SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 8, 2010

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

990

CA 09-02290

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GORSKI, JJ.

CHRISTINA L. HERDENDORF, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEICO INSURANCE COMPANY, DEFENDANT-APPELLANT.

CHRISTINA L. HERDENDORF, PLAINTIFF-RESPONDENT,

V

JESSE JANSKY AND GEICO INSURANCE COMPANY, DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered June 16, 2009. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing the complaints.

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

Memorandum: Plaintiff commenced an action seeking supplementary underinsured motorist (SUM) coverage under an automobile insurance policy and an umbrella insurance policy issued by defendant Geico Insurance Company (Geico) to plaintiff's parents. Plaintiff subsequently commenced a second action seeking SUM coverage for the full amount of the umbrella policy. Defendants moved for summary judgment dismissing the complaints "[b]ased upon the undisputed fact that [Geico] has never offered SUM coverage under its umbrella policies in New York State." Supreme Court denied the motion, and we affirm.

At the outset, we agree with defendants that the umbrella policy at issue is not ambiguous and does not provide SUM coverage (*see Matter of Utica Mut. Ins. Co. [Leno]*, 214 AD2d 980, *lv denied* 86 NY2d 708; *Connolly v St. Paul Fire & Mar. Ins. Co.*, 198 AD2d 652, 653). The umbrella policy stated that it would pay damages on behalf of an insured arising out of an occurrence, and damages were defined as the

total of, inter alia, "damages an *insured* must pay . . . because of *personal injury* or *property damage* covered by [the umbrella] policy." The umbrella policy contained exclusions for damages resulting from "*[p]ersonal injury* to any *insured*" and for "*[p]ersonal injury* or *property damage* resulting from an . . . underinsured motorist claim unless a premium is shown for the [SUM] coverage in the declarations," and that is not the case here.

Plaintiff's misreading of the declarations page of the umbrella policy did not create an ambiguity in that policy, and plaintiff erroneously relies on extrinsic evidence in an attempt to create an ambiguity. "[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement [that] is complete and clear and unambiguous upon its face" (*Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 379, *rearg denied* 25 NY2d 959; *see South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278). Contrary to plaintiff's contention, the failure of defendants to issue a timely disclaimer does not alone warrant denial of the motion (*see* Insurance Law § 3420 [former (d)]). A "[d]isclaimer pursuant to section 3420 [(former [d])] is unnecessary when a claim falls outside the scope of the policy's coverage portion" (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188), and that is the case here. The exclusions relied upon by defendants "simply reinforce[] the provision" that the umbrella policy provides coverage only for those damages that the insured must pay (*New York Mut. Underwriters v Baumgartner*, 19 AD3d 1137, 1140). Indeed, this case does not present "a situation in which the claim would be covered but for the policy exclusion[s]" (*id.*).

We nevertheless reject defendants' contention that the court erred in denying the motion. Plaintiff alleged in the second action that the failure of Geico to provide SUM coverage was based on the "errors and omission" of its agent, defendant Jesse Jansky, in failing to obtain SUM coverage or to notify the policyholders of his inability to do so. An insurance agent " 'may be held liable, based upon either breach of contract or tort, for neglect in failing to procure insurance' " (*Mott v New York Prop. Ins. Underwriting Assn.*, 209 AD2d 981, 981; *see Rodriguez v Investors Ins. Co. of Am.*, 201 AD2d 355; *American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 346). "[A] general request for insurance does not trigger a duty to recommend coverage for every possible scenario" (*Frost v Mayville Tremaine*, 299 AD2d 839, 840; *see Catalanotto v Commercial Mut. Ins. Co.*, 285 AD2d 788, 790, *lv denied* 97 NY2d 604; *Empire Indus. Corp. v Insurance Cos. of N. Am.*, 226 AD2d 580). Where, however, there is a specific request for insurance, the agent has a duty to obtain the requested coverage or to inform the client of his or her inability to do so (*see Murphy v Kuhn*, 90 NY2d 266, 270; *Catalanotto*, 285 AD2d at 790; *Twin Tiers Eye Care Assoc. v First Unum Life Ins. Co.*, 270 AD2d 918, 919, *lv denied* 95 NY2d 758). In such a case, it must be demonstrated that the coverage could have been procured prior to the occurrence of the insured event (*see Mott*, 209 AD2d 981; *Rodriguez*, 201 AD2d 355; *American Motorist Ins. Co.*, 102 AD2d at 346).

