



*SUPREME COURT OF THE STATE OF NEW YORK*  
*APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT*

DECISIONS FILED

JULY 2, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

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. 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***

20

**CA 07-00494**

PRESENT: SCUDDER, P.J., HURLBUTT, CENTRA, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF JAMES TAYLOR,  
PETITIONER-APPELLANT,

V

ORDER

PATRICK J. DUFFY, ASSESSOR, TOWN OF WEST MONROE,  
AND TOWN OF WEST MONROE, RESPONDENTS-RESPONDENTS.

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DENNIN & DENNIN, LAKE PLACID (GREGORY M. DENNIN OF COUNSEL), FOR  
PETITIONER-APPELLANT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE  
(BRIAN J. SMITH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered February 7, 2007 in a proceeding pursuant to RPTL article 7. The order dismissed the petition.

Now, upon reading and filing the stipulation discontinuing action signed by the attorneys for the parties on June 18 and 26, 2009,

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

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

264

**KA 07-01088**

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STACEY L. WILLIAMS, DEFENDANT-APPELLANT.

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GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered April 27, 2007. The order directed defendant to pay restitution.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the order is affirmed, and the matter is remitted to Genesee County Court for a new hearing in accordance with the following Memorandum: Defendant was convicted upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), and he now appeals from an order of restitution. Defendant contends that County Court erred in ordering him to pay restitution in the amount of \$4,812.35. We agree, for the same reason as that set forth in our decision in *People v Bunnell* (59 AD3d 942, amended on rearg \_\_\_ AD3d \_\_\_ [June 5, 2009], amended \_\_\_ AD3d \_\_\_ [June 19, 2009]). Although defendant failed to preserve his contention for our review (see CPL 470.05 [2]), preservation is not required because defendant has an essential "right to be sentenced as provided by law" (*People v Fuller*, 57 NY2d 152, 156), and that right is implicated here (see *Bunnell*, \_\_\_ AD3d \_\_\_ [June 19, 2009]). We therefore modify the order by vacating the amount of restitution ordered, and we remit the matter to County Court for a new hearing to determine the amount of restitution in compliance with Penal Law § 60.27.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**316**

**CA 08-01602**

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

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JOHN L. OLSZEWSKI, INDIVIDUALLY AND AS PARENT  
AND NATURAL GUARDIAN OF NICHOLAS J. OLSZEWSKI,  
AN INFANT UNDER THE AGE OF 14 YEARS,  
PLAINTIFF-RESPONDENT,

V

ORDER

THOMAS B. HALL, ET AL., DEFENDANTS,  
AND SCI FUNERAL SERVICES OF NEW YORK, INC.,  
DOING BUSINESS AS PIRRO & SONS FUNERAL HOME,  
DEFENDANT-APPELLANT.

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BARRETT LAZAR, LLC, FOREST HILLS (MARC B. SCHULEY OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

BOTTAR LEONE, PLLC, SYRACUSE (EDWARD S. LEONE OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered October 29, 2007 in a personal injury action. The order denied the motion of defendant SCI Funeral Services of New York, Inc., doing business as Pirro & Sons Funeral Home, for summary judgment dismissing the amended complaint against it.

Now, upon the stipulation of discontinuance of appeal and settlement of action signed by the attorneys for the parties to the appeal on May 27, 2009 and filed in the Onondaga County Clerk's Office on June 17, 2009,

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

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

589

CA 08-01232

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND GORSKI, JJ.

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BARBARA J. BUCKMANN, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK AND NEW YORK STATE THRUWAY  
AUTHORITY, DEFENDANTS-RESPONDENTS.  
(CLAIM NO. 111344.)

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DOMINIC PELLEGRINO, ROCHESTER, FOR CLAIMANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF  
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Court of Claims (Renee Forgenski Minarik, J.), entered May 2, 2008. The order denied claimant's motion for partial summary judgment and granted the cross motion of defendants for summary judgment dismissing the claim.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion is denied, the claim is reinstated and the motion is granted.

Memorandum: Claimant commenced this Labor Law § 240 (1) action seeking damages for injuries she sustained when she fell from an elevated platform while repairing a non-functioning signal lamp at a lock on the Erie Canal. We agree with claimant that the Court of Claims erred in granting defendants' cross motion for summary judgment dismissing the claim and in denying her motion for partial summary judgment on liability under Labor Law § 240 (1). Initially, we note that defendants did not cross-appeal from the order, and thus their contention that the court erred in determining that defendant State of New York (State) is not protected by Workers' Compensation Law § 11 is not before us (*see generally* CPLR 5515 [1]; *Koch v Consolidated Edison Co. of N.Y.*, 62 NY2d 548, 562 n 10, *rearg denied* 63 NY2d 771, *cert denied* 469 US 1210; *Zeman v Falconer Elecs., Inc.*, 55 AD3d 1240, 1241). The court further determined, however, that the action against defendant New York State Thruway Authority (Thruway Authority) is barred by that statute because the Thruway Authority is not a separate and distinct legal entity from claimant's employer, the New York State Canal Corporation (Canal Corporation). That was error.

Contrary to the court's determination and the contention of defendants, the Thruway Authority is not in fact claimant's employer. "The employees of the [C]anal [C]orporation, except those who are also

employees of the [Thruway A]uthority, generally shall not be deemed to be employees of the [Thruway A]uthority by reason of their employment by the [C]anal [C]orporation" (Public Authorities Law § 382 [5]). Furthermore, the Thruway Authority and the Canal Corporation are not alter ego corporations, nor are they engaged in a joint venture to operate the canals of the State. First, defendants were "not entitled to summary judgment upon the ground that [the Canal Corporation] is an alter ego of [the Thruway Authority] because [they] failed to submit sufficient evidence to demonstrate, as a matter of law, that [the Thruway Authority] exercises complete domination and control of [the Canal Corporation's] day-to-day operations" (*Almonte v Western Beef, Inc.*, 21 AD3d 514, 515-516). Second, defendants were not entitled to summary judgment based on a joint venture theory. "Indispens[able] to the creation of a joint venture is a sharing in the profits and losses of the business" (*Poppenberg v Reliable Maintenance Corp.*, 89 AD2d 791, 792), and defendants failed to establish that the two entities did so.

We also agree with claimant that the court erred in denying her motion for partial summary judgment, inasmuch as she was engaged in repair work when she fell and thus is entitled to the protection afforded by Labor Law § 240 (1). That statute imposes a nondelegable duty upon contractors and owners to furnish or erect suitable devices to protect workers who are engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (see *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512-513). "The critical inquiry in determining coverage under the statute is 'what type of work the [worker] was performing at the time of injury' " (*Panek v County of Albany*, 99 NY2d 452, 457, quoting *Joblon v Solow*, 91 NY2d 457, 465). In order to establish that she was performing repair work within the ambit of the statute, as opposed to routine maintenance, claimant was required to establish that the part of the building or structure "being worked upon was inoperable or not functioning properly" (*Goat v Southern Elec. Intl.*, 263 AD2d 654, 655; see *Craft v Clark Trading Corp.*, 257 AD2d 886, 887). Claimant established in support of her motion that the signal light in question was not functioning because of a broken lens, and that she was engaged in repairing the broken lens at the time of the accident. Claimant further established that the lens typically did not require replacement as a result of normal wear and tear (*cf. Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53; *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528). Consequently, we agree with claimant that the replacement of the broken lens that prevented the proper functioning of the signal light, which was required in order for the canal to be utilized by boats, "constitutes the repair of a structure within the meaning of Labor Law § 240 (1), rather than routine maintenance" (*Benfanti v Tri-Main Dev.*, 231 AD2d 855; see generally *Hakes v Tops Mkts., LLC*, 10 Misc 3d 1079[A], 2004 NY Slip Op 51897[U], *affd for reasons stated* 26 AD3d 729; *Hyslop v Mobil Oil Corp.*, 296 AD2d 827, *amended on renewal* 302 AD2d 1017).

Finally, we agree with claimant that the court erred in concluding that there was a triable issue of fact whether her actions

were the sole proximate cause of the accident. Defendants failed to submit evidence establishing that claimant "had adequate safety devices available; that [s]he knew both that they were available and that [s]he was expected to use them; that [s]he chose for no good reason not to do so; and that had [s]he not made that choice [s]he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40; see *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288-289; *Balbuena v New York Stock Exch., Inc.*, 45 AD3d 279, 280).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

698

CA 08-02563

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

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TIMOTHY D. O'SHEA AND MARY M. O'SHEA,  
INDIVIDUALLY AND AS HUSBAND AND WIFE,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

BUFFALO MEDICAL GROUP, P.C., DARREN M.  
CAPARASO, M.D., AND BLAZE SEKOVSKI, M.D.,  
DEFENDANTS-APPELLANTS.

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CONNORS & VILARDO, LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS.

HOGAN WILLIG, PLLC, AMHERST (JOHN B. LICATA OF COUNSEL), FOR  
PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 21, 2008 in a medical malpractice action. The order, insofar as appealed from, denied that part of defendants' motion for summary judgment dismissing the complaint against defendant Blaze Sekovski, M.D.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motion is granted in part, and the complaint against defendant Blaze Sekovski, M.D. is dismissed.

Memorandum: As limited by their brief, defendants appeal from an order insofar as it denied that part of their motion for summary judgment dismissing the complaint against Blaze Sekovski, M.D. (defendant) in this medical malpractice action. We agree with defendants that Supreme Court erred in denying that part of their motion. "On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Murray v Hirsch*, 58 AD3d 701, 702, lv denied 12 NY3d 709). Here, defendants met their burden by submitting the affidavit of defendant establishing that his administration of a stress test to plaintiff Timothy D. O'Shea was consistent with the applicable standard of care (*see generally Swezey v Montague Rehab & Pain Mgt., P.C.*, 59 AD3d 431, 433; *Kremer v Buffalo Gen. Hosp.*, 269 AD2d 744). The burden then shifted to plaintiffs to raise triable issues of fact by submitting a physician's affidavit both "attesting to a departure from accepted practice and containing the attesting [physician's] opinion that the defendant's omissions or departures were a competent

producing cause of the injury' " (*Mosezhnik v Berenstein*, 33 AD3d 895, 896; see *Murray*, 58 AD3d at 702-703; *Poblocki v Todoro*, 49 AD3d 1239; *Perro v Schappert*, 47 AD3d 694; *DeCintio v Lawrence Hosp.*, 25 AD3d 320; *Rossi v Arnot Ogden Med. Ctr.*, 268 AD2d 916, 917, lv denied 95 NY2d 751). We conclude that, although the affirmation of plaintiffs' expert raises a triable issue of fact concerning a departure from accepted practice, the affirmation is merely conclusory with respect to the issue of proximate cause and thus is insufficient to defeat the motion insofar as it seeks summary judgment dismissing the complaint against defendant (see *Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436; *Rebozo v Wilen*, 41 AD3d 457, 459; *Mosezhnik*, 33 AD3d at 897).

All concur except GREEN and GORSKI, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent, and would affirm. We agree with the majority that the affidavit of Blaze Sekovski, M.D. (defendant) was sufficient to establish that his administration of the stress test to Timothy D. O'Shea (plaintiff) was consistent with the applicable standard of care. Plaintiffs, however, do not dispute that defendant's administration of the test and interpretation of the result were consistent with the applicable standard of care. Rather, plaintiffs allege that defendant was negligent in making an incorrect diagnosis and giving erroneous advice to plaintiff. Plaintiffs further allege that it was foreseeable that plaintiff would, and did in fact, rely on defendant's advice and that, as a result, the correct diagnosis of plaintiff's cancerous brain tumor was delayed (see generally *Heller v Peekskill Community Hosp.*, 198 AD2d 265, 266; *Hickey v Travelers Ins. Co.*, 158 AD2d 112, 115). Defendants' motion for summary judgment dismissing the complaint thus was properly denied insofar as it sought summary judgment dismissing the complaint against defendant because defendants' submissions fail even to address those allegations (see generally *Moreira v City of New York*, 4 AD3d 311). We note in particular that, with respect to the issue whether the delay in diagnosis caused injury to plaintiff, defendants failed to meet their initial burden of establishing their entitlement to judgment as a matter of law (see *Schaub v Cooper*, 34 AD3d 268, 271). We thus need not consider the sufficiency of plaintiffs' opposing papers with respect to that issue (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

699

CA 09-00083

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

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NIAGARA FALLS WATER BOARD,  
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS,  
DEFENDANT-APPELLANT-RESPONDENT.

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JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HEATH J. SZYMCAK OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

HISCOCK & BARCLAY, LLP, BUFFALO (JAMES P. DOMAGALSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 16, 2008. The order granted in part the motion of defendant to dismiss the complaint and granted in part the cross motion of plaintiff for leave to amend the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion to dismiss the first cause of action and reinstating that cause of action and by granting that part of the cross motion with respect to that cause of action upon condition that plaintiff shall serve an amended complaint within 20 days of service of the order of this Court with notice of entry, and by granting those parts of the motion to dismiss the third, fourth, and fifth causes of action and dismissing those causes of action and by denying those parts of the cross motion with respect to those causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover funds allegedly due pursuant to the terms of Resolution 2003-90, adopted by defendant's City Council (Resolution), and pursuant to an Acquisition Agreement between the parties. Addressing first plaintiff's cross appeal, we agree with plaintiff that Supreme Court erred in granting that part of defendant's motion to dismiss the first cause of action, alleging breach of contract, for failure to state a cause of action and in denying that part of plaintiff's cross motion seeking leave to amend the first cause of action. "In determining whether a complaint fails to state a cause of action, a court is required to 'accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference,

and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Daley v County of Erie*, 59 AD3d 1087, 1087, quoting *Leon v Martinez*, 84 NY2d 83, 87-88; see generally CPLR 3211 [a] [7]). Here, the Resolution sets forth defendant's express undertaking to grant funds in satisfaction of the unpaid water bills of nonparty Niagara Falls Memorial Medical Center. The complaint and the proposed amended complaint allege that plaintiff was entitled to those funds as an account receivable under the terms of the Acquisition Agreement. Further, "leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Tag Mechanical Sys., Inc. v V.I.P. Structures, Inc.*, \_\_\_ AD3d \_\_\_, \_\_\_ [June 5, 2009] [internal quotation marks omitted]; see generally CPLR 3025 [b]). Here, defendant has not demonstrated the requisite prejudice that would result from the proposed amendment to the breach of contract cause of action, nor is the proposed amendment to that cause of action patently lacking in merit. We therefore modify the order accordingly.

We agree with defendant, however, that the court properly granted that part of its motion to dismiss the second cause of action, for unjust enrichment. Inasmuch as the Acquisition Agreement governs the parties' rights with respect to all water-related accounts receivable, plaintiff has no right to quasi-contractual relief (see generally *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389). We further agree with defendant that the court erred in denying those parts of its motion to dismiss the remaining causes of action and in granting those parts of plaintiff's cross motion with respect to those causes of action. The third cause of action, for misrepresentation, is impermissibly "based solely upon a mere failure to perform promises of future acts. A failure so to perform is merely a breach of contract, which must be enforced by an action on that contract" (*Wegman v Dairylea Coop.*, 50 AD2d 108, 113, *lv dismissed* 38 NY2d 710, 918; see *Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-324). The fourth cause of action, seeking declaratory relief, is " 'unnecessary and inappropriate [because] the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract' " (*Main Evaluations v State of New York*, 296 AD2d 852, 853, *appeal dismissed and lv denied* 98 NY2d 762). Finally, the fifth cause of action, for indemnification, is also duplicative of the breach of contract cause of action. We therefore further modify the order accordingly.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

741

CA 08-02559

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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ERIC VERA, CLAIMANT-RESPONDENT,

V

ORDER

BLOOMFIELD CENTRAL SCHOOL DISTRICT,  
RESPONDENT-APPELLANT.

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OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL),  
FOR RESPONDENT-APPELLANT.

HALL AND KARZ, CANANDAIGUA (SAMUEL M. HALL OF COUNSEL), FOR  
CLAIMANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Ontario County  
(William F. Kocher, A.J.), entered February 14, 2008. The order  
granted the application of claimant for leave to serve a late notice  
of claim.

