SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 11, 2010

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

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. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

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

1617/09

CA 09-01495

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND PINE, JJ.

JENNIFER M. DOHERTY AND PATRICK M. DOHERTY,
AS ASSIGNEES OF THOMAS S. FITZPATRICK,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MERCHANTS MUTUAL INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

LAW OFFICE OF DEAN P. SMITH, ORCHARD PARK (DEAN P. SMITH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, PHILADELPHIA, PENNSYLVANIA (ERIC A. FITZGERALD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered October 2, 2008. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs, as assignees of Thomas S. Fitzpatrick, the defendant in the underlying personal injury action, commenced this action alleging that defendant acted in bad faith by failing to settle the underlying action and thereby exposing Fitzpatrick to personal liability. Plaintiffs commenced the underlying action seeking damages for injuries sustained by Jennifer M. Doherty (plaintiff) when the vehicle she was operating was rear-ended by a vehicle operated by Fitzpatrick. The jury awarded plaintiffs damages in excess of the coverage that Fitzpatrick had pursuant to his insurance policy with defendant and, in this action, plaintiffs seek damages in the amount of the difference between the verdict and the policy limit. Supreme Court (Wolfgang, J.) granted defendant's motion seeking summary judgment dismissing the complaint. We affirm.

"To prevail in . . . an action [seeking damages for an insurer's bad faith refusal to settle an underlying action], a plaintiff must establish that the insured lost an actual opportunity to settle the . . . [action] . . . at a time when all serious doubts about [his or her] liability were removed . . ., and that defendant insurer [acted with gross disregard for the insured's interests, i.e., it] engaged in a pattern of behavior evincing a conscious or knowing indifference to

the probability that [the] insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted" (*Kumar v American Tr. Ins. Co.*, 57 AD3d 1449, 1450 [internal quotation marks omitted]; *see Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453-454, *rearg denied* 83 NY2d 779). In the underlying action, Supreme Court (Curran, J.) denied Fitzpatrick's motion seeking summary judgment dismissing the complaint based in part on its determination that plaintiffs raised a triable issue of fact whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d), and the court granted plaintiffs' cross motion seeking partial summary judgment on the issue of Fitzpatrick's negligence.

It is undisputed that, prior to the trial of the underlying action, the attorneys for plaintiffs and Fitzpatrick requested that defendant settle the underlying action for the policy limit of $300,000. Nevertheless, "[i]t is settled that an insurer 'cannot be compelled to concede liability and settle a questionable claim' . . . simply 'because an opportunity to do so is presented' " (*Pavia*, 82 NY2d at 454). In support of its instant motion, defendant established that it investigated the claim in the underlying action and arranged for a physical examination of plaintiff to determine the extent of her alleged injuries and whether they constituted a serious injury. Although the expert retained by defendant and plaintiff's treating physician had differing views with respect to the extent of plaintiff's injuries, the expert determined that plaintiff sustained cervical, thoracic and lumbar strains that resulted in a "moderate, partial, temporary disability for recreational activities and activities of daily living in the home." Defendant's investigation included a videotape of plaintiff engaged in activities without apparent difficulty, despite her alleged injuries. Defendant further established that it participated in settlement negotiations prior to and during the trial and that Supreme Court (Curran, J.) was actively engaged in the settlement negotiation process. Prior to trial, plaintiffs reduced their demand to $250,000 and, during the trial, they further reduced their demand to $240,000. Defendant thereafter increased its settlement offer from $25,000 to $55,000. Furthermore, the internal records of defendant submitted in support of the instant motion establish that the "high-low" offer that it made after the trial commenced was "not well received," and plaintiffs' attorney testified at his deposition that the "high-low" offer was rejected.

