SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 1, 2011

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. JEROME C. GORSKI

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

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CA 10-01375

PRESENT: SMITH, J.P., CARNI, SCONIERS, GREEN, AND GORSKI, JJ.

KENWORTH OF BUFFALO, NY, INC.,
PLAINTIFF-RESPONDENT,

V ORDER

HYDROACOUSTICS, INC.,
DEFENDANT-RESPONDENT.

HYDROACOUSTICS, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

ANTHONY J. COSTELLO & SON (MAX)
DEVELOPMENT, LLC, THIRD-PARTY
DEFENDANT-APPELLANT.

STEPHEN E. HALL, ROCHESTER, FOR THIRD-PARTY DEFENDANT-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (HUGH C. CARLIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered March 31, 2010. The order, inter alia, denied the motion of third-party defendant for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 10, 2011,

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

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

697

CA 10-02146

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

TINA M. HOLSTEIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COMMUNITY GENERAL HOSPITAL OF GREATER SYRACUSE,
DEFENDANT-APPELLANT.

MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ P.C., WHITE PLAINS (MYRA I. PACKMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEFRANCISCO & FALGIATANO LAW FIRM, SYRACUSE (JEFF D. DEFRANCISCO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 24, 2010 in a medical malpractice action. The judgment, entered upon a jury verdict, awarded plaintiff the sum of $1,690,000 with interest.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries she sustained based on the negligence of defendant's employee. We reject defendant's contention that Supreme Court erred in denying its motion to set aside the jury verdict and for a new trial pursuant to CPLR 4404 (a). Contrary to defendant's contention, we conclude that the verdict is not against the weight of the evidence, inasmuch as the evidence did not " 'so preponderate[] in favor of the [defendant] that [the verdict] could not have been reached on any fair interpretation of the evidence' " (*Lifson v City of Syracuse* [appeal No. 2], 72 AD3d 1523, 1524; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746). Indeed, the "trial was a prototypical battle of the experts, and the jury's acceptance of [plaintiff's] case was a rational and fair interpretation of the evidence" (*Lillis v D'Souza*, 174 AD2d 976, 977, *lv denied* 78 NY2d 858; *see Winiarski v Harris* [appeal No. 2], 78 AD3d 1556, 1557). We reject defendant's further contention that the jury's award of compensatory damages "deviate[d] materially from what would be reasonable compensation" (CPLR 5501 [c]; *see generally Schmitt v Werner Enters.*, 277 AD2d 1003).

We further conclude that defendant waived his contention that a new trial is warranted based upon the failure of the court to poll the jury. Following the jury's announcement of the verdict, defense

counsel "ask[ed] that the jury be polled," to which the court responded, "Jury be polled, they have signed. They each have individually signed." Defense counsel then stated, "Okay. All right. Thank you," following which the court excused the jury. We cannot conclude that the equivocal comment by the court constituted a ruling on defense counsel's request. This case is distinguishable from *Duffy v Vogel* (12 NY3d 169, 172), where the request to poll the jury was explicitly "denied as 'unnecessary[,]' and the jury [was] discharged." Rather, here, defense counsel was afforded an opportunity to clarify her request prior to the jury being discharged "and[,] when [defense] counsel immediately abandoned the subject[,] the court might well have assumed that [defense] counsel acquiesced that the polling was unnecessary" (*Farhart v Matuljak*, 283 App Div 977, 978). Inasmuch as defense counsel failed to indicate "that [she] nevertheless . . . wished [to have] the jury polled[] or [to] ask[ ] for a definite ruling" (*id.*), we conclude that defense counsel failed to make her "position sufficiently clear to the court to make the question available upon appeal" (*id.*).

All concur except SCUDDER, P.J., and MARTOCHE, J., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent inasmuch as we agree with defendant that a new trial is warranted based upon the failure of Supreme Court to poll the jury. There is no question that defense counsel unequivocally requested that the jury be polled and, in our view, the court had an absolute duty to rule on that request. In response to defense counsel's request, the court stated, "Jury be polled, they have signed. They have each individually signed." Defense counsel thereafter responded, "Okay. All right. Thank you." We conclude that it was unnecessary for defense counsel to make a formal exception to the ruling of the court (*see* CPLR 4017). Even if we were to agree with the majority that the court's response to the request of defense counsel was equivocal, we cannot conclude that defendant waived his contention based on the subsequent response of defense counsel. A party has an absolute right to have the jury polled and that right exists unless the party " 'has expressly agreed to waive that right' " (*Duffy v Vogel*, 12 NY3d 169, 174). Any ambiguity in the court's response should not be held against defense counsel, and her statement does not constitute a clear and express abandonment of her original request. Thus, we view the exchange between defense counsel and the court as ambiguous at best, and we resolve the ambiguity in favor of defense counsel, who made a clear and direct request to have the jury polled. We would therefore reverse the judgment, grant defendant's post-trial motion, set aside the verdict and grant a new trial.

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

718

CA 11-00275

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

CHERYL A. HAAS AND WILLIAM K. HAAS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

F.F. THOMPSON HOSPITAL, INC., F.F. THOMPSON HEALTH SYSTEM, INC., F.F. THOMPSON FOUNDATION, INC., F.F. THOMPSON CONTINUING CARE CENTER, INC., ELIZABETH DUBOVSKY, M.D., JOHN NICHOLS, M.D., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

HIRSCH & TUBIOLO, P.C., ROCHESTER (CHRISTOPHER S. NOONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DIBBLE & MILLER, P.C., ROCHESTER (JOHN J. JAKUBEK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered June 22, 2010 in a medical malpractice action. The order, insofar as appealed from, denied those parts of the motion of defendants F.F. Thompson Hospital, Inc., F.F. Thompson Health System, Inc., F.F. Thompson Foundation, Inc., F.F. Thompson Continuing Care Center, Inc., Elizabeth Dubovsky, M.D. and John Nichols, M.D. seeking summary judgment dismissing the complaint against them.

