SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 10, 2012

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. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1255
CA 11-00842
PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

RACHEL L. STERN, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

GUY H. EASTER, INDIVIDUALLY AND DOING BUSINESS
AS BROOKLAWN GOLF CLUB, MIDCOURT BUILDERS CORP.,
DEFENDANTS-APPELLANTS-RESPONDENTS,
PEMCO PROPERTIES III, PG ASSOCIATES,
DEFENDANTS-RESPONDENTS,
AND JOHN DOE, DEFENDANT.

LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (DAVID G. BURCH, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

SANTACROSE & FRARY, ALBANY (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered October 5, 2010. The order granted the motion of defendants Pemco Properties III and PG Associates for summary judgment, and granted in part and denied in part the motion of defendants Guy H. Easter, individually and doing business as Brooklawn Golf Club, and Midcourt Builders Corp. for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion of defendants Guy H. Easter, individually and doing business as Brooklawn Golf Club, and Midcourt Builders Corp. in its entirety and dismissing the complaint against them and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she was struck by a golf ball that was driven by an unknown golfer allegedly from the 18th tee of the Brooklawn Golf Club (Brooklawn), which is owned by defendant Midcourt Builders Corp. (Midcourt). Defendant Guy H. Easter and his wife are the owners of Midcourt. At the time she was struck, plaintiff was having coffee with a friend at the outdoor patio area of an office building adjacent to the golf course. The building was owned by defendants Pemco Properties III and PG Associates (Pemco defendants). Plaintiff asserted causes of action for negligence against Easter,

individually and doing business as Brooklawn, and against Midcourt, the Pemco defendants and "John Doe," the golfer who allegedly struck the ball from the 18th tee.

Following discovery, the Pemco defendants, as well as Easter and Midcourt, moved for summary judgment dismissing the complaint against them. Supreme Court granted the motion of the Pemco defendants and granted only that part of the motion of defendants Easter and Midcourt with respect to Easter. We conclude that the court should have granted the motion of Easter and Midcourt in its entirety, and we therefore modify the order accordingly.

As plaintiff correctly contends, a property owner generally owes a duty "to exercise reasonable care in the maintenance of its property to prevent foreseeable injury that might occur on the adjoining property" (*Gayden v City of Rochester*, 148 AD2d 975, 975; *see Gellman v Seawane Golf & Country Club, Inc.*, 24 AD3d 415, 418). There is, however, "no legal duty to protect against an occurrence which is extraordinary in nature and would not suggest itself to a reasonably careful and prudent person as one which should be guarded against" (*Martinez v Santoro*, 273 AD2d 448, 448). Thus, a golf course may not be held liable "within the concepts of negligence [for golf balls entering adjoining property where there is] lack of notice . . . and lack of foreseeability" (*Nussbaum v Lacopo*, 27 NY2d 311, 316). Here, "[t]he record does not support a conclusion that the occurrence was frequent. In fact, plaintiff's evidence . . . is consistent with occasional incursions only. Thus, there is no [evidence] upon which to base a finding of even constructive notice," nor is there evidence upon which to base a finding of foreseeability (*id.*).

The uncontroverted evidence in the record before us establishes that the patio area where plaintiff was struck by the golf ball was constructed many years after the golf course had been built. Moreover, the patio was over 200 yards from the 18th tee, and over 150 feet from the middle of the 18th fairway. The friend with whom plaintiff was having coffee is the only source of evidence that any golf ball had ever entered the patio area. According to the friend's deposition testimony, he recalled that, on one occasion during a company picnic, a golf ball had rolled onto the patio from the direction of the 18th tee. Midcourt, however, had no notice of that occurrence. Rather, the evidence submitted by plaintiff established that Midcourt had notice that only two golf balls struck the building owned by the Pemco defendants over the course of 15 years. One of the balls struck the building approximately 75 feet from the patio area, while the other ball struck the building approximately 100 feet from the patio area. We note that the record is devoid of evidence that those golf balls were driven from the 18th tee and, given the configuration of the golf course, it would be merely speculative to conclude that they were (*see generally Mallen v Farmingdale Lanes, LLC*, 89 AD3d 996; *Endieveri v County of Oneida*, 35 AD3d 1268).

In any event, even assuming, arguendo, that the golf balls that struck the building were driven from the 18th tee, we conclude that two such incursions over the course of approximately 15 years is too

infrequent to constitute notice of an unreasonably dangerous condition (*see Nussbaum*, 27 NY2d at 316). While " '[q]uestions concerning foreseeability and proximate cause are generally questions for the jury' " (*Paul v Cooper*, 45 AD3d 1485, 1487; *see Prystajko v Western N.Y. Pub. Broadcasting Assn.*, 57 AD3d 1401), "where only one conclusion may be drawn from the established facts . . . the question of legal cause may be decided as a matter of law" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784, 829). That is the case here with respect to the issue of foreseeability. The incursion of golf balls onto the property where plaintiff was situated was so minimal and infrequent as to compel the conclusion that, as a matter of law, the golf ball incident in question was an extraordinary occurrence that a reasonably prudent golf course owner would not be expected to guard against (*see generally Martinez v Santoro*, 273 AD2d 448; *Clifford v Sachem Cent. School Dist. at Holbrook*, 271 AD2d 470, *lv denied* 95 NY2d 759).

For the same reasons, we conclude that the court properly granted the motion of the Pemco defendants. Plaintiff submitted evidence that those defendants had notice of only two golf balls striking the building, and neither ball landed in or within 75 feet of the patio area where plaintiff was injured. Although there was evidence that vehicles in the parking lot of the Pemco defendants were hit by balls driven from the 10th tee, the patio is on a different side of the building from the side adjacent to the parking lot. In addition, the patio is behind the 10th tee, rendering it highly unlikely that a ball struck therefrom or from anywhere else on that hole could land in the patio area. Thus, the fact that golf balls driven from the 10th tee sometimes landed in the parking lot did not serve to place the Pemco defendants on notice that someone in the patio area could be struck by a golf ball. We therefore conclude that, as with Midcourt, evidence that two balls struck the Pemco defendants' building over a course of approximately 15 years is simply too minimal and infrequent to give rise to liability against the Pemco defendants.

All concur except FAHEY, J.P., who dissents and votes to modify in accordance with the following Memorandum: I respectfully dissent. I cannot agree with the majority that Supreme Court erred in denying that part of the motion of defendants Guy H. Easter, individually and doing business as Brooklawn Golf Club (Easter), and Midcourt Builders Corp. (Midcourt) for summary judgment dismissing the complaint against Midcourt. I also disagree with the majority that the court properly granted the motion of defendants Pemco Properties III and PG Associates (Pemco defendants) for summary judgment dismissing the complaint against them.

Turning first to the motion of Easter and Midcourt, as the majority correctly notes, a golf course may not be held liable "within the concepts of negligence [for golf balls entering adjoining property where there is] lack of notice . . . and lack of foreseeability" (*Nussbaum v Lacopo*, 27 NY2d 311, 316). In my view, however, plaintiff raised an issue of fact whether Midcourt had actual or constructive notice of the threat of a high-velocity golf ball impact in the area of the premises owned by the Pemco defendants where plaintiff was

injured on April 17, 2006. The record establishes that Midcourt knew that errant golf shots had entered the premises of the Pemco defendants, causing damage to windshields and breaking windows in the office building located there. That damage, as plaintiff's expert noted, could only have been caused by "high trajectory, high speed golf ball flight." Plaintiff's expert further stated that the unprotected seating area for the public on the premises of the Pemco defendants, i.e., the patio area where plaintiff was struck, "leaves visitors in the direct path of an errant shot."

This case is distinguishable from *Nussbaum*. There, the plaintiff lived in a home abutting the fairway of the 13th hole of the defendant country club. Between the plaintiff's patio and that fairway was approximately 20 to 30 feet of rough, and located in that rough was a natural barrier of trees that ranged in height from 45 to 60 feet. The injury at issue there occurred in June 1963, when a trespasser struck a ball from the 13th tee, at a time when the rough was dense and the trees were in full foliage. The shot crossed into the area of the plaintiff's patio and hit the plaintiff (*id.* at 314).

The plaintiff in *Nussbaum* commenced an action against, inter alia, the golf course, asserting causes of action for nuisance and negligence against it. In concluding that the plaintiff was not entitled to damages for nuisance, the Court of Appeals noted that, "according to [the] plaintiff and his wife, [the presence of] a few golf balls, which were found in the *bushes* and *fence area* of [the] plaintiff's backyard," were minimal trespasses that would not warrant the granting of an injunction and could not sustain recovery for the plaintiff's injuries under a theory of nuisance (*id.* at 316). The location where the golf balls were found was also germane to the Court's conclusion that the defendant country club did not have notice of a danger, and that the accident was unforeseeable. In sum, the Court concluded that minimal invasions in the bushes and fence area of the plaintiff's property did not give notice of the danger of the type of intrusion, i.e., a high-velocity strike, that caused the plaintiff's injuries. In that vein, the Court noted that the plaintiff's wife had testified that "no golf ball ever struck her house," and that there was no evidence that a golf ball had previously passed over or through the rough and trees that guarded the plaintiff's house (*id.* at 317).

Here, unlike in *Nussbaum*, Midcourt had notice of prior *high-velocity intrusions* onto the premises of the Pemco defendants, i.e., intrusions of the nature that caused plaintiff's injuries. More to the point, the key to the issue of notice with respect to Midcourt is the nature of the prior intrusions onto the premises of the Pemco defendants, which were capable of causing the injuries at issue here. As the Court of Appeals wrote in *Nussbaum*, "[i]t was that potential occurrence[, i.e., a high-velocity impact,] which might constitute a danger, and no notice of such an incident was given" (*id.*). Here, however, the record in this case establishes that notice of such a high-velocity impact was given.

I further conclude with respect to the motion of defendants

Easter and Midcourt that there is an issue of fact whether the accident was foreseeable with respect to Midcourt. The record establishes that the premises of the Pemco defendants, including the patio area where plaintiff was struck, was unprotected from errant shots. At the time of the accident, the course was open and immature. Moreover, the patio area was protected only by three trees. In my view, that lack of protection made the possibility of this accident "clear 'to the ordinarily prudent eye' " (*id.*), especially given the evidence of prior impacts at the premises of the Pemco defendants and the opinion of plaintiff's expert that the patio was within reach of a shot from the 18th tee even in spite of the trees.

Turning now to the motion of the Pemco defendants, "as a general matter, an owner owes no duty to warn or to protect others from a defective or dangerous condition on neighboring premises, unless the owner had created or contributed to it" (*Galindo v Town of Clarkstown*, 2 NY3d 633, 636). The basis for such a rule, as the *Galindo* Court noted, is "obvious—a person who lacks ownership or control of property cannot fairly be held accountable for injuries resulting from a hazard on the property" (*id.; see Haymon v Pettit*, 9 NY3d 324, 328, *rearg denied* 10 NY3d 745).

The *Galindo* rule does not require dismissal of the complaint against the Pemco defendants. "In *Galindo*, [the Court of Appeals] left open 'the possibility that some dangers from neighboring property might be so clearly known to the landowner, *though not open or obvious to others*, that a duty to warn would arise' " (*Clementoni v Consolidated Rail Corp.*, 8 NY2d 963, 965, quoting *Galindo*, 2 NY3d at 637). Here, in my view, there was such a danger. The Pemco defendants knew that a tenant on their premises had constructed the patio and that there were two broken windows at the building on their premises as a result of golf balls striking those windows. The windows logically could have been broken only by a high-velocity impact. The patio is situated adjacent to the building on the premises of the Pemco defendants and thus, logically, high-velocity strikes that imperiled the windows of the building also imperiled patrons of the patio. Consequently, in my view, the danger of an accident such as this was so clearly known to the Pemco defendants that a duty to warn arose (*cf. Galindo*, 2 NY3d at 637-638).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

1297
CA 11-01246
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

THEREASA OVERHOFF AND DEAN OVERHOFF,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SUNTA PERFETTO, DEFENDANT-APPELLANT.

BURGIO, KITA & CURVIN, BUFFALO (JAMES P. BURGIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (HOWARD E. BERGER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered June 7, 2011 in a personal injury action. The order denied defendant's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Theresa Overhoff (plaintiff) when a vehicle operated by defendant collided with a vehicle driven by plaintiff. Supreme Court erred in denying defendant's motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Defendant met her initial burden on the motion "by submitting medical records and reports constituting 'persuasive evidence that plaintiff's alleged pain and injuries were related to . . . preexisting condition[s]' " rather than the instant accident (*Spanos v Fanto*, 63 AD3d 1665, 1666). In particular, defendant submitted the report of a physician who reviewed plaintiff's medical records and conducted a medical examination of plaintiff on defendant's behalf. The physician opined that plaintiff did not sustain a serious injury in the accident at issue, that imaging studies of plaintiff's spine performed prior to and subsequent to the instant accident were "essentially the same," and that plaintiff had no functional disability or limitations causally related to the instant accident. The burden thus shifted to plaintiffs "to come forward with evidence addressing defendant's claimed lack of causation" (*Pommells v Perez*, 4 NY3d 566, 580). Plaintiffs, however, failed to meet that burden inasmuch as their submissions in opposition to the motion "failed to address the manner in which plaintiff's

physical injuries were causally related to the accident in light of [her] past medical history" (*Smith v Besanceney*, 61 AD3d 1336, 1337-1338). In addition, the physician who examined plaintiff at the request of her attorney failed to refute the opinion of defendant's expert that plaintiff did not sustain a functional disability or limitation related to the accident by, for example, comparing plaintiff's pre- and post-accident range of motion restrictions in her neck or back or assessing her pre- and post-accident qualitative limitations (*see Jaromin v Northrup*, 39 AD3d 1264, 1265).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

1300
CA 11-01450
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

JOSEPH V. COSTANZO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE WOMAN'S CHRISTIAN ASSOCIATION OF JAMESTOWN, NEW YORK AND WOMAN'S CHRISTIAN ASSOCIATION HOSPITAL (WCA HOSPITAL), DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (FRANK C. CALLOCCHIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CORNELIUS J. LANG, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered February 18, 2011 in a personal injury action. The order denied the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell on clear liquid on a stairway in defendant Woman's Christian Association Hospital (hereafter, hospital), owned by defendant The Woman's Christian Association of Jamestown, New York. We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. Defendants met their initial burden of establishing as a matter of law that they " 'did not create the [allegedly] dangerous condition that caused plaintiff to fall and did not have actual or constructive notice thereof' " (*Ferguson v County of Niagara*, 49 AD3d 1313, 1314; *see Lane v Wilmorite, Inc.*, 1 AD3d 907, 908; *cf. Rapini v New Plan Excel Realty Trust, Inc.*, 11 AD3d 890). With respect to the creation of the condition, defendants submitted evidence that the stairway is used by hospital employees and the public alike, and on the record before us, any conclusion that an employee of the hospital, as opposed to a member of the general public, spilled the liquid at issue would be mere speculation (*see Castore v Tutto Bene Rest., Inc.*, 77 AD3d 599; *Berger v ISK Manhattan, Inc.*, 10 AD3d 510). As for actual notice, defendants met their initial burden through the submission of, inter alia, the deposition testimony of various employees who testified that they were not aware of any complaints concerning the stairway prior to

plaintiff's fall and that they did not observe any water or other substances on the stairway before that time (*see Ferington v Dudkowski*, 49 AD3d 1267; *Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857). Finally, defendants met their initial burden on the issue of constructive notice of the wet condition by submitting, inter alia, plaintiff's deposition testimony that he did not see any liquid on the stairs when he ascended the stairway 5 to 10 minutes before his fall. We thus conclude therefrom that defendants "established as a matter of law that [the wet condition] on the [stairway] formed so close in time to the accident that [they] could not reasonably have been expected to notice and remedy the condition" (*Steele v Lafferty*, 79 AD3d 1802, 1803 [internal quotation marks omitted]; *see Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322-323, *affd* 8 NY3d 931; *Berger*, 10 AD3d at 511-512). In opposition to the motion, plaintiff failed to raise a triable issue of fact as to defendants' creation or notice of the wet condition (*see generally Majchrzak v Harry's Harbour Place Grille, Inc.*, 28 AD3d 1109; *Lane*, 1 AD3d at 908; *Fowler v St. Luke's Mem. Hosp. Ctr.* [appeal No. 2], 273 AD2d 893). Plaintiff's " 'speculation with respect to . . . the length of time [the liquid] was on the floor is insufficient to raise a triable issue of fact' " (*Bellassai v Roberts Wesleyan Coll.*, 59 AD3d 1125, 1126; *see Berger*, 10 AD3d at 512-513; *Gloria v MGM Emerald Enters.*, 298 AD2d 355, 355-356).

