

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

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CA 08-01125

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

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KATHLEEN B. SHORT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

RONALD A. SHORT, DEFENDANT-RESPONDENT.

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CAROLE C. LIVSEY, ROCHESTER, FOR PLAINTIFF-APPELLANT.

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Appeal from an order of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), dated July 25, 2007 in a divorce action. The order dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended complaint is reinstated, and the matter is remitted to Supreme Court, Wayne County, for further proceedings in accordance with the following Memorandum: We conclude that Supreme Court erred in dismissing the amended complaint in this divorce action on the ground that plaintiff failed to establish cruel and inhuman treatment on the part of defendant. Plaintiff met her burden of establishing by a preponderance of the credible evidence that defendant engaged in "serious misconduct . . . such that plaintiff's physical or mental well-being was endangered and continued cohabitation with defendant is unsafe or improper" (*Ridley v Ridley*, 275 AD2d 941, 942; see Domestic Relations Law § 170 [1]; *Brady v Brady*, 64 NY2d 339, 343; *Collins v Collins*, 284 AD2d 743, 745), and defendant failed to rebut that showing (see *Levine v Levine*, 2 AD3d 498, 500). We therefore reverse the order, reinstate the amended complaint, and remit the matter to Supreme Court to grant judgment in favor of plaintiff and to determine the remaining issues.

Entered: March 20, 2009

JoAnn M. Wahl  
Clerk of the Court