We conclude that defendant established that Fitzpatrick did not lose an actual opportunity to settle the claim at a time when all serious doubts about his liability were removed and it was clear that the potential recovery far exceeded the insurance coverage (*see id.*), and thus that it did not act with gross disregard for Fitzpatrick's interests (*see id.* at 453). We therefore conclude that defendant established its entitlement to summary judgment dismissing the complaint, and that plaintiffs failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

All concur except CENTRA and CARNI, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent and begin our analysis with the well-settled proposition that a jury question exists in most cases where the issue is whether an insurer's good faith obligation has been met (*see* 2 NY PJI2d 4:67, at 1016). Bad faith is generally proven by evidence largely circumstantial in nature (*see Cappano v Phoenix Assur. Co. of N.Y.*, 28 AD2d 639). Like many other actions involving bad faith, it is a rare occasion to uncover a "smoking gun" and instead the proof of these cases requires the careful and collective evaluation of a confluence of factors and inferences uniquely within the province of a jury. The determination of whether an insurer acted in bad faith involves a review of the evolving body of information that is developed over the course of the management of the claim and the settlement posture of the parties as the litigation progresses.

Although the plaintiff's burden of proof in a bad faith action is correctly stated by the majority, in our view the majority fails to provide appropriate scrutiny to the legion of factors the Court of Appeals has identified as necessary in reaching the conclusion that there was no bad faith as a matter of law (*see Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 454-455, *rearg denied* 83 NY2d 779). Although not mentioned by the majority, we also note at the outset that the jury verdict against Thomas S. Fitzpatrick in the underlying personal injury action was $740,000 and defendant's highest settlement offer was $55,000. The limit of Fitzpatrick's insurance policy with defendant was $300,000, and the sum of $289,489 was available after payment of other claims.

One of the important factors to be considered in evaluating the merits of a bad faith claim is the likelihood that a verdict in favor of the injured claimant, in this case Jennifer M. Doherty (Doherty), would exceed the policy limit (*see* PJI 4:67). Here, the record establishes that, on May 9, 2003, defendant concluded, with respect to the issue of negligence, that it had "no legal defenses" and, on January 9, 2003, defendant determined that its proportionate share of fault for liability in this rear-end accident was "100%." On December 11, 2003, defendant's claim representative advised defendant's counsel that a motion for summary judgment on the serious injury threshold was not authorized because defendant's own "IME indicate[d] [Doherty] is disabled" and that such a motion would not be granted since defendant's "IME was completed on 11/4/03 (1 year and 2 mos after the [date of loss]) indicating [Doherty] is still disabled." Thus, defendant had already determined that its insured was 100% responsible for the accident and that Doherty was still disabled more than one year after the accident. All serious doubts about culpability for the accident were resolved in Doherty's favor very early on in the process. The only issues to be resolved were whether Doherty sustained a threshold serious injury and, if so, the damages to be awarded.

On August 13, 2004, notwithstanding defendant's prior determination that Doherty was still disabled more than a year after the accident, Supreme Court denied a motion for summary judgment by

Fitzpatrick on the issue of the serious injury threshold. In making this determination, the court stated that Doherty and her husband presented "objective evidence" of a serious injury which was supported by the "qualitative assessment" of Doherty's orthopedic surgeon.

Doherty was 27 years old in December 2003 and had a life expectancy of 54.4 years (*see* 1B NY PJI3d, Appendix A, at 1729). Thus, defendant's potential exposure included 54.4 years of future pain and suffering and disability. The jury awarded $500,000 for future pain and suffering. There is no indication in defendant's file that it calculated Doherty's life expectancy at any time.

Necessarily inherent in an insurer's duty to its insured is a well-reasoned and thorough analysis leading to the establishment of a predicted jury verdict value in the event of a verdict in favor of the injured claimant (*see* PJI 4:67). The record is devoid of any assertion by defendant that it had evaluated and actually assigned a potential jury verdict value, as compared to a settlement value, to Doherty's personal injury claim. Indeed, defendant's claim representative admitted that she never assigned a value or even a value *range* to the claim and could not recall how she arrived at the $10,000 settlement offer that remained in place until the first day of trial, when it was increased to $25,000. The record does not contain evidence of any analysis by defendant of the potential for high-end jury verdicts in the trial venue or any examination of jury verdict reports in cases with similar injuries in similar venues. Thus, in our view, on this record, defendant utterly failed to satisfy one of the most fundamental factors essential to a finding of good faith.