In support of their motion, defendants submitted evidence establishing that Geico does not provide SUM coverage in umbrella policies issued in New York. They also submitted the deposition testimony of Jansky, who had no recollection of his conversation with the policyholders but testified that, if they had requested SUM coverage, he would have told them that Geico did not offer that coverage under an umbrella policy. In opposition to the motion, however, plaintiff submitted the affidavit of one of the policyholders, who averred that he specifically requested SUM coverage in the umbrella policy when he spoke with Jansky. He further stated that Jansky informed him that the umbrella policy would cover claims against his family, as well as claims brought by them, including those for injuries in underinsurance situations. That policyholder also averred that he was never told that Geico did not offer SUM coverage under umbrella policies. Plaintiff thus raised a triable issue of fact whether defendants breached their duty to her by failing to obtain the requested coverage or to inform the policyholders of Geico's inability to provide such coverage.

Defendants contend that, even if plaintiff had requested SUM coverage, such coverage was not available in umbrella policies issued by Geico in New York, and thus they cannot be required to provide coverage where none exists. We reject that contention. Although defendants established that Geico did not provide SUM coverage in New York, they failed to establish that other insurers did not provide such coverage. Defendants' reliance on *American Motorist Ins. Co.* in support of the motion is misplaced. In that case, the insurance company established that no insurance company offered the coverage in question, i.e., coverage for interspousal liability claims, and thus the First Department concluded that there was no triable issue of fact "whether interspousal coverage could be obtained in New York from any insurance company" and no basis to impose liability upon the insurance company (102 AD2d at 346).

Finally, to the extent that defendants further contend that plaintiff "is conclusively presumed to know the contents of an insurance policy concededly received" (*Laconte v Bashwinger Ins. Agency*, 305 AD2d 845, 846; *see Loevner v Sullivan & Strauss Agency, Inc.*, 35 AD3d 392, 394, *lv denied* 8 NY3d 808), that contention is not properly before us because it is raised for the first time in defendants' reply brief (*see generally Matter of State of New York v Zimmer* [appeal No. 4], 63 AD3d 1563; *McCarthy v Roberts Roofing & Siding Co., Inc.*, 45 AD3d 1375; *Turner v Canale*, 15 AD3d 960, *lv denied* 5 NY3d 702).

All concur except SCONIERS, J., who is not participating.

Entered: October 8, 2010 Patricia L. Morgan
Clerk of the Court

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

1002

CAF 09-00683

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

IN THE MATTER OF SHELLY DORMIO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PATRICK MAHONEY, RESPONDENT-RESPONDENT.

PAUL M. DEEP, UTICA, FOR PETITIONER-APPELLANT.

PAUL SKAVINA, ATTORNEY FOR THE CHILD, ROME, FOR JACOB M.

Appeal from an order of the Family Court, Oneida County (Frank S. Cook, J.H.O.), entered March 18, 2009 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, dismissed the petition for sole custody.

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

Memorandum: Petitioner mother appeals from an order dismissing her petition, following a hearing, that sought to modify a prior custody order with respect to the parties' child. The prior order was entered following a lengthy hearing and, inter alia, awarded joint custody of the child to the parties, with the child to reside with each parent during alternate weeks. Contrary to the contention of the mother, Family Court properly dismissed her petition. "A party seeking a change in an established custody arrangement must show 'a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child' " (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417; *see Matter of Chrysler v Fabian*, 66 AD3d 1446, *lv denied* 13 NY3d 715). An existing custody arrangement is not subject to modification "merely because of changes in marital status, economic circumstances or improvements in moral or psychological adjustment, at least so long as [a] custodial parent has not been shown to be unfit, or perhaps less fit, to continue as [a] proper custodian" (*Obey v Degling*, 37 NY2d 768, 770; *see Di Fiore*, 2 AD3d 1417). We conclude that the court's determination dismissing the petition has a sound and substantial basis in the record, and we therefore will not disturb it (*see Matter of Horn v Horn*, 74 AD3d 1848).

