telephone. Under those facts, the charge on recent exclusive possession of stolen property was appropriate (see *People v Howard*, 60 NY2d 999, 1001). Moreover, the charge properly allowed " 'the jury, hearing the whole charge, [to] gather from its language the correct rules which should be applied in arriving at [its] decision' " (*People v Ladd*, 89 NY2d 893, 895, quoting *People v Russell*, 266 NY 147, 153; see generally *People v Fernandez*, 286 AD2d 444, lv denied 97 NY2d 681).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1633**

**CA 09-01491**

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

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GERALD F. WEAVER AND KIMBERLY WEAVER,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOWN OF PENFIELD, DEFENDANT-APPELLANT,  
ET AL., DEFENDANT.

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WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (SCOTT K. ROHRING OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered December 18, 2008 in a personal injury action. The order, insofar as appealed from, granted that part of plaintiffs' motion for partial summary judgment with respect to the negligence of defendant Town of Penfield and denied the cross motion of defendant Town of Penfield for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the cross motion of defendant Town of Penfield is granted, the complaint against that defendant is dismissed and that part of the motion for partial summary judgment with respect to the negligence of that defendant is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Gerald F. Weaver (plaintiff), a paramedic supervisor employed by Monroe Ambulance, when an ambulance owned by defendant Penfield Volunteer Emergency Ambulance Service, Inc. collided with a vehicle driven by an employee of the Town of Penfield (defendant). Plaintiffs moved for partial summary judgment both on liability and on the ground that plaintiff sustained a serious injury to his left shoulder under the permanent consequential limitation of use and significant limitation of use categories set forth in Insurance Law § 5102 (d). Defendant cross-moved for summary judgment dismissing the complaint against it on the ground that plaintiff did not sustain a serious injury under those two categories, the only two alleged by plaintiffs. As relevant on appeal, Supreme Court granted that part of plaintiffs' motion for summary judgment with respect to negligence against defendant and denied defendant's cross motion, determining that there are triable issues of fact

whether plaintiff sustained a serious injury under the significant limitation of use and the 90/180-day categories. We note at the outset that the court erred in determining sua sponte that there are issues of fact with respect to the 90/180-day category, inasmuch as plaintiffs did not allege in their complaint, as amplified by the bill of particulars and supplemental bill of particulars, that plaintiff had sustained such an injury, nor in any event did they assert that he had sustained such an injury in their motion papers. We further note that only defendant has taken an appeal, and thus the sole issue before us with respect to serious injury concerns the viability of the significant limitation of use category of serious injury, the court having determined that there were issues of fact only with respect to that category and the 90/180-day category.

We conclude that the court should have granted the cross motion and dismissed the complaint against defendant, inasmuch as defendant established as a matter of law that plaintiff did not sustain a serious injury under the significant limitation of use category of serious injury (see *Harris v Carella*, 42 AD3d 915, 916), and plaintiffs failed to raise a triable issue of fact with respect thereto (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). In order to satisfy the serious injury threshold pursuant to Insurance Law § 5102 (d), a plaintiff must present "objective proof" of an injury; subjective complaints of pain alone are insufficient (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350). "In addition, [an] expert must provide either 'a numeric percentage of a plaintiff's loss of range of motion' or a 'qualitative assessment of a plaintiff's condition . . . , provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system' " (*Leahey v Fitzgerald*, 1 AD3d 924, 925-926, quoting *Toure*, 98 NY2d at 350).

In support of the cross motion, defendant submitted the affirmed report of an orthopedic surgeon who examined plaintiff at its request. The surgeon reviewed plaintiff's medical records and concluded that there were no objective findings of any injury caused by the motor vehicle accident at issue. Defendant also submitted the report of a physician concluding that an X ray of plaintiff's left shoulder taken a few days after the accident did not show a fracture or dislocation and that the shoulder was "[u]nremarkable." In addition, an MRI of plaintiff's left shoulder taken a few months after the accident showed no evidence that plaintiff sustained a partial or full rotator cuff tear or a labral tear. We thus conclude that defendant established that plaintiff sustained only a mild shoulder "strain" as a result of the accident and that there was no objective medical evidence that he sustained a significant injury to his left shoulder (see *Herbst v Marshall* [appeal No. 2], 49 AD3d 1194, 1195; *Harris*, 42 AD3d at 916; see also *Delfino v Luzon*, 60 AD3d 196, 197; see generally *Toure*, 98 NY2d 353).

In support of their motion and in opposition to the cross motion, plaintiffs failed to submit any objective medical evidence that

plaintiff sustained a serious injury to his left shoulder (see generally *Toure*, 98 NY2d at 350; *Barnes v Estes*, 46 AD3d 1441). Plaintiffs submitted a report from a workers' compensation evaluation conducted more than one year after the accident, which states that plaintiff sustained an "[i]mpingement" of his left shoulder and that he lacked 20 degrees of abduction and 30 degrees of flexion in that shoulder. Although an expert's quantitative assessment of the degree of a plaintiff's loss of range of motion may be used to substantiate a claim of serious injury (see *Toure*, 98 NY2d at 350), here the workers' compensation report failed to relate the range of motion losses to any objective findings of injury to plaintiff's left shoulder (see *Beaton v Jones*, 50 AD3d 1500, 1502). Indeed, that report notes that the MRI of plaintiff's left shoulder contained no evidence of a tear or other acute injury. Moreover, the report does not recite the tests used to ascertain the degree of plaintiff's loss of range of motion (see *Delfino*, 60 AD3d at 198; cf. *Harris*, 42 AD3d at 917), and it also does not account for the absence of range of motion restrictions in plaintiff's left shoulder immediately following the accident (see *Beaton*, 50 AD3d at 1502; *Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669).

Although the record contains some objective evidence of an injury to plaintiff's cervical spine, we note that the complaint, as amplified by the bill of particulars and supplemental bill of particulars, does not allege that plaintiff sustained a serious injury to his cervical spine as a result of the accident.

Finally, in view of our determination that plaintiff did not sustain a serious injury, we need not address defendant's contention that the court erred in granting that part of plaintiffs' motion with respect to defendant's negligence. We therefore dismiss that part of plaintiff's motion as moot.

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

**1634**

**CA 09-01333**

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

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VIRGIL SMITH, INDIVIDUALLY AND AS PARENT  
AND NATURAL GUARDIAN OF DEREK SMITH, A MINOR,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

HAZEL E. SHERWOOD, DEFENDANT,  
CITY OF SYRACUSE, SYRACUSE CITY SCHOOL  
DISTRICT, BOARD OF EDUCATION OF SYRACUSE  
CITY SCHOOL DISTRICT, CENTRAL NEW YORK  
REGIONAL TRANSPORTATION AUTHORITY, ALSO  
KNOWN AS CENTRO, INC., AND THEODORE R.  
GRAY, DEFENDANTS-RESPONDENTS.

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KENNY & KENNY, PLLC, SYRACUSE (MICHAEL P. KENNY OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

RORY A. MCMAHON, CORPORATION COUNSEL, SYRACUSE (MARY ANNE DOHERTY OF  
COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF SYRACUSE, SYRACUSE CITY  
SCHOOL DISTRICT, AND BOARD OF EDUCATION OF SYRACUSE CITY SCHOOL  
DISTRICT.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS CENTRAL NEW YORK REGIONAL TRANSPORTATION  
AUTHORITY, ALSO KNOWN AS CENTRO, INC., AND THEODORE R. GRAY.

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Appeal from an order of the Supreme Court, Onondaga County  
(Deborah H. Karalunas, J.), entered December 10, 2008 in a personal  
injury action. The order, among other things, granted the motion of  
defendants City of Syracuse, Syracuse City School District, and Board  
of Education of Syracuse City School District for summary judgment  
dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is modified  
on the law by denying in part the motion of defendants Central New  
York Regional Transportation Authority, also known as Centro, Inc.,  
and Theodore R. Gray and reinstating the common-law negligence claim  
against those defendants and as modified the order is affirmed without  
costs.

Memorandum: Plaintiff commenced this action, individually and on  
behalf of his 12-year-old son, seeking damages for injuries sustained  
by his son when he was struck by a vehicle operated by defendant Hazel  
E. Sherwood. At the time of the accident, plaintiff's son was a

student at a private school in defendant City of Syracuse (City) and was transported to and from school on buses owned by defendant Central New York Regional Transportation Authority, also known as Centro, Inc. (Centro), pursuant to a contract between Centro and defendant School District. The buses were not yellow school buses and were not equipped with the safety features required for school buses pursuant to Vehicle and Traffic Law § 375 (20). On the date of the accident, defendant bus driver drove past the stop for plaintiff's son and dropped him off on the opposite side of the street. Upon exiting the bus, plaintiff's son walked in front of the bus and was struck by Sherwood's vehicle while he was attempting to cross the street.

Supreme Court erred in granting that part of the motion of Centro and defendant bus driver (collectively, Centro defendants) seeking summary judgment dismissing the common-law negligence claim against them, and we therefore modify the order accordingly. Because Centro was acting on behalf of the School District in transporting students, Centro had a common-law duty to perform that service in a careful and prudent manner (see *Pratt v Robinson*, 39 NY2d 554, 561). Further, a bus driver has a continuing duty "to exercise reasonable care to [ensure] that discharged [students] reach[] a position of safety before moving his [or her] vehicle," and that duty extends to discharged students who must cross to the opposite side of the street if the bus driver knows that they must do so (*Sewar v Gagliardi Bros. Serv.*, 69 AD2d 281, 286, *affd* 51 NY2d 752). Here, there is evidence in the record that defendant bus driver knew that plaintiff's son had to cross the street after exiting the bus, without the benefit of the red flashing lights found on yellow school buses. Although Centro was not subject to the equipment requirements of Vehicle and Traffic Law § 375 (20), the absence of that equipment increased the danger of discharging plaintiff's son on the wrong side of the street. "[B]ecause '[t]he presence of the bus necessarily created some hazard' . . . by obstructing the views of the child and the drivers of overtaking vehicles, 'the jury might well find that [the Centro defendants] assumed a duty to protect [the child] against the special danger which it had created' " (*Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 671-672, *rearg denied* 93 NY2d 1042, quoting *McDonald v Central School Dist. No. 3 of Towns of Romulus, Varick & Fayette, Seneca County*, 179 Misc 333, 336, *affd* 264 App Div 943, *affd* 289 NY 800). We further conclude that the Centro defendants failed to meet their burden of establishing as a matter of law that defendant bus driver's failure to provide any supervision or assistance to plaintiff's son in crossing the street was not a proximate cause of the accident (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Contrary to plaintiff's contention, however, the court properly granted those parts of the motion of the Centro defendants seeking summary judgment dismissing the claims alleging violations of the Vehicle and Traffic Law against them. The Centro defendants were not bound by the requirements of Vehicle and Traffic Law § 375 (20) or § 1174 (b) inasmuch as the bus used to transport plaintiff's son was not a yellow school bus and was not used exclusively to transport students (see *Wisoff v County of Westchester*, 296 AD2d 402; *Sigmond v Liberty*

*Lines Tr.*, 261 AD2d 385, 387).

We further conclude that the court properly granted the motion of the City, the School District, and defendant Board of Education of the School District (collectively, School District defendants) for summary judgment dismissing the complaint against them. It is well settled that a school district owes a common-law duty of care to its students while they "are in its physical custody or orbit of authority . . . , and if the school [district] chooses to provide transportation services it must do so in a careful and prudent manner" (*Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 378, *rearg denied* 87 NY2d 862). Here, however, the School District contracted out its responsibility for transportation to Centro, and they therefore cannot be held liable for injuries sustained by plaintiff's son after he boarded the Centro bus (*see id.* at 379; *Wisoff*, 296 AD2d 402). Insofar as plaintiff's claim against the School District defendants is premised upon their alleged violation of the duty imposed by Vehicle and Traffic Law § 1174 (b), that statute "clearly place[s] the affirmative obligation on bus drivers, not school[ districts]" (*Chainani*, 87 NY2d at 379), and thus there is no statutory basis for the imposition of liability with respect to the School District defendants. Finally, contrary to plaintiff's contention, the mere fact that the School District entered into a contract with Centro to provide transportation to its students on buses other than yellow school buses does not constitute a breach of duty to plaintiff or his son (*see generally Wisoff*, 296 AD2d 402; *Sigmond*, 261 AD2d at 387).