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

Memorandum: Defendants-appellants (defendants) appeal from an order that, inter alia, denied those parts of their motion for summary judgment dismissing the complaint against them in this medical malpractice action. We affirm. Even assuming, arguendo, that defendants met their initial burden on the motion, we conclude that plaintiffs raised triable issues of fact sufficient to defeat the motion by submitting the affidavit of their medical expert (*see Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "The conflicting opinions of the experts for plaintiff[s] and defendant[s] with respect to . . . defendant[s'] alleged deviation[s] from the accepted standard of medical care [and whether those alleged deviations affected the extent of the injuries sustained by plaintiff Cheryl A. Haas] present credibility issues that cannot be resolved on a motion for summary

judgment" (*Ferlito v Dara*, 306 AD2d 874; *see Gedon v Bry-Lin Hosps.*, 286 AD2d 892, 894, *lv denied* 98 NY2d 601).

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

722

TP 11-00134

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

IN THE MATTER OF THEODORE J. USATYNSKI, AS VOLUNTARY ADMINISTRATOR OF THE ESTATE OF THEODORE W. USATYNSKI, DECEASED, PETITIONER,

V MEMORANDUM AND ORDER

RICHARD F. DAINES, M.D., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, ELIZABETH R. BERLIN, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, AND DAVID SUTKOWY, COMMISSIONER, ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

MANNION & COPANI, SYRACUSE (ANTHONY F. COPANI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS RICHARD F. DAINES, M.D., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, AND ELIZABETH R. BERLIN, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

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, Onondaga County [Anthony J. Paris, J.], entered November 18, 2010) to review a decision after fair hearing of the New York State Office of Temporary and Disability Assistance. The decision, among other things, confirmed the determination of the Onondaga County Department of Social Services denying an application made on behalf of Theodore W. Usatynski for Medicaid benefits.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the decision after a fair hearing that confirmed the determination of the Onondaga County Department of Social Services (DSS) denying his application on behalf of his father (decedent) for Medicaid benefits. During the pendency of this appeal, respondents Richard F. Daines, M.D., Commissioner, New York State Department of Health, and Elizabeth R. Berlin, Executive Deputy Commissioner, New York State Office of Temporary and Disability Assistance, advised this Court that the determination of DSS has been

withdrawn and that DSS was directed to redetermine decedent's eligibility for Medicaid benefits. Thereafter, petitioner's counsel advised this Court that DSS determined that petitioner was eligible for Medicaid benefits. Thus, " 'petitioner has received all the relief to which he is entitled and is no longer aggrieved, [and] the proceeding is dismissed as moot' " (*Matter of Mahagan v New York State Dept. of Health*, 53 AD3d 1118, 1119; *see Matter of Wellman v Surles*, 185 AD2d 464, 466).

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

725

KA 09-02332

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARREN MCEATHRON, DEFENDANT-APPELLANT.

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

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered October 20, 2008. The judgment convicted defendant, upon a jury verdict, of kidnapping in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of kidnapping in the second degree (Penal Law § 135.20) and assault in the second degree (§ 120.05 [6]). We reject defendant's contention that County Court erred in denying his motion for a trial order of dismissal with respect to the kidnapping charge on the ground that it violates the merger doctrine. That doctrine prohibits a conviction for kidnapping based upon acts that fall within the definition of that crime but are merely incidental to another crime (*see generally People v Gonzalez*, 80 NY2d 146, 151-152; *People v Cassidy*, 40 NY2d 763, 767). Contrary to the People's contention, we conclude at the outset that defendant preserved his contention for our review. Defense counsel moved for a trial order of dismissal at the close of the People's case and renewed that motion at the conclusion of all the evidence (*see* CPL 290.10 [1]; *People v Payne*, 3 NY3d 266, 276-277, *rearg denied* 3 NY3d 767; *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678).

We agree with the People, however, that the merger doctrine does not apply to the facts of this case. In making that determination, our "guiding principle is whether [defendant's] restraint [of the victim] was 'so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that independent criminal responsibility may not fairly be attributed to them' " (*Gonzalez*, 80 NY2d at 153, quoting *Cassidy*, 40 NY2d at 767). Here, " '[t]he [abduction] was not a minimal intrusion

necessary and integral to another crime, nor was it simultaneous and inseparable from another crime. It was a crime in itself' " (*People v O'Connor*, 21 AD3d 1364, 1365, *lv denied* 6 NY3d 757, quoting *Gonzalez*, 80 NY2d at 153). Thus, we conclude that the kidnapping was not a part of the assault. Rather, the evidence demonstrates that defendant restrained and began to transport the victim for undisclosed purposes and that the assault was incidental to the kidnapping.

