SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

June 16, 2000

HON. EUGENE F. PIGOTT, JR., PRESIDING JUSTICE

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. LEO F. HAYES

HON. DONALD J. WISNER

HON. ROBERT G. HURLBUTT

HON. HENRY J. SCUDDER

HON. L. PAUL KEHOE

HON. JOHN P. BALIO

HON. JOHN F. LAWTON, ASSOCIATE JUSTICES

CARL M. DARNALL, CLERK

(110) KA 99-5141. (Cayuga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JAYME CLEVELAND, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant appeals from a judgment convicting him 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 (Penal Law § 220.16 [1]). The conviction arose out of defendant's sale of cocaine to a police informant. There is no merit to defendant's contentions that the People failed to corroborate the informant's testimony, that the tape recording of the transactions between defendant and the informant was improperly admitted in evidence, and that the People failed to establish a sufficient foundation for admission of the cocaine in evidence.

Where, as here, an informant acts as an agent of police without the intent to commit a crime, he is not an accomplice whose testimony must be corroborated (*see, People v Cona*, 49 NY2d 26, 34; *People v Adams*, 185 AD2d 680, *lv denied* 80 NY2d 926; *People v Robinson*, 139 AD2d 925, *lv denied* 72 NY2d 865).

Whether a tape recording is sufficiently audible to warrant its admission in evidence is a matter for the exercise of the trial court's discretion (*see, People v Lubow*, 29 NY2d 58, 68; *People v Gandy*, 152 AD2d 909, *lv denied* 74 NY2d 896). A tape recording must be excluded from evidence only if it is so inaudible and indistinct that the jury would have to speculate concerning its contents (*see, Lauro v Bradley*, 265 AD2d 875; *People v Scarbrough*, 254 AD2d 824, *lv denied* 92 NY2d 1038). Although portions of the subject tape recording were inaudible, County Court did not err in admitting it in evidence (*see, People v Rivera*, 257 AD2d 172, 178, *affd* 94 NY2d 908; *People v Martino*, 244 AD2d 875, *lv denied* 92 NY2d 1035, 93 NY2d 855).

Various witnesses, including the officer who sent the drugs to the lab and received them back, as well as the chemist who tested the drugs at the lab, accounted for the identity and unchanged condition of the drugs based upon their appearance and the case number and other unique markings placed on the evidence bag. Such testimony established an adequate foundation for admission of the drugs in evidence (*see, People v Julian*, 41 NY2d 340, 342-343; *People v Parker*, 217 AD2d 946, *lv denied* 87 NY2d 849; *People v Casado*, 212 AD2d 1028, 1029, *lv denied* 85 NY2d 970). Any deficiencies in the chain of custody went to the weight, not the admissibility, of the evidence (*see, People v*

Hooks, 258 AD2d 954, *lv denied* 93 NY2d 972; *People v Casado, supra*, at 1029). (Appeal from Judgment of Cayuga County Court, Corning, J. - Criminal Sale Controlled Substance, 3rd Degree.) PRESENT: PINE, J. P., WISNER, HURLBUTT, BALIO AND LAWTON, JJ. (Filed June 16, 2000.)

(603) CA 99-860. (Monroe Co.) -- SPRING SHEET METAL & ROOFING CO., INC., PLAINTIFF-APPELLANT, V KOPPERS INDUSTRIES, INC., AND OWENS-CORNING, DEFENDANTS-RESPONDENTS. -- Order unanimously reversed on the law without costs, motions denied and complaint reinstated. Memorandum: In 1990 the owners and operators of the Techniplex Mall commenced an action seeking damages from plaintiff, a roofing subcontractor, for installing an allegedly defective roof (the *Techniplex* action). Plaintiff commenced a third-party action against the manufacturers of the roofing materials (defendants herein), seeking common-law indemnification. Plaintiff later amended the third-party complaint, withdrawing the claim for common-law indemnification and replacing it with a claim for contribution. Defendants moved to dismiss the third-party complaint on the ground that their alleged liability to plaintiff was based upon breach of contract and contribution was not available. Plaintiff cross-moved for leave to amend the third-party complaint to allege a cause of action for common-law indemnification. Supreme Court (Siragusa, J.) granted defendants' motions and denied plaintiff's cross motion. In its decision, the court expressed its intention not to deny plaintiff the right to seek indemnification in the future and stated that plaintiff "can choose to commence whatever action it deems appropriate if a recovery is had by Techniplex." The *Techniplex* action was settled in 1995. Plaintiff thereafter commenced the instant action seeking common-law indemnification for the amount it paid in the settlement.

Supreme Court erred in granting defendants' motions to dismiss the complaint on the ground of res judicata. "It is, of course, axiomatic that a party seeking to assert *res judicata* or claim preclusion must show the existence of a prior judgment on the merits" (*Miller Mfg. Co. v Zeiler,* 45 NY2d 956, 958). Defendants failed to meet that burden. In dismissing the third-party complaint for indemnification and denying leave to amend the third-party complaint in the *Techniplex* action, the court did not rule on the merits of plaintiff's proposed cause of action for common-law indemnification. Plaintiff's right to that relief has never been litigated, and the doctrine of res judicata "must not be allowed to operate to deprive a party of an actual

opportunity to be heard" (*Commissioners of State Ins. Fund v Low*, 3 NY2d 590, 595). Further, in its decision in the *Techniplex* action, the court expressly stated that plaintiff was not foreclosed from commencing a separate action for common-law indemnification. "Under these circumstances, it would be improper and unjust to prevent plaintiff from litigating" this action (*Miller Mfg. Co. v Zeiler, supra*, at 958; *see, City of New York v Caristo Constr. Corp.*, 62 NY2d 819, 820-821; *Buchholz-Hill Transp. Co. v Baxter*, 206 NY 173, 176-177).

We reject the alternative grounds for affirmance raised by defendant Owens-Corning (*see, Matter of American Dental Coop. v Attorney-General of State of N. Y.*, 127 AD2d 274, 279, n 3). Accepting the facts alleged in the complaint as true and according plaintiff the benefit of every favorable inference, we conclude that the complaint states a cause of action for common-law indemnification *(see, Leon v Martinez*, 84 NY2d 83, 87-88). (Appeal from Order of Supreme Court, Monroe County, Lunn, J. - Dismiss Pleading.) PRESENT: PIGOTT, JR., P. J., GREEN, WISNER AND SCUDDER, JJ. (Filed June 16, 2000.)

(615) CA 99-1277. (Erie Co.) -- ANGELLA R. PITCHURE, PLAINTIFF-RESPONDENT, V KANDEFER PLUMBING & HEATING AND BRIAN C. MARTIN, DEFENDANTS-APPELLANTS. -- Order reversed on the law without costs and motion denied. Memorandum: Plaintiff commenced this action to recover damages for personal injuries that she sustained when her stopped vehicle was struck from behind by a vehicle owned by defendant Kandefer Plumbing & Heating and driven by defendant Brian C. Martin. Supreme Court erred in granting plaintiff's motion for partial summary judgment on liability. It is well established that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle (*see, Diller v City of New York Police Dept.*, ___ AD2d ___ [decided Feb. 1, 2000]; *Baron v Murray*, ___ AD2d ___ [decided Jan. 24, 2000]; *see also, Downs v Toth*, 265 AD2d 925). The presumption of negligence imposes a duty of explanation with respect to the operation of the rear vehicle (*see, Levine v Taylor*, ___ AD2d ___ [decided Jan. 31, 2000], citing *Pfaffenbach v White Plains Express Corp.*, 17 NY2d 132, 135, and *Gambino v City of New York*, 205 AD2d 583). In order to rebut the presumption, the driver of the rear vehicle must submit a non-negligent explanation for the collision (*see, Diller v City of New York Police Dept., supra; Hanak v Jani*, 265 AD2d 453). Here, Martin submitted a non-negligent explanation for the

collision (*see, Hanak v Jani, supra*), and it is for the jury to determine whether he breached his duty to keep a proper lookout and maintain a reasonably safe rate of speed and distance.

All concur except Kehoe, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent and would affirm Supreme Court's order granting plaintiff's motion for partial summary judgment on liability. Defendant Brian C. Martin failed to offer a non-negligent explanation for the collision. Martin admits that he proceeded at 40 miles per hour over the hill despite his admitted inability to see traffic conditions on the other side. He also admits that he could not stop in time to avoid hitting plaintiff's car, the last in a line of 30 cars that had been brought safely to a stop in response to road construction. Under the circumstances, the court was warranted in concluding as a matter of law that Martin breached his duty to keep a proper lookout and maintain a reasonably safe rate of speed and distance, taking into account adverse road conditions (*see, Mitchell v Gonzalez,* ___ AD2d ___ [decided Feb. 17, 2000]; *Downs v Toth,* 265 AD2d 925; *Johnson v Phillips,* 261 AD2d 269, 271). (Appeal from Order of Supreme Court, Erie County, Whelan, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed May 31, 2000.)

(619) CA 99-1117. (Erie Co.) -- WAYNE E. SPONHOLZ AND THERESA R. SPONHOLZ, PLAINTIFFS-RESPONDENTS-APPELLANTS, V BENDERSON PROPERTY DEVELOPMENT, INC., BENDERSON DEVELOPMENT CORPORATION, BENDERSON DEVELOPMENT COMPANY, INC., 2525 WALDEN ASSOCIATES, INC., BUFFTECH, INC., AND DAVID BLUM, DEFENDANTS-APPELLANTS-RESPONDENTS. BENDERSON PROPERTY DEVELOPMENT, INC., ET AL., THIRD-PARTY PLAINTIFFS, V J.A. WIERTEL CONSTRUCTION, INC., THIRD-PARTY DEFENDANT-RESPONDENT. -- Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Wayne E. Sponholz (plaintiff) commenced this action seeking damages for injuries he allegedly sustained when the stairway he was using collapsed, causing him to fall 12 to 15 feet to the first floor. We previously concluded that defendants were entitled to summary judgment dismissing the Labor Law § 240 (1) claim because the stairway did not constitute a temporary statutory device within the meaning of that section (*Sponholz v Benderson Prop. Dev.,* 266 AD2d 815). We now conclude that triable issues of fact exist with respect to part of the Labor Law § 241 (6) claim and the Labor Law § 200 and common-law negligence claims.

With respect to Labor Law § 241 (6), we disagree with defendants that plaintiff is not a covered employee under that section because he was engaged in routine maintenance. Labor Law § 241 (6) "requires contractors and owners to provide 'reasonable and adequate protection and safety' to employees working in, and persons lawfully frequenting, '[a]ll areas in which construction, excavation or demolition work is being performed'" (*Jock v Fien*, 80 NY2d 965, 968). Plaintiff's employer was hired to inspect and, if necessary, to repair the air conditioning units in furtherance of the renovation of the building. Plaintiff inspected and repaired those air conditioning units before the renovation was complete, and thus his work was "necessary and incidental" to the renovation of the building (*Mosher v St. Joseph's Villa*, 184 AD2d 1000, 1002; *see generally, Shaheen v International Bus. Machs. Corp.*, 157 AD2d 429, 431-433).

Supreme Court erred in granting that part of defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claim with respect to the alleged violations of 12 NYCRR 23-3.2, concerning general requirements for demolition work, and 12 NYCRR 23-3.3, concerning demolition procedures. Contrary to the court's determination, there are triable issues of fact concerning the applicability of those regulations, including whether there was a partial dismantling of the building (*see*, 12 NYCRR 23-1.4 [b] [16] [defining "demolition work"]; *Gonzalez v Marine Midland Bank*, 259 AD2d 999, 1000), and whether the stairway was a "structure" (12 NYCRR 23-3.2 [b]) or a "weakened or deteriorated floor[] or wall[]" (12 NYCRR 23-3.3 [c]) that required stabilization. The court properly denied that part of defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claim with respect to the alleged violation of 12 NYCRR 23-1.7 (f). That regulation requires that stairways, ramps, runways, ladders, or other safe means of access be provided. There is a triable issue of fact whether defendants provided a safe stairway for plaintiff to use. Contrary to the contention of plaintiffs, they are not entitled to partial summary judgment on the Labor Law § 241 (6) claim with respect to any of those alleged violations.

The court further erred in denying that part of defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claim with respect to the alleged violation of 12 NYCRR 23-2.7. Plaintiffs may not rely upon 12 NYCRR 23-2.7 (e), which requires protective railings on stairways. The lack of safety railings was not a proximate cause of plaintiff's fall; it is undisputed

that plaintiff was injured because the stairway collapsed, not because he slipped or tripped on the stairway (*cf., Frank v Meadowlakes Dev. Corp.,* 256 AD2d 1141).

We agree with plaintiffs that the court erred in granting that part of defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims. Defendants contend that they are not liable because they did not supervise or control the demolition and renovation work, nor did they have actual or constructive notice of the alleged defect. There is a distinction, however, "between those cases in which the injury was caused by the defective condition of the premises and those in which the injury was the result of a defect not 'in the land itself but in the equipment or its operation' (*Nagel v Metzger*, 103 AD2d 1, 8)" (*Miller v Wilmorite, Inc.*, 231 AD2d 843). "In the latter case, [a] defendant is not liable [if] he exercised no supervisory control over the injury-producing work" (*Farrell v Okeic*, 266 AD2d 892). In the instant case, however, plaintiff alleges that his injury was caused by the unstable stairway, a defective condition of the premises. Defendants failed to meet their initial burden of establishing that they took "reasonable care and prudence in securing the safety of the work area" (*Hammond v International Paper Co.*, 161 AD2d 914; *see, Motyka v Ogden Martin Sys. of Onondaga Ltd. Partnership,* ___ AD2d ___ [decided May 10, 2000]; *Farrell v Okeic, supra*).

In addition, defendants failed to establish that they neither created nor had actual or constructive notice of the unstable stairway (*see, Gambee v Dunford*, ___ AD2d ___ [decided Mar. 29, 2000]; *Carnicelli v Miller Brewing Co.*, 191 AD2d 980, 981). Defendants were aware that the supporting wall adjacent to the stairway was removed in the course of the renovation. There was no inspection of the stairway until after it collapsed, and defendants presented no evidence that the alleged defect in the stairway could not have been discovered through a reasonable inspection before it collapsed. Thus, we modify the order accordingly. (Appeals from Order of Supreme Court, Erie County, Sedita, Jr., J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(638) CA 99-843. (Erie Co.) -- JAMES R. SMITH, ET AL., PLAINTIFFS-RESPONDENTS, V PETER M. KANTER, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Judgment unanimously affirmed without costs. Memorandum: Plaintiffs are owners of shares of preferred stock of defendant Triad Manufacturing Group,

Inc. (Triad), a defunct company. Defendant Peter M. Kanter was one of Triad's three officers and directors. On a prior appeal, we held that Supreme Court erred in granting summary judgment to Kanter on three causes of action in action No. 1 (*Smith v Triad Mfg. Group,* 255 AD2d 962). That action and action No. 2 proceeded to trial, and upon plaintiffs' motion after the close of the evidence, the court properly directed a verdict in favor of plaintiffs on the sixth cause of action in action No. 1 (appeal No. 1), and on the second cause of action in action No. 2 (appeal No. 2).

The sixth cause of action in action No. 1 alleges a violation of section 5 of the Federal Securities Act of 1933 (Act). Plaintiffs established the violation of that section by submitting evidence that there was no registration statement filed with the Securities and Exchange Commission and that Kanter sold securities using the mails (*see,* 15 USC § 77e; *Securities & Exch. Commn. v Continental Tobacco Co. of S. C.,* 463 F2d 137, 155).

Kanter contends that, pursuant to section 4 of the Act, he was exempted from the requirements of section 5 because the offering of stock was not a public offering (*see,* 15 USC § 77d [2]). Kanter had the burden of proof to establish the applicability of that exemption. While courts have considered such factors as the number of offerees and their relationship to each other and to the issuer, the sophistication of the offerees, the size of the offering, and the manner of the offering in determining whether the public offering exemption applies (*see, United States v Arutunoff,* 1 F3d 1112, 1118; *Swenson v Engelstad,* 626 F2d 421, 425), "the applicability of [the exemption] should turn on whether the particular class of persons affected need[s] the protection of the Act" (*Securities & Exch. Commn. v Ralston Purina Co.,* 346 US 119, 125; *see, United States v Arutunoff, supra,* at 1118; *Swenson v Engelstad, supra,* at 425-426).

Kanter failed to meet his burden of proof by presenting evidence sufficient for a reasonable jury to find in his favor (*see, United States v Arutunoff, supra,* at 1119; *see generally, Szczerbiak v Pilat,* 90 NY2d 553, 556). Kanter never established the number of offerees or their identity (*see, Swenson v Engelstad, supra,* at 427). The testimony of plaintiffs established that they were not sophisticated investors or experienced in financial or business matters. Most of the plaintiffs had a high school education, and some were elderly and were diagnosed with Alzheimer's disease shortly after their

investment. For the most part, plaintiffs are not related to one another or to the officers of Triad, nor are they acquainted with one another. Kanter failed to establish that plaintiffs had access to information about Triad such that registration would be unnecessary (*see, Van Dyke v Coburn Enters.,* 873 F2d 1094, 1098).

The second cause of action in action No. 2 alleges fraudulent conveyance. Pursuant to Debtor and Creditor Law § 273, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." After the closing of the preferred stock offering, Kanter paid himself over $92,000 from Triad's corporate account. Plaintiffs presented unrefuted evidence at trial establishing that such payments were made when Triad was insolvent. Based upon the evidence at trial, no reasonable jury could find that the conveyances were made for fair consideration (*see generally, Szczerbiak v Pilat, supra,* at 556). Fair consideration is given for property "[w]hen in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied" (Debtor and Creditor Law § 272 [a]; *see, Matter of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria v Upstate Bldg. Corp.,* 262 AD2d 981, 982). The bulk of the payments were made to Kanter to buy back the stock he had received from Triad. That stock, however, was not to be sold or transferred and was worth substantially less than the amount he received for it. Kanter was also aware that, in accepting Triad's checks, there would be almost no money left to operate Triad and that plaintiffs would lose their investment. Based on that evidence and other evidence at trial, plaintiffs established that the conveyances were not made in good faith, i.e., Kanter failed "to deal honestly, fairly and openly", and thus were not made for fair consideration (*Southern Indus. v Jeremias,* 66 AD2d 178, 183; *see, Furlong v Storch,* 132 AD2d 866, 868). (Appeal from Judgment of Supreme Court, Erie County, LaMendola, J. - Federal Securities Act.) PRESENT: PIGOTT, JR., P. J., HAYES, SCUDDER, KEHOE AND BALIO, JJ. (Filed June 16, 2000.)

(639) CA 99-844. (Erie Co.) -- JAMES R. SMITH, ET AL., PLAINTIFFS-RESPONDENTS, V PETER M. KANTER, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Judgment unanimously

affirmed without costs. Same Memorandum as in *Smith v Kanter* ([appeal No. 1] ___ AD2d ___ [decided herewith]). (Appeal from Judgment of Supreme Court, Erie County, LaMendola, J. - Debtor and Creditor Law.) PRESENT: PIGOTT, JR., P. J., HAYES, SCUDDER, KEHOE AND BALIO, JJ. (Filed June 16, 2000.)

(643) CA 99-1446. (Erie Co.) -- DAVID G. ADDERLY AND DENISE M. ADDERLY, PLAINTIFFS-APPELLANTS, V ADF CONSTRUCTION CORPORATION AND LIBERTY PARK SENIORS, L.P., DEFENDANTS-RESPONDENTS. ADF CONSTRUCTION CORPORATION, THIRD-PARTY PLAINTIFF, V EMPSON-BIEBER CO., INC., A/K/A EMPSON-BIEBER CUSTOM HOMES, THIRD-PARTY DEFENDANT-RESPONDENT. LIBERTY PARK SENIORS, L.P., THIRD-PARTY PLAINTIFF, V EMPSON-BIEBER CO., INC., A/K/A EMPSON-BIEBER CUSTOM HOMES, THIRD-PARTY DEFENDANT-RESPONDENT. -- Order reversed on the law without costs and motion granted. Memorandum: David G. Adderly (plaintiff) was installing windows in an apartment building when the ladder upon which he was working "kicked out" from under him, causing him to fall 15 feet to the ground. The ladder was not tied off at the time of plaintiff's accident. Supreme Court erred in denying plaintiffs' motion for partial summary judgment on liability pursuant to Labor Law § 240 (1). Plaintiffs met their initial burden by submitting evidence establishing that the ladder was not so "placed * * * as to give proper protection to" plaintiff (Labor Law § 240 [1]; *see, Gordon v Eastern Ry. Supply,* 82 NY2d 555, 561-562; *Szymanski v Nabisco, Inc.,* 256 AD2d 1154, 1155), and defendants failed to raise an issue of fact whether plaintiff's conduct was the sole proximate cause of the accident (*see, Lawrence v Forest City Ratner Cos.,* ___ AD2d ___ [decided Jan. 27, 2000]; *cf., Weininger v Hagedorn & Co.,* 91 NY2d 958, *rearg denied* 92 NY2d 875).

All concur except Balio, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent and would affirm on the ground that plaintiffs have not established as a matter of law that the ladder itself or the safety spikes attached to it were defective, nor have they established that the absence of any other safety device was a proximate cause of the accident (*see, Felker v Corning Inc.*, 90 NY2d 219, 224; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524, *rearg denied* 65 NY2d 1054; *Duda v Rouse Constr. Corp.*, 32 NY2d 405, 410). Thus, I conclude that plaintiffs did not meet their initial burden of establishing their entitlement to judgment on liability as a matter of law with respect to the Labor Law § 240 (1) claim. Even assuming that plaintiffs met their initial burden, I further

conclude that defendants raised a triable issue of fact whether the actions of plaintiff David G. Adderly were the sole proximate cause of his injuries (*see, Weininger v Hagedorn & Co.*, 91 NY2d 958, 960, *rearg denied* 92 NY2d 875). (Appeal from Order of Supreme Court, Erie County, LaMendola, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., HAYES, SCUDDER, KEHOE AND BALIO, JJ. (Filed June 16, 2000.)

(658) CA 99-1073. (Chautauqua Co.) -- ANTHONY CIANCIO, PLAINTIFF-RESPONDENT-APPELLANT, V ALDINE FRANCISCO, DEFENDANT-APPELLANT-RESPONDENT. ALDINE FRANCISCO, THIRD-PARTY PLAINTIFF, V MARY VOTY AND DENNIS VOTY, THIRD-PARTY DEFENDANTS-RESPONDENTS. -- Appeal and cross appeal unanimously dismissed without costs upon stipulations. (Appeals from Order of Supreme Court, Chautauqua County, Gerace, J. - Summary Judgment.) PRESENT: GREEN, J. P., WISNER, HURLBUTT AND BALIO, JJ. (Filed June 16, 2000.)

(661) CA 99-3521. (Monroe Co.) -- KEVIN K. LOPEZ, ET AL., PLAINTIFFS, V WILLIAM B. KONAR ENTERPRISES, ET AL., DEFENDANTS. WILLIAM B. KONAR ENTERPRISES AND WILSON ENTERPRISES, THIRD-PARTY PLAINTIFFS-APPELLANTS, V HALLENBECK-RITZ, INC., THIRD-PARTY DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Order unanimously affirmed without costs. Memorandum: Plaintiffs commenced an action against Xerox Corporation (Xerox) seeking damages for injuries sustained by Kevin K. Lopez (plaintiff) in a fall from a ladder. Xerox commenced a third-party action against plaintiff's employer, Hallenbeck-Ritz, Inc. (Hallenbeck). The action and third-party action were commenced prior to the effective date of the Omnibus Workers' Compensation Reform Act of 1996 (Act) (L 1996, ch 635, § 2). Plaintiffs thereafter commenced a separate action against William B. Konar Enterprises (Konar) and Wilson Enterprises (Wilson) after the effective date of the Act, and Konar and Wilson commenced the subject third-party action against Hallenbeck seeking common-law indemnification. After Supreme Court consolidated plaintiffs' main actions, plaintiffs discontinued the action against Xerox. Konar and Wilson moved for summary judgment on the third-party complaint, and Hallenbeck cross-moved for summary judgment dismissing the third-party complaint on the ground that the third-party action of Konar and Wilson was barred by Workers' Compensation Law § 11, as amended by the Act.

Supreme Court properly granted Hallenbeck's cross motion. Workers Compensation Law § 11, unnumbered paragraph 3 provides

that an employer shall not be liable for contribution or indemnity to any third person based on liability for injuries sustained by an employee acting within the scope of his or her employment unless such third person proves that the employee has sustained grave injury. The Act applies prospectively to actions filed after its enactment (*see, Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 581) and thus applies to bar the third-party action in this case.

The court erred, however, in denying plaintiffs' motion for partial summary judgment on the Labor Law § 240 (1) cause of action. Plaintiffs established a prima facie case with respect to liability, and defendants failed to raise a triable issue of fact with respect to proximate cause (*see, Felker v Corning Inc.*, 90 NY2d 219, 224) and the recalcitrant worker defense (*see, Fichter v Smith*, 259 AD2d 1023, *lv dismissed in part and denied in part* 93 NY2d 994). Thus, we modify the order in appeal No. 2 by granting plaintiffs' motion. (Appeal from Order of Supreme Court, Monroe County, Galloway, J. - Summary Judgment.) PRESENT: GREEN, J. P., WISNER, HURLBUTT AND BALIO, JJ. (Filed June 16, 2000.)

(662) CA 99-3522. (Monroe Co.) -- KEVIN K. LOPEZ AND HEATHER L. LOPEZ, PLAINTIFFS-APPELLANTS, V WILLIAM B. KONAR ENTERPRISES AND WILSON ENTERPRISES, DEFENDANTS-RESPONDENTS. WILLIAM B. KONAR ENTERPRISES, ET AL., THIRD-PARTY PLAINTIFFS, V HALLENBECK-RITZ, INC., THIRD-PARTY DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Order unanimously modified on the law and as modified affirmed without costs in accordance with the same Memorandum as in *Lopez v William B. Konar Enters.* ([appeal No. 1] ___ AD2d ___ [decided herewith]). (Appeal from Order of Supreme Court, Monroe County, Galloway, J. - Summary Judgment.) PRESENT: GREEN, J. P., WISNER, HURLBUTT AND BALIO, JJ. (Filed June 16, 2000.)

(675) CA 99-1047. (Cayuga Co.) -- STANLEY C. LONGYEAR, ET AL., PLAINTIFFS, V ZOTOS INTERNATIONAL, INC., DEFENDANT. ZOTOS INTERNATIONAL INC., THIRD-PARTY PLAINTIFF-APPELLANT, V R.L. WOODCOCK & ASSOCIATES, INC., THIRD-PARTY DEFENDANT-RESPONDENT. -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Order of Supreme Court, Cayuga County, Contiguglia, J. - Discovery.) PRESENT: PIGOTT, JR., P. J., PINE, SCUDDER AND LAWTON, JJ. (Filed May 12, 2000.)

(715) CA 99-1432. (Monroe Co.) -- CHARTER OAK FIRE INSURANCE COMPANY AND THE TRAVELERS INSURANCE COMPANIES, PLAINTIFFS-RESPONDENTS, V TINA LOUISE BORRELLI, RICHARD P. COLLINE, JR., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Order insofar as appealed from unanimously reversed on the law without costs, cross motion granted and complaint against defendants Tina Louise Borrelli and Richard P. Colline, Jr. dismissed. Memorandum: Plaintiff The Travelers Insurance Companies (Travelers) insured property owned by defendants Tina Louise Borrelli and Richard P. Colline, Jr. After the roof collapsed, Borrelli and Colline filed a proof of loss in the amount of $622,590, listing as other parties who had an interest in or an encumbrance on the property defendants Rin Tin Development Corporation (Rin Tin), B. Joseph Checho, Virginia A. Checho and Rosele Chamberlain. Travelers rejected the proof of loss, and Borrelli and Colline commenced a breach of contract action against Travelers, identified therein as The Travelers Insurance Company of North America. Travelers as plaintiff in appeal Nos. 1 and 2 and The Travelers Insurance Company of North America as defendant in appeal No. 3 are represented by the same counsel and refer to themselves in both actions as Travelers without distinction between the two entities. We do the same here. Travelers did not implead the other parties who might have an interest in the insurance proceeds, despite its knowledge of their possible claims. During the trial of that action, Travelers entered into a stipulation of settlement with Borrelli, Colline and their attorney. Pursuant to that stipulation of settlement, which was placed on the record, Travelers agreed to pay to those parties the sum of $323,000, the stipulated value of the loss, in exchange for a stipulation of discontinuance and general releases. When Travelers demanded as well a general release from Rin Tin, the attorney for Borrelli and Colline objected on the ground that Rin Tin was not a party to the action or the stipulation. Borrelli and Colline then moved for judgment against Travelers, contending that Travelers had not complied with the stipulation of settlement. Travelers did not move to vacate the stipulation but, rather, Travelers and its subsidiary, plaintiff Charter Oak Fire Insurance Company (collectively Travelers), commenced an interpleader action, naming as defendants the parties with whom Travelers had settled and other parties known to Travelers who might have claims to the insurance proceeds.

Borrelli and Colline cross-moved to dismiss the complaint in the interpleader action, and that cross motion was denied by Supreme Court. Borrelli and Colline appeal from the order denying that cross motion (appeal No. 1). The court granted another order providing that the payment by Travelers of the sum of $323,000 to the Monroe County Treasurer (County Treasurer) discharged Travelers from further liability to any interpleader defendant. Borrelli and Colline also appeal from that order (appeal No. 2). Finally, Borrelli and Colline entered judgment against Travelers based on the stipulation of settlement in the breach of contract action. The court granted an order vacating that judgment and extended a temporary restraining order preventing judgment from being entered in that action. Borrelli and Colline appeal from that order as well (appeal No. 3).

The court erred in denying the cross motion of Borrelli and Colline to dismiss the complaint in the interpleader action against them. At the time it entered into the stipulation of settlement, Travelers had knowledge of other parties with potential claims on the insurance proceeds. It chose to settle that action and obtain releases only from Borrelli, Colline and their attorney. Travelers should not be allowed to use an interpleader action to circumvent that stipulation. Travelers has not sought to vacate the stipulation; it merely obtained a temporary restraining order in the interpleader action that prevented the parties to the stipulation from entering judgment in the breach of contract action.

The court further erred in granting an order discharging Travelers from liability to Borrelli, Colline and their attorney in exchange for its deposit of the sum of $323,000 with the County Treasurer. Travelers is obligated to pay that full amount to Borrelli, Colline and their attorney based on the stipulation of settlement, and any amounts disbursed to the County Treasurer or other possible claimants would diminish the amount of proceeds they receive. By discharging Travelers from liability after payment of $323,000 to the County Treasurer, the court effectively altered the stipulation of settlement without requiring Travelers to make the requisite showing of "cause sufficient to invalidate a contract such as fraud, collusion, mistake or accident" (*Hallock v State of New York,* 64 NY2d 224, 230).

Finally, the court erred in vacating the judgment entered in the breach of contract action. Because the court should have dismissed the interpleader action and Travelers has not moved to

vacate the stipulation of settlement, there is no impediment to entry of a judgment based upon the stipulation. (Appeal from Order of Supreme Court, Monroe County, Fisher, J. - Dismiss Pleading.) PRESENT: PIGOTT, JR., P. J., PINE, HAYES AND LAWTON, JJ. (Filed June 16, 2000.)

(716) CA 99-1248. (Monroe Co.) -- CHARTER OAK FIRE INSURANCE COMPANY AND THE TRAVELERS INSURANCE COMPANIES, PLAINTIFFS-RESPONDENTS, V TINA LOUISE BORRELLI, RICHARD P. COLLINE, JR., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Order unanimously reversed on the law without costs. Same Memorandum as in *Charter Oak Fire Ins. Co. v Borrelli* ([appeal No. 1] ___ AD2d ___ [decided herewith]). (Appeal from Order of Supreme Court, Monroe County, Fisher, J. - Interpleader.) PRESENT: PIGOTT, JR., P. J., PINE, HAYES AND LAWTON, JJ. (Filed June 16, 2000.)

(717) CA 99-1116. (Monroe Co.) -- TINA LOUISE BORRELLI AND RICHARD P. COLLINE, JR., PLAINTIFFS-APPELLANTS, V THE TRAVELERS INSURANCE COMPANY OF NORTH AMERICA, DEFENDANT-RESPONDENT, ET AL., DEFENDANT. (APPEAL NO. 3.) -- Order unanimously reversed on the law without costs and judgment reinstated. Same Memorandum as in *Charter Oak Fire Ins. Co. v Borrelli* ([appeal No. 1] ___ AD2d ___ [decided herewith]). (Appeal from Order of Supreme Court, Monroe County, Fisher, J. - Vacate Judgment.) PRESENT: PIGOTT, JR., P. J., PINE, HAYES AND LAWTON, JJ. (Filed June 16, 2000.)

(718) CA 99-3578. (Erie Co.) -- DAVID W. LONG, PLAINTIFF-RESPONDENT, V KEVIN G. CLEARY, DEFENDANT, AND CITY OF LACKAWANNA, DEFENDANT-APPELLANT. -- Amended judgment unanimously reversed on the law without costs, motion granted and amended complaint against defendant City of Lackawanna dismissed. Memorandum: Defendant City of Lackawanna (City) appeals from an amended judgment entered upon a jury verdict finding the City 40% liable for an automobile accident between the vehicles driven by defendant Kevin G. Cleary and plaintiff. The jury found Cleary 45% liable and plaintiff 15% liable.

Contrary to plaintiff's contention, the City properly appealed from the amended judgment, which superseded the original judgment, because the amended judgment altered the original judgment in a material respect (*see, Gormel v Prudential Ins. Co. of Am.*, 151 AD2d 1048; *cf., Matter of Kolasz v Levitt*, 63 AD2d 777, 779).

The record is devoid of proof that the City's negligence, if any, was a proximate cause of the accident and plaintiff's resulting injury, and thus Supreme Court erred in denying the City's motion for a trial order of dismissal pursuant to CPLR 4401. The sole basis for the alleged negligence of the City was its failure to place skip lines on the highway before the intersection. Plaintiff, however, presented no proof that such markings were required under the New York Manual of Uniform Traffic Control Devices. Indeed, plaintiff's expert testified that the only applicable reference in the manual was a provision "that any roadway with pavement sixteen feet or wider *may* be marked to indicate lane use [emphasis supplied]", and that such markings are intended to prevent vehicles from wandering from lane to lane.

Even assuming, arguendo, that the City should have placed the skip lines on the highway, we conclude that plaintiff failed to establish that the failure to do so was a proximate cause of the accident (*see generally, Ball v State of New York*, 96 AD2d 1139, *affd* 61 NY2d 990*; Atkinson v County of Oneida*, 59 NY2d 840, *rearg denied* 60 NY2d 587*; Boucher v Town of Candor*, 234 AD2d 669*; Levitt v County of Suffolk*, 166 AD2d 421, 423, *lv dismissed* 77 NY2d 834*; Price v Hampson*, 142 AD2d 974). The speculation of plaintiff's expert that the skip lines would have alerted plaintiff to the fact that this was a four-lane intersection and the self-serving statement of Cleary that, had he known it was a four-lane highway, he would have been "more cautious" before turning in front of plaintiff's oncoming vehicle do not establish proximate cause. "Speculation, guess and surmise may not be substituted for competent evidence" (*Price v Hampson, supra*, at 975-976). At the very most, the failure to mark the intersection "merely furnished the condition or occasion for the occurrence of the event rather than one of its causes" (*Sheehan v City of New York*, 40 NY2d 496, 503*; see, Margolin v Friedman*, 43 NY2d 982, 983*; Bonsera v Universal Recycling Servs. Corp.*, ___ AD2d ___ [decided Feb. 22, 2000]*; Haylett v New York City Tr. Auth.*, 251 AD2d 373).

Owens v City of Syracuse (258 AD2d 898), relied upon by plaintiff, does not support a contrary result. In *Owens*, the plaintiffs' expert testified that the failure of defendant City of Syracuse to provide a center line along the entire length of the street violated a provision of the New York Manual of Uniform Traffic Control Devices (17 NYCRR 262.2 [a]). Here, there is no proof of a violation of the manual. Likewise, *Scheemaker v State*

of New York (125 AD2d 964, 965, *affd* 70 NY2d 985), also relied upon by plaintiff, is inapposite. The State's liability in *Scheemaker* was predicated on the failure of the State to post lower mandatory speed limit signs at a dangerous intersection.

Thus, we reverse the amended judgment, grant the motion of the City and dismiss the amended complaint against it. (Appeal from Amended Judgment of Supreme Court, Erie County, Kane, J. - Negligence.) PRESENT: PIGOTT, JR., P. J., PINE, HAYES, BALIO AND LAWTON, JJ. (Filed June 16, 2000.)

(724) CA 99-1199. (Erie Co.) -- DAVID S. GAETA AND SUSAN GAETA, PLAINTIFFS-RESPONDENTS-APPELLANTS, V REGINA M. KOSEK, DEFENDANT-APPELLANT-RESPONDENT. -- Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Supreme Court did not abuse its discretion in granting plaintiffs' motion for reargument of defendant's motion for summary judgment dismissing the complaint (*see, Calabrese v Smetko,* 244 AD2d 890, 890-891). The court agreed with plaintiffs that it had mistakenly arrived at its earlier decision because it had overlooked the objective evidence of the injury allegedly sustained by David S. Gaeta (plaintiff).

The court erred upon reargument, however, in granting defendant's motion in part. Although defendant met her initial burden, plaintiffs in opposition met their burden by making a prima facie showing that plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) sufficient to raise a triable issue of fact. They submitted a no-fault verification form signed by plaintiff's physician establishing that plaintiff was disabled and thus was unable to return to work or perform his usual and customary daily activities for at least 90 days immediately after the accident (*see, Sellitto v Casey,* ___ AD2d ___ [decided Jan. 13, 2000]). With respect to the remaining categories of serious injury alleged, plaintiffs by their submission of plaintiff's medical records raised triable issues of fact whether plaintiff has a permanent loss of use of a body organ, member, function, or system; a permanent consequential limitation of use of a body organ or member; or a significant limitation of use of a body function or system.

We modify the order, therefore, by denying defendant's motion in its entirety. (Appeals from Order of Supreme Court, Erie County, LaMendola, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., PINE, HAYES, BALIO AND LAWTON, JJ. (Filed June 16, 2000.)

(739) CAF 99-781. (Erie Co.) -- MATTER OF KENYADA D., RESPONDENT-APPELLANT. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs. Memorandum: We note that the order extending placement, which by its terms has expired, was not affected by the stay of the orders concerning the location of placement. (Appeal from Order of Erie County Family Court, Townsend, J. - Placement.) PRESENT: PINE, J. P., HAYES, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(740) CAF 99-782. (Erie Co.) -- MATTER OF KENYADA D., RESPONDENT-APPELLANT. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT. (APPEAL NO. 2.) -- Appeal unanimously dismissed without costs. Same Memorandum as in *Matter of Kenyada D.* ([appeal No. 1] ___ AD2d ___ [decided herewith]). (Appeal from Order of Erie County Family Court, Townsend, J. - Placement.) PRESENT: PINE, J. P., HAYES, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(741) CAF 99-1447. (Erie Co.) -- MATTER OF WILLIAM F., ROBERT F., SCOTT F., RYAN F. AND COURTNEY F. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; CHARLES F., RESPONDENT-APPELLANT, ET AL., RESPONDENT. -- Order unanimously affirmed without costs. (Appeal from Order of Erie County Family Court, Szczur, J. - Neglect.) PRESENT: PINE, J. P., HAYES, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(748) CA 99-823. (Erie Co.) -- COSIMO CHIMERA AND JO ANN CHIMERA, PLAINTIFFS-APPELLANTS, V NEW YORK STATE DORMITORY AUTHORITY, DEFENDANT-RESPONDENT, ET AL., DEFENDANT. -- Order unanimously affirmed without costs. Memorandum: Plaintiffs' motion for leave to serve a late notice of claim against defendant New York State Dormitory Authority (Dormitory Authority) pursuant to General Municipal Law § 50-e (5) was properly denied. The accident occurred on November 5, 1996, and the notice of motion is dated December 7, 1998, two years and one month after the accident. With the exception of an action for wrongful death, a tort action for personal injury against the Dormitory Authority must be commenced within one year and 90 days after the cause of action accrues (*see*, Public Authorities Law § 1691 [1]). Because an extension of time to serve a notice of claim "shall not exceed the time limited for the commencement" of the action (General Municipal Law § 50-e [5]; *see*, *Pierson v City of New York*, 56

NY2d 950, 954), the motion was untimely. (Appeal from Order of Supreme Court, Erie County, Sconiers, J. - Notice of Claim.) PRESENT: PINE, J. P., HAYES, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(775) KA 99-5192. (Livingston Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RENEE T. COLLINS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant appeals from a judgment convicting her of grand larceny in the second degree (Penal Law § 155.40 [1]) and sentencing her to an indeterminate term of incarceration of 5 to 15 years. The conviction arises out of a scheme in which defendant repeatedly falsely promised the victim, a quadriplegic, that she would marry and "take care of" him, inducing the victim to give defendant large sums of money and control over accounts from which defendant removed additional sums. On appeal, defendant contends that the evidence is legally insufficient, that the verdict is against the weight of the evidence and that the sentence is unduly harsh or severe.

The evidence is not legally insufficient. The evidence establishes that defendant wrongfully obtained the property "by means of" a false promise, that defendant made the promise for the purpose of inducing the victim to transfer the property, and that the victim was thereby induced to transfer the property (Penal Law § 155.05 [2] [d]; *see, People v Ponnapula*, 229 AD2d 257, 267-268; *People v Coloney*, 98 AD2d 969; *see also, People v Antilla*, 77 NY2d 853, 854). We reject defendant's contention that, because of the contingent nature of the promise, the victim could not reasonably have relied on it. The concept of reasonable reliance is not found in the larceny statute. Moreover, because the gravamen of the crime is a false promise to perform an act in the future (*see*, Penal Law § 155.05 [2] [d]), it is immaterial that the promised marriage could not have occurred immediately. There likewise is no merit to defendant's contention that, because a promise to marry is unenforceable as a matter of contract law, it cannot serve as the predicate for a prosecution for larceny by false promise. The contention that defendant would have performed her promise had she not been arrested is belied by her admission that she intended to deceive the victim. We reject the contention that there is insufficient corroboration of defendant's confession. The victim's testimony provides ample corroboration, as do the financial documents showing the transfers to defendant (*see*, CPL 60.50; *People v*

Mikuszewski, 73 NY2d 407, 415; *People v Booden*, 69 NY2d 185, 187). Additionally, we reject the contention that defendant's withdrawals from the joint account could not constitute a larcenous taking (*see, People v Antilla*, *supra*, at 855). The verdict is not against the weight of the evidence *(see, People v Bleakley*, 69 NY2d 490, 495), nor is the sentence unduly harsh or severe.

We have reviewed the contentions raised in defendant's *pro se* supplemental brief and conclude that they are without merit. (Appeal from Judgment of Livingston County Court, Alonzo, J. - Grand Larceny, 2nd Degree.) PRESENT: GREEN, J. P., WISNER, HURLBUTT, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(786) CA 99-1242. (Onondaga Co.) -- HELEN CARTER AND ROBERT CARTER, PLAINTIFFS-RESPONDENTS, V GENERAL MOTORS CORPORATION, DEFENDANT, AND JAY'S CHEVROLET, DEFENDANT-APPELLANT. -- Order unanimously affirmed without costs. Memorandum: Supreme Court properly denied that part of the cross motion of defendant Jay's Chevrolet (Jay's) seeking summary judgment dismissing the claim under Vehicle and Traffic Law § 417. The statute is "primarily designed to protect the purchasers [of used motor vehicles] from being sold an improperly equipped or defective vehicle" (*Pierce v International Harvester Co.*, 61 AD2d 255, 260, quoting statement of Counsel and Deputy Commissioner of Motor Vehicles in support of L 1954, ch 86, 1954 Legis Ann, at 263-264). Although Vehicle and Traffic Law § 417 requires dealers of used motor vehicles to provide written notice to the buyer that the vehicle complies with regulatory requirements "as shall be specified by the commissioner [of the department of motor vehicles]" (*see*, 15 NYCRR 78.13 [b], [c] [1] - [18]), the statute also requires that such notice contain a certification that the vehicle "is in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery" (Vehicle and Traffic Law § 417). Thus, contrary to the contention of Jay's, the certification is not limited to the 18 items listed in the regulations. (Appeal from Order of Supreme Court, Onondaga County, Major, J. - Summary Judgment.) PRESENT: GREEN, J. P., WISNER, HURLBUTT, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(824) TP 00-00171. (Oneida Co.) -- MATTER OF THOMAS GRAY, PETITIONER, V GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT. -- Determination

unanimously confirmed without costs and petition dismissed. (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Oneida County, Murad, J.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(825) KA 99-5481. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V MICHAEL S., DEFENDANT-APPELLANT. -- Adjudication unanimously modified as a matter of discretion in the interest of justice and as modified affirmed and matter remitted to Supreme Court for further proceedings in accordance with the following Memorandum: Defendant pleaded guilty to attempted burglary in the third degree (Penal Law §§ 110.00, 140.20) and was adjudicated a youthful offender and sentenced to a term of probation of five years. Defendant thereafter admitted to violating the conditions of probation, and Supreme Court promised to sentence defendant to continued probation. Defendant failed to appear on the scheduled sentencing date, and a bench warrant was issued. At sentencing, the court sentenced defendant to a term of incarceration of 1⅓ to 4 years.

Defendant contends that the court erred in failing to afford him an opportunity to withdraw his plea before imposing an enhanced sentence (*see, People v Selikoff,* 35 NY2d 227, 241, *cert denied* 419 US 1122; *People v Williams,* 195 AD2d 1040, 1041; *People v Scrivens,* 175 AD2d 671, 672). Defendant did not object to the enhanced sentence or move to withdraw his plea and thus failed to preserve his contention for our review (*see,* CPL 470.05 [2]; *People v Luksch,* 265 AD2d 895, *lv denied* 94 NY2d 825; *People v Wilson,* 257 AD2d 674, *lv denied* 93 NY2d 981; *People v Perry,* 252 AD2d 990, *lv denied* 92 NY2d 929). Under the circumstances of this case, however, we exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see,* CPL 470.15 [6] [a]). At sentencing, the court asked the parties whether it had made any sentencing promise. The prosecutor remained silent, while defense counsel erroneously stated that the court had made no sentencing promise. The court then imposed an enhanced sentence, the maximum allowable, despite never having advised defendant that it would enhance the sentence if he failed to appear at sentencing (*see, People v Hendricks,* ___ AD2d ___ [decided Mar. 29, 2000]; *People v Ortiz,* 244 AD2d 960, 961; *People v Nosek,* 236 AD2d 892, 893, *lv denied* 91 NY2d 877). We thus modify the adjudication by vacating the sentence, and we remit the matter to Supreme Court to impose the sentence promised or to afford defendant the opportunity to withdraw his

plea. (Appeal from Adjudication of Supreme Court, Erie County, Howe, J. - Youthful Offender.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(826) KA 98-05201. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V STEVEN MALDONADO, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Supreme Court, Monroe County, Mark, J. - Criminal Possession Controlled Substance, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(827) KA 99-5086. (Ontario Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JEFFREY LAWRENCE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: An issue concerning the interpretation or application of a criminal statute or a challenge to the legal sufficiency of the factual allegations of an indictment does not survive a defendant's plea of guilty (*see, People v Levin,* 57 NY2d 1008, 1009, *rearg denied* 58 NY2d 824; *People v Thomas,* 53 NY2d 338, 340, 343-345). A guilty plea also forecloses any challenge to the legal sufficiency of the evidence before the Grand Jury (*see, People v Simms,* ___ AD2d ___ [decided Feb. 16, 2000]; *People v Buthy*, 85 AD2d 890). Defendant's contention that the evidence before the Grand Jury was legally insufficient to establish larceny by extortion therefore is not properly before us (*see,* Penal Law § 155.40 [2]; § 155.05 [2] [e]). The sentence is not unduly harsh or severe. (Appeal from Judgment of Ontario County Court, Harvey, J. - Grand Larceny, 4th Degree.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(828) KA 99-5466. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V VINCENT KEMP, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant was convicted of criminal possession of a weapon in the third degree (Penal Law § 265.02) and two counts of criminal possession of a weapon in the fourth degree (Penal Law § 265.01), stemming from two incidents taking place at his girlfriend’s house on January 30, 1998, and February 18, 1998, and aggravated harassment in the second degree (Penal Law § 240.30), stemming from alleged death threats by defendant against five people on or about February 24, 1998.

Defendant contends that County Court erred in ruling that he lacked standing to challenge the seizure of weapons from his

girlfriend's house. Even assuming that defendant had standing based on an expectation of privacy in the premises owned by his girlfriend (*see, People v Ortiz*, 83 NY2d 840, 842), we conclude that the voluntary consent of defendant's girlfriend to a search of the premises and removal of the guns rendered the warrantless search valid (*see, People v Williams*, 267 AD2d 772, *lv denied* 94 NY2d 886; *People v Cooper*, 258 AD2d 891, *lv denied* 93 NY2d 968). We further reject the contention of defendant that the exemption set forth in Penal Law § 265.20 (a) (5) applies to him; defendant has never been issued a certificate of good conduct pursuant to Correction Law § 703-b. Because there was legally sufficient evidence at trial to support defendant's conviction under count one of the indictment, we do not address defendant's contention that count one was not supported by legally sufficient evidence before the Grand Jury (*see*, CPL 210.30 [6]). The record establishes that defendant received meaningful representation (*see, People v Benevento*, 91 NY2d 708, 712-713). We have examined defendant's remaining contentions and conclude that they are lacking in merit. (Appeal from Judgment of Erie County Court, Drury, J. - Criminal Possession Weapon, 3rd Degree.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(829) KA 98-5264. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RENAY LYNCH, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]) and robbery in the first degree (Penal Law § 160.15 [1]). Supreme Court properly denied the motion of defendant to suppress her inculpatory statements made to police while she was in custody on an unrelated charge of grand larceny. Defendant had not yet been arraigned on the grand larceny charge nor had an attorney-client relationship been established with respect to that charge when defendant made incriminating statements concerning the murder. Defendant was then given *Miranda* warnings and made inculpatory oral and written statements. Her right to counsel was not violated when she was allowed to waive counsel and was questioned on the murder charge outside the presence of counsel (*see, People v Ruff*, 81 NY2d 330, 333-335; *People v Kazmarick*, 52 NY2d 322, 327-328; *People v Wergen*, 250 AD2d 1006, 1007). Contrary to defendant's contention, there is no evidence that arraignment was intentionally delayed solely for the purpose of depriving

defendant of her right to counsel (*see, People v Ortlieb,* 84 NY2d 989, 990; *People v McFadden,* 261 AD2d 417, 417-418, *lv denied* 94 NY2d 882). Defendant contends for the first time on appeal that her statements were taken in violation of her Fifth Amendment rights, and thus her contention is not preserved for our review (*see,* CPL 470.05 [2]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see,* CPL 470.15 [6] [a]).

Defendant received effective assistance of counsel (*see, People v Baldi,* 54 NY2d 137, 147). The verdict is not against the weight of the evidence. The jury was entitled to resolve the credibility issues against defendant, and we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see, People v Bleakley,* 69 NY2d 490, 495). In light of the heinous nature of the crime, we conclude that the sentence is neither unduly harsh nor severe. (Appeal from Judgment of Supreme Court, Erie County, Tills, J. - Murder, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(830) KA 99-5077. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V DAMECHA HARRIS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant appeals from a judgment convicting him after a jury trial of assault in the second degree (Penal Law § 120.05 [3]) and assault in the third degree (Penal Law § 120.00 [2]). Contrary to defendant's contention, the proof presented by the People at trial supports the theories alleged in the indictment, and the proof is legally sufficient to support the conviction (*see, People v Grega,* 72 NY2d 489, 497; *People v Spann,* 56 NY2d 469, 473). Defendant further contends that Supreme Court erred in failing to include the words "by punching him" when it instructed the jury with respect to the elements of the crimes charged in the indictment. Defendant failed to request such an instruction or to object to the charge as given, and thus his contention is unpreserved for our review (*see,* CPL 470.05 [2]). In any event, the court's charge was proper (*see,* 1 CJI[NY] PL 120.00 [2]; 120.05 [3], [7]) and did not alter the theory of the crimes as charged in the indictment (*see, People v Platz,* 248 AD2d 409, *lv denied* 91 NY2d 944; *People v Loyd,* 193 AD2d 1062, *lv denied* 82 NY2d 756). The verdict is not against the weight of the evidence (*see, People v Bleakley,* 69 NY2d 490, 495; *People v Towles,* 197 AD2d 651, *lv denied* 82 NY2d 904).