All concur except HURLBUTT, J.P., and FAHEY, J., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part and would affirm the order. We agree with the majority that Supreme Court properly granted those parts of the motion of defendant Central New York Regional Transportation Authority, also known as Centro, Inc., and defendant bus driver (collectively, Centro defendants) for summary judgment dismissing the claims alleging violations of the Vehicle and Traffic Law against them, as well as the motion of defendant City of Syracuse (City), defendant City School District (School District), and defendant Board of Education of the School District for summary judgment dismissing the complaint against them. In our view, however, the court also properly granted that part of the motion of the Centro defendants for summary judgment dismissing the common-law negligence claim against them. We cannot agree with the majority that the driver of a city bus that is neither painted yellow nor equipped with the flashing lights and stop signs utilized by school buses has a duty to ensure that a student passenger has safely crossed the street. Indeed, with respect to the common-law negligence claim against the Centro defendants, their "duty to [plaintiff's son] as a passenger terminated when [he] alighted safely on the curb" (*Kramer v Lagnese*, 144 AD2d 648, 649; *see Wisoff v County of Westchester*, 296 AD2d 402; *Sigmond v Liberty Lines Tr.*, 261 AD2d 385, 387).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1635**

**CA 09-01133**

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

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STEVEN SEARLEY, INDIVIDUALLY AND AS  
ADMINISTRATOR OF THE ESTATE OF MICHAEL  
SEARLEY, AN INFANT, DECEASED, AND SUEANNE  
SEARLEY, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

ORDER

WEGMANS FOOD MARKETS, INC.,  
DEFENDANT-RESPONDENT-APPELLANT.

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BRENNA, BRENNA & BOYCE, PLLC, ROCHESTER (ROBERT L. BRENNA, JR., OF  
COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

WARD NORRIS HELLER & REIDY LLP, ROCHESTER (TONY R. SEARS OF COUNSEL),  
FOR DEFENDANT-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court,  
Monroe County (Matthew A. Rosenbaum, J.), entered August 6, 2008. The  
order, inter alia, granted 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: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1636

CA 09-01131

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

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ELEANORE MUTO, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ROMAN CATHOLIC CHURCH OF ST. JOHN THE  
EVANGELIST AND ST. JOHN THE EVANGELIST  
CHURCH OF GREECE, DEFENDANTS-APPELLANTS.

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CHARLES A. HALL, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

THE KAMMHOLZ LAW FIRM, FAIRPORT (BRADLEY P. KAMMHOLZ OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (David M. Barry, J.), entered March 31, 2009 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly tripped on a floor mat on property owned and occupied by defendants, causing her to fall. Contrary to the contention of defendants, Supreme Court properly denied their motion for summary judgment dismissing the complaint. By their own submissions, defendants raised a triable issue of fact whether they had notice that the condition of the floor mat on the day of plaintiff's fall rendered it a tripping hazard (*see Groth v BJ's Wholesale Club, Inc.*, 59 AD3d 1086; *cf. Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1637**

**CA 09-00973**

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

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SCOTT M. HARVEY AND JOHANNA HARVEY,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NICOLE M. GAULIN, DEFENDANT.

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COUNTY OF ORLEANS, APPELLANT.  
(APPEAL NO. 1.)

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WEBSTER SZANYI LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR  
APPELLANT.

HANDELMAN, WITKOWICZ & LEVITSKY, ROCHESTER (STEVEN M. WITKOWICZ OF  
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from a decision (denominated memorandum and decision) of  
the Supreme Court, Orleans County (James H. Dillon, J.), entered  
September 23, 2008 in a personal injury action. The decision stated  
that the court would allow the late filings of the notice of claim.

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

Same Memorandum as in *Harvey v Gaulin* ([appeal No. 2] \_\_\_ AD3d  
\_\_\_ [Dec. 30, 2009]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1638

CA 09-00974

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

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SCOTT M. HARVEY AND JOHANNA HARVEY,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NICOLE M. GAULIN, DEFENDANT.

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COUNTY OF ORLEANS AND KENDALL CENTRAL  
SCHOOL DISTRICT, APPELLANTS.  
(APPEAL NO. 2.)

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WEBSTER SZANYI LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR  
APPELLANT COUNTY OF ORLEANS.

HURWITZ & FINE, P.C., BUFFALO (SHAWN P. MARTIN OF COUNSEL), FOR  
APPELLANT KENDALL CENTRAL SCHOOL DISTRICT.

HANDELMAN, WITKOWICZ & LEVITSKY, ROCHESTER (STEVEN M. WITKOWICZ OF  
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeals from an order of the Supreme Court, Orleans County (James H. Dillon, J.), entered December 8, 2008 in a personal injury action. The order, among other things, granted plaintiffs' application for leave to serve a late notice of claim.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained on March 27, 2007 by Scott M. Harvey (plaintiff) when a vehicle driven by defendant Nicole M. Gaulin made a left turn in front of the motorcycle driven by plaintiff. Plaintiffs first learned by way of an affidavit executed by Gaulin on January 14, 2008 that Gaulin was employed by the County of Orleans (County) and was assigned to the Kendall Central School District (KCS D) and, approximately six months later, made an application for leave to serve a late notice of claim. Supreme Court issued a "Memorandum and Decision" in September 2008 in which it stated that it would allow the late "filings" but the order granting the application was not entered until December 8, 2008. We note at the outset that in appeal No. 1 the County purports to appeal from the "order" granted in September. That appeal must be dismissed, however, because "[t]hat document [i.e. the "Memorandum and Decision"] did not actually order anything and

'[n]o appeal lies from a mere decision' " (*Pecora v Lawrence*, 28 AD3d 1136, 1137).

With respect to appeal No. 2, we conclude that Supreme Court did not abuse its discretion in granting plaintiffs' application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). "The court is vested with broad discretion to grant or deny [such an] application . . . and, although [plaintiffs] failed to offer a reasonable excuse for [their] failure to serve the notice of claim within the statutory 90-day period . . ., that failure is not fatal [because] actual notice was had and there is no compelling showing of prejudice to [the County or KCSD]" (*Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434, 1435 [internal quotation marks omitted]; see § 50-e [1] [a]; [5]). We further conclude, however, that the court erred in directing in the second ordering paragraph that the County and KCSD "are made defendants in the within action" without first affording them the opportunity to conduct a hearing pursuant to General Municipal Law § 50-h (see *Southern Tier Plastics, Inc. v County of Broome*, 53 AD3d 980), and before plaintiffs had served a notice of claim (see §§ 50-e, 50-i) and an amended complaint (see CPLR 304 [former (a)]). We therefore modify the order accordingly.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1639**

**CA 08-02035**

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

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CHRISTOPHER HALLING, CLAIMANT-APPELLANT,

V

ORDER

THE STATE OF NEW YORK, DEFENDANT-RESPONDENT.

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DOMINIC PELLEGRINO, ROCHESTER, FOR CLAIMANT-APPELLANT.

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

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Appeal from a judgment of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered July 31, 2008. The judgment granted the motion of defendant to dismiss the claim for medical malpractice.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1640**

**CA 09-01132**

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

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TERRANCE D. GREENE AND SHARON GREENE,  
PLAINTIFFS-RESPONDENTS,

V

ORDER

AVOCA CENTRAL SCHOOL DISTRICT,  
DEFENDANT-APPELLANT.

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COUGHLIN & GERHART, LLP, BINGHAMTON (KEITH A. O'HARA OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

LEARNED, REILLY, LEARNED & HUGHES, LLP, ELMIRA (SCOTT J. LEARNED OF  
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Steuben County  
(Marianne Furfure, A.J.), entered February 20, 2009 in a personal  
injury action. The order denied the motion of defendant for summary  
judgment dismissing the complaint.

Now, upon the stipulation of discontinuance signed by the  
attorneys for the parties on September 18, 2009 and filed in the  
Steuben County Clerk's Office on September 22, 2009,

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1642**

**CA 09-01127**

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

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IN THE MATTER OF MICHAEL DIGEORGIO, DOING  
BUSINESS AS DIGEORGIO ENTERPRISES,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID J. SWARTS, COMMISSIONER, DEPARTMENT  
OF MOTOR VEHICLES OF STATE OF NEW YORK,  
RESPONDENT-APPELLANT.

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ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL),  
FOR RESPONDENT-APPELLANT.

PETER BERESKIN, 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 August 12, 2008 in a proceeding pursuant to CPLR article 78. The judgment granted the petition and ordered respondent to approve petitioner's application for an inspection station license.

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

Memorandum: Respondent appeals from a judgment in this CPLR article 78 proceeding that, inter alia, ordered him to "approve" petitioner's application for an inspection station license. We agree with respondent that there was a rational basis for his denial of petitioner's application and that judicial intervention therefore was not warranted (*see Matter of Blake Bus. School v Sobol*, 176 AD2d 1139, 1140, *appeal dismissed* 80 NY2d 825; *Matter of Berger v Leach*, 103 AD2d 1018). Contrary to petitioner's contention, respondent was entitled to consider past violations of inspection laws and regulations by all of the owners and employees of the prospective inspection station in determining whether to grant the application, i.e., he should issue the license "only when satisfied that the station is properly equipped and has competent personnel to make such inspections and that such inspections will be properly conducted" (Vehicle and Traffic Law § 303 [a] [1]; *see generally Spencer v NYC Taxi & Limousine Commn.*, 30 AD3d 300; *Matter of New York City Tr. Auth. v Pierrot*, 144 AD2d 814, 816).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1643**

**CA 09-01336**

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

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JAMES F. BRAMER, II, ALSO KNOWN AS JAMES  
BRAMER, II, ALSO KNOWN AS JAMES F. BRAMER, II,  
DOING BUSINESS AS BRAMER'S SUNOCO, AND  
BRAMER'S SERVICES, INC., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

UTICA MUTUAL INSURANCE COMPANY AND ITS  
AFFILIATED COMPANIES INCLUDING REPUBLIC  
FRANKLIN INSURANCE CO. AND GRAPHIC ARTS  
MUTUAL INSURANCE COMPANY,  
DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANT.

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MICHAEL J. KELLY, PERRY, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (CARRIE P. APPLER OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered April 13, 2009 in a declaratory judgment action. The judgment, among other things, granted the motion of defendants Utica Mutual Insurance Company and its affiliated companies including Republic Franklin Insurance Co. and Graphic Arts Mutual Insurance Company for summary judgment.

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

Memorandum: Plaintiff appeals from a judgment that, inter alia, declared that defendants-respondents (hereafter, defendants) are not obligated to defend or indemnify plaintiff in an underlying action commenced by New York State pursuant to Navigation Law § 181 seeking to recover the cost of remediating petroleum contamination (*State of New York v Essex Prop. Mgt., LLC*, 12 AD3d 1123). We affirm.

It is well settled that notice provisions of an insurance policy "operate[] as a condition precedent to coverage" (*White v City of New York*, 81 NY2d 955, 957), and that the insurer is not required to demonstrate prejudice before disclaiming coverage based on the unexcused failure to comply with the notice requirements (see *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743). Failure to provide the insurer with timely notice, however, may be excused by

a good faith belief that no claim will be asserted against the insured, provided that the belief is reasonable under all of the circumstances (see *Philadelphia Indem. Ins. Co. v Genesee Val. Improvement Corp.*, 41 AD3d 44, 46). " '[A]t issue is not whether the insured believes he will ultimately be found liable for the injury' " (*id.*). In addition, "a justifiable lack of knowledge of insurance coverage may excuse a delay in reporting an occurrence" (*Winstead v Uniondale Union Free School Dist.*, 201 AD2d 721, 723). "The burden of establishing a reasonable excuse for the delay is upon the insured" (*Matter of Travelers Ins. Co. [DeLosh]*, 249 AD2d 924, 925; see *Great Canal Realty Corp.*, 5 NY3d at 744).

Here, the record establishes that plaintiff received notice of the condition giving rise to the underlying action no later than September 1998 and that plaintiff contacted an insurer other than defendants seeking "legal representation reimbursement" at approximately the same time. Plaintiff did not, however, notify defendants of the condition and seek coverage under the applicable policies until December 7, 2000. That delay is unreasonable as a matter of law (see *e.g. Philadelphia Indem. Ins. Co.*, 41 AD3d at 46-47; *Lyell Party House v Travelers Indem. Co.*, 11 AD3d 972, 973) and, under the circumstances of this case, plaintiff failed to meet its burden of establishing that its delay in providing notice to defendants "was reasonably founded upon a good-faith belief that it should not have anticipated a claim" (*Philadelphia Indem. Ins. Co.*, 41 AD3d at 47). Contrary to the contention of plaintiff, he also failed to meet his burden of establishing that he was justifiably ignorant of the insurance coverage available to him under the policies issued by defendants (see *Winstead*, 201 AD2d at 723).