Defendant further contends that he was denied a fair trial when the People improperly bolstered the victim's testimony. That contention is not preserved for our review inasmuch as defendant's objection to the testimony in question was based only on the ground that it constituted inadmissible hearsay. In any event, any bolstering that may have taken place is harmless inasmuch as the evidence of defendant's guilt was overwhelming and there is no significant probability that the jury would have acquitted defendant but for the error (*see People v Johnson*, 57 NY2d 969, 970; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Defendant failed to preserve for our review his contention with respect to the remaining instances of alleged prosecutorial misconduct involving the questioning of witnesses (*see* CPL 470.05 [2]), 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]). Defendant also failed to preserve for our review his contention that he was deprived of a fair trial based on prosecutorial misconduct during summation (*see People v Fisher*, 78 AD3d 1605, 1605-1606; *People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849) and, in any event, that contention is without merit. The majority of the comments in question were within " 'the broad bounds of rhetorical comment permissible' " during summations (*People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854, quoting *People v Galloway*, 54 NY2d 396, 399), and they were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915). Even assuming, arguendo, that some of the prosecutor's comments were beyond those bounds, we conclude that they were not so egregious as to deprive defendant of a fair trial (*see People v Figgins*, 72 AD3d 1599, *lv denied* 15 NY3d 893; *People v Sweney*, 55 AD3d 1350, 1351, *lv denied* 11 NY3d 901).

We reject the contention of defendant that he was denied effective assistance of counsel. To the extent that defendant contends that defense counsel was ineffective for failing to move to suppress certain evidence, "[d]efendant has failed to show that [such] a . . . motion . . ., if made, would have been successful" (*People v Matthews*, 27 AD3d 1115, 1116). In addition, defendant failed to "demonstrate the absence of strategic or other legitimate explanations" for defense counsel's failure to make the pretrial motions that he now claims should have been made (*People v Garcia*, 75 NY2d 973, 974; *see People v Crouch*, 70 AD3d 1369, 1370, *lv denied* 15 NY3d 773).

The sentence is not unduly harsh or severe. We have considered

defendant’s remaining contentions and conclude that they are without merit.

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

726

KA 11-00081

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

R. MICHAEL HILDRETH, DEFENDANT-APPELLANT.

THE PARRINELLO LAW FIRM, LLP, ROCHESTER (BRUCE F. FREEMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered August 15, 2007. The judgment convicted defendant, upon a nonjury verdict, of official misconduct and eavesdropping.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of official misconduct (Penal Law § 195.00 [1]) and eavesdropping (§ 250.05). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). In support of his challenge to the legal sufficiency of the evidence supporting the eavesdropping conviction, defendant contends that there was a "complete absence of evidence that he 'intercepted' or 'accessed' an electronic communication." We reject that contention. "A person is guilty of eavesdropping when he [or she] unlawfully engages in . . . intercepting or accessing of an electronic communication" (§ 250.05), which is defined as the "intentional acquiring, receiving, collecting, overhearing, or recording of an electronic communication, without the consent of the sender or intended receiver thereof, by means of any instrument, device or equipment" (§ 250.00 [6]). The fact that none of the witnesses testified that information was recorded by the program installed by defendant on the victim's computer does not render the evidence supporting the eavesdropping conviction legally insufficient. Indeed, there was ample circumstantial evidence, including the documentary evidence from the company that created the program, establishing that it was installed on the victim's computer, that it was configured to record certain types of communications and send a

report regarding them to an e-mail address and that it attempted to send such a report. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678). Here, we conclude that the evidence at trial could lead a rational person to conclude that the program installed by defendant recorded information that it gained from the victim's electronic communication.

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We further conclude that defendant was not denied effective assistance of counsel based on defense counsel's failure to make an omnibus motion or to request a bill of particulars (*see People v Brink*, 30 AD3d 1014, 1015, *lv denied* 7 NY3d 810). In addition, "defense counsel's failure to make a specific motion for a trial order of dismissal at the close of the People's case did not constitute ineffective assistance of counsel, inasmuch as any such motion would have had no chance of success" (*People v Horton*, 79 AD3d 1614, 1616, *lv denied* 16 NY3d 859; *see generally People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

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CA 11-00333

PRESENT: SCUDDER, P.J., SMITH, CARNI, SCONIERS, AND GREEN, JJ.

NIAGARA FOODS, INC., BENLEY REALTY CO. AND THE CHARTER OAK FIRE INSURANCE COMPANY, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

FERGUSON ELECTRIC SERVICE COMPANY, INC. AND TEGG CORPORATION, DEFENDANTS-RESPONDENTS-APPELLANTS.

LAW OFFICES OF ROBERT A. STUTMAN, P.C., NEW YORK CITY (KEVIN P. SMITH OF COUNSEL), AND BRANDT, ROBERSON & BRANDT, P.C., LOCKPORT, FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT FERGUSON ELECTRIC SERVICE COMPANY, INC.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT TEGG CORPORATION.

Appeal and cross appeals from an amended order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 27, 2010. The amended order, among other things, granted in part defendants' motions to dismiss.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by granting that part of the motion of defendant Ferguson Electric Service Company, Inc. to dismiss the breach of contract cause of action asserted against it by plaintiff Benley Realty Co. and as modified the amended order is affirmed without costs.

Memorandum: In this action to recover damages sustained as the result of a fire, plaintiffs appeal and defendants each cross-appeal from an amended order that, inter alia, granted in part defendants' respective motions to dismiss the first amended complaint. Addressing first plaintiffs' appeal, we conclude that Supreme Court properly granted those parts of the motions to dismiss the causes of action for fraud and negligent misrepresentation.