Although the majority concludes that defendant "investigated the claim in the underlying action," we submit that the quality and thoroughness of that investigation should be the subject of careful review. It is for the jury to decide if "[a] reasonable investigation of the facts . . . would indicate that the chances of successfully defending the [underlying] action were very remote" (*State of New York v Merchant's Ins. Co. of N.H.*, 109 AD2d 935, 936). Here, it is undisputed that Doherty and her husband presented defendant with qualified and well-respected medical testimony and opinion that she had sustained a significant shoulder injury in addition to permanent injuries at multiple levels of her cervical spine and a disc injury in her lumbar spine at the L5-S1 level. Yet, the record is equally clear that defendant did not attempt to obtain an independent medical examination related to Doherty's shoulder and, in fact, relied upon the limited examination of a neurologist who admitted that she was not qualified to offer an opinion regarding Doherty's shoulder and that accident biomechanics was "a weak point in her expertise." Defendant's examining physician provided this videotaped testimony on August 31, 2004. The trial commenced on September 9, 2004. Thus, we conclude that, when the trial began, defendant knew that it had no competent evidence to rebut the evidence of Doherty and her husband with respect to Doherty's injured shoulder and the need for surgical repair.

While the majority notes that defendant had obtained videotape

surveillance of Doherty—a stay-at-home mother of two children ages 5 and 7—engaging in "activities without apparent difficulty," including carrying her children, the record establishes that, once the trial began, defendant made no evaluation of the jury composition, which included four women who might understand and sympathize with Doherty's lack of choice in engaging in those activities while Doherty's husband worked at two jobs. In our view, a defendant does not establish good faith by using tunnel vision to evaluate the claim and the evolving nature of the process.

The record also establishes that defendant was never prepared to offer the policy limits in that the claim manager's settlement authority was limited to $150,000, and the claim manager testified that he never spoke with his supervisor concerning authorization to offer a greater amount.

We disagree with the majority's conclusion that defendant's participation in settlement negotiations is indicative of its good faith. Even the ultimate tender of full policy limits on the eve of trial cannot insulate an insurer from liability for bad faith failure to settle within policy limits (*see Knobloch v Royal Globe Ins. Co.*, 38 NY2d 471, 478). Here, on the first day of trial, defendant's counsel advised that he needed to revise his exposure opinion and that, if the jury believed that Doherty needed surgery, the potential exposure was above $250,000. Although defendant had no expert to rebut Doherty's need for shoulder surgery, its settlement offer remained at $25,000. Four days into trial, defendant's settlement offer was increased to $55,000. The settlement demand of Doherty and her husband was $240,000—well within the policy limits and below the potential exposure indicated by defendant's counsel. Their counsel thereafter declined to continue negotiations and an opportunity to settle within the policy limits had been lost. To the extent that defendant contends that Doherty and her husband cut off settlement discussion or denied defendant an opportunity to settle, the jury could reasonably conclude that their decision to do so "was the direct result of defendant's own conduct" because "[d]efendant never indicated that it would make a fair and reasonable offer and, by failing to do so, defendant suppressed negotiations" (*State of New York v Merchants Ins. Co. of N.H.*, 109 AD2d 935, 937).

We also recognize that opportunities to settle the claim within the policy limits can be lost at various points in the evolving continuum of the litigation and claim management process. In our view, an opportunity to settle the claim may be lost early in the process and may not be recovered or the bad faith cured by subsequent conduct. In other words, we do not believe that an insurer's bad faith is measured at the moment before the jury returns a verdict. Instead, conduct by the insurer weeks or months before the jury verdict may have entrenched the parties or foreclosed the opportunity for settlement long before a jury is empaneled. Thus, in our view, the fact that defendant made a "high-low" offer four days after the trial commenced is not dispositive. Even assuming, arguendo, that the "high-low" offer was meaningful, which, in our view, it was not, such "a belated tender [does not] operate without more to exonerate a

carrier from a *pre-existing* liability for bad-faith failure to settle within policy limits" (*Knobloch*, 38 NY2d at 478 [emphasis added]). Our own precedent establishes that the delayed unconditional making of a settlement offer of the full policy limits does not automatically relieve the carrier of liability (*see Reifenstein v Allstate Ins. Co.*, 92 AD2d 715, 716). It is not the mere fact that a "high-low" offer was made, but also the timing of that offer that must be evaluated in light of all the circumstances. Therefore, we cannot agree with the majority that defendant's "high-low" offer conclusively demonstrates that defendant met its good faith obligation. Instead, it is "but a factor for the jury to consider on the question of bad faith" (*id*. at 716).