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

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

**1644**

**CA 09-00618**

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

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BRIAN R. ATWATER AND MELISSA J. ATWATER,  
PLAINTIFFS-RESPONDENTS,

V

ORDER

THUNDER BAY HOMES, ET AL., DEFENDANTS,  
RYDER TRUCK RENTAL, INC., ERIC J. CONGER,  
AND ANDREW FULLER, INDIVIDUALLY AND DOING  
BUSINESS AS ANDY FULLER TRUCKING OR FULLER  
TRUCKING, DEFENDANTS-APPELLANTS.

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

HARRY V. ARMANI & ASSOCIATES, SYRACUSE (HARRY V. ARMANI OF COUNSEL),  
FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 17, 2008 in a personal injury action. The order denied the motion of defendants Ryder Truck Rental, Inc., Eric J. Conger, and Andrew Fuller, individually and doing business as Andy Fuller Trucking or Fuller Trucking, for an order setting aside the jury verdict in favor of plaintiffs on the issue of liability.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1645**

**KA 07-01495**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFREY C. BILLINS, DEFENDANT-APPELLANT.

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PAUL M. DEEP, UTICA, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered May 15, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (two counts), criminal possession of a weapon in the second degree, criminal possession of a weapon in third degree (two counts) and criminally using drug paraphernalia in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]). Contrary to the contention of defendant, the record establishes that his waiver of the right to appeal was knowingly, intelligently and voluntarily entered (*see People v Lopez*, 6 NY3d 248, 256). That valid waiver encompasses defendant's challenge to the factual sufficiency of the plea allocution and, in any event, defendant failed to preserve that challenge for our review (*see People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789). The challenge by defendant to the severity of the sentence is also encompassed by his valid waiver of the right to appeal (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1646**

**KA 08-01038**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WESLEY KIRKLAND, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., 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 (Shirley Troutman, J.), rendered March 27, 2008. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Erie County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [3]). We agree with defendant that he was deprived of effective assistance of counsel inasmuch as his attorney took a position adverse to him when defendant moved pro se for the assignment of new counsel and to withdraw his guilty plea. Although defense counsel had no duty to support the motions, he became a witness against defendant by taking a position adverse to him, thereby depriving defendant of effective assistance of counsel (see *People v Hunter*, 35 AD3d 1228, 1228; *People v Lewis*, 286 AD2d 934, 934). County Court "should not have determined the motion[] [to withdraw the plea] without first assigning a different attorney to represent defendant" (*People v Chrysler*, 233 AD2d 928, 928). We therefore hold the case, reserve decision, and remit the matter to County Court for the assignment of counsel and a de novo determination of the motion to withdraw the guilty plea (see *People v Chaney*, 294 AD2d 931).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1647**

**KA 08-02077**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CHARLES R. SCHMIDT, 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 an order of the Ontario County Court (William F. Kocher, J.), entered August 14, 2008. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1648**

**KA 08-02074**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JONATHAN A. CUNNINGHAM, 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 an order of the Genesee County Court (Robert C. Noonan, J.), entered May 16, 2008. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, the statements in the case summary constitute reliable hearsay upon which County Court properly relied pursuant to Correction Law § 168-n (3) (*see People v Thompson*, 66 AD3d 1455; *People v Ramos*, 41 AD3d 1250, *lv denied* 9 NY3d 809; *People v Wragg*, 41 AD3d 1273, *lv denied* 9 NY3d 809). Those statements constitute clear and convincing evidence that an upward departure from the presumptive risk level was warranted based upon "an aggravating . . . factor of a kind, or to a degree, . . . otherwise not adequately taken into account by the [risk assessment] guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1649**

**KA 09-01289**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GLEN M. GOFF, DEFENDANT-APPELLANT.

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REDMOND & PARRINELLO, LLP, ROCHESTER (BRUCE F. FREEMAN OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered May 31, 2007. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the second degree (three counts) and criminal sexual act in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing those parts convicting defendant of sexual abuse in the second degree under count three of the indictment and criminal sexual act in the first degree and dismissing counts three and four of the indictment and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of sexual abuse in the second degree (Penal Law § 130.60 [2]) and one count of criminal sexual act in the first degree (§ 130.50 [4]). Defendant failed to preserve for our review his contention that the conviction under the third count of the indictment, charging sexual abuse in the second degree, and under the fourth count of the indictment, charging criminal sexual act in the first degree, is not supported by legally sufficient evidence (see *People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of those counts as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we agree with defendant, however, that the verdict with respect to both of those counts is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495), and we therefore modify the judgment accordingly. Where, as here, a different finding from that of the jury would not have been unreasonable, we must " 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from that testimony' " and, if we conclude that the trier of fact failed to give the evidence the weight

it should be accorded, we may set aside the verdict (*id.*).

Here, the two counts in question concerned one incident that, according to County Court's jury instruction, occurred "sometime after Christmas 2004 and around or during the first week of January 2005." During that incident, defendant allegedly touched the complainant's penis and engaged in oral sexual conduct. The complainant testified that the incident occurred after Christmas break and on a Tuesday after school, when his mother was working and he was home alone with defendant. His mother, however, testified that she ended her job on Christmas Eve and that, after that date, either she or her husband would meet the complainant at his bus stop on Tuesdays. The complainant became confused on cross-examination at trial, and he testified that one of his parents would in fact meet him at his bus stop after Christmas and that he therefore would not have been alone with defendant after school. In addition, the complainant admitted that he told the police that defendant had not used his mouth during any incident. The complainant was unable to recall many details concerning the incident and gave conflicting testimony with respect to those details that he did recall, including defendant's position on the couch (*see People v Wallace*, 306 AD2d 802, 803). We thus conclude that the jury failed to give the evidence the weight it should be accorded with respect to the third and fourth counts of the indictment (*see generally Bleakley*, 69 NY2d at 495). However, viewing the evidence in light of the elements of the remaining counts as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to the contention of defendant, the court properly curtailed his cross-examination of the complainant because the court did not thereby " 'keep[] from the jury relevant and important facts bearing on the trustworthiness of crucial testimony' " (*People v Dennard*, 39 AD3d 1277, 1279, *lv denied* 9 NY3d 842). Indeed, the length of defendant's cross-examination of the complainant was approximately four times that of the prosecutor's direct examination of him, and defendant failed to identify any areas of questioning that he was unable to cover. The further contention of defendant that the court demonstrated bias against him is not preserved for our review (*see People v Wright*, 34 AD3d 1274, 1275, *lv denied* 8 NY3d 886; *People v Tricic*, 34 AD3d 1319, 1320, *lv denied* 8 NY3d 850) and, in any event, that contention is without merit. Rather, the court properly precluded defendant from asking cumulative and argumentative questions (*see People v Martich*, 30 AD3d 305, *lv denied* 7 NY3d 868).

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

1650

**KA 07-00916**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GREGG W. MORRISON, DEFENDANT-APPELLANT.

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DONALD M. THOMPSON, ROCHESTER, FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (TRACEY A. BRUNECZ OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered March 19, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and, upon his plea of guilty, of reckless endangerment in the second 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, the plea is vacated, and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [4]) and upon his plea of guilty of reckless endangerment in the second degree (§ 120.20). The conviction arises out of an incident in which defendant, while a passenger in the front seat of a vehicle, interfered with the driver's operation of the vehicle and caused it to collide with the victim's vehicle. The contention of defendant that County Court erred in conducting the *Sandoval* hearing in his absence is raised for the first time in defendant's reply brief and thus is not properly before us (see *People v Sponburgh*, 61 AD3d 1415, *lv denied* 12 NY3d 929; *People v Donahue*, 21 AD3d 1359, *lv denied* 6 NY3d 775; *People v McQueen*, 11 AD3d 1005, 1006, *lv denied* 4 NY3d 765). Nevertheless, we exercise our power to review it as a matter of discretion in the interest of justice, and we agree with defendant that his presence at the *Sandoval* hearing was required (see *People v Favor*, 82 NY2d 254, 258; see generally *People v Dokes*, 79 NY2d 656, 660-662). The court's *Sandoval* ruling was not wholly favorable to defendant, and thus it cannot be said that defendant's presence at the hearing would have been superfluous (see *People v Michalek*, 82 NY2d 906, 907; *People v Odiate*, 82 NY2d 872, 874; see generally *Favor*, 82 NY2d at 268). Although the court placed its *Sandoval* ruling on the record in defendant's presence the day after the hearing, "[a] mere repetition or recitation in the defendant's presence of what has

already been determined in [the defendant's] absence is insufficient compliance with the *Sandoval* rule" (*People v Monclavo*, 87 NY2d 1029, 1031). We therefore reverse that part of the judgment convicting defendant of assault in the second degree and grant a new trial on that count of the indictment. Because we are unable to determine whether defendant's guilty plea to reckless endangerment in the second degree was induced by the jury's verdict finding defendant guilty of assault (see *People v Ramos*, 40 NY2d 610, 619; *People v Burley*, 60 AD2d 973), we also reverse that part of the judgment convicting defendant of reckless endangerment in the second degree and grant a new trial on the second count of the indictment, charging defendant with reckless endangerment in the first degree (§ 120.25).

Viewing the evidence in light of the elements of the crime of assault in the second degree as charged to the jury (see *People v Danielson*, 9 NY2d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). "Giving 'appropriate deference to the jury's superior opportunity to assess the witnesses' credibility' " (*People v Marshall*, 65 AD3d 710, 712), we conclude that, although a different result would not have been unreasonable, the jury was entitled to credit the victim's version of how the accident occurred over defendant's version (see *People v Wedlington*, \_\_\_ AD3d \_\_\_ [Nov. 20, 2009]).

In view of our determination that reversal of the judgment is required, we need not review defendant's remaining contentions. Nevertheless, because we are granting a new trial, we note in the interest of judicial economy that the testimony of the witnesses at trial concerning the statements of the driver of the vehicle in which defendant was a passenger with respect to the cause of the accident constituted inadmissible hearsay (see generally *People v Huertas*, 75 NY2d 487, 491-492). That testimony also impermissibly bolstered the credibility of the driver at trial, particularly with respect to her testimony concerning the cause of the accident (see generally *People v Davis*, \_\_\_ AD3d \_\_\_ [Nov. 13, 2009]; *People v Osborne*, 63 AD3d 1707, *lv denied* 13 NY3d 748).

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

1651

**KA 08-01366**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BASIL PAYNE, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, J.), rendered June 19, 2008. The judgment convicted defendant, upon a jury verdict, of attempted murder 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 attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). Defendant failed to preserve for our review his contention that Supreme Court failed to conduct an adequate inquiry concerning the issue whether certain jurors were grossly unqualified to serve (*see People v Fortino*, 61 AD3d 1410, *lv denied* 12 NY3d 925; *People v Clark*, 28 AD3d 1190), 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]). Contrary to the further contention of defendant, defense counsel was not ineffective in failing to preserve that contention with respect to the jurors for our review. Defendant failed to demonstrate the absence of strategic or other legitimate explanations for the alleged omission by defense counsel (*see generally People v Benevento*, 91 NY2d 708, 712).

We reject the contention of defendant that the evidence is legally insufficient to establish his intent to kill the police officer and to use a weapon against that officer (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at

495), and the sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1652**

**KA 06-00040**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS L. HAMMONS, JR., DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered October 18, 2005. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and endangering the welfare of a child (§ 260.10 [1]). Defendant contends that Supreme Court erred in permitting the People on redirect examination of the complainant to elicit evidence with respect to defendant's telephone conversation with the complainant that had been recorded by the police but subsequently had been suppressed. Even assuming, arguendo, that defendant preserved his contention for our review, we conclude that any error with respect to the admission of the testimony on redirect is harmless. The proof of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the alleged error (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Contrary to defendant's further contention, the court did not abuse its discretion in refusing to give an adverse inference charge concerning the failure of the police to record defendant's interrogation. It is well settled that the police have no obligation to record an interrogation (*see People v Childres*, 60 AD3d 1278, 1279, *lv denied* 12 NY3d 913), and that the failure to record a defendant's interrogation electronically does not constitute a denial of due process (*see People v Lomack*, 63 AD3d 1658, *lv denied* 13 NY3d 798;

*People v Malave*, 52 AD3d 1313, 1315, *lv denied* 11 NY3d 790).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1653

CA 09-00755

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

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JESSICA WILKINSON, CHRISTINA WILKINSON, AND  
CATHERINE JOHNSON, AS ASSIGNEES OF NATHAN  
WALCZYK, PLAINTIFFS-APPELLANTS,  
ET AL., PLAINTIFF,

V

ORDER

STATE FARM MUTUAL AUTOMOBILE INSURANCE  
COMPANY, DEFENDANT-RESPONDENT.