By requesting that the court charge assault in the third degree as a lesser included offense of assault in the second degree under the second count of the indictment and by failing to object to the charge as given, defendant has waived his contention that the court erred in charging assault in the third degree as a lesser included offense (*see, People v Walden*, 227 AD2d 887, 887-888, *lv denied* 88 NY2d 936, 943). In any event, the court did not err. Assault in the third degree (Penal Law § 120.00 [2]) is a lesser included offense of assault in the second degree (Penal Law § 120.05 [7]) (*see,* CPL 1.20 [37]), and there is a reasonable view of the evidence, viewed in the light most favorable to defendant, that defendant committed the lesser offense but not the greater (*see generally, People v Nealy,* 143 AD2d 1057).

We reject the contention of defendant that he was denied effective assistance of counsel. "[T]he evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi,* 54 NY2d 137, 147; *see, People v Flores,* 84 NY2d 184, 187). The sentence is neither unduly harsh nor severe. We have examined defendant's remaining contentions and conclude that they are lacking in merit. (Appeal from Judgment of Supreme Court, Erie County, Rossetti, J. - Assault, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(831) TP 99-1573. (Erie Co.) -- MATTER OF SHANE M. DRAMAN, PETITIONER, V LAMAR ADVERTISING OF PENN, INC., AND NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENTS. -- Determination unanimously annulled on the law without costs and matter remitted to respondent New York State Division of Human Rights for further proceedings in accordance with the following Memorandum: In this proceeding transferred to this Court pursuant to Executive Law § 298, petitioner seeks review of the determination of the Commissioner of respondent New York State Division of Human Rights (Division) dismissing his complaint following a public hearing. The complaint alleges that petitioner was forced to resign from his employment because of his religious beliefs (*see*, Executive Law § 296 [1] [a]). We conclude that the determination of the Commissioner is inconsistent because he concludes both that petitioner failed to establish a prima facie case of discrimination and that petitioner's employer "has presented sufficient evidence to rebut the presumption of discrimination".

The presumption of discrimination arises only if the employee establishes a prima facie case of discrimination (*see, Texas Dept. of Community Affairs v Burdine*, 450 US 248, 254). Additionally, we conclude that, in deciding whether petitioner established a prima facie case, the Commissioner improperly considered the reasons given by petitioner's employer for its actions (*see, Ferrante v American Lung Assn.*, 90 NY2d 623, 629). Finally, the Commissioner erred in failing to determine whether the reasons given by petitioner's employer for its actions were a pretext for discrimination. "Once the [employer] 'responds to the [employee's] proof by offering evidence of the reason for the [employee's discharge], the factfinder must then decide' * * * 'whether the [discharge] was discriminatory'" (*St. Mary's Honor Ctr. v Hicks*, 509 US 502, 518-519, quoting *United States Postal Serv. Bd. of Governors v Aikens*, 460 US 711, 714-715). We therefore annul the determination and remit the matter to the Division for a new determination with findings of fact. (Executive Law § 298 Proceeding Transferred by Order of Supreme Court, Erie County, Glownia, J.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(832) CA 99-1337. (Ontario Co.) -- LAWRENCE E. COLYER, ET AL., PLAINTIFFS, V K MART CORPORATION, ET AL., DEFENDANTS. K MART CORPORATION AND DOMINICK P. MASSA AND SONS, INC., THIRD-PARTY PLAINTIFFS-RESPONDENTS, V LARRY COLYER MASONRY, INC., THIRD-PARTY DEFENDANT-RESPONDENT, AND MARGRET M. DIEHL, D/B/A MIRAGE DEVELOPMENT, THIRD-PARTY DEFENDANT-APPELLANT. -- Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Third-party defendant Margret M. Diehl, d/b/a Mirage Development (Mirage), appeals from those portions of an order that granted the motion of defendants-third-party plaintiffs, K Mart Corporation (K Mart) and Dominick P. Massa and Sons, Inc. (Massa), for summary judgment on their third-party claims against Mirage seeking common-law and contractual indemnification and that denied the motion of Mirage for summary judgment on its cross claim seeking common-law indemnification from third-party defendant Larry Colyer Masonry, Inc. (LCM). Supreme Court erred in granting that part of the motion of K Mart and Massa seeking summary judgment on their third-party claim for contractual indemnification. The indemnification provision is triggered only in the event of a finding of negligence on the part of Mirage or its agents, employees or subcontractors. There is no basis in the record to

find such negligence as a matter of law *(see, Malecki v Wal-Mart Stores,* 222 AD2d 1010, 1011; *Baskewicz v Rochester Gas & Elec. Corp.,* 217 AD2d 922, 923; *Hayes v Crane Hogan Structural Sys.,* 191 AD2d 978, 979; *Stimson v Lapp Insulator Co.,* 186 AD2d 1052, 1053), and thus we modify the order by denying that part of the motion.

The court properly granted, however, that part of the motion of K Mart and Massa for summary judgment on their third-party claim for common-law indemnification. The right of common-law indemnification belongs to parties determined to be vicariously liable without proof of any negligence or active fault on their own part (*see, Kemp v Lakelands Precast,* 55 NY2d 1032, 1034; *Kelly v Diesel Constr. Div. of Carl A. Morse*, 35 NY2d 1, 5-7). As a matter of law, K Mart and Massa are such parties, given their demonstrated lack of supervision, direction or control over the work (*see, Kemp v Lakelands Precast, supra,* at 1034; *Livecchi v Eastman Kodak Co.,* 258 AD2d 916; *Aman v Federal Express Corp.,* 247 AD2d 879, 880). An owner's or contractor's general authority to coordinate the work and monitor its progress and safety conditions is not a basis for denying common-law indemnification (*see, Siago v Garbade Constr. Co.,* 262 AD2d 945; *Boshnakov v Higgins-Kieffer, Inc.,* 255 AD2d 983). The obligation of common-law indemnification runs against those parties who, by virtue of their direction and supervision over the injury-producing work, were actively at fault in bringing about the injury (*see, Felker v Corning Inc.,* 90 NY2d 219, 226; *Glielmi v Toys "R" Us,* 62 NY2d 664, 666-667; *Frank v Meadowlakes Dev. Corp.,* 256 AD2d 1141, 1143). As a matter of law, Mirage is such a party, given the uncontroverted evidence that it had the contractual obligation to supervise and control the work (*see, Felker v Corning Inc., supra*, at 226; *Golda v Hutchinson Enters.,* 247 AD2d 863). We nonetheless further modify the order by deleting the word "conditional" from the second ordering paragraph. Plaintiffs were awarded summary judgment on liability against Massa and K Mart, and Mirage is obligated at common law to indemnify K Mart and Massa for their costs incurred in defense of plaintiffs' action (*see, Chapel v Mitchell,* 84 NY2d 345, 347-348) irrespective of whether defendants ultimately are ordered to pay damages to plaintiffs (*see, Reynolds v Ciminelli-Walbridge*, 261 AD2d 839, 840).

The court properly denied the motion of Mirage for summary judgment on its cross claim seeking common-law indemnification from LCM. Mirage has been held, as a matter of law, to be

obligated to indemnify K Mart and Massa. Because indemnification runs only in favor of a party not actively at fault against a party actively at fault, Mirage is not entitled to common-law indemnification from LCM (*cf., Leo v Artco Contr.*, 266 AD2d 808; *Szymanski v Nabisco, Inc.*, 256 AD2d 1154, 1155; *Eastman v Volpe Mfg. USA, Co.*, 229 AD2d 913). The relative responsibility of those two entities raises an issue of apportionment or contribution (*see generally, Rosado v Proctor & Schwartz*, 66 NY2d 21, 23-25). (Appeal from Order of Supreme Court, Ontario County, Scudder, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(834) CA 99-1680. (Cattaraugus Co.) -- VAN BRON CORPORATION, PLAINTIFF-RESPONDENT, V GIER'S FARM SERVICE, INC., DWAYNE D. GIER AND DONALD L. COPPINGS, DEFENDANTS-APPELLANTS. -- Appeal unanimously dismissed without costs. Memorandum: Defendants appeal from an order of Supreme Court denying their motion to dismiss this action pursuant to CPLR 3211 (a) (4) on the ground that there is another action pending between the parties for the same cause of action in Supreme Court, Chautauqua County, which was commenced by defendants the day before this action was commenced. After the order was entered, however, the Chautauqua County action was dismissed, and no appeal was taken from the order dismissing that action. Because there is no longer another action pending between the parties for the same cause of action, the issue raised herein is moot. (Appeal from Order of Supreme Court, Cattaraugus County, Cosgrove, J. - Dismiss Pleading.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(836) CA 99-1326. (Niagara Co.) -- H. FREDERICK ARNOLD, PLAINTIFF-RESPONDENT, V JACKSON'S GARAGE, INC., LOREN C. YANEY, DEFENDANTS-RESPONDENTS, POHL TRANSPORTATION, DEFENDANT-APPELLANT, ET AL., DEFENDANT. -- Order unanimously affirmed without costs (*see, Alcalay v Fleetmark Inc.,* 266 AD2d 118). (Appeal from Order of Supreme Court, Niagara County, Koshian, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(837) CA 00-19. (Jefferson Co.) -- MATTER OF GEORGE G. COUCH, ELIZABETH S. PRICE-KELLOGG, ROBERT A. UHLIG AND RUTH A. UHLIG, PETITIONERS-APPELLANTS, V TOWN OF CAPE VINCENT, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed with costs for

reasons stated in decision at Supreme Court, Gilbert, J. (Appeal from Judgment of Supreme Court, Jefferson County, Gilbert, J. - CPLR art 78.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(839) CA 00-00174. (Onondaga Co.) -- MATTER OF EMPIRE STATE CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., ET AL., PETITIONERS-APPELLANTS, V COUNTY OF ONONDAGA, RESPONDENT-RESPONDENT, AND SYRACUSE BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, BY ITS PRESIDENT, WILLIAM C. TOWSLEY, INTERVENOR-RESPONDENT. -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Judgment of Supreme Court, Onondaga County, Stone, J. - CPLR art 78.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(840) CA 99-1659. (Oneida Co.) -- LAWRENCE BARTLETT, JAMES F. LOCORINI AND TERI L. LOCORINI, PLAINTIFFS-APPELLANTS, V HARRON COMMUNICATIONS CORP., ET AL., DEFENDANTS, AND WILLIAM J. KENNETT, D/B/A INDEPENDENT CABLE SERVICES, DEFENDANT-RESPONDENT. WILLIAM J. KENNETT, D/B/A INDEPENDENT CABLE SERVICES, FOURTH-PARTY PLAINTIFF-RESPONDENT, V PETER MC CARTHY AND JEREMIAH MC CARTHY, INDIVIDUALLY AND NOW OR FORMERLY DOING BUSINESS AS MC CARTHY BROTHERS, FOURTH-PARTY DEFENDANTS-RESPONDENTS-APPELLANTS. -- Order unanimously affirmed without costs. (Appeals from Order of Supreme Court, Oneida County, Parker, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(841) CA 00-95. (Onondaga Co.) -- WALTER G. JACOBSON, PLAINTIFF-RESPONDENT, V RALPH J. BALDUCCI, DEFENDANT-APPELLANT. -- Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Onondaga County, Elliott, J. - Discovery.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(842) CA 99-3452. (Oneida Co.) -- PHILIP F. WOLFF, PLAINTIFF-APPELLANT, V ELLY V. MAHRER, AS EXECUTOR OF THE ESTATE OF DR. F. JOHN MAHRER, DECEASED, AND ELLY V. MAHRER, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (*see, Smith v Catholic Med. Ctr.*, 155 AD2d 435; *see also*, CPLR 5501 [a] [1]). (Appeal from Order of Supreme Court, Oneida County, McCarthy, J. - Set Aside Verdict.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(843) CA 99-3582. (Oneida Co.) -- PHILIP F. WOLFF, PLAINTIFF-APPELLANT, V ELLY V. MAHRER, AS EXECUTOR OF THE ESTATE OF DR. F. JOHN MAHRER, DECEASED, AND ELLY V. MAHRER, DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Judgment unanimously affirmed without costs. Memorandum: Plaintiff commenced this action seeking damages for injuries allegedly sustained in a low-speed automobile collision. On appeal from a judgment in favor of defendant based on a jury verdict finding that plaintiff did not sustain a serious injury (*see,* Insurance Law § 5102 [d]), plaintiff contends that Supreme Court should have set aside the verdict and granted a new trial in the interest of justice on the ground that defendant's attorney improperly questioned witnesses concerning prejudicial matters.

Questions asked by defendant's attorney of his own witnesses concerning plaintiff's reputation for truth and veracity were proper (*see,* Prince, Richardson on Evidence § 6-402 - 6-405 [Farrell 11th ed]), as were questions asked of plaintiff on cross-examination. A witness may be impeached by questioning concerning any prior immoral, vicious, or criminal acts that may show him to be unworthy of belief (*see, Badr v Hogan,* 75 NY2d 629, 635; *see generally,* Prince, Richardson on Evidence, *op. cit.,* §§ 6-406, 6-407). Questions asked by defendant's attorney in cross-examining plaintiff's witness were likewise proper. Evidence of the character of a party or witness is generally inadmissible in a civil action (*see, O'Connell v Jacobs,* 181 AD2d 1064, *affd* 81 NY2d 797; *Noonan v Luther*, 206 NY 105, 108), and questions concerning prior bad acts generally may not be asked of a witness other than the one who committed those acts (*see, Badr v Hogan, supra*, at 635). Here, however, defendant's attorney properly inquired whether the witness was aware of plaintiff's prior bad acts in an effort to impeach the witness's testimony, elicited over defendant's objection, concerning plaintiff's good character and reputation for truth and veracity (*see, People v Garrick,* 246 AD2d 478, *lv denied* 92 NY2d 852; *cf., Taylor v Heft,* 150 App Div 509, 513). (Appeal from Judgment of Supreme Court, Oneida County, McCarthy, J. - Negligence.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(844) CA 99-1174. (Cattaraugus Co.) -- DEBRA GOODWIN AND ROY HUFFMAN, PLAINTIFFS-RESPONDENTS, V NEW YORK STATE ELECTRIC & GAS CORPORATION, DEFENDANT, AND KAY M. EDDY, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (*see, Matter of Eric D.* [appeal No. 1], 162 AD2d 1051). (Appeal

from Order of Supreme Court, Cattaraugus County, Cosgrove, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(845) CA 99-1256. (Cattaraugus Co.) -- DEBRA GOODWIN AND ROY HUFFMAN, PLAINTIFFS-RESPONDENTS, V NEW YORK STATE ELECTRIC & GAS CORPORATION, DEFENDANT, AND KAY M. EDDY, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Amended order unanimously affirmed without costs for reasons stated in decision at Supreme Court, Cosgrove, J. (Appeal from Amended Order of Supreme Court, Cattaraugus County, Cosgrove, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND KEHOE, JJ. (Filed June 16, 2000.)

(845.1) OP 00-01131. (Monroe Co.) -- MATTER OF JOSE J. SANTIAGO, PETITIONER, V THE HONORABLE WILLIAM H. BRISTOL, MONROE COUNTY COURT JUDGE, RESPONDENT, GANNETT CO., WOKR-TV, WHEC-TV, WUHF-TV, WROC-TV, R-NEWS, THE HONORABLE HOWARD R. RELIN, MONROE COUNTY DISTRICT ATTORNEY, AND THE HONORABLE ELIOT SPITZER, ATTORNEY-GENERAL OF THE STATE OF NEW YORK, INTERVENORS-RESPONDENTS. -- Petition unanimously granted without costs and judgment granted in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, *inter alia*, judgment prohibiting respondent from enforcing his order declaring Civil Rights Law § 52 unconstitutional pursuant to NY Constitution, article I, § 8 and permitting audiovisual coverage of petitioner's trial. Pending before respondent is an indictment charging petitioner with murder in the first degree and other crimes arising from an incident in Rochester on March 1, 1999, and the District Attorney seeks the death penalty. Prior to trial, several Rochester television stations and the Gannett Co., Inc. (intervenors) moved to intervene for the purpose of obtaining an order permitting audiovisual coverage of the trial. Petitioner and the District Attorney opposed the motion, arguing, *inter alia*, that such coverage is prohibited by Civil Rights Law § 52. Among other things, petitioner alleges herein that respondent acted in excess of his authority in granting the motion to intervene. We stayed respondent's order, thus permitting the trial to proceed without audiovisual coverage pending final determination of this proceeding.

Initially, we reject intervenors' contention that petitioner has an adequate remedy at law and thus that the petition should be dismissed. Although an appeal following a conviction would bring up for review the contention that audiovisual coverage

denied petitioner a fair trial (*see, Chandler v Florida*, 449 US 560, 581), it would not address the issue presented herein, whether respondent exceeded his authority in permitting the media to intervene over the objection of petitioner and the District Attorney. Prohibition lies when a court acts "in excess of authorized powers in a proceeding over which it has jurisdiction" (*Matter of Rush v Mordue*, 68 NY2d 348, 352; *see, La Rocca v Lane*, 37 NY2d 575, 578-579, *cert denied* 424 US 968).

We conclude that respondent acted in excess of his authorized powers in permitting the media to intervene in petitioner's criminal action. The right of the media to intervene in that action is premised upon its right of access to petitioner's trial. That right is protected by both the First Amendment (*see, Richmond Newspapers v Virginia*, 448 US 555) and Judiciary Law § 4, which mandates public trials (*see, Matter of Westchester Rockland Newspapers v Leggett*, 48 NY2d 430, 437). The right of access, however, is not the right to broadcast the proceedings. Intervenors have no right under the US Constitution to televise or otherwise broadcast petitioner's trial (*see, Nixon v Warner Communications*, 435 US 589, 610; *see also*, *Chandler v Florida, supra*, at 569), and there is no precedent in New York recognizing such a right (*see, Matter of Johnson Newspaper Corp. v Melino*, 77 NY2d 1, 8). Indeed, Civil Rights Law § 52 prohibits televising, broadcasting or taking motion pictures of a trial, and the Rules of the Chief Judge generally forbid "[t]aking photographs, films or videotapes, or audiotaping, broadcasting or telecasting, in a courthouse" (22 NYCRR 29.1 [a]). Because intervenors have no constitutional or statutory right to broadcast, respondent was without authority to permit them to intervene. In its decision, respondent indicated that he was acting pursuant to his inherent authority to control his courtroom. Respondent is not authorized, however, to exercise that authority "in a manner that conflicts with existing legislative command" (*People v Mezon*, 80 NY2d 155, 159). Rather than moving in County Court for an order permitting audiovisual coverage of petitioner's trial, intervenors should have commenced a declaratory judgment action in Supreme Court challenging the constitutionality of the statute and rule barring such coverage (*see*, *People v Langdon*, 258 AD2d 937). Thus, we grant the petition and grant judgment in favor of petitioner prohibiting respondent from enforcing his order. (Original Proceeding Pursuant to CPLR art 78.) PRESENT: PIGOTT, JR., P. J., GREEN, PINE, WISNER AND KEHOE, JJ. (Filed May 25, 2000.)

(846) TP 99-1542. (Jefferson Co.) -- MATTER OF MARC BARRETT, PETITIONER, V HORACE ALBAUGH, SUPERINTENDENT, CAPE VINCENT CORRECTIONAL FACILITY, RESPONDENT. -- Determination unanimously confirmed without costs and petition dismissed. (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Jefferson County, Gilbert, J.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(847) KA 98-05367. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RICHARD SANTOS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Monroe County Court, Maloy, J. - Criminal Sale Controlled Substance, 2nd Degree.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(848) KA 97-05495. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V REGINALD JOHNSON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Monroe County Court, Marks, J. - Unauthorized Use Motor Vehicle, 2nd Degree.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(849) KA 99-1550. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V TIMOTHY MULDROW, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: County Court properly denied the motion of defendant to suppress evidence seized during a search of his apartment. Defendant lacks standing to challenge the entry by police officers into the common hallway area accessible to all tenants and their invitees (*see, People v Bilsky*, 261 AD2d 174, *lv dismissed* 94 NY2d 859; *Mauceri v County of Suffolk*, 234 AD2d 350). Contrary to defendant's contention, the court properly determined that the police officers did not approach defendant's brother with their handguns drawn and that defendant's brother voluntarily consented to the officers' entry into the apartment. There is no basis in this record to disturb the court's resolution of those issues in the People's favor (*see, People v Prochilo*, 41 NY2d 759, 761).

We reject defendant's contention that the court erred in determining that a prosecution witness was competent to provide sworn testimony. "The resolution of the issue of witness competency is exclusively the responsibility of the trial court", and the court's determination should be sustained where, as here,

there is no "clear abuse of discretionary power" (*People v Parks*, 41 NY2d 36, 46).

Although the court erred in admitting two hearsay statements, the error is harmless; the proof of defendant's guilt is overwhelming and there is no significant probability that defendant otherwise would have been acquitted (*see, People v Crimmins*, 36 NY2d 230, 242). (Appeal from Judgment of Monroe County Court, Egan, J. - Murder, 2nd Degree.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(852) KA 98-5353. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V BILLY G. WILLIAMS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: On appeal from a judgment convicting him of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that the verdict is against the weight of the evidence and that the sentence is unduly harsh or severe. The criminal intent of a burglar or attempted burglar may be inferred from the circumstances of the entry or attempted entry (*see, People v Gaines,* 74 NY2d 358, 362, n 1; *People v Barnes,* 50 NY2d 375, 381; *People v Mackey*, 49 NY2d 274, 280). The People need not establish that defendant intended to commit any particular crime (*see, People v Mahboudian,* 74 NY2d 174, 193; *People v Mackey, supra*, at 278-279). Here, the evidence supports the inference that defendant had the intent to commit a crime inside the apartment, and the jury gave the evidence the weight it should be accorded (*see, People v Bleakley,* 69 NY2d 490, 495; *People v Williams,* 221 AD2d 673; *People v Mann*, 216 AD2d 796, 798-799, *lv denied* 86 NY2d 797; *People v Estrada*, 173 AD2d 555, *lv denied* 78 NY2d 954). The sentence imposed, a determinate term of incarceration of six years, is not unduly harsh or severe. (Appeal from Judgment of Erie County Court, McCarthy, J. - Attempted Burglary, 2nd Degree.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(853) KA 99-1551. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RAYMOND STUBBS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed (*see, People v Muldrow*, ___ AD2d ___ [decided herewith]). (Appeal from Judgment of Monroe County Court, Egan, J. - Murder, 2nd Degree.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(854) CA 00-00212. (Livingston Co.) -- JOHN CURTISS, PLAINTIFF-APPELLANT, V COUNTY OF LIVINGSTON, JOHN M. YORK, INDIVIDUALLY AND AS SHERIFF OF LIVINGSTON COUNTY, AND DANIEL MALONEY, INDIVIDUALLY AND AS EMPLOYEE OF COUNTY OF LIVINGSTON, DEFENDANTS-RESPONDENTS. -- Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Livingston County, Polito, J. - Set Aside Verdict.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(855) CA 00-00180. (Jefferson Co.) -- MATTER OF THE ARBITRATION BETWEEN JEFFERSON COUNTY DEPUTY SHERIFF'S EMPLOYEES' ASSOCIATION, LOCAL 3089, COUNCIL 82, AFSCME, AFL-CIO, PETITIONER-RESPONDENT, AND JEFFERSON COUNTY, RESPONDENT-APPELLANT. -- Order unanimously affirmed without costs for reasons stated in decision at Supreme Court, Gilbert, J. (Appeal from Order of Supreme Court, Jefferson County, Gilbert, J. - Arbitration.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(856) CA 99-1295. (Niagara Co.) -- JOSEPH P. OATES, PLAINTIFF-APPELLANT, V CITY OF NIAGARA FALLS, DEFENDANT, AND O'BRIEN-KREITZBERG & ASSOCIATES, INC., DEFENDANT-RESPONDENT. -- Order unanimously affirmed without costs for reasons stated in decision at Supreme Court, Koshian, J. (Appeal from Order of Supreme Court, Niagara County, Koshian, J. - Summary Judgment.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(857) CA 99-1123. (Erie Co.) -- MATTER OF JUAN IRENE, PETITIONER-RESPONDENT, V CATHEDRAL PARK TOWER BOARD OF MANAGERS, LTD., AND CATHEDRAL PARK TOWER, RESPONDENTS-APPELLANTS. -- Judgment unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Supreme Court granted in part respondents' motion for summary judgment and dismissed the petition insofar as it sought to compel respondents to approve that part of the application of petitioner seeking permission to alter the exterior windows of his condominium unit. The court granted the petition insofar as it sought to compel respondents to approve that part of the application seeking permission to construct a sun-room on the roof of the building with elevator access from the condominium unit. The court should have granted respondents' motion in its entirety and dismissed the petition. Thus, we modify the judgment accordingly. Pursuant to section 6.08 of article VI of the Declaration of

Condominium, petitioner waived his right to judicial review of respondents' denial of his application. It is well established that where, as here, a board "acts for the purposes of the [condominium], within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. * * * [U]nless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538). Petitioner failed to present evidence of bad faith, fraud, self-dealing or other misconduct (*see, Matter of Vacca v Board of Mgrs. of Primrose Lane Condominium*, 251 AD2d 674, 675). Rather, the record establishes that respondents were acting in good faith for the purposes of the condominium and that their actions were within the scope of their authority (*see, Cooper v Greenbriar Owners Corp.*, 239 AD2d 311, 311-312; *Board of Mgrs. of Greens Condominium v Feldman*, 190 AD2d 650, 651, *lv denied* 81 NY2d 710). (Appeal from Judgment of Supreme Court, Erie County, Mintz, J. - CPLR art 78.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(858) CA 99-1293. (Onondaga Co.) -- NICHOLAS J. MASTERPOL, INC., PLAINTIFF-RESPONDENT-APPELLANT, V THE TRAVELERS INSURANCE COMPANIES, DEFENDANT-RESPONDENT-APPELLANT, SINCLAIR & ANDREWS INSURANCE AND SINCLAIR & ANDREWS, INC., DEFENDANTS-APPELLANTS-RESPONDENTS. -- Judgment unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Supreme Court properly denied those parts of plaintiff's motion seeking summary judgment and dismissal of the defense of defendant The Travelers Insurance Companies (Travelers) based upon Travelers' disclaimer of coverage, and determined that the disclaimer is valid and enforceable. The disclaimer by Travelers was based on the clear and unambiguous language of the policy excluding coverage if plaintiff's building was vacant for 60 consecutive days prior to the loss, and the record establishes that the building was vacant within the meaning of the policy for the requisite period (*see, Nurnberg v Citizens Cas. Co. of N. Y.*, 18 AD2d 650, *affd* 13 NY2d 681). The court also properly denied that part of plaintiff's motion seeking, in the alternative, leave to amend the amended complaint to allege a cause of action for reformation. "While leave to amend should be freely given (*see*, CPLR 3025 [b]), a proposed amendment which is devoid of merit should not be permitted" (*West Branch Realty Corp. v Exchange Ins. Co.*, 260 AD2d 473). The

record contains no proof that the policy was executed under either a mutual mistake or a unilateral mistake coupled with fraud (*see, Loyalty Life Ins. Co. v Fredenberg,* 214 AD2d 297, 299-300; *Town of German Flats v Aetna Cas. & Sur. Co.,* 174 AD2d 1003, 1004, *lv denied* 78 NY2d 860). Rather, the record establishes only a unilateral mistake by plaintiff (*see, Metzger v Aetna Ins. Co.,* 227 NY 411, 415-416; *Bardi v Farmers Fire Ins. Co.,* 260 AD2d 783, 786, *lv denied* 93 NY2d 815, *rearg denied* 94 NY2d 839).

The court erred, however, in denying the cross motions of defendants for summary judgment dismissing the amended complaint, and thus we modify the judgment accordingly. Plaintiff had conclusive presumptive knowledge of the terms of the policy prior to the loss and took no action to close the gap in coverage resulting from the exclusion for vacancy (*see, Madhvani v Sheehan,* 234 AD2d 652, 654-655; *Rogers v Urbanke,* 194 AD2d 1024, 1024-1025; *Rotanelli v Madden,* 172 AD2d 815, 817, *lv denied* 79 NY2d 754). Plaintiff's request for insurance neither triggered a duty on defendants' part to recommend coverage in the event that the building was vacant, nor "relieve[d] plaintiff of its obligation to read the policy, which contained an express exclusion" for vacancy (*L.C.E.L. Collectibles v American Ins. Co.,* 228 AD2d 196, 197). (Appeals from Judgment of Supreme Court, Onondaga County, Tormey, III, J., for Hurlbutt, J., pursuant to CPLR 9002 - Summary Judgment.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(859) CA 99-1159. (Erie Co.) -- JOSEPH P. SALERNO, PLAINTIFF-APPELLANT, V LYNN M. SALERNO, DEFENDANT-RESPONDENT. -- Order unanimously affirmed without costs. Memorandum: The parties were married in 1989 and had twin daughters, Lauren and Alexis, born in 1993. Alexis was born with multiple handicaps, including brain damage that resulted in cerebral palsy. The parties entered into a separation and property settlement agreement in November 1995 providing for joint custody of the children, with defendant designated the primary residential parent. Plaintiff commenced an action for divorce in November 1996 and sought sole custody of the children. Supreme Court properly concluded following a trial that the existing custodial arrangement should continue.

The determination of the trial court, which heard and observed the witnesses, is entitled to great deference and should not be disturbed where, as here, it has a sound and substantial

basis in the record (*see, Matter of Kamholtz v Kovary*, 210 AD2d 813, 814; *Fox v Fox,* 177 AD2d 209, 211-212). Although a prior custody arrangement is not determinative, it is an important factor and will be continued unless there is an indication that a "change in custody will substantially enhance the child[ren]'s welfare" (*Matter of Clary v Bond*, 186 AD2d 869, 870). The testimony at trial establishes that defendant has been the primary caretaker of the children since their birth, and by all accounts is a loving and caring parent to the children. While plaintiff is very attentive to Alexis, he tends to place her needs ahead of Lauren's needs. Thus, the record establishes that it is in the best interests of the children to continue custody with defendant (*see generally, Eschbach v Eschbach,* 56 NY2d 167, 171; *Matter of Hyde v Hudor,* 265 AD2d 765, 766).

Although the opinion of the court-appointed psychologist was a factor for the court to consider, that opinion is not determinative and here the court properly rejected it (*see, Matter of Aldrich v Aldrich,* 263 AD2d 579; *Matter of Prete v Prete,* 193 AD2d 804, 805; *cf., Young v Young,* 212 AD2d 114, 118-120). The psychologist testified that plaintiff would be a better advocate for the needs of Alexis and that Lauren harbors negative feelings toward her family due to the attention given Alexis. The psychologist opined that plaintiff should have custody of Alexis and that defendant should retain custody of Lauren. In the alternative, he recommended that Alexis be institutionalized.

Courts should be reluctant to separate siblings (*see, Eschbach v Eschbach, supra,* at 173; *Matter of Ebert v Ebert,* 38 NY2d 700, 704; *Obey v Degling,* 37 NY2d 768, 771), and thus sibling relationships will not be disrupted where, as here, there is no overwhelming need to do so (*see, White v White,* 209 AD2d 949, 950, *lv dismissed* 85 NY2d 924; *Matter of Lobo v Muttee,* 196 AD2d 585, 587; *Matter of James v Carpenter,* 187 AD2d 997). Although the psychologist opined that plaintiff would be a better advocate for Alexis, he did not opine that defendant is an inappropriate caretaker. Indeed, the evidence at trial establishes that defendant is able to care for Alexis without excluding Lauren. In addition, the testimony of the other witnesses, including plaintiff and defendant, establishes that the twin sisters share a close bond, and the parents do not wish to separate the siblings. In any event, we note that, in continuing the existing custodial arrangement, pursuant to which

each parent spends time alone with each child, the court thereby addressed the psychologist's concerns regarding Lauren.

Finally, we disagree with plaintiff and the Law Guardian that the court erred in failing to adopt the recommendation of the Law Guardian to continue the current custodial arrangement, assign a parent coordinator to resolve conflicts between the parents, and increase the amount of time each parent spent alone with each child. A court is not required to adopt the recommendation of a Law Guardian (*see, Fisher v Fisher,* 206 AD2d 910). (Appeal from Order of Supreme Court, Erie County, NeMoyer, J. - Custody.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(860) CA 99-1325. (Erie Co.) -- MATTER OF THE ESTATE OF DORIAN ARROYO, DECEASED. YOLANDA ARROYO, PETITIONER-RESPONDENT; ROBERTO ARROYO, RESPONDENT-APPELLANT. -- Order unanimously affirmed without costs. Memorandum: The Surrogate properly excluded respondent from receiving any share of the settlement proceeds attributable to the wrongful death of his child. Pursuant to EPTL 4-1.4 (a), "No distributive share in the estate of a deceased child shall be allowed to a parent who has failed or refused to provide for, or has abandoned such child while such child is under the age of twenty-one years". Disqualification under EPTL 4-1.4 precludes one from sharing in wrongful death proceeds under EPTL 5-4.1 (*see,* Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 5-4.1, at 305). Here, the record establishes that respondent failed or refused to support his child for 2½ years prior to her death (*see, Matter of Wright,* ___ AD2d ___ [decided Apr. 4, 2000]; *Matter of Baecher,* 198 AD2d 221, *lv denied* 83 NY2d 751; *Matter of Brennan*, 169 AD2d 1000, 1000-1001; *Matter of Daniel*, 275 App Div 890). Moreover, the record establishes that respondent abandoned his child by neglecting or refusing to fulfill the natural and legal obligations of training, care and guidance owed by a parent to a child (*see, Matter of Downs,* 157 Misc 293; *Matter of Schiffrin*, 152 Misc 33, 34; *Matter of Guilianelli,* 7 Misc 2d 171; *see also, Matter of Davis,* 142 Misc 681, 691). Contrary to his contention, respondent was not mentally incompetent to such a degree as to excuse his abandonment of his child and failure to support her (*cf.*, *Matter of Musczak*, 196 Misc 364, 366-367; *Matter of Barth,* 176 Misc 310, 311; *Matter of Zounek*, 143 Misc 827, 828). (Appeal from Order of Erie County Surrogate's Court, Mattina, S. - EPTL.)

PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(861) CA 00-00144. (Erie Co.) -- ANTHONY ACCURSO AND MARY ELLEN ACCURSO, PLAINTIFFS-APPELLANTS, V FOREST CITY ENTERPRISES, DEFENDANT-RESPONDENT. -- Order unanimously affirmed without costs. Memorandum: Supreme Court properly denied plaintiffs' motion pursuant to CPLR 4404 (a) to set aside the jury verdict as against the weight of the evidence. "A jury's verdict is not against the weight of the evidence unless utterly irrational and unsupported by a fair interpretation of the evidence" (*Lillis v D'Souza*, 174 AD2d 976, 977, *lv denied* 78 NY2d 858; *see generally, Cohen v Hallmark Cards*, 45 NY2d 493, 498-499). The jury properly evaluated the conflicting expert testimony and the credibility of the other witnesses (*see, Hall v Prestige Remodeling & Home Repair Serv.*, 192 AD2d 1098; *Delay v Rhinehart*, 176 AD2d 1211; *Lillis v D'Souza, supra*, at 977). The record establishes that the jury's verdict is rational and supported by a fair interpretation of the evidence, which included testimony from defendant's expert that the injuries of plaintiff Anthony Accurso were not caused by his fall on January 5, 1994. (Appeal from Order of Supreme Court, Erie County, Dillon, J. - Set Aside Verdict.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(862) CA 99-1547. (Genesee Co.) -- JANICE CADIEUX AND MICHAEL CADIEUX, AS PARENTS AND NATURAL GUARDIANS OF JORDON CADIEUX AND STEPHEN CADIEUX, INFANTS, AND JANICE CADIEUX, INDIVIDUALLY, PLAINTIFFS-RESPONDENTS, V ROSE ANNE GOUGH, ET AL., DEFENDANTS, AND THOMAS D. WILLIAMS, ESQ., DEFENDANT-APPELLANT. -- Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: This action arises from the purchase of residential property by plaintiff Janice Cadieux (Janice) in September 1994. Plaintiffs allege that Janice and plaintiffs' three infant children suffered personal injuries because the water on the property was contaminated with bacteria. Plaintiffs seek damages for those personal injuries, the loss of services, society and companionship of the children, and the cost of correcting the conditions causing the contamination of the water supply.

In September 1998 plaintiffs moved for leave to serve a second supplemental summons and complaint adding as a defendant Thomas D. Williams, Esq. (defendant), the attorney who

represented Janice in the purchase of the property. Defendant opposed the motion on the ground that plaintiffs' action against him is time-barred. Supreme Court properly granted the motion to the extent that plaintiffs seek to allege claims on behalf of the three infant children. The children are entitled to the benefit of the infancy toll provided in CPLR 208 (*see, Lewis v Wascomat, Inc.*, 125 AD2d 194, 195). The court properly denied the motion to the extent that plaintiffs seek to allege claims for damages for personal injuries to Janice arising from defendant's alleged malpractice. Those claims against defendant are untimely (*see, Davis v Isaacson, Robustelli, Fox, Fine, Greco & Fogelgaren*, 258 AD2d 321, 322, *lv dismissed* 93 NY2d 957).

The court erred, however, in granting the motion to the extent that plaintiffs seek to recover damages for Janice's pecuniary or property loss arising from defendant's alleged malpractice. The legal malpractice cause of action accrued prior to September 4, 1996, the effective date of the amendment to CPLR 214 (6) (L 1996, ch 623), which shortened the limitations period with respect to plaintiffs' claims for pecuniary or property loss from six years to three years. Plaintiffs, however, did not seek leave to commence the action against defendant until September 1998, approximately one year after the Statute of Limitations had run on the legal malpractice cause of action under the amended statute and two years after the effective date of the amendment. Thus, the legal malpractice cause of action is also untimely with respect to plaintiffs' claims for pecuniary or property loss (*see, Lefkowitz v Preminger*, 261 AD2d 447, 448).

The court further erred in granting the motion to the extent that plaintiffs seek to allege a derivative cause of action. The tolling of the Statute of Limitations for the claims of the infant children pursuant to CPLR 208 does not apply to plaintiffs' derivative cause of action (*see, Matter of Seekings v Jamestown Pub. School Sys.*, 224 AD2d 942, 944; *Whipple v Goldsmith*, 202 AD2d 834, 835; *Lewis v Wascomat, Inc., supra*, at 195).

We modify the order, therefore, by denying plaintiffs' motion insofar as it seeks leave to serve a second supplemental summons and complaint alleging a derivative cause of action and seeking damages for Janice's pecuniary or property loss arising from defendant's alleged malpractice. (Appeal from Order of Supreme Court, Genesee County, Rath, Jr., J. - Amend Pleading.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(863) CA 99-1633. (Erie Co.) -- INDUSTRIAL CONTRACTORS CONSULTANTS, INC., PLAINTIFF-RESPONDENT-APPELLANT, V C.W. BAKER INSURANCE AGENCY, INC., DEFENDANT-APPELLANT-RESPONDENT. (APPEAL NO. 1.) -- Appeal and cross appeal unanimously dismissed without costs upon stipulation. (Appeals from Order of Supreme Court, Erie County, Sedita, Jr., J. - Amend Pleading.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(864) CA 99-1644. (Erie Co.) -- INDUSTRIAL CONTRACTORS CONSULTANTS, INC., PLAINTIFF-RESPONDENT-APPELLANT, V C.W. BAKER INSURANCE AGENCY, INC., DEFENDANT-APPELLANT-RESPONDENT. (APPEAL NO. 2.) -- Appeal and cross appeal unanimously dismissed without costs upon stipulation. (Appeals from Resettled Order of Supreme Court, Erie County, Sedita, Jr., J. - Vacate Order.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(865) CA 00-00142. (Erie Co.) -- JOSEPH J. MC GUIRE AND SHIRLEY M. MC GUIRE, CLAIMANTS-RESPONDENTS, V STATE OF NEW YORK AND NEW YORK STATE THRUWAY AUTHORITY, DEFENDANTS-APPELLANTS. (CLAIM NO. 95827.) (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (*see, Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *see also, Chase Manhattan Bank v Roberts & Roberts*, 63 AD2d 566, 567; CPLR 5501 [a] [1]). (Appeal from Order of Court of Claims, Lane, J. - Summary Judgment.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(866) CA 00-00158. (Erie Co.) -- JOSEPH J. MC GUIRE AND SHIRLEY M. MCGUIRE, CLAIMANTS-RESPONDENTS, V STATE OF NEW YORK AND NEW YORK STATE THRUWAY AUTHORITY, DEFENDANTS-APPELLANTS. (CLAIM NO. 95827.) (APPEAL NO. 2.) -- Judgment unanimously affirmed without costs. Memorandum: Claimants commenced this action to recover for injuries sustained by Joseph J. McGuire (claimant) in a fall from a scaffolding at a construction site owned by defendants. Defendants appeal from a judgment granting claimants' motion for partial summary judgment on liability under Labor Law § 240 (1) and denying defendants' cross motion for summary judgment dismissing that claim.

Supreme Court properly denied defendants' cross motion insofar as it was based on the recalcitrant worker defense. The affidavits submitted in support of the cross motion fail to establish the elements of that defense, i.e., a purposeful or deliberate refusal to heed a specific order to use a safety

device that is immediately and visibly available to the worker or actually put in place (*see, Jastrzebeski v North Shore School Dist.,* 223 AD2d 677, 679-680, *affd* 88 NY2d 946; *Balthazar v Full Circle Constr. Corp.,* ___ AD2d ___ [decided Apr. 25, 2000]; *see generally, Gordon v Eastern Ry. Supply,* 82 NY2d 555, 562-563; *Stolt v General Foods Corp.,* 81 NY2d 918, 920).

The court properly granted claimants' motion for partial summary judgment on liability under Labor Law § 240 (1) and properly denied defendants' cross motion insofar as it sought dismissal of that cause of action on the ground that the conduct of claimant was the sole proximate cause of his injuries. Claimants established the causal connection between the injuries and the statutory violations (*see, Felker v Corning Inc.,* 90 NY2d 219, 224-225; *Gordon v Eastern Ry. Supply, supra,* at 561-562; *Smith v Hooker Chem. & Plastics Corp.,* 70 NY2d 994, 996, *rearg denied* 71 NY2d 995), and defendants failed to raise a triable issue of fact on causation. There is no view of the evidence that could lead to the conclusion that defendants' statutory violations were not the cause of claimant's injuries (*see, Livecchi v Eastman Kodak Co.,* 258 AD2d 916; *Aman v Federal Express Corp.,* 247 AD2d 879, 880; *Kanney v Goodyear Tire & Rubber Co.,* 245 AD2d 1034, 1035). Moreover, defendants failed to sustain their initial burden, in support of their cross motion, of establishing that the conduct of claimant was the sole proximate cause of his injuries (*see, Lawrence v Forest City Ratner Cos.,* ___ AD2d ___ [decided Jan. 27, 2000]; *Wasilewski v Museum of Modern Art,* 260 AD2d 271, 271-272; *Hodge v Crouse Hinds Div. of Cooper Indus.,* 207 AD2d 1007). (Appeal from Judgment of Court of Claims, Lane, J. - Summary Judgment.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(867) CA 99-3020. (Monroe Co.) -- LARRY J. LO MAGLIO, PLAINTIFF-RESPONDENT, V CARMEN MARIE LO MAGLIO, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Judgment unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Supreme Court properly denied defendant’s cross motion to vacate the stipulation of the parties made in open court that resolved the issues of custody and child support and permitted each party to obtain a divorce on the ground of cruel and inhuman treatment. The record does not support the contention of defendant that she entered into the stipulation under duress.

The court did not err in failing to award child support retroactive to the date on which defendant filed a petition in Family Court seeking an order of protection. Defendant did not seek child support in that petition, and thus she was not entitled to child support prior to the commencement of this action (*see, Greene v Greene*, 90 AD2d 533). Because defendant stipulated during trial of the divorce action that the oldest child of the parties' marriage was emancipated, the court did not err in refusing to modify the judgment to provide child support for that child.

We also reject the contention of defendant that she is entitled to permanent, rather than durational, maintenance. "The amount and duration of maintenance are matters left to the sound discretion of the trial court" (*Wittig v Wittig*, 258 AD2d 883). The record supports the court's determination that defendant has the education and qualifications to enable her to become self-supporting within 18 months, and we perceive no basis to disturb the court's exercise of discretion in awarding durational maintenance for that limited period (*see, Zurek v Zurek*, 255 AD2d 922). However, because defendant's medical condition is likely to be permanent, the court should have directed plaintiff to continue to provide the same level of medical insurance coverage that he provided during the marriage to the extent such coverage is not provided by defendant's employer (*see, Fischer v Fischer*, 199 AD2d 1028). Thus, we modify the judgment accordingly.

We have reviewed defendant's remaining contentions and conclude that they lack merit. (Appeal from Judgment of Supreme Court, Monroe County, Affronti, J. - Matrimonial.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(868) CA 99-3422. (Monroe Co.) -- LARRY J. LO MAGLIO, PLAINTIFF-RESPONDENT, V CARMEN MARIE LO MAGLIO, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Order unanimously affirmed without costs. Same Memorandum as in *Lo Maglio v Lo Maglio* ([appeal No. 1] ___ AD2d ___ [decided herewith]). (Appeal from Order of Supreme Court, Monroe County, Affronti, J. - Matrimonial.) PRESENT: GREEN, J. P., HAYES, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(869) TP 99-1654. (Wyoming Co.) -- MATTER OF MICHAEL MILHOUSE, PETITIONER, V GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT. -- Determination

unanimously confirmed without costs and petition dismissed. (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Wyoming County, Dadd, J.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(870) KA 99-5330. (Onondaga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RONZELL RICHARDSON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Onondaga County Court, Fahey, J. - Arson, 1st Degree.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(871) KA 97-02356. (Onondaga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RODRIGO MARTINEZ, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Onondaga County Court, Burke, J. - Criminal Sale Controlled Substance, 3rd Degree.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(872) KA 97-2301. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JAMEEL WILLIAMS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant was convicted after a jury trial of murder in the second degree (Penal Law § 125.25 [1]) in connection with the beating death of the victim on a street corner in the City of Buffalo. The prosecution presented the testimony of two eyewitnesses, who testified that they observed defendant, who was wearing a red coat, striking the victim about the head and neck and choking the victim. One eyewitness also testified that defendant did a "victory dance" and then kicked the victim in the head and jumped on his chest and stomach. The Erie County Medical Examiner testified that the cause of death was a blunt force injury to the head and neck area, that there were no cuts or bruises on the victim's hands, and that neither strangulation nor the cocaine found in the victim's system was the cause of death. In support of a justification defense, defendant testified that he and the victim had argued and that he chased the victim after the victim "snatched" defendant's gold necklace. Defendant testified that he retrieved the necklace but the victim then punched him; during the ensuing fight the two fell to the ground, each choking the other. Defendant testified that he released the victim when defendant felt the pressure relieved from his own throat. When

the victim did not move, defendant tried to resuscitate him by administering cardiac pulmonary resuscitation. Defendant left the scene "in a daze" and proceeded to his aunt's house. Defendant's testimony was consistent with the voluntary statement made by defendant to the police in the presence of defense counsel. Defendant also presented witnesses to support his testimony that he did not own a red coat and that someone had been observed attempting to resuscitate the victim.

We reject the contention that defendant was denied effective assistance of counsel. Supreme Court properly denied defendant's motion pursuant to CPL 330.30 to set aside the verdict on that ground, determining that, while "not perfect, [defense counsel's] cross-examination of witnesses, opening and closing statements and argument of legal issues at pre-trial hearings and at trial were all conducted in a thorough, professional and effective manner." Furthermore, it is not for an appellate court "to second-guess whether a course chosen by defendant's counsel was the best trial strategy * * * so long as defendant was afforded meaningful representation" (*People v Satterfield,* 66 NY2d 796, 799-800). Defendant's contention that defense counsel should have presented expert testimony concerning the effects of cocaine use by the victim in order to provide exculpatory or mitigating evidence concerns matters outside the record and is therefore properly addressed in a CPL 440.10 motion (*see, People v Snitzel,* ___ AD2d ___ [decided Mar. 29, 2000]; *People v Chiera,* 255 AD2d 685, 686). Defendant's further contention that defense counsel should have called certain witnesses to testify is also properly the subject of a CPL 440.10 motion (*see, People v Snitzel, supra*). Although we agree with defendant that one prosecution witness was difficult and made certain prejudicial remarks, we reject his contention that defense counsel's actions with respect to that witness deprived him of meaningful representation (*see generally, People v Baldi,* 54 NY2d 137, 147). Although defense counsel's representation was not error free, we conclude that defense counsel's conduct, viewed either with respect to specific alleged errors or as a whole, did not "rise to the level of 'egregious and prejudicial' conduct * * * necessary to prevail on an ineffective assistance of counsel claim" (*People v Flores,* 84 NY2d 184, 187-188; *see, People v Benevento,* 91 NY2d 708, 713).

Because the court charged the lesser included offense of manslaughter in the first degree and defendant was convicted of

murder in the second degree, defendant is foreclosed from challenging the court's denial of his request to charge the further lesser included offenses of manslaughter in the second degree and criminally negligent homicide (*see, People v Henderson,* 244 AD2d 889, 890, *lv denied* 91 NY2d 926; *see also, People v Boettcher,* 69 NY2d 174, 180).

Contrary to defendant's contention, a prosecution witness was properly permitted to testify with respect to her identification of defendant from a photo array. Defendant opened the door to the testimony of that witness by eliciting testimony from her aunt concerning that identification and any conversation they may have had with respect to it (*see, People v Bunch,* 58 AD2d 608).

The contention of defendant that he was denied the right to testify with respect to the victim's reputation for violence is not preserved for our review (*see,* CPL 470.05 [2]). In any event, that contention is without merit.

Defendant did not establish that he was denied a fair trial by alleged cumulative errors of defense counsel, the prosecutor and the court (*cf., People v Dowdell,* 88 AD2d 239, 248). Finally, we have reviewed defendant's remaining contentions and conclude that they are without merit. (Appeal from Judgment of Supreme Court, Erie County, Cosgrove, J. - Murder, 2nd Degree.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(873) KA 99-1630. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V ROBERT STEVENSON, DEFENDANT-APPELLANT. -- Judgment unanimously reversed on the law, plea vacated, motion to suppress granted in part and matter remitted to Erie County Court for further proceedings on the indictment. Memorandum: In the early morning hours, two uniformed Buffalo police officers were patrolling Midway Avenue in an unmarked police vehicle. While outside a bar with a reputation for violence, one officer observed defendant standing behind a legally parked car. After making eye contact with defendant, that officer observed defendant crouch and move from left to right as if he were moving something heavy. The officers approached defendant on foot and asked defendant to spread his legs and place his hands on the police vehicle. Upon frisking defendant, the officers discovered an ammunition clip. No weapon was recovered from defendant's person, but a loaded .45 caliber pistol was found on the street

near the rear tire of the vehicle by which defendant had been standing. After defendant was placed under arrest, he made several inculpatory statements.

County Court erred in denying that part of defendant's motion seeking suppression of the ammunition clip. "[A] stop and frisk is a more obtrusive procedure than a mere request for information or a stop invoking the common-law right of inquiry, and as such normally must be founded on a reasonable suspicion that the particular person has committed or is about to commit a crime" (*People v Benjamin,* 51 NY2d 267, 270). "[W]here no more than a common-law right to inquire exists, a frisk must be based upon a reasonable suspicion that the officers are in physical danger and that defendant poses a threat to their safety" (*People v Hauser*, 80 AD2d 460, 462; *see, People v Russ,* 61 NY2d 693, 694-695). The movement of defendant combined with the location did not provide the officers with reasonable cause to believe that a crime was afoot or reasonable cause to believe that defendant was armed. The fact that defendant was located in a high crime area does not by itself justify the police conduct where, as here, there were no other objective indicia of criminality (*see, People v Powell*, 246 AD2d 366, 369-370, *appeal dismissed* 92 NY2d 886; *People v Hampton*, 200 AD2d 466, 468, *appeal dismissed* 83 NY2d 998).

Contrary to defendant's contention, however, the suppression of the ammunition clip does not require suppression of the gun or defendant's statements. Defendant abandoned the gun on the street before any contact with police, and thus it cannot be said that the abandonment was "coerced or precipitated by unlawful police activity" (*People v Ramirez-Portoreal*, 88 NY2d 99, 110; *see, People v Boodle*, 47 NY2d 398, 404-405, *cert denied* 444 US 969). Because defendant abandoned the gun, he lacked standing to challenge the search of the public street and the subsequent seizure of the gun (*see, People v Ramirez-Portoreal, supra*, at 110; *People v Brown,* 182 AD2d 451, 452, *lv denied* 80 NY2d 828). Once the gun was recovered, the police had probable cause to arrest defendant, and thus there is no basis to suppress defendant's subsequent statements as the product of an illegal frisk. (Appeal from Judgment of Erie County Court, D'Amico, J. - Criminal Possession Weapon, 3rd Degree.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(874) KA 97-5516. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V TERRELL JENNINGS, DEFENDANT-APPELLANT. -- Judgment unanimously modified on the law and as modified affirmed and matter remitted to Supreme Court for resentencing under count one of the indictment in accordance with the following Memorandum: Defendant appeals from a judgment convicting him after a jury trial of assault in the first degree (Penal Law §§ 20.00, 120.10 [1]) and criminal possession of a weapon in the second degree (Penal Law § 265.03). The evidence is legally sufficient to establish defendant's guilt beyond a reasonable doubt, and the verdict is not against the weight of the evidence (*see, People v Bleakley*, 69 NY2d 490, 495). Defendant contends in a *pro se* supplemental brief that the failure of Supreme Court to give a circumstantial evidence instruction employing the "moral certainty" standard denied him a fair trial. That contention, however, is not preserved for our review (*see, People v Jacobsen,* 255 AD2d 951, *lv denied* 93 NY2d 972; *People v Smith*, 217 AD2d 910), 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]).