Lastly, in our view, the contention of defendant that its reliance upon the trial court's discussions during settlement conferences provides some form of absolution from a bad faith claim is misplaced. We conclude that, had the trial court recommended a settlement figure more favorable to Doherty, such as $700,000, defendant would have summarily rejected the trial court's view. In any event, we are well aware that, during settlement conferences, a trial court is not provided full access to the files and investigative materials of the parties. In our view, defendant's good faith is measured by what it knew and had in its files—not by a trial court's view of the case based upon limited information provided during a settlement conference.

Therefore, we conclude that there are issues of fact whether defendant "engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that [its] insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted" (*Pavia*, 82 NY2d at 453-454; *see Kumar v American Tr. Ins. Co.*, 57 AD3d 1449).

Thus, we would reverse the order, deny defendant's motion for summary judgment and reinstate the complaint.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 09-01415

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

ALLIED BUILDERS, INC., PLAINTIFF-APPELLANT,

V ORDER

GREECE CENTRAL SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, FAIRPORT (EDWARD P. HOURIHAN, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered September 25, 2008. The order, insofar as appealed from, denied in part the cross motion of plaintiff for summary judgment and determined that defendant is entitled to summary judgment dismissing certain causes of action.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on February 26, 2010,

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 09-01417

PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ.

ALLIED BUILDERS, INC., PLAINTIFF-APPELLANT,

V ORDER

GREECE CENTRAL SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, FAIRPORT (EDWARD P. HOURIHAN, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered February 27, 2009. The amended order, insofar as appealed from, granted in part the motion of defendant for summary judgment dismissing certain causes of action and denied in part the cross motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on February 26, 2010,

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 08-00891

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY D. GIBSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered March 19, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that Supreme Court erred in refusing to suppress evidence establishing that his DNA matched the DNA obtained from a knitted cap found a short distance from the scene of the robbery. According to defendant, his indelible right to counsel was violated because, despite knowing that defendant was in custody on an unrelated charge for which he was represented by counsel, a police investigator offered defendant a cigarette for the purpose of obtaining DNA evidence from his saliva in an effort to link him to the instant robbery. Defendant was in custody at the police station at that time pursuant to a bench warrant issued on the unrelated charge. Defendant had asked to speak to a certain investigator known to him from prior dealings, and the investigator offered defendant the cigarette during their conversation in the investigator's office. At the time, the investigator suspected defendant of having committed the robbery at issue herein, and the police had DNA evidence from the knitted cap worn by the perpetrator. Defendant smoked the cigarette and left its remains in an ashtray at the completion of the conversation. A DNA test later showed that defendant's DNA from the cigarette matched that obtained from the cap, and defendant was thereafter charged with the commission of the robbery.

Because formal proceedings had not been commenced against defendant with respect to the robbery charge, defendant's right to

counsel arose from the unrelated charge pursuant to the Fifth Amendment and its state counterpart (*see Miranda v Arizona*, 384 US 436, 466; *People v Settles*, 46 NY2d 154, 161). It is well established that the rights set forth in the Fifth Amendment do not apply to evidence that is not "testimonial or communicative" in nature (*Schmerber v California*, 384 US 757, 761; *see People v Hawkins*, 55 NY2d 474, 482, *cert denied* 459 US 846). As the Court of Appeals has explained, "[e]vidence is 'testimonial or communicative' when it reveals a person's subjective knowledge or thought processes" (*People v Hager*, 69 NY2d 141, 142). The Fifth Amendment thus does not protect an accused from being compelled to produce " 'real or physical evidence' " (*Pennsylvania v Muniz*, 496 US 582, 582, quoting *Schmerber*, 384 US at 764). For example, a person suspected of driving while intoxicated is not required to receive *Miranda* warnings before being asked by the police to submit to field sobriety tests or a chemical test to determine his or her blood alcohol content (*see People v Berg*, 92 NY2d 701, 703; *Hager*, 69 NY2d at 142), nor does the taking of a handwriting sample from a suspect in custody who refuses to answer questions in the absence of counsel run afoul of the Fifth Amendment (*see Gilbert v California*, 388 US 263, 266). We conclude that the DNA from defendant's saliva is analogous to the blood alcohol content of a blood sample, and thus can be viewed only as real or physical evidence because it is not testimonial or communicative in nature under the definition set forth in *Hager* (*see e.g. Wilson v Collins*, 517 F3d 421, 430; *United States v Zimmerman*, 514 F3d 851, 855).