Entered: October 8, 2010

Patricia L. Morgan
Clerk of the Court

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

1006

CA 10-00048

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

IN THE MATTER OF ONTARIO HEIGHTS HOMEOWNERS ASSOCIATION, JACK TYRIE, AND WILLIAM DUNSMOOR, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF OSWEGO PLANNING BOARD AND UNITED GROUP DEVELOPMENT CORP., RESPONDENTS-RESPONDENTS.

HANCOCK & ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN OF OSWEGO PLANNING BOARD.

MICHAEL J. STANLEY, OSWEGO, FOR RESPONDENT-RESPONDENT UNITED GROUP DEVELOPMENT CORP.

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered September 24, 2009 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, dismissed the petition.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the petition with respect to petitioner William Dunsmoor is reinstated, and the matter is remitted to Supreme Court, Oswego County, for further proceedings in accordance with the following Memorandum: Petitioner William Dunsmoor filed a pro se notice of appeal from a judgment that, inter alia, determined that petitioners lacked standing to challenge the determination of respondent Town of Oswego Planning Board (Planning Board) with respect to a proposed development on County Route 7 in Oswego. We note at the outset that, although Dunsmoor's notice of appeal purports to be on behalf of all three petitioners, Dunsmoor was without authority to take an appeal on behalf of the remaining two petitioners because he is not an attorney admitted to practice law in the State of New York (*see Matter of Schulz v New York State Dept. of Envtl. Conservation*, 186 AD2d 941, 942 n 1, *lv denied* 81 NY2d 707; *see also Whitehead v Town House Equities, Ltd.*, 8 AD3d 369). We further note that the motion of the Planning Board seeking to dismiss this appeal as moot was denied by this Court, with leave to renew the motion at oral argument of the appeal. The Planning Board in fact renewed the motion at oral argument, and we again deny it.

On the merits of the standing issue, we agree with Dunsmoor that Supreme Court erred in determining that he lacks standing to bring this proceeding. Dunsmoor, who resides across the street from the proposed development, has alleged that he may suffer environmental harm as a result of the Planning Board's decision to permit the developer to utilize a private sewage treatment plant on the proposed development, rather than utilizing the City of Oswego's public sewer system. The record establishes that Dunsmoor owns property that is 697 feet from the property line of the proposed development and 1,242 feet from the edge of the development. Thus, he is " 'arguably within the zone of interest to be protected by [article 8 of the Environmental Conservation Law]' . . . and [has] standing to seek judicial review 'without pleading and proving special damage, because adverse effect or aggrievement can be inferred from the proximity' " (*Matter of Michalak v Zoning Bd. of Appeals of Town of Pomfret*, 286 AD2d 906, 906-907). We therefore reverse the judgment insofar as appealed from, reinstate the petition with respect to Dunsmoor, and remit the matter to Supreme Court for further proceedings thereon.

Entered: October 8, 2010 Patricia L. Morgan
Clerk of the Court

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

1028

CA 10-00409

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

DOUG BURNETT AND KELLY BURNETT,
PLAINTIFFS-RESPONDENTS,

V ORDER

COLUMBUS MCKINNON CORPORATION,
DEFENDANT-APPELLANT.

AMIGONE, SANCHEZ, MATTREY & MARSHALL, LLP, BUFFALO (RICHARD A. CLACK OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOVDE DASSOW & DEETS LLC, INDIANAPOLIS, INDIANA (NICHOLAS C. DEETS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

MATTHIESEN WICKERT LEHRER, S.C., HARTFORD, WISCONSIN (GARY L. WICKERT OF COUNSEL), FOR INTERVENOR FRANKENMUTH MUTUAL INSURANCE COMPANY.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 18, 2009. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on September 8, 2010,

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

Entered: October 8, 2010

Patricia L. Morgan
Clerk of the Court

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

1052

CA 10-00592

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

RAYMOND RYAN, PLAINTIFF-RESPONDENT,

V ORDER

STANLEY BABIARZ, DEFENDANT-APPELLANT.

FRANK A. BERSANI, JR., SYRACUSE, FOR DEFENDANT-APPELLANT.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (RICHARD PERTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette Clark, J.), entered February 3, 2010 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs for reasons stated at Supreme Court.