All concur except CARNI and LINDLEY, JJ., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part. We agree with the majority that defendants established as a matter of law that they did not create the allegedly dangerous condition that caused the accident, i.e., the liquid on the stairs upon which plaintiff slipped, and that they lacked actual notice of it. We further agree with the majority that plaintiff failed to raise an issue of fact on those theories of negligence, and thus we would modify the order by granting those parts of defendants' motion with respect to their alleged creation of the dangerous condition and their alleged actual notice of it. In our view, however, defendants failed to meet their initial burden on their motion of establishing as a matter of law that they lacked constructive notice of the presence of the liquid on the stairs (*see King v Sam's E., Inc.*, 81 AD3d 1414), and we conclude that Supreme Court therefore properly denied that part of their motion seeking summary judgment dismissing the complaint to that extent, regardless of the sufficiency of plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Musachio v Smithtown Cent. School Dist.*, 68 AD3d 949).

Defendants' purported lack of constructive notice is based on the deposition testimony of plaintiff that he did not notice any liquid when he walked up the stairs 5 to 10 minutes before he fell. Defendants speculate that, because plaintiff did not notice the liquid on his way up the stairs, it was not present at that time. They thus further speculate that the liquid must have been spilled on the stairs less than 10 minutes before the accident, which is an insufficient period of time upon which to base a finding of constructive notice. The mere fact that plaintiff did not notice the liquid as he ascended

the stairs, however, does not establish as a matter of law that the liquid was not present at that time. Because plaintiff had no reason to inspect the stairs as he ascended them, it is possible that the liquid was there at that time and he simply did not see it. Indeed, plaintiff testified that he also did not see the liquid before he fell as he descended the stairs, and defendants have not disputed that the liquid was in fact there when plaintiff fell. Because defendants failed to submit any nonspeculative evidence as to how long the liquid was on the stairs prior to the accident, we conclude that they failed to establish their lack of constructive notice as a matter of law and thus failed to establish their entitlement to summary judgment dismissing the complaint in its entirety (*see generally King*, 81 AD3d at 1415).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

1321
CA 10-02145
PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ.

IN RE: EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION.

STEPHEN DRABCZYK, AS EXECUTOR OF THE ESTATE OF RONALD DRABCZYK, DECEASED, PLAINTIFF-RESPONDENT,

MEMORANDUM AND ORDER

V

FISHER CONTROLS INTERNATIONAL, LLC, DEFENDANT-APPELLANT.

CONNORS & VILARDO, LLP, BUFFALO (LAWRENCE J. VILARDO OF COUNSEL), AND HAGERTY & BRADY, FOR DEFENDANT-APPELLANT.

BELLUCK & FOX, LLP, NEW YORK CITY (SETH A. DYMOND OF COUNSEL), AND JOYCE & JOYCE ASSOCIATES, BARNSTABLE, MASSACHUSETTS, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John P. Lane, J.H.O.), entered September 17, 2010. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the award of punitive damages and as modified the judgment is affirmed without costs.

Memorandum: Defendant appeals from a judgment awarding plaintiff compensatory and punitive damages in this wrongful death action based upon the exposure of plaintiff’s decedent to asbestos contained in valves produced by defendant. The evidence presented at trial established that, in the course of his employment from 1970 until 1996, decedent repaired and refurbished valves produced by defendant. Approximately one half of the valves that defendant sold to decendent’s employer contained asbestos. The evidence further established that decedent was exposed to asbestos from other sources, both in his work environment beginning in 1965 and in prior employment in the 1950s and 1960s. The jury apportioned 5% of the liability for damages for decedent’s pain and suffering to defendant. Following the verdict on liability, the jury determined that defendant acted with reckless disregard for decedent’s safety and thus that defendant’s liability was not limited to 5% of the verdict (*see* CPLR 1601 [1]; 1602 [7]). The jury thereafter awarded plaintiff punitive damages.

Although we agree with defendant that Supreme Court erred in

charging the jury that defendant could be liable for decedent’s exposure to asbestos contained in products used in conjunction with defendant’s valves (*see generally Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 297-298), we nevertheless conclude that the error is harmless.

We reject defendant’s contention that there is no valid line of reasoning and permissible inferences that could lead a rational jury to conclude that defendant acted with reckless disregard for decedent’s safety by failing to warn him of the dangers associated with the use of its products containing asbestos (*see generally Matter of New York City Asbestos Litig.*, 89 NY2d 955, 956, *affg* 225 AD2d 414; *Cohen v Hallmark Cards*, 45 NY2d 493, 499). We recognize that the Court of Appeals declined to determine whether the reckless disregard standard or a higher standard applies to the issue of punitive damages (*see New York City Asbestos Litig.*, 89 NY2d at 957). We therefore conclude that, because the jury found that defendant acted with reckless disregard for decedent’s safety, the court did not abuse its discretion by charging the jury on the issue of punitive damages.

Although the determination whether to award punitive damages and in what amount those damages should be awarded generally rests within the sound discretion of the trier of fact, this Court may nevertheless exercise its own discretion in reviewing the determination (*see Nardelli v Stamberg*, 44 NY2d 500, 503-504). We conclude that the evidence does not establish “this to be one of the ‘singularly rare cases’ where punitive damages are warranted” (*New York City Asbestos Litig.*, 225 AD2d at 415). Plaintiff’s expert testified that he used transmission electronic microscopy to establish that the level of asbestos to which decedent may have been exposed from defendant’s products exceeded the Occupational Safety and Health Administration (OSHA) standards established in 1976 and revised in 1986. That technology, however, was not available in the 1970s and 1980s. The measurements taken by plaintiff’s expert using contrast microscopy were well below the OSHA standards of 1986. We therefore conclude that plaintiff failed to establish that defendant “ ‘engaged in outrageous or oppressive intentional misconduct or [acted] with reckless or wanton disregard of [the] safety or rights’ ” of decedent (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489). We therefore modify the judgment by vacating the award of punitive damages.

In light of our determination, we do not address defendant’s remaining contentions concerning the award of punitive damages.

Entered: February 10, 2012 Frances E. Cafarell
Clerk of the Court

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

1341
CA 11-01159
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, GREEN, AND MARTOCHE, JJ.

J&S CONVEYERS REALTY, LLC, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT F. GREENBAUM, ET AL., DEFENDANTS,
POINKERS, INC., AS SUCCESSOR IN INTEREST TO
CUSTOM AIR DESIGN, INC., DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (WILLIAM E. BRUECKNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HISCOCK & BARCLAY LLP, ROCHESTER (JAMES S. GROSSMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (John J. Ark, J.), entered August 6, 2010. The judgment awarded plaintiff the sum of $140,144.80 against defendant Poinkers, Inc., as successor in interest to Custom Air Design, Inc.

Now, upon reading and filing the stipulation of dismissal signed by the attorneys for the parties on January 18 and 20, 2012,

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

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

1389
CA 11-01232
PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

KENNETH J. HECKER, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 116642.)

MODICA & ASSOCIATES, ATTORNEYS, PLLC, ROCHESTER (JEFFREY A. VAISEY OF COUNSEL), FOR CLAIMANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK, LLP, ROCHESTER (RICHARD C. BRISTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered October 21, 2010 in a personal injury action. The order granted the motion of defendant for summary judgment, dismissed the claim and denied claimant's cross motion for partial summary judgment.

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

Memorandum: Claimant commenced this action seeking damages for injuries he sustained based upon, inter alia, defendant's alleged violation of Labor Law § 241 (6). Claimant's employer had contracted with defendant to perform rehabilitation work on an historic lift bridge, but several months after the work was completed it became necessary to replace defective components in the lift mechanism 30 feet below the ground. Claimant was shoveling snow from the diamond plate decking at the corner of the bridge in order to access the pit door when he slipped and fell onto his back. The Court of Claims granted defendant's motion for summary judgment dismissing the claim, which alleged various violations of the Labor Law and common-law negligence, but the sole issue before us on appeal is whether the court properly granted the motion insofar as defendant sought dismissal of the Labor Law § 241 (6) claim to the extent that it is premised on the violation of 12 NYCRR 23-1.7 (d). That regulation requires that an employer "shall not suffer or permit any employee to use a floor, passageway, [or] walkway . . . which is in a slippery condition. Ice, snow, [and] water. . . which may cause slippery footing shall be removed, sanded or covered to provide safe footing." We agree with claimant that the court erred in relying upon *Gaisor v Gregory Madison Ave., LLC* (13 AD3d 58) in determining that snow removal was an integral part of claimant's work and thus that he could

not allege a violation of Labor Law § 241 (6) based on that regulation in connection with injuries he sustained while removing the snow. Instead, we conclude that, "[e]ven if snow removal fell within the scope of [claimant's] responsibilities, such would only be relevant in determining comparative fault, and would not require a grant of summary judgment in defendant['s] favor" (*Booth v Seven World Trade Co., L.P.*, 82 AD3d 499, 502).

We nevertheless affirm the order on other grounds. Although the parties do not specifically address, on appeal, the issue whether 12 NYCRR 23-1.7 (d) applies to the facts herein, claimant's bill of particulars and cross motion alleged the applicability of the regulation and claimant appealed from the entire order, including that part denying his cross motion. Under the circumstances of this case, we conclude that we may review the applicability of the regulation to the facts herein and, upon such review, we conclude that the record establishes that it does not apply. Although claimant had shoveled sidewalks to reach the corners of the bridge where he would access the subterranean work site, and the pit door through which he would access the work site was located in a sidewalk, we conclude that claimant was not using the area in which he fell as a floor, passageway or walkway at the time of his fall (*see Hertel v Hueber-Breuer Constr. Co.*, 48 AD3d 1259; *Bale v Pyron Corp.*, 256 AD2d 1128; *cf. Sullivan v RGS Energy Group, Inc.*, 78 AD3d 1503).

All concur except CENTRA and CARNI, JJ., who dissent and vote to modify in accordance with the following Memorandum: We respectfully dissent on the sole issue before us on this appeal and thus would modify the order by denying the motion in part and reinstating the Labor Law § 241 (6) claim to the extent it is premised on the violation of 12 NYCRR 23-1.7 (d). We agree with the majority that the Court of Claims erred in dismissing that claim by relying on *Gaisor v Gregory Madison Ave., LLC* (13 AD3d 58), inasmuch as any argument by defendant that snow removal was an integral part of claimant's work is relevant only on the issue of comparative fault (*see Booth v Seven World Trade Co., L.P.*, 82 AD3d 499, 502). Nevertheless, we disagree with the majority that we should affirm on other grounds, i.e., that the regulation does not apply to the facts here. As the majority recognizes, defendant did not raise that argument before the court or before us. In our view, it is "fundamentally unfair to determine this issue sua sponte" (*Woods v Design Ctr., LLC*, 42 AD3d 876, 878). We should not be "in the business of blindsighting litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made" (*Misicki v Caradonna*, 12 NY3d 511, 519).

In any event, to the extent that this issue can be resolved on the facts in the record before us, we disagree with the majority that 12 NYCRR 23-1.7 (d) does not apply. That regulation requires that an employer "shall not suffer or permit any employee to use a floor, passageway, [or] walkway . . . . which is in a slippery condition. Ice, snow, [and] water . . . which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Here, the record establishes that claimant's employer was required to replace defective

components in a lift mechanism 30 feet below the ground. Employees would gain access to the underground work site by going through a "pit door" located on the sidewalk of the bridge. At the time of the accident, claimant was clearing snow off of the pit door and the sidewalk when he slipped on the pit door and fell onto his back. Inasmuch as the pit door was located on the sidewalk and was the only way to access the underground work site, we conclude that, at the time of his accident, claimant was using a passageway or walkway within the meaning of the regulation (*see Fassett v Wegmans Food Mkts., Inc.*, 66 AD3d 1274, 1277-1278; *Whalen v City of New York*, 270 AD2d 340, 341-342).

Entered: February 10, 2012 Frances E. Cafarell
Clerk of the Court

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

1393
CA 11-01330
PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

MARY E. UVANNI AND MICHAEL J. UVANNI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICK CRUMB AND LINDA CRUMB,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF DANIEL W. COFFEY, ALBANY (DANIEL W. COFFEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (EVA BRINDISI PEARLMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered April 25, 2011. The amended order, insofar as appealed from, denied in part the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the amended order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the complaint is dismissed.

Memorandum: Plaintiff Mary E. Uvanni was walking her dog, Bentley, when defendants' unleashed dog, Scooby, emerged from behind a shrub and bit Bentley. Scooby apparently had slipped past defendant Linda Crumb from defendants' fenced-in backyard. Defendants moved for summary judgment dismissing the complaint on the ground that they did not have prior knowledge of Scooby's dangerous propensities. Supreme Court granted the motion only to the extent that plaintiffs seek punitive damages, but otherwise denied the motion. We conclude that the court should have granted the motion in its entirety.