Inasmuch as the Fifth Amendment right of defendant against self-incrimination was not violated by the surreptitious seizure of his saliva by the police, it necessarily follows that his derivative right to counsel under the Fifth Amendment was not thereby violated either. Indeed, we note that the Supreme Court in *Schmerber* held that a petitioner whose blood was drawn without his consent and against the advice of his attorney was not deprived of his right against self-incrimination or his right to counsel. The Court in *Schmerber* reasoned, inter alia, that the evidence in question was not testimonial or communicative in nature and thus that the petitioner's Fifth Amendment rights were not violated (*id.* at 765). The Court further reasoned that, because the petitioner was not entitled to assert a privilege against self-incrimination, he also was not denied his right to counsel. The Court wrote that, "[s]ince [the] petitioner was not entitled to assert the privilege [against self-incrimination], he has no greater right because counsel erroneously advised him that he could assert it" (*id.* at 766). Although the right to counsel under the New York State constitution is broader than that under the Federal constitution (*see People v Ramos*, 99 NY2d 27, 33), New York jurisprudence parallels federal law with respect to the scope of Fifth Amendment protection (*see Hawkins*, 55 NY2d at 482). We thus conclude that the police did not violate defendant's right to counsel by obtaining defendant's DNA from the saliva on the discarded cigarette.

As further support for our determination, we note that, were we to agree with the dissent, a person stopped by the police on suspicion of driving while intoxicated could refuse without consequence to

submit to field sobriety tests and a chemical test if he or she happened to be represented by counsel on pending charges or, indeed, if he or she simply asked for an attorney. Because under those circumstances the right to counsel previously would have attached or would thereby be invoked upon the request for an attorney, the refusal of the suspect to consent to the tests could not be used against him or her at trial, thus making it virtually impossible in many cases for the prosecution to obtain a conviction. Although the suspect, by virtue of operating a vehicle in New York State, may under certain conditions be deemed to have consented to a chemical test (*see* Vehicle and Traffic Law § 1194 [2] [a] [1]), state law cannot, of course, override constitutional provisions, including the right to counsel. We thus cannot agree with the dissent's conclusion, which, in our view, stems from an overly broad interpretation of the right to counsel in the Fifth Amendment context and could have far-reaching consequences.

We reject the further contentions of defendant that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. Clothing worn by the perpetrator was found by the police in the backyard of a residence approximately 200 yards from the scene of the robbery, including the knitted cap with the DNA matching that of defendant. In addition, defendant's girlfriend was observed near the scene of the robbery shortly after the crime was committed, and she and defendant were seen walking together approximately a half mile from the crime scene less than an hour later. Finally, defendant matched the general description of the perpetrator, whose face was covered by clothing during the robbery. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences to support the jury's finding that defendant committed the robbery based on the evidence presented at trial (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, we have reviewed defendant's remaining contentions and conclude that none warrants reversal.

All concur except GREEN, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent. I cannot agree with the majority that Supreme Court properly refused to suppress DNA evidence obtained from defendant because, as defendant correctly contends, that evidence was obtained in violation of his right to counsel. The record of the suppression hearing establishes that, when that evidence was obtained, defendant was in custody on unrelated charges and was represented by counsel on those charges. Consequently, he could not be interrogated on any matter, " 'whether related or unrelated to the subject of the representation' " (*People v Burdo*, 91 NY2d 146, 149). The investigating detective was aware that defendant was represented by counsel, but nevertheless devised a scheme to obtain DNA evidence from him in counsel's absence. The

detective was acquainted with defendant, knew that he was a smoker and did not have access to cigarettes while incarcerated, and would likely request a cigarette from the detective. As in *People v Ferro* (63 NY2d 316, 322, *cert denied* 472 US 1007), the detective engaged in conduct that was " 'reasonably likely to elicit an incriminating response' " from defendant (*see People v Kollar*, 305 AD2d 295, 297, *appeal dismissed* 1 NY3d 591), and that was designed to circumvent defendant's right to counsel.

