



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

DECISIONS FILED

JUNE 12, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

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CA 08-00492

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

IN THE MATTER OF ROBERT P. MEEGAN, JR.,
INDIVIDUALLY AND AS PRESIDENT OF BUFFALO
POLICE BENEVOLENT ASSOCIATION, AND BUFFALO
POLICE BENEVOLENT ASSOCIATION,
PETITIONERS-RESPONDENTS-APPELLANTS,

V

MEMORANDUM AND ORDER

BYRON W. BROWN, MAYOR OF CITY OF BUFFALO,
CITY OF BUFFALO AND BUFFALO FISCAL STABILITY
AUTHORITY, RESPONDENTS-APPELLANTS-RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF JOSEPH E. FOLEY, INDIVIDUALLY
AND AS PRESIDENT OF BUFFALO PROFESSIONAL
FIREFIGHTERS ASSOCIATION, INC., LOCAL 282,
IAFF, AFL-CIO-CLC, AND BUFFALO PROFESSIONAL
FIREFIGHTERS ASSOCIATION, INC., LOCAL 282,
IAFF, AFL-CIO-CLC, PETITIONERS-RESPONDENTS,

V

BYRON W. BROWN, MAYOR OF CITY OF BUFFALO,
CITY OF BUFFALO AND BUFFALO FISCAL STABILITY
AUTHORITY, RESPONDENTS-APPELLANTS.
(PROCEEDING NO. 2.)

BUFFALO TEACHERS FEDERATION, INC., NYSUT,
BUFFALO EDUCATIONAL SUPPORT TEAM, NYSUT,
TRANSPORTATION AIDES OF BUFFALO, NYSUT, AFSCME
LOCAL 264, AND PROFESSIONAL, CLERICAL AND
TECHNICAL EMPLOYEES ASSOCIATION,
PLAINTIFFS-RESPONDENTS,

V

BUFFALO BOARD OF EDUCATION FOR CITY SCHOOL
DISTRICT OF CITY OF BUFFALO AND BUFFALO FISCAL
STABILITY AUTHORITY, DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (MATTHEW C. VAN VESSEM OF
COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS AND RESPONDENTS-
APPELLANTS BYRON W. BROWN, MAYOR OF CITY OF BUFFALO, AND CITY OF
BUFFALO.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR RESPONDENT-APPELLANT-RESPONDENT, RESPONDENT-APPELLANT AND DEFENDANT-APPELLANT BUFFALO FISCAL STABILITY AUTHORITY.

DAMON & MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-APPELLANT BUFFALO BOARD OF EDUCATION FOR CITY SCHOOL DISTRICT OF CITY OF BUFFALO.

W. JAMES SCHWAN, BUFFALO, FOR PETITIONERS-RESPONDENTS-APPELLANTS.

CREIGHTON, PEARCE, JOHNSEN & GIROUX, BUFFALO (E. JOSEPH GIROUX, JR., OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

JAMES R. SANDNER, LATHAM (ANDREW D. ROTH, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals and cross appeal from a judgment (denominated order) of the Supreme Court, Erie County (John A. Michalek, J.), entered November 14, 2007 in CPLR article 78 proceedings and a declaratory judgment action. The judgment, among other things, granted the amended petitions in proceeding Nos. 1 and 2 and granted plaintiffs' motion for summary judgment in action No. 1.

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

Memorandum: In light of a State Comptroller's report concerning a fiscal crisis in the City of Buffalo (City), a respondent in proceeding Nos. 1 and 2, the Legislature passed the Buffalo Fiscal Stability Authority Act (Act) on July 3, 2003 to address that fiscal crisis (see Public Authorities Law § 3850 et seq.). The Act created the Buffalo Fiscal Stability Authority (BFSA), a public benefit corporation that is a respondent in proceeding Nos. 1 and 2, to assist in achieving fiscal stability in the City by the 2006-2007 fiscal year (see § 3857 [1]). In particular, the BFSA was empowered to impose a wage freeze upon its finding that such freeze was essential to the adoption or maintenance of a City budget or financial plan (see § 3858 [2] [c] [i]).

On April 21, 2004, the BFSA invoked its power to impose a wage freeze and determined "that a wage freeze, with respect to the City and all covered Organizations, is essential to the maintenance of the Revised Financial Plan and to the adoption and maintenance of future budgets and financial plans that are in compliance with the Act." The BFSA further resolved that, effective April 21, 2004, "this shall be a freeze with respect to all wages . . . for all employees of the City [that] shall apply to prevent and prohibit any increase in wage rates." On June 1, 2007, the BFSA resolved to lift the wage freeze, effective July 1, 2007.

All of the collective bargaining agreements between the City and

the petitioners in proceeding Nos. 1 and 2 and the plaintiffs in action No. 1 contain plans or schedules for career advancement or promotion that are referred to herein as steps. As an employee acquires service credit or years of employment, he or she advances in steps and receives a concomitant increase in salary. The general purpose of the "steps" is to recognize increased experience, proficiency and mastery of particular sets of job skills or requirements. Additionally, the collective bargaining agreements contain across-the-board percentage wage increases that apply to all of the "steps" within the bargaining unit.

Upon the lifting of the wage freeze, the BFSA and the City indicated that City employees would be entitled only to a one "step" increase in salary and wages, in effect "resuming" the advancement up the steps that had been frozen in 2004. The unions, however, contended that, although the employees could not be paid the increased wages to which they would have been entitled during the wage freeze period, they nevertheless were entitled upon the lifting of the wage freeze to be moved ahead four salary "steps." In rejecting that contention, the BFSA and the City asserted that such an increase in salary "steps" would have an untenable financial impact.

The respondents in proceeding Nos. 1 and 2 and the defendants in action No. 1 appeal from a judgment denying the motions of the respondents to dismiss the amended petitions and sua sponte granting the relief requested therein, as well as granting the motion of the plaintiffs in action No. 1 for summary judgment on the amended complaint and denying the cross motions of the defendants in action No. 1 for summary judgment dismissing the amended complaint. The petitioners in proceeding No. 1 also cross-appeal from the same judgment insofar as the court "failed to determine that the [BFSA] lifted or should have lifted the wage freeze no later than January 31, 2007." Supreme Court concluded that "[p]etitioners [and plaintiffs] are entitled to their previously negotiated wage increase benefits going forward immediately . . . [inasmuch as t]o interpret [Public Authorities Law §] 3858 (2) (c) (iii) in the manner advanced by [r]espondents [and defendants] would result in a cancellation of the wage increases which is not authorized or permitted by the statute." We affirm.

The parties agree that the resolution of these appeals and this cross appeal involves an issue of law that is dependent upon statutory construction. Our analysis thus must begin with the express language of Public Authorities Law § 3858 (2), which provides in pertinent part: "In carrying out the purposes of this title during any control period, the [BFSA]: . . . (c) may impose a wage and/or hiring freeze: (i) During a control period, upon a finding by the [BFSA] that a wage and/or hiring freeze is essential to the adoption or maintenance of a city budget or a financial plan that is in compliance with this title, the [BFSA] shall be empowered to order that all increases in salary or wages of employees of the city and employees of covered organizations . . . are suspended. Such order may also provide that all increased payments for . . . salary adjustments according to plan and step-ups or increments for employees of the city and employees of covered

organizations . . . are, in the same manner, suspended . . . (iii) Notwithstanding the provisions of subparagraphs (i) and (ii) of this paragraph, no retroactive pay adjustments of any kind shall accrue or be deemed to accrue during the period of wage freeze, and no such additional amounts shall be paid at the time a wage freeze is lifted, or at any time thereafter."

Public Authorities Law § 3858 (2) (d) provides that the BFSA: "shall periodically evaluate the suspension of salary or wage increases or suspensions of other increased payments or benefits, and may, if it finds that the fiscal crisis, in the sole judgment of the [BFSA] has abated, terminate such suspensions"

We conclude that, pursuant to the plain meaning of the express language of Public Authorities Law § 3858, the contractual provision concerning the employees' ongoing advancement on the salary schedules as a result of continued accrual of service credit was not cancelled, annulled or eliminated.

Rather, the City's obligation to make *payment* of the type of wage increases in question was suspended until the wage freeze was terminated. The City cannot ignore the fact that the employees have continued to accrue service credit and have climbed the ladder of salary and career increments set forth in the collective bargaining agreements.

We reject the contention of petitioners in proceeding No. 1 that the partial lifting of the wage freeze on January 31, 2007 with respect to the International Union of Operating Engineers, Local 409 (Local 409), should have applied to all unions. The new collective bargaining agreement between the Buffalo City School District and Local 409 providing for the lifting of the wage freeze was properly approved and certified by the BFSA "as an exception to the BFSA Wage Freeze Resolution" inasmuch as it constituted "an acceptable and appropriate contribution towards alleviating the fiscal crisis of the City" (see Public Authorities Law § 3858 [2] [c] [ii]). Such certification was specific to the new collective bargaining agreement reached with Local 409 and did not inure to the benefit of other bargaining units or lift the wage freeze in its entirety.

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

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CA 08-01575

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

STEUBEN TRUST CORPORATION, ALSO KNOWN AS STEUBEN
TRUST COMPANY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GENESEE METAL PRODUCTS, INC.,
DEFENDANT-RESPONDENT.

THE WOLFORD LAW FIRM LLP, ROCHESTER (MICHAEL R. WOLFORD OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Allegany County (Mark H. Dadd, A.J.), entered June 19, 2008 in a breach of contract action. The order denied plaintiff's motion for partial summary judgment on the first cause of action.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law with costs and the motion is granted, and

It is further ORDERED that judgment be entered in favor of plaintiff and against defendant in the amount of \$112,500, together with interest at the rate of 9% per annum, commencing from the due date of each rental payment, and costs, disbursements, and attorneys' fees, and the matter is remitted to Supreme Court, Allegany County, for further proceedings in accordance with the following Memorandum: In May 1999, defendant leased premises for an 18-year term from the Allegany Area Economic Development Corporation (AAEDC). Plaintiff is the successor in interest to the AAEDC. The lease provided that defendant was to pay monthly rent "without any abatement, deduction or setoff," and it included an option provision for defendant's purchase of the premises. When defendant's president made an inquiry in 2003 concerning the possibility of exercising the purchase option, the executive director of the AAEDC quoted a price that defendant's president viewed as inconsistent with his understanding of the agreement between defendant and the AAEDC. Although the exterior maintenance of the premises was the landlord's responsibility under the terms of the lease, in August 2004 defendant nevertheless contracted for certain maintenance thereto, which the landlord had refused to perform, and defendant withheld the cost of that maintenance from the monthly rent. The AAEDC refused to accept defendant's partial payment and all subsequent rental payments, and it

commenced an eviction proceeding in June 2005. Defendant's answer in the eviction proceeding, wherein defendant was the respondent, asserted for the first time that the lease was unenforceable because the option provision was vague. The eviction proceeding was ultimately dismissed on jurisdictional grounds, and defendant thereafter terminated the lease and vacated the premises as of October 31, 2005.

Plaintiff then commenced this action and moved for partial summary judgment on its first cause of action, for rent due from August 2004 through October 2005. In its answer, defendant interposed the affirmative defense of fraudulent inducement based upon misrepresentations allegedly made by the executive director of the AAEDC concerning the purchase option provision. Supreme Court denied plaintiff's motion based upon its determination that there are issues of fact with respect to the enforceability of the lease because the option provision was vague. We reverse.

Plaintiff established its entitlement to summary judgment by presenting evidence of the lease, defendant's default, and the assignment of the lease to it (*see generally Votta v Votta Enters.*, 249 AD2d 536, 537), and defendant failed to raise an issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Even assuming, arguendo, that the option provision is indeed ambiguous, we note that plaintiff is not seeking to enforce that provision. Instead, plaintiff is seeking to recover rent that was unambiguously due pursuant to the lease, and there is no question that the parties intended to be bound by the lease (*see generally Town of Eden v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 85-90, *lv denied* 97 NY2d 603). Furthermore, we conclude that defendant waived any defense sounding in fraud because it was aware of the position of the executive director of the AAEDC concerning the option provision in 2003 but did not terminate the lease until October 2005 (*see Votta*, 249 AD2d at 537; *Lindenwood Dev. Corp. v Levine*, 178 AD2d 633, 634; *Honegger v Parador Enters.*, 71 AD2d 877).

We therefore reverse the order, grant plaintiff's motion, direct that judgment be entered in favor of plaintiff and against defendant in the amount of \$112,500, together with interest at the rate of 9% per annum, commencing from the due date of each rental payment, and costs, disbursements, and attorneys' fees, and remit the matter to Supreme Court to determine the amount of reasonable attorneys' fees incurred in bringing this action.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

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KAH 07-00986

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
VARREL MITCHELL, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MALCOLM CULLY, SUPERINTENDENT, LIVINGSTON
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

VARREL MITCHELL, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE S. MERESON OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered November 22, 2006 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: Supreme Court properly dismissed the petition for a writ of habeas corpus. Petitioner has not yet perfected his appeal to the Appellate Division, Third Department, and he raises issues that may either be raised on that appeal or by way of a motion pursuant to CPL article 440 (*see People ex rel. Malik v State of New York*, 58 AD3d 1042, 1043; *People ex rel. Lyons v Conway*, 32 AD3d 1324, lv denied 8 NY3d 802; *People ex rel. Encarnacion v McGinnis*, 2 AD3d 933, lv denied 1 NY3d 510). Petitioner failed to preserve for our review his contention that the court erred in failing to conduct a hearing to determine whether he had a valid appeal pending in the Third Department inasmuch as he never requested such a hearing. In any event, that contention lacks merit because the papers submitted by petitioner in support of the petition for a writ of habeas corpus show that such an appeal is pending, and thus petitioner failed to "present factual issues that would entitle [him] to an evidentiary hearing" (*People ex rel. Jackson v New York State Dept. of Correctional Servs.*, 253 AD2d 919).