It is well established that "the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" (*Collier v Zambito*, 1 NY3d 444, 446). "Vicious propensities include the 'propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " (*id.*). Thus, the behavior of the animal need not be dangerous or ferocious, but must simply reflect "a proclivity to act in a way that puts others at risk of harm" (*id.* at 447). In addition, such proclivity must result in the injury giving rise to the lawsuit (*see id.*; *Barone v Phillips*, 83 AD3d 1523, 1524).

Here, there is no evidence in the record before us that Scooby had previously attacked other dogs or persons. Although there is evidence that defendants were aware that Scooby on several occasions had escaped from the house or backyard, the injury here did not arise from Scooby's propensity to escape. Rather, the injury arose from Scooby's having attacked and bitten Bentley. Plaintiffs' reliance on other behavior exhibited by Scooby is misplaced. We note that there is evidence in the record that Scooby "barked like a dog protecting his home" and ran along the perimeter of the fence whenever someone walked in the alleyway behind defendants' house, as well as evidence that Scooby "circle[d]" another person and her dogs on at least one occasion. That evidence, however, does not raise an issue of fact regarding defendants' knowledge of the allegedly dangerous propensities of Scooby that caused the injury in this case (*see Smith v Reilly*, 17 NY3d 895). Finally, plaintiffs rely for the first time on appeal on Agriculture and Markets Law § 123 in support of their claim for veterinary expenses, and thus any issue with respect to the applicability of that statute is not properly before us (*see generally Tomaszewski v Seewaldt* [appeal No. 1], 11 AD3d 995).

Entered: February 10, 2012 Frances E. Cafarell
Clerk of the Court

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

22
TP 11-01466
PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF PENNELLA L. LINTON, PETITIONER,

V MEMORANDUM AND ORDER

STATE OF NEW YORK DEPARTMENT OF MOTOR VEHICLES
APPEALS BOARD, RESPONDENT.

PENNELLA L. LINTON, PETITIONER PRO SE.

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

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, Monroe County [Evelyn Frazee, J.], dated July 18, 2011) to review a determination of respondent. The determination revoked the driver's license of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking her driver's license based on her refusal to submit to a chemical test following her arrest for driving while intoxicated. The record establishes that a police officer stopped the vehicle driven by petitioner based on her failure to yield the right-of-way, to maintain her lane and to stop at a red light. Although the officer warned petitioner of the consequences of refusing to submit to a chemical test, she nevertheless refused to do so.

Contrary to petitioner's contention, the determination is supported by substantial evidence. " 'Hearsay evidence is admissible in administrative hearings' . . ., 'and if sufficiently relevant and probative may constitute substantial evidence' " (*Matter of Mastrodonato v New York State Dept. of Motor Vehicles*, 27 AD3d 1121, 1122; *see Matter of Gray v Adduci*, 73 NY2d 741, 742). Here, the documentary evidence submitted at the hearing established that the officer had reasonable grounds to believe that petitioner had been driving while impaired or intoxicated, that the officer made a lawful arrest of petitioner and "that petitioner refused to submit to the chemical test after being warned of the consequences of such refusal" (*Gray*, 73 NY2d at 742; *see* Vehicle and Traffic Law § 1194 [2] [c]).

“[T]he Administrative Law Judge [(ALJ)] was entitled to discredit petitioner’s testimony to the contrary” (*Mastrodonato*, 27 AD3d at 1122), and the record as a whole does not support petitioner’s further contention “that the [ALJ] was prejudiced or biased or had predetermined the case” (*Matter of Donlick v Hults*, 13 AD2d 879, 880; *see Matter of Wai Lun Fung v Daus*, 45 AD3d 392).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

23
TP 11-01686
PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF MILTON RUFFIN, PETITIONER,

V   ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT.

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, Wyoming County [Mark H. Dadd, A.J.], entered August 11, 2011) 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: February 10, 2012   Frances E. Cafarell
                                                                  Clerk of the Court

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

24
KA 10-01467
PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEMONE PEOPLES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO 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 (M. William Boller, A.J.), rendered July 2, 2010. 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 (*see People v Lococo*, 92 NY2d 825, 827).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

26
KA 08-01801
PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WARREN S. BRASWELL, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KELLEY PROVO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered June 24, 2008. Defendant was resentenced upon his conviction of attempted burglary in the second degree.

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

27

KA 10-01592

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DANIEL J. HYERS, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (LAURIE M. BECKERINK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered March 29, 2010. 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.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

31

KA 09-01204

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELLIOTT I. JAMES, ALSO KNOWN AS PIG,
DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered April 21, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third 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 Cattaraugus County Court for the filing of a predicate felony statement and resentencing in accordance with the following Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant's general motion for a trial order of dismissal failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19) and, in any event, defendant failed to renew that motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Drennan*, 81 AD3d 1279, 1280, *lv denied* 16 NY3d 858, 17 NY3d 816). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We also reject the contention of defendant that he was denied effective assistance of counsel based on the failure of defense counsel to assert defendant's right to testify before the grand jury. Such failure "does not, per se, amount to a denial of effective assistance of counsel under the circumstance of this case" (*People v Wiggins*, 89 NY2d 872, 873; *see People v Simmons*, 10 NY3d 946, 949). Defendant has not established that "he was prejudiced by the failure

of [defense counsel] to effectuate his appearance before the grand jury” or that, “had he testified in the grand jury, the outcome would have been different” (*Simmons*, 10 NY3d at 949). To the extent that defendant contends he was denied effective assistance of counsel when defense counsel allegedly took a position that was adverse to defendant, that contention is based upon matters outside the record on appeal and thus must be raised by way of motion pursuant to CPL article 440 (*see People v Johnson*, 81 AD3d 1428, *lv denied* 16 NY3d 896).

We agree with defendant, however, that his waiver of a new presentence report was invalid pursuant to CPL 390.20 (4) (a) and that the People erred in failing to file a predicate felony statement. Where, as here, “an indeterminate or determinate sentence of imprisonment [was] to be imposed,” a waiver of the presentence report was not authorized (CPL 390.20 [4] [a]; *see People v Shapard*, 59 AD3d 1054). We further conclude that the People’s failure to file a predicate felony statement is not harmless (*cf. People v Bouyea*, 64 NY2d 1140, 1142).

In addition, defendant’s sentence is illegal insofar as the period of postrelease supervision exceeds three years (*see* Penal Law § 70.45 [2] [d]; § 70.70 [3] [b]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for the filing of a predicate felony statement and resentencing after preparation of a presentence report.

In light of our determination, we do not reach defendant’s remaining contention.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

33
CA 11-01598
PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

ALBERT G. FRACCOLA, JR. AND PLAYTIME
BOUTIQUE, INC., PLAINTIFFS-APPELLANTS,

V ORDER

PHYLLIS FRACCOLA, INDIVIDUALLY AND AS SOLE
SHAREHOLDER OF HYDRANIA, INC., AND HYDRANIA, INC.,
DEFENDANTS-RESPONDENTS.

ALBERT G. FRACCOLA, JR., PLAINTIFF-APPELLANT PRO SE.

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered May 18, 2011. The order, among other things, granted the motion of defendants to dismiss the complaint.

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

36

CA 11-00595

PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND SCONIERS, JJ.

DANA JUHASZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN JUHASZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (KIMBERLY A. COLAIACOVO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered June 17, 2010. The order, among other things, denied defendant's motion for a downward modification of child support.

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

Same Memorandum as in *Juhasz v Juhasz* ([appeal No. 2] ___ AD3d ___ [Feb. 10, 2012]).

Entered: February 10, 2012 Frances E. Cafarell
Clerk of the Court

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

37

CA 11-00596

PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND SCONIERS, JJ.

DANA JUHASZ, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STEPHEN JUHASZ, DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 2.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

HARRIS BEACH PLLC, BUFFALO (KIMBERLY A. COLAIACOVO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 25, 2011. The order, among other things, denied those parts of plaintiff's motion seeking an order finding defendant in contempt and attorneys' fees and denied defendant's cross motion for a downward modification of child support.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion seeking attorneys' fees in the amount of $1,405 and granting that part of defendant's cross motion seeking permission to pay the property taxes on the marital residence and to deduct 1/12 of that amount from each of his monthly child support payments unless plaintiff, within 60 days of service of a copy of the order of this Court with notice of entry, provides a receipt establishing that all property taxes due on the marital residence have been paid, and as modified the order is affirmed without costs.

Memorandum: On a prior appeal in this divorce action, we modified the amended judgment of divorce by, inter alia, vacating the amount awarded to plaintiff for child support because Supreme Court "failed to articulate any basis for that portion of the award based on the parental income exceeding [the statutory cap of] $80,000" applicable at the time the amended judgment was rendered (*Juhasz v Juhasz*, 59 AD3d 1023, 1025, *lv dismissed* 12 NY3d 848). We remitted the matter to Supreme Court to determine defendant's child support obligation in compliance with the Child Support Standards Act (*id.*). Defendant thereafter moved, inter alia, to terminate plaintiff's exclusive use and occupancy of the marital residence and to decrease the award of child support based on the new statutory cap of $130,000 of combined parental income (*see* Domestic Relations Law § 240 [1-b] [c] [2]; Social Services Law § 111-i [2] [b]). By the order in appeal

No. 1, the court, inter alia, continued plaintiff’s exclusive use and occupancy of the marital residence and awarded child support by applying the child support percentage to the entire combined parental income, including the amount exceeding the new statutory cap.

Plaintiff subsequently moved for, inter alia, an order finding defendant in contempt based on his failure to comply with the court’s order in appeal No. 1 by failing to pay the full amount of child support for the two months preceding the motion, and she requested attorneys’ fees in the amount of $56,662.48. Defendant cross-moved for a reduction in child support based on the fact that, at that time, the eldest of the three children had started college and was no longer living at home. Based on his allegations that plaintiff was not paying property taxes for the marital residence, defendant also requested that he be permitted to pay those taxes and deduct that amount from his child support obligation or, in the alternative, that plaintiff’s exclusive use and occupancy of the marital residence be terminated. By the order in appeal No. 2, the court, inter alia, denied that part of the motion seeking an award of attorneys’ fees and denied the cross motion.

We reject defendant’s contention in appeal No. 1 that, in setting the amount of his child support obligation, the court erred in failing to subtract his maintenance obligation from his income. Where, as here, “there [is] no provision for an adjustment of child support upon the termination of maintenance, . . . there [is] no basis for the court to deduct maintenance from [the] defendant’s income in determining the amount of child support” (*Salvato v Salvato*, 89 AD3d 1509, 1509-1510; *see* Domestic Relations Law § 240 [1-b] [b] [5] [vii] [C]; *Jarrell v Jarrell*, 276 AD2d 353, 354, *lv denied* 96 NY2d 710; *Block v Block*, 258 AD2d 324, 326). We reject defendant’s further contentions that the court erred in failing to consider plaintiff’s income and in awarding child support on income exceeding the $130,000 statutory cap. First, the court properly noted that plaintiff had “no discernible income.” Second, the court properly applied the statutory percentage to that portion of the combined parental income exceeding $130,000 and set forth its reasons for doing so, which included defendant’s considerable assets and “the standard of living that the children would have enjoyed had the marriage not ended” (*Reed v Reed*, 55 AD3d 1249, 1251; *see Francis v Francis*, 72 AD3d 1594; *see generally* § 240 [1-b] [c] [3]; *Matter of Cassano v Cassano*, 85 NY2d 649, 653-654). Defendant further contends that the court erred in awarding child support on income exceeding the statutory cap because plaintiff failed to submit an updated financial affidavit. We conclude that defendant failed to preserve that contention for our review inasmuch as he failed to raise it before the order in appeal No. 1 was issued (*see generally Leroy v Leroy*, 298 AD2d 923).

With respect to both appeals, defendant contends that the court abused its discretion in denying his requests to terminate plaintiff’s exclusive use and occupancy of the marital residence. We reject that contention. “ ‘Courts now express a preference for allowing a custodial parent to remain in the marital residence until the youngest child becomes 18 unless such parent can obtain comparable housing at a

lower cost or is financially incapable of maintaining the marital residence, or either spouse is in immediate need of his or her share of the sale proceeds' " (*Stacey v Stacey*, 52 AD3d 1219, 1221; *see Smith v Smith*, 79 AD3d 1643, 1644-1645). It is undisputed that there is at least one child under the age of 18 residing in the marital residence full time. Furthermore, plaintiff candidly admitted that she could not obtain comparable housing at a lower cost, and defendant, with his considerable investments, failed to establish a need for his share of the sale proceeds. Defendant further contends that termination of plaintiff's exclusive use and occupancy of the marital residence is justified because plaintiff failed to pay the property taxes for the marital residence. Even assuming, arguendo, that plaintiff failed to pay those taxes, we conclude that defendant failed to establish that plaintiff is financially incapable of maintaining the residence. Plaintiff receives child support in the amount of $4,000 per month, there is no mortgage on the property, and the tax return for plaintiff and her new husband, who also resides in the marital residence, establishes that plaintiff has sufficient income to maintain the property.

In the cross motion at issue in appeal No. 2, defendant requested that he be permitted to pay the delinquent property taxes and deduct those payments from his child support obligation, but he has not requested such relief in his brief on appeal. Although we could therefore deem that request abandoned (*see Matter of Tucker v Martin*, 75 AD3d 1087, 1091; *Okvist v Contro*, 21 AD3d 1328; *Ciesinski v Town of Aurora*, 202 AD2d 984), we nevertheless conclude that such relief should be granted under our "inherent plenary power . . . to fashion any remedy necessary for the proper administration of justice" (*People ex rel. Doe v Beaudoin*, 102 AD2d 359, 363; *see* NY Const, art VI, § 7; *Conforti v Goradia*, 234 AD2d 237, 238). We therefore modify the order in appeal No. 2 by granting that part of defendant's cross motion seeking permission to pay the property taxes on the marital residence and to deduct 1/12 of that amount from each of his monthly child support payments unless plaintiff, within 60 days of service of a copy of the order of this Court with notice of entry, provides a receipt establishing that all property taxes due on the marital residence have been paid.