With respect to that part of the fraud cause of action against defendant Tegg Corporation (Tegg), plaintiffs relied upon an e-mail from Tegg that merely constituted a promise for future action, which is insufficient to support that cause of action against Tegg (*see*

Transit Mgt., LLC v Watson Indus., Inc., 23 AD3d 1152, 1155; *Cerabono v Price*, 7 AD3d 479, 480, *lv dismissed* 3 NY3d 737, *lv denied* 4 NY3d 704). With respect to that part of the fraud cause of action against defendant Ferguson Electric Service Company, Inc. (Ferguson), we note that it is well settled that "[a] cause of action premised upon fraud cannot lie where it is based on the same allegations as [a] breach of contract [cause of action]" (*Heffez v L & G Gen. Constr., Inc.*, 56 AD3d 526, 527). Nevertheless, where the alleged fraudulent representation is collateral to the contract, i.e., it is a fraudulent representation regarding present fact as opposed to one reflecting an intent to perform, the fraud and breach of contract causes of action simultaneously may be maintained (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956; *McKernin v Fanny Farmer Candy Shops*, 176 AD2d 233, 234). Here, the fraud and breach of contract causes of action with respect to Ferguson are based upon the same allegations inasmuch as both rely upon the May 3, 2004 agreement between Ferguson and plaintiff Niagara Foods, Inc. (Niagara Foods). Moreover, the documents attached to the first amended complaint establish that Ferguson made no false representation of present fact. With respect to the negligent misrepresentation cause of action, no special relationship other than an ordinary business relationship is asserted in the first amended complaint with respect to either Tegg or Ferguson. Thus, the court properly granted those parts of defendants' motions dismissing that cause of action against them (*see Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 795-796; *H & R Project Assoc. v City of Syracuse*, 289 AD2d 967, 969; *Cecos Intl. v Advanced Polymer Sciences*, 245 AD2d 1017).

With respect to defendants' cross appeals, we reject their contention that the court erred in denying those parts of their motions to dismiss the strict products liability cause of action. Plaintiffs properly pleaded a cause of action for strict products liability (*see Van Iderstine v Lane Pipe Corp.*, 89 AD2d 459, 460-461, *lv dismissed* 58 NY2d 610, 1113), and the court was correct that, at this stage of the litigation, there is an issue of fact whether defendants provided a service, a product, or a combination thereof. We agree with Ferguson, however, that the court erred in denying that part of its motion to dismiss the breach of contract cause of action asserted by plaintiff Benley Realty Co. (Benley) against it inasmuch as Benley did not enter into a contract with Ferguson (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 181-182). Nor has Benley established that it was a third-party beneficiary of the contract between Ferguson and Niagara Foods or that any benefit it received from that contract was sufficiently immediate to establish the assumption of a duty by Ferguson to compensate Benley in the event that the benefit was lost (*see id.* at 182). We therefore modify the amended order accordingly.

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

807

CA 11-00332

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

GARY BERGER, INDIVIDUALLY AND AS FATHER AND
NATURAL GUARDIAN OF KATHRYN BERGER, AN INFANT,
PLAINTIFF-RESPONDENT,

V ORDER

TERESA A. HENDERSON, WALTER R. HENDERSON,
DEFENDANTS-RESPONDENTS,
AND THE BUFFALO NEWS, INC., DEFENDANT-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 16, 2010 in a personal injury action. The order denied the motion of defendant The Buffalo News, Inc. for summary judgment dismissing the amended complaint against it.

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

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

821

KA 09-00152

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE J. PRUITT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered December 3, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in or near school grounds.

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 criminal sale of a controlled substance in or near school grounds (Penal Law § 220.44 [2]). Contrary to defendant's contention, the sentence is not unduly harsh or severe. We note however, that the certificate of conviction incorrectly recites that defendant was convicted of criminal sale of a controlled substance in the third degree under Penal Law § 220.39 (1), and it must therefore be amended to reflect that he was convicted of criminal sale of a controlled substance in or near school grounds under Penal Law § 220.44 (2) (*see People v Saxton*, 32 AD3d 1286).

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

823

KA 10-00381

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAVID SANCHEZ, ALSO KNOWN AS DAVID CANFIELD,
DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered January 15, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

825

KA 10-01585

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN DANIELS, DEFENDANT-APPELLANT.

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.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 16, 2009. The order determined that defendant is a level three 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 three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Defendant was convicted in 1980 of, inter alia, rape in the first degree (Penal Law § 130.35 [1]) in Niagara County Court. The Judge who sentenced defendant thereafter retired, and the SORA hearing subsequently was conducted by an Acting Supreme Court Justice. Defendant failed to preserve for our review his contention that the transfer of the SORA hearing to Supreme Court was not authorized by 22 NYCRR 200.14 (*see generally People v Ott*, 83 AD3d 1495). In any event, section 200.14 has no application to a SORA risk level determination "inasmuch as [a] SORA determination is not part of the criminal action" (*People v Ayala*, 72 AD3d 1577, 1578, *lv denied* 15 NY3d 816). Defendant also failed to preserve for our review his contention that the SORA determination was not authorized inasmuch as it was not made by the "sentencing court," i.e., Niagara County Court (Correction Law § 168-n [2]). In any event, we note that SORA contemplates that risk level determinations may be made by a court other than the "sentencing court" (*see* Correction Law § 168-*o* [2], [3]). To the extent that defendant contends that Supreme Court lacked subject matter jurisdiction to preside over the SORA hearing, we conclude that defendant waived that contention. "Given that Supreme Court had the power to hear the case, the transfer error defendant alleges is the equivalent of an improper venue claim, which is not jurisdictional in nature and is waived if not timely raised" (*People v*

Wilson, 14 NY3d 895, 897; *see Ott*, 83 AD3d at 1496), and here defendant did not timely raise the alleged transfer error inasmuch as his contention is raised for the first time on appeal.