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GREENE & REID, PLLC, SYRACUSE (JAMES E. REID OF COUNSEL), BOTTAR  
LEONE, P.C., AND GALE & DANCKS, LLC, FAYETTEVILLE, FOR  
PLAINTIFFS-APPELLANTS.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

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Appeals from an order of the Supreme Court, Cayuga County (Mark  
H. Fandrich, A.J.), entered March 25, 2009. The order granted 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 for reasons stated in the decision  
at Supreme Court.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1654**

**CA 09-01220**

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

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PHILIP TAFELSKI,  
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

THE BUFFALO CITY CEMETERY, INC.,  
DEFENDANT-APPELLANT-RESPONDENT.

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DAMON MOREY LLP, BUFFALO (STEVEN M. ZWEIG OF COUNSEL), FOR  
DEFENDANT-APPELLANT-RESPONDENT.

LOTEMPPIO & BROWN, P.C., BUFFALO (PATRICK J. BROWN OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), dated December 4, 2008. The order, inter alia, denied the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the Labor Law § 241 (6) claim in its entirety and dismissing that claim in its entirety and by granting the cross 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 while working on the decking for the roof of a mausoleum. At the time of the accident, plaintiff was standing on the scaffold that was erected in the interior of the mausoleum and was adjusting clamps to a header beam. Plaintiff's coworker was standing above plaintiff on the partially constructed roof, laying plywood panels on the joists that were on the scaffold. When plaintiff's coworker dropped a plywood panel into place over the area where plaintiff was working, the plywood either struck plaintiff in the head or jarred the scaffold, causing plaintiff to lose his balance and to slip several rungs down the scaffold. Defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved for partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action. Plaintiff consented to the dismissal of the common-law negligence cause of action, the Labor Law § 200 claim, and the Labor Law § 241 (6) claim except insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (a). Supreme Court otherwise denied the motion and cross motion.

Addressing first plaintiff's cross appeal, we agree with plaintiff that the court erred in denying his cross motion, and we therefore modify the order accordingly. In support of his cross motion, plaintiff established that he was not furnished with appropriate safety devices within the meaning of Labor Law § 240 (1) and that the absence of such devices was a proximate cause of his injuries (see *Campuzano v Board of Educ. of City of N.Y.*, 54 AD3d 268, 269; *Partridge v Waterloo Cent. School Dist.*, 12 AD3d 1054, 1055; *Spaulding v Metropolitan Life Ins. Co.*, 271 AD2d 316; see generally *Felker v Corning Inc.*, 90 NY2d 219, 223-225). Contrary to defendant's contention, the work involved an elevation-related risk and not a usual and ordinary risk of a construction site "to which the 'extraordinary protections of Labor Law § 240 (1) [do not] extend' " (*Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823, 825), and the scaffold failed to protect plaintiff from falling while he was working at a height (*cf. Melber v 6333 Main St.*, 91 NY2d 759, 763).

We agree with defendant on its appeal that the court erred in denying that part of its motion with respect to the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (a), and we therefore further modify the order accordingly. In support of its motion, defendant established that 12 NYCRR 23-1.7 (a) is not applicable to the facts of this case because the worksite was not " 'normally exposed to falling material or objects' " (*Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 826; see *Sears v Niagara County Indus. Dev. Agency*, 258 AD2d 918, 918-919). The plywood panel did not constitute a falling object inasmuch as plaintiff's coworker intended to drop the panel in order to place it on the joists above plaintiff.

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

1655

CA 09-01292

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

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ROCHESTER EQUIPMENT & MAINTENANCE,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ROXBURY MOUNTAIN SERVICE, INC., AND  
MARK LIPPMAN, DEFENDANTS-APPELLANTS.

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TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (LISA BERRITTELLA OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS, CHESWORTH, O'BRIEN, JOHNSTONE, WELCH & LEONE, LLP, ROCHESTER  
(ADAM M. CLARK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered January 16, 2009 in a breach of contract action. The order, insofar as appealed from, granted those parts of the cross motion of plaintiff for partial summary judgment with respect to the first three causes of action.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, breach of a contract pursuant to which it purchased a used construction vehicle from defendants. After purchasing the vehicle and refurbishing it, plaintiff discovered that it had been stolen. The vehicle was subsequently seized by the Department of Motor Vehicles and sold at public auction to a third person who is not a party to this action.

Supreme Court properly granted those parts of plaintiff's cross motion seeking partial summary judgment on liability with respect to the first three causes of action, for breach of contract, breach of express warranty and breach of implied warranty insofar as those causes of action are asserted against defendant Roxbury Mountain Service, Inc. (Roxbury) and defendant Mark Lippman in his capacity as the founder and owner of Roxbury. Pursuant to UCC 2-312 (1) (a), "there is in a contract for sale a warranty by the seller that . . . the title conveyed shall be good, and its transfer rightful" (see generally *Marine Midland Bank v Murray Walter, Inc.*, 101 AD2d 691). That statutory warranty is excluded "only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to

sell only such right or title as he or a third person may have" (UCC 2-312 [2]). In support of its cross motion, plaintiff established that the "[a]s is" provision in the contract related to the condition and operability of the vehicle rather than its title and that the contract otherwise failed to include specific language disclaiming the statutory warranty of title required by UCC 2-312 (2). Plaintiff further established in support of its cross motion that it had no reason to know that defendants did not purport to have title to the vehicle, or that they were selling the vehicle on behalf of a third party and thus were selling only the title held by that third party. We therefore conclude that plaintiff met its burden of establishing its entitlement to judgment as a matter of law on liability with respect to the first three causes of action.

We further conclude that defendants failed to raise a triable issue of fact with respect to those three causes of action. The warranty exemption set forth in UCC 2-316 (3) (b) by its terms relates to the warranties of merchantability and fitness referenced in UCC 2-316 (2) and does not govern the warranty of title (see UCC 2-312, Official Comment, at 270; see generally *B & F Prod. Dev., Inc. v Fasst Prods. LLC*, 22 Misc 3d 1107[A], 2009 NY Slip Op 50063[U], \*9).

Defendants further contend that the court erred to the extent that it granted those parts of the cross motion seeking partial summary judgment on liability with respect to the first three causes of action insofar as they are asserted against Lippman in his individual capacity. However, the court did not specifically address the liability of Lippman in his individual capacity with respect to those causes of action, and it is well established that the court's failure to issue an express ruling is deemed a denial thereof (see *Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864). In any event, the evidence in the record before us establishes that Lippman entered into the contract only in his corporate capacity and that the sale of the stolen vehicle was conducted as part of the normal course of defendants' business (see *Noel v L & M Holding Corp.*, 35 AD3d 681; *Gordon v Teramo & Co.*, 308 AD2d 432).

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

1656

CA 08-02179

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

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PATRICIA A. MAZZONI, KARL B. ELLIOTT  
AND JOANNE E. ELLIOTT,  
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

MEMORANDUM AND ORDER

VILLAGE OF SENECA FALLS, DEFENDANT-RESPONDENT,  
SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY  
AND FINGER LAKES RAILWAY CORP.,  
DEFENDANTS-RESPONDENTS-APPELLANTS.

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THE AYERS LAW FIRM, PLLC, PALATINE BRIDGE (KENNETH L. AYERS OF  
COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

LYNCH LAW OFFICE, SYRACUSE (THOMAS J. LYNCH OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (DAVID M. TANG OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS-APPELLANTS.

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Appeal and cross appeal from an order of the Supreme Court,  
Seneca County (W. Patrick Falvey, A.J.), entered September 26, 2008.  
The order, inter alia, denied the motion of plaintiffs for partial  
summary judgment.

It is hereby ORDERED that the order so appealed from is  
unanimously modified on the law by vacating the last sentence of the  
third numbered determination, by vacating the fifth numbered  
determination insofar as it applies to plaintiff Patricia A. Mazzoni,  
and by vacating the seventh numbered determination in part and  
reinstating the causes of action for nuisance, ejection, trespass,  
and despoliation with respect to plaintiff Patricia A. Mazzoni's  
alleged adverse possession of the property in question and reinstating  
the causes of action for prescriptive easement and implied easement  
and as modified the order is affirmed without costs.

Memorandum: Plaintiff Patricia A. Mazzoni and plaintiffs Karl B.  
Elliott and Joanne E. Elliott each commenced an action against  
defendant Village of Seneca Falls (Village) and defendants Seneca  
County Industrial Development Agency and Finger Lakes Railway Corp.  
(collectively, Railroad defendants), and those actions thereafter were  
consolidated. Mazzoni sought, inter alia, to establish her ownership  
by adverse possession of certain disputed property in the Village  
(hereafter, Mazzoni disputed property), the largest parcel of which is

"relocated Dey Street." The Elliotts sought, inter alia, to establish their ownership by adverse possession of a portion of property known as "original Dey Street." We note at the outset that four of the issues before us on appeal concern only Mazzoni.

We agree with Mazzoni that Supreme Court erred in determining, as part of its fifth numbered determination, that as a matter of law she had no right to relocated Dey Street "beyond that of the general public." We further conclude, however, that the court properly denied that part of plaintiffs' motion for partial summary judgment on Mazzoni's second cause of action, seeking title to the Mazzoni disputed property by adverse possession. By her own submissions in support of the motion, Mazzoni raised issues of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Pursuant to RPAPL article 15, Mazzoni has an affirmative duty to demonstrate that title lies with her, and she failed to meet that duty because, as the Village correctly contends, she " 'merely [pointed] to weaknesses in [the Village's] title' " (*Crawford v Town of Huntington*, 299 AD2d 446, 447, *lv denied* 99 NY2d 507). Moreover, under the version of the RPAPL in effect when Mazzoni commenced this action, where the claim of adverse possession is "not based upon a written instrument[, the possessor is required to] show that the parcel was either 'usually cultivated or improved' (RPAPL 522 [1]) or 'protected by a substantial inclosure' (RPAPL 522 [2])" (*Qualben v Aiello*, 53 AD3d 604, 605). We again conclude that, by her own submissions, Mazzoni raised an issue of fact concerning her entitlement to partial summary judgment on her adverse possession cause of action based on the "usually cultivated or improved" ground, excluding that portion of the property used and maintained by the Railroad defendants and a subsurface drainage pipe maintained by the Village (*see generally Frank v Fortuna Energy, Inc.*, 49 AD3d 1294).

Contrary to defendants' contention, however, we further conclude that Mazzoni's adverse possession cause of action is not precluded as a matter of law by governmental immunity. With respect to the Village, it has not established as a matter of law what interest, if any, it has in the Mazzoni disputed property, with the exception of the subsurface drainage pipe (*see generally Starnier Tree Serv. Co. v City of New Rochelle*, 271 AD2d 681). With respect to the Railroad defendants, the doctrine of adverse possession may be used against them to acquire title to property owned by a railroad (*see Harrison v New York Cent. R.R. Co.*, 255 App Div 183, 188, *affd* 281 NY 653). Thus, based on our discussion herein, we conclude that the court's fifth numbered determination must be vacated insofar as it applies to Mazzoni, and we modify the order accordingly.

In light of our determination that there are issues of fact concerning Mazzoni's ownership of the Mazzoni disputed property, we conclude that the court erred in dismissing her causes of action for nuisance, ejection, trespass, and despoliation with respect to her alleged adverse possession of the Mazzoni disputed property. We further conclude that on the record before us there are issues of fact with respect to that property concerning her alternative causes of action for a prescriptive easement (*see generally Walsh v Ellis*, 64

AD3d 702, 705) and an implied easement (*see generally Monte v DiMarco*, 192 AD2d 1111, 1111-1112, *lv denied* 82 NY2d 653). Thus, the court's seventh numbered determination must be vacated in part, and we further modify the order accordingly.