Now, upon the stipulation discontinuing action signed by the  
attorneys for the parties on April 20, 2009 and filed in the Ontario  
County Clerk's Office on May 27, 2009,

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

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

754

**KA 07-01558**

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSE MEJIA, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered July 19, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the first degree, robbery in the first degree, criminal possession of a weapon in the second degree and criminal possession of stolen property in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, those parts of the motion seeking to suppress statements made by defendant to the police are granted and a new trial is granted on counts one through four and six and seven of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]) and robbery in the first degree (§ 160.15 [2]). Contrary to defendant's contention, County Court properly admitted the trial testimony of a witness concerning an admission by silence by defendant (*see People v Olewine*, 164 AD2d 971; *see generally People v Lord*, 103 AD2d 1032, 1033, *lv denied* 63 NY2d 776). We reject the further contention of defendant that the court erred in denying that part of his omnibus motion seeking to suppress his sneakers. "In reviewing a determination of the suppression court, great weight must be accorded its decision because of its ability to observe and assess the credibility of the witnesses, and its findings should not be disturbed unless clearly erroneous" (*People v Stokes*, 212 AD2d 986, 987, *lv denied* 86 NY2d 741). Here, the suppression court credited the testimony of the police officers that, when they arrived at defendant's house, defendant asked his mother for his sneakers, and his mother gave the sneakers to an officer. The record thus supports the court's determination that the police lawfully obtained the sneakers from defendant's mother in accordance with defendant's request.

We agree with defendant, however, that the court erred in denying those parts of his omnibus motion seeking to suppress his statements to the police. The court again credited the testimony of the police officers but, contrary to the court's determination, we conclude that their testimony establishes that defendant was in custody during the interrogation. The police officers, who had knowledge that a codefendant had implicated defendant in the murder, testified that they went to defendant's home and asked defendant to accompany them to the police station. Although defendant agreed, he was frisked and handcuffed, and the handcuffs were not removed until defendant was placed in a secure interview room. In addition, defendant was escorted when he needed to use the bathroom. The police began to question defendant about the shooting but did not administer *Miranda* warnings until after he had made incriminating statements. We agree with defendant that a reasonable person, innocent of any crime, would have believed under those circumstances that he or she was in custody (see *People v Rhodes*, 49 AD3d 668, 669, lv denied 10 NY3d 938; *People v Ramos*, 27 AD3d 1073, 1074-1075, lv dismissed 6 NY3d 897; *People v Evans*, 294 AD2d 918, 919, lv dismissed 98 NY2d 768; see generally *People v Yukl*, 25 NY2d 585, 589, cert denied 400 US 851).

In light of our determination, we do not review defendant's remaining contentions.

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

755

**KA 06-03781**

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARRIE FULMORE, DEFENDANT-APPELLANT.

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WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered May 24, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: On appeal from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law §§ 20.00, 125.25 [2]), defendant contends that Supreme Court erred in refusing to charge the jury that, in order to find her guilty of murder in the second degree, the jury was required to find that her state of mind was that of depraved indifference. We agree. As defendant correctly contends, she is "entitled to the application of current principles of substantive law upon [her] direct appeal from the judgment of conviction" (*People v Collins*, 45 AD3d 1472, 1473, lv denied 10 NY3d 861; see generally *People v Vasquez*, 88 NY2d 561, 573) and, during the pendency of this appeal, the Court of Appeals held that "depraved indifference to human life is a culpable mental state" (*People v Feingold*, 7 NY3d 288, 294). Because the jury charge did not unambiguously state that depraved indifference was the culpable mental state for the crime with which defendant was charged, we cannot conclude "that the jury, hearing the whole charge, would gather from its language the correct rules which should be applied in arriving at [a] decision" (*People v Russell*, 266 NY 147, 153; see generally *People v Ladd*, 89 NY2d 893, 895). We therefore reverse the judgment and grant a new trial (see generally *People v Barry*, 46 AD3d 1340).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

757

CAF 08-00957

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF MINDY L. HOWARD,  
PETITIONER-APPELLANT,  
ET AL., PETITIONER,

V

MEMORANDUM AND ORDER

SHIRLEY MCLOUGHLIN, RESPONDENT-RESPONDENT.

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SUGARMAN LAW FIRM, LLP, SYRACUSE (REBECCA A. CRANCE OF COUNSEL), FOR  
PETITIONER-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL),  
FOR RESPONDENT-RESPONDENT.

STEPHANIE N. DAVIS, LAW GUARDIAN, OSWEGO, FOR APRIL H.

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Appeal from an order of the Family Court, Oswego County (Spencer J. Ludington, J.), entered April 8, 2008 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, granted that part of the motion of respondent to dismiss the petition with respect to petitioner Mindy L. Howard and dismissed the petition with respect to that petitioner.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, the petition with respect to petitioner Mindy L. Howard is reinstated, and the matter is remitted to Family Court, Oswego County, for further proceedings in accordance with the following Memorandum: Petitioner mother, as limited by her brief, contends on appeal that Family Court erred in granting the motion of respondent maternal grandmother to dismiss the mother's petition seeking to modify a prior order awarding custody of the mother's child to the grandmother. We agree with the mother that the court erred in dismissing the petition without determining whether extraordinary circumstances existed to warrant continued custody with the grandmother and, if so, whether the mother established that there has been a change in circumstances such that a modification in custody would be in the best interests of the child. "It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981, quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544). The nonparent has the burden

of establishing that extraordinary circumstances exist even where, as here, "the prior order granting custody of the child to [the] nonparent[] was made upon consent of the parties" (*Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351, lv denied 7 NY3d 717; see also *Matter of Guinta v Doxtator*, 20 AD3d 47, 53; *Gary G.*, 248 AD2d at 981). As noted, it is only after a court has determined that extraordinary circumstances exist that the custody inquiry becomes "whether there has been a change of circumstances requiring a modification of custody to ensure the best interests of the child" (*Guinta*, 20 AD3d at 51).

Here, there is no indication in the record that, in the history of the parties' litigation, the court previously made a determination of extraordinary circumstances divesting the mother of her superior right to custody (see *id.*; see generally *Bennett*, 40 NY2d at 544), and the record is insufficient to enable us to make our own determination with respect to whether extraordinary circumstances exist and, if so, whether the mother established a change in circumstances to warrant a modification of the existing custody arrangement in the best interests of the child (*cf. Gary G.*, 248 AD2d at 981; *Matter of Michael G.B. v Angela L.B.*, 219 AD2d 289, 292). We note that a hearing on the issue of extraordinary circumstances is not required where the court otherwise possesses sufficient information to render an informed determination on that issue (see generally *Matter of Bogdan v Bogdan*, 291 AD2d 909). We therefore reverse the order insofar as appealed from, deny the grandmother's motion in part, reinstate the petition with respect to the mother, and remit the matter to Family Court to determine, following a hearing if necessary, whether extraordinary circumstances exist and, if so, whether a change of circumstances requires modification of custody to ensure the best interests of the child (see generally *Matter of Male Infant L.*, 61 NY2d 420, 427-429; *McDevitt v Stimpson*, 281 AD2d 860, 862). Finally, we reject the contention of the mother that she was denied effective assistance of counsel (see generally *Matter of Nagi T. v Magdia T.*, 48 AD3d 1061).

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

760

CA 08-02201

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THOMAS L. REED, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NEA RESIDENTIAL, INC., DEFENDANT-APPELLANT,  
ET AL., DEFENDANTS.

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JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BRADLEY A. HOPPE OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

CANTOR, LUKASIK, DOLCE & PANEPINTO, P.C., BUFFALO (STEPHEN C. HALPERN  
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 3, 2008. The order, insofar as appealed from, denied that part of the motion of defendant NEA Residential, Inc. for partial summary judgment dismissing the Labor Law § 241 (6) claim against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while performing framing work for a single-family residence on property owned by defendants Michael S. Radecke and Billie Jo Radecke. NEA Residential, Inc. (defendant) was the designated project coordinator for the construction project, and defendant hired plaintiff's employer to perform framing work for the project. We conclude that Supreme Court properly denied that part of the motion of defendant for partial summary judgment dismissing the Labor Law § 241 (6) claim against it. There is a triable issue of fact whether defendant, as the project coordinator, was acting as the statutory agent of the property owners pursuant to the terms of its agreement with them and thus is liable to plaintiff pursuant to section 241 (6) (see *Sherbourne v Murnane Bldg. Contrs., Inc.*, 28 AD3d 1151, 1152). In addition, there is a triable issue of fact whether defendant "was responsible for coordinating and supervising the . . . project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors" and thus is liable pursuant to section 241 (6) as a general contractor (*Kulaszewski v Clinton Disposal Servs.*, 272 AD2d 855, 856; see also *Ewing v ADF Constr. Corp.*, 16 AD3d 1085, 1087).

Finally, we decline the request of plaintiff to search the record

and grant summary judgment on the Labor Law § 241 (6) claim pursuant to CPLR 3212 (b). Where, as here, the question of control over the construction project is at issue, summary judgment is inappropriate (see *Hall v T.G. Miller & Assoc.*, 167 AD2d 688, 691).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

762

CA 09-00246

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF THE ARBITRATION BETWEEN  
CARMEN I. FALZONE, NOW KNOWN AS CARMEN I.  
CORDERO, CLAIMANT-RESPONDENT,

AND

MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,  
RESPONDENT-APPELLANT.

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BROWN & KELLY, LLP, BUFFALO (H. WARD HAMLIN, JR., OF COUNSEL), FOR  
RESPONDENT-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (DAVID H. ELIBOL OF  
COUNSEL), FOR CLAIMANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County  
(Christopher J. Burns, J.), entered November 20, 2008 in a proceeding  
pursuant to CPLR article 75. The order granted claimant's motion and  
vacated an arbitration award.

It is hereby ORDERED that the order so appealed from is reversed  
on the law without costs, the motion is denied, and the arbitration  
award is confirmed.

Memorandum: Claimant was allegedly injured in an automobile  
accident and, following a hearing based on the denial by respondent,  
her insurer, of her request for no-fault benefits, the arbitrator  
awarded claimant the sum of \$4,354.56. Claimant also sought  
supplementary uninsured motorists (SUM) benefits and, following a  
second hearing before a different arbitrator, the arbitrator denied  
her request for such benefits on the ground that her injuries were not  
caused by the accident. Claimant moved pursuant to CPLR article 75 to  
vacate or modify the SUM arbitration award contending, inter alia,  
that respondent was collaterally estopped from relitigating the issue  
of causation with respect to her injuries. Respondent, on the other  
hand, sought confirmation of the SUM arbitrator's award. We agree  
with respondent that Supreme Court erred in granting claimant's  
motion. The fact that a prior arbitration award is inconsistent with  
a subsequent award is not an enumerated ground in either subdivision  
(b) or (c) of CPLR 7511 for vacating or modifying the subsequent award  
(see *Matter of City School Dist. of City of Tonawanda v Tonawanda  
Educ. Assn.*, 63 NY2d 846, 848). As the court properly recognized,  
"[i]t was within the [SUM] arbitrator's authority to determine the  
preclusive effect of the prior arbitration on the instant arbitration"

(*Matter of Progressive N. Ins. Co. v Sentry Ins. A Mut. Co.*, 51 AD3d 800, 801). The court erred in noting, however, that it was unable to determine whether the SUM arbitrator even considered claimant's contention with respect to collateral estoppel. Arbitrators are not required to provide reasons for their decisions (see *Matter of Solow Bldg. Co. v Morgan Guar. Trust Co. of N.Y.*, 6 AD3d 356, 356-357, lv denied 3 NY3d 605, cert denied 543 US 1148; *Matter of Guetta [Raxon Fabrics Corp.]*, 123 AD2d 40, 41), and thus the SUM arbitrator was not required to state that he had considered that contention.

All concur except PERADOTTO and GORSKI, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm. Although collateral estoppel "is not a basis on which [Supreme C]ourt may, under CPLR 7511, vacate an arbitration award" (*Matter of Globus Coffee, LLC v SJN, Inc.*, 47 AD3d 713, 714; see *Matter of City School Dist. of City of Tonawanda v Tonawanda Educ. Assn.*, 63 NY2d 846, 848), vacatur is permitted where the award " 'violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*Matter of Mays-Carr [State Farm Ins. Co.]*, 43 AD3d 1439, 1439, quoting *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336; see generally CPLR 7511 [b] [1] [iiii]). In our view, the arbitrator who issued the award with respect to supplementary uninsured motorists (SUM) benefits exceeded his power by disregarding the preclusive effect of a prior arbitration award and instead issuing a different determination with respect to causation, involving the same parties and based upon the same facts (see *Matter of American Honda Motor Co. v Dennis*, 259 AD2d 613; *Motor Veh. Acc. Indem. Corp. v Travelers Ins. Co.*, 246 AD2d 420, 422).

We agree with the majority that it generally is within the arbitrator's discretion to determine the preclusive effect of a prior arbitration award on the instant arbitration (see *City School Dist. of City of Tonawanda*, 63 NY2d at 848). In a number of the cases setting forth that general proposition, however, there are factual issues whether the prior award should be given preclusive effect, either because the parties are not identical (see e.g. *id.*, 63 NY2d at 847-848; *Board of Educ. of Patchogue-Medford Union Free School Dist. v Patchogue-Medford Congress of Teachers*, 48 NY2d 812, 813), or it is not clear whether the disputed issue was resolved in the prior proceeding (see e.g. *Globus Coffee, LLC*, 47 AD3d at 714; *Matter of Town of Newburgh v Civil Serv. Empls. Assn.*, 272 AD2d 405; *Matter of Medina Power Co. [Small Power Producers]*, 241 AD2d 915). Here, there are no such factual issues. The SUM arbitrator was thus barred from relitigating the issue of causation between the identical parties, inasmuch as it was " 'actually contested and therefore determined by the [prior] award' " (*Medina Power Co.*, 241 AD2d 915).

Further, we note that "strong public policy considerations favor finality in the resolution of disputes of all kinds to assure that parties will not be vexed by further litigation" (*Merrill Lynch, Pierce, Fenner & Smith v Benjamin*, 1 AD3d 39, 40), and that "[t]he object of arbitration is to achieve a final disposition of differences

between parties in an easier, more expeditious and less expensive manner" (*Matter of Maye [Bluestein]*, 40 NY2d 113, 117-118). Just as a court may not redetermine an issue conclusively decided in a prior arbitration proceeding between the same parties (see *Clemens v Apple*, 65 NY2d 746, 748-749), despite having the same discretion as an arbitrator with respect to collateral estoppel determinations (see *Rembrandt Indus. v Hodges Intl.*, 38 NY2d 502, 504), an arbitrator is similarly precluded from redetermining an issue previously settled between the parties pursuant to an arbitration award (see *American Honda Motor Co.*, 259 AD2d 613). To conclude otherwise would "defeat[] . . . two of arbitration's primary virtues, speed and finality" (*Matter of Weinrott [Carp]*, 32 NY2d 190, 198), and would instead encourage parties to seek that finality by way of the court system.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

769

**TP 08-01957**

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

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IN THE MATTER OF MICHAEL R. KINNIE, LICENSEE FOR  
COMEDY PLAYHOUSE, LLC, PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE LIQUOR AUTHORITY, RESPONDENT.

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ANDREW R. KINNIE, SACKETS HARBOR, FOR PETITIONER.

THOMAS J. DONOHUE, NEW YORK STATE LIQUOR AUTHORITY, ALBANY (MARK D.  
FRERING OF COUNSEL), FOR RESPONDENT.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Jefferson County [Hugh A. Gilbert, J.], entered September 18, 2008) to annul a determination of respondent. The determination found that petitioner violated Alcoholic Beverage Control Law § 106 (6).