With respect to the merits, we agree with defendant that the People failed to prove by the requisite clear and convincing evidence that the rape victim was a stranger (*see generally* Correction Law § 168-n [3]), and thus that the court erred in assessing 20 points on the risk assessment instrument (RAI) for risk factor 7. Reducing defendant's score on the RAI by 20 points, however, does not alter his presumptive risk level (*see People v Bove*, 52 AD3d 1124, 1125), and there is no indication in the record that defendant presented clear and convincing evidence of special circumstances warranting a downward departure or, indeed, that he even requested one (*see People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708). We therefore conclude that the court properly determined that he is a level three risk.

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

826

KA 09-00930

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TYRAY GILLIAM, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

TYRAY GILLIAM, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered May 28, 2008. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

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

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

827

KA 10-01120

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD F. GAST, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO 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 Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered December 15, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree and attempted forgery in the second 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 criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [2]) and attempted forgery in the second degree (§§ 110.00, 170.10 [1]). Defendant contends that reversal is required because Supreme Court failed to make a sufficient inquiry whether defendant's alleged lack of necessary medication affected his ability to enter a knowing, voluntary and intelligent plea. Although defendant's contention survives his valid waiver of the right to appeal (*see People v Brown*, 66 AD3d 1385, *lv denied* 14 NY3d 839), defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve his contention for our review (*see People v Garrett*, 60 AD3d 1389). In any event, defendant's contention is without merit. The court conducted a thorough inquiry into defendant's ability to enter the plea, and defendant stated that his lack of medication did not affect that ability. Defendant's answers to the questions of the court indicate that defendant understood the terms and consequences of the plea (*see People v Sonberg*, 61 AD3d 1350, *lv denied* 13 NY3d 800; *see generally People v Alexander*, 97 NY2d 482, 486).

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

828

KA 08-00866

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RENDELL BROOME, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered September 13, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

830.1

CAF 10-01379

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

IN THE MATTER OF KELLY A. MAIDA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN CAPRARO, RESPONDENT-RESPONDENT.

KELLY A. HOBAICA, PETITIONER-APPELLANT PRO SE.

Appeal from an order of the Family Court, Herkimer County (Anthony J. Garramone, J.H.O.), entered April 27, 2010 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of respondent to dismiss the petition.

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

Memorandum: Petitioner mother commenced this proceeding alleging that respondent father was in violation of a prior order pursuant to which the parties had joint custody of their youngest child, with the mother having primary physical custody. According to the mother, the father violated the order by keeping the child in South Carolina and refusing to allow the mother to bring her to New York. Family Court properly granted the father's motion to dismiss the petition for lack of jurisdiction. Where a court of this state has made an initial custody determination, it has "exclusive, continuing jurisdiction over the determination until . . . [, inter alia,] a court of this state determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships" (Domestic Relations Law § 76-a [1] [a]; *see Matter of Gulyamova v Abdullaev*, 53 AD3d 489). Here, the parties and the child moved to South Carolina in 2007, and the father, with the mother's consent, has had primary physical custody of the child since December 2007. The mother did not move back to New York until approximately the time she filed the violation petition in February 2010. We thus conclude that the child did not have "a significant connection with New York, and substantial evidence was no longer available in New York" concerning, inter alia, her care (*Gulyamova*, 53 AD3d at 490; *see Matter of Felicia McM. v Jerrold L.W.*, 51 AD3d 501; *Matter of Zippo v Zippo*, 41 AD3d 915, 916).

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

830

CA 11-00336

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

DOLORES SANTIAGO, PLAINTIFF-APPELLANT,

V ORDER

KARL M. SCHMIDT, DEFENDANT-RESPONDENT.

LAW OFFICES OF MARC JONAS, UTICA (MARC JONAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROSSI AND MURNANE, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered August 12, 2010. The order, among other things, vacated a judgment entered February 22, 2010, and prohibited plaintiff from seeking further judgment.

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

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

831

KA 10-02153

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM F. CAREY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered October 19, 2010. The judgment revoked defendant's sentence of shock probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant was convicted upon a plea of guilty of, inter alia, driving while intoxicated as a class E felony (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]) and was sentenced to a term of shock probation. He subsequently admitted that he violated a condition of probation and now appeals from a judgment revoking his sentence of shock probation and imposing a sentence of imprisonment. Defendant failed to preserve for our review his contention that County Court erred in failing to order an updated presentence report before sentencing him following the revocation of probation (*see People v Obbagy*, 56 AD3d 1223, *lv denied* 11 NY3d 928; *People v Pomales*, 37 AD3d 1098, *lv denied* 8 NY3d 949). In any event, that contention lacks merit. The declaration of delinquency and uniform court report " 'constituted the functional equivalent of an updated [presentence] report' " (*People v Fairman*, 38 AD3d 1346, 1347, *lv denied* 9 NY3d 865; *see People v Somers*, 280 AD2d 925, *lv denied* 96 NY2d 806). Moreover, the same judge presided over both the original proceedings and the revocation proceedings, and thus "[t]he court was 'fully familiar with any changes in defendant's status, conduct or condition' since the original sentencing" (*People v Howard*, 254 AD2d 701, *lv denied* 93 NY2d 853; *see People v Perry*, 278 AD2d 933, *lv denied* 96 NY2d 866; *cf. People v Klinkowski*, 281 AD2d 972, *lv denied* 96 NY2d 831).

