

MOTION NO. (1896/89) KA 05-02532. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN J. JOHNSON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1576/90) KA 90-01576. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HARRY AYRHART, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND VALENTINO, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (484/97) KA 04-00304. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EARL STONE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND VALENTINO, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1095/97) KA 15-00058. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAMARR SCOTT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND LINDLEY, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1078/99) KA 97-00568. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANK D'ANTUONO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (849/00) KA 99-01550. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY MULDROW, DEFENDANT-APPELLANT. -- Motion for reargument or, in the alternative, a writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (632/01) KA 98-05621. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES PEARCE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (994/01) KA 98-05472. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CARL GEE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (626/02) KA 00-03001. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY YOUNGBLOOD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND WHALEN, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (802/03) KA 01-00914. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHARROWL DAVIS, ALSO KNOWN AS SHARROD DAVIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND WHALEN, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (467/05) KA 02-00776. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY A. RIMMEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND LINDLEY, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (925/11) KA 08-01253. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RABAH E. MORAN, ALSO KNOWN AS TERRY MCKEE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PERADOTTO, J.P., LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1327/12) KA 10-01107. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ISIAH WILLIAMS, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (35/14) CA 13-00639. -- SVETLANA BALUK AND MARK OSILOVSKIY, PLAINTIFFS-APPELLANTS, V NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-RESPONDENT. -- Motion insofar as it seeks in the alternative leave to appeal to the Court of Appeals denied and the motion insofar as it seeks leave to reargue, deemed a motion seeking leave to renew (see CPLR 2221 [e] [2]; *Karlin v Bridges*, 172 AD2d 644, 645), is granted in part and, upon renewal, the memorandum and order entered February 7, 2014 (114 AD3d 1151) is amended by deleting the ordering paragraph and substituting the following ordering paragraph:

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion and reinstating the complaint, and as modified the order is affirmed without costs.

The memorandum and order is further amended by deleting the memorandum and substituting the following memorandum:

Plaintiffs commenced this action alleging that defendant breached its obligations under their homeowner's policy when it failed to reimburse them fully for sums they expended to repair or replace damage resulting from "puff-back" from their malfunctioning furnace. We conclude that Supreme Court erred in granting defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7), and we therefore modify the order by denying that motion and reinstating the complaint.

The loss settlement provision of the policy states that defendant will pay the cost to repair or replace an insured building, "but not more than the least of the following amounts:

(1) [t]he limit of liability under [the] policy that applies to the building; (2) [t]he replacement cost of that part of the building damaged with material of like kind and quality and for like use; or (3) [t]he necessary amount actually spent to repair or replace the damaged building." That provision further states that defendant "will pay no more than the actual cash value of the damage until actual repair or replacement is complete."

Another provision in the policy states that "[n]o action can be brought against [defendant] unless there has been full compliance with all of the terms under [the Conditions] Section . . . of

[the] policy and the action is started within two years after the date of loss." Defendant made payments to plaintiffs for the actual cash value of the damage, but refused to pay the full cost of their repairs, including recoverable depreciation, which were not completed within two years after the date of loss. Thus, the contractual limitation period expired before defendant's alleged breach.

"[T]here is nothing inherently unreasonable about a two-year period of limitation," and agreements that modify the statute of limitations by specifying a shorter period for commencing an action are generally enforced (*Executive Plaza, LLC v Peerless Ins. Co.*, 22 NY3d 511, 518; see *Blitman Constr. Corp. v Insurance Co. of N. Am.*, 66 NY2d 820). In certain circumstances, however, as in *Executive Plaza*, "[i]t is neither fair nor reasonable to require a suit within two years from the date of the loss, while imposing a condition precedent to the suit—in this case, completion of [repair or] replacement of the property—that cannot be met within that two-year period" (*id.* at 518). Here, the record fails to establish whether plaintiffs were able to satisfy the condition precedent in the loss settlement provision of their policy prior to commencing this action, i.e., completion of repairs within two years after the loss. Thus, an issue remains "whether the plaintiff[s] had a reasonable opportunity to commence [their] action within the period of limitation" (*id.* at 519 [internal quotation marks omitted]), and that issue must be resolved before it is determined whether the contractual limitation period is

enforceable in this case.