Petitioner also failed to preserve for our review his contention that the response to the petition by respondent was insufficient because it did not constitute a "return" pursuant to CPLR 7008 (b) (*see generally People ex rel. Woods v Walker*, 283 AD2d 991, appeal dismissed and lv denied 96 NY2d 928). In any event, that contention lacks merit inasmuch as "CPLR 7008 does not mandate that respondent

file a return or prohibit the court from reaching the merits of the petition in the absence of a return" (*People ex rel. Vasquez v McCoy*, 280 AD2d 929, *lv dismissed* 96 NY2d 823). We reject petitioner's further contention that the court erred in rendering its determination prior to receiving petitioner's reply to the response. Pursuant to CPLR 7009 (b), petitioner "may" submit a reply, and thus a reply is not required before the court's issuance of a determination.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

695

CA 08-01699

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

CHERYL FOLEY AND WILLIAM FOLEY,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

WEST-HERR AUTOMOTIVE GROUP, INC., DEFENDANT,
WEST-HERR FORD, INC., AND FORD MOTOR COMPANY,
DEFENDANTS-RESPONDENTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ELIZABETH M. BERGEN OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered May 5, 2008 in a personal injury action. The order denied the motion of plaintiffs seeking, inter alia, permission to conduct further discovery.

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

Memorandum: Supreme Court did not abuse its discretion in denying the motion of plaintiffs seeking permission to conduct further discovery and to vacate the court's demand to serve and file a note of issue pursuant to CPLR 3216 (b) (3) within 90 days. The court's demand provided that, in the event that plaintiffs failed to comply with the demand, the court upon its own motion would dismiss the complaint based on plaintiffs' unreasonable neglect in proceeding with the action. We note that plaintiffs moved within the 90-day period to vacate the demand and for an extension of time in which to complete discovery, thereby avoiding default with respect to the court's demand (see *Walton v Clifton Springs Hosp. & Clinic*, 255 AD2d 964, 965; *Conway v Brooklyn Union Gas Co.*, 212 AD2d 497; cf. *Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503-504). We further note, however, that "[t]he motion requires the moving party to make a showing of need for the extension or good excuse for past delay" (*Walton*, 255 AD2d at 965 [internal quotation marks omitted]; see CPLR 2004; *Cook v City of New York*, 11 AD3d 424). We conclude that plaintiffs failed to demonstrate good cause for an extension of time in which to complete discovery, and they also failed to present a good excuse for the delay. Plaintiffs sought to excuse the prior delay by showing that the court's discovery deadline was ineffective, in view of the

parties' continued discovery and the determination of an appeal after that deadline had expired. However, the record does not support the conclusion that the court's demand pursuant to CPLR 3216 (b) (3) was based upon plaintiffs' violation of its discovery deadline, as opposed to the failure of plaintiffs to move the case forward after the discovery deadline had expired. We therefore conclude that the court did not abuse its discretion in denying the motion. We note in any event that the order denying plaintiffs' motion further extended the time in which to file a note of issue and statement of readiness beyond the original 90-day deadline in the demand, and it specified that, in the event that plaintiffs did not comply with that later deadline, the court's motion to dismiss the complaint would be "heard" on such later date. Thus, the order in effect gave plaintiffs yet another extension of time in which to complete discovery.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

710

KA 05-02012

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID VANDYNE, SR., DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered June 7, 2005. The judgment convicted defendant, upon a jury verdict, of murder in the first degree, murder in the second degree and robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of murder in the second degree and dismissing count two of the indictment and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him, following a jury trial, of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]), murder in the second degree (§ 125.25 [3]) and robbery in the first degree (§ 160.15 [2]), defendant contends that his warrantless arrest was illegal. We reject that contention. It is well settled that "the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment . . . , prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest" (*Payton v New York*, 445 US 573, 576; see *People v Levan*, 62 NY2d 139, 144). Contrary to the contention of defendant, we conclude that the unlocked storage cubicle in which he was arrested did not constitute his "home." The storage cubicle was located in the basement of an apartment building where defendant had previously resided. After being given a three-day notice with respect to his failure to pay rent, defendant voluntarily vacated his apartment and turned in his keys, evincing an intent to terminate the lease rather than face additional charges based on his nonpayment of rent. Thus, although the lease had not expired at the time of the arrest, defendant no longer had a reasonable expectation of privacy in the apartment or any storage cubicles based on the lease (see e.g. *People v Bradley*, 17 AD3d 1050, 1051, lv denied 5 NY3d 786; *People v Sapp*,

280 AD2d 906, *lv denied* 96 NY2d 834; *People v Orlando*, 223 AD2d 927, *lv denied* 88 NY2d 851).

We reject the further contention of defendant that he had made the storage cubicle in which he was arrested into his "makeshift bedroom" and thus had a reasonable expectation of privacy there (see *People v Phillips*, 118 AD2d 600, 601, *lv denied* 67 NY2d 948; see also *People v Williams*, 180 AD2d 703; *People v Williams*, 100 AD2d 602). Indeed, the record establishes that defendant was arrested in a storage cubicle that had not been assigned to him and was accessible to all tenants in the apartment building (see generally *People v Allen*, 54 AD3d 868, 869, *lv denied* 11 NY3d 922).

Viewing the evidence in light of the elements of murder in the first degree as charged to the jury (see generally *People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict on that count is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Inasmuch as the evidence supports the determination that defendant committed the murder "in furtherance of robbery" (Penal Law § 125.27 [1] [a] [vii]), it cannot be said that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495). Although we agree with defendant that a gratuitous reference to religion by a prosecution witness was improper, the jury was instructed to disregard that reference, and "[t]he jury is presumed to have followed [that] instruction . . . , thereby alleviating any prejudice to defendant" (*People v Young*, 55 AD3d 1234, 1236, *lv denied* 11 NY3d 901). In any event, we conclude that the error is harmless (see *People v Johnson*, 3 AD3d 581, *lv denied* 2 NY3d 763; see also *People v Dat Pham*, 283 AD2d 952, *lv denied* 96 NY2d 900; cf. *People v Benedetto*, 294 AD2d 958; see generally *People v Crimmins*, 36 NY2d 230, 241-242).

As the People correctly concede, however, that part of the judgment convicting defendant of murder in the second degree must be reversed and count two of the indictment dismissed inasmuch as second degree felony murder is a lesser included offense of first degree intentional felony murder (see CPL 300.40 [3] [b]; *People v Santiago*, 41 AD3d 1172, 1175, *lv denied* 9 NY3d 964). We therefore modify the judgment accordingly.

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

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CA 08-01701

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

JOLLY CAPLASH, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ROCHESTER ORAL & MAXILLOFACIAL SURGERY
ASSOCIATES, LLC, AND MOHAMMED SALAHUDDIN,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

PETER L. KRISTAL, ROCHESTER, FOR DEFENDANT-APPELLANT ROCHESTER ORAL &
MAXILLOFACIAL SURGERY ASSOCIATES, LLC.

RICHARD E. REGAN, ROCHESTER, FOR DEFENDANT-APPELLANT MOHAMMED
SALAHUDDIN.

FINUCANE & HARTZELL, LLP, PITTSFORD (LEO G. FINUCANE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeals from an amended order of the Supreme Court, Monroe County
(Kenneth R. Fisher, J.), entered June 3, 2008. The amended order,
among other things, denied defendant Mohammed Salahuddin's motion for
summary judgment.

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

Memorandum: When this case was before us on a prior appeal, we
determined that Supreme Court "erred in summarily granting plaintiff's
cross motion for, inter alia, dissolution of [defendant Rochester Oral
& Maxillofacial Surgery Associates, LLC (hereafter, company)] pursuant
to Limited Liability Company Law § 702" (*Caplash v Rochester Oral &
Maxillofacial Surgery Assoc., LLC*, 48 AD3d 1139, 1140). We concluded
that "plaintiff met his burden on the cross motion by establishing
that it was not reasonably practicable to carry on the business in
conformity with the operating agreement [but] that there [was] an
issue of fact whether plaintiff has standing to seek dissolution" of
the company, and we remitted the matter to Supreme Court for a hearing
on that issue (*id.* at 1140-1141). On remittal, the court decided the
standing issue in plaintiff's favor, and the court also granted
plaintiff's cross motion for summary judgment dissolving the company
(*Caplash v Rochester Oral & Maxillofacial Surgery Assoc., LLC*, 20 Misc
3d 1104[A], 2008 NY Slip Op 51216[U]).

In appeal No. 1, defendant Mohammed Salahuddin, a co-equal member

of the company with plaintiff, contends that the court upon remittal erred in denying his motion for summary judgment determining that plaintiff lacked standing to seek dissolution of the company and in searching the record and dismissing the company's counterclaims, thus granting relief not sought by plaintiff. The company, as limited by its brief, contends on appeal that the court erred in dismissing its second counterclaim against plaintiff, alleging plaintiff's misuse of a company credit card, and in denying that part of its cross motion for injunctive relief, seeking to enforce plaintiff's covenant not to compete with the company.

In appeal No. 2, Salahuddin and the company contend that the court erred in determining that "the standing issue is resolved in [plaintiff's] favor" and in granting plaintiff's cross motion for summary judgment seeking a determination dissolving the company. In appeal No. 3, Salahuddin contends that the court erred in denying his motion seeking recusal of the court.

We conclude with respect to appeal No. 1 that the court properly denied the motion of Salahuddin for summary judgment determining that plaintiff lacked standing to seek dissolution of the company. That motion was made during a recess in a hearing on the issue of standing that the court was conducting in accordance with our remittal directive. At that juncture, summary disposition of the standing issue would have been patently inappropriate inasmuch as plaintiff had not yet concluded his presentation of evidence at the hearing and thus would have been prevented from potentially obtaining a ruling in his favor on that issue (*see generally Greenbaum v Hershman*, 31 AD3d 607; *cf.* CPLR 4401).

We further conclude with respect to appeal No. 1 that the court properly dismissed the company's counterclaim alleging plaintiff's misuse of a company credit card. "[W]here there are only two stockholders each with a 50% share, an action [or counterclaim] cannot be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over corporate affairs; the proper remedy is a stockholder's derivative action" (*Stone v Frederick*, 245 AD2d 742, 744-745).

With respect to appeal No. 2, we conclude that the court did not err in concluding that plaintiff has standing to seek dissolution pursuant to Limited Liability Company Law § 702 (*see generally Matter of Roller [W.R.S.B. Dev. Co.]*, 259 AD2d 1012), despite his submission of a letter of resignation. In our view, the company was a "member-managed LLC," rather than a "manager-managed LLC" (*see generally* § 412 [a]). Our analysis thus turns on the issue whether Salahuddin was authorized to appoint as company counsel an attorney who accepted plaintiff's resignation letter transmitted to him by plaintiff before plaintiff cross-moved for dissolution. "An act of a member . . . that is not apparently for the carrying on of the business of the limited liability company in the usual way does not bind the limited liability company unless authorized in fact by the limited liability company in the particular matter" (§ 412 [c]). Since the appointment of company counsel by Salahuddin was neither for carrying on the usual business

of the company, i.e., dental surgery, nor, as required by the terms of the operating agreement, sanctioned by majority vote of the company's members, the company counsel allegedly appointed by Salahuddin was not authorized to represent the company and thus could not have accepted plaintiff's purported resignation letter.

Even assuming, arguendo, that the company counsel was properly appointed by Salahuddin, we conclude that he was neither retained to address general business matters on behalf of the company nor authorized by the operating agreement to act on behalf of that entity (see Limited Liability Company Law § 102 [c]). Salahuddin's reliance upon *Blondell v Malone* (91 AD2d 1201) in support of the proposition that the attorney in question was counsel of record for the company because that attorney had not been removed by court order or stipulation of the parties is misplaced. *Blondell* was intended to protect a client whose attorney seeks to withdraw from representation, rather than to impede the removal of an attorney who was not authorized to represent an alleged client (*id.* at 1202). Moreover, there is no indication that the attorney in question in fact accepted plaintiff's purported resignation before plaintiff cross-moved for dissolution (see Siegel, NY Prac § 249 [4th ed]), or that the purported resignation letter concerned plaintiff's *membership* in the company, as opposed to his *employment* with the company. In light of our determination that plaintiff has standing to seek dissolution of the company, we agree with the concession of the company that its contention with respect to its cross motion for injunctive relief in appeal No. 1 need not be addressed (see generally *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Finally, with respect to the order in appeal No. 3, we conclude that the court did not err in denying Salahuddin's motion seeking recusal of the court. Salahuddin "failed to allege any basis for mandatory disqualification or recusal [pursuant to Judiciary Law § 14], and we conclude that the court did not abuse its discretion in refusing to recuse itself" (*Matter of Gutzmer v Santini*, 60 AD3d 1295). Contrary to Salahuddin's contention, the March 14, 2008 scheduling order issued by the court was neither an impermissible public statement concerning the case (see 22 NYCRR 100.3 [E] [1] [f]), nor was it an expression of prejudgment bias.

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

715

CA 08-01702

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

JOLLY CAPLASH, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ROCHESTER ORAL & MAXILLOFACIAL SURGERY
ASSOCIATES, LLC, AND MOHAMMED SALAHUDDIN,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

PETER L. KRISTAL, ROCHESTER, FOR DEFENDANT-APPELLANT ROCHESTER ORAL &
MAXILLOFACIAL SURGERY ASSOCIATES, LLC.

RICHARD E. REGAN, ROCHESTER, FOR DEFENDANT-APPELLANT MOHAMMED
SALAHUDDIN.

FINUCANE & HARTZELL, LLP, PITTSFORD (LEO G. FINUCANE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County
(Kenneth R. Fisher, J.), entered June 28, 2008. The order, among
other things, granted plaintiff's cross motion for summary judgment.

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

Same Memorandum as in *Caplash v Rochester Oral & Maxillofacial
Surgery Assoc., LLC* ([appeal No. 1] ___ AD3d ___ [June 12, 2009]).

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

716

CA 08-01703

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

JOLLY CAPLASH, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ROCHESTER ORAL & MAXILLOFACIAL SURGERY
ASSOCIATES, LLC, DEFENDANT,
AND MOHAMMED SALAHUDDIN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

RICHARD E. REGAN, ROCHESTER, FOR DEFENDANT-APPELLANT.

FINUCANE & HARTZELL, LLP, PITTSFORD (LEO G. FINUCANE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered July 26, 2008. The order, among other things, denied defendant Mohammed Salahuddin's motion for recusal.

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

Same Memorandum as in *Caplash v Rochester Oral & Maxillofacial Surgery Assoc., LLC* ([appeal No. 1] ___ AD3d ___ [June 12, 2009]).

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

717

TP 08-02230

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

IN THE MATTER OF JULIET A. PADULO, AS
VOLUNTARY ADMINISTRATOR OF THE ESTATE OF
ADA J. ROMEO, DECEASED, PETITIONER,

V

MEMORANDUM AND ORDER

KELLY REED, COMMISSIONER, MONROE COUNTY
DEPARTMENT OF HUMAN SERVICES, RICHARD F.
DAINES, M.D., COMMISSIONER, NEW YORK
STATE DEPARTMENT OF HEALTH, AND MARK LACIVITA,
DIRECTOR OF ADMINISTRATION, OFFICE OF
ADMINISTRATIVE HEARINGS, RESPONDENTS.