Defendant further contends that the court should have permitted him to withdraw his admission to the violation of probation because

the court never informed him that the sentence of imprisonment was an agreed-upon sentence and there is no indication in the record that defense counsel informed him of the terms of the agreement. To the extent that defendant's contention may be construed as a contention that his admission was not knowingly, voluntarily or intelligently entered, that contention is not preserved for our review and does not fall within the rare exception to the preservation requirement (*see People v Springstead*, 57 AD3d 1397, 1398, *lv denied* 12 NY3d 788; *People v Barra*, 45 AD3d 1393, 1393-1394, *lv denied* 10 NY3d 761; *see generally People v Lopez*, 71 NY2d 662, 666). Insofar as defendant contends that defense counsel failed to inform him of the terms of the agreement, that contention is based on material outside the record and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Shorter*, 305 AD2d 1070, 1071, *lv denied* 100 NY2d 566). Finally, the sentence is not unduly harsh or severe.

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

832

KA 10-00809

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH W. NEUER, DEFENDANT-APPELLANT.

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.

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered March 9, 2010. The order determined that defendant is a level three 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 three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Defendant failed to preserve for our review his contention that he was denied due process when the District Attorney's Office, rather than the Board of Examiners of Sex Offenders, prepared the risk assessment instrument (*see People v Charache*, 9 NY3d 829; *People v McElhearn*, 56 AD3d 978, 978-979, *lv denied* 13 NY3d 706).

We agree with defendant that the People failed to establish by the requisite clear and convincing evidence that he should be assessed 10 points under risk factor 10 based upon the recency of a prior sex crime (*see generally* Correction Law § 168-n [3]). Defendant had not yet been convicted of that prior sex crime at the time he committed the present offense (*see generally People v Weathersby*, 61 AD3d 1382, 1382-1383, *lv denied* 13 NY3d 701; *People v Marrero*, 52 AD3d 797, 798). Rather, although defendant committed that prior sex crime approximately five months before committing the present offense, he did not plead guilty to that crime until several months after committing the present offense. For the same reason, we agree with defendant that County Court erred in applying the presumptive override for a prior sex felony because defendant had not been convicted of the prior sex felony at the time he committed the instant offense (*see generally People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708).

We further agree with defendant that the People failed to establish by the requisite clear and convincing evidence that he should be assessed 20 points under risk factor 13 based upon his conduct while under supervision. The People correctly noted at the SORA hearing that defendant committed the instant offense while under supervision for a prior conviction of endangering the welfare of a child, but risk factor 13 is concerned with a sex offender's *post*-offense behavior while supervised (*see generally People v Warren*, 42 AD3d 593, 594-595, *lv denied* 9 NY3d 810). Inasmuch as there is no indication that defendant engaged in any inappropriate behavior while confined or supervised for the present offense, the court erred in assessing the 20 points under risk factor 13.

Taking into account the above errors in calculating defendant's risk level, we conclude that defendant is a presumptive level two risk rather than a presumptive level three risk, as determined by the court. We agree with the People, however, that an upward departure is warranted under the circumstances of this case, a contention raised by the People during the SORA hearing and again raised by the People on appeal as an alternative basis for an affirmance (*see People v Aldrich*, 56 AD3d 1228, 1229). The "recalculated total risk factor score d[oes] not adequately take into account defendant's criminal record or lack of success during periods of supervised release, and thus . . . an upward departure from the presumptive risk level [is] warranted" (*People v Barnes*, 34 AD3d 1227, 1228, *lv denied* 8 NY3d 803). The record establishes that "the risk of repeat offense is high and there exists a threat to the public safety" (Correction Law § 168-*l* [6] [c]).

Entered: July 1, 2011 Patricia L. Morgan
Clerk of the Court

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

833

KA 10-01454

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON STILTS, DEFENDANT-APPELLANT.

CHRISTOPHER S. BRADSTREET, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (AMANDA M. CHAFEE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered April 10, 2009. 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 term of probation previously imposed upon his conviction of rape in the second degree (Penal Law § 130.30 [1]) and sentencing him to a determinate term of incarceration, following a hearing on the issue whether he violated the conditions of his probation. We reject defendant's contention that County Court erred in denying his request for substitution of counsel. The record establishes that the court "made the requisite inquiry to determine whether defendant had good cause for substitution" (*People v Henderson*, 77 AD3d 1311, 1311), and " 'thereafter reasonably concluded that defendant's . . . objections had no merit or substance' " (*id.*). The denial of a defendant's request for substitution of assigned counsel does not constitute an abuse of the court's discretion where, as in this case, "tensions between client and counsel on the eve of [a hearing] were the precipitate of differences over strategy" (*People v Medina*, 44 NY2d 199, 208; *see People v Shorter*, 6 AD3d 1204, 1205, *lv denied* 3 NY3d 648). We reject defendant's further contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

834

KA 10-01436

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANNA VOLL, DEFENDANT-APPELLANT.

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.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 27, 2010. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree and identity theft in the second 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 grand larceny in the fourth degree (Penal Law § 155.30 [1]) and identity theft in the second degree (§ 190.79 [2]), defendant contends that County Court erred in setting the duration of the order of protection issued against her at sentencing. According to defendant, the expiration date of the order of protection can be no later than March 2, 2018, rather than May 27, 2018, as set by the court. As defendant correctly concedes, however, she failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-317), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see People v Childres*, 60 AD3d 1278, 1279, *lv denied* 12 NY3d 913).