We further conclude in appeal No. 2 that the court did not abuse its discretion in denying that part of defendant's cross motion seeking a reduction in child support inasmuch as the two older children are now attending college and no longer living in the marital residence full time. "A credit against child support for college expenses is not mandatory but depends upon the facts and circumstances in the particular case, taking into account the needs of the custodial parent to maintain a household and provide certain necessaries" (*Pistilli v Pistilli*, 53 AD3d 1138, 1140 [internal quotation marks omitted]; *see Burns v Burns*, 233 AD2d 852, 853, *lv denied* 89 NY2d 810). Here, plaintiff must still maintain a household for the child living at home and for the older children's school breaks and weekend visits. Furthermore, because tuition, room and board are paid for by a trust established by defendant's parents, it cannot be said that defendant incurred any costs that are duplicative of basic child

support (*see Matter of Rath v Melens*, 15 AD3d 837; *see also Matter of Haessly v Haessly*, 203 AD2d 700, 702-703; *cf. Wortman v Wortman*, 11 AD3d 604, 607; *Rohrs v Rohrs*, 297 AD2d 317, 318).

Finally, we agree with plaintiff on her cross appeal in appeal No. 2 that the court improvidently exercised its discretion in denying her request for attorneys' fees associated with the motion at issue in that appeal. "The decision to award . . . attorney[s'] fees lies, in the first instance, in the discretion of the trial court and then in the Appellate Division whose discretionary authority is as broad as [that of] the trial court[]" (*O'Brien v O'Brien*, 66 NY2d 576, 590). There is a rebuttable presumption that attorneys' fees shall be awarded to the less monied spouse where a spouse seeks to enforce a prior order, even where the award of such fees is not mandatory (*see* Domestic Relations Law § 237 [b]). The motion of plaintiff at issue in appeal No. 2 was predicated on defendant's failure to pay the full amount of child support and his unilateral decision to deduct college expenses from his child support payments. The court determined that defendant had failed to make those full payments and ordered him to pay the previously deducted amounts. Inasmuch as plaintiff's attorney submitted an invoice establishing fees in the amount of $1,405 with respect to the motion, we further modify the order in appeal No. 2 by granting that part of plaintiff's motion seeking attorneys' fees in that amount. To the extent that plaintiff sought attorneys' fees for work unrelated to the motion, we conclude that the court did not abuse its discretion in denying that relief.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

39

CA 11-00510

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

NANCY S. WULBRECHT, AS ADMINISTRATRIX OF THE
ESTATE OF ROBERT M. WULBRECHT, DECEASED,
PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

DIETRICH JEHLE, M.D., ET AL., DEFENDANTS,
AND ERIE COUNTY MEDICAL CENTER CORPORATION,
DEFENDANT-RESPONDENT.

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered October 13, 2010 in a medical malpractice and wrongful death action. The order, among other things, granted plaintiff's motion for leave to reargue and upon reargument adhered to its prior order dismissing all direct claims against defendant Erie County Medical Center Corporation and its employees and agents.

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

Memorandum: Plaintiff, as administratrix of the estate of her husband (decedent), commenced this medical malpractice and wrongful death action seeking damages for the death of decedent, a psychiatric patient who committed suicide. Plaintiff appeals from an order denying her motion seeking to settle the prior order granting those parts of the motion of Erie County Medical Center Corporation (defendant) for summary judgment dismissing the direct claims against it. The order also granted plaintiff's motion for leave to reargue her opposition to those parts of defendant's motion for summary judgment dismissing the medical malpractice claims against it arising out of the acts and omissions of its employee, former defendant Denise Giessert, M.D, and, upon reargument, Supreme Court adhered to its original determination granting defendant's motion with respect to those claims. We affirm.

"[I]t is well settled that, '[i]n general, a hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee, and may not be held concurrently

liable unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of [the attending physician's orders]' . . . In addition, '[a] resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene' " (*Lorenzo v Kahn*, 74 AD3d 1711, 1713; *see Muniz v Katlowitz*, 49 AD3d 511, 513).

Defendant established its entitlement to judgment as a matter of law with respect to the medical malpractice claims against it arising out of the acts and omissions of Dr. Giessert, the resident psychiatrist who first met with decedent prior to his admission to the hospital. The evidence submitted by defendant demonstrated that Dr. Giessert was acting under the supervision of defendant Victoria Brooks, M.D. and defendant Hong Yu, M.D., the attending psychiatrists who were required to approve any orders signed by Dr. Giessert. Thus, defendant cannot be held liable for any alleged malpractice on the part of Dr. Giessert, inasmuch as she did not exercise any independent medical judgment, and the directions of Dr. Brooks and Dr. Yu did not so greatly deviate from normal practice that Dr. Giessert should have intervened (*see Lorenzo*, 74 AD3d at 1713; *Muniz*, 49 AD3d at 513-514; *Soto v Andaz*, 8 AD3d 470, 471). Plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Defendant also established its entitlement to judgment as a matter of law with respect to the claims against it for common-law negligence. " 'The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of common everyday experience of the trier of the facts' " (*Kerker v Hurwitz*, 163 AD2d 859, 859, *amended on rearg* 166 AD2d 931). In addition, "a private hospital is required to exercise reasonable care and diligence in safeguarding a patient, measured by the capacity of the patient to provide for his [or her] own safety" (*Horton v Niagara Falls Mem. Med. Ctr.*, 51 AD2d 152, 154, *lv denied* 39 NY2d 709). Failure to "restrain, supervise and exercise care for [a patient's] safety" in an adequate manner constitutes common-law negligence (*White v Sheehan Mem. Hosp*., 119 AD2d 989).

Here, defendant met its initial burden with respect to the claims against it for common-law negligence. The medical records and deposition testimony submitted by defendant demonstrated that its staff checked on decedent at 30-minute intervals in accordance with the treatment plan. Plaintiff failed to submit evidence sufficient to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

72
KA 10-01620
PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — ORDER

JOHN JOHNSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN 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 (M. William Boller, A.J.), rendered June 11, 2010. 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 (*see People v Lococo*, 92 NY2d 825, 827).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

73

KA 10-01627

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAWRENCE L. BUGGS, ALSO KNOWN AS CONGO,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered February 8, 2006. 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.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

74

KA 11-00420

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON A. D'ANGELO, DEFENDANT-APPELLANT.

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

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered January 19, 2011. The judgment convicted defendant, upon his 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 (*see People v Lococo*, 92 NY2d 825, 827).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

75

KA 09-01207

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

AKEEM M. SIMMONS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered May 15, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

76

KA 10-01114

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTOINE BROWN, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered February 24, 2010. The judgment convicted defendant, upon a nonjury verdict, of robbery in the first degree, robbery in the second degree and grand larceny 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 a nonjury verdict of robbery in the first degree (Penal Law § 160.15 [4]), robbery in the second degree (§ 160.10 [1]), and grand larceny in the third degree (former § 155.35). Defendant failed to preserve for our review his contention that County Court erred in granting the People's motion for an order directing him to submit to a buccal swab inasmuch as he did not move to suppress the DNA evidence obtained therefrom (*see People v Clark*, 15 AD3d 864, 865, *lv denied* 4 NY3d 885, 5 NY3d 787; *see generally People v Middleton*, 54 NY2d 42, 48-49). "In any event, 'there is no basis here to disturb the court's determination that there was probable cause to order the [buccal swab]' " (*Clark*, 15 AD3d at 865; *see generally Matter of Abe A.*, 56 NY2d 288, 297-298).

Contrary to defendant's further contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although the employees of the bank robbed by defendant and his accomplices could not specifically identify defendant, the element of identity was established by a compelling chain of circumstantial evidence that had no reasonable explanation except that defendant was one of the perpetrators (*see People v Butler*, 81 AD3d 484, *lv denied* 16 NY3d 893; *People v Clark*, 76 AD3d 916, *lv denied* 15 NY3d 952; *People v Jurgensen*, 288 AD2d 937, 938, *lv denied* 97 NY2d 684). That evidence included the presence of

defendant's DNA in the stolen vehicle used by the perpetrators to flee the scene. 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). Finally, the sentence is not unduly harsh or severe.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

77

KA 10-02199

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIANA M. FLINN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered July 2, 2010. 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: In appeal No. 1, defendant appeals from a judgment revoking the sentence of probation previously imposed upon her conviction of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]) and imposing a sentence of one year in jail based on her violation of the terms and conditions of her probation. In appeal No. 2, defendant appeals from a judgment revoking the sentence of probation previously imposed upon her conviction of assault in the second degree (Penal Law § 120.05 [1]) and imposing a sentence of imprisonment based on her violation of the terms and conditions of her probation.

We reject the contention of defendant in each appeal that the People failed to establish by a preponderance of the evidence that defendant violated the terms and conditions of her probation (*see* CPL 410.70 [1], [3]; *People v Donohue*, 64 AD3d 1187; *People v Bergman*, 56 AD3d 1225, *lv denied* 12 NY3d 756). The People established that defendant operated a motor vehicle without the written permission of County Court and that she consumed alcoholic beverages before doing so in violation of the terms and conditions of her probation. Contrary to defendant's further contention in appeal No. 2, the sentence is not unduly harsh or severe.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

80

KA 08-01360

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHARIFF JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 29, 2008. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that the evidence is not legally sufficient to support the conviction. Defendant failed to move for a trial order of dismissal on the ground that the evidence concerning his mental culpability and intent was legally insufficient, and thus he failed to preserve that part of his contention for our review (*see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). Although defendant preserved for our review his contention concerning the issue of identity, we conclude that the evidence with respect thereto, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495).

To the extent that defendant contends that hearsay was improperly admitted in evidence at trial and that such hearsay bolstered the People's case, that contention is not preserved for our review with respect to the testimony of the two police detectives who were not undercover (*see People v Thomas*, 85 AD3d 1572, 1573; *People v Velsor*, 73 AD3d 819, *lv denied* 15 NY3d 810). We decline to exercise our power to review that contention as a matter of discretion in the interest of

justice (*see* CPL 470.15 [6] [a]). Although defendant preserved for our review his contention that the testimony of one of the undercover detectives constituted hearsay, Supreme Court did not abuse its discretion in determining that the testimony in question was not offered for its truth, and we will not disturb that determination (*see generally People v Carroll*, 95 NY2d 375, 385). Defendant did not preserve for our review his contention that the testimony of that undercover detective constituted improper bolstering (*see Thomas*, 85 AD3d at 1573). Defendant also failed to preserve for our review his contention that he was denied his right of confrontation (*see People v Kello*, 96 NY2d 740, 743-744), as well as his contention that the court erred in permitting the prosecutor to make improper statements during summation (*see People v Kithcart*, 85 AD3d 1558, 1559-1560, *lv denied* 17 NY3d 818). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

81

KA 10-00153

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BYRON HOWARD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE 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 (Michael L. D'Amico, J.), rendered January 14, 2010. The judgment convicted defendant, upon a nonjury verdict, of murder in the first degree (two counts), murder in the second degree (four counts), burglary in the first degree, arson in the third degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of murder in the second degree under counts three and four of the indictment and dismissing those counts and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]) and four counts of murder in the second degree (§ 125.25 [1], [3]). The evidence established that defendant entered the home of his ex-girlfriend and waited for several hours until she returned home with her current boyfriend, at which time he shot them both and set her house on fire. Viewing the evidence in light of the elements of the crimes in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject the contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to object to certain hearsay testimony, his elicitation of hearsay testimony on cross-examination, or his failure to call a certain witness. Rather, 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).

We agree with defendant that County Court erred in allowing a fire marshall to testify regarding six categories of motivation for setting a fire, including revenge and crime concealment. The People failed to demonstrate that those categories are "generally accepted in the scientific community . . . or that the subject is beyond the ordinary ken of the [trier of fact]" (*People v Avellanet*, 242 AD2d 865, 865, *lv denied* 91 NY2d 868). We conclude, however, that the error is harmless inasmuch as the evidence of defendant's guilt is overwhelming and there is no significant probability that, absent the error, the court would have acquitted defendant (*see id.*; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Defendant's further contention that the fire marshall improperly testified that he eliminated all causes of the fire except the "human element" is not preserved for our review (*see* CPL 470.05 [2]) and, in any event, that contention is without merit (*see generally People v Rivers*, 18 NY3d 222).

As the People correctly concede, however, those parts of the judgment convicting defendant of murder in the second degree under counts three and four of the indictment must be reversed and those counts dismissed because they are inclusory concurrent counts of the two murder in the first degree counts (*see* CPL 300.40 [3] [b]; *People v Pierre*, 37 AD3d 1172, *lv denied* 8 NY3d 989; *see generally People v Miller*, 6 NY3d 295, 300-303). We therefore modify the judgment accordingly. In addition, we note that the certificate of conviction incorrectly recites that defendant was convicted of criminal possession of a weapon in the second degree under Penal Law § 265.03 (1), and it must therefore be amended to reflect that he was convicted of that crime under Penal Law § 265.03 (3) (*see People v Saxton*, 32 AD3d 1286). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

82

KA 10-02200

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIANA M. FLINN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered July 2, 2010. 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.

Same Memorandum as in *People v Flinn* ([appeal No. 1] ___ AD3d ___ [Feb. 10, 2012]).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

86

CAF 11-01051

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

IN THE MATTER OF LINDA K. MAGGIO,
PETITIONER-RESPONDENT,

V ORDER

JOHN A. MAGGIO, RESPONDENT-APPELLANT.

WILLIAM M. BORRILL, NEW HARTFORD, FOR RESPONDENT-APPELLANT.

C. LOUIS ABELOVE, UTICA, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered February 10, 2011 in a proceeding pursuant to Family Court Act article 4. The order, among other things, denied respondent's objections to orders of support issued by the Support Magistrate.

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

87
CAF 10-02452
PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

IN THE MATTER OF ALLISON E. NOON,
PETITIONER-APPELLANT,

V ORDER

BENJAMIN E. NOON, RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, FOR PETITIONER-APPELLANT.

TIMOTHY A. BENEDICT, ROME, FOR RESPONDENT-RESPONDENT.

JOHN P. AMUSO, ATTORNEY FOR THE CHILDREN, CLINTON, FOR ROBERT N. AND PEYTON N.

Appeal from an order of the Family Court, Oneida County (Louis P. Gigliotti, A.J.), entered November 24, 2010 in a proceeding pursuant to Family Court Act article 6. The order dismissed the violation and modification petitions.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on December 13 and 19, 2011 and by the Attorney for the Children on December 16, 2011,

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

91
CA 11-01689
PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

GORDON LILLIE AND JOYCE LILLIE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

WILMORITE, INC., DOING BUSINESS AS GREECE RIDGE
CENTER, DEFENDANT-APPELLANT-RESPONDENT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (VALERIE L. BARBIC OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

KAMMHOLZ MESSINA, LLP, VICTOR (CHARLES D. STEINMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered December 7, 2010 in a personal injury action. The judgment and order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that said cross appeal is unanimously dismissed, the judgment and order is reversed on the law without costs, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Gordon Lillie when he slipped and fell on a patch of black ice in the parking lot of the Mall at Greece Ridge Center (mall). Defendant, the mall’s property management company, moved for summary judgment dismissing the complaint on the ground that it did not have actual or constructive notice of the ice upon which plaintiff slipped and fell. We agree with defendant on its appeal that Supreme Court erred in denying the motion. Defendant met its initial burden of demonstrating that it had neither actual notice of the icy condition in question nor constructive notice thereof, inasmuch as the patch of black ice was not “visible and apparent,” and plaintiffs failed to raise a triable issue of fact in opposition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837; *see Phillips v Henry B’S, Inc.*, 85 AD3d 1665, 1666; *Mullaney v Royalty Props., LLC*, 81 AD3d 1312).