We agree in part with the Railroad defendants on their cross appeal that the court erred in determining that they "do not have fee title, but merely an easement" over part of original Dey Street. Rather, we conclude on this record that there is an issue of fact whether the Railroad defendants have ownership rights to a portion of original Dey Street. Thus, the last sentence of the court's third numbered determination is vacated, and we further modify the order accordingly.

We have considered the remaining contention of the Railroad defendants concerning their request for costs against the Elliotts and conclude that it is without merit.

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

1657

CA 09-01356

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

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KRISTIN LUPIEN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GORDON LUPIEN, JR., DEFENDANT-RESPONDENT.

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SCHELL & SCHELL, P.C., FAIRPORT (GEORGE A. SCHELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KAREN SMITH CALLANAN, ROCHESTER, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Joanne M. Winslow, J.), entered April 13, 2009 in a divorce action. The order denied the motion of plaintiff seeking an order determining that the parties' premarital agreement is not valid and enforceable as an opting out agreement pursuant to Domestic Relations Law § 236 (B) (3).

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

Memorandum: Supreme Court properly denied plaintiff's motion in this divorce action seeking an order determining that the parties' premarital agreement is not valid and enforceable as an opting out agreement pursuant to Domestic Relations Law § 236 (B) (3). The premarital agreement, which was signed by the parties in Massachusetts at a time when both parties resided there, contains a choice of law clause providing that "[t]he validity and construction of this Agreement shall be determined in accordance with the laws of the Commonwealth of Massachusetts." It is well settled that courts will enforce a choice of law clause " 'so long as the chosen law bears a reasonable relationship to the parties or the transaction' " (*Friedman v Roman*, 65 AD3d 1187, 1188, quoting *Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629). "[G]iven the 'strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements' " (*Van Kipnis v Van Kipnis*, 11 NY3d 573, 577, quoting *Bloomfield v Bloomfield*, 97 NY2d 188, 193 [internal quotation marks omitted]), we see no reason to disregard the parties' intent to apply the law of Massachusetts, the state in which the parties resided when they signed the agreement and the state in which they signed it (*see Friedman*, 65 AD3d at 1188; *see generally Lederman v Lederman*, 203 AD2d 182). Finally, insofar as the statement of the court "that the terms of the agreement seem clear and reasonable" may be deemed to be a determination that the terms of the agreement "were fair and reasonable at the time of the making of the agreement and are

not unconscionable" (Domestic Relations Law § 236 [B] [3]), we note that the statute expressly provides that such a determination is to be made "at the time of entry of final judgment" (*id.*), and thus such a determination is not to be made at this juncture of the litigation.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1658

CA 09-00534

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

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EUGENE TAILLIE, ET AL., PLAINTIFFS,  
AND KEVIN TAILLIE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ROCHESTER GAS AND ELECTRIC CORPORATION, AND  
R.E. GINNA NUCLEAR POWER PLANT LLC,  
DEFENDANTS-RESPONDENTS.

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CHRISTINA A. AGOLA, ATTORNEYS AND COUNSELORS AT LAW, PLLC, ROCHESTER  
(JASON LITTLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (DAVID L. COOK OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered May 23, 2008. The order granted defendants' motion for summary judgment.

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 had acquired title to a portion of defendants' property by adverse possession. Contrary to the contention of Kevin Taillie (plaintiff), Supreme Court properly granted defendants' motion for summary judgment dismissing the remaining cause of action, seeking title to the property by adverse possession. The court previously had granted those parts of a prior motion by defendants that sought summary judgment dismissing the remaining causes of action.

Where, as here, "the entry upon [the property] has been by permission or under some right or authority derived from the owner[s], adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor[s] thereafter [have] assumed the attitude of hostility to any right in the real owner . . . , for if the first possession is by permission it is presumed to so continue until the contrary appears" (*Hinkley v State of New York*, 234 NY 309, 316-317; see *Gallea v Hess Realty Corp.*, 128 AD2d 274, 275-276, *affd* 71 NY2d 999; *Ropitzky v Hungerford*, 27 AD3d 1031, 1031-1032). Here, defendants met their burden on the motion by establishing as a matter of law that two of the five elements of adverse possession were not present, i.e., that

plaintiff's possession was not hostile and under a claim of right, nor did it continue for the requisite 10 years (see *Walling v Przybylo*, 7 NY3d 228, 232). We reject the contention of plaintiff that he raised a triable issue of fact in opposition to the motion by submitting an affidavit in which he asserted that he offered to purchase the property merely to avoid litigation and that he took other actions demonstrating that his possession of the property was hostile and under a claim of right. The majority of those allegations concern actions that fall outside of the relevant 10-year period, and the remaining allegations are merely " 'an attempt to avoid the consequences of [plaintiff's] prior deposition testimony by raising feigned issues of fact' " (*Martin v Savage*, 299 AD2d 903, 904; see *Richter v Collier*, 5 AD3d 1003).

Plaintiff further contends that the motion should have been denied in view of the law of the case doctrine, by virtue of the fact that the issues raised were decided when that part of defendants' prior motion with respect to the adverse possession cause of action was denied. We reject that contention, particularly because defendants' instant motion was based in part on plaintiff's deposition testimony that was not elicited until after the entry of the prior order (see *Hook v Village of Ellenville*, 46 AD3d 1318, 1319 n; cf. *Estate of Sassa v Alfieri*, 19 AD3d 361). In addition, although we are cognizant of "the rule discouraging successive summary judgment motions" (*Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 12 AD3d 1059, 1060), we conclude that "there was sufficient cause for defendant[s'] present motion" (*Welch Foods v Wilson*, 277 AD2d 882, 883).

We have considered plaintiff's remaining contention and conclude that it is without merit.

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

**1659**

**CA 08-01932**

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

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IN THE MATTER OF GUY E. GOSIER, JULIE E. GOSIER, DAVID N. BOURQUIN, JEANINE E. BOURQUIN, CHARLES B. KINGSLEY, LAWRENCE E. COMINS, JANICE COMINS, CHARLES W. MOUNT, CHARLES A. MUNK AND DAWN M. MUNK, PETITIONERS-RESPONDENTS,

V

OPINION AND ORDER

SCOTT G. AUBERTINE, MICHAEL P. COUNTRYMAN, JAMES R. MADILL, WARREN A. JOHNSON, AND G. NORMAN SCHREIB, INDIVIDUALLY AND AS MEMBERS OF TOWN BOARD OF TOWN OF LYME, RESPONDENTS-APPELLANTS.

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HRABCHAK, GEBO & LANGONE, P.C., WATERTOWN (MARK G. GEBO OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

JAMES A. GOSIER, P.C., SYRACUSE (JAMES A. GOSIER OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), dated August 20, 2008 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Opinion by CENTRA, J.: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination rejecting a protest petition with respect to a proposed amendment to the Zoning Ordinance of the Town of Lyme (Zoning Ordinance). The narrow issue raised on this appeal is whether, under Town Law § 265 (1) (a), the signature of only one spouse with respect to property held as tenants by the entirety is sufficient for the property to be included in order to meet the 20% threshold required for a valid protest petition. We conclude that it is.

**FACTS AND PROCEDURAL HISTORY**

BP Wind sought to construct a wind energy facility located partially in the Town of Lyme (Town). The Town Planning Board drafted a proposed local law to amend the Zoning Ordinance to regulate wind

energy facilities, and the Town Board held hearings on the issue. Certain residents, including petitioners, were opposed to the local law based on their belief that it unduly restricted the development of wind energy facilities by, inter alia, requiring excessive setback requirements. Those residents signed the protest petition at issue with respect to the enactment of the local law and submitted it to the Town Board. According to the protest petition, those residents were property owners of at least 20% of the property included in the proposed local law. The Town's Office of Assessment reviewed the petition and, in its report, noted that the Town consisted of 35,920 acres, and that 20% of the total area would be 7,184 acres. The Office of Assessment concluded that the petition included 5,301.61 "valid acres" and 4,308.56 "invalid acres" and that the majority of the signatures relating to the "invalid acres" were themselves invalid because "[n]ot all owners of record on tax roll signed [the] petition." The Town Board reviewed the report of the Office of Assessment and agreed that the protest petition fell short of the minimum required number of signatures. The Town Board then passed the local law by a vote of 3 to 2.

As noted, petitioners commenced this proceeding seeking to annul the determination "rejecting or otherwise denying" the protest petition and, in their answer, respondents sought to dismiss the CPLR article 78 petition. In granting the CPLR article 78 petition, Supreme Court determined that the protest petition was valid, that the determination was arbitrary and capricious and that the local law was invalid and void because it was adopted by a vote of less than a three-fourths majority. We conclude that the judgment should be affirmed.

#### DISCUSSION

Town Law § 265 provides as follows:

"1. Such regulations, restrictions and boundaries [contained in a Town's zoning law] may from time to time be amended. Such amendment shall be effected by a simple majority vote of the town board, except that any such amendment shall require the approval of at least three-fourths of the members of the town board in the event such amendment is the subject of a written protest, presented to the town board and signed by:

(a) the owners of [20%] or more of the area of land included in such proposed change . . . ."

Petitioners contend that the majority of the signatures on the protest petition that were not counted in determining the number of "valid acres" were signatures of only one spouse of property held as tenants by the entirety and that, had those signatures been counted, a supermajority vote of the Town Board would have been required. We agree with the court that the Town Board should have counted those signatures and that, because there was no supermajority vote of the

Town Board, its determination adopting the local law must be annulled.

Town Law § 265 does not define "owners," nor is there any case law interpreting subdivision (1) (a) of the statute. The Court of Appeals, however, has interpreted a similar provision under section 191 of the Town Law (see *Matter of Reister v Town Bd. of Town of Fleming*, 18 NY2d 92, 94). In that case, "[t]he assessment roll showed only the name of the husbands as the owners of property . . . when the property was in fact owned by both husbands and wives as tenants by the entirety," and the petition in that case, seeking the establishment of a water district, was signed only by the husbands (*id.*). The Court considered "whether, when the assessment roll lists only one tenant by the entirety as the owner, such tenant's signature on the petition is sufficient to vote the entire valuation" (*id.* at 95). The Court concluded that it was, considering the nature of a tenancy by the entirety. As the Court wrote, the "salient characteristic [of a tenancy by the entirety] is the unique relationship between a husband and his wife each of whom is seized of the whole and not of any undivided portion of the estate" such that "both and each own the entire fee" (*id.*; see generally *Matter of Violi*, 65 NY2d 392, 395; *Stelz v Shreck*, 128 NY 263, 266).

We acknowledge that *Reister* is distinguishable from this case because, in *Reister*, only one spouse was listed on the assessment roll while, here, both spouses were listed on the assessment roll. We nevertheless conclude that the same reasoning applies, and thus that it is sufficient to have the signature of only one spouse in order to consider the entire property for the purposes of Town Law § 265 (1) (a). We note that our holding is consistent with an opinion of the Attorney General interpreting a similar provision under the Village Law (see 1987 Ops Atty Gen No. 87-85 ["Because a joint tenant has a full, undivided interest in the property, a vote for a challenge . . . would count for the entire parcel of land and not some fraction based on the number of joint tenants"]; see also 1989 Ops Atty Gen No. 89-17).

Respondents contend that it would be unfair for one spouse to bind the other and effectively disenfranchise half of the owners of properties held as tenants by the entirety. We reject that contention. Indeed, it would be similarly unfair for one spouse to withhold his or her consent to the signing of the petition and thereby prevent any of the property from being included in the protest petition. Based on the nature of property held as tenants by the entirety, we believe that it is sufficient for only one spouse to sign the petition. If the Legislature deems it appropriate to define "owners" as all of the record owners of the property, it may certainly revise the statute to do so.

Accordingly, we conclude that the judgment should be affirmed.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1660**

**CA 08-02613**

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

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THOMAS FILIACI, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JERI-LYNN FILIACI, DEFENDANT-RESPONDENT.

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ANGELO T. CALLERI, P.C., ROCHESTER (ANGELO T. CALLERI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JAMES J. PIAMPIANO, ROCHESTER, FOR DEFENDANT-RESPONDENT.

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Appeal from a supplemental judgment of the Supreme Court, Monroe County (David D. Egan, J.), entered September 22, 2008 in a divorce action. The supplemental judgment, among other things, awarded defendant maintenance for a certain period.