It is hereby ORDERED that the determination is unanimously modified on the law and the amended petition is granted in part by annulling that part of the determination finding that petitioner violated Alcoholic Beverage Control Law § 106 (6) on January 6, 2007 and by vacating the penalty and as modified the determination is confirmed without costs, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he violated Alcoholic Beverage Control Law § 106 (6) on two separate occasions. Contrary to the contention of petitioner, the determination that he suffered or permitted gambling on the licensed premises on October 6, 2006 is supported by substantial evidence (*see* § 106 [6]; *Matter of Shorts Bar of Rochester Inc. v New York State Liq. Auth.*, 17 AD3d 1101, 1102). Respondent "demonstrated that [petitioner] had knowledge or the opportunity through reasonable diligence to acquire knowledge of the alleged acts" (*Matter of Island Mermaid Rest. Corp. v New York State Liq. Auth.*, 52 AD3d 603, 604, quoting *Matter of Leake v Sarafan*, 35 NY2d 83, 86). We agree with petitioner, however, that the determination that he suffered or permitted an excessive amount of noise to occur on the licensed premises on January 6, 2007 is not supported by substantial evidence. The record contains no evidence of recent complaints concerning noise from area residents, no objective proof that the noise exceeded acceptable volume levels, and no indication that anyone was affected by the noise (*see* 530 W. 28th St. LP v New York State

*Liq. Auth.*, 55 AD3d 436; *Matter of Culture Club of NYC v New York State Liq. Auth.*, 294 AD2d 204).

We therefore modify the determination and grant the amended petition in part by annulling that part of the determination finding that petitioner violated Alcoholic Beverage Control Law § 106 (6) on January 6, 2007. Inasmuch as respondent imposed a single penalty and the record does not establish any relation between the violations and the penalty, we further modify the determination by vacating the penalty, and we remit the matter to respondent for imposition of an appropriate penalty on the remaining violation (see *Matter of Continental Room, Inc. v New York State Liq. Auth.*, 52 AD3d 1203, 1205).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

786

CA 08-02517

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

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FREE IN CHRIST PENTECOSTAL CHURCH,  
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TIMOTHY JULIAN, INDIVIDUALLY AND IN HIS  
DUAL OFFICIAL CAPACITIES AS MAYOR OF CITY  
OF UTICA AND CHAIRMAN OF UTICA URBAN  
RENEWAL AGENCY, ROBERT SULLIVAN,  
INDIVIDUALLY AND AS CODES COMMISSIONER OF  
CITY OF UTICA, LINDA FATATA, INDIVIDUALLY  
AND AS LEGAL COUNSEL FOR CITY OF UTICA AND  
URBAN RENEWAL AGENCY, UTICA URBAN RENEWAL  
AGENCY, AND CITY OF UTICA,  
DEFENDANTS-RESPONDENTS.

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LAW OFFICES OF LEON R. KOZIOL, UTICA (LEON R. KOZIOL OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

LINDA FATATA, CORPORATION COUNSEL, UTICA (JOHN P. ORILIO OF COUNSEL),  
FOR DEFENDANTS-RESPONDENTS TIMOTHY JULIAN, INDIVIDUALLY AND IN HIS  
CAPACITY AS MAYOR OF CITY OF UTICA, ROBERT SULLIVAN, INDIVIDUALLY AND  
AS CODES COMMISSIONER OF CITY OF UTICA, LINDA FATATA, INDIVIDUALLY AND  
AS LEGAL COUNSEL FOR CITY OF UTICA, PRO SE, AND CITY OF UTICA.

GOLDBERG SEGALLA LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS TIMOTHY JULIAN, IN HIS CAPACITY AS CHAIRMAN OF  
UTICA URBAN RENEWAL AGENCY, LINDA FATATA, AS LEGAL COUNSEL FOR URBAN  
RENEWAL AGENCY, AND UTICA URBAN RENEWAL AGENCY.

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Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered August 22, 2008. The order, inter alia, granted the motion of certain defendants seeking dismissal of the amended complaint against them and the cross motion of the remaining defendants seeking summary judgment dismissing the amended complaint against them.

It is hereby ORDERED that said appeal from the order insofar as it concerned plaintiff's requests for disqualification is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages based on alleged violations of its constitutional rights, and Supreme Court thereafter granted the motion of certain defendants seeking

dismissal of the amended complaint against them and the cross motion of the remaining defendants seeking summary judgment dismissing the amended complaint against them. Plaintiff's papers submitted in opposition included the affidavit of plaintiff's attorney in which he sought, inter alia, to disqualify the Justice who had been assigned to the case. Although plaintiff purported to cross-move for that relief by way of its attorney's affidavit, plaintiff failed to comply with CPLR 2215 by filing a notice of cross motion. Because "the plaintiff merely requested [that] relief in its opposition papers, and did not make a motion on notice as defined in CPLR 2211, the plaintiff is not entitled to appeal as of right from the order denying its request" for disqualification of the Justice assigned to the case (*New York State Div. of Human Rights v Oceanside Cove II Apt. Corp.*, 39 AD3d 608, 609). Additionally, we did not grant plaintiff leave to appeal pursuant to CPLR 5701 (c). Thus, that part of the appeal with respect to the request for disqualification of the Justice assigned to the case must be dismissed (see *New York State Div. of Human Rights*, 39 AD3d at 608-609). We likewise conclude that the appeal must be dismissed insofar as plaintiff challenges the court's denial of its request to disqualify defendant Linda Fatata, corporation counsel for respondent City of Utica. Plaintiff sought that relief for the first time during oral argument of defendants' motion and cross motion, and "[i]t is not enough to request such relief orally on the return date" of the motion and cross motion (*Guggenheim v Guggenheim*, 109 AD2d 1012, 1013).

Finally, because plaintiff failed to address in its brief any issues concerning the dismissal of its amended complaint, we deem any such issues abandoned (see *Ciesinski v Town of Aurora*, 202 AD2d 984).

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

796

CAF 08-02180

PRESENT: HURLBUTT, J.P., SMITH, CENTRA, PINE, AND GORSKI, JJ.

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IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT  
OF SOCIAL SERVICES, ON BEHALF OF MELISSA M.  
CARDONE, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JACK A. CALHOUN, JR., RESPONDENT-RESPONDENT.

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BARBARA L. WIDRIG, MAYVILLE, FOR PETITIONER-APPELLANT.

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Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered July 28, 2008 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, denied the objections of petitioner to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the objections in part and vacating the directive that the New York State order shall terminate in 90 days if not registered in a state in which one of the parties resides and as modified the order is affirmed without costs.

Memorandum: Petitioner, Chautauqua County Department of Social Services (DSS), commenced this proceeding on behalf of the mother of the child in question seeking to hold respondent father in violation of a child support order. At the time of the initial child support order, the mother resided with the child in New York, and the father resided in Florida. In its violation petition, DSS alleged upon information and belief that the mother still resided in New York, but the mother had in fact moved with the child to Florida. The father appeared in the proceeding and admitted the allegations with respect to his violation of the support order. The Support Magistrate determined the amount of arrears, continued the order of support, and entered judgments in favor of the mother and DSS. The Support Magistrate further ordered the parties to "register the order in their state of residence within 90 days." The Support Magistrate directed that "[t]he New York State Order shall terminate in 90 days, if Order is not registered in a state in which one of the parties resides." Family Court denied the objections of DSS and affirmed the order.

We agree with DSS that the court erred in affirming the order of the Support Magistrate insofar as it directed that the child support order would terminate in 90 days in the event that the order of the Support Magistrate was not registered in another state, and we therefore modify the order accordingly. "The court lost continuing,

exclusive jurisdiction to modify the child support provisions when both parties and the child[ ] all moved out of state" (*Holloway v Holloway*, 35 AD3d 1126, 1127; see Family Ct Act § 580-205 [a] [1]; *Matter of Catalano v Catalano*, 295 AD2d 605). Thus, although the New York court may enforce the order of child support, the court is without authority to modify it (see § 580-205 [c]; *Catalano*, 295 AD2d at 606). We conclude that, by directing that the child support order would terminate in 90 days in the event that it was not registered in another state, the court was in effect modifying the order of support but lacked the authority to do so.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

802

CA 08-01249

PRESENT: HURLBUTT, J.P., SMITH, CENTRA, PINE, AND GORSKI, JJ.

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ROBERT C. RUST, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

EDYTHE S. TURGEON, DEFENDANT-RESPONDENT.  
(ACTION NO. 1.)

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IN THE MATTER OF THE APPLICATION OF  
ROBERT C. RUST, PETITIONER-APPELLANT,  
FOR THE JUDICIAL DISSOLUTION OF THE  
ROYCROFT SHOPS, INC.;  
EDYTHE S. TURGEON, RESPONDENT-RESPONDENT.  
(ACTION NO. 2.)

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LORENZO & COHEN, BUFFALO (STEVEN M. COHEN OF COUNSEL), FOR  
PLAINTIFF-APPELLANT AND PETITIONER-APPELLANT.

PHILLIPS LYTTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), AND SHARON  
ANSCOMBE OSGOOD, BUFFALO, FOR DEFENDANT-RESPONDENT AND RESPONDENT-  
RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered July 24, 2007. The order after a hearing found in favor of defendant-respondent.

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

Memorandum: Following termination of the parties' personal and business relationships, plaintiff-petitioner, Robert C. Rust, commenced an action and a special proceeding seeking, inter alia, to resolve issues concerning the division of personal and business property. While the action and proceeding were pending, the parties entered into a stipulation in open court concerning the division of the property (see CPLR 2104). Pursuant to the terms of that stipulation, Supreme Court was given the "broadest possible discretion" to implement and enforce the stipulation, and the parties agreed to waive any right to appeal in the event that a subsequent dispute arose, based on their desire for "a prompt and final and quick disposition of the issues."

After disputes arose concerning the division of property pursuant to the stipulation, Rust moved to enforce the terms of the stipulation. Following a summary hearing conducted pursuant to the

terms of the stipulation, the court found in favor of defendant-respondent. We conclude that Rust is precluded from challenging the court's order on appeal. Rust waived his right to appeal pursuant to the stipulation and is bound by its terms. "Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation" (*Hallock v State of New York*, 64 NY2d 224, 230; see *Republic Painting, Sheeting & Bldg. Corp. v P.S. Bruckel, Inc.* [appeal No. 2], 266 AD2d 814). There is nothing in the record before us to support Rust's contention that the stipulation should be set aside, and we conclude that there is no basis to do so " 'in the interest of elementary fairness' " (*O'Connor v Root*, 284 AD2d 979, 980).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

805

CA 08-02650

PRESENT: HURLBUTT, J.P., SMITH, CENTRA, PINE, AND GORSKI, JJ.

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LAWRENCE I. CHUMSKY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

PATRICIA CHUMSKY, DEFENDANT-RESPONDENT.

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LORENZO & COHEN, BUFFALO (STEVEN M. COHEN OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

WILLIAM R. HITES, BUFFALO, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered March 5, 2008 in a divorce action. The order granted defendant's motion seeking, inter alia, to enforce part of a postjudgment order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion is denied.

Memorandum: Plaintiff appeals from an order granting defendant's motion seeking, inter alia, to enforce that part of a postjudgment order in this divorce action requiring plaintiff to pay defendant a distributive award in monthly installments pursuant to the terms of the parties' stipulation that was incorporated but not merged in the postjudgment order. The stipulation further provided that, in the event that any installment payment was more than 15 days overdue, plaintiff was obligated to pay 9% interest on the balance due at the time of the late payment, calculated from the initial payment due date. In addition, the stipulation provided that, if any payment was more than 30 days late, the entire unpaid balance was immediately due and payable. It is undisputed that plaintiff's installment payments exceeded the 15-day grace period on several occasions, over a 16-month period.

We reject plaintiff's contention that defendant waived her right to interest by repeatedly accepting late payments, but we agree with plaintiff that the provision of the postjudgment order imposing interest as a consequence of a payment less than 30 days late constitutes an unenforceable penalty. We therefore reverse the order and deny the motion. "Whether a contractual provision 'represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances' " (*Bates Adv. USA, Inc. v 498 Seventh,*

*LLC*, 7 NY3d 115, 120, *rearg denied* 7 NY3d 784, quoting *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 379). Where, as here, a stipulation provides for an amount to be paid as a consequence of a breach that is " 'plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced' " (*JMD Holding Corp.*, 4 NY3d at 380, quoting *Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 425). Here, the imposition of interest on the unpaid balance of the distributive awards pursuant to the postjudgment order would nearly double the original amount agreed upon. Given that disproportionate consequence, we conclude that enforcement of that part of the postjudgment order providing for the imposition of interest as a result of payments overdue by more than 15 days but less than 30 days constitutes an unenforceable penalty (see *Weiss v Weiss*, 206 AD2d 741, 742-743; *Willner v Willner*, 145 AD2d 236, 241).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

806

CA 08-02333

PRESENT: HURLBUTT, J.P., SMITH, CENTRA, PINE, AND GORSKI, JJ.

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JOHN ZUPAN AND BONITA ZUPAN,  
PLAINTIFFS-RESPONDENTS,

V

ORDER

ALLSTATE INSURANCE COMPANY,  
DEFENDANT-APPELLANT,  
ET AL., DEFENDANT.

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SUGARMAN LAW FIRM, LLP, SYRACUSE (REBECCA A. CRANCE OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered June 4, 2008. The order and judgment denied the motion of defendant Allstate Insurance Company for summary judgment and granted the cross motion of plaintiffs for summary judgment.

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

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

807

CA 08-02572

PRESENT: HURLBUTT, J.P., SMITH, CENTRA, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK,  
PLAINTIFF-RESPONDENT,

V

OPINION AND ORDER

LAURIE JORNOV, DEFENDANT-APPELLANT.

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PHILIP MUELLER, COMPLAINANT-RESPONDENT.

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DAVID BERNHEIM, CROTON ON HUDSON, FOR DEFENDANT-APPELLANT.

PHILIP MUELLER, SCHENECTADY, COMPLAINANT-RESPONDENT PRO SE.

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Appeal from an order of the Herkimer County Court (Patrick L. Kirk, J.), entered October 31, 2008. The order affirmed a judgment (denominated decision) of the Little Falls City Court (Bart M. Carrig, J.), dated March 11, 2008 determining that defendant's dogs were dangerous dogs pursuant to Agriculture and Markets Law § 121 and directing humane euthanasia.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the directive of humane euthanasia and as modified the order is affirmed, and the matter is remitted to Little Falls City Court for further proceedings pursuant to Agriculture and Markets Law § 121 (2).

Opinion by CENTRA, J.:

I

Defendant appeals from an order affirming the judgment (improperly denominated decision) of City Court directing the euthanization of her two dogs. We are constrained to agree with defendant that County Court erred in affirming the judgment, and we therefore conclude that the order should be modified by vacating that directive, and the matter should be remitted to City Court for further proceedings pursuant to Agriculture and Markets Law § 121 (2).

II

On February 17, 2008, Philip Mueller was walking his German Shepard dog, Maggie, when two pit bull-terrier mixed breed dogs owned by defendant attacked Maggie and injured Mueller as well. According to the testimony of Mueller at the subsequent hearing before City

Court, the two dogs, who were neither leashed nor under the control of any person, ran toward them and proceeded to attack Maggie in tandem. One of the dogs would bite Maggie, latching onto her hindquarters, and when Mueller was able to free Maggie from that dog, the other dog would circle around and latch onto her. During the struggle, Mueller's leg was bitten, and Mueller also lost his footing on the icy ground and fell. He eventually managed to enter his vehicle with Maggie, and it was only then that the dogs stopped the attack and wandered away. Mueller reported the incident to the police, and they prepared a dangerous dog complaint concerning defendant's dogs.

At the hearing before City Court, the People presented evidence of a prior incident on June 19, 2007 during which one of defendant's dogs, which was on a leash, barked and lunged at a person leaving his place of employment. The following day, defendant's dogs mauled a kitten to death in a parking lot while defendant and her grandson were taking the dogs for a walk. The People also presented testimony that, on September 16, 2006, one of defendant's dogs ran from defendant's yard and attacked a neighbor's dog, as well as evidence that, just a few weeks before the incident with Mueller, defendant's dogs were seen running loose around the area where Mueller was attacked. Although those prior incidents were reported to the police, the first dangerous dog proceeding against defendant under Agriculture and Markets Law § 121 was not commenced until after the incident involving Mueller.