Entered: October 8, 2010

Patricia L. Morgan
Clerk of the Court

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

1116

CA 10-00608

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

PATRICIA A. PABON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALONZO M. SCOTT, ET AL., DEFENDANTS,
SHEONTRA M. HARPER AND GUS HARPER, JR.,
DEFENDANTS-RESPONDENTS.

COLUCCI & GALLAHER, P.C., BUFFALO (TODD BUSHWAY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (VICTOR WRIGHT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered July 24, 2009 in a personal injury action. The order, insofar as appealed from, granted the motion of defendants Sheontra M. Harper and Gus Harper, Jr. for summary judgment and dismissed the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and reinstating the complaint against defendants Sheontra M. Harper and Gus Harper, Jr. and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when a motor vehicle operated by Sheontra M. Harper and owned by Gus Harper, Jr. (collectively, defendants) and in which plaintiff was a passenger collided with a vehicle operated by defendant Alonzo M. Scott. Sheontra Harper was driving east and intended to make a right turn at an intersection that was usually controlled by a four-way stop but that was missing the stop sign for vehicles traveling in her direction. She was very familiar with the intersection in question inasmuch as she had traveled through it multiple times from each direction as a school bus driver, and she was aware that the stop sign was missing. Indeed, she reported the missing stop sign to the school bus dispatcher. The collision occurred when Scott ran the stop sign controlling vehicles traveling south into the intersection and collided with Sheontra Harper, who had also entered the intersection without stopping.

We conclude that Supreme Court erred in granting the motion of defendants for summary judgment dismissing the complaint against them. Defendants are correct that Sheontra Harper could not have been issued

a ticket for entering the intersection without stopping (*see* Vehicle and Traffic Law § 1110 [b]), and that the street onto which she attempted to turn was not a through street for which she would have been required to stop regardless of the absence of a stop sign (*see generally Plantikow v City of New York*, 189 AD2d 805, 806; *Mays v Weiman*, 73 AD2d 639; *Villa v Vetuskey*, 50 AD2d 1093, 1093-1094). Nevertheless, we conclude on the record before us that the evidence establishing that Sheontra Harper was aware that the stop sign at the intersection was missing raised triable issues of fact whether she was negligent in entering the intersection without stopping and whether her failure to stop was a proximate cause of the accident. Moreover, "[i]t is well settled that, even where a vehicle enters an intersection with [the right-of-way], the driver may nevertheless be found negligent if he or she fails to use 'reasonable care when proceeding into the intersection' " (*Strasburg v Campbell*, 28 AD3d 1131, 1132). We therefore modify the order accordingly. We further conclude that the court properly denied plaintiff's cross motion for partial summary judgment on the issue of negligence inasmuch as it cannot be said that Sheontra Harper was negligent as a matter of law for entering the intersection without stopping (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: October 8, 2010 Patricia L. Morgan
Clerk of the Court

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

1120

CA 10-00541

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF GENERAL ELECTRIC CAPITAL CORPORATION, BY ALFRED W. POPKESS, AS RECEIVER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LORETTO-UTICA RESIDENTIAL HEALTH CARE FACILITY AND LORETTO-UTICA ADULT RESIDENCE, INC., RESPONDENTS-APPELLANTS.

PINSKY & SKANDALIS, SYRACUSE (DEAN J. DIPILATO OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered May 14, 2009 in a proceeding pursuant to RPAPL article 7. The order and judgment, inter alia, granted the motion of petitioner to confirm the report of the referee and for the entry of money judgments against respondents for rent arrears.

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

Memorandum: Petitioner commenced this summary proceeding pursuant to RPAPL article 7 seeking, inter alia, money judgments against respondents for unpaid rent. General Electric Capital Corporation (GECC) previously commenced a mortgage foreclosure action, and petitioner was appointed temporary receiver in that action. In the instant summary proceeding, Supreme Court appointed a Referee and authorized him, pursuant to an order of reference, to determine the amount of unpaid rent owed by respondents. Following a hearing, the Referee determined that respondents owed $11,212,461 in back rent, and the court thereafter entered money judgments totaling that amount against respondents. We reject the contention of respondents that reversal is required because they were denied their right to a jury trial, as requested in their answer. By failing to object to the order of reference and by participating without objection in the hearing conducted by the Referee, respondents waived their right to a jury trial (*see Matter of Union Indem. Ins. Co. of N.Y.*, 67 AD3d 469, 471, *lv dismissed* 14 NY3d 859; *Matter of Nilda S. v Dawn K.*, 302 AD2d 237, *lv denied* 100 NY2d 512). In any event, respondents admitted that

they had not paid any rent for approximately eight years, since December 2000, and we thus conclude that they were not entitled to a jury trial because they failed to raise a triable issue of fact (*see* RPAPL 745 [1]; *Matter of Rodgers v Crumb*, 242 AD2d 874).