It is hereby ORDERED that the supplemental judgment so appealed from is unanimously modified on the law by providing in subdivision (D) of the 10th decretal paragraph that plaintiff's proportionate percentage of combined parental income is 87.97% and defendant's proportionate percentage of combined parental income is 12.03% and in subdivision (E) of that decretal paragraph that plaintiff's child support obligation is \$16,879.24 per year or \$324.60 per week, by providing in the 11th decretal paragraph that plaintiff shall pay child support to defendant in the amount of \$324.60 per week, by providing in the 15th decretal paragraph that plaintiff's pro rata share of the uninsured health care expenses of each child is 87.97% and defendant's pro rata share of the uninsured health care expenses of each child is 12.03%, by providing in the 17th decretal paragraph that defendant shall be entitled to maintenance for a period of six years commencing October 24, 2007, until the death of either party, or until defendant's valid or invalid marriage, by vacating the amounts awarded for attorney's fees and expenses in the 25th and 26th decretal paragraphs, and by vacating the interim amounts awarded for fees and expenses to defendant's attorney, the Law Guardian and the court reporter and as modified the supplemental judgment is affirmed without costs, and the matter is remitted to Supreme Court, Monroe County, for a hearing in accordance with the following Memorandum: Plaintiff appeals from a supplemental judgment of divorce that directed him to pay defendant the sum of \$332.09 per week in child support and the sum of \$300 per week in maintenance for a period of six years. In addition, plaintiff was directed to pay defendant a total of \$26,264, representing defendant's one-half share in the proceeds from the sale of stock, the cost of computer training programs and the parties' 2006

income tax refunds. Defendant also received an award of attorney's fees and plaintiff was held in contempt of court for his failure to pay maintenance pursuant to an interim order. We reject plaintiff's contention that Supreme Court erred in imputing income of \$90,000 per year to plaintiff and \$10,000 per year to defendant in determining plaintiff's child support obligation. The court's determination was based upon the parties' employment histories and, "[i]n determining a party's child support obligation, 'a court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential'" (*DeVries v DeVries*, 35 AD3d 794, 795; see *Rosenberg v Rosenberg*, 44 AD3d 1022, 1025; *Spreitzer v Spreitzer*, 40 AD3d 840, 842). We agree with plaintiff, however, that the court erred in calculating his child support obligation based on pro rata shares of 90% for plaintiff and 10% for defendant. The basic child support obligation is calculated by multiplying "the combined parental income . . . by the appropriate child support percentage and . . . pror[at]ing such amount] in the same proportion as each parent's income is to the combined parental income" (Domestic Relations Law § 240 [1-b] [c] [2]). Thus, plaintiff's actual pro rata share is 87.97%, and defendant's pro rata share is 12.03%, resulting in a child support award to defendant of \$324.60 per week. Because the same pro rata shares are applicable to uninsured health care expenses (see § 240 [1-b] [c] [former (5)]; *Linda R.H. v Richard E.H.*, 205 AD2d 498, 501), the court also erred in directing plaintiff to pay 90% of the uninsured health care expenses for the children. We therefore modify the supplemental judgment accordingly.

We reject plaintiff's further contention that the court abused its discretion in awarding defendant maintenance for a period of six years. Rather, the court should have provided that defendant is entitled to maintenance for a period of six years, until the death of either party, or until defendant's valid or invalid marriage (see Domestic Relations Law § 236 [B] [1] [a]; [6] [c]; *McLoughlin v McLoughlin*, 63 AD3d 1017, 1018; *Haines v Haines*, 44 AD3d 901, 903). We therefore further modify the supplemental judgment accordingly.

We conclude that the court properly awarded defendant one half of the proceeds from the sale of certain stock and one half of the costs of the computer training programs purchased by plaintiff. The record does not support plaintiff's contention that the stock and computer programs were purchased with funds from plaintiff's separate property. The court also did not abuse its discretion in awarding defendant one half of the parties' 2006 federal and state income tax refunds.

We further agree with plaintiff, however, that the court erred in directing him to pay defendant's attorney's fees and expenses in its interim orders and in the supplemental judgment. The court issued an interim order on May 15, 2007 that, inter alia, directed plaintiff to pay the Law Guardian a retainer of \$1,000 and defendant's attorney the sum of \$4,000 from an escrow fund. The court issued a second order on October 24, 2007 that, inter alia, directed plaintiff to pay defendant's attorney the sum of \$6,972.53 and to pay the court reporter deposition fees in the sum of \$1,451.60 from the escrow fund.

The court issued a third order on November 30, 2007 that directed plaintiff to pay an additional \$2,800 to the Law Guardian from the escrow fund. The supplemental judgment directed plaintiff to pay defendant's attorney the sum of \$8,203.05 from the escrow fund, as well as an additional sum of \$13,206.05. The three orders and supplemental judgment are not supported by affidavits from which the court could "determine the nature, quality and reasonableness of the services rendered" (*Cooper v Cooper*, 179 AD2d 1035, 1036; see *Mulcahy v Mulcahy*, 170 AD2d 587, 588). Although defendant's attorney submitted an affidavit in support of defendant's order to show cause seeking, inter alia, the attorney's fees awarded in the May 15, 2007 interim order, that affidavit merely alleged in a conclusory manner the total numbers of hours that the attorney had expended to date, and defendant failed to submit any other affidavits concerning attorney's fees. We therefore further modify the supplemental judgment accordingly, and we remit the matter to Supreme Court for a hearing to determine the reasonable amount of fees and expenses to be awarded to defendant's attorney, the Law Guardian and the court reporter (see *Stanley v Hain*, 38 AD3d 1205, 1207).

Finally, plaintiff contends that the court erred in holding him in contempt for failing to comply with an interim maintenance order because the court failed to comply with the procedural requirements of Judiciary Law § 756, as mandated by Domestic Relations Law § 245. We reject that contention. Domestic Relations Law § 245 is applicable only where contempt is sought as a means of enforcing a court order, and that is not the case here. Rather, the court made a finding of criminal contempt pursuant to Judiciary Law § 750 based on defendant's willful failure to pay maintenance in violation of an interim order, and the court imposed no sanction for that contempt.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1661

CA 09-01130

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

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CHRISTIAN DUQUIN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ANDREW CHAMELI, DAWN CHAMELI, JAMES CHAMELI,  
DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANT.

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O'BRIEN BOYD, P.C., WILLIAMSVILLE (CHRISTOPHER J. O'BRIEN OF COUNSEL),  
FOR PLAINTIFF-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (NICOLE B. PALMERTON OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered August 26, 2008 in a personal injury action. The order, among other things, denied plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion and reinstating the amended complaint against defendants Andrew Chameli, Dawn Chameli and James Chameli and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for an eye injury he sustained when he was struck by a paintball pellet. Plaintiff moved for partial summary judgment against defendants Andrew Chameli and Dawn Chameli on the issue of liability, and the Chameli defendants (hereafter, defendants) cross-moved for summary judgment dismissing the amended complaint against them based on the doctrine of primary assumption of risk. Supreme Court properly denied the motion but erred in granting the cross motion, and we therefore modify the order accordingly. "[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484; see *Turcotte v Fell*, 68 NY2d 432, 439). To meet their burden, however, defendants were required to establish both that the risk of eye injury was inherent in the sport of paintball, and that plaintiff was aware of that risk (see *Cook v Komorowski*, 300 AD2d 1040). Here, plaintiff testified at his deposition that, prior to the day of his injury, he had never used a paintball gun and was unaware of the risk of injury resulting from the

lack of eye protection. He further testified, however, that "[b]lack in 2002" he understood that a face mask or goggles were needed to protect paintball participants from eye injury. It is undisputed that the accident occurred on March 8, 2002, and thus it is unclear on the record before us whether plaintiff's understanding of the risk predated the accident. Thus, defendants failed to meet their burden of establishing their entitlement to judgment as a matter of law (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1662**

**CA 09-01218**

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

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BEVERLY A. BLAIR, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DONNA S. KELLY, AS EXECUTRIX OF THE  
ESTATE OF JOSEPH R. KELLY, DECEASED, AND  
TRENCO, INC., DEFENDANTS-APPELLANTS.

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

BURGETT & ROBBINS, LLP, JAMESTOWN (LORI L. THIERFELDT OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Chautauqua County  
(James H. Dillon, J.), entered February 18, 2009 in a personal injury  
action. The order, inter alia, directed the disclosure of certain  
medical records of Joseph R. Kelly.

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

Memorandum: Defendants appeal from an order that, inter alia,  
granted that part of plaintiff's motion to compel disclosure of  
certain medical records of Joseph R. Kelly (decedent). Although we  
agree with plaintiff that decedent's medical condition at the time of  
the accident is " 'in controversy' within the meaning of CPLR 3121  
(a)" (*Dillenbeck v Hess*, 73 NY2d 278, 286; see also *Koump v Smith*, 25  
NY2d 287), we further conclude that those records are exempt from  
disclosure inasmuch as defendant Donna S. Kelly, as executrix of  
decedent's estate, did not waive the physician-patient privilege  
"either by way of counterclaim or as a defense to the plaintiff's  
claim" (*Koump*, 25 NY2d at 295; see *Dillenbeck*, 73 NY2d at 278). We  
therefore reverse the order.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1663**

**CA 09-01457**

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

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IN THE MATTER OF BENDERSON DEVELOPMENT  
COMPANY, LLC, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF CITY OF UTICA,  
RESPONDENT,  
AND KESSEL BRENT CORPORATION,  
RESPONDENT-APPELLANT.

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RICHARD E. KAPLAN, UTICA, FOR RESPONDENT-APPELLANT KESSEL BRENT  
CORPORATION.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JOHN J. HENRY OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered November 24, 2008 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Oneida County, for further proceedings on the petition in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Zoning Board of Appeals of the City of Utica (ZBA) approving "the request for the appeal of the decision of the Planning Board's Preliminary Site Plan approval" and directing petitioner to submit a new preliminary site plan. In its decision, Supreme Court stated that it "will grant the petition to the extent that the determination of the [ZBA] to require the petitioner to submit additional plans or new plans is annulled as being arbitrary and capricious; and otherwise, the petition is denied." We note that at the outset that, although the judgment conflicts with the decision, the decision controls (see *Matter of Edward V.*, 204 AD2d 1060, 1061; see also *Gui's Lbr. & Home Ctr., Inc. v Mader Constr. Co., Inc.*, 13 AD3d 1096, 1097, lv dismissed 5 NY3d 842; *Matter of Calm Lake Dev. v Town Bd. of Town of Farmington*, 213 AD2d 979, 980). Here, however, the decision itself is internally inconsistent inasmuch as the sole basis for the court's determination was the failure of respondent Kessel Brent Corporation (Kessel Brent) to comply with certain procedural requirements in appealing the determination of the City of Utica Planning Board to the ZBA, thereby rendering the ZBA's

determination arbitrary and capricious. Such a failure by Kessel Brent would only justify granting the petition, rather than denying it in part while at the same time annulling the requirement that a new site plan be submitted.

Furthermore, the evidence in the record does not support the sole basis for the court's determination. In its decision, the court concluded that the determination of the ZBA was arbitrary and capricious because it failed to follow the procedural requirements in General City Law § 81-a concerning hearings, notice and timeliness of decisions. The ZBA was required to decide the appeal within 62 days unless "extended by mutual consent of the applicant [here, Kessel Brent] and the" ZBA (§ 81-a [8]), and the ZBA and Kessel Brent were required to meet certain other procedural requirements concerning the filing and consideration of the appeal from the Planning Board's determination (see e.g. Utica City Code §§ 2-29-101, 2-29-108, 2-29-571 [3]). The only relevant evidence in the record with respect to the issue of consent establishes that Kessel Brent consented to the delay in determining the appeal, but there is no competent evidence in the record concerning whether the other procedural requirements were met. Moreover, the court did not explore the need for review under article 8 of the Environmental Conservation Law (State Environmental Quality Review Act), or the other issues raised in the petition. We note that, although this Court may make its own findings, here the court decided the petition on procedural grounds without reaching the merits and the record is insufficient to enable us to do so. We therefore reverse the judgment and remit the matter to Supreme Court for further proceedings on the petition consistent with our decision.