"The indelible right to counsel arises from the provision of the State Constitution that guarantees due process of law, the right to effective assistance of counsel and the privilege against compulsory self-incrimination" (*People v Grice*, 100 NY2d 318, 320). Further, under the State Constitution, a waiver of rights may be obtained from a criminal suspect who is actually and known by the police to be represented by counsel only in the presence of counsel (*see People v Grimaldi*, 52 NY2d 611, 616). "Underlying the rule is the concept that a criminal defendant confronted by the awesome prosecutorial machinery of the State is entitled, at a bare minimum, to the advice of counsel when he is considering surrender of his valuable legal rights" (*id.*). The advice of counsel, moreover, is "no less important if the police seek a relinquishment of defendant's constitutional right to be secure against unreasonable searches and seizures than if they seek a waiver of his privilege against self[-]incrimination" (*People v Johnson*, 48 NY2d 565, 569; *see People v Esposito*, 68 NY2d 961, 962).

Consistent with the right to be secure against unreasonable searches and seizures, the People may obtain nontestimonial evidence such as a DNA sample from a suspect pursuant to a court order, "subject to constitutional limitation" (CPL 240.40 [2] [b]; *see Matter of Abe A.*, 56 NY2d 288, 291; *People v Afrika*, 13 AD3d 1218, 1219, *lv denied* 4 NY3d 827). Alternatively, the People may obtain a DNA sample with a suspect's consent, provided that the consent "was voluntary and not the product of coercion" (*People v Dail*, 69 AD3d 873, 874). Here, however, defendant was actually and known by the police to be represented by counsel, and thus it would have been constitutionally impermissible for the detective to seek defendant's consent to provide a DNA sample before defendant had been permitted access to counsel (*see People v Loomis*, 255 AD2d 916, *lv denied* 92 NY2d 1051). In my view, it was no less constitutionally impermissible to obtain such a sample from defendant without his knowledge or consent, i.e., by way of trickery, before he had been permitted access to counsel. I therefore would reverse the judgment, grant that part of defendant's motion seeking to suppress the DNA evidence obtained from defendant while he was in custody, and grant a new trial.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 09-01671

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

THE PEOPLE OF THE STATE OF NEW YORK, BY
ANDREW M. CUOMO, ATTORNEY GENERAL OF THE STATE
OF NEW YORK, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES LAWRENCE, SR., ET AL., RESPONDENTS,
WILLIAM MAIN, KENNETH M. LAWRENCE, SR.,
RESPONDENTS-APPELLANTS,
AND VILLAGE OF SACKETS HARBOR,
RESPONDENT-RESPONDENT.

SCICCHITANO & PINSKY, PLLC, SYRACUSE (BRADLEY M. PINSKY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (CHRISTOPHER WILES OF COUNSEL), FOR PETITIONER-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered March 18, 2009. The judgment, insofar as appealed from, denied in part the motion of respondents James Lawrence, Sr., William Main and Kenneth M. Lawrence, Sr. to dismiss the amended petition.

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

Memorandum: Petitioner commenced this proceeding seeking, inter alia, to recover funds expended by respondent James Lawrence, Sr., as a director of the Sackets Harbor Fire Company, Inc. (SHFC), and William Main and Kenneth M. Lawrence, Sr. (respondents), as officers of the SHFC. The SHFC is comprised of two separate fire stations: Station #1, which is located in and primarily serves respondent Village of Sackets Harbor (Village), and Station #2, which is located in and primarily serves the surrounding Town of Hounsfield. When the members of Station #2 determined to break away from Station #1 and form their own fire department, they voted to hire the law firm of Scicchitano & Pinsky (Pinsky firm) to seek dissolution of the SHFC. Thereafter, from February 28, 2007 through September 29, 2008,

respondents, as Treasurer and First Assistant Chief of Station #2, respectively, signed checks payable to the Pinsky firm that totaled over $26,000. All of the payments were approved by the members of Station #2. On September 27, 2007, the SHFC Board of Directors (Board) voted to transfer the assets of Station #2 to the newly formed Town of Hounsfield Fire Company, Inc. for no consideration and to seek dissolution of the SHFC.