BRENNA, BRENNA & BOYCE, PLLC, ROCHESTER (TODD W. GUSTAFSON OF
COUNSEL), FOR PETITIONER.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (RICHARD A.
MARCHESE, JR., OF COUNSEL), FOR RESPONDENT KELLY REED, COMMISSIONER,
MONROE COUNTY DEPARTMENT OF HUMAN SERVICES.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL),
FOR RESPONDENTS RICHARD F. DAINES, M.D., COMMISSIONER, NEW YORK STATE
DEPARTMENT OF HEALTH, AND MARK LACIVITA, DIRECTOR OF ADMINISTRATION,
OFFICE OF ADMINISTRATIVE HEARINGS.

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 [Thomas A. Stander, J.], entered September 30, 2008) to annul a determination of respondent Richard F. Daines, M.D., Commissioner, New York State Department of Health. The determination, after a fair hearing, denied the application of petitioner's decedent for Medicaid coverage.

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

Memorandum: Petitioner, as voluntary administrator of the estate of Ada J. Romeo (decedent), commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Commissioner of the New York State Department of Health (DOH) affirming the determination of respondent Commissioner of the Monroe County Department of Human Services that denied decedent's application for Medicaid coverage on the ground that decedent had made uncompensated transfers during the relevant "look-back" period (see 42 USC § 1396p [c] [1] [B]).

The record establishes that between 1976 and 1994 decedent purchased United States Savings Bonds naming herself and either petitioner or one of petitioner's children as owners. On December 15, 2001, decedent gave all of the savings bonds to petitioner, whereupon petitioner distributed them to herself and her children. Decedent moved into a nursing home in 2004, and between July 2004 and February 2005 petitioner liquidated all of the bonds, including those that she had distributed to her children. Petitioner deposited the proceeds into a joint account that she and her husband held with decedent, and petitioner subsequently distributed some of the bond proceeds to herself and her children. Petitioner used the remaining proceeds to pay for decedent's nursing home care. On September 8, 2005, petitioner applied for Medicaid benefits on behalf of decedent, and a fair hearing was conducted following the denial of the application. DOH thereafter upheld the denial of the application.

Contrary to petitioner's contention, the determination of DOH following the fair hearing is supported by substantial evidence (see generally CPLR 7803 [4]; *Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239). The record establishes that decedent was a co-owner of the bonds until they were liquidated, at which time petitioner deposited all of the bond funds into the joint bank account and used over one third of the bond funds to pay for decedent's nursing home care. Thus, the record supports DOH's determination that decedent retained an ownership interest in the bonds and that the actual transfer of the assets did not take place until petitioner distributed the bond proceeds to herself and her children.

We reject petitioner's contention that DOH misapplied 18 NYCRR 360-4.4 (c) (2) (vi) and 96 ADM-8 by determining that the liquidation, rather than the transfer of possession, was the action that "reduce[d] or eliminate[d]" decedent's "control" of the bonds. "[W]ith regard to the agency's application of Medicaid regulations and directives, the fact that the agency's 'interpretation might not be the most natural reading of [its] regulation, or that the regulation could be interpreted in another way, does not make the interpretation irrational' " (*Matter of Rogers v Novello*, 26 AD3d 580, 581, quoting *Matter of Elcor Health Servs. v Novello*, 100 NY2d 273, 280).

We reject the further contention of petitioner that she established that decedent transferred the bonds to petitioner and her children in 2001. Petitioner relies upon the New York State Medicaid Reference Guide, which provides that, "[i]f a person other than the [applicant] will not relinquish possession of the bond, the bond is not considered an available resource." Although petitioner submitted affidavits in which she and her family averred that decedent gifted the bonds to them in 2001 and that they did not intend to relinquish the bonds, DOH did not credit those affidavits. "It is for the administrative agency, not the courts, to weigh conflicting evidence, assess the credibility of witnesses, and determine which testimony to accept and which to reject" (*Matter of Smalls v Hammons*, 231 AD2d 528; see *Faber v Merrifield*, 11 AD3d 1009). Thus, this Court may not substitute its credibility determinations for those of DOH (see *Faber*,

11 AD3d at 1010).

In sum, the bond proceeds were deposited into the joint account and thus were presumed to belong to decedent (see 96 ADM-8, 18), and petitioner failed to rebut that presumption.

Finally, we reject the contention of petitioner that she is entitled to attorneys' fees inasmuch as she is not a "prevailing party" (42 USC § 1988 [b]; see generally *Matter of Thomasel v Perales*, 78 NY2d 561, 567).

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

721

CA 09-00224

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

WANDA E. HARTLEY AND THOMAS HARTLEY,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

EVELYN I. WHITE, DEFENDANT-APPELLANT.

BURGIO, KITA & CURVIN, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR
DEFENDANT-APPELLANT.

ROLAND M. CERCONE, LLP, BUFFALO (SEAN P. KELLEY OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 24, 2008 in a personal injury action. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Wanda E. Hartley (plaintiff) when the vehicle she was driving was struck by a vehicle driven by defendant. Defendant appeals from an order denying her motion 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). We note at the outset that, in opposition to the motion, plaintiffs abandoned their claims of serious injury with respect to the significant disfigurement and permanent loss of use categories of serious injury (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 297; *Feggins v Fagard*, 52 AD3d 1221, 1222). We thus conclude that Supreme Court erred in denying the motion with respect to those categories, and we therefore modify the order accordingly.

We further conclude that the court erred in denying the motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury, and we

therefore further modify the order accordingly. Defendant established her entitlement to judgment as a matter of law with respect to those categories by submitting the affirmation and report of a physician who examined plaintiff at defendant's request. The physician stated that plaintiff's injuries were attributable to the preexisting degenerative disease in plaintiff's cervical spine and that plaintiff sustained only a temporary aggravation of that condition as a result of the accident (see e.g. *Schader v Woyciesjes*, 55 AD3d 1292, 1293; *Chmiel v Figueroa*, 53 AD3d 1092; see generally *Carrasco v Mendez*, 4 NY3d 566, 579-580). We reject the contention of plaintiffs that they raised a triable issue of fact sufficient to defeat the motion with respect to those categories by submitting the affirmed report of a chiropractor and uncertified medical records of treatment rendered to plaintiff by that chiropractor after the accident. As defendant correctly contends, "the affirmed report of the chiropractor is not in admissible form inasmuch as it was not sworn to before a notary or other authorized official" (*Feggins*, 52 AD3d at 1223; see *Shinn v Catanzaro*, 1 AD3d 195, 197-198). We reject defendant's further contention, however, that the chiropractic records are inadmissible. Those records were referenced in the affirmed physician's report submitted by defendant (see *Feggins*, 52 AD3d at 1223). We nevertheless conclude that those records fail to raise a triable issue of fact with respect to the permanent consequential limitation of use and significant limitation of use categories because they do not refute the opinion of the physician who examined plaintiff on defendant's behalf that plaintiff did not sustain an injury under those categories as a result of the accident (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Finally, we conclude that the court properly denied the motion of defendant with respect to the 90/180 category of serious injury. Although the physician who examined plaintiff on defendant's behalf stated in his affirmation that plaintiff did not sustain a serious injury under that category as a result of the accident, he indicated in both his affirmation and report that plaintiff sustained a temporary aggravation of preexisting degenerative changes in the area of the cervical spine as a result of the accident. Defendant also submitted evidence that plaintiff was unable to engage in her typical "household stuff," knit or regularly ride her bicycle in the six months after the accident. We thus conclude that defendant herself raised a triable issue of fact with respect to the 90/180 category (see *Pugh v DeSantis*, 37 AD3d 1026, 1030; see generally *Zuckerman*, 49 NY2d at 562).

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

731

KA 06-00037

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

OTIS L. SIMMONS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered October 11, 2005. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, criminal sexual act in the first degree (two counts), aggravated sexual abuse in the third degree and sexual abuse 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 following a jury trial of various sex crimes arising out of his rape of the victim in the basement of an apartment building. He contends that County Court erred in allowing the victim to identify him in court, inasmuch as she had been unable to identify him in any pretrial identification procedures. We agree with defendant that the court erred in allowing the prosecutor to show the victim the photo array during his redirect examination of her, whereupon she identified defendant's photograph as depicting the assailant. Defense counsel's cross-examination of the victim did not open the door to that re-direct examination (*cf. People v Massie*, 2 NY3d 179, 184-185; *People v Wilson*, 195 AD2d 493). We further agree with defendant that the court compounded that error by allowing the victim to identify defendant in court as the assailant. We conclude, however, that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). The evidence of guilt is overwhelming, including the statement of defendant to the police that he committed various sexual acts with a woman in the basement of the same apartment building on the same date and at approximately the same time as that alleged by the victim (*see People v Franco*, 48 AD3d 477, 478, *lv denied* 10 NY3d 840), and there is no significant probability that the error might have contributed to the conviction.

We reject defendant's contention that the court's "improper conduct" deprived defendant of his right to a fair trial. The court's directive to defense counsel to "sit down" did not result in the type of prejudice that would warrant reversal (*cf. People v De Jesus*, 42 NY2d 519), nor did the court abuse its discretion in curtailing defense counsel's cross-examination of the victim (*see generally People v Sorge*, 301 NY 198, 201-202; *People v Brown*, 267 AD2d 1051, *lv denied* 94 NY2d 917). We further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to the further contention of defendant, the court did not err in refusing to suppress defendant's "confession." The court was entitled to credit the testimony of the police officer over that of defendant at the suppression hearing (*see generally People v Prochilo*, 41 NY2d 759, 761; *People v Stokes*, 212 AD2d 986, 987, *lv denied* 86 NY2d 741).

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

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

734

KA 05-01130

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AARON B. PIKE, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (TRACEY A. BRUNECZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered April 12, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the first degree and conspiracy in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of conspiracy in the second degree and dismissing count four of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the first degree (Penal Law § 125.27 [1] [a] [vi]; [b]) and conspiracy in the second degree (§ 105.15). We agree with defendant that the indictment, insofar as it charged him with conspiracy, is jurisdictionally defective. Pursuant to Penal Law § 105.20, "[a] person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy." Where, as here, "[a] count . . . charging [a] defendant with conspiracy . . . fail[s] to allege an overt act," that count is jurisdictionally defective and must be dismissed (*People v Keiffer*, 149 AD2d 974, 974; see *People v Russo*, 57 AD2d 578, 579). While the overt act "may be the object crime" (*People v McGee*, 49 NY2d 48, 57, cert denied sub nom. *Waters v New York*, 446 US 942; see *People v Austin*, 9 AD3d 369, 371, lv denied 3 NY3d 739), here the count charging defendant with conspiracy does not set forth that the overt act was in fact committed. We reject the People's contention that the elements of the overt act were incorporated into the conspiracy count of the indictment by the reference to Penal Law § 105.15 in that count (see generally *People v D'Angelo*, 98 NY2d 733, 735). Penal Law § 105.15 does not state that an overt act must be pleaded and proved. Rather, that requirement with respect to the crime of conspiracy is

found in Penal Law § 105.20. We reject the People's further contention that the defect in the indictment may be cured by incorporating the allegations in the bill of particulars into the indictment. While it is well settled that a bill of particulars may cure deficits in the factual allegations of an indictment (see generally *People v Iannone*, 45 NY2d 589, 597-600), the defect in this case is the failure to allege a material element of the crime charged. That defect is jurisdictional, mandating dismissal of the conspiracy count of the indictment (see *id.* at 600-601), and we therefore modify the judgment accordingly.

Turning to the remaining contentions of defendant, we conclude that County Court did not abuse or improvidently exercise its discretion in denying his motion seeking funds to retain a jury consultant (see *People v Koberstein*, 262 AD2d 1032, 1033, *lv denied* 94 NY2d 798; see generally *People v Cahill*, 2 NY3d 14, 44 n 11). Defendant failed to establish that the retention of such an expert was necessary under the circumstances of this case (see generally County Law § 722-c; *Koberstein*, 262 AD2d at 1033).

Contrary to the further contentions of defendant, the court properly admitted *Ventimiglia* evidence as "circumstantial corroborating evidence of identity" (*People v Jones*, 276 AD2d 292, 292, *lv denied* 95 NY2d 965; see *People v Robinson*, 28 AD3d 1126, 1128, *lv denied* 7 NY3d 794), and the court properly refused to instruct the jury that two witnesses were accomplices as a matter of law (see generally *People v Caban*, 5 NY3d 143, 152-153; *People v Basch*, 36 NY2d 154, 157). In addition, we conclude that the court did not abuse its discretion in permitting the People's expert to give a tutorial on blood spatter evidence, inasmuch as that testimony tended to aid the jury in considering and evaluating the expert's conclusions concerning the blood spatter evidence presented at trial (see generally *People v Lee*, 96 NY2d 157, 162).

The contention of defendant that he was denied his right to effective assistance of counsel based on defense counsel's advice that he refrain from testifying at trial " 'implicates strategic discussions between defendant and [defense] counsel that are de hors the record,' and thus that contention is not reviewable on direct appeal" (*People v Prince*, 5 AD3d 1098, 1099, *lv denied* 2 NY3d 804). We further conclude that defendant was not denied effective assistance of counsel when defense counsel stipulated to a prima facie case of conspiracy in order to avoid lengthy offers of proof similar to those offered in the trial of a coconspirator (see *People v Johnson*, 30 AD3d 1042, 1043, *lv denied* 7 NY3d 790, 902; *People v Brown*, 175 AD2d 210, 211). In any event, "defendant has not demonstrated 'the absence of strategic or other legitimate explanations for [defense] counsel's' stipulation" (*Johnson*, 30 AD3d at 1043, quoting *People v Rivera*, 71 NY2d 705, 709).

We reject the contention of defendant that the evidence is not legally sufficient to support the murder conviction (see generally *People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in

light of the elements of murder in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, we conclude that the sentence with respect to the murder conviction is not unduly harsh or severe.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

737

CA 09-00202

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

BLUE HERON CONSTRUCTION COMPANY, LLC,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

VILLAGE OF NUNDA, DEFENDANT-APPELLANT.

