

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

1038

CA 09-00355

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

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

V

ORDER

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

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

V

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

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

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

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

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

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

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

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

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

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

Entered: December 30, 2009

Patricia L. Morgan  
Clerk of the Court