In February 2008, various members of Station #2, including respondents, commenced a proceeding seeking judicial dissolution of the SHFC. Approximately two months later, a new Board was elected, and it opposed dissolution. Thus, the new Board passed a resolution "against the splitting up of the [SHFC]," and it rescinded the prior resolution authorizing dissolution. In a prior appeal, we affirmed the order "denying and dismissing" the petition seeking judicial dissolution on the ground that petitioner failed to name the Village as a necessary party (*Matter of Cloe v Attorney Gen. of the State of N.Y.*, 70 AD3d 1348).

Petitioner thereafter commenced this proceeding, contending that the payments to the Pinsky firm were unlawful because they were not authorized by the Board, and respondents and James Lawrence (Lawrence) moved for summary judgment dismissing the amended petition in its entirety. We note that, although only three of the five respondents made the motion on behalf of the five respondents, we nevertheless treat the motion as made by all five respondents, in the interest of judicial economy. In support of the motion, respondents and Lawrence contended that the payments to the Pinsky firm were authorized pursuant to the SHFC bylaws and that respondents and Lawrence were protected by the business judgment rule because they had acted in good faith in making those payments. Supreme Court denied those parts of the motion for summary judgment dismissing the amended petition against respondents, concluding that there were "irregularities" in the payments to the Pinsky firm that raised an issue of fact whether respondents were authorized to make the payments.

We conclude that respondents met their initial burden of establishing that the payments at issue were either authorized or made by respondents in good faith and that petitioner failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore reverse the judgment insofar as appealed from.

Pursuant to N-PCL 720 (b), petitioner may seek recoupment of funds improperly expended by officers of a not-for-profit corporation. To the extent that the Attorney General, on behalf of petitioner, contends that he is required to demonstrate only that the officers acted in a manner that is contrary to the interests of the corporation and thus that he is held to a common-law standard of liability that is lower than that contemplated by section 720, we reject that contention (*see generally People v Grasso*, 11 NY3d 64, 70-72). N-PCL 720 (a) (1) (B) authorizes petitioner to commence a proceeding "[t]o compel the [respondent] to account for his [or her] official conduct" based upon "[t]he acquisition by himself [or herself], transfer to others, loss

or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his [or her] duties." Because officers of a not-for-profit corporation are protected by the business judgment rule (*see* N-PCL 717), liability pursuant to section 720 (a) (1) "requires a showing that the officer or director lacked good faith in executing his [or her] duties" (*Grasso*, 11 NY3d at 71).

We reject petitioner's contention that respondents acted in bad faith in expending funds on behalf of Station #2 without authorization from the Board. In support of their motion, respondents and Lawrence submitted evidence that the bylaws of the SHFC give each station the authority to expend the funds belonging to that station. Each station maintained a separate bank account and, pursuant to the bylaws, each station had its own treasurer, who was required to "deposit all monies received by [him or her] belonging to the Fire Stations in the name of the Fire Stations . . . ." Respondents stated that, once Station #2 members authorized them to expend funds, they were required to do so. Each station had its own meetings during which members of the individual stations authorized various expenditures, and the minutes from the relevant meetings of Station #2 were submitted in support of the motion.

Furthermore, respondents and Lawrence submitted evidence that each station raised at least some of its separate funds and that, historically, each station used its separate funds for its separate purposes, including hiring its own attorney. Indeed, Station #2 had hired its own attorneys in the past to acquire property, and Station #1 had previously hired its own attorney in connection with a prior dispute with Station #2. The Village and officials from Station #1 had negotiated with the Pinsky firm for months with respect to the dissolution dispute and had never objected to Station #2's authority to retain the Pinsky firm. Each respondent stated that he received no personal benefit from the money paid to the Pinsky firm. In addition, respondents stated that, in making the payments, they had relied on the Pinsky firm's advice that the payments were authorized, and that statement was confirmed by the Pinsky firm.

In opposition to the motion, petitioner refuted virtually none of respondents' factual allegations. Indeed, petitioner submitted only an attorney's affirmation merely stating that some of the checks to the Pinsky firm were written a few days prior to authorization of those checks by the members of Station #2.

Petitioner further contends that respondents' expenditure of funds to retain the Pinsky firm in order to dissolve the corporation demonstrates a lack of good faith because, in the absence of a majority vote of all members of the SHFC to dissolve the corporation, the pursuit of dissolution may not be considered a legitimate corporate purpose. We reject that contention. Pursuant to N-PCL 1102 (a) (2), "ten percent of the total number of members" may commence a proceeding for judicial dissolution of a corporation under certain circumstances, and thus a minority interest has the power to dissolve a corporation. Moreover, in retaining the Pinsky firm, respondents received no personal gain beyond that of the members of Station #2 who

authorized the payments.