FIX SPINDELMAN BROVITZ & GOLDMAN, P.C., FAIRPORT (KARL S. ESSLER OF
COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (DAVID J. EDWARDS OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Kenneth R. Fisher, J.), entered October 29, 2008 in an action for breach of contract and unjust enrichment. The order, insofar as appealed from, denied in part defendant's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for the alleged breach by defendant of its construction contract with plaintiff and for unjust enrichment. According to plaintiff, it fully and adequately performed the work of the contract, and defendant thus owed plaintiff the sum of \$69,205.23, representing \$54,500 in liquidated damages based on plaintiff's failure to comply with the contract insofar as it required substantial completion of the work by the contractual deadline, and a retainage amount of \$14,705.23 based on the termination of the contract prior to final completion of the work. Defendant contends on appeal that Supreme Court should have granted its motion for summary judgment dismissing the complaint in its entirety, rather than only granting that part of the motion dismissing the claim for lost profits. We agree.

We note at the outset our agreement with defendant that the court erred in denying its motion in part, inasmuch as plaintiff failed to seek the requisite extension of the deadline for substantial completion. "It is well settled that, where parties have set forth their agreement in an unambiguous and complete document, that agreement should be enforced according to its terms" (*Westfield Family Physicians, P.C. v HealthNow N.Y., Inc.*, 59 AD3d 1014, 1015; see *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162). The dates by which

substantial completion and final completion of the project were required were set forth in section 12.02(A) of the contract, which refers to "Contract Times." Any adjustment with respect to those dates could be made only by a written "Change Order" or a "Claim" for an adjustment, pursuant to section 12.02(B) of the contract. Article 12 of the contract sets forth a metric by which any "Claim" for an adjustment of the "Contract Times" was to be covered, but it did not relieve plaintiff of its obligation to seek such an extension in the event that defendant was responsible for the delay. It is undisputed that plaintiff did not request an extension of the "Contract Times," nor did it achieve substantial completion or final completion of the work of the contract by the contractual deadline.

We further agree with defendant that the liquidated damages provision of the contract was enforceable. "As a general rule, where the delays are caused by the mutual fault of the parties, a liquidated damage clause is abrogated and each party must resort to an action to recover its actual damages" (*J.R. Stevenson Corp. v County of Westchester*, 113 AD2d 918, 921; see *Mosler Safe Co. v Maiden Lane Safe Deposit Co.*, 199 NY 479, 486). Where, however, the contract includes a provision allowing it to be extended for causes beyond the contractor's control, the obligation to pay liquidated damages is preserved (see *X.L.O. Concrete Corp. v Brady & Co.*, 104 AD2d 181, 186, *affd* 66 NY2d 970; *Mosler Safe Co.*, 199 NY at 486-487; *Mars Assoc. v Facilities Dev. Corp.*, 124 AD2d 291, 292-293; *J.R. Stevenson Corp.*, 113 AD2d at 921-922). We reject the contentions of plaintiff that the assessment of liquidated damages is inequitable based on the dispute with respect to the cause of its delay in substantially completing the work and that defendant waived the provision of the contract requiring timely completion of the work (see generally *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968; *Deep v Clinton Cent. School Dist.*, 48 AD3d 1125, 1126). Plaintiff's contention that defendant may not impose liquidated damages because such damages were substantially higher than any actual damage sustained by defendant is raised for the first time on appeal and thus is not properly before us (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

746

CA 08-02564

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

MICHAEL R. NOWICKI AND SUSAN R. NOWICKI,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

JULIETTE P. ESPERSEN, DEFENDANT-APPELLANT.

BURGETT & ROBBINS, JAMESTOWN (ROBERT A. LIEBERS OF COUNSEL), FOR
DEFENDANT-APPELLANT.

WRIGHT, WRIGHT AND HAMPTON, JAMESTOWN (EDWARD P. WRIGHT OF COUNSEL),
FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered March 27, 2008 in an action seeking specific performance of a contract for the sale of real property. The order granted plaintiffs' motion for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking specific performance of a contract for the sale of property owned by defendant. Defendant appeals from an order granting plaintiffs' motion for summary judgment on the complaint. We affirm. While at the property in question on the day of the purchase offer, defendant pointed out the boundary markers of the property and indicated to plaintiffs that she intended to sell the property between those markers. Pursuant to a tax map, the two parcels comprising the property included 83 feet of lake frontage. Several weeks later, following defendant's acceptance of the purchase offer, a survey conducted at defendant's request revealed that the property actually included 114.7 feet of lake frontage. Defendant subsequently sought to rescind the contract based on a mutual mistake of fact concerning the actual size of the property.

Defendant contends that Supreme Court erred in granting the motion because there is a triable issue of fact with respect to the alleged mutual mistake of fact. We reject that contention. In order for a contract to be voidable based on a mutual mistake of fact, the "mutual mistake must exist at the time the contract is entered into and must be substantial" (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453). "The idea is that the agreement as expressed, in some material respect, does not

represent the 'meeting of the minds' of the parties" (*id.*; see *Brauer v Central Trust Co.*, 77 AD2d 239, 243, *lv denied* 52 NY2d 703). Here, there was no mutual mistake with respect to the property that defendant contracted to sell to plaintiffs and, indeed, defendant testified at her deposition that she intended to sell "the entire property" between the boundary markers. Plaintiffs inspected the property, offered to purchase the two parcels as they were described on the tax map, and were informed of the specific boundaries of the property that defendant intended to sell to them (see *Shay v Mitchell*, 50 AD2d 404, 409, *affd* 40 NY2d 1040). The failure of defendant to obtain a survey of the property to determine its actual size prior to entering into the contract or to specify in the contract a price per foot for the lake frontage belies her contention that a price based upon the precise amount of lake frontage and a per foot calculation was a material element of the contract about which the parties were mistaken.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

763

CA 08-02278

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

VICTORIA T. ENTERPRISES, INC., DOING BUSINESS AS
GEORGETOWN SQUARE WINE & LIQUOR,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CHARMER INDUSTRIES, INC., SERVICE-UNIVERSAL
DISTRIBUTORS, INC., EBER BROS. WINE AND LIQUOR
CORPORATION, EBER-NDC, LLC, PEERLESS IMPORTERS,
INC., COLONY LIQUOR AND WINE DISTRIBUTORS, LLC,
SOUTHERN WINE & SPIRITS OF NEW YORK, INC.,
SOUTHERN WINE & SPIRITS OF UPSTATE NEW YORK, INC.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (CHRISTOPHER JOHNSON OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

JONES DAY, NEW YORK CITY (VICTORIA DORFMAN OF COUNSEL), NOLAN & HELLER
LLP, ALBANY, MORRISON COHEN LLP, AND HARRIS BEACH PLLC, PITTSFORD, FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered July 29, 2008 in an action for damages for, inter alia, alleged violations of the Donnelly Act and the Alcoholic Beverage Control Law. The order, insofar as appealed from, granted the motion of defendants-respondents to dismiss the amended complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages allegedly "arising out of defendants' long-standing deceptive pricing practices, unfair trade and monopolistic business practices" in the wine and liquor industry. Plaintiff appeals from an order that, inter alia, granted the motion of defendants-respondents (defendants) to dismiss the amended complaint against them. We affirm. Contrary to plaintiff's contention, Supreme Court properly granted that part of the motion to dismiss the causes of action based on alleged violations of the Donnelly Act (General Business Law § 340 *et seq.*) and the Alcoholic Beverage Control Law for failure to state a cause of action. The majority of the allegations in the amended complaint contain no more than a vague and conclusory repetition of the statutory language

without reference to date, time or place, and thus the allegations are insufficiently particular to state a cause of action under either of those statutes (see CPLR 3013; see generally *Cole v Mandell Food Stores*, 93 NY2d 34, 40; *New Dimension Solutions, Inc. v Spearhead Sys. Consultants [US], Ltd.*, 28 AD3d 260; *Fowler v American Lawyer Media*, 306 AD2d 113).

The sole allegation in the amended complaint that refers to a specific defendant and an arguably specific event is that defendant Service-Universal Distributors, Inc. (Service-Universal) "had a virtual monopoly on the sale of Absolut[] vodka, the largest volume vodka import in the United States at the time[, and that Service-Universal] would often tie in the sale of . . . a less popular brand[] to the sale of Absolut[], in violation of New York Law." We conclude however, that plaintiff did not thereby state a cause of action pursuant to the Donnelly Act. Tying arrangements are prohibited "when the seller has some special ability-usually called market power-to force a purchaser to do something that he would not do in a competitive market" (*Illinois Tool Works Inc. v Independent Ink, Inc.*, 547 US 28, 36 [internal quotation marks omitted]). Thus, although "some such arrangements are still unlawful, such as those that are the product of a true monopoly or a marketwide conspiracy . . . , that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof" (*id.* at 42-43). Allegations that a seller controls a specific brand of a product are insufficient to establish that the seller has market power (see generally *Sheridan v Marathon Petroleum Co. LLC*, 530 F3d 590, 595; *Re-Alco Indus. v National Ctr. for Health Educ.*, 812 F Supp 387, 392), and the amended complaint otherwise fails to allege that Service-Universal or any defendant had the power to control the wine and liquor market. Indeed, with respect to the alleged causes of action for violation of the Donnelly Act, we conclude that the amended complaint merely alleges, in various forms, that plaintiff's competitors were offered a better wholesale price than that offered to plaintiff. Although "plaintiff may have been deprived of certain [profits] as a result of [defendants'] practice[s], [those] losses are clearly not tantamount to injury to competition in the market as a whole and thus do not constitute a cognizable claim under the Donnelly Act" (*Benjamin of Forest Hills Realty, Inc. v Austin Sheppard Realty, Inc.*, 34 AD3d 91, 97).

We reject the further contention of plaintiff that it has a private right of action pursuant to the Alcoholic Beverage Control Law and the regulations adopted pursuant thereto. The statute and regulations do not expressly provide for a private right of action, and thus a private right of action is permitted only in the event that it may fairly be inferred from the legislative history (see *Sheehy v Big Flats Community Day*, 73 NY2d 629, 633). In determining whether such a right may be fairly inferred, "the essential factors to be considered are: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (*id.*; see *CPC Intl. v McKesson Corp.*, 70

NY2d 268, 276; *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 324-325; *Niagara Mohawk Power Corp. v Testone*, 272 AD2d 910, 911; see also *McLean v City of New York*, 12 NY3d 194, 200). Contrary to plaintiff's contention, we conclude that no private right of action may be inferred from the legislative history of the Alcoholic Beverage Control Law. "The Legislature enacted the [Alcoholic Beverage Control] Law to promote temperance in the consumption of alcoholic beverages and to advance 'respect for [the] law' " (*DJL Rest. Corp. v City of New York*, 96 NY2d 91, 96; see § 2). "[I]t would be inappropriate for [this Court] to find another enforcement mechanism beyond the statute's already 'comprehensive' scheme . . . [and, c]onsidering that the statute gives no hint of any private enforcement remedy for money damages, we will not impute one to the lawmakers" (*Mark G. v Sabol*, 93 NY2d 710, 720-721).

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

777

KA 05-02579

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON L. WRIGHT, DEFENDANT-APPELLANT.

JONATHAN I. EDELSTEIN, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 11, 2005. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of murder in the second degree (Penal Law § 125.25 [2]) to manslaughter in the second degree (§ 125.15 [1]) and vacating the sentence imposed on count two of the indictment and by vacating the sentence imposed on count four of the indictment and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for sentencing on the conviction of manslaughter in the second degree and for resentencing on the conviction of robbery in the first degree.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]) and robbery in the first degree (§ 160.15 [1]). We agree with defendant that the evidence is legally insufficient to support the conviction of depraved indifference murder. We note at the outset that defendant preserved his contention for our review inasmuch as his motion for a trial order of dismissal "specifie[d] the alleged infirmity" (*People v Hawkins*, 11 NY3d 484, 492) by alerting Supreme Court that the acts against the victim were intentional and manifested an intent to kill or to cause serious physical injury and that the jury therefore should not be charged on the count of depraved indifference murder (*see generally People v Jean-Baptiste*, 11 NY3d 539, 542; *People v Feingold*, 7 NY3d 288, 294). Furthermore, in denying the motion, the court was "plainly . . . aware of, and expressly decided, the question raised on appeal" (*Hawkins*, 11 NY3d at 493).

We conclude that the evidence at trial established that the

victim was beaten by defendant and two other individuals over a period of approximately 20 to 30 minutes and that he died as a result of blunt force trauma. We agree with defendant that, although the acts against the victim manifested an intent to harm him, the beating of the victim by defendant did not rise to the level of "wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target of [his] inexcusable acts" (*People v Suarez*, 6 NY3d 202, 213; cf. *People v Poplis*, 30 NY2d 85, 87-88; *People v Nunez*, 51 AD3d 1398, 1399, lv denied 11 NY3d 792). Although the victim was left in a vacant lot by defendant and others, the abandonment of the victim does not by itself constitute depraved indifference murder inasmuch as " 'the core statutory requirement of depraved indifference is [not] established' " (*People v Mancini*, 7 NY3d 767, 768; see also *People v Mills*, 1 NY3d 269, 275-276).

We nevertheless conclude that the evidence is legally sufficient to support the lesser included offense of manslaughter in the second degree (Penal Law § 125.15 [1]; see *Jean-Baptiste*, 11 NY3d at 544; *People v George*, 11 NY3d 848, 850; *People v Atkinson*, 7 NY3d 765, 766-767). The evidence presented at trial establishes that defendant intended to cause the victim serious physical injury, and that his conduct created a substantial and unjustifiable risk that the victim would not merely sustain serious physical injury, but would die (see *People v Atkinson*, 21 AD3d 145, 151, mod 7 NY3d 765; see generally *People v Trappier*, 87 NY2d 55, 59). We therefore modify the judgment by reducing the conviction of murder in the second degree to manslaughter in the second degree and vacating the sentence imposed on count two of the indictment (see CPL 470.15 [2] [a]), and we remit the matter to Supreme Court for sentencing on the conviction of manslaughter in the second degree (see CPL 470.20 [4]).