We reject the further contention of respondents that the court erred in confirming the Referee's report in the absence of a finding that they had breached the leases. The leases unambiguously required respondents to pay rent in an amount equal to the landlord's expenses associated with maintaining the property, including the amount necessary to pay the mortgage. As noted, respondents admitted that they paid no rent for eight years, and the mere fact that the landlord ceased making mortgage payments to the mortgagee did not relieve respondents of their obligation to pay rent under the leases. Thus, the only unresolved issue for the Referee to determine was the precise amount of unpaid rent.

Contrary to the contention of respondents, the court did not abuse its discretion in severing the causes of action for money judgments from the causes of action seeking eviction of respondents and possession of the premises in question. "The decision whether to grant severance 'rests soundly in the discretion of the . . . court and, on appeal, will be affirmed absent a demonstration of abuse of discretion or prejudice to a substantial right' " (*Rapini v New Plan Excel Realty Trust, Inc.*, 8 AD3d 1013, 1014). Here, we perceive no abuse of discretion, and respondents have failed to demonstrate prejudice based on the severance, particularly in view of the fact that the court stayed enforcement of the money judgments until "a proper party, entity or operator" of each of the respective facilities is in place and approved by the Department of Health.

We agree with respondents, however, that petitioner should have obtained a new index number for this summary proceeding pursuant to RPAPL article 7 rather than using the index number for the mortgage foreclosure action. Nevertheless, the failure to purchase a new index number does not mandate reversal where, as here, a substantial right of a party is not prejudiced (*see* CPLR 2001; *Matter of Miller v Waters*, 51 AD3d 113, 115-116). Finally, we conclude that the court properly awarded judgment to GECC directly inasmuch as GECC is ultimately entitled to the proceeds of the money judgments (*see generally Chase Manhattan Bank v Brown & E. Ridge Partners*, 243 AD2d 81, 84-85).

Entered: October 8, 2010 Patricia L. Morgan
Clerk of the Court

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

1121

CA 09-02515

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

GLORIA A. RICHTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RALPH C. RICHTER, DEFENDANT-APPELLANT.

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

MACHT, BRENIZER & GINGOLD, PC, SYRACUSE (HARLAN B. GINGOLD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Martha Walsh Hood, A.J.), entered February 9, 2009 in a divorce action. The judgment, inter alia, equitably distributed the marital property of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by deleting the 11th decretal paragraph insofar as it requires defendant to provide a life insurance policy or annuity sufficient to protect plaintiff's share of the pension received by defendant until plaintiff's 84th birthday and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Onondaga County, for a hearing in accordance with the following Memorandum: Defendant appeals from a judgment of divorce that, inter alia, directed him to pay child support and a portion of plaintiff's counsel fees, as well as distributed marital property. Contrary to defendant's contention, Supreme Court properly concluded that the property located in Vermont was marital property. The funds from defendant's inheritances, which were used to purchase and improve the property, were commingled with marital funds in a joint account (*see* Banking Law § 675 [b]; *Di Nardo v Di Nardo*, 144 AD2d 906), and defendant failed to establish by clear and convincing evidence "that [the] joint account was established *solely* for the purpose of convenience" (*Kay v Kay*, 302 AD2d 711, 713 [emphasis added]; *see Crescimanno v Crescimanno*, 33 AD3d 649). Contrary to defendant's further contention, the court did not abuse its discretion in awarding plaintiff counsel fees (*see* Domestic Relations Law § 237 [b]; *McBride-Head v Head*, 23 AD3d 1010; *Zielinski v Zielinski*, 289 AD2d 1017).