At the conclusion of the hearing, City Court determined that defendant's dogs were dangerous dogs and directed that they be euthanized. County Court affirmed the judgment of City Court, and we now conclude that the order on appeal should be modified.

### III

Effective December 15, 2004, Agriculture and Markets Law § 121 and related statutes were extensively amended. First, the definition of a " 'dangerous dog' " was expanded to include:

"any dog which (i) without justification attacks a person, companion animal as defined in [section 350 (5)] of this chapter, farm animal as defined in [section 350 (4)] of this chapter or domestic animal as defined in subdivision seven of this section and causes physical injury or death, or (ii) behaves in a manner which a reasonable person would believe poses a serious and unjustified imminent threat of serious physical injury or death to one or more persons, companion animals, farm animals or domestic animals or (iii) without justification attacks a service dog, guide dog or hearing dog and causes physical injury or death" (§ 108 [24]).

Unlike the prior version of the statute, the new version allows a determination that a dog is dangerous when it attacks a "companion animal," which includes in its definition "any dog or cat"

(Agriculture and Markets Law § 350 [5]). We conclude on the record before us that there is clear and convincing evidence that defendant's dogs were dangerous (see § 121 [2]). The dogs, without justification, attacked Mueller's dog, a companion animal, as well as Mueller, causing them physical injury (see § 108 [24] [a] [i]). The dogs also behaved in a manner that a reasonable person would believe posed a serious and imminent threat of serious physical injury or death to Mueller and his dog (see § 108 [24] [a] [ii]). Mueller testified that the dogs continued their attack notwithstanding the fact that he was hitting their heads with the plastic housing of his dog's leash and yelling at them. In addition, Mueller testified that the dogs attempted to climb into Mueller's vehicle to continue their attack. The dogs did not leave the area until Mueller was able to shut the door of his vehicle.

Once a judge or justice determines that a dog is dangerous by clear and convincing evidence then, pursuant to the new version of the statute,

"the judge or justice shall . . . order neutering or spaying of the dog, microchipping of the dog and one or more of the following as deemed appropriate under the circumstances and as deemed necessary for the protection of the public:

"(a) evaluation of the dog by a certified applied behaviorist, a board certified veterinary behaviorist, or another recognized expert in the field and completion of training or other treatment as deemed appropriate by such expert. The owner of the dog shall be responsible for all costs associated with evaluations and training ordered under this section;

"(b) secure, humane confinement of the dog for a period of time and in a manner deemed appropriate by the court but in all instances in a manner designed to: (1) prevent escape of the dog, (2) protect the public from unauthorized contact with the dog, and (3) to protect the dog from the elements pursuant to section [353-b] of this chapter. Such confinement shall not include lengthy periods of tying or chaining;

"(c) restraint of the dog on a leash by an adult of at least twenty-one years of age whenever the dog is on public premises;

"(d) muzzling the dog whenever it is on public premises in a manner that will prevent it from biting any person or animal, but that shall not injure the dog or interfere with its vision or respiration; or

"(e) maintenance of a liability insurance policy in an amount determined by the court, but in no event in excess of one hundred thousand dollars for personal injury or death resulting from an attack by such dangerous dog" (Agriculture and Markets Law § 121 [2]).

The judge or justice may direct humane euthanasia or permanent confinement of the dog only if one of the following aggravating circumstances is established:

"(a) the dog, without justification, attacked a person causing serious physical injury or death; or

"(b) the dog has a known vicious propensity as evidenced by a previous unjustified attack on a person, which caused serious physical injury or death; or

"(c) the dog, without justification, caused serious physical injury or death to a companion animal, farm animal or domestic animal, and has, in the past two years, caused unjustified physical injury or death to a companion or farm animal as evidenced by a 'dangerous dog' finding pursuant to the provisions of this section" (Agriculture and Markets Law § 121 [3]).

Thus, unlike the prior version of the statute, a judge or justice may not automatically direct humane euthanasia or permanent confinement of a dangerous dog (see Agriculture and Markets Law former § 121 [4]). The various memoranda in support of the new legislation indicate that the new version of the statute provides judges and justices with greater leeway in determining the proper remedy beyond the previously mandated remedy of humane euthanasia or permanent confinement (see NY Assembly Mem in Support, Bill Jacket, L 2004, ch 392, § 3, 2004 McKinney's Session Laws of NY, at 1893-1894). While we agree that the new version of the statute provides a court with options other than humane euthanasia and permanent confinement upon determining that a dog is dangerous, in our view the new version actually diminishes the discretion of a court in directing humane euthanasia or permanent confinement, even when it is patently clear that either would be appropriate.

#### IV

An examination of the statute reveals that none of the aggravating circumstances is present here in order to direct the euthanization of the dogs. The first aggravating circumstance is that the dog unjustifiably attacked a person, causing "serious physical injury or death" (Agriculture and Markets Law § 121 [3] [a]). Serious physical injury is defined in Agriculture and Markets Law § 108 (29) as "physical injury which creates a substantial risk of death, or

which causes death or serious or protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ," and we note that the definition of serious physical injury in Penal Law § 10.00 (10) is essentially the same. Based on the evidence before City Court, we conclude that the injuries sustained by Mueller do not meet that threshold. Mueller testified that he sustained a bite wound to his right leg, for which he was prescribed antibiotics, and he sustained a torn hamstring, for which he was instructed to take ibuprofen and attend physical therapy for six to eight weeks. Although Mueller was still in physical therapy at the time of the hearing, the hearing was conducted just a few weeks after the incident. There was no evidence that Mueller would sustain "protracted impairment of health" as a result of the incident (Agriculture and Markets Law § 108 [29]; see *People v Horton*, 9 AD3d 503, 504-505, *lv denied* 3 NY3d 707; *People v Phillip*, 279 AD2d 802, 803-804, *lv denied* 96 NY2d 905).

The second aggravating circumstance is that "the dog has a known vicious propensity as evidenced by a previous unjustified attack on a person, which caused serious physical injury or death" (Agriculture and Markets Law § 121 [3] [b]). That aggravating circumstance also was not established at the hearing. Although a witness testified that one of defendant's dogs barked and lunged in his direction while defendant was walking the dog, that witness did not sustain any injury as a result of that incident, let alone a serious physical injury.

Finally, the third aggravating circumstance is that the dog unjustifiably causes "serious physical injury or death to a companion animal, farm animal or domestic animal, and has, in the past two years, caused unjustified physical injury or death to a companion or farm animal as evidenced by a 'dangerous dog' finding pursuant to the provisions of [Agriculture and Markets Law § 121]" (§ 121 [3] [c]). There is no question that the injury sustained by Mueller's dog constituted a serious physical injury. The evidence established that the bite wounds to the dog came close to major veins, which likely would have caused the dog's death if they had been severed. Moreover, there was a substantial risk of death to Mueller's dog based on the potential infection of the numerous bite wounds. Nevertheless, although the evidence further established that, less than a year prior to this incident, defendant's dogs had killed a cat, there was never a dangerous dog finding in connection with that incident. Under the new version of the statute, such a finding is required under the third and last aggravating circumstance. The statute provides that, when a person witnesses an attack or threatened attack upon a person or companion animal, the person may make a complaint to a dog control officer or police officer of the appropriate municipality (see § 121 [1]). The statute further provides that the officer shall inform the complainant of his or her right to commence a dangerous dog proceeding "and, if there is reason to believe the dog is a dangerous dog, the officer shall forthwith commence such proceeding himself [or herself]" (§ 121 [1]). Here, however, the police never commenced a dangerous dog proceeding in connection with either the incident involving the kitten or any of the other prior incidents involving defendant's dogs.

Because none of the three aggravating circumstances exists here, City Court lacked the authority to direct humane euthanasia, despite its strong belief that euthanization was the appropriate remedy. In our view, the new version of the statute is flawed because it deprives courts of the discretion to determine that humane euthanasia is appropriate in the absence of an aggravating circumstance, even in the face of evidence that defendant's dogs caused serious physical injury to another dog and physical injury to a person and that the dogs had a prior history of attacking another dog, killing a cat, and threatening another person. In addition, the evidence established that defendant failed to grasp the severity of the harm caused by her dogs. She testified that her dogs thought the kitten was a toy, thereby indicating her belief that their behavior was reasonable or justified, and she further testified that the incident with Mueller and his dog was simply a dog fight. Defendant repeatedly minimized the behavior of her dogs or attempted to place the blame for their behavior on others, such as blaming Mueller for keeping his dog restrained while her dogs were attacking it and for hitting her dogs while attempting to stop the attack. Defendant also noted that her housemate had taken the dogs out, unleashed, at the time of the instant attack, and she thus did not believe that her dogs should be euthanized because it was not her fault that they were not on a leash at the time of the attack. There was evidence presented at the hearing, however, that defendant's housemate had taken the dogs with him on prior occasions and had allowed them to roam free. In any event, the evidence at the hearing established that, even when defendant had the dogs restrained, she was unable to stop them from mauling the kitten. Although there clearly are aggravating circumstances here, they undeniably are not those listed in the statute. We thus would deem it advisable to amend the statute to afford a judge or justice the discretion to direct the humane euthanasia of a dangerous dog when there are aggravating circumstances deemed by the judge or justice to warrant such action.

V

The remaining contentions of defendant do not require a further modification. The People established by clear and convincing evidence that the dogs that attacked Mueller and his dog were the dogs owned by defendant, as defendant conceded in her testimony. Defendant never objected to the receipt of various documents in evidence and never requested an adjournment to review those documents or to subpoena witnesses, and thus her contentions with respect thereto are not preserved for our review. We reject the further contention of defendant that City Court abused its discretion in refusing to assign counsel to represent her. This action is civil in nature (*see Matter of Foote*, 129 Misc 2, 4), and defendant faced a "civil penalty" of up to \$1,500 (§ 121 [7]). Defendant's dogs had not previously been determined to be dangerous, and defendant thus was not facing a misdemeanor charge (*see* § 121 [8]). We note that the requirement of assigned counsel in criminal actions is based on the underlying principle "that when the State or Government proceeds against the individual with risk of loss of liberty or grievous forfeiture, the right to counsel and due process of law carries with it the provision

of counsel if the individual charged is unable to provide it for himself [or herself]" (*Matter of Smiley*, 36 NY2d 433, 437). However, the general rule in civil actions is that " 'there is no absolute right to assigned counsel; whether in a particular case counsel shall be assigned lies instead in the discretion of the court' " (*Planck v County of Schenectady*, 51 AD3d 1283, 1283, quoting *Smiley*, 36 NY2d at 438). Here, the court did not abuse its discretion in denying defendant's request for assigned counsel inasmuch as defendant faced only civil penalties and no "grievous forfeiture" (*Smiley*, 36 NY2d at 437). Although "an adverse determination could form the basis for potential criminal charges . . . , such effects are contingent possibilities, too remote and speculative to require counsel at this stage" (*Matter of Miller v Gordon*, 58 AD2d 1027, 1027). "The danger of incarceration would arise only if [defendant negligently permitted her dogs thereafter to bite or kill a person], not as a direct result of any determination in [this] proceeding" (*id.*).

We have considered defendant's remaining contentions and conclude that they are without merit.

VI

Accordingly, we conclude that the order should be modified by vacating the directive of humane euthanasia, and the matter should be remitted to City Court for further proceedings pursuant to Agriculture and Markets Law § 121 (2) (*see generally Cuzzo v Loccisano*, 15 Misc 3d 16, 17).

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

819

**KA 07-02574**

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JONATHAN O. JONES, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered May 26, 2005. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]). The contention of defendant that his guilty plea was not knowing, voluntary and intelligent survives his waiver of the right to appeal (*see People v Seaberg*, 74 NY2d 1, 10). Furthermore, although defendant failed to preserve that contention for our review, we conclude that his statements during the plea colloquy cast significant doubt upon his guilt with respect to the crime of depraved indifference murder, and thus this case falls within the exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666).

The statements of defendant during the plea colloquy established an unintentional killing, during which he waved the gun at the victim and tried to use it as a bludgeon against the victim. Also according to the plea colloquy, during the course of the altercation the gun accidentally discharged and caused the victim's death. We thus conclude that the factual allocution failed to establish that defendant acted with a depraved indifference state of mind (*People v Feingold*, 7 NY3d 288, 296). Although defendant entered his guilty plea before the Court of Appeals decided *Feingold*, which definitively stated for the first time that the depraved indifference element of depraved indifference murder is a culpable mental state rather than

the circumstances under which the killing is committed (*see id.* at 294), we nevertheless conclude that *Feingold* applies herein inasmuch as this case was pending on direct appeal when *Feingold* was decided (*see People v Jean-Baptiste*, 11 NY3d 539, 542-543; *People v Collins*, 45 AD3d 1472, 1473, *lv denied* 10 NY3d 861). We therefore reverse the judgment of conviction, vacate the plea and remit the matter to County Court for further proceedings on the indictment.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

823

**CA 08-02574**

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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MATTHEW J. LASTOWSKI, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

V.S. VIRKLER & SON, INC., TOWN OF  
MARTINSBURG, DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANT.

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V.S. VIRKLER & SON, INC., THIRD-PARTY  
PLAINTIFF,

V

HOOPER CORPORATION, THIRD-PARTY  
DEFENDANT-RESPONDENT.

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ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

LAW OFFICES OF MICHAEL M. EMMINGER, SYRACUSE (P. DAVID TWICHELL OF  
COUNSEL), FOR DEFENDANT-RESPONDENT V.S. VIRKLER & SON, INC.

MURPHY, BURNS, BARBER & MURPHY, LLP, ALBANY, CONGDON, FLAHERTY,  
O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE  
GASSER OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF MARTINSBURG.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTIN L. NORFLEET  
OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Lewis County (Hugh A. Gilbert, J.), entered July 9, 2008 in a personal injury action. The order, insofar as appealed from, granted the motions of defendants V.S. Virkler & Son, Inc. and Town of Martinsburg for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part the motion of defendant V.S. Virkler & Son, Inc. and reinstating the complaint against it insofar as the complaint alleges that defendant V.S. Virkler & Son, Inc. was negligent in creating a dangerous condition on Whittaker Road by depositing or failing to remove stone dust and reinstating the cross claim of third-party defendant against it and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for

injuries that he sustained when the backhoe he was driving tipped over, pinning him underneath. While driving the backhoe from one job site to another during a rainstorm, plaintiff passed the exit and entrance to a quarry abutting Whittaker Road in defendant Town of Martinsburg (Town). The quarry was owned and operated by defendant V.S. Virkler & Son, Inc. (Virkler) and, beyond the quarry, Whittaker Road descended steeply toward an intersection. After cresting the hill and beginning the descent, the backhoe began to fishtail and ultimately tipped over.

According to plaintiff, the Town was negligent in its design, maintenance and repair of Whittaker Road, and it created the roadway condition that caused the accident. Also according to plaintiff, the operation by Virkler of a quarry on Whittaker Road caused the accumulation of "stone dust" on the road surface, making the road slippery and causing or contributing to the accident and injuries. We conclude that Supreme Court properly granted the motion of the Town for summary judgment dismissing the complaint and cross claims against it. We further conclude, however, that the court erred in granting those parts of the motion of Virkler for summary judgment dismissing the complaint against it insofar as the complaint alleges that Virkler was negligent in creating a dangerous condition on Whittaker Road by depositing or failing to remove stone dust, and for summary judgment dismissing the cross claim of third-party defendant against it. We therefore modify the order accordingly.

With respect to the motion of the Town, we conclude that the Town met its initial burden on its motion by establishing as a matter of law that it did not have prior written notice of the allegedly defective condition of Whittaker Road, as required by Local Law No. 4 (1997) of the Town (*see Yarborough v City of New York*, 10 NY3d 726, 728; *Marshall v City of New York*, 52 AD3d 586, 586-587). The burden then shifted to plaintiff to raise a triable issue of fact whether either of the two exceptions to the written notice requirement applied, i.e., that the Town "affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the [Town]" (*Yarborough*, 10 NY3d at 728), and plaintiff failed to meet that burden (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). First, the expert affidavit submitted by plaintiff, while faulting the adequacy of the subsurface installed on Whittaker Road in 1994 and 2000, acknowledged that it was the number and weight of trucks to and from the quarry over the course of time that resulted in the allegedly dangerous pavement condition that plaintiff allegedly encountered at the time of his accident in July 2005. Second, we reject plaintiff's contention that the Town derived a special benefit by granting a conditional use permit for the operation of Virkler's quarry in an agricultural zone (*see Guadagno v City of Niagara Falls*, 38 AD3d 1310, 1311).