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1665

**KA 08-02482**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DEVIN M. JOCK, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Orleans County Court (Mark H. Dadd, J.), rendered November 5, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), the sole contention of defendant is that County Court abused its discretion in denying his request for youthful offender status. We reject that contention (*see People v Smith*, 286 AD2d 878, *lv denied* 98 NY2d 641). It is well established that the decision whether to grant youthful offender status "rests within the sound discretion of the court and depends upon all the attending facts and circumstances of the case" (*People v Shrubbsall*, 167 AD2d 929, 930). We decline to grant the further request of defendant that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*cf. id.* at 930-931).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

1666

**KA 06-03138**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KELLY A. SWANK, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered August 8, 2006. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated, a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [2]; § 1193 [1] [c] [former (i)]). Defendant contends that her plea was not voluntarily, knowingly, and intelligently entered because Supreme Court failed to address her prior conviction of driving while intoxicated during the plea colloquy, and thus her conviction should be reduced to a misdemeanor. As defendant correctly concedes, however, she failed to preserve that contention for our review (*see generally People v Jenkins*, 37 AD3d 1087, *lv denied* 8 NY3d 946; *People v Gradia*, 28 AD3d 1206, *lv denied* 7 NY3d 756). In any event, defendant's contention lacks merit. The indictment charged defendant with two counts of felony driving while intoxicated, and the special information that accompanied the indictment indicated, in compliance with CPL 200.60 (1) and (2), that defendant had previously been convicted of driving while intoxicated. We thus conclude on the record before us that defendant was sufficiently apprised of the fact that she was being charged with felonies (*see People v Sanchez*, 55 AD3d 460, *lv denied* 11 NY3d 930; *cf. People v Young*, 46 AD2d 768), and that she was aware that she was pleading guilty to a felony rather than a misdemeanor (*see People v Genovese*, 45 AD2d 744). Indeed, the court indicated that defendant's plea was in full satisfaction of the indictment, thereby establishing that the plea "covered the felony DWI charges" (*Sanchez*, 55 AD3d at 460). Contrary to defendant's contention, neither the court nor

defendant was required to acknowledge her prior conviction during the plea colloquy. Although CPL 200.60 (3) provides that, "[a]fter commencement of the trial and before the close of the [P]eople's case, the court, in the absence of the jury, must arraign the defendant upon such special information, and must advise [the defendant] that he [or she] may admit the previous conviction alleged, deny it or remain mute," that section "is by its terms inapplicable in the context of a guilty plea" (*People v Dezimm*, 193 AD2d 976).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1672**

**CA 09-01360**

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

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IN THE MATTER OF VILLAGE OF LANCASTER  
AND MARK J. GEE, PETITIONERS-RESPONDENTS,

V

ORDER

COUNTY OF ERIE, ERIE COUNTY DEPARTMENT  
OF PERSONNEL, AND JOHN W. GREENAN,  
PERSONNEL COMMISSIONER OF ERIE COUNTY  
DEPARTMENT OF PERSONNEL,  
RESPONDENTS-APPELLANTS.

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CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (JEANNINE M. PURTELL OF  
COUNSEL), FOR RESPONDENTS-APPELLANTS.

BARTLO, HETTLER & WEISS, KENMORE (PAUL D. WEISS OF COUNSEL), FOR  
PETITIONERS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court,  
Erie County (John F. O'Donnell, J.), entered April 22, 2009 in a  
proceeding pursuant to CPLR article 78. The judgment granted the  
amended petition.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1673**

**CA 08-01865**

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

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IN THE MATTER OF TOWN OF SENNETT TOWN BOARD  
AND PAUL E. WEIMAN, JR., IN HIS OFFICIAL  
CAPACITY AS TOWN OF SENNETT CODE ENFORCEMENT  
OFFICER, PETITIONERS-RESPONDENTS,

V

ORDER

RYBACH & RIG PROPERTIES, LLC, ET AL.,  
RESPONDENTS,  
GREG RIGBY, RESPONDENT-APPELLANT,  
AND TOWN OF SENNETT ZONING BOARD OF APPEALS,  
RESPONDENT-RESPONDENT.

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GREG RIGBY, RESPONDENT-APPELLANT PRO SE.

CHENEY & BLAIR, LLP, SKANEATELES (DONALD J. CHENEY OF COUNSEL), FOR  
PETITIONERS-RESPONDENTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JOHN R. LANGEY OF COUNSEL),  
FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order and judgment) of the  
Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered July 14,  
2008 in a proceeding pursuant to CPLR article 78. The judgment,  
insofar as appealed from, denied the cross claim of respondents Rybach  
& Rig Properties, LLC, The East End Creamery, LLC, Greg Rigby, Mark  
Bachman and John Ryan.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1674**

**CA 09-00843**

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

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MARGARET ANN SAWICKI, AS VOLUNTARY  
ADMINISTRATOR FOR THE ESTATE OF JOHN  
JUZDOWSKI, DECEASED, PLAINTIFF-APPELLANT,

ORDER

V

TIMOTHY SPAICH, DEFENDANT-RESPONDENT.

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MICHAEL W. RICKARD, II, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

J. GRANT ZAJAS, ANGOLA, FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered June 20, 2008 in a contract action. The judgment, among other things, denied the motion of plaintiff for leave to renew her motion for summary judgment.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1679**

**CA 08-01973**

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

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LENO W. GEE, PLAINTIFF-APPELLANT,

V

ORDER

M & T BANK, MARK HOGAN, AND CITIBANK,  
DEFENDANTS-RESPONDENTS.

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LENO W. GEE, PLAINTIFF-APPELLANT PRO SE.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

---

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered September 10, 2008 in an action for, inter alia, breach of fiduciary duty. The order denied plaintiff's motion for summary judgment.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1691**

**CAF 09-00572**

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

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IN THE MATTER OF CARL A. GUTZMER,  
PETITIONER-APPELLANT,

V

ORDER

MYRIAM L. SANTINI, RESPONDENT-RESPONDENT.

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

OAK ORCHARD LEGAL SERVICES A DIVISION OF NEIGHBORHOOD LEGAL SERVICES,  
INC., BATAVIA (JOHN M. ZONITCH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

DEREK R. BROWNLEE, LAW GUARDIAN, BATAVIA, FOR CAILYN G.

---

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered July 15, 2008 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1692**

**CAF 08-02192**

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

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IN THE MATTER OF BARBARA A. BRAULT,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DEBORAH K. SMUGORZEWSKI, RESPONDENT-APPELLANT,  
ET AL., RESPONDENT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS OF  
COUNSEL), FOR RESPONDENT-APPELLANT.

JAMES S. HINMAN, ROCHESTER, FOR PETITIONER-RESPONDENT.

LORI ROBB MONAGHAN, LAW GUARDIAN, ROCHESTER, FOR NATHAN D.H.

---

Appeal from an order of the Family Court, Monroe County (Julie Anne Gordon, R.), entered September 19, 2008 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded custody of the subject child to petitioner.

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

Memorandum: Petitioner, the child's paternal grandmother, commenced this proceeding pursuant to Family Court Act article 6 seeking custody of her grandson. Respondent mother appeals from an order that, inter alia, awarded custody of the child to the grandmother. We reject the mother's sole contention on appeal that the Referee erred in determining that there were extraordinary circumstances, thus warranting a hearing to determine whether the best interests of the child would be served by an award of custody to a nonparent. Contrary to the contention of the mother, "there was sufficient evidence before the [Referee] to support [the] finding of extraordinary circumstances, including evidence of her chronic mental illness, unstable living situation, and a failure on her part to address the special needs of the subject child" (*Matter of Donohue v Donohue*, 44 AD3d 1042, 1043; see *Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351, lv denied 7 NY3d 717; cf. *Matter of Gale v Gray*, 39 AD3d 903).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1693**

**CAF 08-00899**

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

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IN THE MATTER OF RAUL R., JR.

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ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,                   MEMORANDUM AND ORDER  
PETITIONER-RESPONDENT;

CHALINA C., ALSO KNOWN AS CHALINA R.,  
RESPONDENT-APPELLANT.

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

THEODORE W. STENUF, LAW GUARDIAN, MINOA, FOR RAUL R., JR.

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Appeal from an order of the Family Court, Onondaga County  
(Michael L. Hanuszczak, J.), entered April 4, 2008 in a proceeding  
pursuant to Social Services Law § 384-b. The order, among other  
things, revoked a suspended judgment and terminated respondent's  
parental rights.

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

Memorandum: Respondent mother appeals from an order revoking a  
suspended judgment and terminating her parental rights with respect to  
her son on the ground of permanent neglect. Contrary to the mother's  
contention, petitioner established by a preponderance of the evidence  
that the mother violated several conditions of the suspended judgment  
and that termination of her parental rights was in the best interests  
of the child (*see Matter of Dennis A.*, 64 AD3d 1191, 1192; *Matter of  
Male M.*, 46 AD3d 471; *Matter of Aaron S.*, 15 AD3d 585).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1694**

**CA 09-01110**

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

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TOWN OF ONONDAGA BY DAVID COONS, AND DIANE COONS,  
MARK HARTNAGEL AND JOHN SHAMLIAN, CONSTITUTING  
THREE DISTRICT TAXPAYERS PURSUANT TO TOWN LAW  
§ 268 (2), PLAINTIFFS-APPELLANTS,

V

ORDER

MICHAEL GRIMM, MICHAEL GRIMM SERVICES, INC.,  
MICHAEL ROOT GRIMM, LLC, AND KAREN GRIMM, LLC,  
DEFENDANTS-RESPONDENTS.

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SCOTT F. CHATFIELD, MARIETTA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE  
(JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SARGENT & GILMORE, LLP, SYRACUSE (RICHARD H. SARGENT OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Onondaga County  
(Donald A. Greenwood, J.), entered November 7, 2008. The order, among  
other things, granted defendants' cross motion for summary judgment  
dismissing the complaint.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1697**

**CA 09-01400**

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

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DAREYA NATHAN, AN INFANT, BY HER PARENTS  
AND NATURAL GUARDIANS, DARYL NATHAN AND  
AKEYA DAVIS, AND DARYL NATHAN AND AKEYA  
DAVIS, PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

ROCHESTER HOUSING AUTHORITY,  
DEFENDANT-RESPONDENT.

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EDWIN ROBERT SCHULMAN, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

ERNEST D. SANTORO, ESQ., P.C., ROCHESTER (ERNEST D. SANTORO OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered February 6, 2009 in a personal injury action. The order denied the motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff daughter when she fell through the balusters of a railing in a building owned by defendant. Contrary to the contention of plaintiffs, Supreme Court properly denied their motion for partial summary judgment on the issue of liability. "Plaintiff[s'] expert[s] cited no authority, treatise, standard, building code, article or other corroborating evidence to support [their] assertion that good and accepted engineering and building safety practices called for the installation" of balusters with narrower gaps than those in the building in question (*Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 8-9). "The opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards has no probative force where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation" (*Wong v Goldbaum*, 23 AD3d 277, 279; see *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544). Plaintiffs thus failed to meet their initial burden on the motion, and we need not consider the sufficiency of defendant's opposing papers (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*,

64 NY2d 851, 853).

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1698**

**CA 09-01228**

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

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KELLY M. MULDOWNEY, PLAINTIFF-RESPONDENT,

V

ORDER

JEFFREY J. ROGOWSKI, DEFENDANT-APPELLANT,  
AND JOSEPH PALCZAK, DEFENDANT-RESPONDENT.

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LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (ALAN J. BEDENKO OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (TIFFANY M. KOPACZ OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 9, 2009 in a personal injury action. The order denied the motion of defendant Jeffrey J. Rogowski to dismiss the complaint and the cross claims against him.

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

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

**1700**

**CA 09-01553**

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

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AIR CHARTER TEAM, INC., PLAINTIFF-RESPONDENT,

V

ORDER

CATERING SPECIALISTS, LLC, DEFENDANT-APPELLANT.

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

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

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Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered July 15, 2009 in a breach of contract action. The order, inter alia, granted the motion of plaintiff to take the oral deposition of a nonparty.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on October 14, 2009,

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court

CALENDAR NO. (1132/08) KA 07-01663. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN MOSLEY, DEFENDANT-APPELLANT. -- Appeal dismissed upon stipulation. PRESENT: HURLBUTT, J.P., SMITH, CENTRA, GREEN, AND PINE, JJ. (Filed Dec. 30, 2009.)

MOTION NO. (283/01) KA 98-05448. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GREGORY HILL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, GREEN, AND PINE, JJ. (Filed Dec. 30, 2009.)