We reject the further contention of defendant in his *pro se* supplemental brief that he was denied effective assistance of counsel. "[T]he evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147; *see, People v Flores*, 84 NY2d 184, 187). The remaining contention raised in defendant's *pro se* supplemental brief is not preserved for our review (*see*, CPL 470.05 [2]), 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]).

Finally, we conclude that defendant must be resentenced on the count of assault in the first degree. When defendant committed the underlying crime in October 1996, assault in the first degree under subdivision (1) of Penal Law § 120.10 was a class C violent felony (*see*, Penal Law former § 70.02 [1] [b]). In November 1996, however, assault in the first degree under subdivision (1) of Penal Law § 120.10 was reclassified as a class B violent felony (*see*, L 1996, ch 646). It is unclear from the record whether defendant was properly sentenced for the commission of a class C violent felony rather than for a class B violent felony (*see generally, People v Smith*, 108 AD2d 686,

687). We therefore modify the judgment by vacating the sentence imposed on the count of assault in the first degree and remit the matter to Supreme Court for resentencing under count one of the indictment. (Appeal from Judgment of Supreme Court, Erie County, Forma, J. - Assault, 1st Degree.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(875) KAH 00-1. (Oneida Co.) -- PEOPLE OF THE STATE OF NEW YORK EX REL. JEFFREY SANTORO, PETITIONER-APPELLANT, V MELVIN HOLLINS, SUPERINTENDENT, ONEIDA CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed without costs. Memorandum: We reject the contention of petitioner that he is entitled to habeas corpus relief because he did not receive effective assistance of counsel at his final parole revocation hearing. Such relief is not available because petitioner would not be entitled to immediate release from custody if there were merit to his contention that his counsel's advice to plead guilty to a parole violation constituted ineffective assistance (*see*, *People ex rel. Douglas v Vincent*, 50 NY2d 901, 903; *People ex rel. Davila v Herbert*, 258 AD2d 921; *People ex rel. Kinzer v Williams*, 256 AD2d 1240).

We further reject the contention of petitioner that the retroactive application of the 1997 amendments to 9 NYCRR 8005.20 (c) violates the constitutional prohibition against ex post facto laws (*see*, *People ex rel. Alsaifullah v New York State Div. of Parole*, ___ AD2d ___ [decided Feb. 22, 2000]; *People ex rel. Tyler v Travis*, ___ AD2d ___ [decided Feb. 3, 2000]; *People ex rel. Johnson v Russi*, 258 AD2d 346, 347, *appeal dismissed and lv denied* 93 NY2d 945).

We have reviewed petitioner's remaining contentions and conclude that they are without merit. (Appeal from Judgment of Supreme Court, Oneida County, Murad, J. - Habeas Corpus.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(876) TP 00-25. (Monroe Co.) -- MATTER OF NEW YORK STATE OFFICE OF MENTAL HEALTH, ROCHESTER PSYCHIATRIC CENTER, PETITIONER, V NEW YORK STATE DIVISION OF HUMAN RIGHTS AND MARY E. SCHUTT, RESPONDENTS. -- Determination unanimously confirmed without costs and petition dismissed. Memorandum: Petitioner seeks to annul the determination of the Commissioner of respondent New York State Division of Human Rights (Division) finding that petitioner

discriminated against Mary E. Schutt (respondent), its employee, in 1986 by refusing to appoint her to two positions for which she was qualified. The Commissioner adopted the findings of the Administrative Law Judge (ALJ) that petitioner discriminated against respondent on the basis of a disability resulting from a back injury and that petitioner retaliated against respondent for filing a claim with the Division in 1984 that was later withdrawn. The ALJ rejected petitioner's explanations for the conduct, concluding that the explanations were not credible and were pretextual. The Commissioner adopted the findings and conclusions of the ALJ. We "may not weigh the evidence or reject the Division's determination where the evidence is conflicting and room for choice exits" *(Matter of State Div. of Human Rights [Granelle],* 70 NY2d 100, 106; *see, Matter of New York State Dept. of Correctional Servs. v New York State Div. of Human Rights,* 225 AD2d 856, 857), and thus we are constrained to conclude that the determination is supported by substantial evidence (*see generally, Matter of State Div. of Human Rights [Granelle], supra,* at 106*)*.

Petitioner does not contend that respondent failed to make a prima facie showing of discrimination and retaliation. Rather, petitioner contends that it met its burden of rebutting the presumption of discrimination by explaining its actions, thereby requiring respondent to prove that the explanations were merely a pretext for discrimination (*see, Ferrante v American Lung Assn.,* 90 NY2d 623, 629-630). However, because the ALJ found that petitioner's witnesses were not credible and concluded that respondent made a prima facie showing of discrimination and retaliation, respondent was not required to prove pretext; the combination of respondent's prima facie case and the "'rejection of [petitioner's] proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination'" (*Ferrante v American Lung Assn., supra,* at 630, quoting *St. Mary's Honor Ctr. v Hicks,* 509 US 502, 511). Thus, we confirm the determination and dismiss the petition. We have considered petitioner's remaining contentions and conclude that they are without merit. (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Monroe County, Affronti, J.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(877) CA 99-1607. (Erie Co.) -- MATTER OF KENNETH L. BURNING, PETITIONER-APPELLANT, V NIAGARA FRONTIER TRANSIT METRO SYSTEM,

INC., NIAGARA FRONTIER TRANSPORTATION AUTHORITY AND LOCAL UNION 1342 OF THE AMALGAMATED TRANSIT UNION, RESPONDENTS-RESPONDENTS. -- Judgment unanimously affirmed without costs. Memorandum: Petitioner challenges his termination from employment with respondent Niagara Frontier Transportation Authority and its subsidiary, respondent Niagara Frontier Transit Metro System, Inc. Petitioner, who is subject to the grievance and arbitration provisions of a collective bargaining agreement, may bring a direct action against his employer if he establishes that he was denied fair representation by respondent Local Union 1342 of the Amalgamated Transit Union (Union) (*see, Vaca v Sipes*, 386 US 171, 185; *Jackson v Regional Tr. Serv.*, 54 AD2d 305, 306-307). "It is well settled that a union breaches its statutory duty of fair representation only when its conduct toward a member is arbitrary, discriminatory or in bad faith" (*Braatz v Mathison*, 180 AD2d 1007; *see, Vaca v Sipes*, *supra*, at 190). Petitioner contends that the Union arbitrarily and in bad faith failed to proceed to arbitration, thereby breaching its duty of fair representation. The mere failure of a union to proceed to arbitration, however, does not establish a breach of the duty of fair representation (*see, Vaca v Sipes, supra*, at 191-192; *Braatz v Mathison, supra,* at 1007-1008; *Symanski v East Ramapo Cent. School Dist.*, 117 AD2d 18, 21), and petitioner failed to demonstrate that the Union's conduct was arbitrary, discriminatory or in bad faith (*see, Braatz v Mathison, supra*). Thus, Supreme Court properly granted respondents' motions to dismiss the amended petition.

Petitioner's remaining challenge to the severity of the penalty was not raised in the amended petition and therefore has not been preserved for our review (*see, Gregory v Town of Cambria*, 69 NY2d 655, 656-657). (Appeal from Judgment of Supreme Court, Erie County, O'Donnell, J. - CPLR art 78.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(878) CA 00-00136. (Onondaga Co.) -- ARTHUR T. CIARAMELLA, PLAINTIFF-RESPONDENT, V STATE FARM INSURANCE COMPANY, DEFENDANT-APPELLANT. -- Judgment unanimously reversed on the law without costs and judgment granted in accordance with the following Memorandum: Supreme Court erred in granting judgment in favor of plaintiff declaring that plaintiff provided timely notice of a supplementary uninsured motorist (SUM) claim and that defendant

has a duty to provide coverage for plaintiff. The court should have granted judgment in favor of defendant declaring that defendant has no duty to provide coverage for plaintiff. Although the relevant provision of the insurance policy required plaintiff to give notice of a SUM claim "as soon as practicable" (*see*, *Matter of Metropolitan Prop. & Cas. Ins. Co. v Mancuso*, 93 NY2d 487, 495), plaintiff did not give the required notice until 1½ years after the accident, which occurred in March 1997. Even assuming, arguendo, that plaintiff was excused from providing timely notice until the true extent of his injury was known in December 1997 (*see*, *Matter of Metropolitan Prop. & Cas. Ins. Co. v Mancuso*, *supra*, at 493), we conclude that plaintiff failed to explain the next eight months of delay during which he was represented by counsel. Plaintiff contends that no attempt was made to ascertain the other driver's policy limits during this period because defendant failed to provide relevant information about plaintiff's coverage when plaintiff asked for that information shortly after the accident. That contention lacks merit for several reasons. First, the record establishes that plaintiff did not ask defendant about SUM coverage until July 1998. Second, when plaintiff asked defendant for policy information shortly after the accident, the seriousness of plaintiff's injuries was not apparent and defendant had no reason to believe that plaintiff had a SUM claim. Third, in the absence of fraud or other wrongful conduct, plaintiff as the policy holder "is conclusively presumed to know its contents and to assent to them" (*Metzger v Aetna Ins. Co.*, 227 NY 411, 416). "Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations" (*Metzger v Aetna Ins. Co.*, *supra*, at 416).

Finally, the fact that defendant had potential knowledge of plaintiff's SUM claim because it was plaintiff's no-fault carrier does not alter the fact that plaintiff failed to provide timely written notice (*see, Matter of Allstate Ins. Co. [Dewyea]*, 245 AD2d 667, 668). "The resolution of the issue whether plaintiff[] provided timely notice 'turns solely on [his] diligence and therefore on facts within [his] knowledge'" (*Dixon v New York Cent. Mut. Fire Ins. Co.*, 265 AD2d 914, quoting *Matter of Seasonwein [MVAIC]*, 23 AD2d 732). Defendant's "actual notice of the accident does not vitiate the requirement that [plaintiff] provide timely notice of [his] claim" (*Matter of Nationwide Mut. Ins. Co. [Steber]*, ___ AD2d ___ [decided May 10, 2000]; *see*,

Matter of Nationwide Ins. Co. [De Rose], 241 AD2d 607, 608). We therefore reverse the judgment and grant judgment in favor of defendant declaring that it has no duty to provide coverage for plaintiff. (Appeal from Judgment of Supreme Court, Onondaga County, Murphy, J. - Declaratory Judgment.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(879) CA 99-1632. (Onondaga Co.) -- GENERAL ELECTRIC COMPANY, PLAINTIFF-RESPONDENT, V SMITH, SOVIK, KENDRICK & SUGNET, P.C., DEFENDANT-APPELLANT. -- Order unanimously affirmed with costs. (Appeal from Order of Supreme Court, Onondaga County, McCarthy, J. - Dismiss Pleading.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(881) CA 00-00096. (Chautauqua Co.) -- RICHARD A. COLE, M.D., PLAINTIFF-APPELLANT, V METROPOLITAN LIFE INSURANCE CO., DEFENDANT-RESPONDENT. -- Order unanimously affirmed without costs. Memorandum: We reject plaintiff's contention that Supreme Court erred in granting defendant's motion to dismiss the complaint based on plaintiff's lack of standing. We agree with the court that plaintiff, a physician practicing in Pennsylvania, lacks standing to enforce an insurance contract between defendant insurer and New York State providing State employees with medical insurance under the Empire Plan (Plan). Plaintiff was not a participating provider in the Plan, and the insurance certificates in the record provide that "[a]ssignment of benefits to a Non-Participating Provider is not permitted".

There is no merit to the contention of plaintiff that he is a third-party beneficiary of the contract. As a third party seeking to enforce a contract, plaintiff had to establish that he was an intended beneficiary of the contract rather than merely an incidental beneficiary (*see, Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 43-44; *Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 33-34, *affd* 49 NY2d 924). "One is an intended beneficiary if one's right to performance is 'appropriate to effectuate the intention of the parties' to the contract *and* either the performance will satisfy a money debt obligation of the promisee to the beneficiary or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance'" (*Lake Placid Club Attached Lodges v Elizabethtown Bldrs.*, 131 AD2d 159, 161, quoting Restatement [Second] of Contracts § 302 [1] [a],

[b]*; see, Fourth Ocean Putnam Corp. v Interstate Wrecking Co., supra*, at 44; *Rekis v Lake Minnewaska Mtn. Houses*, 170 AD2d 124, 128, *lv dismissed* 79 NY2d 851, *rearg denied* 79 NY2d 978). On the other hand, "[a]n incidental beneficiary is a third party who may derive [a] benefit from the performance of a contract though he is neither the promisee nor the one to whom performance is to be rendered" (*Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 79, citing 2 Williston, Contracts § 402 [3d ed]; *see, Artwear, Inc. v Hughes*, 202 AD2d 76, 81; *World Trade Knitting Mills v Lido Knitting Mills*, 154 AD2d 99, 103).

The court properly determined that there was no intent to benefit plaintiff or a class of which plaintiff is a member. The contract was intended to benefit State employees by providing such employees and their dependents with medical insurance. The Plan excludes non-participating providers from receiving direct benefits; they are to be paid by the patients and have no relationship with the insurance provider. Thus, we conclude that plaintiff, a non-participating provider, was not an intended beneficiary and cannot enforce the insurance contract between the State and defendant.

Although plaintiff's patients assigned their rights to plaintiff, those assignments are void. "[I]t has been consistently held that assignments made in contravention of a prohibition clause in a contract are void if the contract contains clear, definite and appropriate language declaring the invalidity of such assignments" (*Macklowe v 42nd St. Dev. Corp.*, 170 AD2d 388, 389; *see, Sullivan v International Fid. Ins. Co.*, 96 AD2d 555, 556). Here, the contract contains such language and the assignments cannot confer standing upon plaintiff.

Plaintiff's remaining contentions are raised for the first time on appeal and thus are not properly before us (*see, Rentways, Inc. v O'Neill Milk & Cream Co.*, 308 NY 342, 349; *Orellano v Samples Tire Equip. & Supply Corp.*, 110 AD2d 757, 758). (Appeal from Order of Supreme Court, Chautauqua County, Gerace, J. - Dismiss Pleading.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(882) CA 99-1305. (Onondaga Co.) -- MARK B. AND ALICE E-B., PLAINTIFFS-APPELLANTS, V COUNTY OF ONONDAGA, DEFENDANT-RESPONDENT. -- Order unanimously affirmed without costs. Memorandum: Supreme Court properly granted defendant's motion seeking dismissal of the complaint pursuant to CPLR 3211 (a).

The allegation that defendant intentionally ignored a known hazard does not bring the case within the "intentional injury" exception to the exclusivity provision of the Workers' Compensation Law (*see*, Workers' Compensation Law § 11; *Acevedo v Consolidated Edison Co. of N. Y.*, 189 AD2d 497, 500-501, *lv dismissed* 82 NY2d 748; *Briggs v Pymm Thermometer Corp.*, 147 AD2d 433, 435; *Ferrara v American ACMI*, 122 AD2d 930, 931; *Finch v Swingly*, 42 AD2d 1035, 1036; *see also*, *Patterson v Salvation Army*, 203 AD2d 87, 88). (Appeal from Order of Supreme Court, Onondaga County, Elliott, J. - Dismiss Pleading.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(883) CA 99-1334. (Livingston Co.) -- MATTER OF THE ARBITRATION BETWEEN ALLSTATE INSURANCE COMPANY, PETITIONER-APPELLANT, AND AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, RESPONDENT-RESPONDENT. -- Order unanimously affirmed with costs. (Appeal from Order of Supreme Court, Livingston County, Cicoria, J. - Arbitration.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(884) CA 99-1222. (Erie Co.) -- CHERYL GOLDING AND RANDY GOLDING, PLAINTIFFS-RESPONDENTS, V JOHN A. FARMER, DEFENDANT-APPELLANT. -- Order unanimously affirmed without costs. Memorandum: Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. Defendant was traveling northbound in the right lane of Transit Road in the Town of Lancaster, and Cheryl Golding (plaintiff) was traveling in the left lane, behind defendant's vehicle. Defendant stopped his vehicle to allow a driver to enter the roadway from a parking lot on the east side of Transit Road. That driver attempted to make a left turn to proceed southbound and struck plaintiff's vehicle. Although defendant met his initial burden of establishing his entitlement to judgment as a matter of law, plaintiffs raised an issue of fact whether defendant indicated to the driver who struck plaintiff's vehicle that it was safe to enter the roadway (*see generally, Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to defendant's contention, that driver's act of checking for oncoming traffic after defendant allegedly indicated that it was safe to enter the roadway was not "a superseding act which severed the causal nexus between the [alleged] negligence of [defendant] and the accident" (*Barber v Merchant*, 180 AD2d 984,

986-987). (Appeal from Order of Supreme Court, Erie County, Mahoney, J. - Summary Judgment.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(885) CA 00-00138. (Erie Co.) -- JOSE CAMACHO, PLAINTIFF-RESPONDENT, V JENARO GARCIA AND KATHLEEN GARCIA, DEFENDANTS-APPELLANTS. -- Order unanimously reversed on the law without costs, motion granted and amended complaint dismissed. Memorandum: Plaintiff commenced this action to recover for personal injuries sustained as a result of a slip and fall on defendants' driveway. Supreme Court erred in denying defendants' motion for summary judgment dismissing the amended complaint. In support of their motion, defendants established that six to eight inches of snow fell intermittently on the day of the accident and that there was a storm in progress when plaintiff fell. It is well settled that "[a] landowner is not responsible for a failure to remove snow and ice until a reasonable time has elapsed after cessation of the storm" (*Cerra v Perk Dev.*, 197 AD2d 851; *see, Petrowski v Abraham*, 265 AD2d 901; *Siegel v Molino*, 236 AD2d 879). "The storm in progress doctrine is not limited to situations where blizzard conditions exist; it also applies in situations where there is some type of less severe, yet still inclement, winter weather" (*Olejniczak v E.I. du Pont de Nemours & Co.*, 79 F Supp 2d 209, 216; *see, Zima v North Colonie Cent. School Dist.*, 225 AD2d 993, 994). Plaintiff's assertion in opposition to the motion that no snow was falling at the time of the accident is insufficient to raise a triable issue of fact. "Even if there was a lull or break in the storm around the time of plaintiff's accident, this does not establish that defendant[s] had a reasonable time after the cessation of the storm to correct hazardous snow or ice-related conditions" *(Krutz v Betz Funeral Home*, 236 AD2d 704, 705, *lv denied* 90 NY2d 803, citing *Jensen v Roohan*, 233 AD2d 587, 588; *Lopez v Picotte Cos.*, 223 AD2d 823, 824). (Appeal from Order of Supreme Court, Erie County, Glownia, J. - Summary Judgment.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(886) CA 99-1180. (Monroe Co.) -- JOSEPH E. G., JR., INDIVIDUALLY, AND JOSEPH G. AND CHRISTINE G., AS HIS PARENTS AND NATURAL GUARDIANS, PLAINTIFFS-APPELLANTS, V EAST IRONDEQUOIT CENTRAL SCHOOL DISTRICT, FAIRPORT CENTRAL SCHOOL DISTRICT AND VICTOR CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS. --

Amended order unanimously reversed on the law without costs, motions and cross motion denied and complaint reinstated. Memorandum: Supreme Court erred in granting defendants' motions and cross motion for summary judgment dismissing the complaint. The infant plaintiff, a member of the East Ridge High School wrestling team, developed herpes simplex I after participating in a wrestling meet at Victor High School involving teams from defendant school districts. Defendants Fairport Central School District and East Irondequoit Central School District failed to submit evidence in admissible form establishing their entitlement to judgment as a matter of law (*see*, *Zuckerman v City of New York*, 49 NY2d 557, 562). The affidavits of their counsel, who have no personal knowledge of the facts, lack evidentiary value (*see, Wright v Rite-Aid of N. Y.*, 249 AD2d 931; *McGowan v Villa Maria Coll.*, 185 AD2d 674; *see also, Buffalo Retired Teachers 91-94 Alliance v Buffalo Teachers Fedn.*, 251 AD2d 968), and uncertified, unsworn medical records are not in admissible form (*see, Butera v Woodhouse*, 267 AD2d 1039; *Briggs v Consolidated Rail Corp.*, 190 AD2d 1047, 1048-1049). Although the motion of defendant Victor Central School District was supported by evidence in admissible form, i.e., the affidavit of its wrestling coach, that affidavit does not address the allegation that defendant Victor Central School District was negligent in failing to clean the mats properly after a wrestler sustained a bloody nose. Thus, that defendant also failed to meet its initial burden of establishing its entitlement to judgment as a matter of law, and the "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). (Appeal from Amended Order of Supreme Court, Monroe County, Siracuse, J. - Summary Judgment.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(887) CA 99-1294. (Onondaga Co.) -- DONNA L. MANGANO AND SAMUEL A. MANGANO, PLAINTIFFS-APPELLANTS, V JOHN F. SHERMAN AND ANTONIO BELLAVIA, DEFENDANTS-RESPONDENTS. -- Judgment unanimously reversed on the law without costs, motion denied and complaint reinstated. Memorandum: Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint on the ground that Donna L. Mangano (plaintiff) did not sustain a serious injury (*see*, Insurance Law § 5102 [d]) in the motor vehicle accident at issue herein. Although defendants met their

initial burden, plaintiffs raised a triable issue of fact by submitting the affidavit of an orthopedic surgeon who had treated plaintiff for over 2½ years following the accident. He opined to a reasonable degree of medical certainty that plaintiff had suffered permanent limitations including, *inter alia*, a 20% to 30% loss of flexion, rotation and extension in her neck, a 20 degree loss of full elevation of the right shoulder, permanent winging of the right scapula with permanent nerve damage and palsy to the long thoracic nerve and a 20% loss of use of the right shoulder. That evidence is sufficient to raise an issue of fact whether plaintiff sustained a serious injury (*see*, *Rodriguez v Duggan*, 266 AD2d 859; *Nathanson v David*, 244 AD2d 930; *Jablonski v Bolt*, 213 AD2d 982). (Appeal from Judgment of Supreme Court, Onondaga County, McCarthy, J. - Summary Judgment.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(888) CA 99-1553. (Monroe Co.) -- MASI MANAGEMENT, INC., PLAINTIFF-APPELLANT, V TOWN OF OGDEN, GAY H. LENHARD, DONALD A. WALZER, THOMAS J. COLE, ROSANNE F. HOLBROOK, JOHN G. HUBBARD, THOMAS J. USCHOLD, RICHARD OLSON, DANIEL SCHUM, DAVID VOKE AND PLANNING BOARD OF TOWN OF OGDEN, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (*see, Matter of Eric D.* [appeal No. 1], 162 AD2d 1051). (Appeal from Order of Supreme Court, Monroe County, Fisher, J. - Dismiss Pleading.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(889) CA 99-1566. (Monroe Co.) -- MASI MANAGEMENT, INC., PLAINTIFF-APPELLANT, V TOWN OF OGDEN, GAY H. LENHARD, DONALD A. WALZER, THOMAS J. COLE, ROSANNE F. HOLBROOK, JOHN G. HUBBARD, THOMAS J. USCHOLD, RICHARD OLSON, DANIEL SCHUM, DAVID VOKE AND PLANNING BOARD OF TOWN OF OGDEN, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) -- Appeal unanimously dismissed without costs (*see,* CPLR 5501 [a] [1]). (Appeal from Amended Order of Supreme Court, Monroe County, Fisher, J. - Dismiss Pleading.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(890) CA 99-1567. (Monroe Co.) -- MASI MANAGEMENT, INC., PLAINTIFF-APPELLANT, V TOWN OF OGDEN, GAY H. LENHARD, DONALD A. WALZER, THOMAS J. COLE, ROSANNE F. HOLBROOK, JOHN G. HUBBARD, THOMAS J. USCHOLD, RICHARD OLSON, DANIEL SCHUM, DAVID VOKE AND

PLANNING BOARD OF TOWN OF OGDEN, DEFENDANTS-RESPONDENTS. (APPEAL NO. 3.) -- Judgment unanimously affirmed without costs. Memorandum: Supreme Court properly granted defendants' motion to dismiss the complaint for failure to state a cause of action (*see,* CPLR 3211 [a] [7]). Plaintiff was the contract-vendee of a 52-acre parcel in defendant Town of Ogden (Town), which was classified as two-family residential (R-2). At the urging of members of defendant Planning Board of Town of Ogden (Planning Board), plaintiff revised its plan to develop the parcel as a multi-use project by replacing rental duplex units with patio homes. Plaintiff submitted an application to rezone the parcel to permit single family homes, patio homes, an apartment complex and a retail/office building. Shortly thereafter, a local competing developer submitted an application to rezone a 50-acre parcel from an R-2 classification to a senior citizen housing district classification; the developer's plan included single family patio homes, both to rent and to own, and three apartment buildings. Plaintiff, in an effort to expedite the approval process, modified its application by substituting duplex units for patio homes, thereby complying with the existing R-2 classification for a portion of the subdivision plan. Plaintiff's application was denied with prejudice. Moreover, the Town Board, whose members plaintiff has sued, eliminated all R-2 classifications within the Town with the exception of two: a parcel owned by a Planning Board member and another parcel owned by the competing developer. Approximately two weeks later, the Town Board adopted a local law classifying the parcel owned by the competing developer as a senior citizen housing district.

Plaintiff commenced the instant action seeking compensatory and punitive damages, alleging that its rights protected by the Federal and State constitutions were violated by the actions of defendants. Plaintiff alleged that defendants intended to prevent it from developing the parcel and did so by eliminating the R-2 classification; thwarting plaintiff's efforts to obtain a public hearing on the application for a multi-use project; providing misleading information to plaintiff; and assisting the competing developer by expediting the approval of his application. Plaintiff further alleged that the fact that the attorney for the competing developer was married to a Town Board member supports its allegations that defendants acted maliciously with the intent to injure plaintiff.

Assuming, arguendo, that plaintiff and the competing developer were similarly situated, we reject the contention of plaintiff that defendants violated its rights to equal protection under the United States and New York Constitutions. Plaintiff failed to demonstrate that defendants acted "'with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances'" (*Matter of 303 W. 42nd St. Corp. v Klein,* 46 NY2d 686, 693, quoting *Yick Wo v Hopkins,* 118 US 356, 373-374), or that "defendants maliciously singled out its application [for a multi-purpose project] with the intent to injure [plaintiff]" (*Crowley v Courville,* 76 F3d 47, 53; *see also, People v Blount,* 90 NY2d 998, 999).

The further contention of plaintiff that defendants violated its Federal due process rights is without merit. Plaintiff does not have "a legitimate claim of entitlement" (*Crowley v Courville, supra,* at 52) to the continuation of the R-2 designation of the parcel, a permit to build duplex units, or the reclassification of the parcel. The decision of the Town Board to rezone a parcel is discretionary (*see, Matter of Rivervale Realty Co. v Town Bd.,* 170 AD2d 762, 763), and the Town Board exercised its discretion to deny plaintiff's application and to approve the application of the competing developer, whose plan met the Town's legitimate interest in providing senior citizen housing, without duplex units (*see, Crowley v Courville, supra,* at 52). Furthermore, plaintiff had no vested right to the existing R-2 classification (*see, DLC Mgt. Corp. v Town of Hyde Park,* 163 F3d 124, 130-131; *see also, Matter of Ellington Constr. Corp. v Zoning Bd. of Appeals,* 77 NY2d 114, 122). Plaintiff urges us to adopt the standard used by the Court of Appeals for the Third Circuit in *Sameric Corp. of Delaware v City of Philadelphia* (142 F3d 582, 590-591) and determine that actions by defendants that were motivated by bias, bad faith or other improper motive deprived plaintiff of its substantive due process rights. However, in interpreting New York State law, the Court of Appeals for the Second Circuit in *DLC Mgt. Corp. v Town of Hyde Park* (*supra*, at 131) determined that, although plaintiff in that case had been treated "shabbily and unfairly", plaintiff lacked a "legitimate claim of entitlement to the * * * zoning classification." We agree with that Court's conclusion that, if due process protection were expanded as plaintiff urges,

"any owner of zoned land, which presumably includes the vast majority of landowners, would be entitled to assert a claim * * * alleging a substantive due process violation each time a local governing body rezoned * * * land under questionable or unfair circumstances" (*DLC Mgt. Corp. v Town of Hyde Park, supra,* at 131). Plaintiff concedes that there is no precedent to apply the protection of the rights and privileges clause of the New York Constitution (article I, § 1) to land use regulations, and we decline to do so. Finally, were we to reach the merits of defendants' motion seeking, in the alternative, summary judgment, we would conclude that defendants established their entitlement to judgment as a matter of law and that plaintiff failed to raise an issue of fact (*see generally, Zuckerman v City of New York*, 49 NY2d 557, 562). (Appeal from Judgment of Supreme Court, Monroe County, Fisher, J. - Dismiss Pleading.) PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(891) TP 00-00172. (Oneida Co.) -- MATTER OF KENNETH GREENE, PETITIONER, V GARY FILION, SUPERINTENDENT, MARCY CORRECTIONAL FACILITY, RESPONDENT. -- Proceeding unanimously dismissed without costs as moot (*see, Matter of Free v Coombe*, 234 AD2d 996). (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Oneida County, Murad, J.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(892) KA 99-05398. (Ontario Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JERRIE E. KELLY, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Ontario County Court, Henry, Jr., J. - Criminal Mischief, 3rd Degree.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(893) KA 98-05166. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V ROBERT PATTON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: We reject the contention of defendant that his waiver of the right to appeal does not encompass his challenge to the enhanced sentence imposed by County Court. As part of the plea agreement, defendant agreed that, if he was arrested for any reason before sentencing, the court would not be bound by its sentence commitment. Defendant was arrested before sentencing and was charged with criminal possession of a controlled substance in the third degree.

"'[B]ecause defendant was sentenced in accordance with the plea agreement, he waived his right to appeal from the sentence'" (*People v Wynn*, 239 AD2d 921, 922, *lv denied* 90 NY2d 912, quoting *People v Van Buren*, 203 AD2d 961). In any event, the enhanced sentence is neither unduly harsh nor severe. (Appeal from Judgment of Monroe County Court, Egan, J. - Criminal Sale Controlled Substance, 3rd Degree.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(894) KA 99-5332. (Onondaga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JOHN L. SNYDER, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant was convicted following a jury trial of one count of driving while ability impaired (Vehicle and Traffic Law § 1192 [1]), two counts of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3]), and two counts of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [2], [3]; § 1193 [1] [c]), arising out of three separate incidents. When the trial commenced, defendant admitted to three special informations filed by the People alleging prior convictions for driving while under the influence and driving while intoxicated and acknowledged that his license was revoked for one of those convictions (*see*, CPL 200.60). There is no merit to the contention of defendant that the special informations were inadequate (*see, People v Smith*, 183 AD2d 653, 654, *lv denied* 80 NY2d 910).

Because all charges were based on the same or similar statutory provisions, County Court did not abuse its discretion in denying defendant's motion to sever (*see*, CPL 200.20 [c]; *People v O'Connor*, 242 AD2d 908, 909, *lv denied* 91 NY2d 895). Defendant failed to make a convincing showing that he would be unduly and genuinely prejudiced by the joint trial of the charges and failed to demonstrate in concrete terms that he had a strong need to refrain from testifying concerning the charges arising from one incident and important testimony to present concerning the charges arising from the other incidents (*see, People v Cabrera*, 188 AD2d 1062, 1063; *see also, People v Lane*, 56 NY2d 1, 7-9).

Contrary to the contention of defendant, he received meaningful representation from the first attorney who represented him (*see, People v Baldi*, 54 NY2d 137, 147). The sentence is neither unduly harsh nor severe. (Appeal from Judgment of

Onondaga County Court, Mulroy, J. - Felony Driving While Intoxicated.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(895) KA 99-5255. (Ontario Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V WESLEY C. MONTAGUE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant contends that County Court erred in denying his motion to suppress evidence seized from his residence pursuant to a search warrant on the ground that the warrant was not supported by probable cause. We disagree. In order to establish probable cause, a warrant application "must provide the Magistrate with information sufficient to support a reasonable belief that evidence of a crime may be found in a certain place" (*People v McCulloch*, 226 AD2d 848, 849, *lv denied* 88 NY2d 1070). Here, the warrant application contained the unsworn statement of defendant's landlord that he had entered defendant's mobile home and observed marihuana apparatus and marihuana plants. Because defendant's landlord is an identified citizen informant, the reliability of the statement is presumed (*see, People v Hetrick*, 80 NY2d 344, 349; *People v Cantre*, 95 AD2d 522, 526, *affd* 65 NY2d 790 *on opn below*), and the basis of knowledge of the landlord was established by his personal observations of the marihuana apparatus and marihuana plants in defendant's mobile home. That information provided probable cause to support the issuance of the warrant (*see generally, People v Hetrick, supra*, at 348-350; *People v Markiewicz*, 246 AD2d 914, 914-915, *lv denied* 91 NY2d 974). (Appeal from Judgment of Ontario County Court, Harvey, J. - Criminal Possession Marihuana, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(896) KA 99-5302. (Onondaga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V DONELL STEPNEY, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: There is no merit to defendant's contention that County Court failed to conduct a sufficient inquiry before accepting defendant's guilty plea. The record establishes that, when defendant made statements during the plea colloquy casting significant doubt upon his guilt, the court interrupted the proceedings to afford defendant an opportunity to consult with counsel, and then properly conducted further inquiry to ensure that defendant's

plea was knowing and voluntary and that there was a factual basis for the plea (*see, People v Lopez*, 71 NY2d 662, 666-668). "Having failed to express, in any way, dissatisfaction with the court's remedial action, defendant has waived any further challenge to the allocution, and thus no issue is preserved for our review" (*People v Lopez, supra*, at 668). In any event, we conclude that defendant's plea allocution is sufficient to support the conviction (*see generally, People v Harris*, 61 NY2d 9, 16-17). (Appeal from Judgment of Onondaga County Court, McGuire, J. - Burglary, 1st Degree.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(897) KA 00-113. (Onondaga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V TERRELL LOVE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Supreme Court properly denied defendant's motion to suppress physical evidence. The court's findings of credibility are entitled to great weight and should not be disturbed where, as here, they are supported by the record (*see, People v Prochilo*, 41 NY2d 759, 761; *People v Little*, 259 AD2d 1031, *lv denied* 93 NY2d 926). The court properly determined that defendant gave police permission to "check" his residence for suspects or victims of an attempted burglary and that the police did not exceed the scope of that authority when they observed cocaine on a kitchen counter. While consent to "check" is not consent to search (*see, e.g., People v Saunders*, 161 AD2d 1202; *People v Lazarus*, 159 AD2d 1027, *lv denied* 76 NY2d 738; *People v Guzman*, 153 AD2d 320, 323-324, *lv granted* 75 NY2d 926), we conclude that the police did not conduct a search. Rather, the police were lawfully present in the kitchen where they observed the drugs in plain view (*see, People v Diaz*, 81 NY2d 106, 110; *People v Spoto*, 187 AD2d 1017, *lv denied* 81 NY2d 893). (Appeal from Judgment of Supreme Court, Onondaga County, Brunetti, J. - Criminal Possession Controlled Substance, 3rd Degree.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(898) TP 99-1679. (Erie Co.) -- MATTER OF ROBERT PIECZONKA, PETITIONER, V ERNEST J. JEWETT, MAYOR OF VILLAGE OF BLASDELL, BARBARA S. CESAR, VILLAGE OF BLASDELL ADMINISTRATOR, CLERK AND TREASURER, AND VILLAGE OF BLASDELL, RESPONDENTS. -- Determination unanimously annulled on the law without costs and petition granted. Memorandum: Petitioner commenced this CPLR article 78

proceeding seeking to annul the determination of respondents finding him guilty of various charges and terminating his employment with respondent Village of Blasdell. He contends that respondents failed to comply with Civil Service Law § 75 (2) and thus lacked jurisdiction, that the determination is not supported by substantial evidence and that the penalty is excessive. Because resolution of the issue with respect to Civil Service Law § 75 (2) would not have "terminate[d] the proceeding" within the meaning of CPLR 7804 (g) (*see, Matter of Ocean v Selsky*, 252 AD2d 984; *Matter of G & G Shops v New York City Loft Bd.*, 193 AD2d 405), Supreme Court erred in deciding that issue. "The matter now being before us, however, we may decide the issue de novo" (*Matter of Ocean v Selsky*, *supra*, at 985).

We agree with petitioner that respondents failed to comply with Civil Service Law § 75 (2), which provides in relevant part that the hearing on the charges preferred against the employee "shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose." "In the absence of a written delegation authorizing a deputy or other person to conduct the hearing, the removing board or officer has no jurisdiction to discipline an employee" (*Matter of Wiggins v Board of Educ.*, 60 NY2d 385, 387). Contrary to respondents' contention, the letter sent to petitioner informing him of the date, time and location of the hearing and the name of the Hearing Officer does not constitute the requisite written delegation of authority (*see, Matter of Teamster Local Union No. 182 ex rel. Vohid v Upper Mohawk Val. Regional Water Bd.*, 259 AD2d 1008). We therefore annul the determination and grant the petition. (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Erie County, Sedita, Jr., J.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(899) CA 99-1229. (Erie Co.) -- ROBERT J. FERRARA AND NANCY FERRARA, PLAINTIFFS-APPELLANTS, V AM-ELM REALTY, INC., F/K/A MARKGLENN REALTY, INC., AND 1691 KENMORE AVENUE, INC., DEFENDANTS-RESPONDENTS. AM-ELM REALTY, INC., F/K/A MARKGLENN REALTY, INC., AND 1691 KENMORE AVENUE, INC., THIRD-PARTY PLAINTIFFS-APPELLANTS, V STERLING SUBURBAN GLASS CO., INC., THIRD-PARTY DEFENDANT-RESPONDENT. -- Order unanimously affirmed without costs. (Appeals from Order of Supreme Court, Erie

County, Michalek, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(900) CA 00-00397. (Monroe Co.) -- EDWARD F. MOLL AND JOAN MOLL, PLAINTIFFS-RESPONDENTS, V WEGMANS FOOD MARKETS, INC., DEFENDANT-APPELLANT, ET AL., DEFENDANT. -- Order unanimously affirmed with costs. (Appeal from Order of Supreme Court, Monroe County, Barry, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(901) CA 00-00182. (Monroe Co.) -- MATTER OF PORTSIDE LEASING AND MANAGEMENT, INC., PETITIONER-RESPONDENT, V LORETTA MC FARLAND, RESPONDENT-APPELLANT. -- Order and Judgment unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: In this summary proceeding to recover possession of real property for non-payment of rent (*see*, RPAPL art 7), County Court erred in failing to reduce the damages awarded to petitioner by Town Court in the amount of $284, representing unpaid rent for the month of July 1998. That relief was not requested in the petition. County Court had appellate authority to review questions of law and questions of fact as well as any exercise of discretion by Town Court (*see*, UJCA 1702 [d]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, UJCA 1702, at 404) but it properly ruled that respondent's warranty of habitability defense was untimely (*see*, RPAPL 743). Therefore, we modify the order and judgment by reducing the damages to $308.37. (Appeal from Order of Monroe County Court, Egan, J. - RPAPL.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(902) CA 00-94. (Niagara Co.) -- MATTER OF HERMANN PROBST, PETITIONER-APPELLANT, V TOWN OF WHEATFIELD, PLANNING BOARD OF TOWN OF WHEATFIELD AND ZONING BOARD OF APPEALS OF TOWN OF WHEATFIELD, RESPONDENTS-RESPONDENTS. -- Judgment unanimously reversed on the law without costs, petition granted in part and matter remitted to respondent Zoning Board of Appeals of Town of Wheatfield for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding to challenge the determination of respondent Zoning Board of Appeals of Town of Wheatfield (ZBA) denying petitioner's application for an area variance. Supreme Court erred in dismissing the petition. Respondents concede that the ZBA failed

to consider the requisite criteria set forth in Town Law § 267-b (3). We therefore reverse the judgment, grant the petition in part by annulling the determination of the ZBA and remit the matter to the ZBA for a new determination of the application (*see, Matter of Zelnick v Small,* ___ AD2d ___ [decided Jan. 24, 2000]). (Appeal from Judgment of Supreme Court, Niagara County, Koshian, J. - CPLR art 78.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(903) CA 99-3313. (Onondaga Co.) -- EDWARD J. SPIRES, PLAINTIFF-RESPONDENT, V VASILIKI MIHOU, DEFENDANT. PAUL CONSTANDINOU, APPELLANT. -- Order insofar as appealed from unanimously reversed on the law without costs and matter remitted to Supreme Court for further proceedings in accordance with the following Memorandum: Paul Constandinou appeals from that part of an order denying his motion to vacate a judgment by confession granted in favor of plaintiff upon the affidavit of defendant. Plaintiff's judgment resulted from legal services rendered to defendant in connection with her divorce from Constandinou. Constandinou obtained a money judgment against defendant in the divorce proceeding, but plaintiff's judgment relegated Constandinou to the status of a junior creditor.

We reject the contention of Constandinou that the affidavit in confession of judgment is facially insufficient. A judgment by confession may be entered upon an affidavit executed by a defendant in favor of a plaintiff "stating concisely the facts out of which the debt arose and showing that the sum confessed is justly due or to become due" (CPLR 3218 [a] [2]). The affidavit is sufficient if it adequately sets out the facts giving rise to the underlying debt (*see, Giryluk v Giryluk*, 30 AD2d 22, 25, *affd* 23 NY2d 894). Here, defendant's affidavit adequately states the nature, extent, duration and cost of the legal services rendered by plaintiff that gave rise to the judgment at issue.

Constandinou has failed to raise an issue of fact whether plaintiff's judgment should be vacated as contrary to public policy because it is premised upon fees for the allegedly unlawful practice of law in Canada. While the record contains a reference by plaintiff to one occasion when he accompanied defendant to an Ontario court as her "friend", his itemized bill contains no charges for that appearance or date, and the record does not otherwise indicate that plaintiff's services were

"rendered in a foreign jurisdiction" (*El Gemayel v Seaman*, 72 NY2d 701, 707).

We conclude, however, that Constandinou has presented sufficient evidence to raise an issue of fact whether the judgment by confession was the result of collusion. We therefore reverse the judgment insofar as appealed from and remit the matter to Supreme Court for a hearing to determine the validity of the judgment by confession. (Appeal from Order of Supreme Court, Onondaga County, Major, J. - Vacate Judgment.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(906) CA 99-1638. (Onondaga Co.) -- LARRY FERNANDES, PLAINTIFF-RESPONDENT, V 222 TEALL AVE. CORPORATION, DEFENDANT-APPELLANT. 222 TEALL AVE. CORPORATION, THIRD-PARTY PLAINTIFF, V NATIONWIDE WAREHOUSE AND STORAGE, INC., THIRD-PARTY DEFENDANT-APPELLANT. -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Order of Supreme Court, Onondaga County, Stone, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(907) CA 99-5351. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK EX REL. ELVIN RAMOS, PETITIONER-APPELLANT, V VICTOR HERBERT, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, AND BRION D. TRAVIS, CHAIRMAN, NEW YORK STATE DIVISION OF PAROLE, RESPONDENTS-RESPONDENTS. -- Appeal unanimously dismissed without costs as moot (*see, Matter of Walker v Senkowski*, 260 AD2d 830; *Matter of Eastman v New York State Bd. of Parole*, 247 AD2d 740). (Appeal from Judgment of Supreme Court, Erie County, Dillon, J. - Habeas Corpus.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(908) CA 00-140. (Niagara Co.) -- ERIC PAUL FARINA, SR., AND ERIC PAUL FARINA, JR., PLAINTIFFS-RESPONDENTS, V SECURITY MUTUAL INSURANCE COMPANY, DEFENDANT-APPELLANT. -- Judgment unanimously reversed on the law without costs and judgment granted in accordance with the following Memorandum: Plaintiffs commenced this action seeking judgment declaring that defendant must indemnify its insured with respect to a judgment awarded plaintiffs in the underlying action against defendant's insured (*see*, Insurance Law § 3420 [a] [2]). Defendant provided a

defense for its insured in the underlying action, but refused to provide indemnification because the jury found that the insured had caused the infant plaintiff's injuries by "an intentional action which was intended to cause injury less serious than actually suffered by [the infant plaintiff]".

Supreme Court erred in granting judgment in favor of plaintiffs and should have granted judgment in favor of defendant. The homeowner's policy issued by defendant covers the insured for liability arising from an "occurrence", defined by the policy as an "accident". Further, coverage is excluded with regard to liability "caused intentionally by" an insured. The finding of the jury in the underlying action conclusively establishes that the infant plaintiff's injuries were caused by intentional rather than accidental conduct. We therefore reverse the judgment and grant judgment in favor of defendant declaring that it has no obligation to indemnify plaintiffs with respect to the judgment in the underlying action (*see, Pennsylvania Millers Mut. Ins. Co. v Rigo*, 256 AD2d 769, 770-771; *Salimbene v Merchants Mut. Ins. Co.*, 217 AD2d 991, 994; *see generally, Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 160-161). We reject plaintiffs' contentions that the verdict in the underlying action is "based on negligence" because the amount awarded was reduced 20% for the infant plaintiff's comparative negligence and that the injuries were accidental because their severity was unintended. (Appeal from Judgment of Supreme Court, Niagara County, Joslin, J. - Declaratory Judgment.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(909) CA 99-3511. (Erie Co.) -- JAMES R. ROBERTSON, PLAINTIFF-APPELLANT, V SPECTRUM APPLICATIONS, INC., DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Judgment unanimously affirmed without costs. Memorandum: Because plaintiff did not accept payment or the benefits of the judgment, his appeal from the judgment is not precluded (*see, Kriesel v May Dept. Stores Co.*, 261 AD2d 837; *see also, Cornell v T. V. Dev. Corp.*, 17 NY2d 69, 73). Contrary to plaintiff's contention, however, the jury's award of damages does not deviate materially from what would be reasonable compensation (*see,* CPLR 5501 [c]; *Banks v Lindenbaum*, 201 AD2d 523). (Appeal from Judgment of Supreme Court, Erie County, Burns, J. - Negligence.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(910) CA 99-1160. (Erie Co.) -- JAMES R. ROBERTSON, PLAINTIFF-APPELLANT, V SPECTRUM APPLICATIONS, INC., DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Supreme Court did not abuse its discretion in allowing defendant to deposit with the clerk of the court the amount of the judgment against it after plaintiff rejected tender of payment (*cf., Meilak v Atlantic Cement Co.*, 30 AD2d 254, 256). The court erred, however, in directing plaintiff to file a satisfaction-piece. CPLR 5021 (a) (3) directs that the clerk of the court shall make an entry of the satisfaction on the docket of the judgment upon the deposit with the clerk of a sum of money that satisfies the judgment pursuant to an order of the court permitting such deposit. Therefore, we modify the order by vacating the third ordering paragraph and providing in place thereof: "ORDERED that the clerk of the court shall make an entry of the satisfaction on the docket of the judgment upon receipt of the aforementioned deposit from defendant". (Appeal from Order of Supreme Court, Erie County, Burns, J. - CPLR 5021.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(911) CA 99-903. (Oneida Co.) -- BRIGITTE M. GARRISON-HORGAN, PLAINTIFF-APPELLANT, V FRANCIS J. HORGAN, JR., DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Amended judgment unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Plaintiff contends that Supreme Court erred in failing to credit her for pre-divorce payments she made on the marital residence after defendant's departure therefrom in 1993. We agree. On a prior appeal, we found "no error in the method by which the court valued defendant's share of equity in the marital residence" (*Garrison-Horgan v Horgan*, 234 AD2d 957, 958). In valuing defendant's share, the court had reduced it by $15,000 based on plaintiff's reduction of the principal of the two mortgages on the residence and other payments on the residence since defendant's departure. Because we remitted the matter for valuation of other marital assets, we vacated the valuation of defendant's share of equity in the marital residence to enable the court to adjust it if necessary in light of the court's valuation of the other marital assets (*Garrison-Horgan v Horgan, supra*, at 958). Because no additional evidence was presented on remittal regarding

plaintiff's pre-divorce credit, the court erred in eliminating it.

We reject the contention of plaintiff that the value of defendant's share of the marital residence should be further reduced as a result of her post-divorce payments on the residence. We previously rejected the contention of plaintiff that the court erred in directing her to assume liability for the existing mortgages. We likewise reject the contention of plaintiff that the court erred in determining her enhanced earning capacity as a result of the Ph.D. and administrative certificate earned by her during the course of the marriage. In determining plaintiff's enhanced earning capacity, the court properly considered plaintiff's actual salary as a school vice principal (*see, Kessler v Kessler*, 212 AD2d 1038).

We have reviewed plaintiff's remaining contentions and conclude that they are without merit. We therefore modify the amended judgment by providing in the second decretal paragraph that plaintiff shall pay to defendant the sum of $33,000 for defendant's share of equity in the marital residence. (Appeal from Amended Judgment of Supreme Court, Oneida County, Tenney, J. - Matrimonial.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(912) CA 99-923. (Oneida Co.) -- BRIGITTE M. GARRISON-HORGAN, PLAINTIFF-APPELLANT, V FRANCIS J. HORGAN, JR., DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Appeal from order insofar as it denied that part of motion seeking to modify second decretal paragraph of amended judgment unanimously dismissed as moot (*see, Garrison-Horgan v Horgan* [appeal No. 1], ___ AD2d ___ [decided herewith]) and order affirmed without costs. (Appeal from Order of Supreme Court, Oneida County, Tenney, J. - Vacate Judgment.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

(913) TP 00-00139. (Jefferson Co.) -- MATTER OF MICHAEL MINTON, PETITIONER, V GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, AND JAMES NEWTON, SUPERINTENDENT, WATERTOWN CORRECTIONAL FACILITY, RESPONDENTS. -- Determination unanimously confirmed without costs and petition dismissed. (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Jefferson County, Gilbert, J.) PRESENT: PIGOTT,

JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(914) KA 00-00206. (Niagara Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V TERRY D. MATHIS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed (*see, People v Lococo*, 92 NY2d 825, 827). (Appeal from Judgment of Niagara County Court, Fricano, J. - Assault, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(915) KA 99-5530. (Genesee Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RAND A. THOMAS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Genesee County Court, Noonan, J. - Felony Driving While Intoxicated.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(916) KA 99-5482. (Cayuga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V DONALD SAPP, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Because defendant failed to move to withdraw the plea or to vacate the judgment of conviction, his challenge to the factual sufficiency of the plea allocution has not been preserved for our review (*see, People v Person*, 256 AD2d 1232, *lv denied* 93 NY2d 856; *People v Nesbett*, 255 AD2d 950). The plea allocution did not engender significant doubt regarding the voluntariness of the plea to require County Court to conduct a further inquiry (*see, People v Toxey*, 86 NY2d 725, 726, *rearg denied* 86 NY2d 839; *People v Lopez*, 71 NY2d 662, 666). By pleading guilty to criminal contempt in the first degree and admitting that he was convicted of the crime of criminal contempt in the second degree in 1994, defendant waived his contention that reversal is required because the People failed to file a special information pursuant to CPL 200.60 (*see, People v Mooney*, 245 AD2d 1137, *lv denied* 91 NY2d 928).