With respect to the motion of Virkler, however, we conclude that there is an issue of fact on the record before us whether Virkler was negligent in creating a dangerous condition on the road by depositing or failing to remove "stone dust" (*see Zuckerman*, 49 NY2d at 562). We cannot agree with the court that Vehicle and Traffic Law § 1219 is not

applicable to the facts of this case (see *Stanton v Gasport View Dairy Farm*, 221 AD2d 1000).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**824**

**CA 08-01972**

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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LORI A. FRAZIER, FORMERLY KNOWN AS  
LORI A. BURTON, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JOSEPH G. KELLER, AS TEMPORARY ADMINISTRATOR  
OF THE ESTATE OF EARL W. PFARNER, DECEASED,  
DEFENDANT-RESPONDENT.

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BROWN CHIARI LLP, LANCASTER (THERESA M. WALSH OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

BRIAN P. FITZGERALD, P.C., BUFFALO (BRIAN P. FITZGERALD OF COUNSEL),  
FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, J.), entered July 7, 2008 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the amended complaint, as amplified by the amended bill of particulars, with respect to the permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system categories of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a motor vehicle accident that occurred in 1999 when the vehicle she was driving was struck by a vehicle driven by defendant's decedent. Although plaintiff also commenced a separate action against two other defendants seeking damages for injuries she allegedly sustained in a motor vehicle accident that occurred in 2000, this appeal does not involve that accident. Defendant moved for summary judgment dismissing the amended complaint in the action commenced against decedent, who had not yet died, on the ground that plaintiff did not sustain a serious injury in the 1999 accident within the meaning of any of the three serious injury categories alleged by plaintiff in the amended complaint, as amplified by the amended bill of particulars (see Insurance Law § 5102 [d]). Plaintiff appeals from the order granting that motion.

Addressing first the 90/180 category, we conclude that Supreme Court properly granted the motion with respect to that category. Defendant met his initial burden of establishing his entitlement to judgment as a matter of law, and plaintiff failed to submit evidence sufficient to raise a triable issue of fact whether she was "prevented from performing substantially all of the material acts that constitute her usual and customary daily activities for at least 90 of the 180 days immediately following the [1999] accident" (*Vitez v Shelton*, 6 AD3d 1180, 1181; see *Licari v Elliott*, 57 NY2d 230, 236; *Parkhill v Cleary*, 305 AD2d 1088, 1089-1090).

With respect to the permanent consequential limitation of use and significant limitation of use categories, we agree with plaintiff that, although defendant established his entitlement to judgment as a matter of law with respect to those categories, plaintiff raised a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). In opposition to the motion, plaintiff submitted medical records in which her loss of cervical range of motion was quantified and was attributed in part to the 1999 accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350). We therefore modify the order accordingly.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

827

CA 08-01953

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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ZACHARY W. GITCHELL, AN INFANT, BY AND THROUGH HIS NATURAL PARENTS AND LEGAL GUARDIANS KIMBERLY FEEHAN AND WILLIAM GITCHELL, AND KIMBERLY FEEHAN AND WILLIAM GITCHELL, INDIVIDUALLY, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

MEMORANDUM AND ORDER

JOSEPH M. CORBY, ET AL., DEFENDANTS, AND WATKINS GLEN INTERNATIONAL, INC., DEFENDANT-RESPONDENT-APPELLANT.

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LAW OFFICE OF JACOB P. WELCH, CORNING (JACOB P. WELCH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

ROEMER WALLENS & MINEAUX LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered June 17, 2008 in a personal injury action. The order, inter alia, granted the motion of defendant Watkins Glen International, Inc. for summary judgment.

It is hereby ORDERED that the cross appeal is unanimously dismissed (*see Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488; *Matter of Brown v Starkweather*, 197 AD2d 840, 841, *lv denied* 82 NY2d 653; *see also* CPLR 5511) and the order is otherwise modified on the law by denying the motion of defendant Watkins Glen International, Inc. and reinstating the second amended complaint against that defendant and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Zachary W. Gitchell, the 23-month-old son of plaintiff parents, when he was struck by a vehicle driven by defendant Joseph M. Corby. Plaintiff father (hereafter, plaintiff) and Corby were members of defendant Race Services, Inc. (RSI), a volunteer organization that agreed to provide services at racing events for defendant Watkins Glen International, Inc., (WGI), including track repairs and fire rescue. RSI members provided those services in exchange for, inter alia, camping privileges and event passes, as well as the opportunity to be involved with the racing community. Plaintiff and Corby were attending a mandatory safety

seminar on WGI premises when Corby drove plaintiff to the camping facilities provided by WGI on its property for RSI members. After dropping off plaintiff at his campsite, Corby struck plaintiff's son with his vehicle. Plaintiffs alleged that Corby was negligent and that he was acting within the scope of his employment with RSI and was under the control of WGI at the time of the accident. WGI sought summary judgment dismissing the second amended complaint against it on the grounds that (1) Corby was not negligent; (2) Corby was not engaged in employer-related activity at the time of the accident; and (3) Corby, who volunteered his services for RSI, was an independent contractor of WGI, and thus WGI could not be liable for Corby's actions based on the doctrine of respondeat superior. We conclude that Supreme Court erred in granting the motion, and we therefore modify the order accordingly.

With respect to the first ground for the motion, we conclude that the court properly determined that WGI failed to establish its entitlement to judgment on the ground that Corby was not negligent. Nevertheless, addressing the third ground for the motion, we conclude that the court erred in determining as a matter of law that Corby, as an RSI member, was an independent contractor of WGI and thus that WGI was not liable for his actions under the doctrine of respondeat superior. " 'It is well settled that one who hires an independent contractor is not liable for the independent contractor's negligent acts because the employer has no right to control the manner in which the work is to be done' . . . 'Control of the method and means by which the work is to be done . . . is the critical factor in determining whether one is an independent contractor or an employee for the purposes of tort liability' " (*Gfeller v Russo*, 45 AD3d 1301, 1302). Here, the record establishes that WGI required that RSI operate exclusively at the racetrack owned by WGI. In addition, WGI provided uniforms with the WGI insignia to course marshals, provided radios to the course marshals, mandated that certain course personnel wear helmets, and supplied the vehicles, flags, supplies to clean the track, materials to repair the walls and equipment to extinguish fires. Furthermore, WGI specified the number of RSI members required for an event and set forth detailed operational guidelines concerning fire/rescue methods and pit duties. We therefore conclude on the record before us that there is an issue of fact whether RSI was an independent contractor of WGI (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Finally, with respect to the second ground for the motion, assuming, arguendo, that Corby was not an independent contractor of WGI, we conclude that there is an issue of fact on the record before us whether he was acting within the scope of his employment at the time of the accident (*see generally id.*). " 'The general rule is that an employee acts within the scope of his [or her] employment when [he or she] is acting in furtherance of the duties owed to the employer and where the employer is or could be exercising some degree of control, directly or indirectly over the employee's activities' " (*Carlson v D'Agostino* [appeal No. 2], 53 AD3d 1129, 1131, *lv denied* 11 NY3d 708). "[E]mployer responsibility in this area is broad, particularly where employee activity may be regarded as *incidental to*

*the furtherance of the employer's interest*" (*Makoske v Lombardy*, 47 AD2d 284, 288, *affd* 39 NY2d 773; see *Bazan v Bohne*, 144 AD2d 168, 170). Here, Corby spent the weekend on WGI premises in campsites provided by WGI and participated in mandatory safety training for the upcoming racing season. The accident occurred on WGI premises while plaintiff and Corby were on a scheduled break from the mandatory training. Thus, we conclude that the accident occurred while Corby was "engaged generally in the business of [WGI]" (*Davis v Larhette*, 39 AD3d 693, 694) and, because it is unclear on the record before us whether the doctrine of respondeat superior applies (see *Makoske*, 47 AD2d at 287), we conclude that there is an issue of fact whether Corby was acting within the scope of his employment at the time of the accident.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

828

CA 08-01746

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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CARL BARTKOWIAK, PLAINTIFF-APPELLANT,

V

ORDER

MEDTRONIC, INC., MEDTRONIC SOFAMOR  
DANEK, INC., MEDTRONIC SOFAMOR DANEK,  
USA, INC., SPINAL GRAFT TECHNOLOGIES,  
L.L.C., REGENERATION TECHNOLOGIES, INC.,  
MERCY HOSPITAL OF BUFFALO, CATHOLIC  
HEALTH SYSTEM, INC., DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANT.

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VINAL & VINAL, BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

QUIRK AND BAKALOR, P.C., NEW YORK CITY (RICHARD BAKALOR OF COUNSEL),  
PEPPER HAMILTON LLP, PHILADELPHIA, PENNSYLVANIA, FOR  
DEFENDANTS-RESPONDENTS MEDTRONIC, INC., MEDTRONIC SOFAMOR DANEK, INC.,  
MEDTRONIC SOFAMOR DANEK, USA, INC., AND SPINAL GRAFT TECHNOLOGIES,  
L.L.C.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, WHITE PLAINS (JOSEPH A.  
D'AVANZO OF COUNSEL), FOR DEFENDANT-RESPONDENT REGENERATION  
TECHNOLOGIES, INC.

DAMON & MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR  
DEFENDANTS-RESPONDENTS MERCY HOSPITAL OF BUFFALO AND CATHOLIC HEALTH  
SYSTEM, INC.

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Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered December 17, 2007 in an action for, inter alia, strict products liability. The order, among other things, granted the motions of defendants Medtronic, Inc., Medtronic Sofamor Danek, Inc., Medtronic Sofamor Danek, USA, Inc., Regeneration Technologies, Inc., Mercy Hospital of Buffalo, and Catholic Health System, Inc. to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated at Supreme Court.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

851

CA 08-02555

PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, CARNI, AND GORSKI, JJ.

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JASON COOK, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DENNIS P. KENNEY AND GERALDINE M. KENNEY,  
DEFENDANTS-APPELLANTS.

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UAW GM LEGAL SERVICES PLAN, LOCKPORT (BOOKER T. WASHINGTON OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT L. MARINELLI, TONAWANDA, FOR PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), entered February 19, 2008 in an action pursuant to RPAPL article 15. The judgment following a nonjury trial, among other things, declared that plaintiff and his successors in interest are holders of a prescriptive easement over a portion of defendants' property.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the declaration and permanent injunction are vacated, and the matter is remitted to Erie County Court for further proceedings in accordance with the following Memorandum: Defendants, owners of property adjacent to property owned by plaintiff, appeal from a judgment rendered in favor of plaintiff following a bench trial in this action pursuant to RPAPL article 15. We agree with defendants that County Court erred in declaring that plaintiff and his successors in interest are holders of a prescriptive easement, pursuant to which plaintiff has a right-of-way over defendants' property for vehicular ingress and egress, and in permanently enjoining defendants from interfering with plaintiff's easement. On the record before us, we conclude that plaintiff failed to meet his burden of establishing by the requisite clear and convincing evidence that the use of defendants' property by his predecessors in title was " 'hostile, open, notorious and continuous . . . for the prescriptive period' " (*Sadowski v Taylor*, 56 AD3d 991, 994). Indeed, the expert's testimony presented by plaintiff failed to establish that plaintiff's predecessors in title used defendants' property for any purpose, adverse or otherwise, and the conclusions reached by plaintiff's expert with respect to the alleged prescriptive easement were based on mere speculation (*see J.C. Tarr, Q.P.R.T. v Delsener*, 19 AD3d 548, 550-551). We therefore reverse the judgment, vacate the declaration and permanent injunction, and remit the matter to County Court to grant judgment in favor of defendants declaring

invalid plaintiff's claim to a prescriptive easement over defendants' property (see RPAPL 1521 [1]).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

860

**KA 08-02109**

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL J. WOELFLE, DEFENDANT-RESPONDENT.

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FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Erie County Court (Thomas P. Franczyk, J.), entered August 11, 2008. The order granted that part of defendant's omnibus motion seeking to reduce count one of the indictment, charging defendant with robbery in the first degree, to the lesser included offense of attempted robbery in the first degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the motion seeking to reduce count one of the indictment is denied, count one of the indictment is reinstated, and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: We agree with the People that County Court erred in granting that part of defendant's omnibus motion seeking to reduce the count charging robbery in the first degree (Penal Law § 160.15 [3]) to the lesser included offense of attempted robbery in the first degree (§§ 110.00, 160.15 [3]). A defendant is guilty of the crime of robbery in the first degree when, inter alia, he or she forcibly steals property (see § 160.15). "[T]he property need not be removed from the owner's premises for the defendant to gain the requisite dominion and control . . .; a slight movement of the property constitutes sufficient asportation" (*People v Yusufi*, 247 AD2d 648, 649, lv denied 92 NY2d 863). Asportation "is proved by evidence of any 'appreciable changing of the location of the property involved' . . . [and t]here is no requirement that the moving of the property be directly observed" (*People v Reddick*, 159 AD2d 267, 267-268, lv denied 76 NY2d 794).

Here, the evidence before the grand jury established that defendant entered a store, waved a knife, and demanded that the cashier open the register drawer. Although the cashier did not personally observe defendant taking cash or lottery tickets from the

cash register, a witness who chased defendant upon leaving the store and engaged in a struggle with him testified that defendant dropped a bag containing cash and lottery tickets during the struggle. The Court of Appeals has held that, "[i]n the context of [g]rand [j]ury procedure, . . . legally sufficient evidence means proof of a prima facie case, not proof beyond a reasonable doubt," and we conclude that the evidence presented to the grand jury is legally sufficient evidence to support a prima facie case of robbery in the first degree, regardless of whether there was conclusive evidence that the cash and lottery tickets found in the bag were taken from the store (*People v Gordon*, 88 NY2d 92, 95-96).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

863

CAF 08-00936

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

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IN THE MATTER OF TAMMY SHAW,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

FRANK CANNATA, RESPONDENT-RESPONDENT.

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BERNADETTE M. HOPPE, BUFFALO, FOR PETITIONER-APPELLANT.

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Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered April 3, 2008 in a proceeding pursuant to Family Court Act article 6. The order modified a prior custody order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Erie County, for a hearing on the petition.

Memorandum: Petitioner mother contends that Family Court erred in failing to conduct a hearing before modifying a prior custody order by altering her visitation rights when she in fact sought a change of custody. We agree. The record establishes that the mother sought a change of custody based upon allegations of a volatile relationship between the parties' 16-year-old son and respondent father. Based upon the allegations in the petition, the court ordered that an investigation be conducted by Child Protective Services (CPS) pursuant to Family Court Act § 1034. The court did not grant the motion of the Law Guardian to dismiss the petition prior to receiving the report from CPS but, rather, modified the prior order with respect to the mother's visitation rights upon the oral request of the father. We conclude that the mother made a sufficient evidentiary showing of a change of circumstances to warrant a hearing (*cf. Jean v Jean*, 59 AD3d 599, 600), and that the mother was thereby denied her opportunity to prove that it is in the best interests of the child to modify the order of custody by awarding custody to her (*see generally Matter of Lisa B.I. v Carl D.I.*, 46 AD3d 1451). We therefore reverse the order and remit the matter to Family Court for a hearing on the petition.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

867

CA 08-02685

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

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DALE RIGBY, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

THE BRISKY FAMILY LIMITED PARTNERSHIP AND  
BRISKY SUPPLY CO., INC.,  
DEFENDANTS-APPELLANTS-RESPONDENTS.

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GROSSO & MARTINEZ, PITTSFORD (JAMES C. GROSSO OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS-RESPONDENTS.