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

835

KAH 10-01704

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RICKY SMITH, PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE DIVISION OF PAROLE,
RESPONDENT-RESPONDENT.

DEL ATWELL, EAST HAMPTON, FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered March 22, 2010. The judgment denied and dismissed the petition for a writ of habeas corpus.

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

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

836

KA 10-01084

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DENNIS M. ABRAMS, ALSO KNOWN AS DENNIS ABRAMS,
DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 21, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

837

KA 10-00602

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEMONE D. DILLON, DEFENDANT-APPELLANT.

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.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 21, 2009. 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 1, 2011

Patricia L. Morgan
Clerk of the Court

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

841

KA 09-02286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY WARGULA, DEFENDANT-APPELLANT.

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

TIMOTHY WARGULA, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 21, 2009. The judgment convicted defendant, upon his plea of guilty, of manslaughter 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 manslaughter in the first degree (Penal Law § 125.20 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus that his contentions on appeal are not encompassed by the waiver, we nevertheless conclude that they are without merit. We reject defendant's contention that Supreme Court misapprehended the scope of its discretionary authority when it imposed a five-year period of postrelease supervision inasmuch as defendant was sentenced in accordance with the plea agreement providing that he would be sentenced to a determinate term of imprisonment of 18 years and to five years of postrelease supervision (*see generally People v McCrimager*, 81 AD3d 1324). We conclude that the court's reliance on the presentence report for its determination that defendant would not be afforded youthful offender status "constitutes an adequate explanation for the denial of defendant's request for such status" (*People v Lewis*, 49 AD3d 1290, 1291; *see People v DePugh*, 16 AD3d 1083, 1084; *cf. People v Lee*, 79 AD3d 1641; *see generally* CPL 720.20 [1]). We reject defendant's further contention that the sentence is unduly harsh and severe. We have reviewed defendant's remaining contentions, including the contention raised in his pro se supplemental brief, and conclude that they are

without merit.

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

842

KA 10-01465

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMEL LYONS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO 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 (Michael L. D'Amico, J.), rendered December 8, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery 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 robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that his waiver of the right to appeal was invalid. We reject that contention. Despite defendant's contention to the contrary, the record "establish[es] that [he] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *see People v Graham*, 77 AD3d 1439, *lv denied* 15 NY3d 920). Defendant further contends that his waiver of the right to appeal is invalid and unenforceable because the plea "agreement was coercive and it did not contain any favorable terms for" him. Although defendant is correct to the extent that he may be construed to contend that County Court was required to inform him of the sentencing range before he waived his right to appeal (*see People v Hidalgo*, 91 NY2d 733, 737; *People v Bryan*, 78 AD3d 1692, *lv denied* 16 NY3d 829), the record establishes that the court did so. Furthermore, the record belies defendant's contention that the plea agreement was "coercive and did not contain any favorable terms for" him. Indeed, the court promised to adjudicate defendant a youthful offender if he complied with certain conditions between the time of the plea and the time of sentencing, which would have reduced defendant's maximum term of incarceration if he had complied with the conditions set by the court, although the record establishes that defendant failed to do so. We have considered defendant's remaining contentions concerning the alleged invalidity of his waiver of the right to appeal and conclude

that they are without merit. "The valid waiver of the right to appeal encompasses defendant's contention concerning the [ultimate] denial of his request for youthful offender status" (*People v Elshabazz*, 81 AD3d 1429, 1429, *lv denied* 16 NY3d 858; *see People v Capps*, 63 AD3d 1632, *lv denied* 13 NY3d 795; *People v Porter*, 55 AD3d 1313, *lv denied* 11 NY3d 899), as well as his contention concerning the severity of his sentence (*see Lopez*, 6 NY3d at 256; *People v VanDeViver*, 56 AD3d 1118, 1119, *lv denied* 11 NY3d 931, 12 NY3d 788).

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

843

KA 10-01787

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC STEPHENS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered August 2, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court erred in failing to determine that he was entitled to a downward departure to a level two risk. Defendant failed to preserve that contention for our review inasmuch as there is no indication in the record that he requested such a departure (*see People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708). In any event, we conclude that "defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" (*People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703; *see People v Fredendall*, 83 AD3d 1545).

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

844

KA 10-00548

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONEY BEASLEY, DEFENDANT-APPELLANT.

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.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered March 5, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for resentencing in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [4]). We agree with defendant that County Court erred in failing to set forth on the record its determination denying defendant's request for youthful offender treatment (*see* CPL 720.20 [1]; *People v Lee*, 79 AD3d 1641; *cf. People v Wargula*, ___ AD3d ___ [July 1, 2011]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing after a determination whether defendant should be sentenced as a youthful offender (*see Lee*, 79 AD3d at 1641-1642).

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

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

845

CAF 10-01327

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

IN THE MATTER OF JULIAN S. AND VALERY S.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT; ORDER

MEGAN S., RESPONDENT,
AND DENNIS S., RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered June 7, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject children.

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

Entered: July 1, 2011

Patricia L. Morgan
Clerk of the Court

MOTION NO. (1228/86) KA 11-01054. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID BURR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND GREEN, JJ. (Filed July 1, 2011.)

MOTION NO. (553/94) KA 11-01141. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KENT A. KROEMER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, GREEN, AND MARTOCHE, JJ. (Filed July 1, 2011.)