We have reviewed defendant's remaining contentions and conclude that they are without merit. (Appeal from Judgment of Cayuga County Court, Corning, J. - Contempt, 1st Degree.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(917) KA 99-2131. (Cattaraugus Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V CESAR SOTO, A/K/A CAESRLUIS SOTO, A/K/A LOUIS RODRIGUEZ, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: The waiver by defendant of the right to appeal as part of his negotiated plea agreement encompasses his present challenge to County Court's adverse suppression ruling (*see, People v Kemp,* 94 NY2d 831, 833). By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his present challenge to the voluntariness of the plea (*see, People v Lopez,* 71 NY2d 662, 665-666). When defendant indicated that he did not remember the circumstances of the crime because he was "not in [his] right mind" at the time, the court properly made additional inquiry to ascertain that defendant understood that, by entering a plea of guilty, he was waiving the right to raise as a defense "that you weren't in your right mind" (*see, People v Lopez, supra,* at 667-668). The bargained-for sentence is neither unduly harsh nor severe. (Appeal from Judgment of Cattaraugus County Court, Himelein, J. - Assault, 1st Degree.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(918) KA 99-5161. (Seneca Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V EDWARD PATRICK KISE, SR., DEFENDANT-APPELLANT. -- Judgment unanimously reversed as a matter of discretion in the interest of justice and new trial granted. Memorandum: Defendant appeals from a judgment convicting him following a jury trial of sodomy in the second degree (Penal Law § 130.45), sexual abuse in the second degree (Penal Law § 130.60 [2]) and two counts of endangering the welfare of a child (Penal Law § 260.10 [1]). We conclude that defendant was denied a fair trial by the admission of testimony that he had an ongoing sexual relationship with the 11-year-old complainant (*see, People v Lewis*, 69 NY2d 321) and by the prosecutor's reference to that testimony on summation (*see, People v Harris*, 150 AD2d 723, 726). We reject the People's contention that the evidence was probative of a count of endangering the welfare of a child; that count did not charge continuing offenses over a period of time (*cf., People v Keindl*, 68 NY2d 410, 421, *rearg denied* 69 NY2d 823). The admission of evidence offered to demonstrate defendant's propensities and to enhance the credibility of the complainant was improper (*see, People v Lewis, supra,* at 327-328; *People v*

Harris, supra, at 725-726). We also reject the People's contention that the proof of guilt is overwhelming and thus that the error is harmless (*cf., People v Myers*, 185 AD2d 695), and we conclude that the references to the sexual relationship were "likely to divert the jury's attention from the specific offenses charged in the indictment" (*People v Mediak*, 217 AD2d 961, 962, *lv denied* 87 NY2d 848). We have reviewed the remaining contentions of defendant and conclude that they are without merit. (Appeal from Judgment of Seneca County Court, Bender, J. - Sodomy, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(919) KAH 99-1637. (Cattaraugus Co.) -- PEOPLE OF THE STATE OF NEW YORK EX REL. ROBERT WAGNER, PETITIONER-APPELLANT, V BRION D. TRAVIS, COMMISSIONER, NEW YORK STATE DIVISION OF PAROLE, AND ERNEST J. DUSTMAN, CATTARAUGUS COUNTY SHERIFF, RESPONDENTS-RESPONDENTS. -- Appeal unanimously dismissed without costs. Memorandum: The contention of relator that he was denied his right to counsel at the preliminary parole revocation hearing was rendered moot by the determination revoking his parole following the final parole revocation hearing (*see, People ex rel. McCummings v De Angelo,* 259 AD2d 794, 794-795, *lv denied* 93 NY2d 810; *People ex rel. Chavis v McCoy,* 236 AD2d 892). In any event, although parolees may have counsel present at the preliminary hearing, there is no statutory right to counsel at that stage of parole revocation proceedings, "and there is nothing in the record to suggest that this is one of the small minority of cases in which 'fundamental fairness - the touchstone of due process - will compel the assistance of counsel'" (*People ex rel. Clanton v Smith,* 105 AD2d 1123, *lv denied* 64 NY2d 606, quoting *People* ex *rel. Calloway v Skinner,* 33 NY2d 23, 31-32; *see also, People ex rel. Stewart v Foreman,* 123 AD2d 524; 9 NYCRR 8000.5 [a]). (Appeal from Judgment of Cattaraugus County Court, Himelein, J. - Habeas Corpus.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(920) TP 99-1524. (Erie Co.) -- MATTER OF VINCENT A. KEMP, PETITIONER, V ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES AND NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, RESPONDENTS. -- Determination unanimously confirmed without costs and petition dismissed. (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Erie County, Notaro, J.) PRESENT:

PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(921) CA 00-00053. (Erie Co.) -- FRANK P. RAQUET AND MELVIN J. SPOTH, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MITCHELL SPOTH, DECEASED, PLAINTIFFS-RESPONDENTS, V J.M. BRAUN BUILDERS, INC., JOHN BRAUN, CAROL BRAUN, BENITO OLIVIERI AND BENITO OLIVIERI MASON CONSTRUCTION, INC., DEFENDANTS-APPELLANTS. -- Order unanimously affirmed without costs. Memorandum: Supreme Court properly denied the motion of defendants Benito Olivieri Mason Construction, Inc. and Benito Olivieri and the cross motion of defendants J.M. Braun Builders, Inc., John Braun and Carol Braun to dismiss the causes of action pursuant to General Municipal Law § 205-a. Defendants contend that the revival clause in that statute (General Municipal Law § 205-a [2]) unconstitutionally deprives them of property without due process of law. Defendants contend that they were entitled to rely upon the Court of Appeals' affirmance of our order dismissing plaintiffs' action against them prior to the 1996 amendment of General Municipal Law § 205-a (*Zanghi v Niagara Frontier Transp. Commn.,* 85 NY2d 423).

"[T]he Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated" (*Gallewski v Hentz & Co.,* 301 NY 164, 174; *see also, Hymowitz v Lilly & Co.,* 73 NY2d 487, 514, *cert denied* 493 US 944). We conclude that General Municipal Law § 205-a, enacted to ameliorate the harsh effects of the common-law firefighters rule and expand the rights of injured firefighters (*see, Raquet v Braun,* 90 NY2d 177, 184), meets that standard. (Appeals from Order of Supreme Court, Erie County, Glownia, J. - Dismiss Pleading.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(922) CA 99-1286. (Jefferson Co.) -- PEOPLE OF THE STATE OF NEW YORK, BY DENNIS C. VACCO, ATTORNEY-GENERAL OF THE STATE OF NEW YORK, PETITIONER-RESPONDENT-APPELLANT, V BEACH BOYS EQUIPMENT CO., INC., RESPONDENT-APPELLANT-RESPONDENT. -- Order unanimously modified on the law and as modified affirmed without costs and matter remitted to Supreme Court for further proceedings in accordance with the following Memorandum: Supreme Court properly

granted the petition alleging that respondent violated General Business Law § 396-r by charging unconscionably excessive prices for 5000 watt Devilbiss electric generators in the Watertown area following the January 1998 ice storm. It is undisputed that respondent charged $1,200 for the generators, while other retailers in the trade area charged less than one half of that price. We reject the contention of respondent that petitioner failed to establish a prima facie case of price gouging pursuant to General Business Law § 396-r former (3). Contrary to respondent's contention, petitioner established, "at least presumptively" (*People v Two Wheel Corp.*, 71 NY2d 693, 699, *rearg denied* 72 NY2d 910), that "the amount charged by [respondent] was not attributable to additional costs imposed by its suppliers" (General Business Law § 396-r former [3] [c]). In response, respondent failed to raise a triable issue of fact (*see, People v Two Wheel Corp., supra*, at 700). Respondent did not explain why it paid its supplier $1,000 for a 5000 watt Devilbiss generator that retails for $550, nor did it respond to proof that the supplier purchased the generators for $480. Respondent also failed to rebut proof establishing that its purchase of the generators was not an arm's length transaction.

Respondent contends that its prices were attributable to additional expenses related to truck rental, payroll, gas cans, plugs, cord and telephone calls. Even assuming that those expenses were extraordinary and may have warranted an increase in price (*see, People v Two Wheel Corp., supra*, at 700), we conclude that petitioner did not thereby establish that a price increase of 100% was warranted. Indeed, even a small increase in price may be unconscionably excessive under General Business Law § 396-r if "the excess was obtained through unconscionable means" (*People v Two Wheel Corp., supra*, at 699), which was the case here.

We agree with respondent, however, that the court erred in awarding restitution to the purchasers of the 7000 watt Devilbiss generator because that type of generator was not the subject of the verified petition. Although the court may order restitution to all injured consumers, including those not identified by name in the petition, it may not order restitution to purchasers of generators that are not the subject of this proceeding. The allegation that respondent charged an unconscionably excessive price for a 7000 watt Devilbiss generator "is not within the

scope of this proceeding as defined by the petition" (*Matter of Dye v New York City Tr. Auth.*, 57 NY2d 917, 920).

With respect to the cross appeal, we agree with petitioner that the court erred in making payment of a civil penalty contingent upon the nonpayment of restitution. General Business Law § 396-r (4) provides that "the court shall impose a civil penalty in an amount not to exceed ten thousand dollars and, where appropriate, order restitution to aggrieved consumers."

We therefore modify the order by directing respondent to pay restitution to the purchasers of the 5000 watt Devilbiss generator only and by vacating the third ordering paragraph making the payment of the civil penalty contingent upon the nonpayment of restitution. We remit the matter to Supreme Court for the imposition of the mandatory civil penalty pursuant to General Business Law § 396-r (4). (Appeals from Order of Supreme Court, Jefferson County, Gilbert, J. - General Business Law.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(923) CA 99-1475. (Cayuga Co.) -- NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND ITS COMMISSIONER, JOHN P. CAHILL, PLAINTIFFS-RESPONDENTS, V MICHAEL D. O'NEILL AND CAYUGA MEADOWS, INC., DEFENDANTS-APPELLANTS. -- Judgment unanimously affirmed without costs. Memorandum: Supreme Court properly granted plaintiffs' motion seeking summary judgment and dismissal of the affirmative defenses and counterclaims, thereby enforcing the parties' consent order (*see, Williams v Ludlow's Sand & Gravel Co.*, 122 AD2d 612, 614, *lv dismissed* 68 NY2d 997). Defendants operated a compost facility in the Town of Cato in Cayuga County. The parties signed a consent order requiring defendants to pay a stipulated fine of $20,000; to cease accepting any materials at the site; to complete the composting of materials present at the site; to remove any remaining materials not properly composted to a facility authorized to accept the waste; to remove all properly composted materials; to submit a remediation plan that included, *inter alia,* site drainage and re-vegetation plans; and to submit any amended plans within the time period required by plaintiffs. Thereafter, defendants paid a portion of the fine, ceased accepting composting materials, but did accept food products for an enterprise not related to the compost facility, and submitted a proposed remediation plan. Plaintiffs rejected defendants' proposed plan and extended the time for defendants to submit an

amended plan. When defendants failed to submit an amended plan by the extension date, plaintiffs, by letter, required the submission of an amended plan within seven days and removal of the materials from the site by a specified date. Defendants failed to comply with either condition, and plaintiffs commenced this action to enforce the consent order. In granting plaintiffs' motions, the court required defendants to remediate and close the solid waste disposal plant and to pay fines and stipulated penalties in the amount of $600 per day, from January 15, 1997 to January 26, 1999.

We reject the contention of defendants that the terms of plaintiffs' letter rendered them unable to comply with the terms of the consent order; the letter merely reiterated the terms of the consent order (*cf., Cahill v Town of Wolcott,* ___ AD2d ___ [decided Mar. 29, 2000]). The court properly determined that, pursuant to the consent order, the goal of the parties was to close the facility and not, as defendants contend, to permit defendants to resume its operation. Moreover, the court properly directed defendants to pay the fines and civil penalties to which the parties stipulated in the consent order. Contrary to defendants' contention, the *force majeure* clause of the consent order was not implicated by plaintiffs' actions, and, in any event, defendants failed to invoke the clause as required by the consent order. Finally, defendants have abandoned any issues with respect to those affirmative defenses and counterclaims that are not addressed on appeal (*see, Karas v Corning Hosp.* [appeal No. 1], 262 AD2d 1039), and we conclude that the court properly dismissed those affirmative defenses and counterclaims that are addressed on appeal. (Appeal from Judgment of Supreme Court, Cayuga County, Bender, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(924) CA 99-1169. (Monroe Co.) -- PHILLIP JAMES, PLAINTIFF-APPELLANT, V WESTERN NEW YORK COMPUTING SYSTEMS, INC., DEFENDANT-RESPONDENT. -- Order unanimously affirmed without costs. Memorandum: Supreme Court properly granted that part of defendant's motion seeking to dismiss the second cause of action in the amended complaint. Plaintiff alleges in the amended complaint that he was employed by defendant as an at-will employee from July 1985 to December 1998. In 1992 he was offered an opportunity to participate in defendant's stock option plan

pursuant to which he was entitled to purchase up to 5% of defendant's outstanding stock. Each eligible employee who participated would have the opportunity to purchase at book value 2,500 shares of voting common stock each year for 10 years. The stock option plan provided that "the Plan shall not be deemed to constitute a contract of employment between the Company and any employee or to be a consideration for, or an inducement to or condition of, the employment of any person." In April 1993 plaintiff purchased 2,500 shares of defendant's stock pursuant to the stock option plan.

In the latter part of 1993, defendant informed plaintiff that his compensation was being restructured to reduce his commissions to 25%. Plaintiff alleges in the amended complaint that, "[i]n order to induce the Plaintiff to accept the cut in commissions and continue in Defendant's employ, [defendant's president] represented to the Plaintiff that by remaining with [defendant] and participating in the Plan, plaintiff would have the opportunity to own as much as 5% of [defendant] and would make much more money in the long run. In addition, [defendant's president and vice-president of finance] advised plaintiff that the shares he purchased would be worth four to five times what he paid." In January 1994 plaintiff purchased another 2,500 shares of defendant's stock and signed a stock option agreement incorporating the terms and provisions of the stock option plan. In 1995 defendant terminated the stock option plan. In the second cause of action, plaintiff seeks to recover "the current fair market value of the remaining twenty thousand shares of [defendant's] stock less the book value purchase price of said stock" based on either the oral agreement between the parties in the latter part of 1993 or promissory estoppel.

The second cause of action in the amended complaint arose from the same series of transactions alleged in the second cause of action in the complaint, which was dismissed with prejudice. Plaintiff did not appeal from the order dismissing that cause of action. Therefore, the second cause of action is barred by res judicata (*see, O'Brien v City of Syracuse*, 54 NY2d 353, 357; *Davie v Dwyer*, 155 AD2d 921, 921-922).

In any event, even if the second cause of action were not barred by res judicata, we would conclude that it was properly dismissed. Contrary to plaintiff's contention, the amended complaint fails to state a cause of action for breach of an oral contract. The record establishes, and plaintiff concedes, that

the alleged oral agreement falls within the Statute of Frauds (*see*, General Obligations Law § 5-701 [a]). We reject plaintiff's contention that the agreement falls within the part performance exception to the Statute of Frauds. "The doctrine of part performance may be invoked only if plaintiff's actions can be characterized as 'unequivocally referable' to the agreement alleged. * * * [T]he actions alone must be 'unintelligible or at least extraordinary', explainable only with reference to the oral agreement" (*Anostario v Vicinanzo*, 59 NY2d 662, 664). The acts performed must be clear, certain and definite to remove an oral agreement from the Statute of Frauds (*see, Korff v Pica Graphics*, 121 AD2d 511, 512). Plaintiff's actions are not unequivocally referable to the alleged oral agreement, nor are they explainable only with reference to that agreement (*see, Anostario v Vicinanzo, supra*, at 664; *Hart v Windjammer Barefoot Cruises*, 220 AD2d 252; *Klein v Jamor Purveyors*, 108 AD2d 344, 348-349; *Cunnison v Richardson Greenshields Sec.*, 107 AD2d 50, 54).

Also contrary to plaintiff's contention, the amended complaint fails to state a viable cause of action for promissory estoppel. The alleged oral promise is not sufficiently clear and unambiguous to support such a cause of action (*see generally, Gurreri v Associates Ins. Co.*, 248 AD2d 356, 357). The oral agreement is unclear concerning the duration of plaintiff's employment, the specifics of the plan in which plaintiff is to participate, what plaintiff's "opportunity" entails, or the amount of money plaintiff would receive from the stock. Additionally, promissory estoppel is available only where a party reasonably relies on an oral representation and it would be unconscionable to deny enforcement of the oral agreement (*see, Steele v Delverde S.R.L.*, 242 AD2d 414, 415). We conclude that plaintiff's allegations fail to establish the requisite unconscionability (*see, Steel v Delverde S.R.L., supra*, at 415; *Klein v Jamor Purveyors, supra*, at 349).

Furthermore, plaintiff's allegations concerning breach of an oral agreement and promissory estoppel lack merit in light of the express written provisions in the stock option plan and subsequent agreement that the plan could be terminated by defendant at any time and that the plan and agreement were not contracts for employment or inducements for continued employment (*see generally, Marine Midland Bank v Jake's Prods.*, 242 AD2d 415, 416; *Lejkowski v Petrou*, 178 AD2d 465). (Appeal from Order of Supreme Court, Monroe County, Stander, J. - Dismiss Pleading.)

PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(925) CA 00-38. (Monroe Co.) -- CAROLYN HAAS, AS EXECUTOR OF THE ESTATE OF GEORGE D. HAAS, DECEASED, PLAINTIFF-APPELLANT, V SCHULER-HAAS ELECTRIC CORP. AND JOHN E. SCHULER, DEFENDANTS-RESPONDENTS. -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Order of Supreme Court, Monroe County, Stander, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(926) CA 99-1499. (Erie Co.) -- RICHARD N. REISCH, PLAINTIFF-RESPONDENT, V AMADORI CONSTRUCTION CO., INC., AND K & M CONTRACTING & SUPPLY CO., INC., DEFENDANTS-APPELLANTS. -- Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Plaintiff, a civil engineer employed by the New York State Department of Transportation, was in charge of a bridge reconstruction project on Erie County Route 531. While inspecting the job site, he was injured when he slipped and fell off a crude plank ramp leading from a bridge abutment to ground level over an excavation. He commenced this action against defendant Amadori Construction Co., Inc. (Amadori), the general contractor, and defendant K & M Contracting & Supply Co., Inc., a subcontractor, alleging common-law negligence and violations of Labor Law §§ 200, 240 (1), and § 241 (6).

Supreme Court granted that part of plaintiff's cross motion seeking partial summary judgment on liability on the Labor Law § 240 (1) claim against Amadori. The court denied that part of Amadori's motion seeking summary judgment dismissing the Labor Law § 241 (6) claim based upon 12 NYCRR 23-1.22 (b) (2) and (b) (4). The court also denied in part defendants' motions seeking summary judgment dismissing the Labor Law § 200 and common-law negligence claims.

Defendants contend that plaintiff may not invoke the protections of the Labor Law because he was not employed by an owner, contractor or agent thereof to perform construction or repair work. We disagree. Although there is evidence that the bridge was owned by Erie County, the State had a right-of-way and contracted with Amadori to have the work performed. The term "owners" as used in Labor Law §§ 240 and 241 "encompass[es] a person who has an interest in the property and who fulfilled the

role of owner by contracting to have work performed for his benefit" (*Copertino v Ward*, 100 AD2d 565, 566; *see*, *Mangiameli v Galante*, 171 AD2d 162, 163). Plaintiff's inspection work falls within the purview of the Labor Law because it was essential to the construction of the bridge (*see*, *Aubrecht v Acme Elec. Corp.*, 262 AD2d 994; *see also, Melber v 6333 Main St.*, 224 AD2d 995, 995-996, *revd on other grounds* 91 NY2d 759).

Amadori contends that Labor Law § 240 (1) does not apply here because plaintiff was not injured in a fall from an elevated worksite. We disagree. The ramp served the function of a ladder, permitting plaintiff to climb onto the bridge abutment from ground level. It is undisputed that the only other access to the bridge that day was a similar ramp at the far side of the bridge located a 10-mile drive away. "Because plaintiff sustained a gravity-related injury where a protective device was called for because of the elevation differential between the work site and a lower level * * * , his accident falls squarely within the intended scope of Labor Law § 240" (*Lajeunesse v Feinman*, 218 AD2d 827, 828-829; *see*, *Jenkins v Board of Mgrs. of Southampton Meadows Condominium*, ___ AD2d ___ [decided Feb. 14, 2000]; *Tomlins v Siltone Bldg. Co.*, 267 AD2d 947; *cf.*, *Straight v McCarthy Bros. Co.*, 222 AD2d 775). We also reject Amadori's contention that, because plaintiff knew the plank was wet and complained about its safety before using it, there is an issue of fact whether the absence of safety devices was the sole proximate cause of plaintiff's injuries. "It is well settled that the [plaintiff's] contributory negligence is not a defense to a claim based on Labor Law § 240 (1)" (*Stolt v General Foods Corp.*, 81 NY2d 918, 920; *see also*, *Robinson v NAB Constr. Corp.*, 210 AD2d 86, 86-87).

Defendants contend that the court erred in denying those parts of their motions seeking summary judgment dismissing the Labor Law § 200 and common-law negligence claims because they did not supervise or control plaintiff's work. Plaintiff's account of the accident, however, establishes that a dangerous condition on the premises arising from the defective ramp caused the accident and thus supervision or control of plaintiff's work is not at issue (*see, Sponholz v Benderson Prop. Dev.*, ___ AD2d ___ [decided herewith]; *Farrell v Okeic*, 266 AD2d 892; *cf., Lombardi v Stout*, 80 NY2d 290, 295). Defendants also contend that those claims should have been dismissed because plaintiff cannot identify the party responsible for placement of the ramp. In

seeking summary judgment, however, defendants had the initial burden "to make a prima facie showing of entitlement to judgment as a matter of law by coming forward with competent proof refuting the allegations of the complaint as amplified by the bill of particulars" (*Balnys v Town of New Baltimore*, 160 AD2d 1136). The bill of particulars alleges that defendants provided the ramp, and neither defendant came forward with competent proof refuting that allegation. The failure of defendants to make a prima facie showing of entitlement to judgment as a matter of law "requires denial of the motion[s], regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Additionally, we reject defendants' contention that those claims should have been dismissed because the allegedly dangerous condition was readily observable (*see, Ditz v Myriad Constrs*. [appeal No. 1], ___ AD2d ___ [decided Feb. 16, 2000]*; see also, Crawford v Marcello*, 247 AD2d 907; *Morgan v Genrich*, 239 AD2d 919).

Amadori further contends that the Labor Law § 241 (6) claim should have been dismissed insofar as it is based on 12 NYCRR 23-1.22 (b) (2) because that regulation establishes only a general safety standard (*see, Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505). To the extent that the regulation mandates that ramps "be at least 18 inches in width" and "at least two inches thick", it is sufficiently specific to support a Labor Law § 241 (6) claim. We agree with Amadori, however, that the thickness of the ramp had nothing to do with the accident, and thus we modify the order by granting that part of Amadori's motion seeking summary judgment dismissing the Labor Law § 241 (6) claim insofar as it is based on the 12 NYCRR 23-1.22 (b) (2) thickness requirement. Finally, we reject Amadori's contention that the Labor Law § 241 (6) claim should have been dismissed insofar as it is based on 12 NYCRR 23-1.22 (b) (4). That regulation sets forth a safety railing requirement and, contrary to Amadori's contention, there is an issue of fact whether it is applicable here. (Appeals from Order of Supreme Court, Erie County, Rath, Jr., J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(927) CA 00-00159. (Jefferson Co.) -- MS PARTNERSHIP, PLAINTIFF-RESPONDENT, V WAL-MART STORES, INC., DEFENDANT-APPELLANT, ET AL., DEFENDANTS. -- Order unanimously affirmed without costs. Memorandum: Supreme Court properly denied those parts of the

cross motion of Wal-Mart Stores, Inc. (defendant) seeking to compel a further deposition of Mark Perlbinder, a principal of plaintiff, and to compel a deposition of Stephen Perlbinder, the other principal of plaintiff. At his deposition, Mark Perlbinder conceded that he has extensive experience in real estate development matters; that he viewed the plans and specifications for the building leased to defendant prior to its purchase by plaintiff; and that neither he nor any person at his direction inspected the building prior to its purchase. Absent an abuse of discretion, we will not disturb the court's control of the discovery process (*see, Moore v Gemerek*, 222 AD2d 1064; *see also, Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406; CPLR 3101 [a]). The court did not abuse its discretion in determining that defendant failed to establish that the information sought at the further deposition of Mark Perlbinder concerning business transactions unrelated to the litigation is material or necessary (*see, Kern v City of Rochester* [appeal No. 1], 267 AD2d 1026). Nor did the court abuse its discretion in determining that Stephen Perlbinder had no knowledge of the facts underlying the lawsuit and therefore was not required to submit to a deposition.

Defendant contends that, in granting plaintiff's motion to compel, the court thereby required it to produce for deposition former employees or other persons not within its control. We disagree. The court issued a decision and order (one document) that directs defendant to use its best efforts to arrange for the appearance of those persons over whom defendant does not have control and orders that the persons be produced "as directed herein". Thus, the decision and order requires defendant to use its best efforts.

Contrary to the further contention of defendant, the court did not preclude it from offering testimony at trial of persons over whom it does not have control if it fails to produce those persons for deposition. The court merely reserved to plaintiff the right to seek relief pursuant to CPLR 3126 in the event that defendant fails to produce such persons for depositions. (Appeal from Order of Supreme Court, Jefferson County, Gilbert, J. - Discovery.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(928) CA 99-1020. (Erie Co.) -- MICHAEL DILLON, PLAINTIFF, V LUCK BROS., INC., DEFENDANT. LUCK BROS., INC., THIRD-PARTY PLAINTIFF-RESPONDENT, V ACCENT STRIPE, INC., THIRD-PARTY DEFENDANT-

APPELLANT. -- Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Erie County, O'Donnell, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(929) CA 99-1519. (Erie Co.) -- BETH T. CHRISTOPHER, PLAINTIFF-RESPONDENT, V GRAND ISLAND CENTRAL SCHOOL DISTRICT, DEFENDANT-APPELLANT. -- Order unanimously affirmed with costs. (Appeal from Order of Erie County Court, Rogowski, J. - Small Claims.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(930) CA 00-00133. (Erie Co.) -- HARRY A. GIROUX, PLAINTIFF-RESPONDENT, V DUNLOP TIRE CORPORATION, DEFENDANT-APPELLANT. -- Order unanimously affirmed without costs. Memorandum: Plaintiff commenced this action to recover damages for injuries sustained when his motorcycle struck a six-inch high concrete barrier that had been dislodged from defendant's parking lot and dragged into the street. Although Supreme Court properly denied defendant's motion for summary judgment dismissing the amended complaint, it erred in basing that denial on the ground that defendant failed to establish as a matter of law that it lacked actual or constructive notice that the barrier was in the street. "While a property owner may be liable for injuries resulting from a dangerous condition on its property of which it has notice * * *, an adjoining owner has no duty to keep the [street] in a safe condition unless it created the condition or uses the [street] for a special purpose" (*Xerri v Cooper Union*, 255 AD2d 165, 166; *see*, *Montalvo v Western Estates,* 240 AD2d 45, 47).

Here, defendant failed to meet its initial burden of establishing as a matter of law that it did not create the dangerous condition. While defendant supported its motion with evidence that the barrier had been properly secured in the parking lot, defendant also presented evidence that it had not been properly secured. Defendant contends that the dragging of the barrier into the street was an extraordinary and unforeseeable act that severed any causal connection between defendant's actions and plaintiff's injuries. Even assuming, arguendo, that a third party rather than defendant was responsible for dragging the barrier into the street, we conclude that defendant nevertheless is not entitled to summary judgment. The issue whether "an injury-producing act was foreseeable is

typically a question for the trier of fact to resolve" (*Singh v Persaud*, ___ AD2d ___ [decided Feb. 7, 2000]; *see, Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784; *Dennis v City of New York*, 205 AD2d 577, 578). Thus, defendant failed to meet its initial burden of establishing entitlement to judgment as a matter of law, and the "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). (Appeal from Order of Supreme Court, Erie County, O'Donnell, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(931) CA 99-3501. (Wyoming Co.) -- MATTER OF HELIBERTO SANCHEZ, PETITIONER-APPELLANT, V BRION D. TRAVIS, CHAIRMAN, NEW YORK STATE DIVISION OF PAROLE, RESPONDENT-RESPONDENT. -- Appeal unanimously dismissed without costs as moot. (Appeal from Judgment of Supreme Court, Wyoming County, Dadd, J. - CPLR art 78.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(932) CA 99-1023. (Erie Co.) -- MARK PENTA, Ph.D., PLAINTIFF-RESPONDENT, ET AL., PLAINTIFFS, V LEON V. LEWIS, M.D., DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (*see, Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *see also, Chase Manhattan Bank v Roberts & Roberts*, 63 AD2d 566, 567; CPLR 5501 [a] [1]). (Appeal from Order of Supreme Court, Erie County, O'Donnell, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(933) CA 99-1024. (Erie Co.) -- MARK PENTA, Ph.D., PLAINTIFF-RESPONDENT, ET AL., PLAINTIFFS, V LEON V. LEWIS, M.D., DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Judgment unanimously affirmed with costs. (Appeal from Judgment of Supreme Court, Erie County, O'Donnell, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(934) TP 99-681. (Erie Co.) -- MATTER OF JESSIE J. BARNES, PETITIONER, V VICTOR HERBERT, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, AND GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENTS. --

Determination unanimously confirmed without costs and petition dismissed. (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Erie County, Gorski, J.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(935) KA 99-5545. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V TONY KINARD, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Monroe County Court, Egan, J. - Criminal Possession Controlled Substance, 5th Degree.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(936) KA 99-5393. (Genesee Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V SHANE T. WALDRON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25). Defendant contends that County Court erred in failing to specify at sentencing the period of postrelease supervision (*see*, Penal Law § 70.45). By not raising that contention at the time of sentencing, defendant has failed to preserve it for our review (*see*, *People v Miller*, ___ AD2d ___ [decided Mar. 29, 2000]). In any event, we note that, although the court did not specify the period of postrelease supervision at sentencing, it advised defendant during the plea colloquy that he would be subject to a period of postrelease supervision ranging from 1½ to 3 years and that the court could impose the maximum period thereof at sentencing. The sentence, including the period of postrelease supervision, is neither unduly harsh nor severe. (Appeal from Judgment of Genesee County Court, Noonan, J. - Attempted Burglary, 2nd Degree.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(939) KA 97-05256. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JOHN SALGADO, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant contends that the conviction of burglary in the first degree (Penal Law § 140.30 [2]) is against the weight of the evidence because the People failed to establish that he knowingly remained unlawfully in the complainant's apartment with the contemporaneous intent to commit a crime therein (*see, People v Gaines*, 74 NY2d 358, 362). Upon weighing the probative force of

the conflicting testimony, we conclude that the verdict is not against the weight of the evidence (*see, People v Bleakley*, 69 NY2d 490, 495; *People v Long*, 224 AD2d 949, *lv denied* 88 NY2d 967).

We reject defendant's contention that County Court erred in its charge to the jury with respect to the burglary count. Defendant's contention that the court erred in using the language "unlawfully enters" when it was undisputed that defendant lawfully entered the premises (*see, People v Gaines, supra*, at 363) is unpreserved for our review because defendant failed to object to the charge on that ground (*see, People v Ray*, 254 AD2d 189, 190, *lv denied* 92 NY2d 985; *People v Murphy*, 188 AD2d 1061). In any event, the court used that language only in reading the indictment to the jury, and not when instructing the jury on the elements of burglary in the first degree or the lesser included offenses, thereby obviating any prejudice to defendant (*see, People v Agrelo-Travieso*, 257 AD2d 514, 515, *lv denied* 93 NY2d 870). Defendant also contends that the court failed to instruct the jury that the intent to commit a crime must be formed contemporaneously with remaining unlawfully in the building (*see, People v Gaines, supra*, at 363). We disagree. The court's charge adequately conveyed the elements of burglary in the first degree, including the requirement of contemporaneous intent (*see*, Penal Law § 140.30 [2]; 1 CJI[NY] PL 140.30 [2], at 140-1103 - 140-1108). (Appeal from Judgment of Monroe County Court, Smith, J. - Burglary, 1st Degree.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(940) KA 00-00200. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V THOMAS SPRAGUE, DEFENDANT-APPELLANT. -- Case held, decision reserved and matter remitted to Supreme Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him after a jury trial of two counts of sodomy in the first degree (Penal Law § 130.50 [3]) and one count each of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (Penal Law § 260.10 [1]). Defendant contends, *inter alia*, that Supreme Court failed to articulate the basis for sustaining the People's *Batson* challenge to defendant's exercise of a peremptory strike with respect to a black prospective juror (*see*, *Batson v Kentucky*, 476 US 79). We agree.

"When a trial court finds that the opponent of [a] peremptory strike[] * * * has carried its ultimate and unalterable burden of persuasion [of establishing purposeful discrimination], that ruling and its basis must be reflected and gauged on the record made. The legal burdens of production and persuasion must be correctly allocated and maintained, and a meaningful record must reflect that these prerequisites have been satisfied * * * [T]he trial courts bear the judicial responsibility of ensuring that an adequate record is made and of reflecting the basis for their rulings" (*People v Payne*, 88 NY2d 172, 183-184).

Here, defendant offered a facially race-neutral reason for striking the juror in question, and the People contended that such reason was pretextual. However, the court summarily sustained the People's *Batson* challenge without discussing pretext or setting forth the basis for its ruling so as to permit meaningful appellate review (*see*, *People v Payne*, *supra*, at 183-184; *see also*, *People v Tucker*, 256 AD2d 1019, 1020). We therefore hold the case, reserve decision and remit the matter to Supreme Court to set forth the basis for its ruling (*see, People v Payne*, *supra*, at 187). (Appeal from Judgment of Supreme Court, Monroe County, Mark, J. - Sodomy, 1st Degree.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(941) CA 99-1571. (Ontario Co.) -- ROBERT J. SALOTTI, PLAINTIFF-APPELLANT, V WELLCO, INC., DEFENDANT-RESPONDENT. -- Order unanimously affirmed without costs. Memorandum: Plaintiff contends that Supreme Court erred in denying his motion for partial summary judgment on liability under Labor Law § 240 (1) because there are no triable issues of fact concerning whether plaintiff was a recalcitrant worker or whether his actions were the sole proximate cause of his injuries. We agree with plaintiff that the recalcitrant worker defense lacks merit as a matter of law. A defendant does not establish that defense merely by showing that plaintiff was instructed to avoid an unsafe practice (*see, Gordon v Eastern Railway Supply*, 82 NY2d 555, 563; *Hagins v State of New York*, 81 NY2d 921, 922-923). Further, it is well established that the presence of a safety device elsewhere at the job site will not defeat liability (*see, Kaffke v New York State Elec. & Gas Corp.*, 257 AD2d 840, 841; *see generally, Heath v Soloff Constr.*, 107 AD2d 507, 512). In asserting a recalcitrant worker defense, a defendant must

establish that plaintiff deliberately or purposely refused an order to use safety devices actually put in place or made available by the owner or contractor (*see, Hagins v State of New York, supra,* at 922-923; *Stolt v General Foods Corp.*, 81 NY2d 918, 920; *Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 679-680, *affd* 88 NY2d 946; *Kulp v Gannett Co.* [appeal No. 1], 259 AD2d 969).

The court nonetheless properly denied plaintiff's motion. The divergent accounts of the accident set forth in plaintiff's papers create triable issues of fact concerning the manner in which the accident occurred (*see, Smith v Torre,* 247 AD2d 896; *Abramo v Pepsi-Cola Buffalo Bottling Co.*, 224 AD2d 980, 981), in particular, whether defendant violated the statute and whether such alleged violation was a proximate cause of plaintiff's injuries, or whether plaintiff's actions were the sole proximate cause of the injuries (*see, Weininger v Hagedorn & Co.*, 91 NY2d 958, 960, *rearg denied* 92 NY2d 875; *Hilbert v Sahlen Packing Co.*, 267 AD2d 940). (Appeal from Order of Supreme Court, Ontario County, Harvey, J. - Summary Judgment.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(942) CA 00-102. (Erie Co.) -- IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION. LOUISE CHRABAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DENNIS J. CHRABAS, DECEASED, AND LOUISE CHRABAS, PLAINTIFF-RESPONDENT, V A.P. GREEN INDUSTRIES, INC., ET AL., DEFENDANTS, AND OWENS-ILLINOIS, INC., DEFENDANT-APPELLANT. -- Order unanimously affirmed with costs. Memorandum: These actions were commenced to recover damages for injuries allegedly sustained as the result of the exposure of plaintiffs' decedents to asbestos. The exposure occurred in New York when plaintiffs' decedents were residents of New York. Plaintiffs and plaintiffs' decedents were residents of Florida when plaintiffs' decedents were diagnosed with mesothelioma, when the actions were commenced and when plaintiffs' decedents died. Owens-Illinois, Inc. (defendant) is a Delaware corporation with its principal place of business in Ohio.

Supreme Court properly denied the motion of defendant in each action for an order directing that Florida law be applied to the loss allocation issues in each action and instead directed that New York law be applied to those issues. In cases involving domiciliaries of different jurisdictions that have conflicting loss allocation rules, "the law of the place of the tort will

normally apply, unless displacing it '"will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants"'" (*Schultz v Boys Scouts of Am.*, 65 NY2d 189, 201, quoting *Neumeier v Kuehner*, 31 NY2d 121, 128). Here, "the interrelationship of the parties was centered in New York" (*Phelan v Budget Rent A Car Sys.*, 267 AD2d 654; *see, Weisberg v Layne-New York Co.*, 132 AD2d 550, 552), and "we perceive no persuasive reason to displace the law of this State in the circumstances of th[ese] case[s]" (*LaForge v Normandin*, 158 AD2d 990; *see, Phelan v Budget Rent A Car Sys., supra; see also, Weisberg v Layne-New York Co., supra*, at 552). (Appeal from Order of Supreme Court, Erie County, Kane, J. - Conflict of Laws.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(944) CA 00-128. (Genesee Co.) -- JAMES A. PALERMO AND NANCY J. PALERMO, PLAINTIFFS-RESPONDENTS, V CHARLES S. PANGRAZIO, LLOYD S. COLLINS, LINDA A. COLLINS, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. -- Order unanimously affirmed without costs. (Appeals from Order of Supreme Court, Genesee County, Rath, Jr., J. - Summary Judgment.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(945) CA 00-47. (Erie Co.) -- THE ESTATE OF BERNICE TAYLOR, DECEASED, BY WINTHROP H. PHELPS, EXECUTOR, PLAINTIFF-APPELLANT, V PRESCILLA O. MORENO, DEFENDANT-RESPONDENT. -- Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Erie County, Sedita, Jr., J. - Vacate Order.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(947) CA 99-3435. (Erie Co.) -- RUSSELL MIKOLAJCZYK AND LUANNE MIKOLAJCZYK, PLAINTIFFS-APPELLANTS, V M.C. MORGAN CONTRACTORS, INC., JUANITA MORGAN, KATHY STRANAHAN AND KATHY STRANAHAN, D/B/A WEBER'S CERTIFIED PUBLIC SCALES, DEFENDANTS-RESPONDENTS. -- Order unanimously reversed on the law without costs, motions and cross motion denied and complaint reinstated. Memorandum: Plaintiffs commenced this action seeking damages for personal injuries sustained by Russell Mikolajczyk (plaintiff) when he slipped and fell on snow-covered ice on a walkway located on property owned by defendant Juanita Morgan. Defendant M.C. Morgan Contractors, Inc. (MCM) leased all or a part of the entire property, which

consists of three buildings. Defendant Kathy Stranahan and Kathy Stranahan, d/b/a Weber's Certified Public Scales (collectively Stranahan), leased all or a portion of the front office building and the weigh scales outside that building from Morgan or MCM. The accident occurred on a walkway located between the back door of the front office building and the adjacent warehouse. Supreme Court granted those parts of the motions of Morgan and Stranahan and that part of the cross motion of MCM for summary judgment dismissing the complaint. We reverse.

Defendants failed to meet their initial burden of establishing that they had no duty to maintain the property, particularly the walkway at issue. With respect to Morgan, although an out-of-possession landlord is generally not liable for injuries resulting from a defect on the leased premises, "one who retains control of the premises * * * may be liable for defects" (*Young v Moran Props.*, 259 AD2d 1037, 1038). The record establishes that Morgan was at the premises often and would occasionally remove the snow or use salt on the premises. Morgan thus failed to meet her initial burden of establishing that she did not retain control of the premises (*see, Jenkins v Ehmer*, ___ AD2d ___ [decided May 10, 2000]). MCM and Stranahan also failed to meet their initial burden of establishing that they did not control the walkway. The record establishes that, in the years prior to plaintiff's accident, an employee of MCM would clear the walkways and parking areas. At the time of the accident, MCM was no longer actively operating its business, but it was still in existence. Stranahan was actively operating her business at the time of the accident, and the record contains deposition testimony that Stranahan would occasionally shovel or use salt on the walkway.

Even assuming that defendants established that they had no actual notice of the allegedly dangerous condition, we conclude that they failed to meet their initial burden of establishing that they had no constructive notice of it. According to plaintiff's deposition testimony, there were snow drifts between the office building and the warehouse, the snow on the walkway came up to plaintiff's mid-calf, and the ice beneath the snow was thick. There was no allegation that there was a storm in progress, and the record establishes that the walkway had not been cleared of snow or ice for at least a couple of weeks prior to the accident. Morgan admitted that the walkway was not kept clear of snow and ice. Thus, defendants failed to meet their

burden of establishing that the allegedly dangerous condition was not visible and apparent for a sufficient length of time prior to the accident to permit them, in the exercise of reasonable care, to discover and remedy it (*see, Duman v City of Buffalo,* ___ AD2d ___ [decided Feb. 16, 2000]; *see generally, Gordon v American Museum of Natural History,* 67 NY2d 836, 837-838; *Appleby v Webb,* 186 AD2d 1078). (Appeal from Order of Supreme Court, Erie County, Burns, J. - Summary Judgment.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(948) CA 00-00214. (Erie Co.) -- JANET J. PATTERSON, PLAINTIFF-RESPONDENT, V TROYER POTATO PRODUCTS, INC., CONVENIENT FOOD MART, INC., JAMES SHAW, JOSEPH SHAW AND CFM-33004-2, INC., DEFENDANTS-APPELLANTS. -- Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Plaintiff commenced this negligence action to recover damages for personal injuries allegedly sustained when her lower right leg struck a shelf protruding into the aisle of a Convenient Food Mart store. At the time of her injury, an employee of defendant Troyer Potato Products, Inc. (Troyer) was stocking Troyer merchandise on the shelves in the subject aisle.

Supreme Court properly denied the motion of Convenient Food Mart Franchising, Inc. (incorrectly sued as Convenient Food Mart, Inc.), James Shaw, Joseph Shaw and CFM-33004-2, Inc. (CFM defendants) for summary judgment dismissing the complaint against them. Contrary to the contention of the CFM defendants, the evidence submitted by them fails to establish that the allegedly dangerous condition was open and obvious. The deposition testimony of plaintiff submitted by the CFM defendants establishes that the shelf that allegedly caused plaintiff's fall was at near-floor level and was protruding approximately three or four inches, and that she did not notice the shelf prior to her fall. Furthermore, neither the Troyer employee nor the store manager, who was present when the incident occurred, noticed what caused plaintiff's fall. Even assuming, arguendo, that the protruding shelf was readily observable, we conclude that such fact would go "to the issue of comparative negligence and [would] not negate the duty of defendants to keep their premises reasonably safe" (*Crawford v Marcello*, 247 AD2d 907; *see*, *Holl v Holl* [appeal No. 2], ___ AD2d ___ [decided Mar. 29, 2000]).

The court erred, however, in denying the cross motion of Troyer for summary judgment dismissing the complaint against it.

Troyer met its initial burden by establishing that its employee was occupying approximately half of the aisle and that plaintiff walked around him without incident, using the foot and a half on the opposite side of the aisle. In response to an inquiry by the employee, plaintiff advised him that she had sufficient room to pass and had cleared him by two feet at the time of her fall. Troyer thereby established that its employee did not act negligently, and plaintiff failed to raise an issue of fact (*see generally*, *Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, in those additional portions of plaintiff's deposition testimony submitted by plaintiff in opposition to the motion and cross motion, plaintiff stated that the space remaining in the aisle permitted her to walk around the Troyer employee without difficulty. We therefore modify the order by granting the cross motion of Troyer and dismissing the complaint against it. (Appeals from Order of Supreme Court, Erie County, Notaro, J. - Summary Judgment.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(950) CA 00-101. (Erie Co.) -- IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION. BELINDA J. PLANT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT J. PLANT, DECEASED, AND BELINDA J. PLANT, PLAINTIFF-RESPONDENT, V ACandS, INC., ET AL., DEFENDANTS, AND OWENS-ILLINOIS, INC., DEFENDANT-APPELLANT. -- Order unanimously affirmed with costs. Same Memorandum as in *Chrabas v A.P. Green Indus.* (___ AD2d ___ [decided herewith]). (Appeal from Order of Supreme Court, Erie County, Kane, J. - Conflict of Laws.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(951) CA 00-110. (Monroe Co.) -- TAMMY ANNE O'BRIEN, PLAINTIFF-RESPONDENT, V BAUSCH & LOMB, INCORPORATED, DEFENDANT-APPELLANT. -- Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Monroe County, Bergin, J. - Summary Judgment.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(952) CA 99-01344. (Onondaga Co.) -- STEVEN F. MILLER, JR., PLAINTIFF-RESPONDENT-APPELLANT, V CARL LANZISERA, DEFENDANT-APPELLANT-RESPONDENT. (APPEAL NO. 1.) -- Order unanimously affirmed with costs to plaintiff. Memorandum: Plaintiff, a former employee of a now-defunct securities company that was

owned and operated by defendant, commenced an arbitration proceeding against the company in 1989. He alleged, *inter alia*, that the company converted approximately $17,000 from a cash account owned by plaintiff and of which defendant was the trustee. Plaintiff sought to add defendant in his individual capacity as a party to the arbitration proceeding, but defendant objected and the arbitration panel denied plaintiff's request. The arbitration panel determined, *inter alia*, that plaintiff was entitled to recover the $17,000, and plaintiff then commenced an action in Supreme Court alleging that defendant was personally liable for the conversion of the $17,000. Plaintiff moved to compel defendant to appear for a deposition, and defendant cross-moved for summary judgment dismissing the complaint based on, *inter alia*, arbitration and award, collateral estoppel, res judicata and lack of jurisdiction. By order dated April 12, 1990 (1990 order), the court granted plaintiff's motion and denied defendant's cross motion. Defendant filed a notice of appeal from the 1990 order and thereafter moved to resettle the 1990 order and to compel arbitration. The record does not contain an order disposing of those two motions and, according to defendant, the court never decided those motions.

Defendant neither perfected his appeal from the 1990 order nor complied with its terms, and plaintiff again moved to compel defendant to appear for a deposition. By order dated October 7, 1991, the court granted plaintiff's motion, directing that the failure of defendant to appear for a deposition would result in the striking of his answer and a judgment by default, both without further notice. Defendant failed to appear for the deposition and, on November 7, 1991, judgment was entered against defendant.

Defendant did not appeal from the judgment but in February 1999 moved to vacate the judgment and stay its execution. Plaintiff cross-moved for an order imposing monetary sanctions and precluding defendant from filing any further motions or proceedings in connection with the judgment. The court denied defendant's motion and granted that part of plaintiff's cross motion seeking to preclude defendant from filing further motions or proceedings. Defendant appeals and plaintiff cross-appeals.

We reject the contention of defendant that the court's alleged failure to decide his motions in 1990 to resettle the order and to compel arbitration warrants vacatur of the judgment. Pursuant to CPLR 2219 (a), an order determining a motion shall be

made within 60 days after the motion is submitted for decision. Even assuming that the court failed to comply with CPLR 2219 (a), we conclude that the appropriate procedural vehicle to address such a failure would have been a CPLR article 78 proceeding to compel the court to render a decision on the motions (*see generally*, *Matter of Goldman v Seidell*, 234 AD2d 547).

We further reject the contention of defendant that his then attorney was precluded from perfecting the appeal from the 1990 order due to the court's alleged failure to decide the motion to resettle that order. "The purpose of resettlement is to revise an order to reflect the court's decision * * *. Resettlement is not to be used to effect a substantive change in or to amplify the decision of the court" (*Barretta v Webb Corp.*, 181 AD2d 1018, *lv dismissed* 80 NY2d 892). It does not appear from the record that, in seeking resettlement, defendant contended that the 1990 order did not substantively reflect the court's decision, and thus "the time to appeal [was] measured from the original order" (*Matter of Kolasz v Levitt*, 63 AD2d 777, 779).

Defendant further contends that the judgment should be vacated on the ground that the court lacked jurisdiction by reason of the res judicata and collateral estoppel effect of plaintiff's arbitration proceeding. We disagree. Plaintiff sought to add defendant in his individual capacity as a party to the arbitration proceeding, but defendant objected and plaintiff's request was denied. Thus, the issue of defendant's personal liability for the monies taken from plaintiff's account was not litigated in the arbitration proceeding and, therefore, the principles of res judicata and collateral estoppel do not apply to bar this action (*see generally*, *Good Old Days Tavern v Zwirn*, 261 AD2d 288, 289; *CRK Contr. of Suffolk v Brown & Assocs.*, 260 AD2d 530, 531; *cf.*, *Jacobs v Guido*, ___ AD2d ___ [decided Jan. 13, 2000]).

We reject the contention of defendant that the judgment should be vacated on the ground that it was procured by fraudulent means. Pursuant to CPLR 5015 (a) (3), the court may grant a party relief from a judgment or order upon the ground of fraud, misrepresentation or other misconduct of an adverse party. "However, where the default [judgment] is predicated upon CPLR 3126, an appeal of that * * * judgment is the proper and sole remedy for the defaulting party" (*Pinapati v Pagadala*, 244 AD2d 676, 677; *see generally*, *Tony's Ornamental Iron Works v National Bldg. & Restoration Corp.*, 237 AD2d 909). Here, the striking of

defendant's answer and the entry of a default judgment in favor of plaintiff was predicated on the failure of defendant to comply with an order compelling his appearance at a deposition (*see*, CPLR 3126 [3]). Thus, defendant is not entitled to relief under CPLR 5015 (a) (3). Even assuming that a motion pursuant to CPLR 5015 is proper, we conclude that defendant is not entitled to relief thereunder because he offered nothing more than broad, unsubstantiated allegations of fraud on the part of plaintiff (*cf.*, *Yip v Ip*, 229 AD2d 979). Furthermore, "[t]o the extent that [a] motion [to vacate a judgment] was made pursuant to CPLR 5015 (a) (3), such a motion must be made within a reasonable time" (*Green Point Sav. Bank v Arnold*, 260 AD2d 543). Here, defendant's motion was made over seven years later.

Defendant contends that the court erred in precluding him from filing further motions or proceedings in connection with the judgment in the absence of a finding by the court that defendant engaged in frivolous conduct. No such finding is required in the absence of a monetary sanction (*see*, 22 NYCRR 130-1.2). In any event, it is permissible for the court to order "injunctive relief designed to forestall further vexatious litigation" (*Harbas v Gilmore*, 244 AD2d 218, 219) or "to prevent use of the judicial system as a vehicle for harassment, ill will and spite" (*Matter of Sud v Sud*, 227 AD2d 319). We have examined defendant's remaining contentions and conclude that they are without merit.