We further conclude that the court properly denied plaintiffs' cross motion seeking, inter alia, summary judgment declaring that the remainder of their loss is covered under the policy.

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

(Filed Mar. 20, 2015.)

MOTION NO. (879/14) CA 14-00370. -- DENISE D. SIMONEIT, PLAINTIFF-APPELLANT-RESPONDENT, V MARK CERRONE, INC. AND JAMES A. FREEMAN, DEFENDANTS-RESPONDENTS-APPELLANTS. -- Motion for reargument of the appeal is granted to the extent that, upon reargument, the memorandum and order entered November 14, 2014 (122 AD3d 1246) is amended by deleting the ordering paragraph and substituting the following ordering paragraph:

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for partial summary judgment on the issue of defendants' negligence, denying that part of the motion seeking to dismiss the affirmative defense of plaintiff's culpable conduct and reinstating that defense, and striking the affirmative defenses based upon alleged brake failure, and as so modified the order is affirmed without costs.

The memorandum is further amended by deleting the first three sentences of the second paragraph and replacing those sentences with the following:

Contrary to the contention of plaintiff, we conclude that Supreme Court did not abuse its discretion in granting defendants' cross motion. "While a delay in seeking to amend a pleading may be considered by the trial court, it does not bar that court from exercising its discretion in favor of permitting the amendment where[, as here,] there is no prejudice" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 413-414). We agree with plaintiff, however, that preclusion of the affirmative defenses based on brake failure is warranted as a sanction for spoliation (see *Simmons v Pierce*, 39 AD3d 1252, 1253), and we therefore modify the order accordingly.

The memorandum is further amended by deleting the last sentence of the second paragraph and replacing it with the following:

Because the calipers were "a crucial piece of evidence" with respect to any affirmative defenses based upon brake failure, we conclude that striking such affirmative defenses is the appropriate sanction for their disposal of the brakes (*Simmons*, 39 AD3d at 1253 [internal quotation marks omitted]; see *Cutroneo v Dryer*, 12 AD3d 811, 813).

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (957/14) KA 13-00409. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JON N. ROBLEE, DEFENDANT-APPELLANT. -- Motion for reargument of the appeal is granted to the extent that, upon reargument, the memorandum and order entered November 14, 2014 (122 AD3d 1261), is amended by deleting the second sentence of the fourth paragraph of the memorandum and substituting the following:

We reject that contention. Addressing first defendant's claims concerning the number of grand jurors, we note that, pursuant to Criminal Procedure Law, a grand jury proceeding must be conducted before at least 16 grand jurors, 12 of whom must concur in the finding of the indictment (*see* CPL 210.35 [2], [3]; *see also* CPL 190.25 [1]; *People v Grimes*, 115 AD3d 1194, 1195, *lv denied* 24 NY3d 1084; *People v Eun Sil Jang*, 17 AD3d 693, 694). Here, the grand jury minutes establish that 19 grand jurors voted to indict defendant, and 1 voted not to indict him. We therefore perceive no violation of the above statutes.

With respect to defendant's claim concerning the grand jury instructions, it is well established that "[a] grand jury 'need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law' " (*People v Burch*, 108 AD3d 679, 680, *lv denied* 22 NY3d 1087). Furthermore, "[d]ismissal of an indictment under CPL 210.35 (5) is an exceptional remedy that should . . . be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the

[g]rand [j]ury" (*id.* [internal quotation marks omitted]). Here, we conclude that the prosecutor provided the grand jurors " 'with enough information to enable [them] intelligently to decide whether a crime ha[d] been committed and to determine whether there exist[ed] legally sufficient evidence to establish the material elements of the crime' " (*People v Wooten*, 283 AD2d 931, 932, *lv denied* 96 NY2d 943).