GALLO & IACOVANGELO, LLP, ROCHESTER (DAVID D. SPOTO OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court, Wayne County (Stephen R. Sirkin, A.J.), entered March 21, 2008 in a personal injury action. The order denied plaintiff's motion for partial summary judgment and defendants' cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motion in part and dismissing the common-law negligence and Labor Law §§ 200 and 240 (1) causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while working on an elevated surface. Plaintiff was positioned on top of a plate 16 feet above the ground and was guiding a mono truss into place as it was being lifted by a forklift with an extended boom. The forklift operator lifted the truss upward when plaintiff alerted him to the fact that plaintiff had accidentally set the truss on top of one of his fingers. Plaintiff held onto the truss with his right hand and, when the truss lifted upward and outward, he strained a muscle in his groin.

Supreme Court denied plaintiff's motion for partial summary judgment on liability on the Labor Law § 240 (1) and § 241 (6) causes of action and defendants' cross motion for summary judgment dismissing the complaint. As plaintiff correctly concedes, however, the court erred in denying those parts of the cross motion seeking summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action, and we therefore modify the order accordingly.

We reject the contention of defendants that the court erred in denying that part of their cross motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action. Defendants failed to meet their initial burden of establishing that the regulations upon which that cause of action is premised, as set forth in plaintiff's bill of particulars, are not applicable or that any alleged breach thereof did not cause or contribute to the accident (see *Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349).

We agree with defendants, however, that the court erred in denying that part of their cross motion seeking summary judgment dismissing the Labor Law § 240 (1) cause of action, and we therefore further modify the order accordingly. Labor Law § 240 (1) is applicable where there are risks related to elevation differentials, and "the proper erection, construction, placement or operation of one or more devices of the sort listed in [the statute] would allegedly have prevented the injury" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514). "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501). According to plaintiff, he was injured while attempting to prevent himself from falling based on defendants' failure to provide adequate safety devices. Plaintiff's deposition testimony, however, establishes that plaintiff was not injured while attempting to prevent himself from falling, and that a safety device would not have prevented his injury (see generally *Rocovich*, 78 NY2d at 514; *Milligan v Allied Bldrs., Inc.*, 34 AD3d 1268). Plaintiff did not recall losing his balance, and he testified that he did not let go of the truss because there were people below him. Thus, plaintiff would have sustained his injury even if he was using a safety device to protect him from falling. Moreover, "plaintiff's alleged injury did not flow from the application of the force of gravity" (*Favreau v Barnett & Barnett, LLC*, 47 AD3d 996, 997; see *Ross*, 81 NY2d at 501).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

869

CA 09-00023

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

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JOHN MERGENHAGEN,  
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

DISH NETWORK SERVICE L.L.C., AND DISH  
NETWORK SERVICE CORPORATION,  
DEFENDANTS-APPELLANTS-RESPONDENTS.

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KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NELSON E. SCHULE OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL),  
FOR PLAINTIFF-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered June 10, 2008 in a personal injury action. The order granted in part defendants' motion for summary judgment and granted plaintiff's cross motion for partial summary judgment on liability under Labor Law § 240 (1).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion for summary judgment dismissing the Labor Law § 241 (6) claim insofar as that claim is premised on the alleged violations of 12 NYCRR 23-1.7 (d) and 23-1.24 and reinstating that claim to that extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he slipped and fell off the roof of the residence where he was installing a satellite dish. Defendants moved for summary judgment dismissing the complaint, and plaintiff cross-moved for partial summary judgment on liability under Labor Law § 240 (1). Supreme Court granted those parts of defendants' motion with respect to Labor Law §§ 200 and 241 (6) and granted plaintiff's cross motion, and this appeal and cross appeal ensued. We agree with plaintiff that the court erred in granting that part of defendants' motion with respect to the Labor Law § 241 (6) claim insofar as it is premised on two of the three regulations upon which plaintiff relies.

Addressing both the Labor Law § 240 (1) and § 241 (6) claims, we conclude that defendants are correct that they were not "owners" within the meaning of those statutes, but we nevertheless conclude

that they were "contractors" under those statutes. Plaintiff submitted evidence establishing as a matter of law that defendants had the contractual right to control the work, i.e., they " 'had the power to enforce safety standards and choose responsible subcontractors' " (*Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428), and defendants failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Their status as contractors is dependent on their right to exercise control, not whether they in fact did so (*see Johnson v Ebidenergy, Inc.*, 60 AD3d 1419, 1420-1421; *Mulcaire*, 45 AD3d at 1428). We have examined defendants' remaining contention with respect to plaintiff's entitlement to partial summary judgment on liability under Labor Law § 240 (1) and conclude that it lacks merit.

Defendants also failed to establish their entitlement to judgment as a matter of law dismissing the Labor Law § 241 (6) claim with respect to the two Industrial Code regulations upon which plaintiff relies on appeal, 12 NYCRR 23-1.7 (d) and 23-1.24. Section 23-1.7 (d) provides for protection from slipping hazards, and section 23-1.24 requires, inter alia, roofing brackets where the slope of the roof is steeper than one in four inches. We conclude on the record before us that those two regulations are "sufficiently specific to support a Labor Law § 241 (6) claim . . . Moreover, both regulations are applicable to the facts of this case and arguably were violated by defendants, thus warranting a trial of [that] claim" (*Tucker v Edgewater Constr. Co.*, 281 AD2d 865, 866; *see generally Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-505). We therefore modify the order accordingly.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

892

CA 09-00371

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

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MICHELLE MEYERS-KRAFT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PATRICK J. KEEM AND BRIAN C. MASTERSON, DOING  
BUSINESS AS INNOVATIVE LANDSCAPES,  
DEFENDANTS-APPELLANTS.

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PATRICK J. KEEM, THIRD-PARTY  
PLAINTIFF-APPELLANT,

V

JOHN E. WEISBERG, THIRD-PARTY  
DEFENDANT-RESPONDENT.

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WATSON, BENNETT, COLLIGAN, JOHNSON & SCHECHTER, L.L.P., BUFFALO  
(MELISSA A. DAY OF COUNSEL), FOR DEFENDANT-APPELLANT PATRICK J. KEEM  
AND THIRD-PARTY PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL),  
FOR DEFENDANT-APPELLANT BRIAN C. MASTERSON, DOING BUSINESS AS  
INNOVATIVE LANDSCAPES.

LAW OFFICES OF KENNETH P. BERNAS, PLLC, WEST SENECA (KENNETH P. BERNAS  
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICES OF LAWRENCE M. RUBIN, BUFFALO (LAWRENCE M. RUBIN OF  
COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

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Appeals from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered September 25, 2008 in a personal injury action. The order, insofar as appealed from, denied the motions of defendants for summary judgment and denied the cross motion of third-party plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she slipped and fell during the winter of 2006 on property leased to third-party defendant, who operated a chiropractic office on the property. Defendant-third-party plaintiff, Patrick J. Keem, the owner of the property, had entered

into a contract with defendant Brian C. Masterson, doing business as Innovative Landscapes, to plow the parking lot and driveway located on the property.

Supreme Court properly denied the motion of Keem for summary judgment dismissing the complaint against him as well as his cross motion for summary judgment on the third-party complaint. There is an issue of fact on the record before us concerning the precise location where plaintiff fell. The location of plaintiff's fall is critical because third-party defendant was responsible only for clearing the walkways of snow and ice, while Masterson was charged with plowing the parking lot and driveway of the subject premises. In any event, regardless of the location where plaintiff fell, we note that Keem was an out-of-possession landlord who reserved the right to enter the premises at any time under the terms of the lease, thereby retaining control sufficient to form a basis for liability against him (see *Pastor v R.A.K. Tennis Corp.*, 278 AD2d 395; *Young v J.M. Moran Props.*, 259 AD2d 1037).

We further conclude that the court properly denied the motion of Masterson for summary judgment dismissing the complaint and cross claim against him. There are three exceptions to the general rule that a party to a contract is not liable in tort to third persons (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140), and there is an issue of fact whether the first of the three exceptions applies here, "i.e., where the contracting party fails to exercise reasonable care in the performance of his or her duties and thereby launches a force or instrument of harm" (*Anderson v Jefferson-Utica Group, Inc.*, 26 AD3d 760, 761). Although Masterson contends that he did not plow on the afternoon of the accident, third-party defendant testified at his deposition that he believed that, after he had cleared the walkway, Masterson created a dangerous condition on the property by pushing snow onto the walkway at some point during the afternoon of plaintiff's fall. The deposition testimony of third-party defendant was based on his observation that the snow was spread out across the sidewalk when he inspected the sidewalk that evening, and that uncontroverted deposition testimony in fact constitutes circumstantial evidence supporting the position of Keem. In addition, third-party defendant testified that he had complained to Keem about that condition on prior occasions, because Masterson's snowplow would often push snow into the area through which the patients of third-party defendant entered the building. We thus conclude on the record before us that there is an issue of fact whether Masterson, based on his snowplowing methods, created a hazardous condition on the property by pushing snow across the area where plaintiff fell (see *Torosian v Bigsbee Vil. Homeowners Assn.*, 46 AD3d 1314, 1316).

All concur except SMITH and CARNI, JJ., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part and would modify the order by granting the motion of defendant Brian C. Masterson, doing business as Innovative Landscapes, for summary judgment and dismissing the complaint and cross claim against him. We agree with the majority's

implicit conclusion that Masterson met his initial burden of establishing that he did not create the dangerous condition by establishing that he did not plow the parking lot after third-party defendant cleared snow and ice from the area where plaintiff testified that she fell. We respectfully disagree, however, with the majority's further conclusion that the parties opposing the motion raised a triable issue of fact to defeat it.

It is beyond cavil that, after the moving party meets his or her burden on a summary judgment motion, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; see *Zuckerman v City of New York*, 49 NY2d 557, 562; *Harris v Town of Mendon*, 284 AD2d 988, 989). Here, the parties opposing the motion relied solely upon the speculative deposition testimony of third-party defendant that Masterson plowed the parking lot and deposited snow on the sidewalk in the area where plaintiff fell. Third-party defendant admitted in his deposition testimony that he did not see anyone plow the parking lot on the afternoon in question, and he agreed that he was "assuming that [the lot had been plowed] because of the way the snow was pushed across the walkway." When asked whether at any time during the winter in question he had seen a plow push snow onto the area where plaintiff allegedly fell, he testified that he "never saw it." He further admitted that his assumption was based on his observation of the conditions in the relevant part of the parking lot on other occasions, and that he was "assuming by the way the snow was laid there" that Masterson had pushed snow there on those occasions. Inasmuch as third-party defendant provided no factual basis for his conclusion that the snow was deposited by Masterson, and he in fact admitted that his conclusion was based on an assumption, it cannot be disputed that his opinion is mere speculation that is insufficient to raise a triable issue of fact (see *Bellassai v Roberts Wesleyan Coll.*, 59 AD3d 1125; *Raux v City of Utica*, 59 AD3d 984; *Anthony v Wegmans Food Mkts., Inc.*, 11 AD3d 953).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

893

CA 08-02171

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

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THE SHORE OWNERS ASSOCIATION OF CHASE'S  
LAKE, INC., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

THE PEOPLE OF THE STATE OF NEW YORK,  
DEFENDANT-APPELLANT,  
ET AL., DEFENDANTS.

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ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MICHAEL S. BUSKUS OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

SLYE & BURROWS, WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Lewis County (Joseph D. McGuire, J.), entered January 14, 2008 in an action pursuant to RPAPL article 15. The judgment, insofar as appealed from, granted that part of plaintiff's motion seeking a declaration with respect to the width of certain roadways.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part and the declarations with respect to the width of the roadways in question are vacated.

Memorandum: Plaintiff commenced this action pursuant to RPAPL article 15 seeking, inter alia, a declaration that defendant the People of the State of New York (State) "be barred from all claims to an estate or interest in" certain roadways surrounding Chase Lake in the Town of Watson, New York. The State correctly concedes that Supreme Court properly granted that part of plaintiff's motion seeking a declaration that plaintiff is the owner of the roadways in question, but the State contends that the court erred in granting that part of plaintiff's motion seeking declarations with respect to the width of those roadways. We agree. In moving for that relief, plaintiff had the initial burden of establishing its entitlement to judgment of a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562), and we conclude that plaintiff failed to meet its burden with respect to the width of the roadways. Indeed, we note that the tax maps and lot line survey relied upon by plaintiff in support of its motion are inconsistent (*see generally Morganteen v Brenner*, 28 AD3d 725, 726-

727, *lv denied* 7 NY3d 707; *Gallas v Duchesne*, 268 AD2d 728).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**911**

**KA 09-00323**

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

MELISSA GIANNI, DEFENDANT-RESPONDENT.  
(APPEAL NO. 1.)

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WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR APPELLANT.

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

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Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 15, 2008. The order, insofar as appealed from, granted that part of defendant's omnibus motion to dismiss the first count of the indictment, charging defendant with assault in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same Memorandum as in *People v Gianni* ([appeal No. 2] \_\_\_ AD3d \_\_\_ [July 2, 2009]).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**912**

**KA 09-00362**

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

MELISSA GIANNI, DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

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WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR APPELLANT.

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

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Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 1, 2008. The order, insofar as appealed from, upon reconsideration denied the People's request for reinstatement of the first count of the indictment or, in the alternative, an order reducing the first count to the lesser included offense of attempted assault in the second degree.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, the People appeal from an order insofar as it granted that part of defendant's omnibus motion to dismiss the first count of the indictment, charging defendant with assault in the second degree (Penal Law § 120.05 [9]) for allegedly causing physical injury to her seven-month-old child. That order insofar as appealed from was superseded by the order in appeal No. 2, however, which granted the motion of the People seeking reconsideration of their opposition to that part of defendant's omnibus motion seeking to dismiss the first count of the indictment and, upon reconsideration, denied the People's request for reinstatement of the first count or, in the alternative, an order reducing the first count to attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [9]). We therefore dismiss the appeal from the order in appeal No. 1.

We affirm the order in appeal No. 2. County Court properly determined that the evidence before the grand jury was legally insufficient to establish either assault in the second degree or attempted assault in the second degree (see CPL 210.20 [1] [b]). Legally sufficient evidence is "competent evidence which, if accepted as true, would establish every element of an offense charged and the

defendant's commission thereof" (CPL 70.10 [1]; see *People v Jensen*, 86 NY2d 248, 252). "In the context of a [g]rand [j]ury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt" (*People v Bello*, 92 NY2d 523, 526). Here, it is undisputed that, when defendant moved a humidification tube inserted into her child's neck, water entered the tracheostomy hole and caused the child to cough, gag, turn red and experience reduced oxygen levels. Viewing the evidence in the light most favorable to the People (see *People v Jennings*, 69 NY2d 103, 114), we conclude that they failed to present prima facie proof that defendant caused or attempted to cause physical injury to the child (*cf. People v Sylvester*, 254 AD2d 711, 712; see generally *People v Shanklin*, 59 AD2d 588, 589).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

919

**TP 08-01171**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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IN THE MATTER OF NORMAN R. DESNOYERS,  
PETITIONER,

V

ORDER

NORMAN R. BEZIO, DIRECTOR, SPECIAL  
HOUSING/INMATE DISCIPLINARY PROGRAMS,  
NEW YORK STATE DEPARTMENT OF CORRECTIONAL  
SERVICES, RESPONDENT.

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NORMAN R. DESNOYERS, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF  
COUNSEL), FOR RESPONDENT.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [James H. Dillon, J.], entered May 21, 2008) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**920**

**KA 07-02674**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

BOB BISHOP, JR., DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered November 30, 2006. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**921**

**KA 08-01272**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HOWARD M. KYLE, JR., DEFENDANT-APPELLANT.

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DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Niagara County Court (Sara S. Sperrazza, J.), entered May 13, 2008. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that his waiver of his right to a SORA hearing was not knowing, voluntary or intelligent (*see generally People v Costas*, 46 AD3d 475, *lv denied* 10 NY3d 716; *People v Gliatta*, 27 AD3d 441) and, in any event, that contention lacks merit (*see Gliatta*, 27 AD3d 441). Although defendant also failed to preserve for our review his contention that County Court erred in assessing points against him under the risk factor based on his history of drug and alcohol abuse (*see People v Roland*, 292 AD2d 271, *lv denied* 98 NY2d 614), we note in any event that his contention lacks merit. The People presented clear and convincing evidence of defendant's history of drug and alcohol abuse (*see People v Ramos*, 41 AD3d 1250, *lv denied* 9 NY3d 809; *People v Vaughn*, 26 AD3d 776, 777), and defendant presented no evidence to the contrary.