Contrary to the contention of plaintiff on his cross appeal, the court did not err in refusing to impose monetary sanctions against defendant, a *pro se* litigant (*see generally*, *Matter of Boyle v Woodstock*, 257 AD2d 702, 705; *Matter of Buhrmeister v McFarland*, 235 AD2d 846, 848). (Appeals from Order of Supreme Court, Onondaga County, Nicholson, J. - Vacate Judgment.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(953) CA 99-01345. (Onondaga Co.) -- STEVEN F. MILLER, JR., PLAINTIFF-RESPONDENT, V CARL LANZISERA, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Order unanimously affirmed with costs. Same Memorandum as in *Miller v Lanzisera* ([appeal No. 1] ___ AD2d ___ [decided herewith]). (Appeal from Order of Supreme Court, Onondaga County, Nicholson, J. - Resettlement.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(954) CA 99-1223. (Erie Co.) -- ANGELA TATZLER, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF WELF TATZLER, AN INFANT, PLAINTIFF-RESPONDENT, V MAIN UROLOGY ASSOCIATES, P.C. AND DATTA G. WAGLE, M.D., DEFENDANTS-APPELLANTS. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Order of Supreme Court, Erie County, Fallon, J. - Discovery.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(955) CA 99-1224. (Erie Co.) -- ANGELA TATZLER, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF WELF TATZLER, AN INFANT, PLAINTIFF-RESPONDENT, V MAIN UROLOGY ASSOCIATES, P.C., AND DATTA G. WAGLE, M.D., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Order of Supreme Court, Erie County, Fallon, J. - Discovery.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(956) CA 99-1225. (Erie Co.) -- ANGELA TATZLER, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF WELF TATZLER, AN INFANT, PLAINTIFF-RESPONDENT, V MAIN UROLOGY ASSOCIATES, P.C., AND DATTA G. WAGLE, M.D., DEFENDANTS-APPELLANTS. (APPEAL NO. 3.) -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Order of Supreme Court, Erie County, Mintz, J. - Discovery.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(957) CA 99-1226. (Erie Co.) -- ANGELA TATZLER, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF WELF TATZLER, AN INFANT, PLAINTIFF-RESPONDENT, V MAIN UROLOGY ASSOCIATES, P.C., AND DATTA G. WAGLE, M.D., DEFENDANTS-APPELLANTS. (APPEAL NO. 4.) -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Order of Supreme Court, Erie County, Mintz, J. - Discovery.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(958) CA 99-1227. (Erie Co.) -- ANGELA TATZLER, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF WELF TATZLER, AN INFANT, PLAINTIFF-RESPONDENT, V MAIN UROLOGY ASSOCIATES, P.C., AND DATTA G. WAGLE, M.D., DEFENDANTS-APPELLANTS. (APPEAL NO. 5.) -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Order of Supreme Court, Erie County, Fallon, J. - Set Aside

Verdict.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(959) CA 99-1228. (Erie Co.) -- ANGELA TATZLER, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF WELF TATZLER, AN INFANT, PLAINTIFF-RESPONDENT, V MAIN UROLOGY ASSOCIATES, P.C., AND DATTA G. WAGLE, M.D., DEFENDANTS-APPELLANTS. (APPEAL NO. 6.) -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Judgment and Order of Supreme Court, Erie County, Fallon, J. - Negligence.) PRESENT: GREEN, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

(960) TP 99-1656. (Wyoming Co.) -- MATTER OF SALVADOR CARCAMO, PETITIONER, V GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT. -- Determination unanimously confirmed without costs and amended petition dismissed. (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Wyoming County, Dadd, J.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(962) KA 99-5122. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V MICHAEL JAECKLE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed (*see, People v Lococo*, 92 NY2d 825, 827). (Appeal from Judgment of Supreme Court, Erie County, Rossetti, J. - Manslaughter, 2nd Degree.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(963) KA 99-5327. (Orleans Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V FREDDY TAVARES, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Contrary to the contention of defendant, the conviction of promoting prison contraband in the first degree (Penal Law § 205.25 [2]) is supported by legally sufficient evidence. The conviction stems from defendant's possession of dangerous contraband, i.e., a shank, in connection with an altercation with another inmate, while incarcerated in a State correctional facility. Although defendant threw the shank when ordered by correction officers to drop it, and the shank was not thereafter recovered, the other inmate and two correction officers testified that they observed the shank in defendant's possession. The correction officers testified that they observed defendant remove the shank from the waistband of his pants, and they described it

as a cylinder shape, 8" to 10" long, with a point on one end and tape on the other. The other inmate testified that defendant struck him in the shoulder area and stabbed him in the back, and the nurse who treated the inmate testified that he had lacerations in the area of his right biceps and a small puncture wound on his back. We conclude that "there is [a] valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley,* 69 NY2d 490, 495). The sentence is neither unduly harsh nor severe. (Appeal from Judgment of Orleans County Court, Punch, J. - Promoting Prison Contraband, 1st Degree.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(964) KA 99-5243. (Onondaga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V PRINCE E. STANDARD, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: On appeal from a judgment convicting him of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), defendant contends that he was denied effective assistance of counsel. "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi,* 54 NY2d 137, 147). A defendant is not entitled to error-free or perfect representation (*see, People v Benevento*, 91 NY2d 708, 712; *People v Ford,* 86 NY2d 397, 404; *People v Aiken*, 45 NY2d 394, 398). "[A] reviewing court must avoid confusing 'true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis'" (*People v Benevento, supra,* at 712, quoting *People v Baldi, supra,* at 146). It is "incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for counsel's alleged errors (*People v Rivera*, 71 NY2d 705, 709). "As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance" (*People v Benevento, supra,* at 712-713, citing *People v Lane*, 60 NY2d 748, 750). Applying those standards, we conclude that defendant received meaningful representation. Counsel made appropriate pretrial motions, effectively cross-examined the prosecution witness at the *Huntley* hearing and at trial, and made

coherent arguments in his summation. (Appeal from Judgment of Onondaga County Court, Mulroy, J. - Criminal Possession Weapon, 3rd Degree.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(965) KA 98-5487. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V ANTONIO MOROBEL, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: In light of the five factors set forth in *People v Taranovich* (37 NY2d 442, 445), we conclude that Supreme Court properly denied the motion of defendant to dismiss the indictment based on the alleged violation of his constitutional right to a speedy trial (*see,* CPL 30.20). Although 18 months elapsed between the date of defendant's arrest and the scheduled trial date, the charges involved class A-1 felonies, 15 defendants, and a multi-county drug trafficking investigation. While defendant was incarcerated for the entire period, most of the delay was occasioned by motions and hearings concerning defendant and his 14 codefendants. The People's failure to provide disclosure resulted in only minor delays, during which defendant filed additional motions. Further, defendant has failed to show any prejudice as a result of the delay (*see, People v Thorpe*, 183 AD2d 795, 795-796, *lv denied* 80 NY2d 910; *see also, People v Murphy*, 212 AD2d 811, 812, *lv denied* 85 NY2d 977; *cf., People v Blakley*, 34 NY2d 311, 315; *People v Brown* [appeal No. 2], 117 AD2d 978, 979), and this is not a case in which the delay was so great that the need to show prejudice is obviated *(see, People v Santiago*, 209 AD2d 885; *People v Charles*, 180 AD2d 868, 872). (Appeal from Judgment of Supreme Court, Erie County, Howe, J. - Criminal Possession Controlled Substance, 2nd Degree.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(966) KA 98-2359. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V KASSEM M. ALSHOAIBI, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Judgment unanimously modified on the law and as modified affirmed and matter remitted to Erie County Court for resentencing under counts 13, 14, 15, 16 and 18 of the indictment in accordance with the following Memorandum: Defendant was charged with, *inter alia*, two counts of vehicular manslaughter in the first degree (Penal Law § 125.13). Pursuant to CPL 200.60, the People filed a special information to support the necessary

enhancing elements of those counts, alleging that defendant knew or had reason to know that his license was revoked based upon his failure to submit to a chemical test pursuant to section 1194 of the Vehicle and Traffic Law (*see,* Penal Law § 125.13 [2] [b]). When County Court attempted to arraign defendant upon the special information following jury selection, defendant refused to admit, deny, or remain mute on the allegations contained in the special information (*see,* CPL 200.60 [3]), arguing instead that CPL 200.60 did not apply because there was no prior conviction. Contrary to defendant's contention, however, CPL 200.60 applies both to convictions and conviction-related facts (*see, People v Cooper,* 78 NY2d 476, 482-483; *People v Orlen,* 170 Misc 2d 737, 740-741). In any event, CPL 200.60 is designed to protect defendant from prejudice that may result from permitting a jury to learn of prior convictions or conviction-related facts (*see, People v Cooper, supra,* at 481-483). Where, as here, defendant refused to admit the enhancing element of an offense, the People were required to submit evidence establishing all elements of the offense charged. Contrary to defendant's contention, the evidence introduced by the People was relevant to establish all the elements of vehicular manslaughter in the first degree.

Defendant contends that the result of the blood test should have been suppressed because the applicant for the court order directing defendant to submit to the blood test failed to identify the names of any witnesses to the accident. We disagree. The arresting officer applied for the order, and upon being placed under oath, stated that she arrived at the accident scene and observed defendant at the wheel of his vehicle in an unconscious state and smelled a strong odor of alcohol. The officer further stated that at least one of the pedestrians struck by defendant's vehicle was seriously injured. Defendant was unable to give consent to the blood test because he remained unconscious at the hospital. The information provided by the officer in support of the order established that, based upon the totality of the circumstances, there was reasonable cause to believe that defendant was operating a motor vehicle in violation of section 1192 of the Vehicle and Traffic Law and was unable to consent to the blood test (*see,* Vehicle and Traffic Law § 1194 [3] [d] [2]).

Defendant contends that the court erred in allowing a police officer to bolster the testimony of a prior witness. The general protest by defendant to that testimony is insufficient to

preserve his present contention for our review (*see*, CPL 470.05 [2]; *People v West*, 56 NY2d 662, 663). In any event, any error 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 error (*see, People v Crimmins,* 36 NY2d 230, 241-242; *People v Usher,* 265 AD2d 813, *lv denied* 94 NY2d 886).

Contrary to defendant's further contention, the court did not improvidently exercise its discretion in allowing the People to cross-examine a defense witness concerning collateral matters that were designed to impeach his credibility (*see, People v Pritchett,* 248 AD2d 967, 968, *lv denied* 92 NY2d 929). Defendant further contends that reversal is required based on misconduct by the prosecutor during his opening and closing statements. Defendant failed to preserve that contention for our review (*see,* CPL 470.05 [2]). In any event, the comments made by the prosecutor were not so inflammatory or egregious as to amount to a denial of due process (*see, People v Mitchell,* ___ AD2d ___ [decided Mar. 29, 2000]).

Defendant contends that the court erred in refusing to charge unlicensed operation of a motor vehicle (Vehicle and Traffic Law § 509 [1]) as a lesser included offense of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a]). That contention is foreclosed by the jury's verdict finding him guilty of aggravated unlicensed operation of a motor vehicle in the first degree and the jury's implicit rejection of the charged lesser-included offenses of aggravated unlicensed operation of a motor vehicle in the second and third degrees (*see, People v Boettcher,* 69 NY2d 174, 180; *People v Richette,* 33 NY2d 42, 45-46; *People v Broadie,* 221 AD2d 352, 353, *lv denied* 87 NY2d 1017; *see also, People v Lucious,* ___ AD2d ___ [decided Feb. 16, 2000]).

Considering the circumstances of this offense, we conclude that the sentence is neither unduly harsh nor severe. We conclude, however, that the sentence imposed on each of the three counts of leaving the scene of an incident without reporting (Vehicle and Traffic Law § 600 [2]) is illegal. Where, as here, defendant's conduct constitutes a class E felony, Vehicle and Traffic Law § 600 (2) (b) allows a term of imprisonment (*see,* Penal Law § 70.00 [2] [e]; [3] [b]), but not a fine. The court also imposed illegal sentences on the count of reckless driving, an unclassified misdemeanor (*see,* Vehicle and Traffic Law §§

1212, 1801), and on one of the counts of speeding (*see*, Vehicle and Traffic Law § 1180 [d] [1]; [h] [1]). We thus modify the judgment by vacating the sentences imposed under counts 13, 14, 15, 16 and 18 of the indictment, and we remit the matter to Erie County Court for resentencing on those counts.

We have considered defendant's remaining contentions and conclude that they are lacking in merit. (Appeal from Judgment of Erie County Court, DiTullio, J. - Manslaughter, 2nd Degree.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(967) KA 99-1661. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V KASSEM M. ALSHOAIBI, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Appeal from resentence insofar as it concerns counts 4 and 7 of the indictment unanimously dismissed as moot and resentence affirmed. (Appeal from Resentence of Erie County Court, DiTullio, J. - Resentence.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(968) KA 99-1662. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V KASSEM M. ALSHOAIBI, DEFENDANT-APPELLANT. (APPEAL NO. 3.) -- Resentence unanimously affirmed. (Appeal from Resentence of Erie County Court, DiTullio, J. - Resentence.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(969) CA 00-41. (Onondaga Co.) -- SAUNDERS CONCRETE CO., INC., PLAINTIFF-APPELLANT, V AD-CAMP DEVELOPMENT CORP., D/B/A SIGNATURE CREST BUILDERS AND D/B/A SIGNATURE HOMES, DEFENDANT-RESPONDENT. -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Order of Onondaga County Court, Mulroy, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(970) CA 00-00146. (Onondaga Co.) -- CITIBANK (SOUTH DAKOTA), N.A., PLAINTIFF-RESPONDENT, V CARL AMATO, DEFENDANT-APPELLANT. -- Order unanimously affirmed with costs. (Appeal from Order of Supreme Court, Onondaga County, Elliott, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(971) CA 99-1642. (Monroe Co.) -- EXHIBITGROUP/GILTSPUR, INC., PLAINTIFF-APPELLANT, V SPOON EXHIBIT SERVICES, ET AL., DEFENDANTS, AND HERBERT L. BESAW, DEFENDANT-RESPONDENT. -- Order unanimously reversed on the law with costs, motion denied and second cause of action against defendant Herbert L. Besaw reinstated. Memorandum: Supreme Court erred in granting the motion of Herbert L. Besaw (defendant) for summary judgment dismissing against him the second cause of action seeking monetary and injunctive relief for his alleged breach of a 1997 covenant not to solicit plaintiff's employees. Contrary to the court's determination, the 1997 employment agreement containing that covenant was not superseded by a 1998 settlement agreement between plaintiff and defendant. The settlement agreement is a general release and covenant not to sue. The release runs only from defendant to plaintiff and releases only those claims belonging to defendant that arose or might arise out of the termination of defendant's employment. Nothing in the agreement indicates that plaintiff was releasing any right it might have to enforce defendant's obligations to plaintiff. In particular, nothing indicates an intention by plaintiff to surrender its valuable contract right to sue defendant for his solicitation of plaintiff's employees. Defendant's reliance on paragraph 13 of the settlement agreement is misplaced. That paragraph provides that "[t]his agreement contains the entire agreement between the parties hereto, and fully supersedes any and all prior agreements or understandings pertaining to the subject matter hereof." The "prior agreements or understandings" referred to in the merger clause are only those "prior agreements or understandings" that a party would be precluded from proving by operation of the parol evidence rule (*see generally, W.W.W. Assocs. v Giancontieri,* 77 NY2d 157, 162; *Marine Midland Bank-Southern v Thurlow,* 53 NY2d 381, 387), i.e., only those agreements, promises or understandings that were part of the negotiations directly leading to the written settlement agreement. The nonsolicitation obligation, which is set forth in a separate prior integrated writing and which thus would be independently provable notwithstanding the parol evidence rule, was not one of those merged prior agreements or understandings. (Appeal from Order of Supreme Court, Monroe County, Stander, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(972) CA 99-1283. (Erie Co.) -- MICHAEL J. GILMARTIN AND PEARL GILMARTIN, PLAINTIFFS-RESPONDENTS, V ULDERICO TEMPESTOSO, ANTONIO CICCOTELLI, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. -- Order unanimously affirmed without costs. Memorandum: Michael J. Gilmartin (plaintiff) was injured when he allegedly slipped and fell on a layer of ice on an exterior staircase of a building owned by Ulderico Tempestoso and Antonio Ciccotelli (defendants). Supreme Court properly denied the motion of defendants for summary judgment dismissing the complaint against them. In support of the motion, defendants submitted deposition testimony in which they each testified that they had orally informed the tenants that the tenants were responsible for ice and snow removal but that no such provision is contained in the one-page lease. In addition, Tempestoso testified that he visited the premises five or six times a month to collect rent and to ascertain that their rules were being followed. Contrary to the contention of defendants, they failed to meet their initial burden of establishing as a matter of law that they are out-of-possession landlords with no control over the premises and thus are not liable for the allegedly dangerous condition of the premises (*see, Cherubini v Testa,* 130 AD2d 380, 382; *cf., Carvano v Morgan*, ___ AD2d ___ [decided Mar. 6, 2000]; *see also, Young v Moran Props.*, 259 AD2d 1037, 1038).

Also contrary to the contention of defendants, they failed to meet their initial burden of establishing as a matter of law that they had no constructive notice of the allegedly dangerous condition (*see, Mikolajczyk v M.C. Morgan Contrs.*, ___ AD2d ___ [decided herewith]; *Laster v Port Auth. of N. Y. & N. J.*, 251 AD2d 204, 205, *lv denied* 92 NY2d 812) or that they had no duty to clear the ice because there was a snowstorm in progress when plaintiff fell (*see, Cerra v Perk Dev.*, 197 AD2d 851). (Appeal from Order of Supreme Court, Erie County, Michalek, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(973) CA 00-43. (Onondaga Co.) -- 9274 GROUP, INC., PLAINTIFF-APPELLANT, V VALSAMAKIS POTAMIANOS, ARCHEMEDIS POTAMIANOS, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. -- Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Onondaga County, Major, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(974) CA 00-42. (Onondaga Co.) -- W.F. SAUNDERS & SONS, INC., PLAINTIFF-APPELLANT, V AD-CAMP DEVELOPMENT CORP., D/B/A SIGNATURE CREST BUILDERS AND D/B/A SIGNATURE HOMES, DEFENDANT-RESPONDENT. -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Order of Onondaga County Court, Mulroy, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(975) CA 00-00147. (Niagara Co.) -- CITIBANK (SOUTH DAKOTA), N.A., PLAINTIFF-RESPONDENT, V JUSTIN H. BRAYLEY, DEFENDANT-APPELLANT. -- Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Niagara County, Koshian, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(976) CA 99-858. (Onondaga Co.) -- SYRACUSE SHEET METAL CO., INC., PLAINTIFF-RESPONDENT, V CNA INSURANCE COMPANY AND TRANSCONTINENTAL INSURANCE CO., DEFENDANTS-APPELLANTS. -- Appeal unanimously dismissed without costs upon stipulation. (Appeal from Order of Supreme Court, Onondaga County, Stone, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(977) CA 99-1170. (Oneida Co.) -- ELIZABETH A. HUNT (MILLER), PLAINTIFF-RESPONDENT, V RICHARD D. HUNT, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Order unanimously reversed on the law with costs, plaintiff's motion denied without prejudice and award of attorney's fees vacated. Memorandum: Supreme Court erred in failing to strike plaintiff's submissions based on the failure of plaintiff's attorney to file the requisite certifications pursuant to 22 NYCRR 202.16 (e) and 130-1.1a. Pursuant to section 202.16 (e), "[e]very paper served on another party or filed or submitted to the court in a matrimonial action shall be signed as provided in section 130-1.1a of this Title" (22 NYCRR 202.16 [e]). Section 130-1.1a (a) requires a party's attorney to sign every pleading, motion or other paper served on a party or submitted to the court, and section 130-1.1a (b) provides that the attorney thereby "certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1 (c) of this Subpart." The rule requiring

certification does not impose a new ethical obligation, but is meant to impress upon the matrimonial bar the necessity for compliance with the ethical obligations previously in place (*see, Rosen v Rosen*, 161 Misc 2d 795, 799). "[T]he implication of the rule is also clear, that the court should not grant relief in the absence of the certification" (*Rosen v Rosen*, *supra*, at 800).

We reject the contention of plaintiff's attorney that he was not put on notice of the failure to comply with the certification rule because the court never called that failure to his attention. The court is not required to call an attorney's attention to such failure and, in any event, plaintiff's attorney was placed on notice thereof by the affirmation of defendant's attorney and defendant's motion seeking, *inter alia*, to strike plaintiff's submissions on that ground.

In seeking attorney's fees, plaintiff's attorney also failed to comply with 22 NYCRR 1400.2 and 1400.3, which apply to attorneys in domestic relations matters. Pursuant to section 1400.2, an attorney must provide a prospective client with a statement of client's rights and responsibilities before the signing of a written retainer agreement. Pursuant to section 1400.3, an attorney must execute a written agreement with the client setting forth the terms of compensation and the nature of the services to be rendered. The retainer agreement must be signed by the attorney and the client and a copy must be filed with the court. Strict compliance with those rules is required (*see, Mueller v Pacicca,* 179 Misc 2d 392, 395; *Philips v Philips*, 178 Misc 2d 159, 161). The "failure to abide by these rules, promulgated to address abuses in the practice of matrimonial law and to protect the public, will result in preclusion from recovering such legal fees" (*Julien v Machson*, 245 AD2d 122; *see, Mueller v Pacicca, supra*, at 394-395). We reject the contention that the rules do not apply because the attorney's representation began before November 30, 1993. The motion brought by plaintiff was a new "claim" within the meaning of 22 NYCRR 1400.1.

We therefore reverse the order in appeal No. 1, deny plaintiff's motion without prejudice and vacate the award of attorney's fees. We modify the order in appeal No. 2 by denying plaintiff's request for attorney's fees. (Appeal from Order of Supreme Court, Oneida County, Tenney, J. - Matrimonial.)
PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ.
(Filed June 16, 2000.)

(978) CA 99-1172. (Oneida Co.) -- ELIZABETH A. HUNT (MILLER), PLAINTIFF-RESPONDENT, V RICHARD D. HUNT, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Order unanimously modified on the law and as modified affirmed with costs to defendant in accordance with the same Memorandum as in *Hunt v Hunt* ([appeal No. 1] ___ AD2d ___ [decided herewith]). (Appeal from Order of Supreme Court, Oneida County, Tenney, J. - Matrimonial.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(979) CA 00-37. (Erie Co.) -- KELLY L. WHITFIELD, PLAINTIFF-RESPONDENT, V JEFFREY L. TOENSE AND WESTERN NEW YORK DOOR DISTRIBUTORS, INC., DEFENDANTS-APPELLANTS. -- Order unanimously affirmed with costs. Memorandum: Plaintiff sustained serious injuries when her vehicle collided head-on with a vehicle driven by defendant Jeffrey L. Toense. At the time of the accident, Toense was operating his vehicle in the scope of his employment with defendant Western New York Door Distributors, Inc. Plaintiff testified at her deposition that, as she rounded a curve on a two-lane road, she saw Toense's vehicle coming towards her and crossing into her lane of travel. In less than one second, Toense's vehicle collided with her vehicle. The driver of the vehicle behind Toense observed Toense's vehicle cross the double yellow line into plaintiff's lane of travel and collide with plaintiff's vehicle. Toense has no memory of the accident, and defendants do not dispute that the collision occurred within plaintiff's lane of travel.

Supreme Court properly granted plaintiff's motion for partial summary judgment on the issue of liability. "Although summary judgment is a drastic remedy and there is considerable reluctance to grant it in negligence actions, the motion should be granted when there is no genuine issue to be resolved at trial" (*McGraw v Ranieri,* 202 AD2d 725, 726). Plaintiff established as a matter of law that the sole proximate cause of the accident was Toense's conduct in crossing the road into her lane of travel, and defendants failed to raise an issue of fact (*see, Hanover Ins. Co. v Washburn,* 219 AD2d 773).

Defendants contend that there is an issue of fact concerning plaintiff's comparative fault that precludes summary judgment. We disagree. Plaintiff was not required to anticipate that Toense's vehicle, traveling in the opposite direction, would cross over into her lane of travel (*see, Cohen v Masten,* 203 AD2d 774, 775, *lv denied* 84 NY2d 809; *Gouchie v Gill,* 198 AD2d 862),

and defendants' speculation that plaintiff might have done something to avoid the accident is insufficient to raise an issue of fact concerning plaintiff's comparative fault (*see, Perez v Brux Cab Corp.*, 251 AD2d 157, 159-160; *Tran v Nowak*, 245 AD2d 1083, 1084; *Jordan v Bowen*, 239 AD2d 910, 911). (Appeals from Order of Supreme Court, Erie County, Glownia, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(980) CA 00-104. (Onondaga Co.) -- JASON STEENWERTH, PLAINTIFF-RESPONDENT, V UNITED REFINING COMPANY OF PENNSYLVANIA, DEFENDANT-APPELLANT. -- Order unanimously affirmed without costs. Memorandum: Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. Plaintiff alleged that his injuries were caused by the dangerous condition of defendant's front step. Defendant failed to meet its initial burden of establishing its entitlement to judgment as a matter of law (*see, Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to the contention of defendant, it failed to establish that the condition of the front step was not dangerous. Even assuming, arguendo, that defendant did not have actual or constructive notice of the allegedly dangerous condition, we conclude that defendant failed to establish as a matter of law that it did not create that condition (*see, Sumell v Wegmans Food Mkts.*, 254 AD2d 702, 702-703). We also reject the contention of defendant that it was entitled to judgment as a matter of law because the allegedly dangerous condition was readily observable. Even if the allegedly dangerous condition was readily observable, that fact would go to the issue of plaintiff's comparative negligence and would not negate defendant's duty to keep the premises reasonably safe (*see, Crawford v Marcello*, 247 AD2d 907; *Morgan v Genrich*, 239 AD2d 919, 920). (Appeal from Order of Supreme Court, Onondaga County, Stone, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(981) CA 99-3473. (Wyoming Co.) -- MATTER OF JOEL RIFKIN, PETITIONER-APPELLANT, V GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed without costs. Memorandum: In this CPLR article 78 proceeding converted by Supreme Court into a declaratory judgment action, petitioner, an inmate,

challenges the constitutionality of his placement in administrative segregation, a more restrictive placement than the protective custody for which he is eligible (*see,* 7 NYCRR 301.4 [a], [b]; 330.2 [a]). The prison authorities removed petitioner from the general prison population based on their determination that the notoriety and serious nature of petitioner's convictions caused disruption in the facility and that the removal of petitioner from the general prison population was required for the security of the facility and the safety of petitioner. Petitioner filed a grievance with respect to his placement status, contending that he is entitled to protective custody rather than administrative segregation. The Hearing Officer determined that, because protective custody required contact with approximately 40 inmates, petitioner's placement in administrative segregation rather than protective custody would promote prison security and the safety of petitioner by limiting his exposure to other inmates. That determination was upheld on administrative appeal and relied upon by the court in declaring that petitioner's constitutional rights are not violated as a result of the placement in administrative segregation. We affirm.

"'[A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators.' In assessing the seriousness of a threat to institutional security prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners inter se and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context * * * turns largely on 'purely subjective evaluations and on predictions of future behavior'" (*Hewitt v Helms,* 459 US 460, 474).

We reject the contention of petitioner that the more restrictive placement violates his right to equal protection. "Equal protection does not require absolute equality * * * or precisely equal advantages. Rather, in the absence of a classification affecting fundamental rights or creating suspect

classifications which must be invalidated unless justified by some compelling State interest, equal protection requires only that a classification which results in unequal treatment rationally further 'some legitimate, articulated state purpose'" (*Matter of Doe v Coughlin,* 71 NY2d 48, 56, *rearg denied* 70 NY2d 1002, quoting *McGinnis v Royster,* 410 US 263, 270). The prison authorities demonstrated a rational basis for the classification (*see, Smith v Coughlin,* 748 F2d 783, 787-788), i.e., that limited exposure to other inmates was necessary to promote prison security and to protect petitioner.

We also reject the contention of petitioner that his placement in administrative segregation constitutes cruel and unusual punishment. "'Segregated confinement involving neither intolerable isolation nor inadequate food, heat, sanitation, lighting or bedding, does not fall within the * * * category' of conduct so below civilized norms as to be cruel and unusual punishment no matter what its provocation" (*Jackson v Meachum,* 699 F2d 578, 582, quoting *O'Brien v Moriarty*, 489 F2d 941, 944).

Finally, we reject the contention of petitioner that his due process rights have been violated because he is subject to the same restrictions as those inmates placed in the special housing unit for disciplinary purposes. With respect to petitioner's substantive due process rights, petitioner's placement in administrative segregation does not "trigger[] due process protection" because that "segregated confinement does not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest" (*Sandin v Conner,* 515 US 472, 485-486). With respect to petitioner's procedural due process rights, the administrative segregation was imposed and continues with the proper exercise of procedural due process; the placement of petitioner was the subject of an administrative hearing and his status is subject to review every 30 days by a three-member committee, the results of which review are forwarded to the prison's superintendent for a final determination (*see,* 7 NYCRR 301.4 [a], [d]). (Appeal from Judgment of Supreme Court, Wyoming County, Dadd, J. - Declaratory Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(982) CA 99-1034. (Onondaga Co.) -- FRANK E. MARCHETERRE, JR., PLAINTIFF-APPELLANT, V S&C ELECTRIC COMPANY, ROBSON & WOESE, INC., FERGUSON ELECTRIC CO., INC., DEFENDANTS-RESPONDENTS, ET

AL., DEFENDANTS. (APPEAL NO. 1.) -- Order unanimously affirmed without costs. Memorandum: In these consolidated appeals in plaintiff's action to recover for injuries sustained as a result of electrical shock, plaintiff appeals from two orders, the first insofar as it granted the motions of defendants S&C Electric Company and Robson & Woese, Inc. for summary judgment dismissing the complaint and cross claims, and the second insofar as it granted the motion of defendant Ferguson Electric Co., Inc. for that same relief. Contrary to plaintiff's contention, Supreme Court properly determined that plaintiff's own culpable conduct was, as a matter of law, a superseding cause of the injuries, and that there are no triable issues of fact concerning the liability of defendants for negligent design of the electrical system or negligent failure to warn and supervise plaintiff. The record establishes that the reckless action of plaintiff in sticking his head into an energized component of the switchgear, in disregard of a risk of electrical shock of which plaintiff was aware by virtue of his education, training and experience, broke the causal connection between any alleged negligence of defendants and the injuries sustained by plaintiff (*see, Breem v Long Is. Light. Co.*, 256 AD2d 294, 295, *lv denied* 93 NY2d 802; *Martinez v State of New York*, 225 AD2d 877, 878-879; *Bombard v Central Hudson Gas & Elec. Co.*, 205 AD2d 1018, 1020, *lv dismissed* 84 NY2d 923). (Appeal from Order of Supreme Court, Onondaga County, Tormey, III, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(983) CA 99-1513. (Onondaga Co.) -- FRANK E. MARCHETERRE, JR., PLAINTIFF-APPELLANT, V S&C ELECTRIC COMPANY, ROBSON & WOESE, INC., FERGUSON ELECTRIC CO., INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Order unanimously affirmed without costs. Same Memorandum as in *Marcheterre v S&C Electric Co.* ([appeal No. 1] ___ AD2d ___ [decided herewith]). (Appeal from Order of Supreme Court, Onondaga County, Tormey, III, J. - Summary Judgment.) PRESENT: PINE, J. P., HAYES, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(984) TP 99-1549. (Erie Co.) -- MATTER OF THOMAS BUTTI, PETITIONER, V GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT. -- Determination unanimously confirmed without costs and petition dismissed.

(CPLR art 78 Proceeding Transferred by Order of Supreme Court, Erie County, Mahoney, J.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(985) KA 98-05371. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V ROSS KLEJMENT, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Monroe County Court, Bristol, J. - Violation of Probation.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(986) KA 00-87. (Niagara Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V ROBERT J. CALEB, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: On appeal from a judgment convicting him of, *inter alia*, sodomy in the second degree (Penal Law § 130.45) and sexual abuse in the first degree (Penal Law § 130.65 [1]), defendant contends that he was denied effective assistance of counsel. Isolated errors, misjudgments or losing tactics by defense counsel should not be confused with true ineffectiveness and will not result in reversal of the judgment of conviction (*see, People v Flores,* 84 NY2d 184, 186-187; *People v Rivera,* 71 NY2d 705, 708-709; *People v Baldi*, 54 NY2d 137, 146-147). "[T]he evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, *supra,* at 147*; see, People v Wallace,* 259 AD2d 978, *lv denied* 93 NY2d 981).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct in the opening statement and on summation. The majority of the instances of alleged misconduct are unpreserved for our review (*see*, CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see,* CPL 470.15 [6] [a]). With regard to those instances of alleged misconduct to which defendant objected, we conclude that they were not so improper or inflammatory as to deny defendant a fair trial.

We have considered defendant's challenge to the severity of the sentence and conclude that it is without merit. (Appeal from Judgment of Niagara County Court, Fricano, J. - Sodomy, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(987) KA 98-2436. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RICHARD FLOWERS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c]). His contention that the guilty plea was involuntary and should be vacated because County Court failed to sentence him in accordance with its prior commitment is without merit. The court promised to sentence defendant to incarceration on weekends if the presentence investigation report was favorable, but if the report was not favorable, it made no commitment regarding the sentence. Because the report was not favorable, the court was not bound by the conditional sentencing promise. The waiver by defendant of his right to appeal encompasses his contention that the sentence is unduly harsh and severe (*see, People v Hidalgo*, 91 NY2d 733, 737; *People v Allen*, 82 NY2d 761, 762). (Appeal from Judgment of Erie County Court, DiTullio, J. - Felony Driving While Intoxicated.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(988) KA 99-5498. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JAMES REED, DEFENDANT-APPELLANT. -- Order unanimously reversed on the law, motion granted and matter remitted to Monroe County Court for resentencing in accordance with the following Memorandum: Defendant contends that County Court erred in failing to grant his motion pursuant to CPL 440.20 to set aside as illegal the sentence of imprisonment imposed in 1954 on his conviction of rape in the first degree. We agree. Defendant established that, when he was sentenced in 1954 to a term of imprisonment of one day to life, no hearing was conducted to afford him the opportunity to rebut the People's psychiatric proof or to submit his own psychiatric proof. Furthermore, the 1954 psychiatric report regarding defendant was inadequate because it failed to "discuss and analyze the defendant's sexual problem and [state] whether such condition was of a type which would yield to treatment" (*People v Kearse*, 28 AD2d 910). Under those circumstances, the procedure used in sentencing defendant to one day to life pursuant to former Penal Law § 2189-a failed to pass constitutional muster and the sentence therefore must be vacated (*see, People v Bailey*, 21 NY2d 588).

We further conclude that the court erred in denying defendant's motion on the ground that it was barred by the doctrine of laches. Laches is an equitable remedy and generally does not bar an action at law (*see generally, Matter of Reidy v Thomas ZZ.*, 113 AD2d 281, 284, *lv dismissed* 68 NY2d 910). In any event, the doctrine of laches is inapplicable because the People did not assert that they were prejudiced by the delay (*see generally, Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203; *People v Bell*, 179 Misc 2d 410, 416).

The People concede that defendant's psychiatric condition is not susceptible to treatment and that, in any event, whatever treatment "program" existed under the statutory scheme in 1954 no longer exists. They further concede that, in releasing defendant on parole, the Parole Board has determined that he does not require segregation from society. Thus, defendant cannot be resentenced pursuant to former Penal Law § 2189-a, which was "limited to those cases in which the record indicat[ed] some basis for a finding that the defendant [was] a danger to society or [was] capable of being benefited by the confinement envisaged under the statutory scheme" (*People v Bailey, supra*, at 594). Consequently, we reverse the order, grant the motion and remit the matter to Monroe County Court for resentencing pursuant to former Penal Law § 2010. (Appeal from Order of Monroe County Court, Marks, J. - CPL art 440.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(989) KA 97-05143. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V GRANT TALLEY, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant contends that the prosecutor's failure to give the Grand Jury limiting instructions after eliciting testimony relating to defendant's assertion of the right to remain silent rendered the Grand Jury proceeding fatally defective and that County Court erred in denying his motion to dismiss the indictment pursuant to CPL 210.20 (1) (c) and 210.35. We disagree. The exceptional remedy of dismissal of an indictment is warranted only where the integrity of the Grand Jury proceeding is impaired and prejudice to the defendant may result (*see*, CPL 210.20 [1] [c]; 210.35 [5]; *People v Huston*, 88 NY2d 400, 409). In view of the remaining evidence before the Grand Jury in this case, we conclude that the failure of the prosecutor to give limiting instructions does not require dismissal of the indictment (*see, People v Rivas*, 260

AD2d 583, 583-584, *lv denied* 93 NY2d 1025). (Appeal from Judgment of Monroe County Court, Marks, J. - Burglary, 3rd Degree.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(990) KA 00-00202. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V CURTIS WILLIAMS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: We reject defendant's contention that the charge on justification impermissibly shifted the burden of proof. County Court followed the New York Pattern Jury Instructions (*see*, 1 CJI[NY] 35.15 [2] [a]) and repeatedly instructed the jury that the People had the burden of disproving the defense of justification beyond a reasonable doubt (*see, People v James K.*, 236 AD2d 825, 825-826, *lv denied* 90 NY2d 859). (Appeal from Judgment of Monroe County Court, Connell, J. - Criminally Negligent Homicide.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(991) KAH 99-5603. (Onondaga Co.) -- PEOPLE OF THE STATE OF NEW YORK EX REL. ANTHONY SCOTT, PETITIONER-APPELLANT, V NEW YORK STATE DIVISION OF PAROLE, RESPONDENT-RESPONDENT. -- Appeal unanimously dismissed without costs. Memorandum: Petitioner appeals from a judgment dismissing the petition for a writ of habeas corpus, brought to challenge aspects of a parole revocation proceeding that had not been finally determined when the proceeding was brought. Under the circumstances, habeas corpus relief is not available because the administrative determination was not yet final and petitioner failed to exhaust his administrative remedies (*see, People ex rel. Childs v Bennett,* 231 AD2d 951, 952, *lv denied* 89 NY2d 802; *Matter of Trimaldi v Superintendent of Washington Correctional Facility,* 169 AD2d 960). Moreover, in these circumstances, the challenge to preliminary matters is rendered moot by the intervening final parole revocation determination (*see, People ex rel. McCummings v De Angelo*, 259 AD2d 794, 794-795, *lv denied* 93 NY2d 810; *People ex rel. Chavis v McCoy*, 236 AD2d 892). (Appeal from Judgment of Supreme Court, Onondaga County, Brunetti, J. - Habeas Corpus.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(992) CAF 99-7185. (Oneida Co.) -- MATTER OF CAMERON S. H. AND KYLE S. H. ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; DARCY H., RESPONDENT-APPELLANT. -- Order unanimously affirmed without costs. Memorandum: Respondent appeals from an order granting the amended petition seeking to revoke a suspended judgment terminating her parental rights with respect to two of her children. We reject respondent's contention that, in determining whether to grant the amended petition, Family Court was required to consider evidence and make findings concerning the best interests of the children. By its prior order of fact-finding and disposition suspending judgment, the court determined that, unless respondent overcame the deficiencies that required placement of the children in foster care, it was in the children's best interests to terminate respondent's parental rights. "The court was not required to conduct a further dispositional hearing on the issue of the children's best interests before terminating respondent's parental rights for failing to comply with the terms of that judgment" (*Matter of Melinda B.*, 258 AD2d 941, 942). Respondent admitted that she failed to comply with the terms of the suspended judgment, and thus we reject her contention that the evidence is insufficient to establish her failure to comply with the terms of the suspended judgment. (Appeal from Order of Oneida County Family Court, Gilbert, J. - Terminate Parental Rights.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(993) CAF 00-86. (Chautauqua Co.) -- MATTER OF WILFREDO H., JR., RESPONDENT-APPELLANT. CHAUTAUQUA COUNTY ATTORNEY, PETITIONER-RESPONDENT. -- Order unanimously affirmed without costs. (Appeal from Order of Chautauqua County Family Court, Claire, J. - Placement.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(994) CAF 99-7111. (Jefferson Co.) -- MATTER OF PAUL A. EPPOLITO, PETITIONER-RESPONDENT, V LISA M. JOBSON, RESPONDENT-APPELLANT. -- Order unanimously affirmed without costs for reasons stated at Jefferson County Family Court, Hunt, J. (Appeal from Order of Jefferson County Family Court, Hunt, J. - Custody.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(995) CA 00-18. (Erie Co.) -- RONALD W. MORRIS AND SHARON E. MORRIS, PLAINTIFFS-RESPONDENTS, V ROBERT L. FREUDENHEIM, DEFENDANT-APPELLANT, SIBLEY REAL ESTATE SERVICES, INC., DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. -- Order unanimously reversed on the law without costs, motion granted and second amended complaint and cross claims against defendant Robert L. Freudenheim dismissed. Memorandum: Supreme Court erred in denying the motion of Robert L. Freudenheim (defendant) for summary judgment dismissing the second amended complaint and cross claims against him. "An out-of-possession owner who has relinquished control over the premises will not be held liable for subsequent injuries resulting from dangerous conditions on the premises" (*Gomez v Walton Realty Assocs.*, 258 AD2d 307, 308; *see, Bittrolff v Ho's Dev. Corp.*, 77 NY2d 896, 898). It is undisputed that defendant relinquished possession and control of the premises to a court-appointed receiver 10 months before the accident and that the premises were purchased at a foreclosure sale nearly five months before the accident. Under those circumstances, liability may be imposed upon defendant only if the allegedly dangerous condition of the elevator existed at the time he relinquished possession and control of the premises "and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it is known" (*Bittrolff v Ho's Dev. Corp., supra,* at 898). Although defendant Sibley Real Estate Services, Inc. (Sibley) submitted proof that the allegedly dangerous condition of the elevator existed at the time defendant relinquished possession and control of the premises, defendant established as a matter of law that the new owner was aware of that condition and had a reasonable time to remedy it (*see, Mazurick v Chalos*, 172 AD2d 805, 806), and Sibley failed to raise a triable issue of fact. (Appeal from Order of Supreme Court, Erie County, Sconiers, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(996) CA 00-78. (Erie Co.) -- SNORAC, INC., D/B/A ENTERPRISE RENT-A-CAR, PLAINTIFF-RESPONDENT, V THOMAS D. SKURA, DEFENDANT-APPELLANT. -- Order and Judgment unanimously reversed on the law with costs, cross motion denied, motion granted and complaint dismissed. Memorandum: Plaintiff, a self-insured rental car agency, rented a car to defendant, who struck and injured a pedestrian while operating the car. Plaintiff settled with the

pedestrian for $8,250 and thereafter sued defendant on various theories, including contractual indemnification, for reimbursement of that sum. County Court affirmed the judgment of City Court denying defendant's motion for summary judgment dismissing the complaint and granting plaintiff's cross motion for summary judgment on the cause of action seeking contractual indemnification. We reverse.

Plaintiff's attempt to disclaim completely the liability imposed by Vehicle and Traffic Law § 388 is contrary to public policy (*see, Morris v Snappy Car Rental,* 84 NY2d 21, 27; *Government Empls. Ins. Co. v Chrysler Ins. Co.,* 256 AD2d 1212, 1213; *Worldwide Ins. Co. v U.S. Capital Ins. Co.,* 181 Misc 2d 480, 485-486; *Allstate Ins. Co. v Snappy Car Rental,* 16 F Supp 2d 410, 414). Neither public policy nor the applicable statutes (*see,* Vehicle and Traffic Law §§ 370, 388) prohibit plaintiff from disclaiming the portion of its liability that exceeds the amount for which motor vehicle owners are required to be insured and from seeking indemnification for such sums pursuant to the parties' agreement (*see, Morris v Snappy Car Rental, supra,* at 27-29; *Government Empls. Ins. Co. v Chrysler Ins. Co., supra,* at 1213). Here, however, the liability of plaintiff to the injured third party has been fixed by its settlement of the third party's claim for $8,250, an amount less than the required coverage. Public policy therefore bars plaintiff from obtaining indemnification from defendant in these circumstances. Thus, we reverse the order and judgment, deny plaintiff's cross motion, grant defendant's motion and dismiss the complaint. (Appeal from Order of Erie County Court, DiTullio, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(998) CA 00-123. (Erie Co.) -- SUSAN LATHROP, INDIVIDUALLY AND AS MOTHER AND NATURAL GUARDIAN OF RICKY LATHROP, AN INFANT, PLAINTIFF-RESPONDENT, V TAMMY L. ODDO, INDIVIDUALLY AND D/B/A THE ORIGINAL TAMMARA'S, DEFENDANT, ALLSTATE INSURANCE COMPANY, DEFENDANT-APPELLANT, AND AMERICAN HOME ASSURANCE COMPANY, DEFENDANT-RESPONDENT. -- Order unanimously affirmed with costs. (Appeal from Order of Supreme Court, Erie County, Kane, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(999) CA 00-52. (Erie Co.) -- SUZANNE M. KNAPCZYK AND LARRY F. KNAPCZYK, PLAINTIFFS-RESPONDENTS, V TOPS MARKETS, INC., AND WILSON FARMS, INC., DEFENDANTS-APPELLANTS. -- Order unanimously affirmed with costs. (Appeal from Order of Supreme Court, Erie County, Burns, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1000) CA 99-1640. (Oswego Co.) -- JAY MILLER, PLAINTIFF-APPELLANT, V ANTOINETTE EKIERT, DEFENDANT-RESPONDENT, ET AL., DEFENDANT. -- Order unanimously affirmed without costs. Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained as the result of diving into Oneida Lake from the end of a dock on property owned by Antoinette Ekiert (defendant). Supreme Court properly granted the motion of defendant for summary judgment dismissing the complaint against her. Defendant submitted proof establishing that "the sole legal cause of plaintiff's injuries was [plaintiff's] own reckless conduct in attempting that dive" (*Olsen v Town of Richfield,* 81 NY2d 1024, 1026; *see, Lionarons v General Elec. Co.,* 215 AD2d 851, 852-853, *affd* 86 NY2d 832; *Butler v Marshall,* 243 AD2d 971, 973), and plaintiff failed to raise a triable issue of fact. (Appeal from Order of Supreme Court, Oswego County, McCarthy, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1001) CA 99-01303. (Erie Co.) -- ELLEN SILVER, PLAINTIFF-APPELLANT, V TOPS MARKETS, INC., DEFENDANT-RESPONDENT. -- Judgment unanimously reversed on the law with costs and new trial granted on damages only. Memorandum: Plaintiff commenced this action seeking damages for injuries sustained to her head and neck as a result of being struck by a falling sign at defendant's store. Following trial, the jury found defendant negligent and awarded plaintiff damages in the amount of $250 for past pain and suffering and no damages for future pain and suffering, past and future lost earnings, and past medical expenses.

Considering the ample and virtually uncontroverted evidence adduced by plaintiff with respect to damages, we conclude that the award of only $250 for past pain and suffering and the failure to award any damages for future pain and suffering, past and future lost earnings, and past medical expenses is contrary to a fair interpretation of the evidence and deviates materially from what would be reasonable compensation (*see,* CPLR 5501 [c];

Simmons v Dendis Constr., ___ AD2d ___ [decided Mar. 29, 2000]; *Quigley v Sikora*, ___ AD2d ___ [decided Feb. 16, 2000]; *Kriesel v May Dept. Stores Co.*, 261 AD2d 837; *Restey v Higgins*, 252 AD2d 954, 955; *Kennett v Piotrowski*, 234 AD2d 983, 984). We therefore reverse the judgment and grant a new trial on the issue of damages only. (Appeal from Judgment of Supreme Court, Erie County, Mintz, J. - Negligence.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1002) CA 99-1676. (Monroe Co.) -- RAYMOND R. LE CHASE AND GLORIA LE CHASE, PLAINTIFFS-RESPONDENTS, V FRANK LA MAR, D.D.S., AND ELMWOOD DENTAL GROUP, P.C., D/B/A ELMWOOD DENTAL IMPLANT AND ORAL RECONSTRUCTION CENTER, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.) -- Judgment unanimously affirmed with costs. Memorandum: There is no merit to defendants' contention that Supreme Court erred in this action for dental malpractice in including only one theory of negligence in the verdict sheet submitted to the jury. Although plaintiffs' expert testified concerning more than one deviation from the level of care acceptable in the professional community in which defendant Frank LaMar, D.D.S. practices (*see generally, Schrempf v State of New York*, 66 NY2d 289, 295), plaintiffs relied upon the sole theory that the lack of aggressive postoperative treatment of a fistula caused the injuries sustained by plaintiff Raymond R. LeChase. Thus, the court properly limited both the jury charge and the verdict sheet to that theory. (Appeal from Judgment of Supreme Court, Monroe County, Lunn, J. - Negligence.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1003) CA 99-881. (Monroe Co.) -- RAYMOND R. LE CHASE AND GLORIA LE CHASE, PLAINTIFFS-RESPONDENTS, V FRANK LA MAR, D.D.S., AND ELMWOOD DENTAL GROUP, P.C., D/B/A ELMWOOD DENTAL IMPLANT AND ORAL RECONSTRUCTION CENTER, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Appeal unanimously dismissed without costs (*see, Smith v Catholic Med. Ctr.*, 155 AD2d 435; *see also*, CPLR 5501 [a] [1]). (Appeal from Order of Supreme Court, Monroe County, Lunn, J. - Set Aside Verdict.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1004) CA 00-00190. (Erie Co.) -- TOWN OF WEST SENECA, PLAINTIFF-RESPONDENT, V AMERICAN REF-FUEL COMPANY OF NIAGARA, L.P., DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (*see generally, Matter of Laborers Intl.*

Union of N. Am., Local 210, AFL-CIO v Shevlin-Manning, Inc., 147 AD2d 977). (Appeal from Order of Supreme Court, Erie County, Kane, J. - Dismiss Pleading.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1005) CA 00-00209. (Erie Co.) -- TOWN OF WEST SENECA, PLAINTIFF-RESPONDENT-APPELLANT, V AMERICAN REF-FUEL COMPANY OF NIAGARA, L.P., DEFENDANT-APPELLANT-RESPONDENT. (APPEAL NO. 2.) -- Order unanimously affirmed without costs. (Appeals from Order of Supreme Court, Erie County, Kane, J. - Dismiss Pleading.) PRESENT: PIGOTT, JR., P. J., GREEN, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1006) TP 99-1541. (Erie Co.) -- MATTER OF ISRAEL TORRES, PETITIONER, V EDWARD R. DONNELLY, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT. -- Determination unanimously confirmed without costs and petition dismissed. (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Erie County, Flaherty, J.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1007) KA 99-05108. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V TIMOTHY J. FLUKER, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Supreme Court, Erie County, Tills, J. - Attempted Criminal Sale Controlled Substance, 3rd Degree.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1008) KA 99-05357. (Niagara Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JOEL HAMILTON, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Judgment unanimously affirmed (*see, People v Lococo*, 92 NY2d 825, 827). (Appeal from Judgment of Niagara County Court, Fricano, J. - Criminal Possession Controlled Substance, 5th Degree.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1009) KA 99-05356. (Niagara Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JOEL HAMILTON, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Judgment unanimously affirmed (*see, People v Lococo*, 92 NY2d 825, 827). (Appeal from Judgment of Niagara County Court, Fricano, J. - Criminal Possession Controlled

Substance, 5th Degree.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1010) KA 98-5018. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V TIMOTHY JONES, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: We reject defendant's contention that the verdict is against the weight of the evidence (*see, People v Bleakley*, 69 NY2d 490, 495). Likewise, we reject the contention of defendant that he was denied effective assistance of counsel (*see, People v Baldi*, 54 NY2d 137, 147; *People v Trait*, 139 AD2d 937, 938, *lv denied* 72 NY2d 867). Defendant further contends that County Court erred in failing to suppress his statements to the police on the ground that they were involuntary. We disagree. Defendant did not appear intoxicated to the police, he responded in the negative to the officer's question whether he had been drinking or had taken drugs, he was coherent during the interview and he acknowledged that he understood his rights and was willing to answer questions. Based on the totality of the circumstances, we conclude that the statements were voluntarily made (*see, People v Barnes*, 267 AD2d 1020; *see also, People v Downey*, 254 AD2d 794, 795, *lv denied* 92 NY2d 1031; *People v Walker*, 235 AD2d 262, *lv denied* 89 NY2d 1102). Finally, the sentence is neither unduly harsh nor severe. (Appeal from Judgment of Monroe County Court, Maloy, J. - Burglary, 1st Degree.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1011) KA 98-2012. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V DEAN BARNES, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Supreme Court properly denied those parts of the motion of defendant seeking suppression of tangible evidence, identification evidence and the statement he made to the police after receiving *Miranda* warnings. Although defendant was illegally detained and the police failed to provide *Miranda* warnings before commencing their initial interrogation, the "connection between the lawless conduct of the police and the discovery of the challenged evidence [was] '* * * so attenuated as to dissipate the taint'" (*Wong Sun v United States,* 371 US 471, 487, quoting *Nardone v United States,* 308 US 338, 341; *see, People v Salami,* 197 AD2d 715, 715-716, *lv denied* 83 NY2d 876; *see also, People v McCloud,* 247 AD2d 409, *lv denied* 91 NY2d 975; *People v Watson,* 200 AD2d 643, *lv denied* 83 NY2d

859). In any event, any error in admitting that evidence is harmless (*see, People v Crimmins,* 36 NY2d 230, 237; *People v Waasdorp,* 237 AD2d 918, 919, *lv denied* 89 NY2d 1102). (Appeal from Judgment of Supreme Court, Monroe County, Mark, J. - Rape, 1st Degree.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1014) KAH 97-05139. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK EX REL. JOSEPH DE ROSA, PETITIONER-APPELLANT, V FRANK E. IRVIN, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed without costs. (Appeal from Judgment of Supreme Court, Erie County, LaMendola, J. - Habeas Corpus.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1015) CAF 99-1554. (Monroe Co.) -- MATTER OF ADRIAN L., RESPONDENT-APPELLANT. MONROE COUNTY ATTORNEY, PETITIONER-RESPONDENT. (APPEAL NO. 1.) -- Order unanimously affirmed without costs. (Appeal from Order of Monroe County Family Court, Miller, J. - Placement.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1015.1) CAF 00-135. (Monroe Co.) -- MATTER OF ADRIAN L., RESPONDENT-APPELLANT. MONROE COUNTY ATTORNEY, PETITIONER-RESPONDENT. (APPEAL NO. 2.) -- Order unanimously affirmed without costs. (Appeal from Order of Monroe County Family Court, Miller, J. - Settle Record.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1016) CAF 99-825. (Onondaga Co.) -- MATTER OF ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O MICHAEL J., PETITIONER-APPELLANT, V HORACE J., RESPONDENT-RESPONDENT. -- Order unanimously affirmed without costs. (Appeal from Order of Onondaga County Family Court, Hedges, J. - Support.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1017) CAF 99-780. (Niagara Co.) -- MATTER OF JEFFREY M. WINKELMAN, PETITIONER-APPELLANT, V KELLY A. FUREY, RESPONDENT-RESPONDENT. -- Order unanimously affirmed without costs. Memorandum: Family Court did not abuse its discretion in awarding custody of the child to respondent mother. Contrary to

petitioner's contention, the court properly weighed the appropriate factors affecting the best interests of the child (*see, Eschbach v Eschbach,* 56 NY2d 167, 171-174). The court was "in the best position to evaluate the character and credibility of the witnesses" (*Matter of Paul C. v Tracy C.*, 209 AD2d 955, 956). "Its determination has a sound and substantial basis in the record and should not be disturbed" (*Matter of Bronson v Bronson*, 254 AD2d 737). (Appeal from Order of Niagara County Family Court, DiFlorio, J.H.O. - Custody.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1019) CAF 00-79. (Livingston Co.) -- MATTER OF SYLVIA S. PARKER, PETITIONER-RESPONDENT, V CHRISTOPHER TOMPKINS, RESPONDENT-APPELLANT. -- Order unanimously affirmed without costs. Memorandum: This custody dispute was initiated by petitioner, the maternal aunt of 13-year-old Andrea T., and was occasioned by the death in October 1998 of Andrea's mother, with whom Andrea had lived since Andrea's parents separated in 1989. Respondent, Andrea's father, has had sporadic contact with Andrea since 1989, despite a separation agreement giving the parents joint custody. Respondent appeals from an order of Family Court that, following separate hearings on the issues of extraordinary circumstances and best interests, awarded custody to petitioner. Contrary to respondent's contention, petitioner sustained her burden of establishing extraordinary circumstances, which include the prolonged separation of Andrea from respondent between 1991 and 1996; respondent's infrequent and mostly insignificant contacts with Andrea before 1991 and since 1996; respondent's failure to pay child support; respondent's unstable lifestyle and lack of an established household; Andrea's bond with petitioner, with whom Andrea has lived since her mother became ill, and with her half-brother, with whom Andrea has lived virtually all her life; and the psychological damage likely to be incurred by Andrea in the event that she is separated from her aunt and half-brother (*see, Matter of Bennett v Jeffreys,* 40 NY2d 543; *Matter of Oscarson v Maresca*, 232 AD2d 732, 733-734; *Matter of Michael G. B. v Angela L. B.,* 219 AD2d 289, 292-294; *Matter of Karen D. v Florence D.,* 210 AD2d 165, 166). (Appeal from Order of Livingston County Family Court, Cicoria, J. - Custody.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1020) CAF 99-7077. (Monroe Co.) -- MATTER OF JESSICA O. MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; JESSIE O., RESPONDENT-APPELLANT. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (*see, Matter of Monica Irene C.*, 262 AD2d 69; *Matter of John Curtis H.* [appeal No. 2], 249 AD2d 928; *Matter of Stacy P.*, 210 AD2d 1009; CPLR 5511). (Appeal from Order of Monroe County Family Court, Donofrio, J., for Bonadio, J., pursuant to CPLR 9002 - Terminate Parental Rights.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1021) CAF 99-7184. (Monroe Co.) -- MATTER OF JESSICA O. MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; JESSIE O., RESPONDENT-APPELLANT. (APPEAL NO. 2.) -- Order unanimously affirmed without costs. (Appeal from Order of Monroe County Family Court, Donofrio, J. - Vacate Order.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1022) CA 00-80. (Erie Co.) -- MATTER OF JOHN RATIGAN, PETITIONER-APPELLANT, V DAEMEN COLLEGE, KATHLEEN C. BOONE, Ph.D., AS ASSOCIATE DEAN OF DAEMEN COLLEGE AND CHAIR OF COLLEGE COMMITTEE ON ACADEMIC STANDARDS AT DAEMEN COLLEGE, AND PAUL JACQUES, AS CHAIR OF ACADEMIC PROGRESS COMMITTEE, RESPONDENTS-RESPONDENTS. -- Judgment unanimously affirmed without costs. Memorandum: Supreme Court properly granted respondents' motion to dismiss the petition challenging the determination dismissing petitioner from the physician assistant program at respondent Daemen College. "[I]n the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student's challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student's academic capabilities, is beyond the scope of judicial review" (*Matter of Susan M. v New York Law School*, 76 NY2d 241, 247). Petitioner failed to demonstrate the presence of any of those elements. Rather, the allegations in the petition "go to the heart of [respondents'] substantive evaluation of the petitioner's academic performance and as such, are beyond judicial review" (*Matter of Susan M. v New York Law School, supra*, at 247). (Appeal from Judgment of Supreme Court, Erie County, Sconiers, J. - CPLR art 78.)

PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1023) CA 99-1127. (Monroe Co.) -- JACK ALLEN, PLAINTIFF-RESPONDENT, V DOMUS DEVELOPMENT CORPORATION, JOHN STEVENS, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF DOMUS DEVELOPMENT CORPORATION, AND SAMUEL A. SANTANDREA, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF DOMUS DEVELOPMENT CORPORATION, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.) -- Order and judgment unanimously affirmed without costs. Memorandum: Defendants appeal from an order and judgment entered upon a jury verdict finding that plaintiff was unlawfully terminated from his employment because of his age (*see*, Executive Law § 296 [1] [a]) and awarding back pay and compensatory damages. Defendants characterize this as a "pretext" case and contend that, based on the three-part analysis first enunciated in *McDonnell Douglas Corp. v Green* (411 US 792, 802), plaintiff is not entitled to recover. Defendants contend that (1) plaintiff failed to establish a prima facie case of age discrimination; (2) they proffered legitimate, independent, and nondiscriminatory reasons for plaintiff's termination; and (3) plaintiff failed to establish that defendants' reasons were a pretext for discrimination (*see, Ferrante v American Lung Assn.*, 90 NY2d 623, 629-630). This case, however, was not tried on that theory. Supreme Court, without exception from defendants, charged the jury on a "mixed-motives" theory of discrimination. Because defendants failed to object to the charge, "the law as stated in that charge became the law applicable to the determination of the rights of the parties * * * and thus established the legal standard by which the sufficiency of the evidence to support the verdict must be judged" (*Harris v Armstrong*, 64 NY2d 700, 702). In a "mixed-motives" case, unlike a "pretext" case, "the burden is on the plaintiff to show that an illegitimate factor * * * played a motivating or substantial role in the defendant's employment decision * * *. If the plaintiff presents sufficient evidence to support an inference of impermissible discrimination, the burden then shifts to the employer to show that the employment decision would have been reached in the absence of that impermissible motive" (*Michaelis v State of New York*, 258 AD2d 693, 694, *lv denied* 93 NY2d 806; *see*, *Tyler v Bethlehem Steel Corp.*, 958 F2d 1176, 1180-1181, *cert denied* 506 US 826). "Given these principles, the verdict should not be disturbed, for

the record does not so preponderate in defendants' favor that the jury could not have reached its verdict by any fair interpretation of the evidence" (*Michaelis v State of New York, supra*, at 694). We reject defendants' contentions that the damages should not have been awarded for the period after July 1993 and that the compensatory damage award is excessive. (Appeal from Order and Judgment of Supreme Court, Monroe County, Polito, J. - Executive Law.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1024) CA 99-1128. (Monroe Co.) -- JACK ALLEN, PLAINTIFF-RESPONDENT, V DOMUS DEVELOPMENT CORPORATION, JOHN STEVENS, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF DOMUS DEVELOPMENT CORPORATION, AND SAMUEL A. SANTANDREA, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF DOMUS DEVELOPMENT CORPORATION, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Appeal unanimously dismissed without costs (*see,* CPLR 5501 [a] [1], [2]). (Appeal from Order of Supreme Court, Monroe County, Polito, J. - Set Aside Verdict.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1026) CA 00-34. (Onondaga Co.) -- WILLIAM A. OSUCHOWSKI, PLAINTIFF-RESPONDENT, V GALLINGER REAL ESTATE, DEFENDANT-APPELLANT. -- Order unanimously affirmed with costs. Memorandum: Plaintiff commenced this action seeking damages arising from his purchase of real estate at an auction conducted by defendant. Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. A triable issue of fact at least arguably exists whether defendant was negligent in conducting the auction and whether its agent made negligent misrepresentations to plaintiff during the auction (*see generally, Hourigan v McGarry*, 106 AD2d 845, 845-846, *appeal dismissed* 65 NY2d 637). We reject defendant's contention that, as a matter of law, a claim for negligent misrepresentation does not lie because the parties were not in privity and did not have a special relationship; "there may be liability for negligent misrepresentation where there is a relationship between the parties such that there is an awareness that the information provided is to be relied upon for a particular purpose by a known party in furtherance of that purpose, and some conduct by the declarant linking it to the relying party and evincing the declarant's understanding of [the] reliance" (*Houlihan/Lawrence,*

Inc. v Duval, 228 AD2d 560, 561). (Appeal from Order of Supreme Court, Onondaga County, Tormey, III, J. - Summary Judgment.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1027) CA 99-1121. (Oneida Co.) -- GLORIA FOWLER, PLAINTIFF-APPELLANT, V ST. LUKE'S MEMORIAL HOSPITAL CENTER, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (*see, Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *see also, Chase Manhattan Bank v Roberts & Roberts*, 63 AD2d 566, 567; CPLR 5501 [a] [1]). (Appeal from Order of Supreme Court, Oneida County, Grow, J. - Summary Judgment.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1028) CA 99-1122. (Oneida Co.) -- GLORIA FOWLER, PLAINTIFF-APPELLANT, V ST. LUKE'S MEMORIAL HOSPITAL CENTER, DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Judgment unanimously affirmed without costs. Memorandum: Plaintiff commenced this action to recover damages for injuries she sustained when she allegedly slipped and fell on water on the floor of a patient's room in defendant hospital. Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment. Defendant established that it had no actual or constructive notice of the water on the floor and plaintiff failed to raise a triable issue of fact (*see, Kane v Human Servs. Ctr.*, 186 AD2d 539, 540, *lv denied* 82 NY2d 657).

The court also properly denied plaintiff's motion for renewal of the motion and cross motion. Plaintiff failed to offer a justifiable excuse for failing to submit the additional evidence supporting the motion for renewal at the time of the original motion and cross motion (*see, Conley v Central Sq. School Dist.*, 255 AD2d 981). "[A] justifiable excuse will be deemed absent where the new facts were capable of being discovered at the time the original motion was made" (*Matter of Dyer v Planning Bd.*, 251 AD2d 907, 910, *appeal dismissed* 92 NY2d 1026, *lv dismissed* 93 NY2d 1000). Here, the identities of the witnesses who submitted affidavits in support of renewal were capable of being discovered at the time of the original motion and cross motion. (Appeal from Judgment of Supreme Court, Oneida

County, Grow, J. - Summary Judgment.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1029) CA 99-1552. (Oneida Co.) -- GLORIA FOWLER, PLAINTIFF-APPELLANT, V ST. LUKE'S MEMORIAL HOSPITAL CENTER, DEFENDANT-RESPONDENT. (APPEAL NO. 3.) -- Order unanimously affirmed without costs. Same Memorandum as in *Fowler v St. Luke's Mem. Hosp. Ctr.* ([appeal No. 2] ___ AD2d ___ [decided herewith]). (Appeal from Order of Supreme Court, Oneida County, Grow, J. - Renewal.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1030) CA 00-77. (Erie Co.) -- PAUL TELESCO AND PATRICIA TELESCO, PLAINTIFFS-RESPONDENTS-APPELLANTS, V PHILIP BATEAU, INDIVIDUALLY AND/OR D/B/A PHIL'S JANITORIAL SERVICE, DEFENDANT-RESPONDENT. PHILIP BATEAU, INDIVIDUALLY AND/OR D/B/A PHIL'S JANITORIAL SERVICE, THIRD-PARTY PLAINTIFF-RESPONDENT, V AMERICAN RED CROSS, GREATER BUFFALO CHAPTER, THIRD-PARTY DEFENDANT-APPELLANT. -- Order unanimously affirmed without costs. Memorandum: Supreme Court properly denied the motion of third-party defendant, American Red Cross, Greater Buffalo Chapter (Red Cross), seeking summary judgment dismissing the third-party complaint. Plaintiffs commenced this action to recover damages for injuries sustained when Paul Telesco (plaintiff) slipped and fell on wet stairs during the course of his employment at the Red Cross building in Buffalo. The third-party complaint, as amplified by the amended bill of particulars, alleges that the accident occurred because of inadequate lighting in the stairwell. Red Cross failed to meet its initial burden of presenting competent evidence refuting that allegation (*see, Caster v State of New York*, 267 AD2d 1003). In support of its motion, Red Cross submitted deposition testimony indicating that plaintiff could not see the wet stairs because the lighting was inadequate, and Red Cross failed to establish as a matter of law that the lighting was not a contributing cause of the accident. Even assuming, arguendo, that Red Cross did not have actual or constructive notice of the allegedly dangerous condition, we conclude that Red Cross failed to establish as a matter of law that it did not create that condition (*see, Sumell v Wegmans Food Mkts.*, 254 AD2d 702, 702-703). The failure of Red Cross to make a prima facie showing of entitlement to judgment as a matter of law "requires denial of the motion, regardless of the sufficiency

of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). (Appeals from Order of Supreme Court, Erie County, Whelan, J. - Summary Judgment.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1031) CA 00-00213. (Monroe Co.) -- MATTER OF DELREATA GREENE, CLAIMANT-APPELLANT, V ROCHESTER HOUSING AUTHORITY, DEFENDANT-RESPONDENT. -- Order unanimously reversed on the law without costs and motion granted. Memorandum: Supreme Court erred in denying claimant's motion for leave to serve a late notice of claim against defendant pursuant to General Municipal Law § 50-e (5). In determining whether to grant leave to serve a late notice of claim, the critical factors to consider are whether claimant had a reasonable excuse for the delay, whether the municipality had actual or constructive notice of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the municipality *(see, More v General Brown Cent. School Dist.*, 262 AD2d 1030; *Williams v City of Niagara Falls*, 244 AD2d 1006). Claimant established a reasonable excuse for the delay; she averred that she was unaware during the initial 90-day period of the seriousness of her injury and its permanency (*see, More v General Brown Cent. School Dist., supra*) or that the apartment complex was owned by defendant (*see, Matter of Nickerson v County of Jefferson*, 199 AD2d 1070). Although defendant contends that there was additional delay between the time when claimant consulted with her attorney and the time when she made the motion, that delay was minimal (*see, Matter of Castellano v New York City Hous. Auth.*, 212 AD2d 606, 607).

Although defendant contends that it lacked notice and hence any opportunity to investigate the allegedly defective condition, we note that claimant alleges that defendant was negligent in designing the parking lot in such a way as to allow snow and ice to accumulate around a drain, and in clearing snow and ice only during the week and not on weekends. Defendant is charged with actual or constructive notice of that allegedly defective condition and negligent policy (*see, Matter of Mahan v Board of Educ.*, ___ AD2d ___ [decided Feb. 16, 2000]), which were recurrent or static and of defendant's own making. Defendant is unable to demonstrate prejudice as a result of the delay because the allegedly defective conditions are "not transitory or likely to dissipate over the period of the delay" (*Matter of Silva v*

City of New York, 246 AD2d 465, 466). (Appeal from Order of Supreme Court, Monroe County, Barry, J. - Notice of Claim.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1032) CA 00-103. (Genesee Co.) -- SHIRLEY A. VAN OSTBERG, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM VAN OSTBERG, JR., DECEASED, PLAINTIFF-RESPONDENT, V JAMES H. CRANE, LEGIA I. CRANE AND ROBERT T. FRIEDL, DEFENDANTS-APPELLANTS. -- Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Supreme Court erred in denying the motion of defendant Robert T. Friedl for summary judgment dismissing the complaint against him. Friedl established that, as he was traveling northbound, the vehicle driven by plaintiff's decedent, who was traveling southbound, crossed into his lane of traffic only a second before the vehicles collided. Friedl thus established a complete defense to plaintiff's action (*see, Gouchie v Gill*, 198 AD2d 862, 863; *see also, Whitfield v Toense*, ___ AD2d ___ [decided herewith]). The speculative affidavit of plaintiff's expert containing alternative explanations concerning the manner in which the accident occurred is insufficient to defeat the motion (*see generally, Romano v Stanley*, 90 NY2d 444, 451-452; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365). We therefore modify the order by granting the motion of Friedl and dismissing the complaint against him.

We further conclude that the court properly denied the motion of defendants James H. Crane and Legia I. Crane for summary judgment dismissing the complaint against them. The evidence, when viewed in the light most favorable to plaintiff, at least arguably raises an issue of fact whether James Crane had sufficient time to take evasive action before striking plaintiff's decedent, who had been ejected from the cab of his pickup truck onto the road (*see, Damerau v Johnson*, 265 AD2d 927; *Stevenson v Recore*, 221 AD2d 834). Indeed, in this wrongful death case, plaintiff is not held to as high a degree of proof as in a case where the injured plaintiff is able to describe the occurrence (*see, Noseworthy v City of New York*, 298 NY 76, 80; *Pierson v Dayton*, 168 AD2d 173, 175). We reject the contention of the Cranes that the alleged failure of plaintiff's decedent to wear an available seatbelt was the sole cause of the accident, requiring dismissal of the complaint against them (*see generally*,

Vehicle and Traffic Law § 1229-c [8]; *see also, Stein v Penatello*, 185 AD2d 976). Furthermore, we decline to grant their request for an order pursuant to CPLR 3212 (g) setting forth the facts that are not in dispute or are uncontroverted. We have reviewed the remaining contentions of the Cranes and conclude that they are without merit. (Appeals from Order of Supreme Court, Genesee County, Rath, Jr., J. - Summary Judgment.) PRESENT: GREEN, J. P., WISNER, KEHOE AND LAWTON, JJ. (Filed June 16, 2000.)

(1033) TP 99-1631. (Orleans Co.) -- MATTER OF ROHAN SWABY, PETITIONER, V GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT. -- Determination unanimously confirmed without costs and petition dismissed. (CPLR art 78 Proceeding Transferred by Order of Supreme Court, Orleans County, Punch, J.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1034) KA 98-05186. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V HERNANDO MOODY, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Supreme Court, Monroe County, Ark, J. - Criminal Possession Weapon, 3rd Degree.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1035) KA 98-02383. (Niagara Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V LINNON SMITH, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Judgment unanimously affirmed. (Appeal from Judgment of Niagara County Court, Hannigan, J. - Attempted Burglary, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1036) KA 00-00157. (Niagara Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V LINNON SMITH, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Judgment unanimously affirmed. (Appeal from Judgment of Niagara County Court, Hannigan, J. - Criminal Possession Stolen Property, 3rd Degree.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1037) KA 98-5653. (Onondaga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V MARCELLE D. SMITH, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum:

Defendant appeals from a judgment convicting him after a jury trial of two counts each of murder in the second degree (Penal Law § 125.25 [2], [3]) and robbery in the first degree (Penal Law § 160.15 [1], [3]) and one count of criminal possession of a weapon in the fourth degree (Penal Law § 265.01). Defendant contends that County Court erred in rejecting his *Batson* claim regarding the prosecutor's exercise of a peremptory challenge. We disagree. The prosecutor proffered a race-neutral explanation for the dismissal of that prospective juror, i.e., that the prospective juror had difficulty hearing and understanding questions and the prosecutor could not understand what he was saying (*see, People v Wint*, 237 AD2d 195, 196, *lv denied* 89 NY2d 1103). Although defendant contended that the explanation of the prosecutor was pretextual because he did not exercise a peremptory challenge with respect to another prospective juror who demonstrated difficulty in understanding questions, uneven application of a proffered race-neutral explanation is merely one factor to consider in assessing whether the prosecutor impermissibly discriminated in the exercise of peremptory challenges (*see, People v Allen*, 86 NY2d 101, 110-111). The court's resolution of that issue is entitled to great deference (*see, People v Hameed*, 212 AD2d 728, 729, *affd* 88 NY2d 232, *cert denied* 519 US 1065), and we perceive no basis in this record to disturb the court's determination that the prosecutor's explanation was not pretextual.

The court did not err in denying defendant's motion for a mistrial based upon an alleged failure to produce *Brady* material. The prior statement to the prosecutor was not exculpatory in nature and thus does not constitute *Brady* material (*see, People v Pepe*, 259 AD2d 949, *lv denied* 93 NY2d 1024).

We reject the contention of defendant that the court erred in denying his motion to suppress statements he made to the police. In determining whether defendant requested to speak with counsel or his mother or was so intoxicated that his statements were involuntarily made, the court resolved credibility issues, and there is no basis in the record to disturb the court's resolution of those issues (*see, People v Prochilo*, 41 NY2d 759, 761).

We conclude that the sentence is not unduly harsh or severe. (Appeal from Judgment of Onondaga County Court, Fahey, J. - Murder, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1038) KA 00-108. (Oneida Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JEFFREY S. LAW, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1]) for beating his parents to death with a hammer. In convicting defendant, the jury rejected his affirmative defense that he lacked criminal responsibility by reason of mental disease or defect (*see,* Penal Law § 40.15). Defendant contends that the verdict is against the weight of the evidence based on a "serious flaw" in the testimony of the People's psychiatric expert, and that the expert improperly invaded the province of the jury. Defendant failed to object to the testimony of that expert, and thus failed to preserve his present contentions for our review (*see,* CPL 470.05 [2]; *People v Jones,* 261 AD2d 920, *lv denied* 93 NY2d 972). In any event, defendant's contentions lack merit. "Where, as here, there was conflicting expert evidence concerning criminal responsibility, the jury was free to accept or reject in whole or in part the opinion of any expert" (*People v Jones, supra*). Although the jury's determination will be set aside "if there is a 'serious flaw' in the testimony of the People's experts" (*People v Bernstein,* 255 AD2d 388, *lv denied* 93 NY2d 850; *see, People v Irizarry,* 238 AD2d 940, 941, *lv denied* 90 NY2d 894; *People v Smith,* 217 AD2d 221, 234-235, *lv denied* 87 NY2d 977), the erroneous statement of the People's expert that "mental disease or defect" as defined in the Penal Law does not constitute such a flaw. In any event, County Court instructed the jury on the applicable law, which the jury is presumed to have followed (*see generally, People v Moore,* 71 NY2d 684, 688). The verdict rejecting the defense of lack of criminal responsibility by reason of a mental disease or defect is not against the weight of the evidence (*see, People v Bleakley,* 69 NY2d 490, 495).

Defendant's contention that certain photographs and a videotape of the victims were inflammatory and should not have been admitted in evidence lacks merit. The court had broad discretion in determining whether the probative value of the photographs and videotape outweighed any prejudice to defendant (*see, People v Stevens,* 76 NY2d 833, 835-836). The photographs and videotape were relevant with respect to, *inter alia,* the cause of death, the extent of the fatal injuries, and the position of the bodies at the crime scene (*see, People v Secore,*

187 AD2d 1008, 1009, *lv denied* 81 NY2d 847; *People v Wilson,* 168 AD2d 696, 697-698).

We reject the contention of defendant that the court erred in denying his motion to suppress five oral and written statements. Defendant was not in custody when he made the first four statements at the crime scene and the hospital; defendant was not physically restrained at the hospital, and the questions asked by police officers preceding the first four statements were investigatory rather than accusatory (*see, People v Bowen,* 229 AD2d 954, 955, *lv denied* 88 NY2d 1019). The fifth statement was made after defendant was considered a suspect and had been given *Miranda* warnings. Contrary to defendant's contention, any promise made by the police to defendant prior to that statement did not "create[] a substantial risk that the defendant might falsely incriminate himself" and thus did not render the statement involuntary (CPL 60.45 [2] [b] [i]; *see, People v Tarsia,* 50 NY2d 1, 11; *People v Hamelinck,* 222 AD2d 1024, *lv denied* 87 NY2d 921).

Defendant's contentions concerning the verdict sheet and the manner in which the jury rendered the verdict are not preserved for our review (*see,* CPL 470.05 [2]). In any event, those contentions are lacking in merit. Considering the brutal nature of the killings, we conclude that the sentence is neither unduly harsh nor severe. (Appeal from Judgment of Oneida County Court, Buckley, J. - Murder, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1039) KA 97-5358. (Oneida Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RICHARD J. CHAMPION, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, *inter alia*, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]). We agree with defendant that County Court erred in denying that part of his motion seeking suppression of his statements to the police. To be effective, *Miranda* warnings must precede custodial interrogation of a suspect. "Later is too late, unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning" (*People v Chapple*, 38 NY2d 112, 115; *see*, *People v Bethea*, 67 NY2d 364).

Before receiving *Miranda* warnings, defendant made incriminating statements regarding the subject crimes in response to custodial interrogation. Approximately 30 minutes later, the same officer administered *Miranda* warnings to defendant and immediately continued his interrogation of defendant, who spoke freely regarding the details of the subject crimes. The court erred in refusing to suppress the later statements. There was no "definite, pronounced break in the interrogation" (*People v Chapple*, *supra*, at 115), and thus "the warnings administered before the later statements were insufficient to protect [defendant's] rights" (*People v Bethea*, *supra*, at 368). However, the error in admitting those statements is harmless beyond a reasonable doubt (*see*, *People v Crimmins*, 36 NY2d 230, 237).

The court properly denied without a hearing that part of the motion of defendant seeking suppression of a list of items used in the commission of the crime that were seized from his residence. Defendant's allegation that the prosecution witness who discovered the list was acting as an agent of the police in securing it was speculative and thus insufficient to require a hearing (*see generally*, *People v Hightower*, 85 NY2d 988, 989-990; *People v Mendoza*, 82 NY2d 415, 421-422; *People v Palmeri*, ___ AD2d ___ [decided May 10, 2000]).

Defendant failed to preserve for our review his contention that, in the absence of a pretrial ruling following a hearing to determine the admissibility of prior bad acts (*see*, *People v Molineux*, 168 NY 264, 293-294), the court erred in admitting testimony on direct examination concerning defendant's obsessive behavior toward the victim and testimony on rebuttal concerning prior threats by defendant to kill his first wife under circumstances similar to those with respect to the subject crimes. Defense counsel did not seek a final ruling on the admissibility of that testimony, nor did he object to that testimony at trial despite his indication to the court that he would defer his objection until hearing the foundation therefor during the trial. In any event, we conclude that the testimony at issue was admissible to demonstrate defendant's motive and intent in attacking the victim (*see*, *People v Guiteau*, 267 AD2d 1094) and to disprove defendant's insanity defense (*see*, *People v Santarelli*, 49 NY2d 241, 248-249, *rearg denied* 49 NY2d 918).

There is no merit to the contention that defendant was denied effective assistance of counsel (*see*, *People v Baldi*, 54 NY2d 137, 147). The sentence is legal and is neither unduly

harsh nor severe. We have reviewed defendant's remaining contentions and conclude that they are without merit. (Appeal from Judgment of Oneida County Court, Dwyer, J. - Attempted Murder, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1041) CAF 00-00148. (Erie Co.) -- MATTER OF TINA F. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; JOHNNY F., RESPONDENT-APPELLANT. -- Order unanimously affirmed without costs. Memorandum: After a dispositional hearing, Family Court adjudicated respondent's child to be permanently neglected and transferred guardianship and custody to petitioner. There is no merit to the contention of respondent that he was denied a fair and impartial hearing. Although the court erred in making certain factual findings, those erroneous findings do not establish that the court was biased. Rather, we conclude that those findings were based on the court's inadvertent mistaken recollections of testimony and that the court nevertheless arrived at an appropriate disposition.

We also reject respondent's contention that the court should have suspended judgment rather than transferring guardianship and custody of the child to petitioner (*see, Matter of Sonny H. B.*, 249 AD2d 940). (Appeal from Order of Erie County Family Court, Rosa, J. - Terminate Parental Rights.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1042) CAF 99-07163. (Erie Co.) -- MATTER OF ELIZABETH F., CRYSTALE V. AND JULIANNE F. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; TINA F., RESPONDENT-APPELLANT. -- Order unanimously affirmed without costs for reasons stated in decision at Erie County Family Court, Rosa, J. (Appeal from Order of Erie County Family Court, Rosa, J. - Terminate Parental Rights.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1044) CAF 99-1635. (Chautauqua Co.) -- MATTER OF LACEY B., RESPONDENT-APPELLANT. CHAUTAUQUA COUNTY ATTORNEY, PETITIONER-RESPONDENT. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (*see, Matter of Eric D.* [appeal No. 1], 162 AD2d 1051). (Appeal from Order of Chautauqua County Family Court, Claire, J. - Placement.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1045) CAF 99-1663. (Chautauqua Co.) -- MATTER OF LACEY B., RESPONDENT-APPELLANT. CHAUTAUQUA COUNTY ATTORNEY, PETITIONER-RESPONDENT. (APPEAL NO. 2.) -- Order unanimously affirmed without costs for reasons stated at Chautauqua County Family Court, Claire, J. (Appeal from Order of Chautauqua County Family Court, Claire, J. - Placement.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1046) CAF 99-01139. (Monroe Co.) -- MATTER OF BERNICE MARINELLI, PETITIONER-RESPONDENT, V JAMES R. VERNILLE, RESPONDENT-APPELLANT. (APPEAL NO. 1.) -- Order unanimously affirmed without costs. Memorandum: By consent order dated July 11, 1991, petitioner and respondent agreed to contribute to their children's college expenses "pursuant to their ability". In April 1998 petitioner commenced this proceeding seeking an order directing respondent to contribute to the college expenses, asserting that he was not paying any portion of those expenses. Following a hearing, the Hearing Examiner concluded that respondent had the ability to pay 50% of the children's college expenses and ordered respondent to repay petitioner 50% of her documented payments. Family Court denied respondent's objections to the order of the Hearing Examiner. In December 1998 petitioner moved by order to show cause to hold respondent in contempt for failing to comply with the order requiring him to pay one half of the ongoing college expenses. The Hearing Examiner found respondent in willful violation of that order and awarded judgment to petitioner.

The Hearing Examiner properly concluded that respondent has the financial ability to pay one half of the college expenses of his children (*see generally, Eiseman v Eiseman*, 237 AD2d 484, 485). Further, the Hearing Examiner did not err in awarding judgment to petitioner without holding a hearing to determine the amount of those expenses. Petitioner presented sufficient evidence to enable the Hearing Examiner to determine that amount as a matter of law, and respondent failed to controvert that evidence. (Appeal from Order of Monroe County Family Court, Sciolino, J. - Support.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1047) CAF 00-00204. (Monroe Co.) -- MATTER OF BERNICE MARINELLI, PETITIONER-RESPONDENT, V JAMES R. VERNILLE, RESPONDENT-APPELLANT. (APPEAL NO. 2.) -- Order unanimously affirmed without costs. Same Memorandum as in *Matter of Marinelli v Vernille* ([appeal No.

1] ___ AD2d ___ [decided herewith]). (Appeal from Order of Monroe County Family Court, Irizarry, H.E. - Support.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1048) CA 99-01304. (Onondaga Co.) -- MATTER OF BENNETT ROAD SEWER COMPANY, INC., PETITIONER-RESPONDENT, V TOWN BOARD OF TOWN OF CAMILLUS, TOWN OF CAMILLUS, MILTON AVENUE SEWER DISTRICT, MILTON AVENUE SEWER DISTRICT EXTENSION AND WESTOVER SEWER DISTRICT, RESPONDENTS-APPELLANTS. -- Judgment unanimously modified on the law and as modified affirmed without costs and matter remitted to respondent Town Board of Town of Camillus for further proceedings in accordance with the following Memorandum: The facts of this case are set forth in our prior decision in *Bennett Rd. Sewer Co. v Town Bd.* (243 AD2d 61). Following our dismissal of that part of the action seeking certain declaratory relief based on the failure to file proofs of service within 15 days after the Statute of Limitations had expired (*see,* CPLR former 306-b [a]), petitioner commenced this CPLR article 78 proceeding within 15 days of that dismissal (*see,* CPLR former 306-b [b]). Petitioner sought the same relief, and Supreme Court granted the petition in part. We now modify that judgment.

Pursuant to our decision, the court properly directed respondent Town of Camillus (Town) to collect and pay to petitioner a $360 tap-in fee for each unit that had tapped into petitioner's facilities (*see, Bennett Rd. Sewer Co. v Town Bd., supra,* at 65, 67). The court erred, however, in determining that petitioner is entitled to tap-in fees incurred prior to May 8, 1990; we previously determined that petitioner is entitled to tap-in fees "for the six years prior to the commencement of this action" (*Bennett Rd. Sewer Co. v Town Bd., supra,* at 67), and the action to which we referred in our prior decision was commenced on May 8, 1996. The court further erred in ordering the Town to collect and pay to petitioner an additional $75 in tap-in fees; there is no support in the record for that relief.

Because the first action commenced by petitioner against respondents and the action commenced by the Town against petitioner were terminated by a consent order, the court erred in consolidating those actions with petitioner's second and third actions against respondents (*see, Bennett Rd. Sewer Co. v Town Bd., supra,* at 64-65).

We agree with the court that the determination of respondent Town Board of Town of Camillus (Board) that petitioner was not entitled to a rate increase was arbitrary and capricious (*see,* CPLR 7803 [3]). Petitioner is "entitled to rates which are 'fair, reasonable and adequate' (Transportation Corporations Law § 121) and may not be denied a reasonable rate of return on its investment" (*Huff v C.K. Sanitary Sys.*, 260 AD2d 892, 897). Petitioner constructed the current sewer system in seven sections. At the hearing before the Board on the petitions for a rate increase, petitioner admitted that it no longer had documentary proof establishing the actual cost of construction of sections four through seven of the sewer system. Petitioner hired an engineering consultant, however, who prepared an estimate of those construction costs. Based upon the testimony of that expert and the numerous documents submitted by petitioner, we conclude that petitioner established that the current sewer rates were inadequate.

In response to that evidence in support of a rate increase, a civil engineer testified for the Town that petitioner was not entitled to a rate increase. He based that opinion upon the lack of documentary proof submitted by petitioner for the construction of sections four through seven, although he acknowledged that those sections were in fact constructed by petitioner. He essentially testified that, because petitioner lost the documents establishing the actual costs of construction, it therefore could not recover those costs. We conclude that the testimony of the civil engineer was not rational and that the Board's determination, which relied on that testimony, was arbitrary and capricious.

We conclude, however, that the court erred in setting a new sewer rate of $427.35, the amount proposed by petitioner. The proper remedy is to remit the matter to the Board for reconsideration of the rate applications (*see, Matter of Heritage Hills Sewage Works Corp. v Town Bd.*, 245 AD2d 450, 454).

We therefore modify the judgment in accordance with the Memorandum herein, and we remit the matter to the Board to determine a rate increase in conformity with the credible evidence before it. "Additional submissions and hearings are not necessary" (*Matter of Heritage Hills Sewage Works Corp. v Town Bd.*, 189 AD2d 816, 817-818). (Appeal from Judgment of Supreme Court, Onondaga County, Murphy, J. - CPLR art 78.) PRESENT:

PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1049) CA 99-1044. (Onondaga Co.) -- DANIEL GEDDES AND CINDY GEDDES, PLAINTIFFS-RESPONDENTS, V CROWN EQUIPMENT CORPORATION AND U.S. MATERIALS HANDLING CORPORATION, DEFENDANTS-APPELLANTS. -- Order unanimously reversed on the law without costs, motion and cross motion granted and complaint dismissed. Memorandum: Daniel Geddes (plaintiff) was injured in the course of his employment with Schoeller Technical Papers, Inc. (Schoeller) when he was struck by a forklift truck as it was backing up. Although a regulation of the Occupational Safety and Health Administration requires that a forklift truck operator look in the direction of her or his path of travel (*see*, 29 CFR 1910.178 [n] [6]), here the operator was using a rearview mirror. Plaintiffs assert causes of action for strict products liability, negligence, and breach of warranty. They allege that the forklift truck, manufactured by defendant Crown Equipment Corporation (Crown) and sold to Schoeller by defendant U.S. Materials Handling Corporation (USMH), was defective and not reasonably safe because it was not equipped with a back-up warning alarm and because the rearview mirrors of the forklift truck subjected its operator to "blind spots". Crown moved and USMH cross-moved for summary judgment dismissing the complaint. Supreme Court denied the motion and cross motion, finding "material factual issues". That was error.

Defendants met their initial burden of establishing that the forklift truck was reasonably safe, "thus satisfying [their] duty not to market a defective product" (*Patane v Thompson & Johnson Equip. Co.*, 233 AD2d 905, 906). They also established that such a warning alarm "is not mandated by any Federal or State law, rule or regulation" (*Patane v Thompson & Johnson Equip. Co., supra*, at 906). In addition, defendants established that Schoeller was aware of the availability of such warning alarms and over a period of many years had purchased forklift trucks without them. Thus, Schoeller, which was "in the best position to evaluate the need for such safety devices based upon the environment in which the forklift truck would be used, made a deliberate decision" not to install such alarms (*Patane v Thompson & Johnson Equip. Co., supra*, at 906). Defendants thereby established that the forklift truck was not defective (*see, Scarangella v Thomas Built Buses*, 93 NY2d 655, 661; *Patane*

v Thompson & Johnson Equip. Co., *supra*, at 906; *Biss v Tenneco, Inc.*, 64 AD2d 204, 207-208, *lv denied* 46 NY2d 711). Nor were defendants under a duty to warn plaintiff of the obvious risk of injury due to unsafe backing of the forklift truck (*see, Scarangella v Thomas Built Buses*, *supra*, at 662; *Liriano v Hobart Corp.*, 92 NY2d 232, 241; *Butler v Interlake Corp.*, 244 AD2d 913, 914).

In opposition, plaintiffs failed to raise a triable issue of fact. The qualifications of their expert do not establish that he has any experience or personal knowledge in the design, manufacture or use of forklift trucks, nor is the expert's conclusion that the forklift truck was defective and unsafe because of the presence and size of the rearview mirrors supported by foundational facts, such as a deviation from industry standards or statistics showing the frequency of injuries caused by using such a forklift truck (*see, Fallon v Hannay & Son*, 153 AD2d 95, 101). "Without even the semblance of a foundation based upon facts in the record or personal knowledge, the opinion of plaintiff[s'] expert was purely speculative and, thus, lacked sufficient probative force to constitute prima facie evidence that the [forklift truck] was not reasonably safe for its intended use" (*Fallon v Hannay & Son*, *supra*, at 102; *see, Merritt v Raven Co.*, ___ AD2d ___ [decided Apr. 20, 2000]). (Appeals from Order of Supreme Court, Onondaga County, Nicholson, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1050) CA 00-00205. (Erie Co.) -- MATTER OF JOHN O'DONNELL, PETITIONER-RESPONDENT, V ROBERT FERGUSON, AS CHIEF OF POLICE OF TOWN OF EVANS, ROBERT R. CATALINO, II, AS SUPERVISOR OF TOWN OF EVANS, AND THOMAS A. PARTRIDGE, THOMAS A. CSATI, KAREN C. ERICKSON AND JOSEPH GOVENETTIO, AS MEMBERS OF TOWN BOARD OF TOWN OF EVANS, RESPONDENTS-APPELLANTS. -- Judgment unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Supreme Court erred in granting the petition in part by reinstating petitioner to the position of part-time police officer in the Town of Evans, directing that he remain in that position unless suspended or dismissed pursuant to Town Law § 155, and ordering a hearing on damages.

From 1990 until 1998, petitioner had been appointed annually as a part-time police officer by the Town Board of the Town of Evans (Town Board). Respondent Chief of Police of the Town of Evans posted a notice in the Police Department stating that, effective November 17, 1998, petitioner would no longer work for the Town. No other notice was given to petitioner, nor was he informed of the reason he would no longer work for the Town. Petitioner, who was a full-time employee of the New York State Department of Corrections, had worked a total of only 27.5 days for the Town from January 1998 to October 1998. However, when petitioner was on duty for the Town, he had the same powers and responsibilities as the full-time members of the Police Department, including the same powers of arrest as the full-time officers. He carried the same firearm, wore the same uniform as the full-time officers, and was allowed to become a member of the same retirement system. In addition, he was required to complete the same specialized training as the full-time officers.

We agree with respondents that petitioner was a "special" police officer appointed pursuant to Town Law § 158 (1) who served at the pleasure of the Town Board and therefore was not entitled to the protections of Town Law § 155. Thus, the court erred in determining that the Town Board lacked authority to dismiss petitioner without first complying with Town Law § 155. Pursuant to Town Law § 158 (1), the Town Board "may employ temporary police officers from time to time" as the Town Board deems necessary, and such officers "shall serve at the pleasure of the Town Board." "[S]uch police officers shall be known as 'special policemen' and shall have all the power and authority conferred upon constables by the general laws of the state and such additional powers, not inconsistent with law, as shall be conferred upon them by the town board." We reject the contention of petitioner that he was employed on a regular basis as a part-time police officer rather than as a "special" police officer; petitioner was not scheduled to work on a regular part-time basis, but was called only from "time to time" to work on a temporary basis (Town Law § 158 [1]; *cf.*, *Matter of Goldfluss v Bonali*, 89 AD2d 708, 709). We therefore modify the judgment by dismissing the petition in its entirety. (Appeal from Judgment of Supreme Court, Erie County, Mintz, J. - CPLR art 78.)
PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ.
(Filed June 16, 2000.)

(1052) CA 99-1641. (Oswego Co.) -- PATRICIA A. GREEN, PLAINTIFF-APPELLANT, V CORLISS VARNUM, M.D., AND ABDUL RAZAQ, M.D., DEFENDANTS-RESPONDENTS. -- Order unanimously reversed on the law without costs, motions denied and complaint reinstated. Memorandum: Plaintiff was treated by defendants on numerous occasions over several years for frequent infections, joint and skeletal pain, fatigue, and various neurological disorders. Plaintiff commenced this medical malpractice action, alleging that defendants failed to diagnose her with multiple myeloma. Supreme Court erred in granting defendants' motions for summary judgment dismissing the complaint as time-barred. Although defendants met their initial burden, plaintiff raised a triable issue of fact whether the Statute of Limitations was tolled by the continuous treatment doctrine (*see*, CPLR 214-a). Plaintiff submitted proof that some of her return visits to defendants were contemplated by both plaintiff and defendants, and that defendants treated plaintiff for symptoms indicating the existence of multiple myeloma. Thus, plaintiff raised a triable issue of fact whether defendants continuously treated her "for the same illness, injury or condition which gave rise to the said act, omission or failure" (CPLR 214-a). "Merely because defendants did not diagnose plaintiff's * * * condition as cancer is not a basis to find that they were not treating [her] for it if [her] symptoms were such as to indicate its existence and they nevertheless failed to properly diagnose it" (*Hill v Manhattan W. Med. Group-H.I.P.*, 242 AD2d 255). (Appeal from Order of Supreme Court, Oswego County, Nicholson, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., PINE, HAYES AND SCUDDER, JJ. (Filed June 16, 2000.)

(1053) CA 00-00156. (Monroe Co.) -- ROBERT GRIFFIN, PLAINTIFF-RESPONDENT, V MWF DEVELOPMENT CORPORATION AND DREIER-GILTNER FUNERAL HOME, INC., DEFENDANTS-APPELLANTS. -- Order unanimously affirmed with costs. Memorandum: Plaintiff, a masonry laborer, was injured in a fall while employed by ECO Construction I, Inc. (ECO) in connection with the renovation of a building owned by defendant Dreier-Giltner Funeral Home, Inc. (D-G). D-G had contracted directly with ECO for the project masonry work. D-G did not hire a general contractor, but entered into a construction management agreement with defendant MWF Development Corporation (MWF). That agreement provided that MWF would, *inter alia*, interview and select an architect or engineer; procure

necessary municipal approvals and permits; award contracts to vendors and subcontractors; review all invoices; determine the work schedule; and furnish "on site construction supervision". Of the total payment of $34,400 to be made to MWF, $22,400 was allocated to on-site construction supervision.

According to plaintiff, just before the accident his work crew was preparing to pour the concrete basement floor. While on the first floor, plaintiff reached down through an unguarded elevator shaft to hand an object to his supervisor, slipped or lost his balance, and fell to the basement floor. Plaintiff commenced this action alleging violations of Labor Law §§ 200, 240 (1) and § 241 (6), and common-law negligence. He thereafter moved for partial summary judgment on liability, and each defendant cross-moved for summary judgment dismissing the complaint. Supreme Court, treating the cross motions as addressing only the Labor Law § 240 (1) cause of action, granted plaintiff's motion and denied defendants' cross motions. Although the court's failure to rule on the remaining aspects of the cross motions is deemed a denial (*see, Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864), defendants have abandoned any issues with respect to that denial by failing to raise such issues on appeal (*see, Ciesinski v Town of Aurora*, 202 AD2d 984).

Because plaintiff was injured as the result of a fall from an elevated worksite, he is entitled to partial summary judgment on liability on the Labor Law § 240 (1) cause of action. Plaintiff's work in the area of the open and unguarded elevator shaft subjected plaintiff to a hazard that the devices required by section 240 (1) are designed to protect against (*see, Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514; *Ring v Bristol Bldrs.*, ___ AD2d ___ [decided May 10, 2000]; *O'Connor v Lincoln Metrocenter Partners*, 266 AD2d 60; *Robertti v Chang*, 227 AD2d 542, 543-543, *lv dismissed* 88 NY2d 1064; *Serino v Miller Brewing Co.* [appeal No. 2], 167 AD2d 917, 918-919, *lv dismissed* 78 NY2d 1008). We reject the contention of MWF that differing versions of the circumstances of plaintiff's fall in the affidavits of plaintiff's supervisor and a co-worker raise an issue of fact on liability with respect to section 240 (1). It is immaterial whether plaintiff was handing an object through the unguarded elevator shaft or simply slipped or lost his balance and fell into the shaft. In either case, plaintiff was present at the worksite in the course of his construction work (*see, O'Connor v Lincoln Metrocenter Partners, supra*). We further reject

defendants' contention that there is an issue of fact whether plaintiff's own conduct was the sole proximate cause of the accident (*cf., Weininger v Hagedorn & Co.*, 91 NY2d 958, *rearg denied* 92 NY2d 875; *Lardaro v New York City Bldrs. Group*, ___ AD2d ___ [decided Apr. 17, 2000]).

The court properly determined that MWF is liable on the Labor Law § 240 (1) cause of action. The construction management agreement between D-G and MWF unambiguously authorized MWF to select the various contractors and to supervise and control their work. MWF is therefore liable as the owner's agent (*see, Russin v Picciano & Son*, 54 NY2d 311, 318; *Newman v Town of York*, 140 AD2d 935, 936; *cf., Fox v Jenny Eng'g Corp.* [appeal No. 2], 122 AD2d 532, 532-533, *affd* 70 NY2d 761; *Kerr v Rochester Gas & Elec. Corp.*, 113 AD2d 412, 416-418). "The key criterion in ascertaining Labor Law § 240 (1) liability is not whether the party charged with the violation actually exercised control over the work, but rather whether he or she had the right to do so" (*Kelly v LeMoyne Coll.*, 199 AD2d 942, 943). (Appeals from Order of Supreme Court, Monroe County, Fisher, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1054) CA 99-1570. (Herkimer Co.) -- HOWARD J. NICHOLS, ADMINISTRATOR OF THE ESTATE OF JOHN SPROSTON, DECEASED, PLAINTIFF-RESPONDENT-APPELLANT, V CUMMINS ENGINE COMPANY, DEFENDANT, CHANCE RIDES, INC., DEFENDANT-RESPONDENT-APPELLANT, AND AUBURN ARMATURE, INC., DEFENDANT-APPELLANT-RESPONDENT. -- Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: In 1991 plaintiff's decedent, an employee of third-party defendant, Gillette Shows, Inc. (Gillette), was electrocuted when he touched the gantry (framed structure) on a platform trailer while holding onto a car on the Skydiver ride, thereby completing an electrical circuit. The Skydiver ride was manufactured prior to 1970 by Chance Manufacturing Company (Chance Manufacturing). Gillette purchased the Skydiver ride from Chance Manufacturing, along with a trailer to house and transport the Skydiver cars. The trailer did not contain any power source to provide power to the Skydiver ride for its assembly and operation, and Gillette installed a genset (a generator, engine and coolant system) in the trailer to provide such power. A busbar box (a metal box to which power lines from the Skydiver ride are connected) was installed on the

outside of the trailer and electrical wiring was installed running from the genset to the busbar box. In 1985 Chance Industries, Inc. purchased the assets of Chance Manufacturing. Subsidiaries of Chance Industries, Inc. were formed, including Chance Operations and defendant Chance Rides, Inc. (Chance Rides). In 1987 Chance Rides refurbished the Skydiver ride.

Supreme Court erred in denying that part of the motion of Chance Rides seeking summary judgment dismissing the complaint against it. Plaintiff alleges that Chance Rides replaced, repaired or modified the genset, the busbar box, or the wiring from the genset to the busbar box. Chance Rides met its initial burden by establishing that it did not replace, repair or refurbish the genset, the busbar box or any of the wiring from the genset to the busbar box, and plaintiff failed to raise a triable issue of fact (*see generally, Zuckerman v City of New York,* 49 NY2d 557, 562). Although plaintiff submitted the testimony of a Gillette employee that the busbar box "looked different" after the Skydiver ride was refurbished in 1987, that witness also testified that he did not know whether it was the same busbar box.

The court properly denied that part of the motion of Chance Rides to preclude the testimony of plaintiff's expert. Although the expert did not inspect the Skydiver ride and the related components until at least three years after decedent's death, the expert's opinion was also based upon a review of the ride manual containing the configuration of electrical connections. The admissibility of expert testimony is a matter entrusted to the sound discretion of the trial court (*see, De Long v County of Erie,* 60 NY2d 296, 307).

The court properly granted that part of the motion of Chance Rides to preclude testimony concerning a prior incident in which another Gillette employee received an electric shock. There was no showing that the prior incident was substantially similar to the incident herein, which resulted in decedent's death (*see, Hyde v County of Rensselaer*, 51 NY2d 927, 929).

Finally, the court should have granted in part the motion of defendant Auburn Armature, Inc. (Auburn) for summary judgment dismissing the complaint against it. Auburn repaired the genset for Gillette on one occasion in April 1987, and thus it cannot be liable to plaintiff on a theory of failure to warn of a design defect (*see, Ayala v V & O Press Co.,* 126 AD2d 229, 237). Therefore, the court should have granted Auburn's motion to the

extent that the complaint alleges a cause of action for failure to warn of a design defect. However, to the extent that the complaint alleges a cause of action based upon Auburn's alleged negligent repair of the genset, Auburn failed to meet its burden of establishing by proof in evidentiary form that it was not negligent in its repair of the genset.

We therefore modify the order by granting that part of the motion of Chance Rides seeking summary judgment dismissing the complaint against it and by granting in part the motion of Auburn and dismissing the complaint against it to the extent that it alleges a cause of action for failure to warn of a design defect. (Appeals from Order of Supreme Court, Herkimer County, Kirk, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1055) CA 99-933. (Monroe Co.) -- CHRISTOPHER COUSINEAU AND ROSALIA COUSINEAU, PLAINTIFFS-RESPONDENTS, V PETER MULBURY, M.D., DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (*see, Smith v Catholic Med. Ctr.*, 155 AD2d 435; *see also*, CPLR 5501 [a] [1]). (Appeal from Order of Supreme Court, Monroe County, Siracuse, J. - Set Aside Verdict.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1056) CA 99-966. (Monroe Co.) -- CHRISTOPHER COUSINEAU AND ROSALIA COUSINEAU, PLAINTIFFS-RESPONDENTS, V PETER MULBURY, M.D., DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Judgment unanimously modified on the law and as modified affirmed without costs and new trial granted on damages for loss of services only unless plaintiffs, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to reduce the verdict for loss of services to $100,000, in which event the judgment is modified accordingly and as modified affirmed without costs in accordance with the following Memorandum: We reject the contention of defendant that Supreme Court erred in concluding that the explanation proffered by his attorney for the exercise of peremptory challenges with respect to two prospective jurors was pretextual. Defendant’s attorney stated that he challenged those prospective jurors because of their “education, their experiences in life”. However, he did not challenge Caucasian jurors with similar educational backgrounds and declined the court’s offer of the opportunity to question those two jurors to

obtain additional information concerning their education and life experiences. Thus, the record supports the court's determination that plaintiffs established intentional discrimination in defendant's exercise of peremptory challenges (*cf., People v Allen*, 86 NY2d 101, 110-111).