Defendant further contends that the robbery count is duplicitous because he was charged with forcibly stealing "property, to wit, a BB gun and/or a pair of sneakers," which according to defendant were discrete thefts that occurred at different times and in different places. We reject that contention. The taking of those items occurred during the same criminal transaction (cf. *People v Bauman*, 51 AD3d 316, 319, *affd* 12 NY3d 152), and the nature of the property is not a material element of robbery (see generally *People v Cash J.Y.*, 60 AD3d 1487, 1489). We reject defendant's further contention that the robbery conviction is not supported by legally sufficient evidence. We agree with defendant that the evidence at trial does not support a finding that he intended permanently to deprive the victim of the BB gun that he removed from the victim's waistband and dropped to the ground. We nevertheless conclude, viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), that there is a valid line of reasoning and permissible inferences to support a finding that defendant forcibly stole the victim's sneakers (see generally *People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime of robbery in the first degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict with respect to

that crime is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject the contention of defendant that he was denied effective assistance of counsel. Viewing the evidence, the law and the circumstances of the case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see generally People v Benevento*, 91 NY2d 708, 712-713). We note, however, that there is a discrepancy between the sentencing minutes, wherein the court erred in imposing an indeterminate term of imprisonment on the robbery count (*see Penal Law § 70.04 [2]*), and the certificate of conviction, which appears to correct the error by imposing a determinate term of imprisonment on that count. Inasmuch as the record does not reflect whether defendant was resentenced, we further modify the judgment by vacating the sentence imposed on count four of the indictment, and we direct Supreme Court upon remittal to resentence defendant on the conviction of robbery in the first degree.

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

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

789

KA 07-02205

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LEO T. CONNOLLY, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, AND NAPIER & NAPIER, ESQS., ROCHESTER,
FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, SPECIAL DISTRICT ATTORNEY OF SENECA COUNTY,
CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (W. Patrick Falvey, J.), rendered October 16, 2008. The judgment convicted defendant, upon a jury verdict, of official misconduct (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the motion seeking to dismiss the indictment is granted and the indictment is dismissed without prejudice to the People to re-present any appropriate charges under counts three and five of the indictment to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of two counts of official misconduct (Penal Law § 195.00 [1]). The evidence at trial established that defendant, the Sheriff of Seneca County, directed certain members of his office to identify, locate, follow and, if possible, issue tickets for alleged traffic violations to members of the public who opposed his candidacy for Sheriff or posted Internet articles that were critical of his job performance. Contrary to defendant's contention, the evidence is legally sufficient to support the conviction. "A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit . . . [, he or she] commits an act relating to his [or her] office but constituting an unauthorized exercise of his [or her] official functions, knowing that such act is unauthorized" (*id.*). Here, the evidence presented at trial established that defendant engaged in "an 'unauthorized exercise' of police functions" by, inter alia, directing investigations of his opponents and critics for purely political purposes and thus misusing department resources and personnel for his own political benefit (*People v Feerick*, 93 NY2d 433, 448). Such evidence of "flagrant and intentional abuse of authority by [one] empowered to enforce the law" is legally sufficient to support the conviction (*id.* at 445).

We agree with defendant, however, that County Court erred in denying that part of his omnibus motion seeking to dismiss the indictment on the ground that the grand jury proceeding was defective inasmuch as it failed "to conform to the requirements of [CPL article 190] to such degree that the integrity thereof [was] impaired and prejudice to the defendant" resulted (CPL 210.35 [5]). A special prosecutor was appointed to investigate alleged wrongdoing by public officials in Seneca County, including defendant. After the grand jury was empaneled and the special prosecutor began to present evidence, one of the grand jurors informed the prosecutor that she was the mother of one of the alleged victims and the mother-in-law of another. In addition, the grand juror's daughter had commenced a civil action against defendant, allegedly arising from the same facts that resulted in the instant indictment against defendant. Although the special prosecutor instructed the grand juror not to participate in any proceeding concerning those witnesses and not to listen to their testimony, she was permitted to remain in the grand jury room during the presentation of the remaining evidence concerning defendant and she heard defendant's testimony. She then was permitted to participate, consult and vote on all of the charges against defendant that did not involve her relatives.

We note at the outset that this issue survives a conviction after trial based upon legally sufficient evidence (*see People v Huston*, 88 NY2d 400, 410-411; *People v Wilkins*, 68 NY2d 269, 277 n 7). Pursuant to CPL 210.20 (1), the court "may, upon motion of the defendant, dismiss [the] indictment . . . upon the ground that . . . [t]he grand jury proceeding was defective" A grand jury proceeding is defective pursuant to CPL 210.20 (1) (c) "when the proceeding 'fails to conform to the requirements of [CPL article 190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result' " (*Wilkins*, 68 NY2d at 278). Although "[t]he likelihood of prejudice turns on the particular facts of each case" (*People v Huston*, 88 NY2d 400, 409), "defendant need not demonstrate actual prejudice" (*People v Sayavong*, 83 NY2d 702, 709), and "a close relationship between a grand juror and a witness raises the real risk of potential prejudice" (*People v Revette*, 48 AD3d 886, 887).

Here, although the grand juror in question did not participate in the vote concerning the particular count of the indictment that pertained to her daughter and son-in-law, she participated in the remainder of the proceedings concerning defendant, including the vote to indict him on the remaining counts in the indictment. In addition, the daughter of the grand juror had a financial interest in defendant's indictment and conviction, arising from the pending civil action, and we conclude that potential prejudice arose from permitting the victims' family member to determine whether to indict defendant. The special prosecutor was therefore required to excuse the grand juror from participating in the case against defendant or to present the matter to the court (*see generally People v Nash*, 236 AD2d 845, *lv denied* 89 NY2d 1039; *People v La Duca*, 172 AD2d 1054, 1055). Because he failed to do so, the indictment must be dismissed without prejudice to the People to re-present any appropriate charges under counts three and five of the indictment to another grand jury.

In view of our determination, we do not address defendant's remaining contention.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

801

CA 09-00185

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

MURRAY J.S. KIRSHTEN, AS GUARDIAN AND AS
ADMINISTRATOR OF THE ESTATE OF GEORGE J.
TAPPER, DECEASED, PLAINTIFF-RESPONDENT,

V

OPINION AND ORDER

AMERICU CREDIT UNION (FORMERLY UP STATE
FEDERAL CREDIT UNION), ET AL., DEFENDANTS.
(AND A THIRD-PARTY ACTION.)
(ACTION NO. 1.)

MURRAY J.S. KIRSHTEN, AS THE ADMINISTRATOR
OF THE ESTATE OF GEORGE J. TAPPER, DECEASED,
PLAINTIFF-RESPONDENT,

V

GENERAL ELECTRIC COMPANY, LOEWS CORPORATION,
TOYS-"R"-US, INC., WACHOVIA CORPORATION,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

GENERAL ELECTRIC COMPANY, THIRD-PARTY
PLAINTIFF,

V

AMERICU CREDIT UNION (FORMERLY UP STATE
FEDERAL CREDIT UNION), THIRD-PARTY
DEFENDANT-APPELLANT.
(ACTION NO. 2.)

NASTO LAW FIRM, YORKVILLE (JOHN A. NASTO, JR., OF COUNSEL), FOR THIRD-
PARTY DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered March 25, 2008 in actions to recover damages for the allegedly improper transfers of securities. The order, insofar as appealed from, denied that part of the motion of defendants AmericU Credit Union (formerly Up State Federal Credit Union), General Electric Company, Loews Corporation, Toys-"R"-Us, Inc. and Wachovia

Corporation for summary judgment.

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

Opinion by CENTRA, J.: Plaintiff, as guardian and administrator of the estate of George J. Tapper (decedent), commenced two actions to recover damages for the allegedly improper transfers of securities owned by decedent. In 1998 decedent transferred certain shares of stock of several corporations to a third party, and his signatures on the transfers were allegedly guaranteed by AmeriCU Credit Union, formerly Up State Federal Credit Union (AmeriCU), a defendant and third-party plaintiff in action No. 1 and the third-party defendant in action No. 2. At the time of the transfers, decedent had not been adjudicated an incompetent person and no guardian had been appointed for him, but plaintiff alleged that decedent was mentally incapacitated due to Alzheimer's disease and the infirmities of old age. Plaintiff was appointed guardian of decedent's property in May 2000, and decedent died on December 2, 2001.

Plaintiff commenced action No. 1 against AmeriCU and its vice-president in April 2002, and he commenced action No. 2 in April 2004 against, inter alia, General Electric Company, Loews Corporation, Toys-"R"-Us, Inc. and Wachovia Corporation (collectively, corporate defendants), corporations that issued the securities. The corporate defendants and AmeriCU (collectively, defendants) moved to consolidate the two actions and for partial summary judgment dismissing the cause of action for wrongful registration under UCC 8-404. Plaintiff has acknowledged that there is only one cause of action against defendants, i.e., for wrongful registration, and thus we deem the motion of defendants to be one for summary judgment dismissing the complaint against them. Defendants now appeal from an order insofar as it denied that part of their motion for summary judgment dismissing the complaint. We conclude that the order should be affirmed.

An issuer of securities has a duty to register a transfer of securities (see UCC 8-401). Pursuant to UCC 8-404 (a) (1), an issuer of securities is liable for the wrongful registration of a transfer "if the issuer has registered a transfer of a security to a person not entitled to it, and the transfer was registered . . . pursuant to an ineffective indorsement or instruction" The corporate defendants, as issuers of the securities, obtained guarantees from AmeriCU pursuant to UCC 8-402 (a) that the signatures were genuine and authorized. As guarantor of the signatures of the indorser, AmeriCU thereby warranted that the signatures were genuine, that the signer was an appropriate person to indorse, and that the signer had "legal capacity" to sign (UCC 8-306 [a]).

An indorsement is effective if it is made by an "appropriate person" (UCC 8-107 [b]). The term "appropriate person" is defined in UCC 8-107 (a) as follows:

"(1) with respect to an indorsement, the person specified by a security certificate or by an

effective special indorsement to be entitled to the security;

"(2) with respect to an instruction, the registered owner of an uncertificated security;

"(3) with respect to an entitlement order, the entitlement holder;

"(4) if the person designated in paragraph (1), (2), or (3) is deceased, the designated person's successor taking under other law or the designated person's personal representative acting for the estate of the decedent; or

"(5) if the person designated in paragraph (1), (2), or (3) lacks capacity, the designated person's guardian, conservator, or other similar representative who has power under other law to transfer the security or financial asset."

The sole issue before us on this appeal concerns the definition of the term "capacity" within the meaning of UCC 8-107 (a) (5).

Defendants contend that the indorsements were effective because decedent was an "appropriate person" to make the indorsements inasmuch as he was the person specified by the security certificates to be entitled to the securities (see UCC 8-107 [a] [1]; [b]). According to defendants, because decedent had not been adjudicated an incompetent person and thus had no guardian, conservator, or other similar representative, he did not "lack[] capacity" within the meaning of UCC 8-107 (a) (5). In other words, defendants contend that the term "capacity" in UCC 8-107 (a) (5) is defined as "legal capacity," and thus that term concerns qualifications such as the age of majority and a lack of an adjudication of incompetency, not "mental capacity."

The term "capacity" is not defined by the UCC, but we note that, pursuant to UCC 1-103, "[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including . . . the law relative to capacity to contract, . . . shall supplement its provisions." In attempting to determine the Legislature's intent with respect to the meaning of the term "capacity," courts should ascertain such intent "from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 94). We conclude that the term "capacity" as used in UCC 8-107 (a) (5) should be broadly interpreted to refer both to legal capacity and to mental capacity.

Defendants essentially contend that the term "capacity" must be construed to mean either legal capacity or mental capacity, not both, and that it would not make sense to define the term as encompassing mental capacity because that would mean, e.g., that a mentally capable

16-year-old would be an appropriate person to indorse a certificate. We cannot adopt such a narrow construction of the statute. If the Legislature had meant to limit the term "capacity" to mean "legal capacity" or to require a person to be adjudicated incompetent before it could be concluded that he or she lacked capacity, the Legislature easily could have inserted language to that effect. For example, in UCC 4-405 (1) the Legislature expressly provided that "[a] payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence" (emphasis added).

In addition, we reject defendants' contention that, because the Legislature used the term "legal capacity" in UCC 8-306 (a) (3), it must likewise have intended that the term "capacity" in UCC 8-107 (a) (5) means "legal capacity." UCC 8-306 (a) provides that "[a] person who guarantees a signature of an indorser of a security certificate warrants that at the time of signing: (1) the signature was genuine; (2) the signer was an appropriate person to indorse . . .; and (3) the signer had legal capacity to sign." UCC 8-107 (a) defines the term "appropriate person," and thus UCC 8-306 incorporates UCC 8-107 (a) (5). If defendants are correct that the term "capacity" in section 8-107 (a) (5) means only "legal capacity," then there would be no need to include subdivision (a) (3) in section 8-306. Moreover, it may be inferred that, when the Legislature used only the term "capacity" in section 8-107 (a) (5), it intended to distinguish that term from the term "legal capacity." It is a well established principle of statutory construction that, "where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (McKinney's Cons Laws of NY, Book 1, Statutes § 240).

As noted previously, the UCC provides that the law concerning capacity to contract supplements the UCC provisions (see UCC 1-103). Pursuant to the common law, "contracts of a mentally incompetent person who has not been adjudicated insane are voidable" (*Ortelere v Teachers' Retirement Bd. of City of N.Y.*, 25 NY2d 196, 202). The contract is voidable at the election of the incompetent person "upon recovering his [or her] reason or at the election of his [or her] committee or personal representative or heirs" (*Verstandig v Schlaffer*, 296 NY 62, 64, *mot to amend remittitur granted* 296 NY 997). Defendants' interpretation of the UCC, in which defendants essentially contend that a mentally incompetent person who has not been adjudicated as such cannot void the transfer, thus is in derogation of the common law. "The Legislature in enacting statutes is presumed to have been acquainted with the common law, and generally, statutes in derogation or in contravention thereof, are strictly construed, to the end that the common law system be changed only so far as required by the words of the act and the mischief to be remedied" (McKinney's Cons Laws of NY, Book 1, Statutes § 301 [a], Comment). Here, had the Legislature meant what defendants contend it meant, which is in

derogation of the common law, the Legislature "needed to use specific and clear language to accomplish [that] goal" (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 522), and it did not do so.

Our conclusion that the term "capacity" includes "mental capacity" is buttressed by the practice of the securities industry. Plaintiff submitted the deposition transcripts of two individuals who practice in that industry, specifically that part of the industry that concerns guaranteeing signatures. Those individuals testified that the practice of requiring signature guarantors is intended to ensure that indorsers are of legal age and sound mind. Defendants have made no showing that the Legislature intended to alter that industry practice (see generally *American Tr. Ins. Co. v Sartor*, 3 NY3d 71, 76).