Finally, defendant failed to preserve for our review his contention that the court erred in assessing 15 points against him under the risk factor for acceptance of responsibility (*see People v Lewis*, 50 AD3d 1567, 1568, *lv denied* 11 NY3d 702) and, in any event, that contention is without merit. Although defendant pleaded guilty to the crime underlying the SORA determination, he showed no remorse in his statement to the probation officer and blamed the crime on his

use of drugs and alcohol. The court properly concluded that defendant's statement did not "reflect a genuine acceptance of responsibility as required by the risk assessment guidelines developed by the Board [of Examiners of Sex Offenders]" (*People v Noriega*, 26 AD3d 767, *lv denied* 6 NY3d 713 [internal quotation marks omitted]).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**922**

**KA 08-00497**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SCOTT H. BAKER, DEFENDANT-APPELLANT.

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GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (MELISSA LIGHTCAP CIANFRINI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 10, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**923**

**KA 08-01779**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DOUGLAS CHINN, DEFENDANT-APPELLANT.

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GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered June 23, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

925

**KA 08-01134**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LEON F. GARBARINI, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN N. BAUERSFELD OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered March 13, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction, and thus he failed to preserve for our review his contention that County Court erred in sentencing him after he made an exculpatory statement at the sentencing hearing (*see People v Lopez*, 71 NY2d 662, 665; *People v Sciascia*, 302 AD2d 980, *lv denied* 100 NY2d 645). In any event, that contention lacks merit. The plea allocution established defendant's guilt, and we note that the court had no obligation to conduct a sua sponte inquiry in response to defendant's statement at sentencing (*see People v Frempong*, 51 AD3d 506, *lv denied* 11 NY3d 736; *People v Sands*, 45 AD3d 414, 415, *lv denied* 10 NY3d 816; *People v Jackson*, 273 AD2d 937, *lv denied* 95 NY2d 906). Indeed, "[t]he court's duty to inquire [is] not triggered by statements [that a] defendant may have made at junctures other than the plea proceeding itself" (*Sands*, 45 AD3d at 415). Defendant also failed to preserve for our review his further contention that the court erred in permitting the prosecutor to conduct a portion of the plea allocution and, in any event, that contention is also without merit (*see People v Swontek* [appeal No. 1], 289 AD2d 989, *lv denied* 97 NY2d 762; *People v Smith*, 288 AD2d 931, 931).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

926

KA 08-00625

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RICKY RIZEK, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered July 24, 2006. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree and attempted rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]) and attempted rape in the first degree (§§ 110.00, 130.35 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (§ 160.10 [1]). Contrary to the contention of defendant in both appeals, his waivers of the right to appeal were voluntarily, knowingly, and intelligently entered (see *People v Lopez*, 6 NY3d 248, 256; *People v Lococo*, 92 NY2d 825, 827). We conclude, however, that the waivers of the right to appeal do not encompass defendant's challenges to the severity of the sentence in each appeal because defendant waived his right to appeal before County Court advised him of the maximum sentence he could receive (see *People v Martinez*, 55 AD3d 1334, lv denied 11 NY3d 927; *People v Mingo*, 38 AD3d 1270). We nevertheless conclude that the sentence in each appeal is not unduly harsh or severe. Finally, the further contention of defendant in appeal No. 1 that he was denied effective assistance of counsel "does not survive his guilty plea or his waiver of the right to appeal because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance" (*People v Dean*, 48 AD3d 1244, 1245, lv denied 10 NY3d 839

[internal quotation marks omitted]).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**927**

**KA 08-00626**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RICKY RIZEK, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered July 24, 2006. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same Memorandum as in *People v Rizek* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [July 2, 2009]).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**928**

**KAH 08-00644**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
DEXTER WASHINGTON, PETITIONER-APPELLANT,

V

ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN  
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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CHARLES A. MARANGOLA, MORAVIA, FOR PETITIONER-APPELLANT.

DEXTER WASHINGTON, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF  
COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court,  
Cayuga County (Thomas G. Leone, A.J.), entered February 4, 2008 in a  
habeas corpus proceeding. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is  
unanimously affirmed without costs (*see People ex rel. Lewis v Graham*,  
57 AD3d 1508, *lv denied* 12 NY3d 705).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

929

CAF 08-00910

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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IN THE MATTER OF TIARA B.

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ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ERIKA B., RESPONDENT-APPELLANT.  
(APPEAL NO. 1.)

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MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-APPELLANT.

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

JOHN G. KOSLOSKY, LAW GUARDIAN, UTICA, FOR TIARA B.

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Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered February 20, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Same Memorandum as in *Matter of Tiara B.* ([appeal No. 2] \_\_\_ AD3d \_\_\_ [July 2, 2009]).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

930

CAF 08-00911

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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IN THE MATTER OF TIARA B.

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ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ERIKA B., RESPONDENT-APPELLANT.  
(APPEAL NO. 2.)

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MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-APPELLANT.

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

JOHN G. KOSLOSKY, LAW GUARDIAN, UTICA, FOR TIARA B.

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Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered March 4, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order denied the motion of respondent to vacate the order in appeal No. 1.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order entered upon her default that, *inter alia*, revoked a suspended judgment and terminated her parental rights with respect to the child who is the subject of this proceeding. The mother failed to appear at the hearing on the petition seeking revocation of the suspended judgment and, although her attorney was present at the hearing, the attorney did not participate. Under those circumstances, we conclude that Family Court properly determined that the mother's unexplained failure to appear constituted a default (*see Matter of Miguel M.-R.B.*, 36 AD3d 613, *lv dismissed* 8 NY3d 957; *Matter of Amy Lee P.*, 245 AD2d 1136; *see also Matter of Geraldine Rose W.*, 196 AD2d 313, 316, *lv dismissed* 84 NY2d 967). We therefore dismiss the appeal from the order in appeal No. 1 (*see Matter of Vanessa M.*, 263 AD2d 542; *Amy Lee P.*, 245 AD2d 1136).

In appeal No. 2, the mother appeals from an order denying her motion to vacate the order entered upon her default. Contrary to the mother's contention, the court did not abuse its discretion in denying the motion inasmuch as the mother failed to establish a reasonable excuse for her failure to appear and a meritorious defense to the petition (*see Matter of David John D.*, 38 AD3d 661; *Matter of Devon*

*Dupree F.*, 298 AD2d 103).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**931.1**

**CA 09-00702**

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

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JENNIFER PIGUT, AS ADMINISTRATOR OF THE ESTATE  
OF LAWRENCE D. MCLELLAN, SR., DECEASED,  
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DANIEL A. LEARY, M.D., ET AL., DEFENDANTS,  
ABBOTT ANESTHESIOLOGIST ASSOCIATES, P.C. AND  
GREGORY V. TOBIAS, M.D., DEFENDANTS-APPELLANTS.

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ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRIAN P. FITZGERALD, P.C., BUFFALO (BRIAN P. FITZGERALD OF COUNSEL),  
FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered October 10, 2008. The order, insofar as appealed from, denied in part the motion of, inter alia, defendants Abbott Anesthesiologist Associates, P.C. and Gregory V. Tobias, M.D. for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the complaint against defendants Abbott Anesthesiologist Associates, P.C. and Gregory V. Tobias, M.D. is dismissed.

Memorandum: Supreme Court erred in denying those parts of the motion of, inter alia, Abbott Anesthesiologist Associates, P.C. and Gregory V. Tobias, M.D. (defendants) for summary judgment dismissing the complaint against them in this medical malpractice action seeking damages for the wrongful death of plaintiff's decedent. Defendants met their initial burden by submitting the affidavit of an expert who stated that Tobias, in performing his professional function of intubating decedent at the request of the physician supervising decedent's care, did not depart from the accepted standard of care (see *Lake v Kaleida Health*, 59 AD3d 966; see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320). The affidavit of plaintiff's expert submitted in opposition to the motion is conclusory and fails to raise a triable issue of fact (see generally *Bowman v Chasky*, 30 AD3d 552). "Under these circumstances - i.e., where [decedent] was under the care of a different physician, [Tobias] was consulted to [intubate decedent]. . . and no evidence has been submitted that . . .

[decedent's post-operative acidosis and hypotension] had gone uninvestigated or untreated - [Tobias] had no duty to scan [decedent's] chart for irregularities outside the scope of that treatment or to act upon them" (*Dombroski v Samaritan Hosp.*, 47 AD3d 80, 86). In any event, the affidavit of plaintiff's expert fails to establish that the alleged departures from accepted standards of care by Tobias were a proximate cause of injury to or the death of decedent (see *Mosezhnik v Berenstein*, 33 AD3d 895, 896; *Bowman*, 30 AD3d 552; see also *Selmensberger v Kaleida Health*, 45 AD3d 1435). We therefore reverse the order insofar as appealed from, grant the motion in its entirety and dismiss the complaint against defendants.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

931

CA 09-00134

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND GREEN, JJ.

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IN THE MATTER OF ANDREW PRATT,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL HOGAN, COMMISSIONER, NEW YORK STATE  
OFFICE OF MENTAL HEALTH, AND DONALD SAWYER,  
DIRECTOR OF CENTRAL NEW YORK PSYCHIATRIC  
CENTERS, RESPONDENTS-RESPONDENTS.

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ANDREW PRATT, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF  
COUNSEL), FOR RESPONDENTS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered December 18, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is reinstated.

Memorandum: Petitioner, who is civilly confined pursuant to article 10 of the Mental Hygiene Law, commenced this CPLR article 78 proceeding alleging that his constitutional rights have been violated because he is an atheist and he is required to attend treatment programs with religious-based content. We note at the outset that, because petitioner alleges a violation of his constitutional rights, he was not required to exhaust his administrative remedies prior to commencing this proceeding pursuant to CPLR article 78 (*see generally Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57). Specifically, petitioner contends that as part of the sex offender treatment program he is required to participate in dialectical behavior therapy, which utilizes "skills based on Eastern philosophy and spiritual training, which are compatible with most Western contemplative and Eastern meditation practices." He further contends that he is required to participate in Alcoholics Anonymous, which has religious-based content (*see generally Matter of Griffin v Coughlin*, 88 NY2d 674, 677). Respondents correctly concede that the objections in point of law set forth in their answer fail to address the allegations in the petition and instead address only the constitutionality of article 10 of the Mental Hygiene Law, which was

not contested by petitioner. We therefore conclude that Supreme Court erred in dismissing the petition based on respondents' objections in point of law (*see generally* CPLR 7804 [f]).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**932**

**KA 08-00688**

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

LAWRENCE FOX, ALSO KNOWN AS BLACK,  
DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF  
COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 27, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

933

**KA 08-00690**

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

LAWRENCE FOX, ALSO KNOWN AS BLACK,  
DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 27, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**934**

**KA 08-01379**

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

WILLIAM I. WALTER, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (HEATHER M. DESTEFANO OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered February 8, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree, endangering the welfare of a child, criminal trespass in the second degree and menacing in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**935**

**KA 08-01144**

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ANDRE JONES, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 19, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**936**

**KA 08-01882**

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

RONALD L. SCONIERS, DEFENDANT-APPELLANT.

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DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered August 5, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**937**

**KA 07-01037**

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MARCIA A. WEBER, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (DAVID E. GANN OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 12, 2007. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

938

**KA 07-02151**

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARCIA A. WEBER, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (DAVID E. GANN OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered July 24, 2007. The order directed defendant to pay restitution.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the order is affirmed, and the matter is remitted to Genesee County Court for a new hearing in accordance with the following Memorandum: On appeal from an order amending her sentence to include restitution, defendant contends, inter alia, that County Court erred in delegating its responsibility to conduct a restitution hearing to its court attorney. We agree, for the same reason as that set forth in our decision in *People v Bunnell* (59 AD3d 942, amended on rearg \_\_\_ AD3d \_\_\_ [June 5, 2009], amended \_\_\_ AD3d \_\_\_ [June 19, 2009]). Although defendant did not preserve her contention for our review, preservation is not required inasmuch as the " 'essential nature' of the right to be sentenced as provided by law" is implicated (*People v Fuller*, 57 NY2d 152, 156). We therefore modify the order by vacating the amount of restitution ordered, and we remit the matter to County Court for a new hearing to determine the amount of restitution in compliance with Penal Law § 60.27.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

939

**KA 08-01016**

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ANTHONY KIRKWOOD, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered February 1, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**940**

**KA 08-00860**

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

EUGENE JACKSON, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (GERALD T. BARTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered October 10, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**941**

**KA 08-01803**

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JACKIE A. ADAMS, DEFENDANT-APPELLANT.

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DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Niagara County Court (Richard C. Kloch, Sr., J.), rendered September 19, 2005. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), defendant contends that County Court erred in denying his motion to vacate the plea on the ground that he was mentally incompetent to enter the plea based on his posttraumatic stress disorder. We reject that contention (*see generally People v Dover*, 227 AD2d 804, *lv denied* 88 NY2d 984). Contrary to the further contention of defendant, he knowingly, intelligently and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737; *People v Moore*, 57 AD3d 1432, *lv denied* 12 NY3d 785). The challenge by defendant to the court's alleged error in sentencing him as a second violent felony offender does not survive his waiver of the right to appeal (*see People v Hamilton*, 49 AD3d 1163), inasmuch as defendant is essentially challenging the procedure pursuant to which he was sentenced as such, rather than the legality of the sentence (*see generally People v Hicks*, 201 AD2d 831, *lv denied* 83 NY2d 911; *People v Rosado*, 199 AD2d 833, 834-835, *lv denied* 83 NY2d 876). "Because the power of the court is not implicated by th[at] challenge[], appellate review of [that challenge] is foreclosed by the bargained-for waiver of [the right to] appeal" (*Rosado*, 199 AD2d at 835). In any event, defendant failed to preserve his challenge for our review (*see People v Myers*, 52 AD3d 1229), and it lacks merit. Defendant was properly afforded notice of

the predicate violent felony inasmuch as he received the predicate felony statement before he was sentenced (see *People v Swan*, 60 AD3d 1395), and the court's determination that defendant was a second violent felony offender is supported by proof beyond a reasonable doubt (see *People v Williams*, 30 AD3d 980, 983, lv denied 7 NY3d 852).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

942

KA 07-01839

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH C. DONOHUE, DEFENDANT-APPELLANT.

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WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (EDWARD L. CHASSIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered June 28, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of sexual abuse in the first degree (Penal Law § 130.65 [3]) and sentencing him to a term of imprisonment. We conclude that the People met their burden of establishing by a preponderance of the evidence that defendant violated the terms and conditions of his probation (*see generally People v Bergman*, 56 AD3d 1225, *lv denied* 12 NY3d 756). The People established that defendant came into contact with two minor children, missed four appointments for sex offender counseling, and failed to pay certain fees and a surcharge in a timely manner, all in violation of the terms and conditions of defendant's probation. Although defendant offered excuses for his various violations, County Court was entitled to discredit those excuses and instead to credit the testimony of the People's witnesses (*see generally People v Cruz*, 35 AD3d 898, *lv denied* 8 NY3d 845). We further conclude that the sentence is not unduly harsh or severe.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

943

CAF 08-01155

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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IN THE MATTER OF JANET L. BERG,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

RICHARD L. NAROLIS, SR., RESPONDENT-RESPONDENT.

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SCOTT T. GODKIN, UTICA, FOR PETITIONER-APPELLANT.

C. JOHN DESALVO, OCALA, FLORIDA, FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered April 25, 2008 in a proceeding pursuant to Domestic Relations Law article 5-A. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Oneida County, for further proceedings on the petition.

Memorandum: Petitioner mother and respondent father signed an agreement in November 2005 pursuant to which they were to have joint legal custody of their child, but the father was to have primary physical custody and was granted permission for the child to relocate with him to Florida. The agreement, which was incorporated into a New York order, further provided that physical custody would be transferred back to the mother upon her relocation to Florida. The mother never relocated to Florida, however, and the child has continued to reside with the father. In December 2007 the mother filed a petition in New York seeking custody of the parties' child.