We reject defendant's contentions that plaintiffs failed to establish that defendant's conduct deviated from the accepted standard of medical care and was the proximate cause of the injury of Christopher Cousineau (plaintiff) and that the award of damages for pain and suffering and future medical expenses is excessive. We agree, however, that the award of $255,000 on the derivative cause of action for loss of services deviates materially from what would be reasonable compensation (*see*, CPLR 5501 [c]; *Rodgers v 72nd St. Assocs.*, ___ AD2d ___ [decided Feb. 17, 2000]; *Bonner v Lee* [appeal No. 2], 255 AD2d 1005, 1006). We conclude that the highest amount that can be justified by plaintiffs' evidence of loss of services is $100,000. We modify the judgment, therefore, by vacating the award of damages for loss of services, and we grant a new trial on damages for loss of services only unless plaintiffs, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to reduce the verdict for loss of services to $100,000, in which event the judgment is modified accordingly and as modified affirmed. (Appeal from Judgment of Supreme Court, Monroe County, Siracuse, J. - Damages.) PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

(1057) KA 99-5571. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V THOMAS WRIGHT, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed (*see, People v Lococo,* 92 NY2d 825, 827). (Appeal from Judgment of Supreme Court, Erie County, Tills, J. - Criminal Possession Forged Instrument, 3rd Degree.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1058) KA 99-5006. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JOHN JAYCOX, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed (*see, People v Lococo*, 92 NY2d 825, 827). (Appeal from Judgment of Erie County Court, Drury, J. - Robbery, 1st Degree.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1059) KA 99-5375. (Jefferson Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V WILFREDO A. FIGUEROA-GUZMAN, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: By failing to move to withdraw his guilty plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that he did not knowingly, intelligently and voluntarily enter his guilty plea (*see, People v Toxey,* 86 NY2d 725, 726, *rearg denied* 86 NY2d 839; *People v Lopez,* 71 NY2d 662, 665). This is not one of those rare cases in which defendant's recitation of the underlying facts engenders significant doubt with respect to defendant's guilt or otherwise calls into question the voluntariness of the plea (*see, People v Toxey, supra,* at 726; *People v Lopez, supra,* at 666). "The record shows that defendant was advised of his rights and that his *Alford* plea (*see, North Carolina v Alford,* 400 US 25) was knowingly, intelligently and voluntarily entered with a full understanding of its consequences" (*People v Alfieri,* 201 AD2d 935, *lv denied* 83 NY2d 908; *see, People v Peralta,* 231 AD2d 958, *lv denied* 90 NY2d 909). Although defendant could not remember what happened on the evening that he allegedly committed the crime, the proof that the People intended to offer at trial, which was established in part at the *Wade* hearing, contained strong evidence of defendant's guilt (*see, People v Peralta, supra; People v Sanford,* 231 AD2d 900, *lv denied* 89 NY2d 929). We also reject the contention that defendant was denied effective assistance of counsel. "[T]he evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147; *see, People v Flores*, 84 NY2d 184, 187). (Appeal from Judgment of Jefferson County Court, Clary, J. - Assault, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1060) KA 99-234. (Cayuga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-APPELLANT, V PATRICK TILLMAN, DEFENDANT-RESPONDENT. -- Order unanimously reversed on the law, motion denied, verdict under counts one and four of the indictment reinstated and matter remitted to Cayuga County Court for sentencing under counts one and four of the indictment. Memorandum: Defendant was charged with, *inter alia*, burglary in the second degree (Penal Law § 140.25 [2]), for having "knowingly

entered and remained unlawfully in [his ex-girlfriend's] residence with the intent to commit the crime of criminal contempt", and criminal contempt in the second degree (Penal Law § 215.50 [2]), for having "intentionally violated an order of protection issued to [his ex-girlfriend] * * * of which he was aware." The jury convicted defendant of those counts, among others.

Prior to sentencing, defendant moved to "vacate the judgment" convicting him of those two counts, contending for the first time that there was no valid order of protection in effect at the time of the alleged incident. County Court treated the motion as one to set aside the verdict with respect to those two counts (*see*, CPL 330.30), granted the motion and dismissed counts one and four of the indictment. That was error.

"The 'basis for vacating a jury verdict prior to sentencing is strictly circumscribed by CPL 330.30' to allow vacatur only if reversal would have been mandated on appeal as a matter of law" (*People v Ortiz*, 250 AD2d 372, 375, *lv denied* 92 NY2d 881, quoting *People v D'Allessandro*, 184 AD2d 114, 117, *lv denied* 81 NY2d 884). Reversal of a judgment of conviction based on legally insufficient evidence is not "mandated on appeal as a matter of law" unless the issue has been preserved for appellate review by a timely motion to dismiss directed at the specific deficiency in the proof (*People v Ortiz*, *supra*, at 375; *see*, *People v Gray*, 86 NY2d 10, 19-20). Here, defendant did not move to dismiss the burglary or contempt charges on the ground that the underlying orders of protection were not valid at the time defendant allegedly violated them. Because defendant's contention concerning the legal sufficiency of the evidence was not preserved for appellate review by a timely motion to dismiss directed at the specific deficiency in the proof (*see*, *People v Gray*, *supra*, at 19-20), "the trial court was without authority to set aside the verdict" (*People v Patino*, 259 AD2d 502, *lv denied* 93 NY2d 976). We therefore reverse the order, deny defendant's motion, reinstate the verdict under counts one and four of the indictment and remit the matter to Cayuga County Court for sentencing on those counts.

In light of our determination, we do not reach the People's remaining contentions. (Appeal from Order of Cayuga County Court, Corning, J. - Dismiss Indictment.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1062) KA 99-02119. (Genesee Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V DEMETRIUS BENNETT, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: We reject the contention that defendant was denied a fair trial as the result of violations of the People's disclosure obligations under CPL 240.45 and *Brady v Maryland* (373 US 83). Even if the failure to disclose the record of the disorderly conduct conviction of a prosecution witness constituted a violation of CPL 240.45 (1) (b), defendant was not thereby denied a fair trial because he "was 'given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the witness'" (*People v Osborne,* 91 NY2d 827, 828, quoting *People v Cortijo,* 70 NY2d 868, 870; *see also, People v Clark,* 228 AD2d 326, *lv denied* 89 NY2d 863). The prosecutor complied with his obligation to disclose "[t]he existence of any pending criminal action against a witness the people intend to call at trial" by identifying the charges pending against the witness (CPL 240.45 [1] [c]). The prosecutor had no obligation pursuant to CPL 240.45 (1) (b) to disclose the juvenile delinquency adjudication of another witness because that adjudication is not a criminal conviction (*see, People v Gray,* 84 NY2d 709, 712; *see also, People v Fyffe,* 249 AD2d 938, *lv denied* 92 NY2d 897). Even assuming that the prosecutor had an obligation to disclose the adjudication prior to trial on the ground that it constitutes *Brady* material (*see, Matter of Evan U.,* 244 AD2d 691, 693-694), we note that the adjudication was disclosed while the witness was testifying and thus conclude that defendant had a meaningful opportunity to use it during his cross-examination of that witness (*see, People v Cortijo, supra,* at 870; *People v Pepe,* 259 AD2d 949, 949-950, *lv denied* 93 NY2d 1024). Thus, defendant was not denied a fair trial by the delayed disclosure (*see, People v Pepe, supra*, at 949-50).

The contention that the prosecutor bolstered the testimony of his key witness is not preserved for our review (*see,* CPL 470.05 [2]; *People v Alston,* 163 AD2d 398, *lv denied* 76 NY2d 851), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see,* CPL 470.15 [6] [a]). We reject defendant's contentions that the verdict is contrary to the weight of the evidence (*see, People v Bleakley,* 69 NY2d 490, 495) and that the sentence is unduly harsh or severe. (Appeal from Judgment of Genesee County Court, Noonan,

J. - Robbery, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1063) KA 99-5301. (Chautauqua Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V HENRY B. STOVALL, JR., DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Defendant contends that the verdict convicting him of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and acquitting him of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) is repugnant. We disagree. A verdict is repugnant "only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict was rendered" (*People v Tucker,* 55 NY2d 1, 7, *rearg denied* 55 NY2d 1039). County Court charged the jury that criminal possession of a controlled substance in the third degree requires knowing and unlawful possession with the intent to sell, while criminal sale of a controlled substance in the third degree requires a knowing and unlawful sale. Because possession and intent to sell are not necessary elements of criminal sale of a controlled substance in the third degree, defendant's acquittal on the possession count is not conclusive with respect to a necessary element of the sale count (*see generally, People v White*, 172 AD2d 790; *People v Gonzalez*, 156 AD2d 711). (Appeal from Judgment of Chautauqua County Court, Ward, J. - Criminal Sale Controlled Substance, 3rd Degree.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1064) CAF 99-7191. (Erie Co.) -- MATTER OF CHAKEEO B-G. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; DIANE B., RESPONDENT-APPELLANT, ET AL., RESPONDENT. -- Order unanimously affirmed without costs. Memorandum: Family Court properly adjudicated respondent's newborn son to be a neglected child. Petitioner established by a preponderance of the evidence that the physical, mental or emotional condition of respondent's newborn son was in imminent danger of becoming impaired as a result of respondent's failure to exercise a minimum degree of care (*see*, Family Ct Act § 1012 [f] [i]; § 1046 [b] [i]). Petitioner established that the nurse practitioner who was caring for respondent's prematurely-born son advised respondent on multiple occasions of her obligation to satisfy various discharge

criteria, including supervised feedings and a course in cardiopulmonary resuscitation, prior to the anticipated discharge date of December 1, 1998. Despite those repeated reminders, respondent failed to complete the required training by that date and, indeed, failed to visit her son or otherwise contact the hospital from November 28 through December 1, 1998. When respondent appeared at the hospital on December 2, 1998, she was advised by a caseworker for Child Protective Services that she had the remainder of the day in which to complete her training. Respondent failed to do so, and petitioner filed the subject neglect petition the following day. The failure of respondent to contact the hospital in the days prior to the discharge date and to satisfy the required criteria for the release of her son, who was in need of special care, demonstrates a failure to exercise a minimum degree of care for her son (*see*, Family Ct Act § 1012 [f] [i]; *see generally*, *Matter of Camara R.*, 263 AD2d 710, 711-712). Respondent presented no evidence to counter petitioner's prima facie showing of neglect.

Contrary to the contention of respondent, the court did not err in considering her history of neglect concerning her other children in addition to the facts in the present case (*see*, *Matter of Daequan FF.*, 243 AD2d 922, 923). Furthermore, we reject her contention that her satisfaction of the required discharge criteria the day after the petition was filed precludes a finding of neglect (*see generally*, *Matter of Camara R.*, *supra*, at 712-713). We have considered respondent's remaining contentions and conclude that they are without merit. (Appeal from Order of Erie County Family Court, Rosa, J. - Neglect.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1065) CAF 99-07210. (Allegany Co.) -- MATTER OF ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O JENNIFER L. H., PETITIONER-RESPONDENT, V THOMAS T., RESPONDENT-APPELLANT. -- Order unanimously reversed on the law without costs, objections granted, order of Hearing Examiner vacated and matter remitted to Allegany County Family Court for further proceedings on the petition. Memorandum: Respondent appeals from an order of Family Court that denied his objections to those parts of a Hearing Examiner's order requiring respondent to pay arrears and $25 per week in child support. Petitioner commenced this proceeding seeking a declaration of paternity and an order of support. Respondent, who was 19 years old and whose only source

of income was supplemental security income (SSI) benefits in the amount of $517 per month, appeared *pro se* before the Hearing Examiner on the return date of the petition. The Hearing Examiner informed respondent that he had the right to the services of an attorney, that an attorney would be appointed for him if he could not afford one and that he was entitled to an adjournment for the purpose of retaining the services of an attorney. Respondent stated unequivocally that he wanted to have an attorney appointed for him. The Hearing Examiner reserved decision on respondent's request for an attorney and ordered genetic marker tests.

Respondent again appeared *pro se* at the next scheduled appearance before the Hearing Examiner. The Hearing Examiner indicated that the genetic marker test results established a 99.63 percent probability that respondent was the father of the child at issue. The Hearing Examiner did not ask respondent whether he still wanted to have an attorney appointed for him; the Hearing Examiner proceeded to extract an admission of paternity from respondent. Only after respondent admitted paternity did the Hearing Examiner provide respondent with a form that contained what the Hearing Examiner described as "the rights I've advised you of orally", and respondent signed the form. Although the form advised respondent of his right to an attorney, it was not provided to him until after he admitted paternity.

The Hearing Examiner then asked the child's mother how much support she "wanted" from respondent. She indicated that she wanted $25 per week, and the Hearing Examiner asked respondent whether he was willing to pay that amount. Respondent stated that he was, but asked the Hearing Examiner whether the Hearing Examiner had been provided with a copy of respondent's "Social Security stuff". The Hearing Examiner answered "no", ordered respondent to pay $25 per week, and set arrears based upon that amount.

We agree with respondent that his right to counsel pursuant to Family Court Act § 262 (a) (viii) was violated when the Hearing Examiner ignored his unequivocal request for the appointment of counsel. The objections to the Hearing Examiner's order should have been granted on that ground alone.

In addition, the amount of child support set by the Hearing Examiner was illegal. Respondent's income of $517 per month, consisting solely of SSI benefits, was below the poverty level; therefore, it was error to require respondent to pay the amount

of $25 per week (*see,* Family Ct Act § 413 [1] [d]; *Matter of Rose v Moody,* 83 NY2d 65, *cert denied sub nom. Attorney General of N. Y. v Moody*, 511 US 1084). We reject the conclusion of Family Court, set forth in its decision underlying the order denying respondent's objections, that respondent consented to the amount of child support. The consent of respondent was obtained in violation of his right to counsel. We further note that the Hearing Examiner's order also violates the nonwaivable provision of Family Court Act § 413 (1) (h) requiring that an order incorporating the parties' agreement to deviate from the basic child support obligation must contain the court's reasons for approving the deviation (*see, Matter of Michelle W. v Forrest James P.*, 218 AD2d 175, 178). Although that issue is raised for the first time in respondent's brief, it is nevertheless properly before us; the issue is one of law appearing on the face of the record that petitioner could not have countered had it been raised in the court of first instance (*see, Oram v Capone,* 206 AD2d 839, 840).

We therefore reverse the order, grant the objections, vacate the order of the Hearing Examiner and remit the matter to Allegany County Family Court for further proceedings on the petition. (Appeal from Order of Allegany County Family Court, Feeman, Jr., J. - Support.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1066) CAF 99-7115. (Ontario Co.) -- MATTER OF CHRISTINA W. ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; LISA MARIE J., RESPONDENT-APPELLANT. -- Order unanimously affirmed without costs. Memorandum: Family Court's determination that respondent permanently neglected her child is supported by clear and convincing evidence. The record establishes that, despite petitioner's diligent efforts to encourage and strengthen the parental relationship, respondent failed substantially and continuously to maintain contact with or plan for the future of the children (*see*, Social Services Law § 384-b [7] [a]). Clear and convincing evidence also supports the court's determination that respondent abandoned the child. Abandonment occurs when the parent "evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency" (Social Services Law §

384-b [5] [a]). Respondent's "sporadic and insubstantial contacts" with petitioner during the six-month period immediately prior to the filing of the petition are insufficient to preclude a finding of abandonment (*Matter of Candice K.*, 245 AD2d 821, 822; *see, Matter of Nahiem G.*, 241 AD2d 632, 633). Finally, the record supports the court's determination that termination of respondent's rights and transfer of the custody and guardianship of the child to petitioner is in the child's best interests (*see, Matter of Star Leslie W.*, 63 NY2d 136, 147-148). (Appeal from Order of Ontario County Family Court, Harvey, J. - Terminate Parental Rights.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1067) CAF 99-1677. (Erie Co.) -- MATTER OF ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O TIFFANY M. H., PETITIONER-RESPONDENT, V GREG G., RESPONDENT-APPELLANT. --
Order unanimously modified on the law and as modified affirmed without costs and matter remitted to Erie County Family Court for further proceedings on the petition in accordance with the following Memorandum: Respondent failed to appear at a paternity proceeding and, upon his default, an order of filiation and support was entered. Almost six years later, petitioner sought an increase in respondent's child support obligation and respondent requested a genetic marker test to determine whether he was the father of the child. The parties stipulated to have the test performed, and the test results excluded respondent as the father of the child. Respondent thereafter moved, *inter alia*, to vacate the order of filiation and support on the ground that the mother had allegedly engaged in "fraud, misrepresentation, or other misconduct" (CPLR 5015 [a] [3]).

Family Court erred in denying the motion in its entirety. "The general rule with respect to opening defaults in civil actions is not to be applied as rigorously in actions or proceedings involving the custody, care and support of children" (*Matter of Patricia J. v Lionel S.*, 203 AD2d 979). Despite knowing that another man could have fathered her child, the mother allowed a paternity petition to be filed on her behalf against respondent only. In addition, during the paternity hearing, the mother failed to reveal that, around the time of conception, she had sexual intercourse with another man in addition to respondent. Under those circumstances, we agree with respondent that his motion to vacate the order of filiation and

support should have been granted. We further agree with respondent that the doctrine of equitable estoppel should not apply to preclude him from challenging the order of filiation and support. The child's best interests are of paramount concern in determining whether the doctrine applies (*see, Matter of Louise P. v Thomas R.*, 223 AD2d 592, 593), and here respondent has never seen the child and has no relationship with her.

We therefore modify the order by granting respondent's motion in part and vacating the order of filiation and support, and we remit the matter to Erie County Family Court for further proceedings on the petition. (Appeal from Order of Erie County Family Court, Mix, J. - Support.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1068) CAF 99-7150. (Erie Co.) -- MATTER OF MARKUS R. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MARGARET H., RESPONDENT-APPELLANT. (APPEAL NO. 1.) -- Order unanimously affirmed without costs. Memorandum: Family Court properly adjudicated respondent's two sons, Markus R. and Matthew R., to be permanently neglected and adjudicated respondent's daughter, Mariah R., to be abandoned. With respect to respondent's sons, petitioner met its burden of establishing by clear and convincing evidence that, despite petitioner's "diligent efforts to encourage and strengthen the parental relationship" (Family Ct Act § 614 [1] [c]), respondent failed to plan for their future. Although the court failed to comply with CPLR 4213 (b) by setting forth the facts it deemed essential to its decision (*see*, *Matter of Kelly G.*, 244 AD2d 709), the record is adequate to enable us to make the necessary findings (*see*, *Matter of Howard R.*, 258 AD2d 893). Contrary to respondent's contention, petitioner established that it made meaningful efforts to assist respondent in overcoming her parental inadequacies, particularly her substance abuse problem. Petitioner referred respondent to a substance abuse counselor, who in turn referred respondent to an inpatient program. However, respondent left the program after only three days. In addition, although the caseworker advised respondent of visitation and other services offered through Catholic Charities, respondent never pursued those services. Furthermore, although respondent inquired about procuring adequate housing on one occasion, the caseworker's attempt to assist respondent in that regard was thwarted when the caseworker was unable to locate

respondent for several months. Thus, petitioner established that its "efforts were futile because respondent made no efforts to correct the circumstances that initially required removal of the children" (*Matter of J. Scott P.*, 244 AD2d 906). "[A]n agency that has embarked on a diligent course but faces an utterly uncooperative or indifferent parent should nevertheless be deemed to have fulfilled its duty" (*Matter of Sheila G.*, 61 NY2d 368, 385; *see*, *Matter of Paulette B.*, ___ AD2d ___ [decided Mar. 29, 2000]).

Contrary to respondent's contention, petitioner was not required to show that it made diligent efforts to encourage respondent to maintain contact with her daughter in order to establish abandonment (*see*, Social Services Law § 384-b [5] [b]). Petitioner met its burden of establishing by clear and convincing evidence that respondent failed to visit her daughter or communicate with her daughter or petitioner during the six-month period immediately preceding the filing of the abandonment petition (*see*, *Matter of Ariel C.*, 248 AD2d 976, *lv denied* 92 NY2d 801), and respondent offered no evidence to the contrary. (Appeal from Order of Erie County Family Court, Dillon, J. - Terminate Parental Rights.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1069) CAF 99-7151. (Erie Co.) -- MATTER OF MATTHEW R. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MARGARET H., RESPONDENT-APPELLANT. (APPEAL NO. 2.) -- Order unanimously affirmed without costs. Same Memorandum as in *Matter of Markus R.* ([appeal No. 1] ___ AD2d ___ [decided herewith]). (Appeal from Order of Erie County Family Court, Dillon, J. - Terminate Parental Rights.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1070) CAF 99-7152. (Erie Co.) -- MATTER OF MARIAH R. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MARGARET H., RESPONDENT-APPELLANT. (APPEAL NO. 3.) -- Order unanimously affirmed without costs. Same Memorandum as in *Matter of Markus R.* ([appeal No. 1] ___ AD2d ___ [decided herewith]). (Appeal from Order of Erie County Family Court, Dillon, J. - Terminate Parental Rights.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1071) CA 99-00955. (Erie Co.) -- J.J. JULIANO CONSTRUCTION, INC., PLAINTIFF-APPELLANT, V BURGIO & CAMPOFELICE, INC., DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. -- Judgment unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Supreme Court erred in allowing Burgio & Campofelice, Inc. (defendant), the general contractor, to charge plaintiff subcontractor for the amounts defendant expended to correct a defect in the concrete floor of the auditorium that was poured by plaintiff. The subcontract provides that the general contractor must provide notice to the subcontractor that the work is defective as a condition precedent to making the subcontractor liable for damages caused by its defective work. Defendant admitted that it did not provide the requisite notice (*see, Sturdy Concrete Corp. v NAB Constr. Corp.*, 65 AD2d 262, 273-274, *appeal dismissed* 46 NY2d 938). We therefore modify the judgment in favor of defendant by subtracting the amount of $6,259.45 ($5,443 plus 15% allowed to defendant for overhead and profit) together with interest thereon and otherwise affirm. We have examined the remaining arguments advanced by plaintiff and conclude that they lack merit. (Appeal from Judgment of Supreme Court, Erie County, Roberts, J.H.O. - Damages.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1072) CA 00-81. (Genesee Co.) -- MATTER OF APPLICATION FOR DISSOLUTION OF PENEPENT CORPORATION, INC. ESTATE OF FRANCIS PENEPENT, PETITIONER-RESPONDENT; RICHARD S. PENEPENT, RESPONDENT-APPELLANT. -- Judgment unanimously affirmed with costs for reasons stated in decision at Supreme Court, Morton, R. (Appeal from Judgment of Supreme Court, Genesee County, Morton, R. - Business Corporation Law.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1073) CA 99-922. (Erie Co.) -- JOHN LAUBER AND CAROLYN LAUBER, PLAINTIFFS-APPELLANTS, V SEARS, ROEBUCK AND COMPANY AND AMERICAN YARD PRODUCTS DIVISION, WCI OUTDOOR PRODUCTS, INC., DEFENDANTS-RESPONDENTS. -- Judgment unanimously affirmed without costs. Memorandum: John Lauber (plaintiff) was injured while driving a tractor purchased from defendant Sears, Roebuck and Company and manufactured by defendant American Yard Products Division, WCI Outdoor Products, Inc. Plaintiff turned around to observe traffic, placing his hand on the rear fender of the tractor to

balance himself, and his fingers were caught in the chains of the rear wheel. He commenced this action asserting causes of action for negligence, breach of warranty, and strict products liability.

Supreme Court properly granted defendants' motion for summary judgment dismissing the amended complaint. Defendants met their initial burden of establishing that there was no defect in the design or manufacture of the tractor and that they were not negligent in its design or manufacture (*see, Rochester Refrig. Corp. v Easy Heat,* 222 AD2d 1013, 1014, *lv dismissed* 87 NY2d 1056, *lv denied* 89 NY2d 817). Defendants established that, in the exercise of reasonable care, plaintiff should have discovered that the rear fender was approximately 1½ inches above the tire and that, if his hand came in contact with the moving tire, an injury would occur (*see generally, Voss v Black & Decker Mfg. Co.,* 59 NY2d 102, 106). Defendants further established that the tractor was reasonably safe for the ordinary purposes for which it is used (*see generally,* UCC 2-314 [2] [c]; *Affuso v Crestline Plastic Pipe Co.,* 194 AD2d 884, 885). Finally, defendants established that they had no duty to warn; the danger of placing fingers close to a moving wheel is among the "limited class of hazards" for which no warning is necessary "because they are patently dangerous or pose open and obvious risks" (*Liriano v Hobart Corp.,* 92 NY2d 232, 241). In opposition to the motion, plaintiffs failed to raise a triable issue of fact on any cause of action. (Appeal from Judgment of Supreme Court, Erie County, Sedita, Jr., J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1074) CA 99-1319. (Monroe Co.) -- LAWRENCE A. SCOTT, PLAINTIFF-APPELLANT, V YOUNG LIFE, MICHAEL G. O'LEARY, IN HIS OFFICIAL CAPACITY AS YOUNG LIFE NORTHERN DIVISION DIVISIONAL ADMINISTRATOR, GAIL G. MERRICK, IN HER OFFICIAL CAPACITY AS YOUNG LIFE NORTHERN DIVISION REGIONAL DIRECTOR, RICHARD J. ROGAN, IN HIS OFFICIAL CAPACITY AS YOUNG LIFE GREATER ROCHESTER AREA DIRECTOR, JACK CLEVELAND, IN HIS OFFICIAL CAPACITY AS YOUNG LIFE GREATER ROCHESTER CHURCH PARTNER STAFF, FRED BASSETTE, IN HIS OFFICIAL CAPACITY AS YOUNG LIFE GREATER ROCHESTER METROPOLITAN BOARD CHAIRMAN, CHRIS DOUGHTY, IN HER OFFICIAL CAPACITY AS YOUNG LIFE GREATER ROCHESTER GATES-CHILI COMMITTEE MEMBER, AND WILLIAM L. PARKER, IN HIS OFFICIAL CAPACITY AS GENERAL COUNSEL AND SECRETARY OF YOUNG LIFE, DEFENDANTS-RESPONDENTS. -- Order

unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: In this defamation action, plaintiff appeals from an order that granted in part defendants' motion for summary judgment by dismissing the first and third through ninth and 11th causes of action. We agree with plaintiff that Supreme Court erred in dismissing the first and sixth through ninth causes of action on the ground of qualified privilege, and thus we modify the order accordingly. By failing to submit any proof in admissible form with respect to those causes of action, defendants did not meet their initial burden of proving qualified privilege with respect to the statements alleged therein, and the burden therefore never shifted to plaintiff to prove that defendants made the statements with malice (*cf.*, *Teixeira v Korth*, 267 AD2d 958).

Contrary to plaintiff's contention, the court properly granted that part of defendants' motion seeking summary judgment dismissing the third and fifth causes of action based on plaintiff's failure to state a cause of action (*see*, CPLR 3211 [a] [7]; *see generally*, *American Food & Vending Corp. v International Bus. Machs. Corp.*, 245 AD2d 1089, 1090, *lv dismissed* 91 NY2d 956). The court properly determined that the statements forming the bases for those causes of action constitute nonactionable statements of opinion rather than statements of fact (*see*, *Gross v New York Times Co.*, 82 NY2d 146, 152-153; *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 139, *rearg denied* 81 NY2d 759, *cert denied* 508 US 910).

We have considered plaintiff's remaining contentions and conclude that they are without merit. (Appeal from Order of Supreme Court, Monroe County, Affronti, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1075) CA 00-00141. (Erie Co.) -- DON F. MANZELLA, PLAINTIFF-RESPONDENT, V PROVIDENT LIFE AND CASUALTY COMPANY, DEFENDANT-APPELLANT. -- Order unanimously affirmed with costs. Memorandum: In August 1991 defendant issued a disability income policy to plaintiff. In September 1992, after suffering a back injury, plaintiff filed a claim for the payment of benefits under the policy. Defendant paid benefits to plaintiff until September 23, 1997, when it notified plaintiff that his benefits were being terminated because he no longer met the policy definition of totally disabled. Plaintiff then commenced this breach of

contract action. In its demand and second demand for production of documents, defendant sought plaintiff's personal income tax returns from a time prior to plaintiff's injury. Defendant contended that plaintiff, who had been a successful insurance agent for Prudential from 1966 through 1991, had suffered business setbacks after making a decision to go into business for himself. Defendant contended that plaintiff's financial situation was relevant on the issue whether plaintiff had a motive to falsify his injury claim.

Supreme Court properly denied defendant's motion to compel disclosure of plaintiff's personal income tax returns. Disclosure of tax returns is disfavored because of their "confidential and private nature" (*Gordon v Grossman,* 183 AD2d 669, 670), and the party seeking such disclosure must make a showing of "overriding necessity" (*Four Aces Jewelry Corp. v Smith,* 256 AD2d 42; *see also, Leinoff, Inc. v 208 W. 29th St. Assocs.,* 243 AD2d 418, 419). Defendant failed to make that showing. The issue in this breach of contract action is whether plaintiff was no longer disabled within the meaning of the policy. Thus, the financial condition of plaintiff preceding his claim for disability benefits is irrelevant. (Appeal from Order of Supreme Court, Erie County, Notaro, J. - Discovery.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1076) CA 99-1665. (Oneida Co.) -- SALLY J. LIDDELL AND PAUL R. LIDDELL, PLAINTIFFS-APPELLANTS, V SLOCUM-DICKSON MEDICAL GROUP, P.C., AND LOUANNE APEL, DEFENDANTS-RESPONDENTS. -- Order unanimously affirmed with costs. Memorandum: Plaintiffs commenced this action to recover damages for injuries allegedly sustained by Sally J. Liddell (plaintiff) as the result of a venipuncture performed by defendant Louanne Apel, a phlebotomist employed by defendant Slocum-Dickson Medical Group, P.C. (Slocum-Dickson). Supreme Court properly granted defendants' motion for partial summary judgment dismissing the fourth cause of action, alleging that Slocum-Dickson was negligent in hiring and supervising Apel. Because Apel was acting within the scope of her employment when plaintiff was injured, Slocum-Dickson is liable for any damages caused by Apel's alleged negligence under the doctrine of respondeat superior, and "no claim may proceed against the employer for negligent hiring" or supervision (*Karoon v New York City Tr. Auth.,* 241 AD2d 323, 324; *see, Eifert v Bush,*

27 AD2d 950, 951, *affd* 22 NY2d 681; *Weinberg v Guttman Breast & Diagnostic Inst.,* 254 AD2d 213). (Appeal from Order of Supreme Court, Oneida County, Grow, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1077) CA 00-00134. (Steuben Co.) -- EUGENE GUTOW, PLAINTIFF-APPELLANT, V JERAMY F. O'BRIEN AND DOROTHY M. ARNOLD, DEFENDANTS-RESPONDENTS. -- Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Steuben County, Furfure, J. - Summary Judgment.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1078) CA 00-111. (Erie Co.) -- ROBERT W. COOK, PLAINTIFF, V JOSEPH KOMOROWSKI, ET AL., DEFENDANTS. (ACTION NO. 1.) ROBERT W. COOK, PLAINTIFF-APPELLANT, V ALLSTATE INSURANCE COMPANY, DEFENDANT-RESPONDENT. (ACTION NO. 2.) (APPEAL NO. 1.) -- Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Erie County, Sconiers, J. - Dismiss Pleading.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1079) CA 00-122. (Erie Co.) -- ROBERT W. COOK, PLAINTIFF, V JOSEPH KOMOROWSKI, ET AL., DEFENDANTS. (ACTION NO. 1.) ROBERT W. COOK, PLAINTIFF-APPELLANT, V ALLSTATE INSURANCE COMPANY, DEFENDANT-RESPONDENT. (ACTION NO. 2.) (APPEAL NO. 2.) -- Appeal unanimously dismissed without costs (*see, Kuhn v Kuhn*, 129 AD2d 967). (Appeal from Decision of Supreme Court, Erie County, Sconiers, J. - Dismiss Pleading.) PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

(1080) KA 99-5275. (Allegany Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JOSEPH M. ALLEN, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Allegany County Court, Euken, J. - Manslaughter, 1st Degree.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1081) KA 99-5025. (Cayuga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V THOMAS R. LADD, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Supreme Court, Cayuga County, Corning, J. - Burglary,

3rd Degree.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1082) KA 98-05319. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V LAUREL FINGLAND, DEFENDANT-APPELLANT. -- Judgment unanimously modified on the law and as modified affirmed and matter remitted to Monroe County Court for resentencing in accordance with the following Memorandum: The sentencing minutes establish that County Court improperly sentenced defendant to a term of incarceration of 1⅓ to 3 years upon her conviction of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [2]; § 1193 [1] [c]; *see,* Penal Law § 70.00 [3] [b]), although a legal sentence of 1⅓ to 4 years is set forth in the certificate of conviction. Because the court imposed an illegal sentence, we modify the judgment by vacating the sentence, and we remit the matter to Monroe County Court for resentencing (*see, People v Bernard,* 214 AD2d 576, 578, *lv denied* 86 NY2d 732). (Appeal from Judgment of Monroe County Court, Bristol, J. - Felony Driving While Intoxicated.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1083) KA 99-2264. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JEFFREY TOBIAS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: County Court properly denied defendant's motion to suppress the showup identification of defendant by the victim's wife. Defendant was apprehended in a vehicle that the police observed speeding from the crime scene, and the police conducted the showup at the crime scene approximately 20 minutes later. Although defendant was identified while wearing handcuffs, the evidence supports the determination of the suppression court that the identification procedure was not unduly suggestive (*see, People v Sanabria*, 266 AD2d 41, *lv denied* 94 NY2d 884; *see also, People v Becht*, 236 AD2d 792, *lv denied* 89 NY2d 1088, *cert denied* 522 US 887).

We reject the contention of defendant that his statement to the police should have been suppressed because eight hours elapsed between the time of his *Miranda* warnings and the time of his statement (*see, People v Baker*, 208 AD2d 758, *lv denied* 85 NY2d 905). Once *Miranda* warnings are issued to an individual in police custody and that individual voluntarily and intelligently waives his rights, repeated warnings are not required as long as questioning occurs within a reasonable time and the custody has

remained continuous (*see, People v Kemp*, 266 AD2d 887; *People v Stanton*, 162 AD2d 987, *lv denied* 76 NY2d 991). Additionally, the court did not abuse its discretion in refusing to admit in evidence the transcript of the Grand Jury testimony of a prosecution witness; defense counsel was permitted to read into the record the witness's inconsistent statements to the Grand Jury and the witness admitted making those statements (*see generally, People v Lugo*, 140 AD2d 715, 716, *lv denied* 72 NY2d 1047). Furthermore, the contention of defendant that he was deprived of *Brady* material has not been preserved for our review (*see, People v Brahney*, 239 AD2d 930, *lv denied* 91 NY2d 869), 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]).

Defendant further contends that prosecutorial misconduct on summation deprived him of a fair trial. We disagree. By sustaining defense counsel's objection and giving a curative instruction, the court obviated any prejudice caused by comments of the prosecutor indicating that defendant had a burden of proof (*see generally, People v Andrews*, 267 AD2d 1071, *lv denied* 94 NY2d 916; *People v Chase*, 265 AD2d 844, 845-846, *lv denied* 94 NY2d 902). To the extent that other comments by the prosecutor on summation were inappropriate, they were not so egregious as to deprive defendant of a fair trial (*see, People v Roopchand*, 107 AD2d 35, 36-37, *affd* 65 NY2d 837).

We have reviewed defendant's remaining contentions and conclude that they are without merit. (Appeal from Judgment of Monroe County Court, Egan, J. - Murder, 2nd Degree.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1084) KA 00-131. (Livingston Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JOHN N. DAVENPORT, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Having failed either to move to withdraw his guilty plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that the plea colloquy is insufficient because County Court did not advise him of his constitutional right to confront his accusers or the requirement that a verdict be unanimous (*see*, *People v Riviezzo*, 124 AD2d 837, *lv denied* 69 NY2d 832; *People v Orr*, 111 AD2d 937, 938, *lv denied* 66 NY2d 766; *see generally, People v Lopez,* 71 NY2d 662, 665). In any event, that contention lacks merit. The record establishes that

defendant's guilty plea was knowingly, intelligently and voluntarily entered (*see, People v Harris*, 61 NY2d 9, 16-19; *People v Merrifield*, 266 AD2d 922; *People v Guerrone*, 208 AD2d 383, 383-384, *lv denied* 84 NY2d 1011). The sentence, to which defendant agreed as part of the negotiated plea, is neither unduly harsh nor severe (*see, People v Welsher*, ___ AD2d ___ [decided Mar. 29, 2000]). (Appeal from Judgment of Livingston County Court, Alonzo, J. - Sodomy, 3rd Degree.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1085) KAH 99-1597. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK EX REL. ALFRED MANCUSO, PETITIONER-APPELLANT, V VICTOR HERBERT, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, AND GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENTS-RESPONDENTS. -- Judgment unanimously affirmed without costs (*see, People ex rel. Batista v Walker*, 198 AD2d 865, *lv denied* 83 NY2d 752). (Appeal from Judgment of Supreme Court, Erie County, Dillon, J. - Habeas Corpus.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1086) KAH 99-05259. (Onondaga Co.) -- PEOPLE OF THE STATE OF NEW YORK EX REL. REGGIE CASWELL, PETITIONER-APPELLANT, V NEW YORK STATE DIVISION OF PAROLE, RESPONDENT-RESPONDENT. -- Appeal unanimously dismissed without costs. Memorandum: Relator contends that he was improperly denied a preliminary parole revocation hearing on the allegation that he was convicted of a crime in Illinois. That contention was rendered moot by the determination revoking relator's parole following a final parole revocation hearing (*see, People ex rel. Wagner v Travis*, ___ AD2d ___ [decided herewith]; *People ex rel. McCummings v De Angelo*, 259 AD2d 794, 794-795, *lv denied* 93 NY2d 810; *People ex rel. Chavis v McCoy*, 236 AD2d 892). (Appeal from Judgment of Supreme Court, Onondaga County, Brunetti, J. - Habeas Corpus.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1087) CAF 99-7056. (Allegany Co.) -- MATTER OF JESSI ANN D., JODI LYNN D., JAMIE MARIE D. AND JOSI B. D. ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; ELLEN D., RESPONDENT-APPELLANT. -- Order unanimously affirmed without costs. (Appeal from Order of Allegany County Family Court, Dadd,

J. - Abandonment.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1088) CAF 99-7201. (Onondaga Co.) -- MATTER OF WENDY F., PETITIONER-APPELLANT, V ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT-RESPONDENT. -- Amended order unanimously affirmed without costs. Memorandum: In 1995 petitioner's son was placed in respondent's custody and was subsequently adjudicated a neglected child. His placement in foster care was extended periodically, and in April 1998 respondent filed a petition alleging that petitioner had permanently neglected her son. Petitioner admitted the allegations in that petition and consented to entry of an order suspending judgment for six months and requiring her to comply with eight conditions. Family Court ordered that the suspended judgment would automatically expire in six months unless petitioner filed a petition alleging that she had complied with the eight conditions. Petitioner was informed that it was her burden to prove compliance and she acknowledged that, should she fail to establish such compliance, her parental rights would be terminated.

The court properly placed the burden of proof on petitioner to prove that she had complied with the conditions in the suspended judgment (*see, Matter of Willie W.*, 206 AD2d 868, *lv denied* 84 NY2d 809). Petitioner failed to meet her burden of establishing by a fair preponderance of the evidence that she complied with each of those conditions (*see, Matter of Gerald M.*, 112 AD2d 6). The evidence adduced at the hearing establishes that petitioner failed to make progress in the required service programs under conditions 4 and 5 and that she denied any need for parenting education. Thus, she failed to prove her compliance with conditions 4 and 5 of the suspended judgment.

We reject the contention of petitioner that the court erred in failing to address the best interests of her son. Petitioner had previously conceded that, if she did not comply with the suspended judgment, it would be in her son's best interests to terminate her parental rights. Thus, the court did not err in failing to conduct a further dispositional hearing on the best interests of the child (*see, Matter of Grace Q.*, 200 AD2d 894, 896; *Matter of Patricia O.*, 175 AD2d 870, 870-871). (Appeal from Amended Order of Onondaga County Family Court, Rossi, J. - Terminate Parental Rights.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1089) CAF 99-7154. (Erie Co.) -- MATTER OF MARK ERIC MOSES, PETITIONER-APPELLANT, V RACHAL S., RESPONDENT-RESPONDENT. -- Order unanimously affirmed without costs. Memorandum: Family Court properly determined following a hearing that petitioner is not entitled to visitation with the parties' seven-year-old daughter. Petitioner was sentenced to 7½ to 15 years in prison for the attempted murder of respondent. Even assuming, arguendo, that the court failed to apply the proper burden of proof (*see, Matter of Lonobile v Betkowski*, 261 AD2d 829), we conclude that the record is sufficient to enable us to determine that visitation would be harmful to the child (*see, Matter of Hadsell v Hadsell*, 249 AD2d 853, *lv denied* 92 NY2d 809). Although there is no proof that the shooting of respondent placed the child in immediate physical danger, petitioner was aware that the child was at home when he shot respondent, and he left respondent lying on the floor seriously wounded for the child to find her. Furthermore, an adverse inference may be drawn from petitioner's invocation of the Fifth Amendment at the hearing (*see, Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 42-43). (Appeal from Order of Erie County Family Court, Rosa, J. - Visitation.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1090) CAF 00-114. (Erie Co.) -- MATTER OF JENNIE R. MASSE, PETITIONER-RESPONDENT, V MARK J. MASSE, RESPONDENT-APPELLANT. -- Order unanimously reversed on the law without costs, objections granted in part, order of Hearing Examiner vacated, petition reinstated and matter remitted to Erie County Family Court for further proceedings on the petition. Memorandum: Respondent appeals from an order of Family Court denying his objections to the Hearing Examiner's order. The Hearing Examiner dismissed as untimely respondent's petition to stay the enforcement of an order of child support that was entered in North Carolina and registered in New York State. The notice of registration of the North Carolina support order was mailed to respondent on July 10, 1998 and received by him on July 11, 1998, and respondent filed the instant petition on August 3, 1998.

Family Court Act § 580-605 (b) (2) requires that a notice of registration of an order must inform the nonregistering party "that a hearing to contest the validity or enforcement of the registered order must be requested within twenty days after notice". Family Court Act § 580-606 (a) requires that "[a]

nonregistering party seeking to contest the validity or enforcement of a registered order in this state shall request a hearing within twenty days after notice of the registration." Neither statute provides guidance with respect to the manner in which notice of the registration of the order is to be provided to a nonregistering party, or the manner in which the 20-day period is to be calculated.

Because the "method of procedure" is not prescribed by the Family Court Act, we conclude that the provisions of CPLR 2103, governing the service of papers, should be applied here (Family Ct Act § 165 [a]). Pursuant to CPLR 2103 (b) (2), "service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period". In adding five days to the date of mailing, we conclude that respondent's application on the last day of the 20-day period in which to request a hearing was timely (*see generally, Matter of Barros v Vila*, ___ AD2d ___ [decided Apr. 6, 2000]). We therefore reverse the order, grant in part the objections, vacate the order of the Hearing Examiner, reinstate the petition and remit the matter to Erie County Family Court for further proceedings on the petition. (Appeal from Order of Erie County Family Court, Battle, J. - Support.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1091) CAF 99-7218. (Erie Co.) -- MATTER OF DEBORAH LEE LEONE, PETITIONER-RESPONDENT, V ARTHUR LANSKY LEVINE, RESPONDENT-APPELLANT. -- Order unanimously affirmed without costs. (Appeal from Order of Erie County Family Court, Townsend, J. - Counsel Fees.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1092) CA 99-1289. (Monroe Co.) -- JAMES WOOD, PLAINTIFF-RESPONDENT, V STRONG MEMORIAL HOSPITAL OF UNIVERSITY OF ROCHESTER, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Judgment unanimously affirmed without costs. Memorandum: Plaintiff commenced this action seeking damages for a broken thumb he sustained when defendant's security guards forcibly removed him from an elevator at defendant, Strong Memorial Hospital of University of Rochester (Hospital). Plaintiff was a patient of the Hospital, having undergone neck fusion surgery. Despite warnings about the dangers of walking and smoking after surgery,

plaintiff attempted to leave the Hospital floor to smoke a cigarette.

On appeal, defendant raises several challenges to the jury charge. We reject defendant's contention that Supreme Court erred in failing to charge the jury on the affirmative defense of justification. Competent adult hospital patients have the right to decline treatment (*see, Matter of Fosmire v Nicoleau*, 75 NY2d 218, 225-226). Although the State will act to prevent suicide, "merely declining medical care, even essential treatment, is not considered a suicidal act or indication of incompetence" (*Matter of Fosmire v Nicoleau, supra,* at 227).

The defense of justification is premised on the theory that certain conduct, while normally unlawful, may be required to prevent an even greater harm (*see generally,* Penal Law art 35). This is not a case, however, where plaintiff was under arrest (*see,* Penal Law § 35.30) or was about to commit suicide or inflict serious physical injury upon himself (*see,* Penal Law § 35.10 [4]). Nor is this a case where a duly licensed physician or a person acting under his direction ordered that plaintiff be restrained in order to provide treatment for him, either upon his consent or in an emergency situation (*see,* Penal Law § 35.10 [5]). Defendant further relies on Public Health Law § 2803-c (3) (h) in contending that the restraint was lawful. That section does not apply because the restraints were not applied by a qualified licensed nurse (*see*, Public Health Law § 2803-c [3] [h]).

Defendant failed to preserve for our review its challenge to the court's failure to charge the jury on the corporate complicity doctrine. That doctrine provides that, "as a predicate for awarding punitive damages against defendant corporation[], the jury had to find that superior officers of the corporation[], acting in the course of their employment, authorized, participated in, consented to, or ratified the misconduct" (*Benson v Syntex Labs.*, 249 AD2d 904, 905; *see, Loughry v Lincoln First Bank*, 67 NY2d 369, 378-380). In the absence of preservation, a jury verdict will not be set aside based on an alleged error in the charge where, as here, the alleged error is not fundamental, i.e., "it is [not] so significant that the jury was prevented from fairly considering the issues at trial" (*Kilburn v Acands, Inc.*, 187 AD2d 988, 989; *see, Staudacher v City of Buffalo*, 155 AD2d 956). Defendant also failed to preserve for our review its challenge to the language

of the charge on punitive damages, and, in any event, there was no error in the language of the charge (*see*, PJI 2:278). (Appeal from Judgment of Supreme Court, Monroe County, Polito, J. - Damages.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1093) CA 00-105. (Monroe Co.) -- JAMES WOOD, PLAINTIFF-RESPONDENT, V STRONG MEMORIAL HOSPITAL OF UNIVERSITY OF ROCHESTER, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Appeal unanimously dismissed without costs (*see*, CPLR 5501 [a] [1], [2]). (Appeal from Order of Supreme Court, Monroe County, Polito, J. - Set Aside Verdict.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1094) CA 99-919. (Erie Co.) -- SUSAN N. KLYN, AS ASSIGNEE OF BUFFALO TONTINE SHOPS CORP., PLAINTIFF-APPELLANT, V THE TRAVELERS INDEMNITY COMPANY, DEFENDANT-RESPONDENT. -- Order unanimously reversed on the law without costs, motion denied and complaint reinstated. Memorandum: Supreme Court erred in granting defendant's motion seeking summary judgment dismissing the complaint. Defendant denied a property loss claim submitted under an "employee dishonesty" endorsement of a policy of insurance issued to Buffalo Tontine Shops Corp. (Tontine) and assigned to plaintiff. Plaintiff commenced this action alleging that she is entitled to payment because Tontine's comptroller embezzled funds from a payroll account over which he had sole control by secretly and fraudulently paying himself unauthorized and excessive salary, commissions and bonuses. We reject defendant's contention that recovery under the policy is barred by the provision excluding coverage for "salaries, commissions, fees, bonuses, * * * or other benefits earned in the normal course of employment". Plaintiff's allegations, if true, establish that Tontine did not knowingly make the payments to the comptroller as compensation for his employment (*see*, *Resolution Trust Corp. v Fidelity & Deposit Co. of Maryland*, 205 F3d 615, 649). The policy protects Tontine from embezzlement or theft by employees (*see, Federal Deposit Ins. Corp. v National Union Fire Ins. Co. of Pittsburgh*, 205 F3d 66, 72; *Glusband v Fittin Cunningham & Lauzon*, 892 F2d 208, 212; *see also, Aetna Cas. & Sur. Co. v Kidder, Peabody & Co.*, 246 AD2d 202, 209, *lv denied* 93 NY2d 805). "Where the employer does not knowingly pay funds to its employee under the belief that the funds have been honestly

earned, but is instead unaware of the employee's receipt of the funds or pays the lost funds for some purpose other than the employee's compensation, the employee has committed pure embezzlement which is recoverable under the [policy]" (*Federal Deposit Ins. Corp. v St. Paul Fire & Marine Ins. Co.*, 738 F Supp 1146, 1160, *mod on other grounds* 942 F2d 1032).

Additionally, we reject defendant's contention that Tontine failed to comply with the provision of the policy requiring "a detailed, sworn proof of loss within 120 days of the date of discovery". It is undisputed that Tontine filed a proof of loss within 60 days of defendant's demand therefor. Because Tontine complied with that demand, Tontine "shall be deemed to have complied with the provisions of [the] contract of insurance relating to the time within which proofs of loss are required" (Insurance Law § 3407 [a]; *see, Ball v Allstate Ins. Co.*, 81 NY2d 22, 25-26).

The remaining issue concerns the period of coverage. Defendant moved for summary judgment dismissing the complaint but in the alternative sought summary judgment dismissing that part of the complaint seeking recovery "for the period 1978 through March 31, 1984", contending that there was no policy of insurance in effect then. Defendant failed to submit any proof in admissible form supporting that contention, and thus defendant failed to meet its initial burden of establishing its entitlement to judgment as a matter of law (*see generally, Zuckerman v City of New York*, 49 NY2d 557, 562). (Appeal from Order of Supreme Court, Erie County, Whelan, J. - Summary Judgment.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1095) CA 99-1634. (Erie Co.) -- DENISE LEVY, AS PARENT AND NATURAL GUARDIAN OF JUSTIN LAMONT LEVY, PLAINTIFF-RESPONDENT-APPELLANT, V ROSETTA WALDEN, DEFENDANT-APPELLANT-RESPONDENT. -- Order unanimously affirmed without costs. (Appeals from Order of Supreme Court, Erie County, Mintz, J. - Summary Judgment.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1096) CA 00-129. (Erie Co.) -- LOUISE GUIZZOTTI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MARK W. GUIZZOTTI, DECEASED, ALEXANDER H. DANN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ALEXANDER H. DANN, JR., DECEASED, AND BRYAN COLERN,

PLAINTIFFS-RESPONDENTS, V DANIEL J. ENGLISH AND JAMES COYLE, DEFENDANTS-APPELLANTS. (ACTION NO. 1.) SCOTT HOUSEKNECHT, ET AL., PLAINTIFFS, V DANIEL J. ENGLISH, DEFENDANT-APPELLANT. (ACTION NO. 2.) -- Order unanimously reversed on the law without costs and motion and cross motion granted. Memorandum: Supreme Court abused its discretion in denying the motion of defendant James Coyle and the cross motion of defendant Daniel J. English to bifurcate the trial. The general rule is that the issues of liability and damages in a negligence action are distinct and severable and should be tried and determined separately (*see, Perez v Millard Fillmore Hosp.*, 263 AD2d 957). Although an exception to the general rule arises when the injuries sustained by plaintiffs have an important bearing on the issue of liability and are probative in determining how the accident occurred, plaintiffs failed to establish the applicability of that exception (*see, Loncz v Blagrove*, 254 AD2d 735, 736; *Kotarski v Kotecki & Sons*, 239 AD2d 909). (Appeals from Order of Supreme Court, Erie County, O'Donnell, J. - Bifurcate Trial.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1097) CA 99-1291. (Erie Co.) -- ROOFING CONSULTANTS, INC., AND THE STATE INSURANCE FUND, PLAINTIFFS-RESPONDENTS, V SCOTTSDALE INSURANCE COMPANY, DEFENDANT-APPELLANT, ET AL., DEFENDANT. -- Judgment unanimously reversed on the law without costs and judgment granted in accordance with the following Memorandum: Supreme Court erred in declaring that Scottsdale Insurance Company (defendant) was obligated to pay half of the costs incurred in defending plaintiff Roofing Consultants, Inc. (Roofing Consultants) in the underlying action and to pay half of any award entered against Roofing Consultants in that action. In November 1995 an employee of Roofing Consultants was injured while working on a roofing project at a Mobil Oil Corporation (Mobil Oil) station. Roofing Consultants first notified defendant, its insurer, of the accident when plaintiffs commenced this declaratory judgment action in September 1998. Defendant properly disclaimed coverage based on the failure of Roofing Consultants to provide timely notice of its employee's claim (*see, White v City of New York*, 81 NY2d 955, 957; *Security Mut. Ins. Co. of N. Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440). The delay of two years and 10 months in providing notice of the claim is unreasonable as a matter of law (*see, American Mfrs.*

Mut. Ins. Co. v CMA Enters., 246 AD2d 373; *see also, Matter of State Farm Mut. Auto. Ins. Co. [Tremaine]*, ___ AD2d ___ [decided Mar. 29, 2000]).

We reject plaintiffs' contention that the notice provided to defendant by Mobil Oil in August 1996 should be imputed to plaintiffs. Mobil Oil notified defendant of the claim after it was sued by the injured employee. Mobil Oil sought indemnification from defendant based on its belief that it was an additional insured under Roofing Consultants' policy with defendant. Contrary to plaintiffs' contention, Mobil Oil was not a claimant but, rather, was acting as an alleged additional insured. Neither notice provided by another insured nor the insurer's actual knowledge of the claim satisfies the contractual obligation of an insured to give timely notice (*see, American Mfrs. Mut. Ins. Co. v CMA Enters., supra*; *Heydt Contr. Corp. v American Home Assur. Co.*, 146 AD2d 497, 499, *appeal dismissed* 74 NY2d 651).