PRESENT: SMITH, J.P., LINDLEY, VALENTINO, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1144/14) CA 14-00590. -- MANUFACTURERS AND TRADERS TRUST COMPANY, PLAINTIFF-RESPONDENT-APPELLANT, V NIAGARA FALLS MALL, INC., DEFENDANT-APPELLANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1264/14) KA 14-00036. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDREW J. JOHNSON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1275/14) CA 14-00902. -- SADE WATSON, PLAINTIFF-APPELLANT, V KIBLER ENTERPRISES, ARTHUR BECKER, JR., MICHAEL BECKER, MARK BECKER, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1280/14) CA 14-00948. -- RAYMOND PINK AND MICHELLE PINK,
PLAINTIFFS-RESPONDENTS, V MATTHEW RICCI, DEFENDANT-RESPONDENT, MARK WILBUR,
CHRISTIN WILBUR, ROME YOUTH HOCKEY ASSOCIATION, INC., WHITESTOWN YOUTH
HOCKEY ASSOCIATION, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. --
Motion for leave to appeal to the Court of Appeals granted. PRESENT:
SCUDDER, P.J., CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1281/14) CA 14-00221. -- THOMAS D. AYERS,
PLAINTIFF-RESPONDENT-APPELLANT, V SNYDER CORP.,
DEFENDANT-APPELLANT-RESPONDENT. (ACTION NO. 1.) THOMAS D. AYERS,
PLAINTIFF-RESPONDENT-APPELLANT, V CENTER FOR TRANSPORTATION EXCELLENCE, LLC
AND SNYDER CORP., DEFENDANTS-APPELLANTS-RESPONDENTS. (ACTION NO. 2.) --
Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY,
AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1300/14) CA 14-00357. -- IN THE MATTER OF THE NONHUMAN RIGHTS
PROJECT, INC., ON BEHALF OF KIKO, PETITIONER-APPELLANT, V CARMEN PRESTI,
INDIVIDUALLY AND AS AN OFFICER AND DIRECTOR OF THE PRIMATE SANCTUARY, INC.,
CHRISTIE E. PRESTI, INDIVIDUALLY AND AS AN OFFICER AND DIRECTOR OF THE
PRIMATE SANCTUARY, INC. AND THE PRIMATE SANCTUARY, INC.,
RESPONDENTS-RESPONDENTS. -- Motion for leave to appeal to the Court of
Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND
WHALEN, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1384/14) KA 12-02110. -- THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT, V EARNEST HUGHES, DEFENDANT-APPELLANT. -- Motion for reargument

of the appeal is granted to the extent that, upon reargument, the memorandum and order entered January 2, 2015 (124 AD3d 1380) is amended by deleting the second paragraph of the memorandum and substituting the following paragraph:

Even assuming, arguendo, that the People committed a *Brady* violation by failing to produce the recording of the victim's 911 call prior to the suppression hearing, we conclude that the content of that call "was probative of the weight to be accorded to the witness[es'] identification, not to the suggestiveness of the showup procedure and, therefore, [the call] could not have impacted the decision to suppress the identification" (*People v Whitted*, 117 AD3d 1179, 1182, *lv denied* 23 NY3d 1026).

Defendant's contention that the People committed a *Rosario* violation by failing to preserve a police officer's notes is unpreserved for our review because defendant did not object to the destruction of the notes or seek a sanction (*see People v Rogelio*, 79 NY2d 843, 844; *People v Sanzotta*, 191 AD2d 1032, 1032-1033). 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]).

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 20, 2015.)

**MOTION NO. (1458/14) KAH 13-02106. -- THE PEOPLE OF THE STATE OF NEW YORK
EX REL. ADAM A. JAMISON, PETITIONER-APPELLANT, V HAROLD D. GRAHAM,
SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. --**

Motion for leave to appeal to the Court of Appeals denied. PRESENT:
CENTRA, J.P., LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1464/14) CA 14-00993. -- JODI HAUSRATH, AS ADMINISTRATRIX FOR THE ESTATE OF ANTOINETTE ADIMEY, DECEASED, AND ANTHONY ADIMEY, PLAINTIFFS-RESPONDENTS, V PHILLIP MORRIS USA, INC., ET AL., DEFENDANTS, LIGGETT GROUP, INC., NOW KNOWN AS BROOKE GROUP, LTD., AND LIGGETT & MYERS TOBACCO COMPANY, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Mar. 21, 2015.)

KA 12-01657. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERRY L. HOLMES, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from a Judgment of Supreme Court, Monroe County, Francis A. Affronti, J. - Criminal Possession of a Weapon, 2nd Degree). PRESENT: SCUDDER, P.J., SMITH, CARNI, SCONIERS, AND WHALEN, JJ. (Filed Mar. 20, 2015.)