We therefore conclude that, if a person lacks mental capacity but has not been adjudicated an incompetent person and does not have a designated guardian, conservator, or other similar representative, then the person nevertheless is not an appropriate person to make an indorsement and the indorsement is therefore not effective. As Supreme Court determined in this case, the issue whether decedent lacked mental capacity at the time of the transfers is an issue to be decided by a trier of fact. Accordingly, we conclude that the order should be affirmed.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

817

KA 07-01685

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PATRICK O. RAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered August 14, 2007. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, 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]). We reject the contention of defendant that he was unduly prejudiced by County Court's *Molineux* ruling. Evidence of uncharged crimes may be admissible if it is relevant to establish some element of the crime under consideration or if it falls within one of the recognized exceptions to the general rule precluding such evidence, i.e., it is relevant to demonstrate motive, intent, absence of mistake or accident, a common scheme or plan, or the identity of defendant (see *People v Alvino*, 71 NY2d 233, 241-242; *People v Ventimiglia*, 52 NY2d 350, 359; *People v Molineux*, 168 NY 264, 293-94; *People v Kocyla*, 167 AD2d 938, 939). Here, testimony concerning defendant's prior uncharged drug transaction was properly admitted in evidence to demonstrate the mental state necessary for defendant's criminal possession of a controlled substance with the intent to sell (see *People v Laws*, 27 AD3d 1116, *lv denied* 7 NY3d 758, 763). In any event, the testimony was admissible "to complete the narrative of events leading up to the crime for which defendant [was] on trial" (*People v Mullings*, 23 AD3d 756, 758, *lv denied* 6 NY3d 756, 759). We reject the further contention of defendant that he was denied a fair

trial based on prosecutorial misconduct inasmuch as the prosecutor's comments "fell within the latitude afforded to attorneys in advocating their cause" (*People v Halm*, 81 NY2d 819, 821). The contention of defendant that he was denied effective assistance of counsel involves matters outside the record and is thus properly raised by way of a motion pursuant to CPL article 440 (see generally *People v Barnes*, 56 AD3d 1171).

Although we agree with defendant that the court erred in admitting his booking photographs in evidence, we conclude that the error is harmless (see generally *People v Crimmins*, 36 NY2d 230, 241-242). Defendant failed to preserve for our review his challenge to the court's ultimate *Sandoval* ruling (see *People v Robles*, 38 AD3d 1294, 1295, *lv denied* 8 NY3d 990). In any event, that challenge lacks merit inasmuch as the court did not abuse its discretion in allowing the prosecutor to question defendant with respect to the circumstances underlying defendant's prior convictions (see *People v Reid*, 34 AD3d 1273, 1274, *lv denied* 8 NY3d 884).

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 conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Also contrary to defendant's contention, the evidence is legally sufficient to support the conviction (see generally *id.*). The sentence is not unduly harsh or severe. Finally, defendant failed to preserve for our review his contention that the People improperly elicited testimony concerning his postarrest silence (see CPL 470.05 [2]), 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]).

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

818

KA 08-00233

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM F. OSBORNE, DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, ALBION, FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (TRACEY A. BRUNECZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered November 20, 2006. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, criminal sexual act in the first degree, and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of rape in the first degree (Penal Law § 130.35 [4]), criminal sexual act in the first degree (§ 130.50 [4]), and endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his contention that County Court erred in admitting in evidence a handwritten note of the victim that implicated defendant in the commission of a criminal sexual act (*see* CPL 470.05 [2]). In any event, although we agree with defendant that the note impermissibly bolstered the victim's testimony and that the court therefore erred in admitting it in evidence, we conclude that the error is harmless (*see generally* *People v Tejada*, 73 NY2d 958, 960; *People v Allah*, 57 AD3d 1115, 1118, *lv denied* 12 NY3d 780).

Defendant failed to preserve for our review his further contention that the People changed the theory of the prosecution on the count charging him with endangering the welfare of a child by presenting evidence of an act that was not presented to the grand jury (*see generally* *People v Bracewell*, 34 AD3d 1197). In any event, that contention lacks merit. The indictment charged defendant in a single count with the commission of multiple instances of endangering the welfare of a child committed during a specified period of time (*see* *People v Kuykendall*, 43 AD3d 493, *lv denied* 9 NY3d 1007; *cf. People v Jacobs*, 52 AD3d 1182), and any "slight variation" in the theory of the prosecution with respect to that count based on the testimony

concerning the act in question cannot be said to have affected defendant's liability for the crime charged (*People v Wright*, 16 AD3d 1173, 1174, *lv denied* 5 NY3d 771).

We further reject the contention of defendant that the court's response to the second jury note was inappropriate. While the court's response went beyond the proposed response discussed with the prosecutor and defense counsel, it did not interject substantive issues outside the scope of the jury's inquiry (see *People v Jackson*, 296 AD2d 658, 660, *lv denied* 98 NY2d 768), it correctly stated the law (see *People v Jackson*, 52 AD3d 1052, 1054, *lv denied* 11 NY3d 789), and it did not prejudice defendant (see *People v Barboza*, 24 AD3d 460, 461, *lv denied* 6 NY3d 773). Finally, we conclude that defendant was not denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147).

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

834

KA 07-01775

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CRAIG MCCULLEN, DEFENDANT-APPELLANT.

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

CRAIG MCCULLEN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered August 21, 2007. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree, criminal possession of stolen property in the fifth degree and possession of burglar's tools.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the DNA databank fee and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, grand larceny in the fourth degree (Penal Law § 155.30 [4]). Defendant failed to preserve for our review the contention in his main and pro se supplemental briefs that County Court erred in allowing the victim to testify with respect to her out-of-court identification of defendant (see CPL 470.05 [2]), 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 agree with defendant that the court erred in admitting testimony of the arresting officer that improperly bolstered the victim's testimony "by providing official confirmation of the [victim's out-of-court] identification of the defendant" (*People v German*, 45 AD3d 861, 862, *lv denied* 9 NY3d 1034; see generally *People v Trowbridge*, 305 NY 471). We conclude that the error is harmless, however, because the evidence of defendant's guilt, without reference to the error, is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (see *German*, 45 AD3d at 862; see generally *People v Crimmins*, 36 NY2d 230, 241-242).

Defendant contends in his main brief that the persistent felony offender statute, i.e., Penal Law § 70.10, is unconstitutional because it violates his right to a jury trial. We reject that contention (see generally *People v Rivera*, 5 NY3d 61, 67, cert denied 546 US 984), and we further conclude that the court did not abuse its discretion in sentencing defendant as a persistent felony offender (see *People v Kairis*, 37 AD3d 1070, lv denied 9 NY3d 846). Contrary to the contention of defendant in his main and pro se supplemental briefs, the court properly allowed his accomplices to testify with respect to statements that he made to them following his arrest inasmuch as those statements constituted evidence of consciousness of guilt (see *People v Violante*, 144 AD2d 995, 996, lv denied 73 NY2d 897). 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 the further contention of defendant in his main and pro se supplemental briefs that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). We have considered the remaining contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

We agree with defendant that the instant crimes were committed before the effective dates of the amendments to Executive Law § 995, which made the crimes "designated offenses" for purposes of imposition of the DNA databank fee of \$50 (see Executive Law § 995 [7]; Penal Law § 60.35 [1] [a] [v]). Thus, the DNA databank fee should not have been imposed. Although defendant failed to preserve his contention for our review (see CPL 470.05 [2]), we exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]), and we therefore modify the judgment accordingly.

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

840

CAF 07-02474

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

IN THE MATTER OF PATRICIA C.

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

CHRISTINE C., RESPONDENT,
AND RONALD C., RESPONDENT-APPELLANT.

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered September 7, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, terminated the parental rights of respondent Ronald C.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the petition against respondent Ronald C. is dismissed.

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to his daughter pursuant to Social Services Law § 384-b (4) (d) on the ground of permanent neglect. We agree with the father that Family Court violated his right to due process by refusing to permit him to present evidence during the fact-finding phase of the proceeding after the father failed to make a timely appearance on the fourth day of the hearing. "A parent has a right to be heard on matters concerning [his or] her child and the parent's rights are not to be disregarded absent a convincing showing of waiver" (*Matter of Kendra M.*, 175 AD2d 657, 658; see *Matter of Cleveland W.*, 256 AD2d 1151). Here, there was no showing of waiver. The father appeared on the first three days of the hearing and communicated his intent to testify. On the fourth day of the hearing, the father's attorney notified the court that, according to the father's employer, the father believed that the hearing commenced at 10:00 A.M. rather than 9:00 A.M., and that he was en route to the hearing. In addition, the father's first witness was available to testify prior to the father's arrival. Under those circumstances, we conclude that the father's due process rights were violated when the court closed the fact-finding hearing and precluded the father from presenting evidence in opposition to the petition (see *Cleveland W.*, 256 AD2d at 1152).

We further agree with the father in any event that petitioner failed to establish that he permanently neglected his daughter. First, petitioner failed to meet its initial burden of establishing "by clear and convincing evidence that it . . . fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family" (*Matter of Sheila G.*, 61 NY2d 368, 373; see Social Services Law § 384-b [7] [a]). In order to meet that burden, "[a]n agency must always determine the particular problems facing a parent with respect to the return of his or her child and make affirmative, repeated, and meaningful efforts to assist the parent in overcoming these handicaps" (*Sheila G.*, 61 NY2d at 385). "The agency should mold its diligent efforts to fit the individual circumstances so as to allow the parent to provide for the child's future" (*Matter of Austin A.*, 243 AD2d 895, 897 [internal quotation marks omitted]). Based upon the evidence presented by petitioner at the fact-finding hearing, we conclude that petitioner "failed to tailor its efforts to the needs of this particular parent and child" (*Matter of Maria Ann P.*, 296 AD2d 574, 575).

Even assuming, arguendo, that petitioner met its burden with respect to diligent efforts, we agree with the father that petitioner failed to meet its further burden of establishing that he failed to maintain contact with his daughter or to plan for her future although physically and financially able to do so (see Social Services Law § 384-b [7] [a]; *Matter of Star Leslie W.*, 63 NY2d 136, 142). The record reflects that, despite substantial geographic, personal, and employment-related obstacles, the father made significant efforts to maintain contact with his daughter and to plan for her future. Indeed, the record establishes that the father completed parenting classes, was in treatment with a counselor for domestic violence and anger management issues, and attempted to maintain full-time employment throughout the period in question. In view of our determination, we need not address the father's remaining contentions.

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

846

CA 09-00123

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

DAVID HECKMAN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JAMES A. SKELLY AND REBECCA J. SKELLY,
DEFENDANTS-RESPONDENTS.

KEENAN STONE LAW CENTRE, PC, HAMBURG (JOHN J. KEENAN OF COUNSEL), AND
BLY, SHEFFIELD, BARGAR, PILLITTIERI & MACCALLUM, JAMESTOWN, FOR
PLAINTIFF-APPELLANT.

BURGIO, KITA & CURVIN, BUFFALO (WILLIAM J. KITA OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered March 27, 2008 in a personal injury action. The order and judgment granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries to his left leg incurred when a concrete step leading to defendants' residence collapsed. Plaintiff had performed an inspection for a home rehabilitation and improvement company at defendant's residence and was leaving the premises at the time of the accident. We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. Contrary to plaintiff's contention, the doctrine of *res ipsa loquitur* does not apply here because it cannot be said that the injury was " 'caused by an agency or instrumentality within the exclusive control of the defendant[s]' " (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209). Indeed, the record establishes that defendants did not own or occupy the residence until nearly 100 years after the house and the front steps were built, and thus any negligence associated with the construction or maintenance of the front steps could be attributable to a previous owner or to the builder (*see Lofstad v S & R Fisheries, Inc.*, 45 AD3d 739, 742; *Crosby v Stone*, 137 AD2d 785, 786, *lv denied* 72 NY2d 807).

We further conclude that defendants established as a matter of law that they neither created the dangerous condition nor had actual or constructive notice of it (*see generally Zuckerman v City of New*

York, 49 NY2d 557, 562; *Pelow v Tri-Main Dev.*, 303 AD2d 940), and plaintiff failed to raise a triable issue of fact to defeat the motion (see generally *Zuckerman*, 49 NY2d at 562). Defendants established that the front steps were constructed before they purchased the home and that they were unaware of any problems with the steps. Indeed, plaintiff testified at his deposition that he did not consider the front steps to be a safety concern while he inspected defendants' residence, before the accident occurred.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

852

CA 08-02378

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

KIM M. JOHNSTONE-MANN AND DOUGLAS L. MANN,
INDIVIDUALLY AND AS HUSBAND AND WIFE,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

JULIE M. STOUT AND RICHARD D. STOUT,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

JULIE M. STOUT, PLAINTIFF-RESPONDENT,

V

KIM JOHNSTONE-MANN, DEFENDANT.
(ACTION NO. 2.)

BURGETT & ROBBINS LLP, JAMESTOWN (DALTON BURGETT OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County
(Timothy J. Walker, A.J.), entered July 28, 2008. The order granted
the motion of defendants Julie M. Stout and Richard D. Stout seeking a
joint trial of action Nos. 1 and 2 and seeking to bifurcate the trial.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by denying that part of the motion
seeking to bifurcate the trial and as modified the order is affirmed
without costs.

Memorandum: In action No. 1, the plaintiffs seek damages for
injuries sustained by Kim M. Johnstone-Mann when the vehicle she was
driving collided with a vehicle driven by Julie M. Stout, a defendant
in action No. 1. Julie Stout in turn commenced action No. 2 against
Johnstone-Mann, seeking damages arising from the same collision.
Supreme Court did not abuse its discretion in granting that part of
the motion of the defendants in action No. 1 and the plaintiff in
action No. 2 seeking a joint trial of the two actions (*see generally*
Nationwide Assoc. v Targee St. Internal Med. Group, P.C. Profit
Sharing Trust, 286 AD2d 717, 718). "Absent a showing of prejudice, a
motion . . . for a joint trial pursuant to CPLR 602 (a) should be

granted where common questions of law or fact exist" (*Spector v Zuckermann*, 287 AD2d 704, 706). We conclude, however, that the court erred in granting that part of the motion seeking to bifurcate the trial. " 'Separate trials on the issues of liability and damage[s] should not be held where the nature of the injuries has an important bearing on the issue of liability' " (*Fox v Frometa*, 43 AD3d 1432). Here, evidence of the injuries and resulting amnesia sustained by Julie Stout is " 'necessary for the . . . purpose of allowing the [trier of fact] to consider whether [she] should be held to a lesser degree of proof' on the issue of liability" (*id.*; see *Schwartz v Binder*, 91 AD2d 660). We therefore modify the order accordingly.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

853

KA 08-01493

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

OPINION AND ORDER

GLEN D. HELMER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, J.), entered May 14, 2008. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Opinion by SCUDDER, P.J.: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). The sole issue on appeal is whether the victim was a stranger to defendant for purposes of determining whether defendant should have been assessed 20 points on the risk assessment instrument for risk factor 7, "[r]elationship with victim." For the reasons that follow, we conclude that County Court erred in determining that the People proved by clear and convincing evidence that the victim and defendant were strangers and in therefore assessing 20 points for that risk factor. Thus, we conclude that defendant should be assessed zero points for factor 7, thereby reducing his score to 65 and rendering him a level one risk.