Contrary to plaintiffs' contention, defendant was not obligated to disclaim coverage until Roofing Consultants provided notice of the accident or claim (*see, Dryden Mut. Ins. Co. v Brockman*, 259 AD2d 947, 948), and the disclaimer in its answer constitutes timely notice of disclaimer (*see, American Mfrs. Mut. Ins. Co. v CMA Enters., supra*, at 373). We therefore reverse the judgment and grant judgment in favor of defendant declaring that defendant has no obligation to contribute to the costs incurred in defending Roofing Consultants in the underlying action or to contribute to any award entered against Roofing Consultants in the underlying action. (Appeal from Judgment of Supreme Court, Erie County, Fahey, J. - Declaratory Judgment.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1098) CA 99-01310. (Onondaga Co.) -- MARY PARKINSON ROMEO, AS ADMINISTRATRIX OF THE ESTATES AND GOODS, CHATTELS AND CREDITS OF BOTH RUTH F. PARKINSON AND RICHARD J. PARKINSON, DECEASED, CLAIMANT-RESPONDENT, V STATE OF NEW YORK, DEFENDANT-APPELLANT. (CLAIM NO. 78634.) -- Judgment unanimously reversed on the law without costs and amended claim dismissed. Memorandum: Ruth F. Parkinson was injured on November 2, 1987 when she was struck by a motor vehicle as she was crossing West Genesee Street between the intersections of North Orchard Road and South Orchard Road in the Town of Geddes. Following a bifurcated trial, the Court of Claims found that the State's failure to install a traffic

control signal on West Genesee Street in April 1986 following a 10-month study of the intersections was a proximate cause of the accident. The court found the State 75% responsible for the accident and, following a trial on damages, awarded claimant $740,000.

It is well established that "liability for injury arising out of the operation of a duly executed highway safety plan may only be predicated on proof that the plan either was evolved without adequate study or lacked reasonable basis" (*Weiss v Fote*, 7 NY2d 579, 589, *rearg denied* 8 NY2d 934). We conclude that the evidence is insufficient as a matter of law to support the court's determination that the study conducted by the State was inadequate and that the State therefore was not immune from liability.

The study was conducted by a qualified engineer with the assistance of another State employee and an engineering intern for the purpose of determining the need for a traffic control signal pursuant to 17 NYCRR part 271. It included, *inter alia*, field inspections, traffic meter counts, peak hour turning counts and an analysis of the accident history over a recent 32-month period. Based on that study, the State upgraded warning signs but did not install a traffic control signal.

The court found that the study was inadequate because the State spent a limited amount of time at the site and failed to take a pedestrian count. There is no requirement, however, that such a study include a minimum number of hours spent at the site. Although claimant's expert testified that the State should have spent at least two days counting the number of pedestrians, claimant failed to establish how that would have altered the State's decision (*see, Schuls v State of New York*, 92 AD2d 721, 722). Indeed, claimant's expert testified that he was "not suggesting that a pedestrian warrant should have been issued in this case" (*see*, 17 NYCRR 271.5). Furthermore, it is undisputed that little or no pedestrian traffic was observed at the site during the course of the study and that there was no history of prior pedestrian accidents. Thus, the State's failure to conduct a pedestrian count cannot be deemed arbitrary or unreasonable (*see, Weiss v Fote, supra*, at 586).

Despite the testimony of claimant's expert, the court found no other inadequacies in the State's study. We reject claimant's contention that the State's study was inadequate because it was not conducted as a traffic safety study in accordance with the

State's "Safety Investigation Procedures Manual". Claimant failed to establish the applicability of that manual. We further reject claimant's contention that the State violated its continuing duty to monitor the effectiveness of the warning signs after they were installed. Claimant submitted no proof of changed conditions or accidents that would have required the replacement of the warning signs with a traffic signal *(see, Weiss v Fote, supra*, at 587-588). Indeed, claimant's expert never addressed that contention during his testimony.

We also reject claimant's contention that the study was inadequate because the State's condition diagram did not show the sight distance restrictions or the location of bus stops. The sight distances were recorded on the "signal investigation data sheet", and the State's engineer was aware of the bus stops from his visits to the site. The engineer's decision to discount the importance of the bus stops due to the lack of pedestrian accidents and pedestrian traffic cannot be deemed arbitrary or unreasonable.

"[S]omething more than a mere choice between conflicting opinions of experts is required before the State * * * may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public" (*Weiss v Fote, supra*, at 588; *see, Light v State of New York*, 250 AD2d 988, 989, *lv denied* 92 NY2d 807). "Strong policy considerations underpin the qualified immunity doctrine set forth in *Weiss* (*supra*), and in cases such as [this] where a governmental body has invoked the expertise of qualified employees, the *Weiss* directive should not be lightly discounted" (*Friedman v State of New York*, 67 NY2d 271, 285). We therefore reverse the judgment and dismiss the amended claim. (Appeal from Judgment of Court of Claims, Midey, Jr., J. - Negligence.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1099) CA 99-1308. (Onondaga Co.) -- CYNTHIA CHARVALA, PLAINTIFF-RESPONDENT, V KELLY & DUTCH REAL ESTATE, INC., DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Appeal unanimously dismissed without costs (*see, Smith v Catholic Med. Ctr.*, 155 AD2d 435; *see also*, CPLR 5501 [a] [1]). (Appeal from Order of Supreme Court, Onondaga County, Tormey, III, J. - Set Aside Verdict.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1100) CA 99-1309. (Onondaga Co.) -- CYNTHIA CHARVALA, PLAINTIFF-RESPONDENT, V KELLY & DUTCH REAL ESTATE, INC., DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Judgment unanimously affirmed without costs. Memorandum: Supreme Court properly denied defendant's motion for a directed verdict or, in the alternative, an order setting aside the verdict as against the weight of the evidence. Contrary to defendant's contention, plaintiff proved by a preponderance of the evidence that defendant's negligence was a proximate cause of her injuries (*see, Burgos v Aqueduct Realty Corp.,* 92 NY2d 544, 550). Plaintiff was employed at a store located on property owned and managed by defendant. Defendant required the employees of the store to park in a designated area, and they could reach the store either by walking along a roadway or by walking on the grassy median that separated the roadway from the parking lot. While walking on the median, plaintiff felt her foot catch on something and she fell, shattering a bone in her arm, sustaining a cervical spine injury and damaging two teeth. Three weeks later, plaintiff returned to the site and took photographs of roots and thick stalks that protruded from the ground but were covered by grass. Although plaintiff could not identify what caused her to fall, she established that there were several roots and thick stalks in the area where she fell and testified that her foot caught on something (*cf., Barland v Cryder House,* 203 AD2d 405, *lv denied* 84 NY2d 947). Thus, defendant is not entitled to a directed verdict because the jury's verdict is not "utterly irrational" (*Cohen v Hallmark Cards,* 45 NY2d 493, 499). We further conclude that the jury's verdict is not against the weight of the evidence (*see, Cohen v Hallmark Cards, supra,* at 498-499).

We reject defendant's contention that the court's charge permitted the jury to base its verdict only upon speculation about the condition of the median at the time of plaintiff's injury. The court instructed the jury that, although plaintiff did not identify the precise condition that caused her to fall, where, as here, there may be more than one unsafe condition, the jury could infer that plaintiff's injuries were caused by one of those conditions. Plaintiff presented evidence from which an inference could be drawn with respect to the condition of the median on the day of her injury; she presented photographs depicting the condition of the median approximately three weeks after she was injured, and she testified that her foot caught on something, causing her to fall. "'It is enough that [plaintiff]

shows facts and conditions from which the negligence of the defendant and the causation of the [injuries] by that negligence may be reasonably inferred'" (*Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 744, quoting *Ingersoll v Liberty Bank*, 278 NY 1, 7). Finally, we decline to disturb the jury's award of damages for pain and suffering. (Appeal from Judgment of Supreme Court, Onondaga County, Tormey, III, J. - Negligence.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1101) CA 99-1660. (Monroe Co.) -- ROBERT W. WYANT, CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 92862.) -- Judgment unanimously affirmed without costs for reasons stated in decision at Court of Claims, Corbett, Jr., J. (Appeal from Judgment of Court of Claims, Corbett, Jr., J. - Negligence.) PRESENT: PINE, J. P., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

(1102) KA 97-5180. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V STEVEN CRAYTON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Supreme Court, Monroe County, Affronti, J. - Burglary, 1st Degree.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1103) KA 99-5131. (Erie Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JOSE DELVALLE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. (Appeal from Judgment of Erie County Court, McCarthy, J. - Violation of Probation.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1104) KA 99-5263. (Onondaga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V KEATEN JACKSON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that his plea of guilty was not knowingly, voluntarily and intelligently entered (*see*, *People v Lopez*, 71 NY2d 662, 665). Defendant contends that his statements during the plea allocution, coupled with his allegedly exculpatory statements at sentencing, cast doubt upon his guilt and thus that County Court had a duty to make further inquiry at sentencing. We disagree.

Because nothing in the plea allocution casts doubt on defendant's guilt, the court had no obligation to conduct a *sua sponte* inquiry into allegedly exculpatory statements made by defendant at sentencing (*see, People v Riley*, 264 AD2d 689, *lv denied* 94 NY2d 906). (Appeal from Judgment of Onondaga County Court, Mulroy, J. - Assault, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1105) KA 99-05383. (Onondaga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V MARK SCHRECENGOST, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: Contrary to the People's contention, the waiver by defendant of the right to appeal as a condition of his plea of guilty does not foreclose his present challenge to the voluntariness of the plea (*see, People v Seaberg,* 74 NY2d 1, 10). We reject the contention of defendant that his plea of guilty was not voluntarily entered. He contends that he pleaded guilty only because his codefendant would not be permitted to plead guilty if defendant failed to do so and his codefendant faced certain conviction if forced to go to trial. "[W]hile a connected plea entailing benefit to a third person can place pressure on a defendant, the 'inclusion of a third-party benefit in a plea bargain is simply one factor for a [trial] court to weigh in making the overall determination whether the plea is voluntarily entered" (*People v Fiumefreddo,* 82 NY2d 536, 545, quoting *United States v Marquez,* 909 F2d 738, 744, *cert denied* 498 US 1084). The record of the plea establishes that defendant's plea was voluntarily entered (*see, People v Moissett,* 76 NY2d 909, 911). County Court advised defendant of his rights, defendant stated that he understood those rights, and defendant admitted to his participation in the crime as detailed by the court. Contrary to defendant's contention, the court did not abuse its discretion in denying defendant's motion to withdraw the plea (*see,* CPL 220.60 [3]; *People v Muccigrosso,* ___ AD2d ___ [decided Feb. 16, 2000]; *People v Peavy,* 225 AD2d 1082, *lv denied* 88 NY2d 883). Finally, "[w]hen defendant entered a plea of guilty he forfeited his right to claim that he was deprived of a speedy trial under CPL 30.30" (*People v O'Brien,* 56 NY2d 1009, 1010). (Appeal from Judgment of Onondaga County Court, Mulroy, J. - Attempted Robbery, 2nd Degree.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1106) KA 00-00199. (Monroe Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V ANTHONY FLOWERS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Memorandum: On appeal from a judgment convicting him of, *inter alia*, five counts of rape in the first degree (Penal Law § 130.35 [1]) and four counts of robbery in the first degree (Penal Law § 160.15 [3]), defendant contends that Supreme Court erred in excluding certain evidence offered by the defense and in allowing the prosecutor to cross-examine defendant about his plea of guilty to a certain felony in 1989 in satisfaction of another unspecified felony charge.

Contrary to defendant's contention, the evidence sought to be elicited was properly excluded as hearsay. Defense counsel sought to elicit facts that the witness, a police officer, had heard from investigatory sources or read in police reports. We reject the contention that defendant did not seek to admit the out-of-court statements for their truth; the statements would have been irrelevant unless true.

The court's *Sandoval* ruling was not erroneous. Although a witness ordinarily may not be impeached based on a mere prior arrest or charge that did not result in conviction (*see, People v Cook,* 37 NY2d 591, 596; *People v Pritchett*, ___ AD2d ___ [decided Mar. 29, 2000]; *People v Sigl,* 124 AD2d 1053), a witness may be cross-examined about a charge that was satisfied by a plea of guilty to another charge (*see, People v Intelisano,* 188 AD2d 881, 882-883; *Murphy v Estate of Vece*, 173 AD2d 445, 447). (Appeal from Judgment of Supreme Court, Monroe County, Wisner, J. - Rape, 1st Degree.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1107) KA 00-9. (Cayuga Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V DOCK MACK, DEFENDANT-APPELLANT. -- Judgment unanimously modified on the law and as modified affirmed in accordance with the following Memorandum: Defendant was convicted following a jury trial of two counts of aggravated harassment of an employee by an inmate (Penal Law § 240.32) arising out of his throwing urine and/or feces on two correction officers. He was sentenced to consecutive terms of imprisonment of 2½ to 5 years and fined $5,000 on each count. Upon our review of the record, we conclude that the evidence is legally sufficient to support the conviction (*see, People v Taylor*, ___

NY2d ___ [decided Mar. 30, 2000]; *People v Bleakley*, 69 NY2d 490, 495).

Defendant's contention that the People's expert witness was not properly qualified as an expert is not preserved for our review (*see,* CPL 470.05 [2]; *People v Stabell*, ___ AD2d ___ [decided Mar. 29, 2000]; *People v Highsmith*, 254 AD2d 768, 769, *lv denied* 92 NY2d 983, 1033). In any event, there is no merit to that contention. The record establishes that the witness was qualified to provide opinion testimony (*see, People v Stabell, supra*).

Defendant also failed to preserve for our review his contention that County Court's charge on intent impermissibly shifted the burden of proof to defendant (*see, People v McKenzie*, 67 NY2d 695, 697; *People v Thomas*, 50 NY2d 467). In any event, the court properly instructed the jury that the presumption was permissive and did not shift the burden of proof to defendant (*see, People v McKenzie, supra*, at 696-697).

Because the two offenses were committed through a single act, the imposition of consecutive sentences of imprisonment and two fines was improper (*see*, Penal Law § 70.25 [2]; § 80.15). Thus, we modify the judgment by providing that the sentences run concurrently and by vacating the fine imposed on the second count of the indictment (*see*, *People v Taylor*, 197 AD2d 858, 859). (Appeal from Judgment of Cayuga County Court, Contiguglia, J. - Aggravated Harassment of Employee by Inmate.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1108) KA 99-05406. (Ontario Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V STEVEN TOMPKINS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed (*see, People v Lopez*, 71 NY2d 662). (Appeal from Judgment of Ontario County Court, Henry, Jr., J. - Grand Larceny, 4th Degree.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1110) CAF 99-7113. (Erie Co.) -- MATTER OF DAVID GRACZYK, PETITIONER-APPELLANT, V LYNN BULERA, RESPONDENT-RESPONDENT. -- Appeal unanimously dismissed without costs (*see, Matter of Cherilyn P.*, 192 AD2d 1084, *lv denied* 82 NY2d 652; *see also*, CPLR 5511). (Appeal from Order of Erie County Family Court, Mix, J. -

Visitation.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1111) CAF 00-56. (Niagara Co.) -- MATTER OF GABRIELA. JIMMY G. AND JACQUELINE G., PETITIONERS-RESPONDENTS; BRIAN B. AND JODY O., RESPONDENTS-APPELLANTS. -- Order unanimously affirmed without costs. Memorandum: This proceeding for the adoption of the infant Gabriela was commenced by petitioners, the prospective adoptive parents, based on extrajudicial consents executed by respondents, the birth parents, one week after the child's birth. Respondents appeal from an order determining that, although the consents are valid and comply with Domestic Relations Law § 115-b, they were timely and validly revoked by respondents, thus necessitating a hearing to determine the best interests of the child. Respondents contend that petitioners' failure to provide them with copies of the extrajudicial consents, as required by Domestic Relations Law § 115-b (4) (c), renders the consents invalid, thus terminating the adoption proceeding and mandating the return of the child to respondents without further proceedings.

Not every violation of Domestic Relations Law § 115-b will necessarily invalidate a consent (*see, Matter of De Filippis v Kirchner,* 217 AD2d 145, 147). The cases require only "substantial compliance", rather than strict or technical compliance, with the statute, although they do not always use those precise terms (*see, Matter of Baby Boy,* 175 Misc 2d 7, 14, *affd* 252 AD2d 971 *for reasons stated*; *Matter of De Filippis v Kirchner, supra,* at 147; *Matter of Baby Boy B.,* 163 AD2d 673, 674, *lv denied* 76 NY2d 710; *see also, Matter of Chaya S. v Frederick Herbert L.,* 90 NY2d 389, 397-398, *rearg denied* 90 NY2d 936 [excusing technical noncompliance with requirements governing judicial consent]; *see generally, Matter of Sarah K.,* 66 NY2d 223, 239-240, *cert denied sub nom. Kosher v Stamatis,* 475 US 1108). The accomplishment of the purposes of the statute, despite technical noncompliance with it, is the critical factor; those purposes are "protecting the natural parent from improvidence or overreaching and insuring that a consent is a product of a fully deliberate act" (*Matter of De Filippis v Kirchner, supra,* at 147, citing *People ex rel. Anonymous v Anonymous,* 139 AD2d 189, 193).

A court must determine whether the birth parents were injured or prejudiced as a result of the noncompliance (*see,*

Matter of Chaya S. v Frederick Herbert L., supra, at 397-398; *Matter of Sarah K., supra,* at 239-240; *Matter of De Filippis v Kirchner, supra,* at 147), or whether they were "otherwise fully informed of the consequences" of the consent (*Matter of De Filippis v Kirchner, supra,* at 147; *see, Matter of Sarah K., supra,* at 240; *cf., Matter of Chaya S. v Frederick Herbert L., supra,* at 397-398). Those few cases invalidating a consent on the ground of noncompliance with the statute invariably do so because the form omitted some basic information required by the statute, thereby frustrating its notice purposes (*see, Matter of Spooner v Spooner,* 244 AD2d 667; *Matter of Benson v Jordan,* 184 AD2d 1080, *lv dismissed* 80 NY2d 924; *People ex rel. Anonymous v Anonymous, supra,* at 194). With regard to the statutory requirement that the parent be given a copy of the consent at the time of execution, it has been observed that the "failure to provide the biological parent with a copy of the executed consent need not always be viewed as a fatal defect, where there was substantial compliance with the statutory provisions and where the biological parent was fully aware of his or her rights and the consequences of consent" (Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C115-b:3, at 225; *compare, Matter of Baby Boy B., supra,* at 674, *with Matter of Male M.,* 76 AD2d 839, *lv denied* 50 NY2d 805, 1056, *and Matter of Baby Boy, supra,* at 14).

On the record before us, there is no basis for invalidating the consents based on petitioners' failure to provide respondents with copies of the consents at the time of execution. Respondents were not prejudiced or injured as a result of the technical violation of the statute, and the statutory purposes were fully accomplished. Respondents admit that, at the urging of petitioners and the notary, they read the consents before signing them, a fact that distinguishes this case from *Matter of Baby Boy (supra),* relied upon by respondents. Moreover, the record makes clear that respondents understood that they had 45 days to revoke their consent, and that they in fact did so in a timely and proper fashion, thus necessitating the best interests hearing ordered by the court. We therefore conclude that the statutory violation did not prevent respondents from being "otherwise fully informed of [the] consequences" of their consents (*Matter of Sarah K., supra,* at 240, citing *Matter of Daniel C.,* 63 NY2d 927; *see, Matter of De Filippis v Kirchner, supra,* at 147). (Appeal from Order of Niagara County Family

Court, Batt, J. - Adoption.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1114) CA 00-00145. (Onondaga Co.) -- MICHELE CERRA, R.N., ELEANOR CONROY, R.N., STEPHANIE COOK, R.N., PRISCILLA CRISPELL, R.N., ALIDA deJONG, R.N., M.S., TINA DOUD, R.N., M.S., DENISE GARCIA, R.N., KRISTINE LEO, R.N., GAYLEN MELTON, R.N., PAULETTE MILLER, R.N., WENDY POMBRIO, R.N., MARY JANE STRANDBERG, R.N., AND JULIE WILL, R.N., PLAINTIFFS-APPELLANTS, V SYRACUSE UNIVERSITY, DEFENDANT-RESPONDENT. (ACTION NO. 1.) PATRICIA GRIMES, R.N., PLAINTIFF-APPELLANT, V SYRACUSE UNIVERSITY, DEFENDANT-RESPONDENT. (ACTION NO. 2.) -- Order unanimously modified on the law and as modified affirmed without costs in accordance with the following Memorandum: Supreme Court erred in denying that part of plaintiffs' cross motion seeking dismissal of the affirmative defense of accord and satisfaction (*see*, CPLR 3211 [b]). The documentary evidence submitted by plaintiffs establishes that the settlement of each action was conditioned on the acceptance by the respective plaintiff of the amount offered by defendant. Because each of the six plaintiffs at issue rejected the offered amount, there was no agreement and thus no "accord" (*cf.*, *Moweta v Citywide Home Improvements of Queens*, 267 AD2d 438). We therefore modify the order accordingly.

Contrary to plaintiffs' contention, the court did not improvidently exercise its discretion in granting in part defendant's motion to sever by ordering separate trials on the issue of damages (*cf.*, *J & A Vending, v J.A.M. Vending*, ___ AD2d ___ [decided Jan. 24, 2000]). The record establishes that the number and differing nature and degree of the damages claims would likely create juror confusion if the actions were tried jointly. (Appeal from Order of Supreme Court, Onondaga County, Murphy, J. - Dismiss Pleading.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1117) CA 00-00660. (Erie Co.) -- JILL BARTKOWSKI, PLAINTIFF-RESPONDENT, V EUGENE BARTKOWSKI, DEFENDANT-APPELLANT. -- Amended order unanimously affirmed without costs. Memorandum: Plaintiff commenced this action seeking a divorce on the ground of cruel and inhuman treatment. Defendant appeals from an amended order denying his motion for summary judgment dismissing the complaint and granting plaintiff's request for a hearing on the issue of custody. Supreme Court properly denied defendant's motion. It

cannot be said as a matter of law that defendant's alleged misconduct is merely trivial or that plaintiff's allegations establish "mere incompatibility" or "transient discord" between the parties (*Hessen v Hessen*, 33 NY2d 406, 410-411; *see, Brady v Brady*, 64 NY2d 339, 343-344). Based on the record before us, we conclude that it would be premature to grant summary judgment to defendant dismissing the complaint and that "plaintiff is entitled to a trial on her action for a divorce on the ground of cruel and inhuman treatment" (*Brooks v Brooks*, 191 AD2d 1042, 1043).

We have considered defendant's remaining contention and conclude that it is without merit. (Appeal from Amended Order of Supreme Court, Erie County, Makowski, J. - Matrimonial.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1120) CAF 00-00663. (Erie Co.) -- MATTER OF RAFAEL P. AND LAUREN P. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; ANTHONY P. AND DEBRA P., RESPONDENTS-RESPONDENTS; AND HONORABLE FRANK J. CLARK, III, ERIE COUNTY DISTRICT ATTORNEY, INTERVENOR-APPELLANT. -- Order unanimously affirmed without costs for reasons stated in decision at Erie County Family Court, Mix, J. (Appeal from Order of Erie County Family Court, Mix, J. - Neglect.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1121) CAF 00-00393. (Wayne Co.) -- MATTER OF WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O KAROLE J. VAN DUSEN, PETITIONER-APPELLANT, V PETER PETTY, RESPONDENT-RESPONDENT. MATTER OF WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O KIMBERLY DEPUYT, PETITIONER-APPELLANT, V IAN GRANDY, RESPONDENT-RESPONDENT. MATTER OF WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O JESSICA DIEHL, PETITIONER-APPELLANT, V DONALD DAVENPORT, JR., RESPONDENT-RESPONDENT. MATTER OF WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O HEATHER L. WINNER, PETITIONER-APPELLANT, V CHARLES A. LORD, RESPONDENT-RESPONDENT. MATTER OF WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O AMIE J. WOODARD, PETITIONER-APPELLANT, V CHARLES DERIDDER, JR., RESPONDENT-RESPONDENT. MATTER OF WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O CONNIE M. SCOUTEN, PETITIONER-APPELLANT, V MARTIN HERNANDES, RESPONDENT-RESPONDENT. MATTER OF WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O STACIE MCDONALD, PETITIONER-APPELLANT, V RICHARD SINCERBEAUX, JR., RESPONDENT-RESPONDENT.

MATTER OF WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O TAMMY THRASH, PETITIONER-APPELLANT, V OTIS KNIGHT, RESPONDENT-RESPONDENT. -- Order reversed on the law without costs, objections granted, orders of Hearing Examiner vacated, petitions reinstated and matter remitted to Wayne County Family Court for further proceedings on the petitions. Memorandum: Petitioner appeals from an order of Family Court denying its objections to the orders of the Hearing Examiner. The Hearing Examiner dismissed the petitions seeking reimbursement for medical assistance expenditures made in connection with the out-of-wedlock births of respondents' children (*see generally, Matter of Steuben County Dept. of Social Servs. v Deats,* 76 NY2d 451). Family Court erred in relying on *Matter of Costello v Geiser* (85 NY2d 103, 111) in denying petitioner's objections to the orders of the Hearing Examiner. The court determined that the failure of petitioner to itemize the expenditures for medical services was fatal to its claims for reimbursement because respondents were liable only for the portion of the medical assistance expenditures made for medical services, not for those portions that compensate for charity allowances and bad debt (*see, Matter of Costello v Geiser, supra,* at 111). Rather, the court should have relied on Family Court Act § 514, which was amended after the Court's decision in *Matter of Costello v Geiser* (*supra*). Pursuant to section 514, "where the mother's confinement, recovery and expenses in connection with her pregnancy were paid under the medical assistance program on the mother's behalf, the father may be liable to the social services district furnishing such medical assistance and to the state department of social services for the full amount of medical assistance so expended, as the court in its discretion may deem proper." Thus, petitioner is entitled to seek reimbursement for the entire amount of the medical assistance expended in connection with the births, although the court must consider the ability of respondents to pay the expenses at the time of the hearings (*see, Matter of Commissioner of Social Servs. of Franklin County v Bernard B.,* 87 NY2d 61, 68-69).

Finally, we conclude that the certified computer generated records submitted by petitioner, kept in the ordinary course of business, are admissible in evidence and are prima facie evidence of the medical assistance expenditures made by petitioner (*see,* CPLR 4518 [a], [g]*; see also,* Prince, Richardson on Evidence § 8-303 [Farrell 11th ed]).

We therefore reverse the order, grant the objections, vacate the orders of the Hearing Examiner, reinstate the petitions, and remit the matter to Wayne County Family Court for further proceedings on the petitions.

All concur, Kehoe, J., not participating. (Appeal from Order of Wayne County Family Court, Parenti, J. - Support.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

(1121.1) CA 99-01622. (Niagara Co.) -- AMELIA MAYVILLE, PLAINTIFF-RESPONDENT, V WAL-MART STORES, INC., DEFENDANT-APPELLANT. -- Order unanimously reversed on the law without costs, motion granted and judgment vacated. Memorandum: Supreme Court erred in denying the motion of defendant to vacate a $175,000 default judgment entered against it in plaintiff's action to recover for personal injuries sustained as a result of a criminal act in defendant's store. Defendant demonstrated a reasonable excuse for its default in appearing in the action and a meritorious defense to the complaint (*see, Di Lorenzo, Inc. v Dutton Lbr. Co.,* 67 NY2d 138, 141; *Yacone v Ryan Homes,* 216 AD2d 963; *Bernardo v USAir Group,* 175 AD2d 642; *Price v Polisner,* 172 AD2d 422, 422-423). Given the brief overall delay, the promptness with which defendant moved to vacate the judgment, the lack of any intention on defendant's part to abandon the action, plaintiff's failure to demonstrate any prejudice attributable to the delay, and the preference for resolving disputes on the merits, we conclude that defendant's default in appearing must be excused (*see, Cerrone v Fasulo,* 245 AD2d 793, 794; *Dwyer v West Bradford Corp.,* 188 AD2d 813, 815; *Zablocki v Straley,* 173 AD2d 1015, 1016). (Appeal from Order of Supreme Court, Niagara County, Koshian, J. - Vacate Judgment.) PRESENT: PIGOTT, JR., P. J., PINE, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

MOTION NO. 102/85 -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JAMES PINKY BROWN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PINE, J. P., HAYES, WISNER AND HURLBUTT, JJ. (Filed June 16, 2000.)

MOTION NO. 1401/91 -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V WILLIAM H. ALLEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted, and the order entered

December 26, 1991, is hereby vacated. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, whether trial counsel was ineffective for not challenging the trial court's failure to properly instruct the jury on the nature of reasonable doubt. Upon our review of the trial court proceedings, we conclude that the issue may have merit. Therefore, the order of December 26, 1991 is vacated and this Court will consider the appeal de novo (*see*, *People v Vasquez*, 70 NY2d 1, *rearg denied* 70 NY2d 748; *People v LeFrois*, 151 AD2d 1046). Defendant is directed to file and serve his brief with this court on or before October 2, 2000. PRESENT: PIGOTT, JR., P. J., GREEN, HAYES, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

MOTION NO. 9/94 -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RAYMOND JOHNSON, DEFENDANT-APPELLANT. -- Motion for reargument of motion for writ of error coram nobis denied. PRESENT: GREEN, J. P., HAYES, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

MOTION NO. 176/94 -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V NELSON VELASQUEZ, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: GREEN, J. P., PINE, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

MOTION NO. (802/98) KA 97-1236. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V SCOTT L. DI ROMA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PINE, J. P., HAYES, WISNER AND HURLBUTT, JJ. (Filed June 16, 2000.)

MOTION NO. (1166/98) KA 98-0227. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V DWAYNE L. BETHUNE, DEFENDANT-APPELLANT. -- Motion for reargument of motion for writ of error coram nobis denied. PRESENT: PINE, J. P., HAYES, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

MOTION NO. (1085/99) TP 99-191. -- MATTER OF DANIEL HOY AND ELAINE HOY, PETITIONERS-RESPONDENTS, V EDWARD MERCADO, AS

COMMISSIONER OF NEW YORK STATE DIVISION OF HUMAN RIGHTS, NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENTS-PETITIONERS, AND JANIE (STEARNS) CRAWFORD, RESPONDENT. -- Motions for leave to appeal to Court of Appeals and for other relief denied. PRESENT: PINE, J. P., HAYES, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

MOTION NO. (1230/99) KA 98-5449. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V EMMANUEL JOHNSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PIGOTT, JR., P. J., HAYES, WISNER AND LAWTON, JJ. (Filed June 16, 2000.)

MOTION NO. (1687/99) CA 99-3263. -- MATTER OF ANDREW P. MELONI, AS SHERIFF OF MONROE COUNTY, AND JOHN D. DOYLE, AS COUNTY EXECUTIVE OF MONROE COUNTY, PETITIONERS-RESPONDENTS, V GLENN S. GOORD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, AND HONORABLE GEORGE E. PATAKI, AS GOVERNOR OF STATE OF NEW YORK, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to Court of Appeals denied. PRESENT: PIGOTT, JR., P. J., PINE, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

MOTION NO. (1737/99) KA 97-5425. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V ERIC TOLLIVER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PINE, J. P., WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

MOTION NOS. (1937-1938/99) CA 99-3535. -- ASENATH ATWAL, PLAINTIFF-RESPONDENT-APPELLANT, V AMARJIT ATWAL, DEFENDANT-APPELLANT-RESPONDENT. (APPEAL NO. 1.) CA 99-3536. -- ASENATH ATWAL, PLAINTIFF-RESPONDENT-APPELLANT, V AMARJIT ATWAL, DEFENDANT-APPELLANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or, in the alternative, leave to appeal to Court of Appeals denied. PRESENT: PIGOTT, JR., P. J., PINE, HAYES, WISNER, AND SCUDDER, JJ. (Filed June 16, 2000.)

MOTION NO. (28/00) CA 99-658. -- STEVEN D. CANGEMI AND MONICA LOZEPONE CANGEMI, PLAINTIFFS-RESPONDENTS, V JENNIFER G. PICKARD, DEFENDANT-RESPONDENT, THOMAS B. MAFRICI, TOM'S CLAM COVE, INC., AND CITY OF SYRACUSE, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to Court of Appeals denied. PRESENT: PINE, J. P., HURLBUTT, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

MOTION NO. (41/00) KA 98-2438. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V ANTHONY SMITH, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PIGOTT, JR., P. J., GREEN, PINE AND SCUDDER, JJ. (Filed June 16, 2000.)

MOTION NOS. (153-154/00) CAF 99-7008. -- MATTER OF DYLAN K. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; DEBORA K., RESPONDENT-APPELLANT (APPEAL NO. 1) CAF 99-7009. -- MATTER OF DEBORA K., PETITIONER-APPELLANT, V ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, O/B/O DYLAN K., RESPONDENT-RESPONDENT. (APPEAL NO. 2) -- Motion for leave to appeal to Court of Appeals denied. PRESENT: PIGOTT, JR., P. J., PINE, HAYES AND SCUDDER, JJ. (Filed June 16, 2000.)

MOTION NO. (292/00) CA 99-976. -- LORRAINE ROWLEY AND TODD ROWLEY, PLAINTIFFS-RESPONDENTS, V CARL ZEISS, INC., DEFENDANT-APPELLANT. -- Motion for leave to appeal to Court of Appeals denied. PRESENT: PIGOTT, JR., P. J., PINE, WISNER AND HURLBUTT, JJ. (Filed June 16, 2000.)

MOTION NO. (310/00) CA 99-1036. -- KENNETH J. HESTERBERG, PLAINTIFF-APPELLANT, V GREATER NIAGARA FRONTIER COUNCIL, INC., AND BOY SCOUTS OF AMERICA, DEFENDANTS-RESPONDENTS. -- Motion for reargument or, in the alternative, leave to appeal to Court of Appeals denied. PRESENT: GREEN, J. P., HAYES, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

MOTION NO. (334/00) CA 99-1013. -- THE ESTATE OF HELEN K. ANGLIN, DECEASED, BY JAMES F. DWYER AND M&T BANK, AS COEXECUTORS, PLAINTIFF-APPELLANT, V THE ESTATE OF EDWIN J. KELLEY, DECEASED, BY NORMA A. KELLEY, AS EXECUTRIX, HAROLD F. LECKEY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. -- Motion for reargument or, in the alternative, leave to appeal to Court of Appeals denied. PRESENT: PIGOTT, JR., P. J., PINE, WISNER AND SCUDDER, JJ. (Filed June 16, 2000.)

MOTION NO. (344/00) KA 97-5066. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V EMMANUEL MITCHELL, JR., DEFENDANT-APPELLANT. -- Motion for reargument granted and, upon reargument, decision filed and ordering paragraph of order entered March 29, 2000 are amended by providing that the judgment is unanimously affirmed and said decision is further amended by deleting the

last three sentences from the last paragraph. PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

MOTION NO. (362/00) CA 99-787. -- ANN LEE BURROWS, PLAINTIFF-APPELLANT, V RALPH W. BURROWS, JR., DEFENDANT-RESPONDENT. -- Motion and cross motion for reargument denied. PRESENT: PIGOTT, JR., P. J., WISNER, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

MOTION NO. (377/00) CA 99-911. -- RICHARD C. ACKERMAN AND MICHAEL J. CHRISTENSEN, PLAINTIFFS-APPELLANTS, V ARTHUR S. BECHHOEFER, DEFENDANT-RESPONDENT. (ACTION NO. 1.) TIMOTHY L. MC MICHAELS AND FRANCIS O. BERCUME, PLAINTIFFS-APPELLANTS, V ARTHUR S. BECHHOEFER, DEFENDANT-RESPONDENT. (ACTION NO. 2.) JOHN E. NICOLO AND SOUTH SLOPE HOLDING CORP., PLAINTIFFS-APPELLANTS, V ARTHUR S. BECHHOEFER, DEFENDANT-RESPONDENT. (ACTION NO. 3.) -- Motion for reargument or, in the alternative, leave to appeal to Court of Appeals denied. PRESENT: HAYES, J. P., WISNER, HURLBUTT AND KEHOE, JJ. (Filed June 16, 2000.)

MOTION NO. (396/00) CA 99-3558. -- MATTER OF CITY OF ROCHESTER, PETITIONER-APPELLANT-RESPONDENT, V 230 PORTLAND AVENUE, INC., RESPONDENT-RESPONDENT-APPELLANT. -- Motion for reargument or, in the alternative, leave to appeal to Court of Appeals denied. PRESENT: GREEN, J. P., PINE, SCUDDER AND LAWTON, JJ. (Filed June 16, 2000.)

MOTION NOS. (420-422/00) CA 99-3537. -- JOHN LANGDON, RICHARD VERSTREATE, DAVID GALEAZZO, GEORGE FEDORIW AND ROBERT E. SCHLEGEL, PLAINTIFFS-APPELLANTS, V TOWN OF WEBSTER, CATHRYN C. THOMAS, AS SUPERVISOR FOR TOWN OF WEBSTER AND AS TREASURER AND WATER COMMISSIONER OF WATER DISTRICTS OF TOWN OF WEBSTER, RONALD W. NESBITT, AS COUNCILMAN FOR TOWN OF WEBSTER AND AS WATER COMMISSIONER OF WATER DISTRICTS OF TOWN OF WEBSTER, AND JAMES F. CARLEVATTI, AS COUNCILMAN FOR TOWN OF WEBSTER AND AS WATER COMMISSIONER OF WATER DISTRICTS OF TOWN OF WEBSTER, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) CA 99-3538. -- JOHN LANGDON, RICHARD VERSTRAETE, DAVID GALEAZZO, GEORGE FEDORIW AND ROBERT E. SCHLEGEL, PLAINTIFFS-APPELLANTS, V TOWN OF WEBSTER, CATHRYN C. THOMAS, AS SUPERVISOR FOR TOWN OF WEBSTER AND AS TREASURER AND WATER COMMISSIONER OF WATER DISTRICTS OF TOWN OF WEBSTER, RONALD

W. NESBITT, AS COUNCILMAN FOR TOWN OF WEBSTER AND AS WATER COMMISSIONER OF WATER DISTRICTS OF TOWN OF WEBSTER, AND JAMES F. CARLEVATTI, AS COUNCILMAN FOR TOWN OF WEBSTER AND AS WATER COMMISSIONER OF WATER DISTRICTS OF TOWN OF WEBSTER, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.) CA 99-3539. -- JOHN LANGDON, RICHARD VERSTRAETE, DAVID GALEAZZO, GEORGE FEDORIW AND ROBERT E. SCHLEGEL, PLAINTIFFS-APPELLANTS, V TOWN OF WEBSTER, CATHRYN C. THOMAS, AS SUPERVISOR FOR TOWN OF WEBSTER AND AS TREASURER AND WATER COMMISSIONER OF WATER DISTRICTS OF TOWN OF WEBSTER, RONALD W. NESBITT, AS COUNCILMAN FOR TOWN OF WEBSTER AND AS WATER COMMISSIONER OF WATER DISTRICTS OF TOWN OF WEBSTER, AND JAMES F. CARLEVATTI, AS COUNCILMAN FOR TOWN OF WEBSTER AND AS WATER COMMISSIONER OF WATER DISTRICTS OF TOWN OF WEBSTER, DEFENDANTS-RESPONDENTS. (APPEAL NO. 3.) -- Motion for reargument or, in the alternative, leave to appeal to Court of Appeals denied. PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

MOTION NO. (426/00) CA 99-932. -- FRANK L. GARGUIOLO, PLAINTIFF-RESPONDENT, V FLEMING COMPANIES, INC., D/B/A JUBILEE FOODS, AND JOHN D. ORYSZAK, D/B/A DOUBLE O FLOOR CARE, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to Court of Appeals denied. PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

MOTION NO. (427/00) CA 99-3407. -- HENRY J. KUJAWA, INDIVIDUALLY AND AS COUNCILMAN FOR TOWN OF WEBSTER, PLAINTIFF-APPELLANT, V TOWN OF WEBSTER, CATHRYN C. THOMAS, INDIVIDUALLY AND AS SUPERVISOR FOR TOWN OF WEBSTER, RONALD W. NESBITT, INDIVIDUALLY AND AS COUNCILMAN FOR TOWN OF WEBSTER, AND JAMES F. CARLEVATTI, INDIVIDUALLY AND AS COUNCILMAN FOR TOWN OF WEBSTER, DEFENDANTS-RESPONDENTS. -- Motion for reargument or, in the alternative, leave to appeal to Court of Appeals denied. PRESENT: PIGOTT, JR., P. J., HAYES, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

MOTION NO. (441/00) KA 99-5158. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JACK VIGLIOTTI, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: PIGOTT, JR., P. J., GREEN, PINE, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

MOTION NOS. (446-447/00) CA 99-3373. -- VILLAGE OF WEBSTER, PLAINTIFF-APPELLANT, V TOWN OF WEBSTER, MONROE COUNTY WATER AUTHORITY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 1.) CA 99-929. -- VILLAGE OF WEBSTER, PLAINTIFF-APPELLANT, V TOWN OF WEBSTER, ET AL., DEFENDANTS, AND MONROE COUNTY WATER AUTHORITY, DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or, in the alternative, leave to appeal to Court of Appeals denied. PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

MOTION NO. (455/00) CA 99-3374. -- VILLAGE OF WEBSTER, PLAINTIFF-APPELLANT, V TOWN OF WEBSTER AND MONROE COUNTY WATER AUTHORITY, DEFENDANTS-RESPONDENTS. (APPEAL NO. 3.) -- Motion for reargument or, in the alternative, leave to appeal to Court of Appeals denied. PRESENT: PIGOTT, JR., P. J., GREEN, HAYES AND HURLBUTT, JJ. (Filed June 16, 2000.)

MOTION NO. (509/00) CAF 99-7188. -- MATTER OF RASYN W. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; BRENDA W., RESPONDENT-APPELLANT. -- Motion for reargument or, in the alternative, leave to appeal to Court of Appeals denied. PRESENT: HAYES, J. P., HURLBUTT, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

MATTER OF GREGORY J. BUSHORR, AN ATTORNEY, RESPONDENT. GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT, PETITIONER. -- Order of suspension entered. Per Curiam Opinion: Respondent was admitted to the practice of law by this Court on February 20, 1973, and maintained an office for the practice of law in Rochester. The Grievance Committee filed a petition charging respondent with acts of professional misconduct arising from the conduct of his real estate practice. Respondent filed an answer denying material allegations of the petition, and a Referee was appointed to conduct a hearing. The Referee filed a report that the Grievance Committee moves to confirm and respondent moves to vacate or modify.

The Referee found that respondent: failed to supervise adequately a paralegal in his employ; neglected a real estate matter by, among other things, failing to discharge an existing mortgage in a timely manner; failed to maintain clients' funds; commingled personal funds with clients' funds; failed to maintain required records; and represented multiple parties in a real

estate transaction without proper disclosure to them and without obtaining their informed consent.

We confirm the findings of fact made by the Referee and conclude that respondent violated the following Disciplinary Rules of the Code of Professional Responsibility:

DR 1-104 (c) (22 NYCRR 1200.5 [c]) - failing to supervise adequately a non-lawyer employee;

DR 5-105 (b) (22 NYCRR 1200.24 [b]) - continuing multiple employment when the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected, or when it would be likely to involve him in representing differing interests;

DR 6-101 (a) (3) (22 NYCRR 1200.30 [a] [3]) - neglecting a legal matter entrusted to him;

DR 7-101 (a) (3) (22 NYCRR 1200.32 [a] [3]) - intentionally prejudicing or damaging a client during the course of the professional relationship;

DR 9-102 (a) (22 NYCRR 1200.46 [a]) - commingling clients' funds with personal funds;

DR 9-102 (b) (1) (22 NYCRR 1200.46 [b] [1]) - failing to maintain funds of a client in a special account separate from his business or personal accounts;

DR 9-102 (c) (4) (22 NYCRR 1200.46 [c] [4]) - failing to pay promptly funds in his possession that a client or third person is entitled to receive; and

DR 9-102 (d) (1) (22 NYCRR 1200.46 [d] [1]) - failing to maintain required records of bank accounts.

We note that respondent has previously received four Letters of Caution for similar misconduct. We have also considered the lack of candor of respondent at the hearing and at his appearance before this Court, as well as his lack of remorse for his serious misconduct. Accordingly, we conclude that he should be suspended for two years and until further order of the Court. PRESENT: PIGOTT, P. J., GREEN, HAYES, HURLBUTT AND LAWTON, JJ. (Filed June 16, 2000.)

MATTER OF ROBERT W. HOCK, AN ATTORNEY, RESPONDENT. GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT, PETITIONER. -- Order of suspension entered. Per Curiam Opinion: Respondent was admitted to the practice of law by the Appellate Division, Second

Department, on July 24, 1991, and maintained an office for the practice of law in Liverpool. The Grievance Committee filed a petition charging respondent with acts of professional misconduct arising from his conduct as counsel to a plaintiff in a personal injury action. Respondent filed an answer denying material allegations of the petition, and a Referee was appointed to conduct a hearing. The Referee filed a report that the Grievance Committee moves to confirm. Respondent requests that the charges in the petition be dismissed.

The Referee found that respondent submitted a false expert disclosure statement and made false statements to the trial court and to defense counsel with regard to the availability and prospective testimony of the expert witness.

We confirm the findings of fact made by the Referee and conclude that respondent violated the following Disciplinary Rules of the Code of Professional Responsibility:

DR 1-102 (a) (4) (22 NYCRR 1200.3 [a] [4]) - engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

DR 1-102 (a) (7) (former [8]) (22 NYCRR 1200.3 [a] [7] [former (8)]) - engaging in conduct that adversely reflects on his fitness to practice law;

DR 7-102 (a) (5) (22 NYCRR 1200.33 [a] [5]) - knowingly making a false statement of fact in his representation of a client; and

DR 7-106 (c) (7) (22 NYCRR 1200.37 [c] [7]) - intentionally violating an established rule of procedure in appearing as a lawyer before a tribunal.

We have considered the mitigating factors submitted by respondent. After consideration of all of the circumstances, we conclude that respondent should be suspended for one year and until further order of the Court (*see*, *Matter of Sargent*, 240 AD2d 40; *Matter of Bridge*, 196 AD2d 43). PRESENT: GREEN, J. P., PINE, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

MATTER OF ROBERT A. LEVEY, AN ATTORNEY, RESPONDENT. GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT. -- Order of censure entered. Per Curiam Opinion: Respondent was admitted to the practice of law by the Appellate Division, Second Department, on

June 26, 1974, and maintained an office for the practice of law in Liverpool. The Grievance Committee filed a petition charging that respondent engaged in conduct involving misrepresentation and that he failed to supervise adequately an attorney in his firm, who filed a false expert disclosure statement in a pending personal injury action and made false statements to the trial court and defense counsel. Respondent filed an answer denying material allegations of the petition, and a Referee was appointed to conduct a hearing. The Referee filed a report that the Grievance Committee moves to confirm.

The Referee declined to find that respondent engaged in conduct involving misrepresentation or that he directed or ratified the conduct of the subordinate attorney. The Referee found, however, that respondent failed to exercise adequate supervision of the subordinate attorney.

We confirm the findings of fact made by the Referee and conclude that respondent violated the following Disciplinary Rules of the Code of Professional Responsibility:

DR 1-104 (b) (22 NYCRR 1200.5 [b]) - failing to make reasonable efforts to ensure that a lawyer over whom he has supervisory authority conforms to the disciplinary rules; and

DR 1-104 (d) (2) (22 NYCRR 1200.5 [d] [2]) - failing to take reasonable remedial action to avoid or mitigate the consequences of conduct constituting a violation of the disciplinary rules by a lawyer over whom he has supervisory authority when he knows or should have known of such conduct.

After consideration of all of the circumstances, we conclude that respondent should be censured. PRESENT: GREEN, J. P., PINE, WISNER, SCUDDER AND KEHOE, JJ. (Filed June 16, 2000.)

MATTER OF ROBERT J. WHITBREAD, AN ATTORNEY, RESPONDENT. GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT, PETITIONER. -- Order of suspension entered. PRESENT: GREEN, J. P., PINE, HAYES, HURLBUTT AND LAWTON, JJ. (Filed May 31, 2000.)

MATTER OF HARRY C. POST, III, AN ATTORNEY, RESIGNOR. -- Voluntary resignation accepted and name removed from roll of attorneys (*see*, *Matter of Manown*, 240 AD2d 83). PRESENT: PINE, J. P., HAYES, WISNER, HURLBUTT, AND SCUDDER, JJ. (Filed June 16, 2000.)

MATTER OF DEBORAH L. ROFFMAN, AN ATTORNEY, RESIGNOR. -- Voluntary resignation accepted and name removed from roll of attorneys

(*see*, *Matter of Manown*, 240 AD2d 83). PRESENT: PINE, J. P., HAYES, WISNER, HURLBUTT AND SCUDDER, JJ. (Filed June 16, 2000.)

KA 98-5514. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V HERBERT D. BROOKS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see, People v Crawford*, 71 AD2d 38). (Appeal from Judgment of Jefferson County Court, Clary, J. - Sodomy, 3rd Degree.) PRESENT: GREEN, J. P., PINE, WISNER, SCUDDER AND KEHOE, JJ. (Filed Apr. 24, 2000.)

KA 99-5457. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RAYMOND J. DUMAS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see, People v Crawford,* 71 AD2d 38). (Appeal from Judgment of Wayne County Court, Kehoe, J. - Sexual Abuse, 1st Degree.) PRESENT: GREEN, J. P., PINE, HURLBUTT, BALIO AND LAWTON, JJ. (Filed May 15, 2000.)

KA 97-5054. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V KENNY FELTON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see, People v Crawford*, 71 AD2d 38). (Appeal from Judgment of Wayne County Court, Kehoe, J. - Criminal Sale Controlled Substance, 3rd Degree.) PRESENT: GREEN, J. P., HAYES, HURLBUTT, SCUDDER AND LAWTON, JJ. (Filed June 5, 2000.)

KAH 99-5524. -- PEOPLE OF THE STATE OF NEW YORK EX REL. RICHARD FLOWERS, PETITIONER-RESPONDENT, V GARY FILION, SUPERINTENDENT, MARCY CORRECTIONAL FACILITY, RESPONDENT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see, People v Crawford*, 71 AD2d 38). (Appeal from Judgment of Supreme Court, Oneida County, Shaheen, J. - Habeas Corpus.) PRESENT: GREEN, J. P., PINE, WISNER, SCUDDER AND KEHOE, JJ. (Filed Apr. 24, 2000.)

KA 00-1050. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V RAMON MARTINEZ, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see, People v Crawford*, 71 ADD 38). (Appeal from Judgment of Monroe County Court, Bristol, J. - Criminal Sale Controlled Substance, 1st Degree.) PRESENT: PINE, J. P., HAYES, HURLBUTT, KEHOE AND LAWTON, JJ. (Filed May 31, 2000.)

KA 99-2241. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V LUIS ROSADO, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see, People v Crawford*, 71 ADD 38). (Appeal from Judgment of Wyoming County Court, Griffin, J. - Attempted Assault, 2nd Degree.) PRESENT: PINE, J. P., HAYES, HURLBUTT, KEHOE AND LAWTON, JJ. (Filed May 31, 2000.)

KA 00-0927. -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V THOMAS TOSCANO, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see, People v Crawford*, 71 ADD 38). (Appeal from Judgment of Monroe County Court, Egan, J. - Grand Larceny, 3rd Degree.) PRESENT: GREEN, J. P., HAYES, HURLBUTT, SCUDDER AND LAWTON, JJ. (Filed May 24, 2000.)

CAF 99-7053. -- MATTER OF GLENDA J., PETITIONER-RESPONDENT, V DAVID C., RESPONDENT-APPELLANT. -- Case held, decision reserved, motion to relieve counsel of assignment granted and new counsel to be assigned. Memorandum: Respondent's counsel was assigned on April 1, 1999 to perfect this appeal from an order of Monroe County Family Court, entered December 4, 1998, which denied respondent's motion to dismiss an order directing respondent to pay child support. Respondent's counsel has moved to be relieved of the assignment on the ground that there are no non-frivolous issues on the appeal. The record shows that no order of filiation has been entered. Therefore, a non-frivolous issue exists concerning whether the court erred in directing respondent to pay child support in the absence of an order of filiation. We relieve counsel of her assignment but assign new counsel to brief that issue as well as any others that counsel's review of the record may disclose. (Appeal from Order of Monroe County Family Court, Taddeo, J. - Support.) PRESENT: PINE, J. P., HAYES, HURLBUTT, KEHOE AND LAWTON, JJ. (Filed May 31, 2000.)