We conclude that Family Court erred in declining to exercise jurisdiction over the proceeding and in dismissing the mother's petition upon determining that, although it had exclusive continuing jurisdiction over the proceeding (see Domestic Relations Law § 76-a), New York was an inconvenient forum under Domestic Relations Law § 76-f. Section 76-f (2) provides that, "[b]efore determining whether it is an inconvenient forum, a court of this state . . . shall allow the parties to submit information and shall consider all relevant factors," including eight specified factors (emphasis added). The record establishes that the court properly allowed the parties to submit information, but we agree with the mother that the record fails to establish that the court considered all of the requisite statutory factors and that reversal therefore is required (see *Matter of Michael*

*McC. v Manuela A.*, 48 AD3d 91, 98, *lv dismissed* 10 NY3d 836; *Matter of Scala v Tefft*, 42 AD3d 689, 692; *Matter of Blerim M. v Racquel M.*, 41 AD3d 306, 310; *cf. Matter of Eisner v Eisner*, 44 AD3d 1111, 1113, *lv denied* 9 NY3d 816; *Clark v Clark*, 21 AD3d 1326).

Based on our determination, we need not address the mother's remaining contention.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**944**

**CA 09-00029**

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ.

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IN THE MATTER OF ANDREW PRATT,  
PETITIONER-APPELLANT,

V

ORDER

DONALD SAWYER, EXECUTIVE DIRECTOR,  
CENTRAL NEW YORK PSYCHIATRIC CENTER,  
RESPONDENT-RESPONDENT.

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ANDREW PRATT, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF  
COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered October 29, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**945**

**KA 08-01682**

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

RENATA L. LONDON, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 18, 2008. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**946**

**KA 08-01372**

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

OCTAVIO B. SMITH, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered June 23, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

947

KA 08-00877

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTWAN L. DAVIS, ALSO KNOWN AS "TWANNIE,"  
DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF  
COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered October 24, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]), defendant contends that his waiver of the right to appeal is invalid because County Court failed to inform him that the waiver would include his right to appeal from the court's suppression ruling. We reject that contention. The court "need not engage in any particular litany when apprising a defendant pleading guilty of the individual rights abandoned" (*People v Lopez*, 6 NY3d 248, 256), and defendant indicated at the plea colloquy that he had spoken with defense counsel concerning the waiver of the right to appeal and that he understood the rights he was relinquishing as a result of the waiver of the right to appeal (*see generally id.*). Thus, the challenge by defendant to the court's suppression ruling is encompassed by his valid waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833; *People v Johnson*, 60 AD3d 1496; *People v Carter*, 59 AD3d 951).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

948

KA 08-00892

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SIDNEY ALLEN, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered February 11, 2008. The judgment convicted defendant, upon his plea of guilty, of unlawful surveillance in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of unlawful surveillance in the second degree (Penal Law § 250.45 [3] [a]) and endangering the welfare of a child (§ 260.10 [1]). We agree with defendant that he did not validly waive his right to appeal. "County Court's single reference to defendant's right to appeal is insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Thousand*, 41 AD3d 1272, 1273, *lv denied* 9 NY3d 927 [internal quotation marks omitted]). Even a valid waiver of the right to appeal, however, would not encompass the contention of defendant that the court failed to take into account the jail time credit to which he is entitled in setting the duration of the orders of protection (*see People v Victor*, 20 AD3d 927, *lv denied* 5 NY3d 833, 855). Defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-317), however, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see People v Edwards*, 59 AD3d 980). Contrary to the further contention of defendant, the court properly concluded, after considering "the nature and circumstances of the crime and . . . the history and character of the defendant, . . . that [his] registration [as a sex offender] would [not] be unduly harsh and inappropriate" (Correction Law § 168-a [2]

[e]).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**949**

**KA 08-00382**

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CRAIG HILL, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered February 14, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree and sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

950

CAF 07-02192

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF DENNIS A. AND JANET A.

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WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHELLE A., RESPONDENT-APPELLANT.

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NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (EDWARD L. CHASSIN OF  
COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. DADD, COUNTY ATTORNEY, WARSAW (JAMIE B. WELCH OF COUNSEL), FOR  
PETITIONER-RESPONDENT.

TERESA KOWALCZYK, LAW GUARDIAN, WARSAW, FOR DENNIS A. AND JANET A.

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Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered October 9, 2007 in a proceeding pursuant to Family Court Act article 10. The order revoked a suspended judgment and terminated respondent's parental rights.

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

Memorandum: On appeal from an order revoking a suspended judgment and terminating her parental rights with respect to two of her children, respondent mother contends that Family Court erred in determining that she violated the terms of the suspended judgment. We reject that contention. Indeed, petitioner established by a preponderance of the evidence that the mother violated various terms and conditions of the suspended judgment (*see Matter of Aaron S.*, 15 AD3d 585). Although each violation, viewed separately, may have been trivial, the violations as a whole, taken together with the mother's history, demonstrate "a lack of commitment and inability to make any significant progress in developing a meaningful parental relationship with the child[ren]" (*Matter of Christian Lee R.*, 38 AD3d 235, 236, *lv denied* 8 NY3d 813).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

951

**KA 07-01924**

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN M. KELLEY, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Monroe County Court (Richard A. Keenan, J.), entered August 14, 2007. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant's contention that County Court erred in assessing points under the risk factor for "duration of offense conduct with victim" lacks merit. We conclude that the People established by the requisite clear and convincing evidence that there was a continuing course of sexual contact (see § 168-n [3]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 10 [2006]; see also *People v Wood*, 60 AD3d 1350). We further conclude that the court properly assessed 15 points under the risk factor for defendant's history of drug and alcohol abuse inasmuch as the People presented clear and convincing evidence of such a history (see *People v Ramos*, 41 AD3d 1250, *lv denied* 9 NY3d 809; *People v Vaughn*, 26 AD3d 776, 777), and defendant presented no evidence of prolonged abstinence "in recent years" (*Vaughn*, 26 AD3d at 777; see *Ramos*, 41 AD3d 1250). Finally, defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level (see *People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708; *People v Regan*, 46 AD3d 1434, 1435) and, in any event, that contention lacks merit (see *Ratcliff*, 53 AD3d 1110; *People v Marks*, 31 AD3d 1142, 1143, *lv denied* 7 NY3d 715).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

953

KA 08-02405

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TAMMY WAGNER, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered October 24, 2008. The judgment convicted defendant, upon her plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). Contrary to the contention of defendant, the plea colloquy establishes that she voluntarily, knowingly and intelligently waived her right to appeal (*see People v Lopez*, 6 NY3d 248, 256). The valid waiver by defendant of the right to appeal encompasses her challenge to the severity of the sentence (*see id.* at 255). Although the further challenge by defendant to the imposition of the DNA databank fee survives that waiver (*see People v Pierre*, 41 AD3d 1267; *see also People v Quishana M.*, 50 AD3d 1513, *lv denied* 10 NY3d 938), defendant failed to preserve that contention for our review (*see Pierre*, 41 AD3d 1267). In any event, we conclude that defendant's challenge is lacking in merit. Contrary to defendant's contentions, County Court was not required to pronounce the amount of that fee at sentencing (*see People v Guerrero*, 12 NY3d 45, 47-48; *People v Tramble*, 60 AD3d 443), and the court's failure to advise defendant that she was subject to that fee prior to the entry of the plea "did not deprive the defendant of the opportunity to knowingly, voluntarily and intelligently choose among alternative courses of action" (*People v Hoti*, 12 NY3d 742, 743; *see People v Taylor*, 60 AD3d 444).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**954**

**KA 06-02546**

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

TIFFANY M. MAZZOCCHI, DEFENDANT-APPELLANT.

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CHRISTINE M. COOK, SYRACUSE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Ontario County (John J. Ark, J.), rendered May 4, 2006. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**955**

**KA 07-02670**

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MICHAEL A. NOBLE, DEFENDANT-APPELLANT.

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CHRISTINE M. COOK, SYRACUSE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered October 26, 2006. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

956

KA 08-01139

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEROME T. CARSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered April 21, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the fourth degree (Penal Law §§ 110.00, 220.09 [3]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the fifth degree (§§ 110.00, 220.06 [1]). Contrary to the contention of defendant, his waiver of the right to appeal in appeal No. 1 was knowingly, intelligently and voluntarily entered (*see People v Lopez*, 6 NY3d 248, 256; *cf. People v Ramos*, 152 AD2d 209). Contrary to defendant's implicit contention, County Court was not required to "engage in any particular litany in order to satisfy itself" that the waiver was validly entered (*People v Callahan*, 80 NY2d 273, 283). The valid waiver by defendant of the right to appeal in appeal No. 1 encompasses his challenge to the court's suppression ruling in that appeal (*see People v Kemp*, 94 NY2d 831, 833; *People v Dean*, 48 AD3d 1244, *lv denied* 10 NY3d 839), and there is no merit to defendant's remaining contention with respect to appeal No. 2 (*see generally People v Fuggazzatto*, 62 NY2d 862).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**957**

**KA 08-01140**

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEROME T. CARSON, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered April 21, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same Memorandum as in *People v Carson* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [July 2, 2009]).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

958

**KA 09-00364**

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH V. FICCHI, DEFENDANT-APPELLANT.

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BIANCO LAW OFFICE, SYRACUSE (RANDI BIANCO OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF  
COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered September 5, 2007. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [2]). Defendant failed to preserve for our review his contention that County Court abused its discretion in failing to afford him youthful offender status, inasmuch as he did not request youthful offender status at the time of the plea proceeding or at sentencing (*see People v Capps*, \_\_\_ AD3d \_\_\_ [June 5, 2009]; *People v Fowler*, 28 AD3d 1183, *lv denied* 7 NY3d 788). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see Fowler*, 28 AD3d at 1184). Contrary to defendant's contention, "[t]he statute requiring the court to make the [youthful offender] determination is not like those which by their terms, indicate it is the court's responsibility to alert the defendant or his lawyer to his rights or the detriment he may suffer" (*People v McGowen*, 42 NY2d 905, 906, *rearg denied* 42 NY2d 1015; *see People v Cunningham*, 238 AD2d 350, *lv denied* 90 NY2d 857).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**959**

**KA 06-00671**

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

TAYVON D. ROSIER, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered February 2, 2006. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

960

**KA 08-01488**

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ANTHONY FLOOD, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 28, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

961

KA 07-02189

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JACQUELINE MORROW, DEFENDANT-APPELLANT.

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MICHAEL A. JONES, JR., VICTOR, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered September 14, 2007. The judgment convicted defendant, upon her plea of guilty, of criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [1]), defendant contends that County Court erred in refusing to suppress evidence seized from a van in which she was a passenger inasmuch as the police lacked the requisite reasonable suspicion to stop the van. We reject that contention (*see generally People v Spencer*, 84 NY2d 749, 753, *cert denied* 516 US 905). The testimony at the suppression hearing established that the van matched the description of the vehicle involved in a larceny, and the van was stopped shortly after the commission of the crime, within a few miles of the scene of the crime. Under those circumstances, the stop of the van was supported by reasonable suspicion that its occupants had committed the larceny (*see People v Van Every*, 1 AD3d 977, 978-979, *lv denied* 1 NY3d 602; *People v Hoffman*, 283 AD2d 928, 928-929, *lv denied* 96 NY2d 919; *cf. People v Taylor*, 31 AD3d 1141, 1142; *People v Brooks*, 266 AD2d 864).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**963**

**CAF 08-01981**

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

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IN THE MATTER OF KELLY ANN ROBINSON,  
PETITIONER-RESPONDENT,

V

ORDER

BRIAN J. BURKE, RESPONDENT-APPELLANT.

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ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

BONNIE A. MCLAUGHLIN, BUFFALO, FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered July 30, 2008 in a proceeding pursuant to Family Court Act article 4. The order committed respondent to a term of incarceration upon a finding of willful violation of a child support order.

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

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

964

CA 08-00110

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

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MICHAEL A. DAVIS, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.  
(CLAIM NO. 106740.)

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MICHAEL A. DAVIS, CLAIMANT-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF  
COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Court of Claims (Renee Forgens Minarik, J.), entered August 1, 2007. The order dismissed the claim for lack of subject matter jurisdiction.

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

Memorandum: Claimant commenced this action seeking damages for injuries resulting from allegedly erroneous advice from two physicians at the correctional facility where he was incarcerated that no treatment was necessary for a lump in his upper abdomen. We agree with defendant that the Court of Claims properly dismissed the claim for lack of subject matter jurisdiction. "A court's lack of subject matter jurisdiction is not waivable" (*Matter of Reis v Zimmer*, 263 AD2d 136, 144, amended on renewal 270 AD2d 968; see *Moulden v White*, 49 AD3d 1250), and we conclude that the court properly dismissed the claim sua sponte (see generally *Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718). Pursuant to Court of Claims Act § 11 (b), "[t]he claim shall state the time when and place where such claim arose, the nature of same, [and] the items of damage or injuries claimed to have been sustained . . . ." The requirements of section 11 (b) are "substantive conditions upon the State's waiver of sovereign immunity" (*Lepkowski v State of New York*, 1 NY3d 201, 207), and noncompliance with the statute renders a claim jurisdictionally defective (see *Kolnacki v State of New York*, 8 NY3d 277, 280-281, rearg denied 8 NY3d 994; *Lepkowski*, 1 NY3d at 209). Here, the claim is jurisdictionally defective inasmuch as it fails to state an injury (see *Lepkowski*, 1 NY3d at 208).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

**965.1**

**KA 08-01385**

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH MAYNARD, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered April 1, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted arson in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted arson in the third degree (Penal Law §§ 110.00, 150.10 [1]). The waiver by defendant of the right to appeal does not encompass his contention that Supreme Court erred in enhancing the sentence without affording him an opportunity to withdraw the plea " 'because there was no discussion of that issue at the time of the plea' " (*People v Fortner*, 23 AD3d 1058). We nevertheless conclude that defendant failed to preserve his contention for our review (*see People v Belile*, 59 AD3d 1002; *People v Evans*, 302 AD2d 893, *lv denied* 100 NY2d 561), 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]*; *cf. People v Waggoner*, 53 AD3d 1143, 1144).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court

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

966

CA 08-01919

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, GREEN, AND GORSKI, JJ.

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IN THE MATTER OF MICHAEL R. TOPOLSKI,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MARY I. JUMBELIC, M.D., CHIEF MEDICAL  
EXAMINER OF ONONDAGA COUNTY,  
RESPONDENT-RESPONDENT.

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MICHAEL R. TOPOLSKI, PETITIONER-APPELLANT PRO SE.

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Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered August 6, 2008. The order, insofar as appealed from, denied in part the application of petitioner pursuant to County Law § 677 (3) (b) for production and disclosure of certain materials.

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

Memorandum: Petitioner, an inmate in a correctional facility, brought an application pursuant to County Law § 677 (3) (b) seeking the production and disclosure of, inter alia, X ray films, CT scans, MRI films, photographs, CD-ROM copies of data, and audio recordings relating to the autopsy of an individual whom petitioner was convicted of intentionally killing. Petitioner contends that such items will prove that he killed the victim in self-defense. We reject the contention of petitioner that Supreme Court abused its discretion in denying in part his application for production and disclosure of those materials. We note that the court granted that part of the application seeking production and disclosure of all written records relating to the autopsy and to the investigation into the victim's cause of death, and we take notice of our own records from petitioner's previous appeal from the judgment of conviction (*People v Topolski*, 28 AD3d 1159, lv dismissed 6 NY3d 898, lv denied 7 NY3d 764, 795), which establish that autopsy photographs and the victim's toxicology report were disclosed to petitioner during the criminal proceedings (see generally *Oakes v Muka*, 56 AD3d 1057, 1059; *New York State Dam Ltd. Partnership v Niagara Mohawk Power Corp.*, 222 AD2d 792, 794 n, lv dismissed in part and denied in part 87 NY2d 1041). We further note that petitioner's justification defense was fully

litigated at the trial and was rejected by the jury.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court