In addition, plaintiffs’ cross appeal must be dismissed because they are not aggrieved by the judgment and order denying defendant’s motion (*see generally Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488). To the extent that plaintiffs contend as an alternative ground for affirmance that their meteorologist’s expert

affidavit was sufficient to raise a triable issue of fact and that the court erred in disregarding it (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), we reject that contention. The climatological data upon which the meteorologist based his opinions was not submitted therewith, and thus the affidavit lacked an adequate factual foundation and was of no probative value (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187; *Schuster v Dukarm*, 38 AD3d 1358, 1359; *see generally Romano v Stanley*, 90 NY2d 444, 452). In any event, the expert's opinion would not change our determination herein (*cf. Zemotel v Jeld-Wen, Inc.*, 50 AD3d 1586).

Entered: February 10, 2012 Frances E. Cafarell
Clerk of the Court

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

92

CA 11-01565

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

JERRY OSGOOD, PLAINTIFF,

V   MEMORANDUM AND ORDER

KDM DEVELOPMENT CORP., KDM DEVELOPMENT SERVICES CORPORATION, TUSCARORA VILLAGE, INC., TUSCARORA VILLAGE MANUFACTURED HOME SALES, INC., AND TUSCARORA VILLAGE MHP, LLC, DEFENDANTS.

KDM DEVELOPMENT CORP., KDM DEVELOPMENT SERVICES CORPORATION, TUSCARORA VILLAGE, INC., TUSCARORA VILLAGE MANUFACTURED HOME SALES, INC., AND TUSCARORA VILLAGE MHP, LLC, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

ROYAL MANUFACTURED HOME SALES, INC., THIRD-PARTY DEFENDANT-APPELLANT,
DYLAN AND DANIEL ENTERPRISES, INC. AND DANIEL V. MASON, DOING BUSINESS AS DYLAN AND DANIEL ENTERPRISES, INC., THIRD-PARTY DEFENDANTS.

GOLDBERG SEGALLA LLP, BUFFALO (COLLEEN M. MURPHY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

GOERGEN, MANSON & HUENKE, BUFFALO (JOSEPH G. GOERGEN, II, OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered April 28, 2011. The order denied the motion of third-party defendant Royal Manufactured Home Sales, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the third-party complaint against third-party defendant Royal Manufactured Home Sales, Inc. is dismissed.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from a ladder while installing siding on a mobile home (home). The home was located in a mobile home park owned by defendant-third-party plaintiff Tuscarora Village MHP, LLC and managed by defendant-

third-party plaintiff KDM Development Corp. Defendant-third-party plaintiff Tuscarora Village Manufactured Home Sales, Inc. sold mobile homes to customers at the mobile home park, and the home on which plaintiff was working at the time of his accident was brokered by third-party defendant Royal Manufactured Home Sales, Inc. (Royal). Defendants commenced the third-party action seeking, inter alia, common-law indemnification and contribution from Royal, and Royal moved for summary judgment dismissing the third-party complaint against it. Supreme Court denied the motion, and we reverse.

Even assuming, arguendo, that Royal is the owner of the home for purposes of the Labor Law, we conclude that Royal met its initial burden on the motion by submitting evidence that it did not supervise or control the injury-producing work, and that it did not provide the ladder from which plaintiff fell (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562; *Carro v Lyons Falls Pulp and Paper, Inc.*, 56 AD3d 1276, 1277-1278). Defendants-third-party plaintiffs (defendants) failed to raise a triable issue of fact in opposition to the motion (*see generally Zuckerman*, 49 NY2d at 562). Defendants contend, as an alternative ground for affirmance, that the motion should be denied because Royal failed to submit the bill of particulars in support of its motion (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130). We reject that contention. " '[A] bill of particulars is not a pleading, but just an expansion of one' " (*Abbotoy v Kurss*, 52 AD3d 1311, 1312, quoting Siegel, NY Prac § 238, at 401 [4th ed]), and thus Royal's failure to support its motion with a copy thereof does not require denial of the motion (*see generally* CPLR 3212 [b]; *D.J. Enters. of WNY v Benderson*, 294 AD2d 825; *Niles v County of Chautauqua*, 285 AD2d 988).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

93

CA 11-01523

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND MARTOCHE, JJ.

PATRICIA STERRY, PLAINTIFF-RESPONDENT,

V   ORDER

CENTRO NP, LLC, DEFENDANT-APPELLANT.

CENTRO NP, LLC, THIRD-PARTY PLAINTIFF,

V

JP TRUCKING, INC., THIRD-PARTY DEFENDANT.

HARRINGTON, OCKO & MONK, LLP, WHITE PLAINS (JULIE C. HELLBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF CRAIG Z. SMALL, BUFFALO (CRAIG Z. SMALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered May 6, 2011 in a personal injury action. The order, among other things, denied that part of the motion of defendant-third-party plaintiff seeking summary judgment dismissing the complaint.

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

Entered: February 10, 2012   Frances E. Cafarell
                                              Clerk of the Court

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

97

KA 09-01250

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL CAREY, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 9, 2009. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, rape in the third degree (two counts) 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 a jury verdict of, inter alia, course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), arising from his sexual abuse of the victim beginning from the time she was 7 years old. Defendant failed to preserve for our review his contentions that his conviction of section 130.75 (1) (b) violates the ex post facto prohibition in article I (§ 10 [cl 1]) of the US Constitution (*see People v Ramos*, 13 NY3d 881, 882, *rearg denied* 14 NY3d 794; *People v Ruz*, 70 NY2d 942; *People v Bove*, 52 AD3d 1124; *People v Whitfield*, 50 AD3d 1580, *lv denied* 10 NY3d 965), and that the nearly six-year time frame set forth in that count of the indictment was excessive (*see People v Soto*, 44 NY2d 683; *People v Erle*, 83 AD3d 1442, 1443, *lv denied* 17 NY3d 794; *People v Adams*, 59 AD3d 928, *lv denied* 12 NY3d 813). We decline to exercise our power to address those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's further contention that Supreme Court erred in permitting the People to introduce evidence of a noncriminal sexual encounter that occurred between defendant and the victim after she turned 17 years old. The evidence was relevant to "explain the relationship between defendant and the victim . . ., as well as to place the events in question in a believable context and explain the victim's [reason for] reporting defendant's conduct" (*People v*

Haidara, 65 AD3d 974, *lv denied* 13 NY3d 939; *see People v Gilley*, 4 AD3d 127, 127-128, *lv denied* 2 NY3d 799). We note in any event that, "[c]onsidering that the court several times provided the jury with appropriate limiting instructions, and [considering that] the probative value of the evidence outweighed the potential prejudice to defendant . . ., we cannot say that [the c]ourt erred by permitting the testimony" (*People v Shofkom*, 63 AD3d 1286, 1288, *lv denied* 13 NY3d 799, *appeal dismissed* 13 NY3d 933).

Defendant failed to preserve for our review his contention that he was punished for asserting his right to a trial because he " 'did not raise the issue at the time of sentencing' " (*People v Dorn*, 71 AD3d 1523, 1523-1524; *see People v Coapman*, 90 AD3d 1681; *People v Brink*, 78 AD3d 1483, 1485, *lv denied* 16 NY3d 742, *reconsideration denied* 16 NY3d 828). In any event, that contention lacks merit (*see People v Stubinger*, 87 AD3d 1316, 1317; *People v Powell*, 81 AD3d 1307, 1308, *lv denied* 17 NY3d 799; *Brink*, 78 AD3d at 1485; *Dorn*, 71 AD3d at 1524). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

98
TP 11-01687
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF DARREN COLLINS, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

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

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, Wyoming County [Mark H. Dadd, A.J.], entered August 11, 2011) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

99

KA 10-01779

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERROL FOWLER-GRAHAM, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 6, 2010. 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.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of robbery in the first degree (Penal Law § 160.15 [3]). Defendant waived his present contention that Supreme Court erred in failing to set forth on the record at sentencing the reasons for its statement that "[y]outhful offender status is denied" inasmuch as defendant did not contend at the time of sentencing that he was entitled to a youthful offender adjudication (*see People v McGowen*, 42 NY2d 905, 906, *rearg denied* 42 NY2d 1015; *People v Crawford*, 85 AD3d 1620, 1620-1621, *lv denied* 17 NY3d 858; *see generally* CPL 720.20 [1]). In addition, defendant failed to preserve for our review his contention that the court's failure to adjudicate him a youthful offender constitutes an abuse of discretion "inasmuch as he failed to seek that status either at the time of the plea proceedings or at sentencing" (*People v Fowler*, 28 AD3d 1183, 1184, *lv denied* 7 NY3d 788; *see People v Wright*, 81 AD3d 1394), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We also decline to grant defendant's request to exercise our interest of justice jurisdiction to afford him such status (*see People v Jock*, 68 AD3d 1816, *lv denied* 14 NY3d 801). Finally, the sentence is not unduly harsh or severe.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

101
KA 10-01851
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIQUA S.D., 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 (VANESSA S. GUITE OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Erie County Court (Michael L. D'Amico, J.), rendered July 13, 2010. Defendant was adjudicated a youthful offender upon a jury verdict that found her guilty of criminal possession of stolen property in the fourth degree.

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

Memorandum: Defendant was adjudicated a youthful offender following her conviction, upon a jury verdict, of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [2]). Preliminarily, we note that defendant's notice of appeal recites incorrect convictions and an incorrect date on which the adjudication was rendered. Defendant's notice of appeal recites the correct indictment number, however, and thus we treat the notice of appeal as valid, in the exercise of our discretion in the interest of justice (*see* CPL 460.10 [6]).

We reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495), upon viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and according great deference to the jury's resolution of credibility issues (*see generally Bleakley*, 69 NY2d at 495). Defendant contends for the first time on appeal that County Court unlawfully ordered her to pay $295 in restitution to the complainant. Although a contention that the restitution portion of a sentence is illegal need not be preserved for our review (*see People v McCarthy*, 83 AD3d 1533, 1534-1535, *lv denied* 17 NY3d 819), here defendant is not in fact contending that the restitution imposed is illegal (*see People v Callahan*, 80 NY2d 273, 280-281). Instead, defendant contends that the court erred in relying upon the presentence report to establish the complainant's

out-of-pocket loss in light of the complainant's trial testimony suggesting that the complainant suffered no out-of-pocket loss. Her contention therefore is "addressed merely to the adequacy of the procedures the court used to arrive at its sentencing determination, specifically its purported overreliance on the presentencing report's restitution recommendation" (*id.* at 281). Thus, defendant is raising a procedural issue that she forfeited by failing to raise it in a timely manner (*see id.*).

Finally, the sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was sentenced at a term of Supreme Court, Erie County, and it must therefore be amended to reflect that she was sentenced at a term of Erie County Court (*see generally People v Switzer*, 55 AD3d 1394, 1395, *lv denied* 11 NY3d 858).

Entered: February 10, 2012 Frances E. Cafarell
Clerk of the Court

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

102
KA 11-00259
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PEARSON E. MILES, JR., 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 (JOHN P. GERKEN, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered December 13, 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.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

103
KA 10-01011
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY A. HAVERS, DEFENDANT-APPELLANT.

JAMES L. DOWSEY, III, ELLICOTTVILLE (KELIANN M. ELNISKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered June 8, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted 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 guilty plea of attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [3]). Although defendant's contention that his plea was not voluntarily, knowingly and intelligently entered survives his valid waiver of the right to appeal, defendant failed to move to withdraw his guilty plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see People v Zulian*, 68 AD3d 1731, *lv denied* 14 NY3d 894). We reject defendant's contention that this is one of those rare cases in which the exception to the preservation requirement applies (*see People v Lopez*, 71 NY2d 662, 666). Defendant's further contention that he was denied effective assistance of counsel does not survive his guilty plea or his valid waiver of the right to appeal inasmuch as defendant "failed to demonstrate 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 Wright*, 66 AD3d 1334, *lv denied* 13 NY3d 912). Finally, to the extent that defendant challenges County Court's suppression ruling following the *Huntley* hearing, his valid waiver of the right to appeal encompasses that ruling (*see People v Kemp*, 94 NY2d 831, 833; *People v Gilbert*, 17 AD3d 1164, *lv denied* 5 NY3d 762).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

105

KA 10-02430

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. GARDINER, DEFENDANT-APPELLANT.

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

DAVID L. GARDINER, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (STEFANIE GRUBER, VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), entered November 16, 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*.). We reject defendant's contention that County Court erred in assessing 30 points against him under risk factor 3, for having three or more victims. Defendant was charged with sexually abusing three children, including his 11-year-old daughter. Although defendant pleaded guilty only to those counts of the indictment relating to the abuse of his daughter, it is well settled that, in determining the number of victims for SORA purposes, the hearing court is not limited to the crime of which defendant was convicted (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 5 [2006]; § 168-n [3]; *People v Callan*, 62 AD3d 1218, 1218-1219). Here, in making its determination, the court was entitled to consider "reliable hearsay evidence," including the case summary, which supported the court's determination as to the number of victims (§ 168-n [3]; *see People v Mingo*, 12 NY3d 563, 572-573; *People v Baker*, 57 AD3d 1472, *lv denied* 12 NY3d 706).

Defendant's contention that the court should have granted a downward departure to a level two risk is not preserved for our review because defendant did not request a downward departure (*see People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708). Finally, contrary to

the contention raised by defendant in his pro se supplemental brief, the court properly assessed 25 points against him under risk factor 2, for having deviate sexual intercourse with at least one of the victims. Although defendant was not convicted of having deviate sexual intercourse with his daughter, the case summary states that he had deviate sexual intercourse with the other two victims, and the indictment charges him with having deviate sexual intercourse with one of them. Moreover, the indictment was presumably based upon the victims' grand jury testimony, which also constitutes reliable hearsay (*see People v Howard*, 52 AD3d 273, *lv denied* 11 NY3d 706).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

106
KAH 11-00078
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
SCOTT MORSE, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (M. William Boller, A.J.), entered November 16, 2010 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.