MOTION NO. (366/01) KA 99-05013. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DERRIC W. CLARK, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, GREEN, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

MOTION NO. (1659/01) KA 99-05058. -- THE PEOPLE OF THE STATE OF NEW YORK, V THOMAS MCFADDEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

MOTION NO. (1468/03) KA 00-02533. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLARENCE PRUDE, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., CENTRA, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

MOTION NO. (29/06) KA 04-00047. -- THE PEOPLE OF THE STATE OF NEW YORK,

**RESPONDENT, V DEXTER MASTOWSKI, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, GREEN, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (185/06) KA 04-02750. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES W. MADILL, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., GREEN, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (445/06) KA 05-00193. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD F. MILLS, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., SMITH, GREEN, AND PINE, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (646/07) KA 04-01772. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ADOLPH WRIGHT, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, GREEN, AND PINE, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (1104/07) KA 05-02034. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JERRY L. JOHNSON, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND GORSKI, JJ. (Filed Dec. 30, 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

or, in the alternative, leave to appeal to the Court of Appeals denied.

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, GREEN, AND PINE, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (27/08) KA 04-02128. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDREW FIGGINS, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis dismissed. PRESENT: HURLBUTT, J.P., SMITH, PERADOTTO, AND GREEN, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (1203/08) KA 07-02291. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID C. WILLIAMS, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise issues on direct appeal that would have resulted in reversal, specifically, in failing to argue that the warrantless search of defendant's residence and property was unlawful and that trial counsel was ineffective in failing to seek a remedy for an alleged *Rosario* violation. Upon our review of the trial court proceedings, we conclude that the issues may have merit. Therefore, the order of October 10, 2008 is vacated and this Court will consider the appeal de novo (see *People v LeFrois*, 151 AD2d 1046). Defendant is directed to perfect his appeal on or before March 1, 2010. PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (1377/08) CA 07-02389. -- JOSEPH GENTILE, PLAINTIFF-APPELLANT, V CAROL GENTILE, DEFENDANT-RESPONDENT. JOSEPH GENTILE, THIRD-PARTY PLAINTIFF-APPELLANT, V JOSEPH L. KILBRIDGE, ESQ. AND PETER J. FIORELLA,**

**JR., ESQ., THIRD-PARTY DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)** -- Motion for leave to appeal to the Court of Appeals and other relief denied.

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (1604/08) KA 03-01950. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD CHARLES BRINK, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, GREEN, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (739/09) CA 08-02607. -- ROBIN ADAIR, ET AL., PLAINTIFFS-RESPONDENTS, V MUNICIPAL UTILITY COMMISSION OF THE VILLAGE OF BATH, DOING BUSINESS AS BATH ELECTRIC, GAS AND WATER SYSTEMS, AND VILLAGE OF BATH, DEFENDANTS-APPELLANTS.** -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., FAHEY, CARNI, AND PINE, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (841/09) CA 08-01231. -- CHRISTOPHER OURSLER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JULIE OURSLER, DECEASED, PLAINTIFF-APPELLANT, V ROBERT E. BRENNAN, DEFENDANT-APPELLANT, AND MALBEAT, INC., DOING BUSINESS AS MALLWITZ'S ISLAND LANES, DEFENDANT-RESPONDENT.** -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, CARNI, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (859/09) KA 08-01165. -- THE PEOPLE OF THE STATE OF NEW YORK,**

**RESPONDENT, V STANLEY A. BROWN, DEFENDANT-APPELLANT.** -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND CENTRA, JJ. (Filed Dec. 30, 2009.)

**MOTION NOS. (987-988/09) CA 08-00195.** -- **JOSEPH GENTILE, PLAINTIFF-APPELLANT, V CAROL GENTILE, DEFENDANT-RESPONDENT.** (APPEAL NO. 1.) CA 08-02032. -- **JOSEPH GENTILE, PLAINTIFF-APPELLANT, V CAROL GENTILE, DEFENDANT-RESPONDENT.** (APPEAL NO. 2.) -- Motion for reargument, leave to appeal to Court of Appeals and other relief denied. PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (998/09) CA 08-01910.** -- **STANLEY A. GIZOWSKI, CLAIMANT-RESPONDENT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-APPELLANT-RESPONDENT.** (CLAIM NO. 112634.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (1006/09) KA 08-01751.** -- **THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES H. POWLESS, DEFENDANT-APPELLANT.** -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (1021/09) CA 08-01826.** -- **IN THE MATTER OF THE APPLICATION OF ARCELORMITTAL LACKAWANNA LLC, AND ARCELORMITTAL TECUMSEH REDEVELOPMENT**

INC., PETITIONERS-RESPONDENTS, V CITY OF LACKAWANNA, RESPONDENT-RESPONDENT, AND CITY OF LACKAWANNA SCHOOL DISTRICT, INTERVENOR-RESPONDENT-RESPONDENT. COUNTY OF ERIE, PROPOSED INTERVENOR-RESPONDENT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

MOTION NO. (1043/09) CA 08-02176. -- IN THE MATTER OF MANUFACTURERS AND TRADERS TRUST COMPANY (FORMERLY MERCHANTS NATIONAL BANK AND TRUST COMPANY OF SYRACUSE), A COTRUSTEE OF THE DAVID SMALL TRUST UNDER AGREEMENT DATED DECEMBER 28, 1938, PETITIONER-RESPONDENT-APPELLANT, TO RESIGN AS TRUSTEE AND FOR APPROVAL OF ITS ACCOUNTING. JOAN SMALL FANELLI, JEAN SMALL COFFMAN, JANE SMALL KLINCZAK, SHEILA SMALL ATWATER, JAMES D. SMALL, AND PATRICIA SMALL KELLETT, INDIVIDUALLY AND AS BENEFICIARIES OF THE TRUST OF DAVID SMALL, RESPONDENTS-APPELLANTS-RESPONDENTS. JOAN SMALL FANELLI, JEAN SMALL COFFMAN, JANE SMALL KLINCZAK, SHEILA SMALL ATWATER, JAMES D. SMALL, AND PATRICIA SMALL KELLETT, INDIVIDUALLY AND AS BENEFICIARIES OF THE TRUST OF DAVID SMALL, PLAINTIFFS-APPELLANTS-RESPONDENTS, V M&T BANK CORPORATION, AS TRUSTEE OF THE TRUST OF DAVID SMALL, DEFENDANT-RESPONDENT-APPELLANT. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND GREEN, JJ. (Filed Dec. 30, 2009.)

MOTION NO. (1069/09) TP 09-00361. -- IN THE MATTER OF MICHAEL MELENDEZ, PETITIONER, V JAMES L. BERBARY, SUPERINTENDENT, COLLINS CORRECTIONAL

**FACILITY, RESPONDENT.** -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

**MOTION NOS. (1073-1074/09) KAH 07-01507.** -- **THE PEOPLE OF THE STATE OF NEW YORK EX REL. ROBERT C. HINTON, JR., PETITIONER-APPELLANT, V HAROLD GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.**

**(APPEAL NO. 1.) KAH 07-01800.** -- **THE PEOPLE OF THE STATE OF NEW YORK EX REL. ROBERT C. HINTON, JR., PETITIONER-APPELLANT, V HAROLD GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.**

**(APPEAL NO. 2.)** -- Motion for reargument denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (1082/09) CA 09-00610.** -- **LEGACY DEVELOPMENT, PLAINTIFF-RESPONDENT, V VICTOR LIBERATORE AND V.V.M.M., LLC,**

**DEFENDANTS-APPELLANTS.** -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

**MOTION NO. (1089/09) CA 09-00250.** -- **KANSAS STATE BANK OF MANHATTAN, PLAINTIFF-RESPONDENT-APPELLANT, V HARRISVILLE VOLUNTEER FIRE DEPARTMENT, INC. AND DANKO EMERGENCY EQUIPMENT CO., DEFENDANTS-APPELLANTS-RESPONDENTS.**

-- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND GORSKI, JJ. (Filed Dec. 30,

2009.)

MOTION NO. (1136.1/09) KA 08-02244. -- THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT, V SAMMY L. SWIFT, DEFENDANT-RESPONDENT. -- Motion for reargument denied. PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ. (Filed Dec. 30, 2009.)

MOTION NOS. (1151-1152/09) CA 08-02263. -- JOHN T. NOTHNAGLE, INC., PLAINTIFF-RESPONDENT-APPELLANT, V PETER G. CHIARIELLO, ELMER'S BRIGHTON GARAGE, INC., DEFENDANTS-APPELLANTS-RESPONDENTS, JOHN F. NICASTRO, 1832-1840 MONROE AVE., LLC, AND 1848 MONROE AVE., LLC, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) CA 08-02264. -- JOHN T. NOTHNAGLE, INC., PLAINTIFF-RESPONDENT, V PETER G. CHIARIELLO, ELMER'S BRIGHTON GARAGE, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ. (Filed Dec. 30, 2009.)

MOTION NO. (1183/09) CA 09-00697. -- DAVID DALE, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF VIRGINIA DALE, DECEASED, PLAINTIFF-APPELLANT, V WALETTA GENTRY, DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND GREEN, JJ. (Filed Dec. 30, 2009.)

MOTION NO. (1438/09) CA 09-00787. -- KENNETH GORDON, ET AL.,  
PLAINTIFFS-APPELLANTS, V PRESBYTERY OF WESTERN NEW YORK AND PRESBYTERIAN  
CHURCH (U.S.A.), A CORPORATION, DEFENDANTS-RESPONDENTS. -- Motion for leave  
to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., SMITH,  
CARNI, AND PINE, JJ. (Filed Dec. 30, 2009.)

KAH 09-00082. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. WAYNE  
BARKSDALE, PETITIONER-APPELLANT, V SUPERINTENDENT, MOHAWK CORRECTIONAL  
FACILITY, AND NEW YORK STATE DIVISION OF PAROLE, RESPONDENTS-RESPONDENTS.  
-- Order unanimously affirmed without costs. Counsel's motion to be  
relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]).  
(Appeal from Order of Supreme Court, Oneida County, Bernadette Romano, J. -  
Habeas Corpus). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND PINE,  
JJ. (Filed Dec. 30, 2009.)

KAH 09-00115. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. LLOYD BRIGGS,  
PETITIONER-APPELLANT, V DEPARTMENT OF CORRECTIONAL SERVICES,  
RESPONDENT-RESPONDENT. -- Order unanimously affirmed without costs.  
Counsel's motion to be relieved of assignment granted (*see People v  
Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Supreme Court, Wyoming  
County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J.,  
CENTRA, FAHEY, CARNI, AND PINE, JJ. (Filed Dec. 30, 2009.)

KAH 08-01459. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. JUAN

**CANDELARIA, PETITIONER-APPELLANT, V ROBERT A. KIRKPATRICK, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.** -- Order unanimously affirmed without costs. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Supreme Court, Erie County, Christopher J. Burns, J. - Habeas Corpus).  
PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND PINE, JJ. (Filed Dec. 30, 2009.)

**KAH 09-00111.** -- **THE PEOPLE OF THE STATE OF NEW YORK EX REL. KEVIN GAMBLE, PETITIONER-APPELLANT, V DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT.** -- Order unanimously affirmed without costs. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND PINE, JJ. (Filed Dec. 30, 2009.)

**KA 08-01675 AND KA 08-01676.** -- **THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALVIN JACOBS, DEFENDANT-APPELLANT.** -- Judgments unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeals from Judgments of Erie County Court, Michael L. D'Amico, J. - Attempted Criminal Possession Controlled Substance, 4th Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND PINE, JJ. (Filed Dec. 30, 2009.)

**KAH 08-00804. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. GARNETT R. LEACOCK, PETITIONER-APPELLANT, V DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT.** -- Order unanimously affirmed without costs. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND PINE, JJ. (Filed Dec. 30, 2009.)

**KAH 08-00805. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. GARNETT R. LEACOCK, PETITIONER-APPELLANT, V DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT.** -- Appeal unanimously dismissed without costs (*see Hill v Goord*, 275 AD2d 492). Counsel's motion to be relieved of assignment granted. (Appeal from Order of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND PINE, JJ. (Filed Dec. 30, 2009.)

**KA 05-01800. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FELIX ORTIZ, 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, James R. Harvey, J. - Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND PINE, JJ. (Filed Dec. 30, 2009.)

**KA 08-00894. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSE A. SABASTRO, 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, Frederick G. Reed, J. - Criminal Sale Controlled Substance, 3rd Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND PINE, JJ. (Filed Dec. 30, 2009.)

**KA 04-01832. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DONALD SIGSBEE, DEFENDANT-APPELLANT.** -- Motion to dismiss granted. Memorandum: Appeal unanimously dismissed and matter remitted to Onondaga County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND CENTRA, JJ. (Filed Dec. 30, 2009.)