Although defendant contends that it is an economic burden to require him to purchase a life insurance policy or annuity to ensure that plaintiff receives her share of his pension, the record does not

establish the amount of insurance necessary or the cost of purchasing and maintaining such insurance. We therefore modify the judgment accordingly, and we remit the matter to Supreme Court for a hearing to determine the amount of life insurance required and the equitable apportionment of the costs (*see* Domestic Relations Law § 236 [B] [8] [a]; *Hendricks v Hendricks*, 13 AD3d 928, 930; *see also Haydock v Haydock*, 254 AD2d 577, 579-580).

Entered: October 8, 2010

Patricia L. Morgan
Clerk of the Court

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

1134

CA 09-02375

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

RAYMOND S. HANDVILLE AND FRANCIS HANDVILLE,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

MJP CONTRACTORS, INC.,
DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANTS.

KENNY & KENNY, PLLC, SYRACUSE (ERIN K. SKUCE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANN MAGNARELLI ALEXANDER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered June 29, 2009 in a personal injury action. The order, inter alia, denied the motion of plaintiffs for partial summary judgment and the cross motion of defendant MJP Contractors, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiffs' motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action, by denying the motion of defendant MJP Contractors, Inc. seeking leave to amend its answer, and by granting those parts of the cross motion of that defendant seeking summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against it, and the Labor Law § 241 (6) cause of action against it insofar as that cause of action is based on the alleged violation of 12 NYCRR 23-1.21 (b) (4) (ii), and dismissing those causes of action to that extent against it, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action to recover damages for injuries allegedly sustained by Raymond S. Handville (plaintiff) when he fell from a ladder scaffold at a construction site. Defendant MJP Contractors, Inc. (MJP) was the general contractor at the site. Supreme Court, in a "bench decision and order" (hereafter, order), denied the motion of plaintiffs for partial summary judgment on liability under Labor Law § 240 (1) and § 241 (6) and granted the motion of MJP seeking leave to amend its answer to include a counterclaim for common-law indemnification "and/or" contribution. In addition, MJP cross-moved

for summary judgment dismissing the complaint against it, and the court granted only that part of the cross motion with respect to the Labor Law § 241 (6) cause of action to the extent that it was based on certain regulations that are not at issue herein. We conclude that the court erred in denying that part of the motion of plaintiffs for partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action. We further conclude that the court erred in granting the motion of MJP for leave to amend its answer and in denying those parts of the cross motion of MJP for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against it, as well as the Labor Law § 241 (6) cause of action against it insofar as it is based on the alleged violation of 12 NYCRR 23-1.21 (b) (4) (ii). We therefore modify the order accordingly.

We agree with plaintiffs on their appeal that they met their initial burden on that part of their motion with respect to Labor Law § 240 (1) (*see Cherry v Time Warner, Inc.*, 66 AD3d 233, 236), and we reject the contention of MJP that it raised a triable issue of fact whether the actions of plaintiff were the sole proximate cause of his injuries under section 240 (1) (*see Ewing v Brunner Intl., Inc.*, 60 AD3d 1323; *see generally Gallagher v New York Post*, 14 NY3d 83, 88). Although MJP submitted evidence establishing that proper safety equipment, i.e., scaffolding approved by the Occupational Safety and Health Administration and related safety lines, was present at the work site, MJP did not present any evidence establishing that plaintiff had been instructed to use that equipment (*see Ganger v Anthony Cimato/ACP Partnership*, 53 AD3d 1051, 1052-1053; *cf. Lovall v Graves Bros., Inc.*, 63 AD3d 1528, 1529).

We also agree with plaintiffs on their appeal that the court erred in granting the motion of MJP for leave to amend its answer inasmuch as it is well settled that such leave "should not be granted where, as here, the proposed amendment lacks merit" (*Hodgson, Russ, Andrews, Woods & Goodyear v Isolatek Intl. Corp.*, 300 AD2d 1047, 1048). Workers' Compensation Law § 11 provides in relevant part that an employer shall not be liable to any third party for contribution and indemnification for injuries sustained by an employee acting within the scope of his or her employment unless the injured worker had sustained a " 'grave injury,' " and there is no allegation in this case that plaintiff sustained such an injury. We reject the contention of MJP that it may seek contribution and indemnification because plaintiff failed to obtain workers' compensation insurance for himself. Even assuming, arguendo, that plaintiff was a self-employed person who was required pursuant to Workers' Compensation Law § 54 (8) to obtain workers' compensation insurance for persons employed by him, we conclude that there is no requirement in section 54 that he obtain such insurance for himself. Thus, plaintiff is not liable for contribution or indemnification pursuant to Workers' Compensation Law § 11 (*cf. Boles v Dormer Giant, Inc.*, 4 NY3d 235, 239-240). Inasmuch as MJP asserts no contractual or other basis for the counterclaim (*cf. Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 431-432), the proposed amendment is patently without merit.