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus, alleging that his detention was illegal and that he is entitled to immediate release from detention because he did not receive due process when in 1998 he was assessed a level two sex offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). According to petitioner, his initial risk assessment was improper. Thus, he contends that he should not have been required to comply with SORA's registration requirements and that the charges stemming from his failure to do so, along with the bail jumping charge "would never have existed." Supreme Court properly dismissed the petition. Habeas corpus relief is unavailable here inasmuch as petitioner could have raised the instant issue on direct appeal or by way of a motion under CPL article 440 (*see People ex rel. Robinson v Graham*, 68 AD3d 1706, *lv denied* 14 NY3d 706). Moreover, petitioner would not be entitled to immediate release from detention even if he were to prevail with respect to SORA because the crime of bail jumping is unrelated to SORA (*see generally People ex rel. Douglas v Vincent*, 50 NY2d 901, 903). Finally, we conclude that petitioner was not a member of the class of plaintiffs covered by the stipulation in *Doe v Pataki* (427 F Supp 2d 398, 402-403, *vacated* 481 F3d 69) who were entitled to a redetermination of their risk

assessment level.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

107

KAH 10-01780

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MICHAEL D. PIERCE, PETITIONER-APPELLANT,

V ORDER

MICHAEL F. HOGAN, COMMISSIONER, OFFICE OF
MENTAL HEALTH, RESPONDENT-RESPONDENT.

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

Appeal from a judgment (denominated decision and order) of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered July 12, 2010 in a habeas corpus proceeding. The judgment denied petitioner's application for poor person status and dismissed his proposed writ of habeas corpus.

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: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

108
CAF 10-02328
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF TIMOTHY D. MIHALKO,
PETITIONER-RESPONDENT,

V   ORDER

CHERI CHARLTON, RESPONDENT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

AVERY S. OLSON, ATTORNEY FOR THE CHILD, JAMESTOWN, FOR TIMOTHY J.M.

Appeal from an order of the Family Court, Chautauqua County (Paul G. Buchanan, J.), entered October 4, 2010 in a proceeding pursuant to Family Court Act article 6. The order awarded sole custody of the parties’ child to petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Graham v Thering*, 55 AD3d 1319, 1320, *lv denied* 11 NY3d 714; *Matter of Krest v Kawczynski*, 9 AD3d 907, 907-908).

Entered: February 10, 2012   Frances E. Cafarell
Clerk of the Court

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

109
CA 11-01524
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

CHARLES WIMMER, AS DIRECTOR AND OFFICER OF
UNITED CABLE TECHS, INC., PLAINTIFF-APPELLANT,

V ORDER

MARK TOMPKINS, DIRECTECHNOLOGIES, LLC, ROBERT
PINE AND JAMES WILDE, DEFENDANTS-RESPONDENTS.

J. SCOTT PORTER, SENECA FALLS, FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF CARL J. DEPALMA, AUBURN (CARL J. DEPALMA OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS DIRECTECHNOLOGIES, LLC, ROBERT PINE AND
JAMES WILDE.

Appeal from a judgment (denominated order) of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered December 10, 2010. The judgment dismissed plaintiff's causes of action after a nonjury trial.

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: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

110

CA 11-01559

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

THOMAS GWITT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DENNY'S, INC., DENNY'S RESTAURANT,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

DAMON MOREY LLP, BUFFALO (JENNIFER L. LEONARDI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (DAVID W. OLSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 12, 2011 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action alleging that he slipped and fell on snow and ice in the parking lot of defendant Denny's, Inc., also, as noted by Supreme Court, improperly sued as Denny's Restaurant (Denny's). Defendants thereafter moved for summary judgment dismissing the second amended complaint. As relevant to this appeal, the court granted the motion in part with respect to Denny's, determining that Denny's was entitled to summary judgment insofar as the second amended complaint, as amplified by the bill of particulars, alleged that Denny's was negligent in creating the icy condition and in having actual notice of it, but that Denny's failed to meet its initial burden on the motion of establishing as a matter of law that it lacked constructive notice of the icy condition. Denny's appeals, contending that the court should have granted the motion in its entirety with respect to it. We affirm.

With respect to constructive notice, Denny's had the initial burden of establishing that the ice was not visible and apparent (*see Phillips v Henry B'S, Inc.*, 85 AD3d 1665, 1666; *Mullaney v Royalty Props., LLC*, 81 AD3d 1312), or "that the ice formed so close in time to the accident that [Denny's] could not reasonably have been expected to notice and remedy the condition" (*Jordan v Musinger*, 197 AD2d 889, 890). Contrary to Denny's contention, the fact that plaintiff did not

notice the ice before he slipped on it does not establish Denny's entitlement to judgment as a matter of law on the issue whether the ice was visible and apparent. Indeed, plaintiff testified without contradiction at his deposition that he observed the ice after he fell, immediately after he exited his car (*see King v Sam's E., Inc.*, 81 AD3d 1414, 1415; *Russo v YMCA of Greater Buffalo*, 12 AD3d 1089, *lv dismissed* 5 NY3d 746).

Contrary to Denny's further contention, the deposition testimony of Denny's manager that she routinely inspected the parking lot did not establish as a matter of law that the ice formed so close in time to the accident that Denny's may not be charged with constructive notice of it (*see Conklin v Ulm*, 41 AD3d 1290). The manager acknowledged at her deposition that she did not inspect the entire parking lot on the morning in question, and that she was primarily looking for garbage, not icy conditions. Although the manager later set forth in an affidavit that she specifically inspected the parking lot for icy conditions when she left the restaurant for the bank at 9:00 A.M., that assertion is at odds with her deposition testimony. We thus conclude that the affidavit was " 'tailored to avoid the consequences of' " that deposition testimony (*Tronolone v Jankowski*, 74 AD3d 1721, 1722), and that the conflict between her deposition testimony and her affidavit raises a question of credibility to be resolved at trial (*see Palmer v Horton*, 66 AD3d 1433, 1434).

Entered: February 10, 2012 Frances E. Cafarell
Clerk of the Court

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

111
CA 11-01623
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF JOHN MARIANO, AS PRESIDENT
OF ORCHARD PARK POLICE BENEVOLENT
ASSOCIATION, INC., AND ORCHARD PARK POLICE
BENEVOLENT ASSOCIATION, INC.,
PETITIONERS-RESPONDENTS, MEMORANDUM AND ORDER

V

TOWN OF ORCHARD PARK, RESPONDENT-APPELLANT.

GOLDBERG SEGALLA, LLP, BUFFALO (JULIE P. APTER OF COUNSEL), FOR
RESPONDENT-APPELLANT.

LAW OFFICE OF WILLIAM E. GRANDE, KENMORE (WILLIAM E. GRANDE OF
COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 1, 2011 in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, denied the cross motion of respondent for a stay of arbitration.

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

Memorandum: This dispute concerns health insurance coverage in a collective bargaining agreement (CBA) between the parties. Although the current CBA covers the period between January 1, 2007 and December 31, 2010, petitioners commenced this proceeding on behalf of the affected retired members, all of whom retired prior to January 1, 2007 and who are therefore governed under the parties' previous CBA, covering the period between January 1, 2004 and December 31, 2006. The issue before us is whether respondent's change to health care coverage for retired police officers is subject to arbitration of the grievance. Petitioners filed a grievance on behalf of the affected retired members pursuant to the CBA protesting the change in coverage, and they sought to enjoin respondent from changing the coverage pending the result of the grievance process. Respondent contended that the retired members were no longer members of petitioner Orchard Park Police Benevolent Association, Inc. (PBA) and thus had no right to file a grievance or to seek arbitration with respondent. Supreme Court denied respondent's cross motion to stay arbitration and granted petitioners' cross motion to compel it. We affirm.

In determining whether a claim is arbitrable in the public

sector, courts must conduct a two-step inquiry (*see Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 137-138). First, a court must determine " 'whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance' " (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79). Second, if there is no such prohibition against arbitrating the grievance at issue, then a court must determine " 'whether such authority was in fact exercised and whether the parties did agree by the terms of their particular arbitration clause to refer their differences in this specific area to arbitration' " (*Board of Educ. of Watertown City School Dist.*, 93 NY2d at 138).

Here, there is no question that the first part of the inquiry was satisfied (*see Matter of City of Ithaca [Ithaca Paid Fire Fighters Assn., IAFF, Local 737]*, 29 AD3d 1129, 1130-1131). With respect to the second part of the inquiry, the fact that the retirees are not members of the PBA or represented by it in collective bargaining negotiations is not determinative in a threshold arbitrability analysis (*see Ledain v Town of Ontario*, 192 Misc 2d 247, 254-256, *affd for the reasons stated* 305 AD2d 1094; *Della Rocco v City of Schenectady*, 252 AD2d 82, 84-85, *lv dismissed* 93 NY2d 1000). Rather, issues concerning the PBA's relationship to retired employees, issues concerning whether retirees are covered by the grievance procedure, and issues concerning whether the clauses of the contract support the grievance are matters involving the scope of the substantive contractual provisions and, as such, are for the arbitrator (*see Matter of Vestal Cent. School Dist. [Vestal Teachers Assn.]*, 2 AD3d 1190, 1192, *lv denied* 2 NY3d 708). We note in addition that New York's public policy encourages arbitration of labor disputes involving public employees (*see Matter of Board of Educ. of W. Irondequoit Cent. School Dist. v West Irondequoit Teachers Assn.*, 55 AD2d 1037, 1038). We thus conclude that the court did not err in granting petitioners' cross motion to compel arbitration. We have considered the remaining contentions of respondent and conclude that they are without merit.

Entered: February 10, 2012 Frances E. Cafarell
Clerk of the Court

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

112
CA 11-01637

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

AYESHA DELK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KENNETH J. JOHNSON, DEFENDANT-RESPONDENT.

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (SEAN M. SPENCER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered November 10, 2010 in a personal injury action. The order, among other things, granted defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when a vehicle owned and operated by defendant rear-ended the vehicle she was driving. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and plaintiff cross-moved for, inter alia, partial summary judgment on liability. Supreme Court granted defendant's motion and dismissed the complaint. We now affirm.

According to her bill of particulars, plaintiff sustained a serious injury under the permanent loss of use, the permanent consequential limitation of use, the significant limitation of use, and the 90/180-day categories of serious injury. In opposition to the motion, however, plaintiff abandoned her contentions with respect to all categories of serious injury with the exception of the 90/180-day category, nor does she contend on appeal that the court erred in denying her cross motion (*see Ciesinski v Town of Aurora*, 202 AD2d 984). We therefore consider only whether the court properly granted that part of defendant's motion with respect to the 90/180-day category.

Defendant met his initial burden on the motion by submitting the affirmed reports of two physicians who examined plaintiff at his request and concluded that there was no objective evidence that

plaintiff sustained a serious injury as a result of the accident (*see Lauffer v Macey*, 74 AD3d 1826, 1827). In addition, defendant submitted plaintiff's deposition testimony in which she testified that, although she missed time from her physically demanding part-time job, she was still able "to perform substantially all of the material acts that constituted [her] usual and customary daily activities" (*Robinson v Polasky*, 32 AD3d 1215, 1216).

In opposition to the motion, plaintiff submitted, inter alia, an MRI report and an affirmation from her treating physician. Although both submissions raise triable issues of fact whether plaintiff sustained an injury in the accident, neither is sufficient to raise a triable issue of fact whether that injury prevented her " 'from performing substantially all of the material acts which constitute [her] usual and customary daily activities' for at least 90 out of the 180 days immediately following the accident" (*Hoffmann v Stechenfinger*, 4 AD3d 778, 780, quoting Insurance Law § 5102 [d]; *see Elmer v Amankwaah*, 2 AD3d 1350). Even assuming, arguendo, that plaintiff's inability to return to her part-time employment curtailed her daily activities to a great extent, we conclude that plaintiff nevertheless failed to establish that she was disabled from working 90 out of the 180 days immediately following the accident (*see Travis v Batchi*, 18 NY3d 208, 220).

Entered: February 10, 2012 Frances E. Cafarell
Clerk of the Court

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

113
CA 11-01514
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF JOHN MULLIGAN, MARION PITCHER,
VINCENT CASALARE, JAMES CASALARE, RUTH CASALARE,
KARIN LANGE, MARTIN HARDING AND BRENDA HARDING,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

DIAMOND DREAMS AT COOPERSTOWN LTD., COOPERSTOWN
PROPERTY GROUP LLC, TOWN OF WARREN TOWN BOARD
AND MITCHELL VANWINKLER, SOLELY IN HIS CAPACITY
AS TOWN OF WARREN CODE ENFORCEMENT OFFICER,
RESPONDENTS-RESPONDENTS.

DOUGLAS H. ZAMELIS, MANLIUS, FOR PETITIONERS-APPELLANTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (ANDREW J. LEJA OF COUNSEL), FOR
RESPONDENT-RESPONDENT DIAMOND DREAMS AT COOPERSTOWN LTD.

Appeal from a judgment (denominated order) of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered April 25, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the first cause of action of petitioners.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the first cause of action in the petition is granted.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, in their first cause of action, to annul all determinations of respondent Town of Warren Town Board (Town Board) purportedly made pursuant to the State Environmental Quality Review Act ([SEQRA] ECL art 8). We agree with petitioners that Supreme Court erred in refusing to grant the relief sought in the first cause of action and thus that reversal is required. As petitioners correctly contend, the Town Board was ineligible to act as lead agency for SEQRA purposes. SEQRA requires an environmental impact statement to be prepared by agencies "on any *action* they propose or approve which may have a significant effect on the environment" (ECL 8-0109 [2] [emphasis added]). An "action" includes a project "involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use or permission to act by one or more agencies" (ECL 8-0105 [4] [i]). However, an "action" does not include "official acts of a ministerial nature, involving no exercise of discretion" (ECL 8-0105 [5] [ii]; *see* 6 NYCRR 617.2 [w]; 617.5 [c] [19]). Thus,

ministerial official acts are not subject to SEQRA review.

Here, the developer of the real estate project in question applied to various state agencies for permits, and those agencies allowed the Town Board to act as lead agency for SEQRA review. The Town Board, however, did not have authority to issue any approvals for the project, and it therefore was without jurisdiction to act as lead agency under SEQRA (*see* 6 NYCRR 617.2 [s], [u]). Respondents failed to specify any section of the Town of Warren Code or any regulation under which the Town Board was acting when it reviewed this project. At most, the Town Board or respondent Town of Warren Code Enforcement Officer issued the building permits based on compliance with a conventional building code, which is not enough to trigger the Town Board's authority to act as lead agency under SEQRA (*see Matter of Steele v Town of Salem Planning Bd.*, 200 AD2d 870, 872-873, *lv denied* 83 NY2d 757; *Matter of Cokertown/Spring Lake Envtl. Assn. v Zoning Bd. of Appeals of Town of Milan*, 169 AD2d 765, 767; *see generally Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d 322, 326).