MOTION NO. (1118/99) KA 97-02098. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEROLD LAMONT USHER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, CENTRA, PERADOTTO, AND GREEN, JJ. (Filed July 1, 2011.)

MOTION NOS. (2087-2089/00) KAH 99-05676. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. DAVID BURR, PETITIONER-APPELLANT, V HONORABLE FRANK J. CLARK, III, ERIE COUNTY DISTRICT ATTORNEY, RESPONDENT-RESPONDENT. (APPEAL NO. 1.) KAH 99-05677. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. DAVID BURR, PETITIONER-APPELLANT, V HONORABLE FRANK J. CLARK, III, ERIE COUNTY DISTRICT ATTORNEY, RESPONDENT-RESPONDENT. (APPEAL NO. 2.) KAH 99-05678. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. DAVID BURR, PETITIONER-APPELLANT, V HONORABLE JOHN A. DILLON, ERIE COUNTY COURT JUDGE, ET AL.,

RESPONDENTS-RESPONDENTS. (APPEAL NO. 3.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND GREEN, JJ. (Filed July 1, 2011.)

MOTION NO. (1140/09) KA 06-01297. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EUGENE KIMBROUGH, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND GORSKI, JJ. (Filed July 1, 2011.)

MOTION NO. (1585/09) KA 07-02429. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AHMIR COLE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND LINDLEY, JJ. (Filed July 1, 2011.)

MOTION NO. (995/10) KA 08-02649. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RONALD BRINK, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND SCONIERS, JJ. (Filed July 1, 2011.)

MOTION NO. (1534.1/10) CA 10-01116. -- WALTER R. BAKOS, PLAINTIFF-RESPONDENT, V NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed July 1, 2011.)

MOTION NOS. (103-104/11) KA 07-00779. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BENJAMIN RIVERA, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 08-00201. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BENJAMIN RIVERA, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ. (Filed July 1, 2011.)

MOTION NO. (313/11) CA 10-01673. -- MARLINO GRESS, MAURICE HOWIE, TIMOTHY M. JOHNSON AND ABRAHAM MCKINNEY, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED PERSONS, PLAINTIFFS-RESPONDENTS, V BYRON BROWN, AS MAYOR, CITY OF BUFFALO, AND BUFFALO FISCAL STABILITY AUTHORITY, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND GORSKI, JJ. (Filed July 1, 2011.)

MOTION NO. (404/11) CA 10-02274. -- JOHN F. SMITH AND LISA SMITH, PLAINTIFFS-RESPONDENTS, V MARIJANE REILLY, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND GREEN, JJ. (Filed July 1, 2011.)

MOTION NO. (447/11) CA 10-01296. -- NICOLE HERNANDEZ, AS ADMINISTRATRIX OF THE ESTATE OF CHARLES M. LEE, JR., DECEASED, AND AS PARENT AND NATURAL GUARDIAN OF THE PERSON AND PROPERTY OF MATTHEW LEE, AN INFANT,

PLAINTIFF-APPELLANT, V TOWN OF HAMBURG, MARK O. PATTON, INDIVIDUALLY AND DOING BUSINESS AS PATTON PLUMBING, MCALLISTER PLUMBING & HEATING, INC., AND SAED INC., DOING BUSINESS AS DOCTOR BACKFLOW PLUMBING, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, GREEN, AND GORSKI, JJ. (Filed July 1, 2011.)

MOTION NO. (489/11) KA 11-00007. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BENEDICT AGOSTINI, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed July 1, 2011.)

MOTION NO. (503/11) CA 10-02496. -- IN THE MATTER OF THE ARBITRATION BETWEEN ERIE INSURANCE COMPANY, PETITIONER-RESPONDENT, AND JOSHUA BOSS, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed July 1, 2011.)

MOTION NO. (557/11) CA 10-01745. -- ALTSHULER SHAHAM PROVIDENT FUNDS, LTD., PLAINTIFF-APPELLANT, V GML TOWER LLC, ET AL., DEFENDANTS, THE PIKE COMPANY, INC., THE HAYNER HOYT CORPORATION AND SYRACUSE MERIT ELECTRIC, A DIVISION OF O'CONNELL ELECTRIC CO., INC., DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J.,

CENTRA, SCONIERS, AND GREEN, JJ. (Filed July 1, 2011.)

MOTION NO. (587.1/11) CA 11-00157. -- EUGENE MARGERUM, ANTHONY HYNES, JOSEPH FAHEY, TIMOTHY HAZELET, PETER KERTZIE, PETER LOTOCKI, SCOTT SKINNER, THOMAS J. REDDINGTON, TIMOTHY CASSEL, MATTHEW S. OSINSKI, MARK ABAD, BRAD ARNONE, AND DAVID DENZ, PLAINTIFFS-RESPONDENTS, V CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF FIRE, AND LEONARD MATARESE, INDIVIDUALLY AND AS COMMISSIONER OF HUMAN RESOURCES FOR CITY OF BUFFALO, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed July 1, 2011.)

KA 10-01469. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HELEN A. THOMAS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel’s motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Erie County Court, Michael F. Pietruszka, J. - Unauthorized Use of a Vehicle, 3rd Degree). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND GREEN, JJ. (Filed July 1, 2011.)

KA 08-01756. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ADDIS WOLDEGUIORGUIS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel’s motion to be relieved of assignment granted (*see People v*

Crawford, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Monroe County, Patricia D. Marks, A.J. - Petit Larceny). PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ. (Filed July 1, 2011.)