It is undisputed that defendant and the victim had sexual relations on the same day on which they had their first face-to-face meeting (*see People v Lewis*, 45 AD3d 1381, *lv denied* 10 NY3d 703; *People v Gaines*, 39 AD3d 1212, *lv denied* 9 NY3d 803). The facts herein distinguish this case from both *Lewis* and *Gaines*, however, because the respective victims in *Lewis* and *Gaines* had met the defendants only hours before having sexual relations and did not know the legal names of the defendants or any other personal information about them. Here, defendant and the victim had communicated via the

Internet and telephone for several weeks before they actually met in person. The 28-year-old defendant accessed MySpace.com in early December 2005 in order to meet women between the ages of 20 to 30 in the Auburn area. The name of the 15-year-old victim was provided in response to defendant's inquiry because her profile stated that she was 20 years old. Through their communications, the victim knew defendant's name and age, as well as the status of defendant's pending divorce (*cf. People v Tejada*, 51 AD3d 472; *Lewis*, 45 AD3d at 1381; *Gaines*, 39 AD3d at 1212-1213). Although the information provided to defendant by the victim with respect to her age was false, she did provide defendant with her address and details about her family. Following more than 100 Internet exchanges and 30 telephone calls, the victim and defendant arranged to meet in person. Defendant picked up the victim on December 31, 2005 at her brother's house at approximately 2:00 in the afternoon, and the two went to a park and to dinner before going to defendant's house. They engaged in sexual relations at approximately 11:30 P.M., and they subsequently had contact with each other on several occasions. In early February 2005, defendant learned that the victim was only 15 years old, and he learned that she was pregnant.

The risk assessment guidelines provide that "the term 'stranger' includes anyone who is not an actual acquaintance of the victim" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 12 [2006]). The term "acquaintance" spans a range of social interactions, and we conclude in this case that, based upon the extensive communication through electronic means over a period of weeks and the information learned therein, defendant and the victim were not strangers when they engaged in sexual relations.

Accordingly, we conclude that the order should be modified by determining that defendant is a level one risk pursuant to SORA.

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

864

CA 09-00044

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

LAUREL FREGA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

GALLINGER REAL ESTATE, DEFENDANT-APPELLANT.

LAW OFFICE OF MICHAEL M. EMMINGER, SYRACUSE (JOHN F. PFEIFER OF COUNSEL), FOR DEFENDANT-APPELLANT.

S. ROBERT WILLIAMS, PLLC, SYRACUSE (MICHELLE ELLSWORTH RUDDEROW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered November 21, 2008 in a personal injury action. The order denied the motion of defendant 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: Plaintiff commenced this action to recover damages for injuries she sustained when the vehicle she was operating collided with another vehicle at an intersection. According to plaintiff, a sign advertising a home for sale that had been installed by defendant at the corner of the intersection obstructed her view of oncoming traffic and thereby caused or contributed to the collision. Supreme Court erred in denying defendant's motion for summary judgment dismissing the complaint. Plaintiff was required to stop "at the point nearest the intersecting roadway where [she had] a view of the approaching traffic on the intersecting roadway before entering the intersection" (Vehicle and Traffic Law § 1172 [a]), and the affidavit of defendant's expert established that the sign was located a sufficient distance from the intersection to enable plaintiff to stop safely and to view approaching traffic (*see Pahler v Daggett*, 170 AD2d 750, 751-752). Defendant thus established that its sign was not a proximate cause of the accident, and plaintiff failed to raise a triable issue of fact (*see id.* at 752; *Olsen v Baker*, 112 AD2d 510, 511, *lv denied* 66 NY2d 604).

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

870

CA 08-00553

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

IN THE MATTER OF DEPUTY JOSEPH D. RAYMOND, SR.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

KEVIN E. WALSH, SHERIFF, COUNTY OF ONONDAGA,
COUNTY OF ONONDAGA AND ONONDAGA COUNTY
SHERIFF'S OFFICE, RESPONDENTS-RESPONDENTS.

COTE, LIMPERT & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF
COUNSEL), FOR PETITIONER-APPELLANT.

COUGHLIN & GERHART, LLP, BINGHAMTON (LARS P. MEAD OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 11, 2007 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.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating his General Municipal Law § 207-c benefits. According to petitioner, the collective bargaining agreement (CBA) between respondents and the union representing petitioner required that a hearing be conducted before those benefits were terminated. We reject that contention. Although the CBA provides that union members have the right to a hearing to contest a determination to terminate benefits pursuant to section 207-c, it does not afford a union member the right to a hearing prior to the termination of such benefits. Indeed, we conclude that petitioner, by entering into the CBA through his union, waived his right to a pretermination hearing (see *Antinore v State of New York*, 49 AD2d 6, 10, *affd* 40 NY2d 921; *Matter of Fortune v State of N.Y., Div. of State Police*, 293 AD2d 154, 158; see generally *Police Benevolent Assn. of N.Y. State Troopers, Inc. v Division of N.Y. State Police*, 11 NY3d 96, 103). Because the petition was in the nature of mandamus to review rather than mandamus to compel the performance of a ministerial act required by law (*cf. Matter of Heck v Keane*, 6 AD3d 95, 98-99), the four-month statute of limitations pursuant to CPLR 217 began to run on the date on which petitioner received notice of the termination of his section 207-c benefits. The record establishes

that petitioner was notified of the termination of his section 207-c benefits on December 2, 1999 and that he was notified of the termination of his hardship benefits on July 26, 2005. The petition was not filed until August 17, 2007 and thus, using either date, the proceeding is time-barred.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

871

CA 09-00127

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

CEDRIC SMITH AND DEBORAH SWANSON-SMITH,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

PICONE CONSTRUCTION CORPORATION,
DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF
COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS & MAXWELL, L.L.P., BUFFALO (ALAN D. VOOS OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered October 16, 2008 in a personal injury action. The order granted plaintiffs' motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) claim and denied defendant's cross motion for summary judgment dismissing that claim.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries allegedly sustained by Cedric Smith (plaintiff) when he fell while carrying bricks up a ladder at a construction site. Defendant appeals from an order granting plaintiffs' motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) claim and denying defendant's cross motion for partial summary judgment dismissing that claim. We affirm.

We conclude that plaintiffs met their initial burden on the motion by establishing that "the absence of . . . a safety device was the proximate cause of [plaintiff's] injuries" (*Felker v Corning Inc.*, 90 NY2d 219, 224; see *Baum v Ciminelli-Cowper Co.*, 300 AD2d 1028, 1029), and that "defendant failed to raise a triable issue of fact whether the conduct of plaintiff was the sole proximate cause of his injuries" (*Ewing v Brunner Intl., Inc.*, 60 AD3d 1323, 1323; see *Ganger v Anthony Cimato/ACP Partnership*, 53 AD3d 1051, 1052-1053; cf. *Tronolone v Praxair, Inc.*, 22 AD3d 1031, 1033). In opposition to the motion, defendant contended that plaintiff should have used an outrigger system to raise the bricks to the level at which the masons

were working, rather than carry them up the ladder by hand. Defendant failed, however, to establish that the outrigger system was installed on the scaffold on the day of plaintiff's injury. Defendant also failed to raise a triable issue of fact "whether plaintiff, based on his training, prior practice, and common sense, knew or should have known" not to carry bricks by hand up the ladder (*Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1427). We thus conclude that defendant failed to submit evidence that would permit a jury to find "that plaintiff had [an] adequate safety device[] available; that he knew both that [it was] available and that he was expected to use [it]; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40).

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

881

KA 07-01084

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICKY T. MILLS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered August 5, 2004. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, sodomy in the second degree, and endangering the welfare of a child (three counts).

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 one count each of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and sodomy in the second degree (former § 130.45 [1]), and three counts of endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the convictions (*see People v Gray*, 86 NY2d 10, 19). The verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495). Defendant failed to move to set aside the verdict on the ground of repugnancy before the jury was discharged and thus failed to preserve for our review his contention that the verdict is repugnant insofar as he was acquitted of sodomy in the first degree, sexual abuse in the first degree, rape in the first degree and course of sexual conduct against a child in the first degree with respect to the youngest child, but was found guilty of sodomy in the second degree, course of sexual conduct against a child in the first degree with respect to the middle child and endangering the welfare of a child with respect to all three children (*see People v Alfaro*, 66 NY2d 985, 987). We reject the contention of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). The sentence is not unduly harsh or severe.

Finally, we note that the certificate of conviction incorrectly

reflects that defendant was convicted upon a plea of guilty, and it must therefore be amended to reflect that he was convicted upon a jury verdict (see *People v Martinez*, 37 AD3d 1099, 1100, lv denied 8 NY3d 947).

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

888

CA 08-02614

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

WARD A. CUMMINGS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT VARGO, DEFENDANT-APPELLANT.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL),
FOR DEFENDANT-APPELLANT.

LAW OFFICES OF MARTIN J. ZUFFRANIERI, BUFFALO (MARTIN J. ZUFFRANIERI
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered October 9, 2008 in a personal injury action. The order granted the motion of plaintiff for partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from the metal roof of defendant's commercial apartment building while applying fiber aluminum coating to the roof surface using a paint roller.

Supreme Court properly granted plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action. Plaintiff is entitled to the protection of Labor Law § 240 (1) because he was a " 'falling worker' " engaged in a covered activity (see *Partridge v Waterloo Cent. School Dist.*, 12 AD3d 1054, 1055). Contrary to defendant's contention, the application of the "silver coat" to the roof is the functional equivalent of painting (see *Artoglou v Gene Scrappy Realty Corp.*, 57 AD3d 460, 461). Painting is a protected activity that "need not [be] incidental to the other listed activities, such as construction, repair or alteration, to be covered" by Labor Law § 240 (1) (*De Oliveira v Little John's Moving*, 289 AD2d 108, 108). We thus reject defendant's contention that plaintiff was engaged in routine maintenance rather than an expressly covered activity, i.e., painting.

We conclude that plaintiff established his entitlement to judgment as a matter of law on liability with respect to the Labor Law § 240 (1) cause of action. "[A]n 'owner or contractor who has failed

to provide any safety devices for workers' " at a work site is absolutely liable for injuries sustained by a worker when the absence of such safety devices is a proximate cause of the worker's injuries (*Felker v Corning Inc.*, 90 NY2d 219, 225, quoting *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 518-519, *rearg denied* 65 NY2d 1054). Here, it is undisputed that plaintiff was not provided with ropes, harnesses or other safety devices, and defendant failed to raise a triable issue of fact whether plaintiff's conduct was the sole proximate cause of the accident (see *Smith v Dieter*, 15 AD3d 897).

We reject defendant's contention that the court prematurely granted the motion because discovery was not yet completed. Defendant "failed to show that facts essential to justify opposition may exist but [could not] then be stated . . . and that [defendant] require[d] the discovery of facts that are within the exclusive knowledge of another party" (*Croman v County of Oneida*, 32 AD3d 1186, 1187 [internal quotation marks omitted]).

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

905

CA 08-02085

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

IN THE MATTER OF THE PETITION OF NEW YORK
STATE URBAN DEVELOPMENT CORPORATION, DOING
BUSINESS AS EMPIRE STATE DEVELOPMENT
CORPORATION, TO ACQUIRE IN FEE SIMPLE CERTAIN
REAL PROPERTY SITUATE IN THE CITY OF NIAGARA
FALLS, COUNTY OF NIAGARA, STATE OF NEW YORK,
TOGETHER WITH ALL COMPENSABLE INTERESTS
THEREIN, INCLUDING SUCH INTERESTS AS MAY BE
HELD BY ANY UNKNOWN CONDEMNNEES, PETITIONER.

MEMORANDUM AND ORDER

THE NIAGARA VENTURE AND NATIONAL URBAN
VENTURES, INC., RESPONDENTS-APPELLANTS;

DINO DICIENZO, INTERTRUST DEVELOPMENT, INC.
AND NIAGARA FALLS URBAN RENEWAL AGENCY,
RESPONDENTS-RESPONDENTS.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (JOHN P.
BARTOLOMEI OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (CYNTHIA L. THOMPSON OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS DINO DICIENZO AND INTERTRUST DEVELOPMENT, INC.

THOMAS M. O'DONNELL, CORPORATION COUNSEL, NIAGARA FALLS (RICHARD ZUCCO
OF COUNSEL), FOR RESPONDENT-RESPONDENT NIAGARA FALLS URBAN RENEWAL
AGENCY.

Appeal from an order of the Supreme Court, Niagara County
(Richard C. Kloch, Sr., A.J.), entered June 10, 2008 in a proceeding
pursuant to EDPL article 4. The order, inter alia, granted the motion
of respondents Dino DiCienzo, Intertrust Development, Inc. and Niagara
Falls Urban Renewal Agency for distribution of the advance payment to
them pursuant to EDPL 304.

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

Memorandum: Petitioner condemnor commenced this proceeding
seeking to acquire title to property located in Niagara Falls, New
York, and Supreme Court granted the petition. The court thereafter
granted petitioner's motion for an order directing the clerk of the
court to accept a deposit from petitioner in the amount determined by
petitioner to be the highest approved appraisal of just compensation
for the property, whereupon petitioner was authorized to exercise its

right to possession of the property pursuant to EDPL 405. Respondents Dino DiCienzo and Intertrust Development, Inc. (collectively, Intertrust defendants) and Niagara Falls Urban Renewal Agency (NFURA) moved for distribution of the advance payment to them pursuant to EDPL 304 and, contrary to the contention of respondents The Niagara Venture (NV) and National Urban Ventures, Inc. (NUV), the court properly granted the motion.