Entered: February 10, 2012 Frances E. Cafarell
Clerk of the Court

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

115
CA 11-01126
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

ANN M. SAWYER AND JEFFREY M. SAWYER,
PLAINTIFFS-APPELLANTS,

V ORDER

VICTOR RUTECKI, THE RUTECKI AGENCY AND WNY
AGENTS GROUP, INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

HODGSON RUSS LLP, BUFFALO (HEATHER K. ZIMMERMAN OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

KEIDEL, WELDON & CUNNINGHAM, LLP, SYRACUSE (CHRISTOPHER B. WELDON OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 29, 2011. The order granted defendants' motion for summary judgment dismissing plaintiffs' complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

116
CA 11-01127
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

ANN M. SAWYER AND JEFFREY M. SAWYER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VICTOR RUTECKI, THE RUTECKI AGENCY AND WNY
AGENTS GROUP, INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

HODGSON RUSS LLP, BUFFALO (HEATHER K. ZIMMERMAN OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

KEIDEL, WELDON & CUNNINGHAM, LLP, SYRACUSE (CHRISTOPHER B. WELDON OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 14, 2011. The judgment dismissed plaintiffs' complaint on the merits.

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

Memorandum: Plaintiffs, the owners of an apartment building in Buffalo that was damaged in a fire, commenced this action asserting causes of action for breach of contract, breach of fiduciary duty and negligence premised upon defendants' alleged failure to notify plaintiffs that their insurance policy for the premises had been cancelled prior to the fire and their failure to procure new coverage. Victor Rutecki (defendant) was plaintiffs' insurance agent, and the remaining defendants are his associated business entities. At plaintiffs' request, defendant procured insurance for the premises from Allegany Co-Op Insurance Company (Allegany). Shortly after the subject policy was issued, Allegany sent an inspector to examine the property for underwriting purposes. Following that inspection, which revealed problems related to the condition of the property, Allegany cancelled the insurance policy. In support of their motion, defendants submitted evidence that Allegany sent a letter to plaintiffs by certified mail notifying them of the cancellation, and plaintiffs thereafter failed to obtain new coverage. Less than eight months later, the subject fire caused extensive damage to the uninsured property.

We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. Although

"insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so[,] . . . they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (*Murphy v Kuhn*, 90 NY2d 266, 270). "Exceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law" (*id.* at 272). For instance, where a "special relationship" develops between an agent and the insured, the agent may be held to have assumed duties in addition to merely "obtain[ing] requested coverage" (*id.* at 270). Such a special relationship may arise where "(1) the agent receives compensation for consultation apart from payment of the premiums . . . (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent . . .; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on" (*id.* at 272).

Here, defendants met their initial burden on the motion, and plaintiffs failed to raise a triable issue of fact to defeat it (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Specifically, defendants established that defendant did not have a special relationship with plaintiffs by submitting evidence that defendant received no compensation from plaintiffs over and above the commissions he received for the insurance policies he had procured, that plaintiffs did not use defendant as their exclusive agent, and that Jeffrey M. Sawyer (plaintiff) retained final decision-making authority over what coverage to obtain. Even accepting as true plaintiffs' allegations that they informed defendant that plaintiff had health issues and that plaintiff referred to defendant as his "insurance guy," we conclude that the uncontroverted evidence establishes that the interactions between the parties "would [not] have put [an] objectively reasonable insurance agent[] on notice that [his or her] advice was being sought and specially relied on" (*Murphy*, 90 NY2d at 272). We note that plaintiffs had known defendant for only three years prior to the fire, and that defendant had obtained insurance coverage for only three of the six rental properties owned by plaintiffs.

We also reject plaintiffs' contention that defendant was negligent in failing to inform them that the policy had been cancelled. Defendant satisfied his duty to plaintiffs by procuring the Allegany policy, and no further duty was imposed on defendant based on the subsequent cancellation of the policy (*see Thompson & Bailey, LLC v Whitmore Group, Ltd.*, 34 AD3d 1001, 1002-1003, *lv denied* 8 NY3d 807). Moreover, as noted, defendants submitted evidence that Allegany notified plaintiffs of the policy cancellation by certified mail, and plaintiffs failed to overcome the presumption of receipt that attaches to such mailing (*see generally Nassau Ins. Co. v Murray*, 46 NY2d 828, 829-830).

Entered: February 10, 2012 Frances E. Cafarell
Clerk of the Court

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

118.1
CAE 11-02587
PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF RICHARD A. SLISZ, CANDIDATE
FOR COUNCILMEMBER, THIRD WARD, CITY OF TONAWANDA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AUGUSTINE R. BEYER, CANDIDATE FOR COUNCILMEMBER,
THIRD WARD, CITY OF TONAWANDA, AND RALPH M. MOHR
AND DENNIS E. WARD, COMMISSIONERS, CONSTITUTING
THE ERIE COUNTY BOARD OF ELECTIONS,
RESPONDENTS-RESPONDENTS.

PETER A. REESE, BUFFALO, FOR PETITIONER-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (EMILIO COLAIACOVO OF COUNSEL), FOR RESPONDENT-RESPONDENT AUGUSTINE R. BEYER, CANDIDATE FOR COUNCILMEMBER, THIRD WARD, CITY OF TONAWANDA.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 22, 2011 in a proceeding pursuant to the Election Law. The order, among other things, dismissed the petition.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion to dismiss is denied, the petition is reinstated and the matter is remitted to Supreme Court, Erie County, for further proceedings on the petition.

Memorandum: Petitioner, Richard A. Slisz, and Augustine R. Beyer (respondent) were candidates for the public office of Councilmember for the Third Ward in the City of Tonawanda (Councilmember office). Following the election on November 8, 2011, and after absentee, military and affidavit ballots were counted, the official results were that respondent had received 435 votes and petitioner had received 434 votes. Thirty-one ballots were deemed “Blank, Void & Scattering” ballots.

Petitioner commenced this special proceeding seeking, inter alia, a manual audit of the voter verifiable audit records of all the ballots cast in the general election for the Councilmember office. He contended that the scanning devices improperly tabulated an absentee ballot as a vote in favor of respondent when it should have been

registered as an " 'overvote' " and not counted for either candidate. In addition, petitioner contended that the scanning devices are not capable of detecting all of the marks that should be deemed valid votes pursuant to 9 NYCRR 6210.15, including symbols such as X, ✓, ➜, and ⬅. According to petitioner, the "obvious limitations" in the scanning devices, when combined with the one-vote margin of victory, created a substantial possibility that the winner of the election as reflected in the voting machine or system tally could change if a voter verifiable record audit were conducted.

Respondent filed a motion to dismiss the petition in lieu of answering it, contending that there was no voting machine error related to the alleged "overvote" absentee ballot inasmuch as both the voting machine and respondent Commissioners of the Erie County Board of Elections had accurately counted the vote as one for respondent. With respect to the 31 votes that were not counted for either candidate, respondent contended that petitioner had failed to establish any "material discrepancy" in the election results to warrant the manual audit sought by petitioner.

Although respondent did not cite a statutory basis for his motion to dismiss, we conclude that it was a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action. When the parties appeared before Supreme Court for argument of the motion, petitioner's attorney stated that he had an expert who would testify concerning the capability of the voting machines to read the otherwise valid markings. After petitioner's attorney conceded that the questionable "overvote" ballot was clearly a vote for respondent, the court adjourned the proceeding in order to receive the results of the manual audit required by Election Law § 9-211 and 9 NYCRR 6210.18. At the next court appearance, respondent Commissioner Ralph M. Mohr testified that there were no unresolved discrepancies found during the mandatory audit, but the court refused to allow petitioner to cross-examine Mohr on the capability of the machines to read the votes that would be considered valid votes pursuant to 9 NYCRR 6210.15. Petitioner was also not afforded the opportunity to have his expert testify on that subject. The court granted respondent's motion and dismissed the petition, determining that petitioner had not met his burden of establishing the existence of a material discrepancy.

We agree with petitioner that the court erred in granting respondent's motion. Pursuant to Election Law § 16-113, the court, in a special proceeding brought by any candidate, may direct a manual audit of the voter verifiable audit records applicable to that candidate where either the mandatory audit required by Election Law § 9-211 and 9 NYCRR 6210.18 requires a further voter verifiable record audit of additional voting machines or "where evidence presented to the court otherwise indicates that there is a likelihood of a material discrepancy between such manual audit tally and such voting machine or system tally, or a discrepancy as defined in [section 9-208 (3)], which creates a substantial possibility that the winner of the

election as reflected in the voting machine or system tally could change if a voter verifiable record audit of additional voting machines or systems or of all voting machines or systems applicable to such election were conducted."

Here, it is undisputed that there were no unresolved discrepancies during the mandatory audit and thus no basis for a further verifiable record audit under Election Law § 9-211 or 9 NYCRR 6210.18. We also note that petitioner has not alleged any discrepancy as defined in Election Law § 9-208 (3). Thus, petitioner's only basis for the contention that there should be a manual audit is that there is "a likelihood of a material discrepancy between such manual audit tally and such voting machine or system tally" (§ 16-113 [2]). Because only one vote separated the two candidates, petitioner contends that there is a "substantial possibility that the winner of the election as reflected in the voting machine or system tally could change" (*id.*).

Pursuant to CPLR 103 (b), the procedures to be followed in special proceedings such as the instant proceeding "shall be the same as in actions, and the provisions of the [CPLR] applicable to actions shall be applicable to special proceedings." The procedures for special proceedings are found in CPLR article 4, which permits a motion to dismiss in lieu of an answer (*see* CPLR 404 [a]; *see also* CPLR 3211 [f]), but also provides for a hearing or a trial on issues of fact (*see* CPLR 409, 410). Only if no triable issues of fact are raised may a court make a summary determination following the hearing (*see* CPLR 409 [b]).

In Election Law special proceedings, as with other proceedings in which a party moves to dismiss the petition under CPLR 3211, the allegations of the petition must be deemed true (*see Matter of Landry v Mansion*, 65 AD3d 803, 804). In our view, "[p]etitioner[] [has] set forth sufficient allegations to avoid dismissal under the liberal standard applicable to CPLR 3211 motions" (*Matter of Fingar v Martin*, 68 AD3d 1435, 1436; *see generally Leon v Martinez*, 84 NY2d 83, 87-88). We thus conclude that the court erred in granting the motion to dismiss without affording petitioner the opportunity to present evidence, and we remit the matter to Supreme Court for further proceedings on the petition.

All concur except MARTOCHE, J., who concurs in the result in the following Memorandum: I respectfully concur in the result reached by the majority, namely, reversal of the order granting the motion of respondent Augustine R. Beyer to dismiss the petition and remittal of the matter to Supreme Court for further proceedings on the petition. The majority, however, in my view, does not provide sufficient guidance to Supreme Court on remittal. There is no question that the election was decided by one vote, and that there were 31 votes that were not counted for either candidate. Unfortunately, those 31 votes have not been segregated from the remaining votes, and thus it is not

possible for petitioner to examine only those 31 votes to determine if they erroneously were not counted in accordance with 9 NYCRR 6210.15. At a minimum, petitioner should be allowed to question representatives of the Erie County Board of Elections regarding the basis for the 31 uncounted votes and to present expert testimony on the issue of the capability of the voting machines to read otherwise valid markings.

Importantly, I note that the court erred in requiring petitioner to prove the actual existence of a material discrepancy in order to survive the pre-answer motion to dismiss. Rather, the correct burden of proof to survive the motion is for petitioner to show the likelihood of a material discrepancy between a manual audit tally and the voting machine or system tally (*see* Election Law § 16-113 [2]).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

138
CA 11-01801
PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ.

TONYA BRIGGS-DANIELS, PLAINTIFF-APPELLANT,

V ORDER

RICHARD A. MILLER AND WILLIAM J. WALTERS,
DOING BUSINESS AS WW SERVICES,
DEFENDANTS-RESPONDENTS.

LAW OFFICES OF JAMES MORRIS, BUFFALO (JAMES E. MORRIS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF DESTIN SANTACROSE, BUFFALO (CHERYL A. KRZYWICKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered November 9, 2010 in a personal injury action. The order denied the motion of plaintiff for summary judgment, granted the cross motion of defendants for summary judgment and dismissed the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties and filed on February 6, 2012,

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

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

170

KA 11-01543

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK BONA, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered April 5, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]). We agree with defendant that he should have been permitted to withdraw his plea. Defendant was arraigned on an indictment before County Court (Fahey, J.). The matter was then transferred to the Syracuse Community Treatment Court (drug court) for an alcohol and substance abuse evaluation and consideration of judicial diversion pursuant to CPL 216.05 (1). The parties and the drug court, i.e., Acting County Court Judge Merrill, agreed to defendant's participation in alcohol and substance abuse treatment (*see* CPL 216.05 [4]), and defendant entered his plea. Although at the time of the plea the drug court indicated that there would be a "[d]rug [c]ourt contract," at no time did defendant "agree on the record or in writing to abide by the release conditions" of drug court (CPL 216.05 [5]). Rather, when defendant returned to drug court a few weeks later to sign the contract, he decided to forego judicial diversion. When the drug court indicated that it would proceed to sentencing, defendant moved to withdraw his plea, and the motion was denied.

We agree with defendant that he never entered judicial diversion and thus that the drug court should have granted his motion and

transferred the matter back to County Court for further proceedings. We disagree with the drug court that defendant entered judicial diversion and then voluntarily terminated his participation pursuant to CPL 216.05 (9) (e). There was never an order issued pursuant to CPL 216.05 (4) granting judicial diversion and, although a plea was entered pursuant to that section, there was no agreement by defendant on the record or in writing to the terms and conditions of drug court as set forth in CPL 216.05 (5).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

171
KA 10-00555
PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND LINDLEY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBBY J. GUPPY, DEFENDANT-APPELLANT.

AMY L. HALLENBECK, FULTON, FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered March 1, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the third degree (three counts) and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of three counts of assault in the third degree (Penal Law § 120.00 [1]) and one count of endangering the welfare of a child (§ 260.10 [1]), defendant contends that County Court abused its discretion in denying his request for youthful offender status. "Having considered the facts and circumstances of this case," we reject that contention (*People v Potter*, 13 AD3d 1191, *lv denied* 4 NY3d 889; *see People v Buryta*, 85 AD3d 1621; *see generally* CPL 720.20 [1] [a]). We decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see generally People v Shrubsall*, 167 AD2d 929, 930-931). Finally, we note that the certificate of conviction incorrectly recites that defendant was convicted of endangering the welfare of a child under Penal Law § 261.10 (1), and it must therefore be amended to reflect that he was convicted of that crime under Penal Law § 260.10 (1) (*see People v Saxton*, 32 AD3d 1286).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

173

KA 10-01512

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

THOMAS DECROCE, DEFENDANT-APPELLANT.