We agree with MJP on its cross appeal, however, that the court

erred in denying those parts of its cross motion with respect to the Labor Law § 200 and common-law negligence causes of action. MJP "established its entitlement to judgment as a matter of law 'by demonstrating that it did not exercise supervisory control over . . . plaintiff's work[] and that it neither created nor had actual or constructive knowledge of the allegedly dangerous condition' " on the premises (*Alnutt v J&E Elec.*, 28 AD3d 1214, 1215; *see generally Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381), and plaintiffs failed to raise a triable issue of fact (*see Talbot v Jetview Props., LLC*, 51 AD3d 1396, 1397; *cf. Shaheen v Hueber-Breuer Constr. Co.*, 4 AD3d 761, 763).

We further agree with MJP on its cross appeal that the court erred in denying that part of its cross motion with respect to the Labor Law § 241 (6) cause of action insofar as it is based on the alleged violation of 12 NYCRR 23-1.21 (b) (4) (ii). That section of the Industrial Code does not apply to this case, in which plaintiff fell from a ladder pick rather than from the rungs of a ladder (*see Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1138; *see also Amantia v Barden & Robeson Corp.*, 38 AD3d 1167, 1168-1169). Finally, we reject the contention of MJP that the court erred in denying that part of its cross motion with respect to the Labor Law § 241 (6) cause of action insofar as it is based on the alleged violation of 12 NYCRR 23-5.17 (c). There is a triable issue of fact whether the ladder scaffold was "placed, fastened or held, or [was] so equipped with acceptable means as to prevent slipping" (*id.*).

Entered: October 8, 2010 Patricia L. Morgan
Clerk of the Court

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

1137

CA 09-02388

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

PATRICIA TULLY, PLAINTIFF-APPELLANT,

V ORDER

ANDERSON'S FROZEN CUSTARD, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

HOGAN WILLIG, GETZVILLE (JOHN LICATA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (TODD BUSHWAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered August 17, 2009 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Entered: October 8, 2010

Patricia L. Morgan
Clerk of the Court

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

1138

CA 10-00064

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND PINE, JJ.

PATRICIA TULLY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANDERSON'S FROZEN CUSTARD, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

HOGAN WILLIG, GETZVILLE (JOHN LICATA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (TODD BUSHWAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered December 23, 2009 in a personal injury action. The order, insofar as appealed from, upon reargument adhered to the court's determination granting the motion of defendant for summary judgment and dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly tripped and fell in a parking lot owned by defendant. According to plaintiff, after she had purchased ice cream at defendant's business and was returning to her vehicle, she stepped into "a depression in the pavement" of the parking lot and fell. We agree with plaintiff that Supreme Court, upon granting the motion of plaintiff for leave to reargue her opposition to defendant's motion seeking summary judgment dismissing the complaint, erred in adhering to its prior determination granting defendant's motion. "Based on the record before us, we conclude that defendant failed to meet its burden of establishing as a matter of law that the alleged defect 'was too trivial to constitute a dangerous or defective condition' " (*Cuebas v Buffalo Motor Lodge/Best Value Inn*, 55 AD3d 1361, 1362; *see Stewart v 7-Eleven, Inc.*, 302 AD2d 881). "[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Trincere v County of Suffolk*, 90 NY2d 976, 977), and we conclude under the circumstances of this case that there is an issue of fact whether the alleged defect is indeed actionable. We note in any event the well-established principle that a defendant cannot

establish its entitlement to summary judgment dismissing the complaint by pointing to alleged gaps in the plaintiff's proof (*see generally Orcutt v American Linen Supply Co.*, 212 AD2d 979).

Entered: October 8, 2010

Patricia L. Morgan
Clerk of the Court