According to NV and NUV, they were denied their right to a "distribution proceeding" and the court was required to hold a hearing with respect to their claims concerning the advance payment. Even assuming, arguendo, that those contentions are preserved for our review, we conclude that they lack merit. Pursuant to EDPL 304 (D), when a conflict arises over title or the percentage of the condemnation award to be paid to several owners with interests in the condemned property, the condemnor shall "deposit the full or advance payment . . . with the clerk of the supreme court having jurisdiction of the claim." At that point, "the condemnor shall notify all persons claiming an interest in the condemnation award that the amount payable thereunder has been deposited and is subject to an application by an interested person or persons to a distribution proceeding" (*id.*). Section 304 (D) does not set forth the procedure for such a proceeding, but section 304 (E) (1), which contains identical language except for the substitution of the term "the attorney general" for "the condemnor," provides that "[t]he procedure on such an application shall be the same as provided in [Court of Claims Act § 23] respecting the distribution of deposited court of claims awards"

Court of Claims Act § 23 provides that applications for awards are to be made by verified petition. The court then issues an order directing all those who have or claim to have an interest in the award "to appear before such court and to present their claims or demands" (*id.*). The court "may on the return day hear all persons interested and make a final order of distribution or refer any claim to a referee to hear, try and report" (*id.* [emphasis added]). Here, the court followed all of those procedures, and the attorneys for all parties appeared before the court and presented their claims. Because there thus is no merit to the claims of NV and NUV with respect to the condemnation award, we conclude that the court did not abuse or improvidently exercise its discretion in issuing a final order without conducting a hearing. We reject the further contention of NV and NUV that, because the Intertrust defendants and NFURA failed to file a notice of claim, they were not entitled to any portion of the condemnation award. The EDPL contains no requirement that a notice of claim be filed by those claiming an interest in the award.

We note in any event that the contentions of NV concerning the advance payment are barred by the doctrine of collateral estoppel (see generally *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500), and that the claims of NUV concerning the condemnation award are barred by the doctrine of judicial estoppel. With respect to NV, those claims to an interest in the property in question were raised and necessarily decided in earlier litigation (see *Niagara Venture v Niagara Falls Urban Renewal Agency*, 56 AD3d

1149; *DiCienzo v Niagara Falls Urban Renewal Agency*, 56 AD3d 1149; *Niagara Venture v Niagara Falls Urban Renewal Agency*, 56 AD3d 1150).

With respect to NUV, "[t]he doctrine of judicial estoppel, also known as the 'doctrine of estoppel against inconsistent positions[,] . . . precludes a party from framing [its] pleadings in a manner inconsistent with a position taken in a prior judicial proceeding' " (*Secured Equities Invs. v McFarland*, 300 AD2d 1137, 1138).

Here, the attorney representing NV and NUV is the real party in interest based on his control of both NV and NUV, and that attorney has consistently maintained that only NV had any interest in the condemned property. Indeed, that position is supported by documentation establishing that NUV assigned all of its rights in the subject property to NV. Thus, that attorney will not now be heard to argue an inconsistent position.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

910

CA 08-02200

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

IN THE MATTER OF HARTFORD/NORTH BAILEY
HOMEOWNERS ASSOCIATION, BY FRANK S. PASZTOR,
ITS PRESIDENT, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF THE TOWN OF AMHERST,
WAL-MART STORES, INC. AND BENDERSON
DEVELOPMENT CO., INC., RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF HARTFORD/NORTH BAILEY
HOMEOWNERS ASSOCIATION, BY FRANK S. PASZTOR,
ITS PRESIDENT, PETITIONER-APPELLANT,

V

PLANNING BOARD OF THE TOWN OF AMHERST, WAL-MART
STORES, INC. AND BENDERSON DEVELOPMENT CO., INC.,
RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 2.)

RICHARD J. LIPPES & ASSOCIATES, BUFFALO (RICHARD J. LIPPES OF
COUNSEL), FOR PETITIONER-APPELLANT.

E. THOMAS JONES, TOWN ATTORNEY, WILLIAMSVILLE, FOR
RESPONDENTS-RESPONDENTS ZONING BOARD OF APPEALS OF THE TOWN OF AMHERST
AND PLANNING BOARD OF THE TOWN OF AMHERST.

HARTER SECREST & EMERY LLP, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL),
FOR RESPONDENT-RESPONDENT WAL-MART STORES, INC.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JOHN J. HENRY OF COUNSEL), FOR
RESPONDENT-RESPONDENT BENDERSON DEVELOPMENT CO., INC.

Appeal from a judgment (denominated order) of the Supreme Court,
Erie County (Joseph G. Makowski, J.), entered July 16, 2008 in
proceedings pursuant to CPLR article 78. The judgment dismissed the
petitions.

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

Memorandum: Petitioner commenced these consolidated CPLR article

78 proceedings seeking, inter alia, to annul the determination of the Zoning Board of Appeals of the Town of Amherst (ZBA), a respondent in proceeding No. 1, issuing a negative declaration pursuant to article 8 of the Environmental Conservation Law (State Environmental Quality Review Act [SEQRA]) and granting an area variance for the construction of a Wal-Mart Supercenter (project). Petitioner also sought to annul the determination of the Planning Board of the Town of Amherst (Planning Board), a respondent in proceeding No. 2, issuing a negative declaration pursuant to SEQRA and granting site plan approval for the project. Petitioner appeals from a judgment granting the motion of the Benderson Development Co., Inc., a respondent in both proceedings, and the cross motion of the Planning Board, the ZBA and respondent Wal-Mart Stores, Inc., also a respondent in both proceedings, seeking to dismiss the petitions. We affirm.

At the outset, we agree with petitioner that Supreme Court erred in determining that it lacks standing to maintain these proceedings. Petitioner met its burden of establishing "that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members" (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211; see *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 775; *Matter of Citizens Organized to Protect the Env't. v Planning Bd. of Town of Irondequoit*, 50 AD3d 1460, 1460-1461). We further conclude that, although the court properly determined that the owners of two parcels of property on which the project would be located should have been joined as necessary parties in these proceedings (see CPLR 1001 [a]; *Matter of Southwest Ogden Neighborhood Assn. v Town of Ogden Planning Bd.*, 43 AD3d 1374, *lv denied* 9 NY3d 818), the court erred in dismissing the petitions on that procedural ground without summoning the two property owners (see CPLR 1001 [b]; *Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 726).

We conclude, however, that the court properly granted the motion and the cross motion on the merits. We reject petitioner's contention that the Planning Board and the ZBA (collectively, Town respondents) failed to comply with the requirements of SEQRA. We agree with petitioner that the Town respondents improperly classified the project as an Unlisted action (see 6 NYCRR 617.2 [ak]), rather than as a Type I action (see 6 NYCRR 617.4). Nevertheless, the record establishes that they followed the procedural and substantive guidelines applicable to a Type I action (see *Matter of Ahearn v Zoning Bd. of Appeals of Town of Shawangunk*, 158 AD2d 801, 803-804, *lv denied* 76 NY2d 706; see also *Matter of Steele v Town of Salem Planning Bd.*, 200 AD2d 870, 872, *lv denied* 83 NY2d 757), and thus the improper classification is of no moment. Petitioner further contends that the negative declarations issued by the Town respondents must be annulled because the Town respondents failed to complete parts 2 and 3 of the full environmental assessment form (EAF) pursuant to SEQRA. We reject that contention because the record establishes that the Town respondents in fact considered the factors set forth in parts 2 and 3 of the full EAF (see *Matter of Residents Against Wal-Mart v Planning Bd. of Town of Greece*, 60 AD3d 1343, 1344; *Matter of Coursen v*

Planning Bd. of Town of Pompey, 37 AD3d 1159).

We further reject petitioner's contention that the Town respondents erred in determining that the project will have no significant adverse impact on the environment. In issuing their respective negative declarations, the Town respondents "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for [their] determination[s]" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417; see *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 688-690). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

913

CAF 08-00073

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

IN THE MATTER OF DEBORAH E.C.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

SHAWN K., RESPONDENT-APPELLANT,
AND GENESEE COUNTY DEPARTMENT OF SOCIAL
SERVICES, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

DEBORAH E.C., PRO SE, AND MICHAEL STEINBERG, ROCHESTER, FOR DEBORAH
E.C., PETITIONER-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT.

JOHN L. RIZZO, COUNTY ATTORNEY, LEROY (COLLEEN S. HEAD OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

JACQUELINE M. GRASSO, LAW GUARDIAN, BATAVIA, FOR SETH K.

Appeals from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered December 17, 2007 in a proceeding pursuant to Family Court Act article 6. The order denied the petition for custody.

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

Memorandum: In appeal No. 1, respondent father and his wife, petitioner stepmother, appeal from an order denying the Family Court Act article 6 petition of the stepmother seeking custody of the father's son and, in appeal No. 2, they appeal from an order denying the stepmother's "modification petition" under Family Court Act article 10, also seeking custody of the father's son. In appeal No. 3, the father appeals from a subsequent order terminating his parental rights with respect to his son. The father and his son's biological mother were the subjects of a Family Court Act article 10 neglect petition, and the biological mother's parental rights previously were terminated. The father is presently incarcerated until at least 2013. Although his son had for a period of time been placed with a family friend, he was transferred to foster care in June 2006 when the family friend could no longer care for him. In January 2007, the stepmother and the father married, and the stepmother filed the petitions for custody at issue in appeal Nos. 1 and 2. Family Court held one

hearing on both petitions and, in thereafter denying the petitions, the court determined that the stepmother should not be awarded custody because she had "emotional issues" and "an extended history of relationships with male figures marked by both domestic violence and substance abuse."

In appeal Nos. 1 and 2, the father and the stepmother contend, *inter alia*, that the court used improper standards of review. We reject that contention. With respect to the article 6 petition, even assuming, *arguendo*, that the stepmother was required to establish the existence of extraordinary circumstances, we conclude that she did so (*see Matter of Vann v Herson*, 2 AD3d 910, 911-912; *see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 548). Thus, the focus with respect to the article 6 petition became the best interests of the child (*see Bennett*, 40 NY2d at 548; *Matter of Autumn B.*, 299 AD2d 758, 759). With respect to the article 10 "modification petition" seeking custody, we likewise conclude that the focus was the best interests of the child. Under the provisions of article 10 as they existed at the time of the hearing, the stepmother was required to establish that she was a "suitable person" with whom the child could reside (*see Family Ct Act* § 1017 [2] [a] [former (i), (ii)]; § 1055 [former (a) (i)]; *Matter of Seth Z.*, 45 AD3d 1208, 1210). That analysis incorporates a best interests standard of review (*see Matter of Harriet U. v Sullivan County Dept. of Social Servs.*, 224 AD2d 910, 911). Under the provisions of article 10, as it has been amended (*see L 2008, ch 519*), there is now an explicit "best interests" standard of review for such petitions (*see* § 1055-b [a] [ii]; *Matter of Gabriel James Mc.*, 60 AD3d 1066).

It is well established that a trial court's determination of a child's best interests "must be accorded the greatest respect" (*Eschbach v Eschbach*, 56 NY2d 167, 173 [internal quotation marks omitted]), and will not be disturbed if " 'it has a sound and substantial basis in the record' " (*Matter of Westfall v Westfall*, 28 AD3d 1229, 1230, *lv denied* 7 NY3d 706). Here, "[a]lthough there is little doubt that the child has psychologically bonded with [the stepmother] to some degree, '[t]he degree of bonding is simply one factor among the totality of the circumstances [to be] considered by Family Court' " (*Matter of Esposito v Shannon*, 32 AD3d 471, 473). On the record before us, we see no basis to disturb the determination of the trial court that custody with the stepmother is not in the child's best interests. Contrary to the contention of the father and stepmother, the court properly considered the father's incarceration and the potential that the father may relapse into a life of crime or substance abuse (*see generally Matter of Marie Annette M.*, 23 AD3d 167, 169; *Matter of Van Orman v Van Orman*, 19 AD3d 1167, 1168; *Matter of Bishop v Livingston*, 296 AD2d 602, 604).

Contrary to the father's contention in appeal No. 3, once the court determined that custody with the stepmother was not a "realistic and feasible plan" (Social Services Law § 384-b [7] [c]), the father was required to make other arrangements for the long-term care of his son in order to avoid a finding of permanent neglect, and he failed to do so. Rather, his only viable plan for his son was long-term foster

care. "[A]n incarcerated parent may not satisfy the planning requirement of the statute where the only plan offered is long-term foster care" (*Matter of Gregory B.*, 74 NY2d 77, 90; see *Matter of "Female" V.*, 21 AD3d 1118, 1119, lv denied 6 NY3d 708; *Matter of Shawn O.*, 19 AD3d 238; cf. *Matter of Latasha F.*, 251 AD2d 1005). Thus, the court properly terminated the father's parental rights upon finding that the father had permanently neglected his son.

Finally, we conclude that the father received meaningful representation (see generally *Matter of John KK.*, 34 AD3d 1050, 1051; *Matter of Nicholas GG.*, 285 AD2d 678, 679-680).

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

914

CAF 08-00075

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

IN THE MATTER OF DEBORAH E.C.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

SHAWN K., RESPONDENT-APPELLANT,
AND GENESEE COUNTY DEPARTMENT OF SOCIAL
SERVICES, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

DEBORAH E.C., PRO SE, AND MICHAEL STEINBERG, ROCHESTER, FOR DEBORAH
E.C., PETITIONER-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT.

JOHN L. RIZZO, COUNTY ATTORNEY, LEROY (COLLEEN S. HEAD OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

JACQUELINE M. GRASSO, LAW GUARDIAN, BATAVIA, FOR SETH K.

Appeals from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered December 17, 2007 in a proceeding pursuant to Family Court Act article 10. The order denied the modification petition for custody.

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

Same Memorandum as in *Matter of Deborah E.C. v Shawn K.* ([appeal No. 1] ___ AD3d ___ [June 12, 2009]).

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court

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

915

CAF 08-02147

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

IN THE MATTER OF SETH K.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHAWN K., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT.

JOHN L. RIZZO, COUNTY ATTORNEY, LEROY (COLLEEN S. HEAD OF COUNSEL),
FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, LAW GUARDIAN, BATAVIA, FOR SETH K.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered October 2, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Same Memorandum as in *Matter of Deborah E.C. v Shawn K.* ([appeal No. 1] ___ AD3d ___ [June 12, 2009]).

Entered: June 12, 2009

Patricia L. Morgan
Clerk of the Court