JOHN A. HERBOWY, ROME, FOR DEFENDANT-APPELLANT.

JOHN H. CRANDALL, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Herkimer County Court (Patrick L. Kirk, J.), entered May 26, 2010. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on January 10 and 18, 2012, and signed by the defendant,

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

177

KA 11-00102

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

NATHANIEL STOKES, 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 (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 6, 2011. The judgment convicted defendant, after a nonjury trial, of burglary in the second degree.

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

179
OP 11-00539
PRESENT: CENTRA, J.P., FAHEY, CARNI, AND LINDLEY, JJ.

IN THE MATTER OF DANIEL T. WARREN, PETITIONER,

V MEMORANDUM AND ORDER

ROBERT J. BIELECKI, COMPTROLLER, TOWN OF WEST SENECA AND WALLACE C. PIOTROWSKI, BUDGET OFFICER AND SUPERVISOR, TOWN OF WEST SENECA, RESPONDENTS.

DANIEL T. WARREN, PETITIONER PRO SE.

PAUL M. MICHALEK, JR., WEST SENECA, FOR RESPONDENT ROBERT J. BIELECKI, COMPTROLLER, TOWN OF WEST SENECA.

PHILLIPS LYTLE LLP, BUFFALO (TIMOTHY W. HOOVER OF COUNSEL), FOR RESPONDENT WALLACE C. PIOTROWSKI, BUDGET OFFICER AND SUPERVISOR, TOWN OF WEST SENECA.

Proceeding pursuant to Public Officers Law § 36 (commenced in the Appellate Division of the Supreme Court in the Fourth Judicial Department) for the removal of respondents from public office.

It is hereby ORDERED that said petition is unanimously dismissed without costs as moot.

Memorandum: Petitioner commenced this proceeding to remove respondents from public office pursuant to Public Officers Law § 36. Inasmuch as respondents no longer hold public office, the proceeding is moot (*see Matter of Copp v Lankford*, 283 AD2d 980; *Matter of McCoach v Maine*, 247 AD2d 784; *Matter of DeFalco v Doetsch*, 208 AD2d 1047, 1048). In any event, we note that, based on the findings of fact made by the Referee appointed by this Court, there would be insufficient grounds upon which to remove either respondent from office pursuant to Public Officers Law § 36, which requires evidence of “self-dealing, corrupt activities, conflict of interest, moral turpitude, intentional wrongdoing or violation of a public trust” (*Matter of Jones v Filkins*, 238 AD2d 954 [internal quotation marks omitted]; *see also Matter of Morin v Gallagher*, 221 AD2d 765).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

180
CAF 11-00267
PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND LINDLEY, JJ.

IN THE MATTER OF XAVIER C.

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

LOUIS C., RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT.

DEANA PREVITE, UTICA, FOR PETITIONER-RESPONDENT.

MONICA R. BARILE, ATTORNEY FOR THE CHILD, NEW HARTFORD, FOR XAVIER C.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered January 21, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

181
CAF 10-01930
PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND LINDLEY, JJ.

IN THE MATTER OF YASMANY DELGADO,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

JUSTINA FRIAS,
RESPONDENT-PETITIONER-APPELLANT.

LEAH K. BOURNE, ROCHESTER, FOR RESPONDENT-PETITIONER-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered August 6, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded the parties joint physical and legal custody of their children and divided their decision-making authority.

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

Memorandum: Respondent-petitioner mother appeals from an order that awarded the parties joint physical and legal custody of their children, granted petitioner-respondent father sole decision-making authority with respect to the children's educational and extracurricular activities and granted the mother sole decision-making authority with respect to the children's medical and religious interests. Contrary to the contention of the mother, Family Court properly refused to award her primary physical custody of the children. "Both parties sought primary physical custody, and the court's determination that joint physical custody is in the children's best interests is supported by a sound and substantial basis in the record and thus will not be disturbed" (*Wideman v Wideman*, 38 AD3d 1318, 1319 [internal quotation marks omitted]). Contrary to the mother's further contention, given the parties' past acrimony, the court properly determined "that it was appropriate to divide the decision-making authority with respect to the children" (*id.; see Matter of Ring v Ring*, 15 AD3d 406, 407).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

182
CAF 10-01967
PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND LINDLEY, JJ.

IN THE MATTER OF KENNETH L.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

MICHELLE B., RESPONDENT-APPELLANT.

JOHN M. MURPHY, JR., PHOENIX, FOR RESPONDENT-APPELLANT.

CARACCIOLI & NELSON, PLLC, WATERTOWN (KEVIN C. CARACCIOLI OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN A. SOVIE, ATTORNEY FOR THE CHILD, WATERTOWN, FOR KENNETH L.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered August 30, 2010 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of respondent to vacate an order terminating her parental rights upon her default.

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

Memorandum: Respondent mother appeals from an order denying her motion to vacate a prior order entered upon her default that terminated her parental rights with respect to the subject child on the ground of permanent neglect. The mother contends that Family Court erred in reinstating the permanent neglect petition on the ground that there had been a substantial failure of a material condition of her judicial surrender of the child. We conclude that the mother waived that contention, inasmuch as her attorney conceded that the petition may be reinstated (*see generally Matter of Brayanna G.*, 66 AD3d 1375, *lv denied* 13 NY3d 714). Contrary to the further contention of the mother, her attorney's failure to contest reinstatement of the petition does not constitute ineffective assistance of counsel. The mother's attorney "cannot be deemed ineffective for failing to make a motion or response to a motion that is unlikely to be successful" (*Matter of Jamaal NN.*, 61 AD3d 1056, 1058, *lv denied* 12 NY3d 711) and, here, the court properly granted petitioner's motion to reinstate the petition. We also reject the mother's contention that she was denied effective assistance of counsel based on, inter alia, her attorney's failure to request an adjournment when the mother did not appear at the fact-finding and dispositional hearing. The court delayed the hearing for 45 minutes

and, when the mother still failed to appear, her attorney asked to be relieved from his representation of the mother in order to preserve the mother's opportunity to move to vacate any default order entered against her. We conclude that such tactical decision on the part of the mother's attorney does not constitute ineffective assistance of counsel (*see Matter of Geraldine Rose W.*, 196 AD2d 313, 319-320, *lv dismissed* 84 NY2d 967; *see generally Matter of Derrick C.*, 52 AD3d 1325, 1326, *lv denied* 11 NY3d 705).

Finally, we conclude that the court properly exercised its discretion in denying the mother's motion to vacate the order entered upon her default. Contrary to the mother's contention, her allegation in support of the motion that she missed the hearing because her vehicle broke down and she could not find alternative transportation does not constitute a reasonable excuse for her default because she failed to provide a credible explanation for her failure to advise the court or petitioner of her unavailability (*see Matter of Lastanzea L.*, 87 AD3d 1356). Although the mother alleged that she contacted her attorney, he stated on the record that he did not receive any communication from the mother. The mother also failed to demonstrate a meritorious defense to the petition (*see Matter of Alexis C.R.*, 71 AD3d 1511, *lv dismissed* 14 NY3d 922; *Matter of Zabrina M.*, 17 AD3d 1132, *lv denied* 5 NY3d 710), and she failed to explain her four-month delay in seeking to vacate the order entered upon her default (*see Lastanzea L.*, 87 AD3d 1356; *Matter of Tashona Sharmaine A.*, 24 AD3d 135).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

185
CA 11-00962
PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND LINDLEY, JJ.

IN THE MATTER OF DAVID K. ROBIDA,
PETITIONER-APPELLANT,

V — MEMORANDUM AND ORDER

CHRISTINE M. ZIEMBA, CHIEF OF POLICE,
CHEEKTOWAGA POLICE DEPARTMENT, AND TOWN OF
CHEEKTOWAGA, RESPONDENTS-RESPONDENTS.

LAW OFFICES OF W. JAMES SCHWAN, BUFFALO (W. JAMES SCHWAN OF COUNSEL), FOR PETITIONER-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated decision, order and judgment) of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered February 2, 2011 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition as untimely.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating him from his employment as a police officer. Supreme Court properly granted respondents' motion to dismiss the proceeding as time-barred. The amended charges against petitioner were brought pursuant to both Civil Service Law § 75 and Town Law § 155, and a hearing was held in accordance with those statutes. The Town Board of respondent Town of Cheektowaga (Town Board) adopted a resolution that terminated petitioner pursuant to, inter alia, Town Law § 155 for acts of off-duty misconduct that the Town Board determined to be "acts of delinquency seriously affecting [petitioner's] general character and fitness for office."

Town Law § 155 specifically provides that a CPLR article 78 proceeding to review a determination pursuant to the statute must be commenced within 30 days of the determination and, inasmuch as it is undisputed that this proceeding was commenced more than 30 days after the Town Board's determination, it is time-barred (*see generally Matter of Flores v Board of Trustees of Vil. of Dobbs Ferry*, 37 AD3d 718, 719-720, *lv denied* 8 NY3d 815; *Matter of Smith v Village of Pawling*, 215 AD2d 667; *Matter of Healy v Village of Cooperstown*, 70

AD2d 712). Contrary to petitioner's contention, the 30-day limitations period set forth in Town Law § 155 is not limited to those disciplinary proceedings that were brought solely pursuant thereto. The statute of limitations for a CPLR article 78 proceeding in which the petitioner seeks to annul a determination pursuant to Civil Service Law § 75 is governed by CPLR 217 (1), which provides that, "[u]nless a shorter time is provided in the law authorizing the proceeding," the proceeding must be commenced within four months after the determination to be reviewed becomes final. Here, such "shorter time" was provided by Town Law § 155, which authorized the disciplinary proceeding and under which petitioner's employment was terminated.

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

193

CA 11-01828

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

IN THE MATTER OF FREDERICK GRAM AND JANE GRAM,
PETITIONERS-APPELLANTS,

V ORDER

ASSESSORS OF TOWN OF CUBA AND BOARD OF
ASSESSMENT REVIEW OF TOWN OF CUBA,
RESPONDENTS-RESPONDENTS.

SHANE & REISNER, LLP, ALLEGANY (JEFFREY P. REISNER OF COUNSEL), FOR PETITIONERS-APPELLANTS.

RICHARDSON & PULLEN, P.C., FILLMORE (DAVID T. PULLEN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Allegany County (Patrick H. NeMoyer, J.), entered February 22, 2011 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: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

194
CAF 11-00689
PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND LINDLEY, JJ.

IN THE MATTER OF MAKAYLA L.P.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

ALECIA M.P., RESPONDENT,
AND DAVID S., RESPONDENT-APPELLANT.

RAYMOND P. KOT, II, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

ALAN P. REED, COUNTY ATTORNEY, BATH (RUTH A. CHAFFEE OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHRISTINE M. VALKENBURGH, ATTORNEY FOR THE CHILD, BATH, FOR MAKAYLA L.P.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered March 9, 2011 in a proceeding pursuant to Family Court Act article 10. The order determined the subject child to be neglected.

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

Memorandum: Respondent father appeals from an order of fact-finding adjudging, inter alia, that he neglected his child. To establish neglect, petitioner was required to prove by a preponderance of the evidence that the child's condition was in imminent danger of impairment based on the father's failure to exercise a minimum degree of parental care in providing proper supervision or guardianship, by unreasonably inflicting harm or creating a substantial risk thereof (*see* Fam Ct Act § 1012 [f] [i] [B]; § 1046 [b] [i]). We conclude that petitioner met its burden. Petitioner presented evidence at the fact-finding hearing establishing that the father was convicted, upon his plea of guilty, of attempted sodomy in the first degree (Penal Law § 110.00, former § 130.50 [4]) and that he was designated a risk level two sex offender based on that conviction. The father admitted that his conviction arose out of an incident that occurred when he was 21 years old and in which he sexually abused his 12-year-old mentally challenged stepsister while he was baby-sitting her. Following his release from prison in 2009, the father did not voluntarily engage in or complete sex offender treatment for his own benefit or the benefit of his family, despite being notified that he needed to do so.

In addition, petitioner demonstrated that, since his release from prison, the father was convicted of assault in the third degree (Penal Law § 120.00) for allegedly biting, pinching and threatening to kill respondent mother. The father also was convicted of unlawful fleeing a police officer in a motor vehicle in the third degree (§ 270.25) and aggravated unlicensed operation of a motor vehicle in the second degree (Vehicle and Traffic Law § 511 [2] [a] [iv]), arising from an incident in which he drove a van in excess of 80 miles per hour while being pursued by the police and with the mother in the vehicle. Further, several orders of protection have been issued against the father in favor of the mother, the father's mother and the foster parents. We therefore conclude, under the circumstances of this case, that there is no reason to disturb Family Court's finding of neglect, which is well supported by the record (*see Matter of Christopher C.*, 73 AD3d 1349, 1351; *Matter of Merrick T.*, 55 AD3d 1318).

Contrary to the father's contention, *Matter of Afton C.* (17 NY3d 1) does not require reversal. In that case, the Court of Appeals determined that the mere fact that a parent was adjudicated a risk level three sex offender and never sought treatment was insufficient to "demonstrate that [the parent] breached a minimum duty of parental care and pose[d] a near or impending harm to his [or her] children" (*id.* at 11). Nevertheless, the Court of Appeals made clear that, where, as here, there are other factors supporting a neglect finding, including a prior conviction arising from abuse of a young relative in the parent's care, the evidence that a parent has been adjudicated a sex offender may be sufficient to establish neglect (*id.*). We therefore conclude that the serious nature of the circumstances underlying the father's sex offense and the aforementioned examples of his reckless behavior since being released from prison render *Afton C.* inapposite.

Finally, the father's contention that his constitutional rights were violated is without merit (*see generally Matter of Tammie Z.*, 66 NY2d 1, 3).

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court

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

811
CA 11-00112
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

WILLIAM C. PRENTICE,
PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

ROYAL NICKERSON,
DEFENDANT-RESPONDENT-RESPONDENT,
NORNEW, INC. AND NORSE ENERGY CORP.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA, LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

DWYER, BLACK & LYLE, LLP, OLEAN (JEFFREY A. BLACK OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (THOMAS E. ROBERTS OF COUNSEL), FOR DEFENDANT-RESPONDENT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered September 29, 2010. The order, among other things, granted plaintiff's motion for partial summary judgment, granted defendant Royal Nickerson's motion for summary judgment on its cross claim for common-law indemnification and granted in part the cross motion of defendants Nornew, Inc. and Norse Energy Corp. for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 3, 4 and 19, 2012,

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

Entered: February 10, 2012

Frances E. Cafarell
Clerk of the Court