Finally, we conclude that none of the "irregularities" noted by the court is sufficient to raise a triable issue of fact with respect to respondents' good faith in making the payments at issue.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

297

CA 09-01693

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND GORSKI, JJ.

X-MED, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WESTERN NEW YORK SPINE, INC.,
DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, BUFFALO (THOMAS F. KNAB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered June 9, 2009 in a breach of contract action. The judgment, upon plaintiff's motion, awarded plaintiff the sum of $89,093.50 against defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying those parts of the motion for summary judgment on the complaint with respect to commissions for May and June 2007 and for dismissal of the second counterclaim and vacating the amounts awarded for commissions for those months and reinstating the second counterclaim and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, breach of contract based upon defendant's failure to pay commissions on medical devices manufactured by Don-Joy Orthopedics, Inc. (DJO) and sold by plaintiff on behalf of defendant. Plaintiff, which is wholly owned by its principal, Anthony Falleti, sold the devices for defendant until June 2007, at which time plaintiff terminated its agency relationship with defendant and began selling the devices directly through DJO, thereby earning a significantly greater commission. Plaintiff moved for summary judgment on the complaint and for dismissal of defendant's counterclaims, and Supreme Court granted plaintiff's motion in part, awarding plaintiff the sum of approximately $89,000 for commissions earned, after offsetting amounts that plaintiff conceded were owed to defendant, as well as other amounts, arising from the allegations set forth in defendant's counterclaims, for breach of contract and breach of fiduciary duty.

Defendant contends on appeal that Supreme Court erred in granting plaintiff's motion in part inasmuch as defendant raised an issue of

fact with respect to whether plaintiff, as prompted by Falleti, breached its fiduciary duty to defendant by holding back sales orders that previously would have been placed through defendant before plaintiff terminated its agency relationship with defendant, thereby forfeiting plaintiff's rights to commissions. We agree in part.

It is undisputed that plaintiff acted as defendant's agent in selling the medical devices until June 2007 and thus owed a duty of loyalty to defendant until that time (*see G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 100-101, *affd* 10 NY3d 941). "One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary" (*Feiger v Iral Jewelry*, 41 NY2d 928, 928). Defendant contends that plaintiff was faithless in the performance of its services because it retained orders that in the normal course of business would have been placed while plaintiff was working as defendant's agent but did not place the orders until it began working directly for DJO and earned a greater commission. In support of that contention, defendant submitted evidence that orders placed in May 2007 were substantially fewer than those placed in the months immediately before or after May 2007 or, indeed, during May 2006. Defendant also submitted evidence that Falleti, who as noted wholly owned plaintiff, had control over the billing process and thus was able to delay the processing of orders. The fact that the commissions earned by plaintiff, and thus Falleti, were significantly greater once plaintiff's relationship with defendant was terminated provided a motive for him to do so.

In addition, defendant asserted that plaintiff, through Falleti, asked a customer to hold orders in May 2007 and instead to place them in June 2007. While that assertion is admittedly hearsay, "hearsay evidence may be considered in opposition to a motion for summary judgment," provided that it is not the only proof relied upon by the opposing party (*Raux v City of Utica*, 59 AD3d 984, 985). Here, the hearsay statement is supported by the pattern of orders placed by the customer as well as an e-mail from the customer, sent on June 1, 2007, indicating that it needed a significant number of the devices "pretty much yesterday."

Finally, defendant submitted the affidavit of a representative of a competing company that had been negotiating for plaintiff's services before plaintiff decided to work directly for DJO. The representative averred therein that, during the negotiations in late April 2007, plaintiff offered to hold back orders in May and instead to place them with the competing company in June. The court erred in determining that the affidavit was irrelevant, inasmuch as the orders specifically called for the use of devices manufactured by DJO. Even if that were true, however, the fact that Falleti allegedly made such an offer is indicative of his intent to hold back orders, which, once he had an agreement with DJO, he could certainly have fulfilled.

Contrary to the court's determination, we conclude that defendant submitted evidence raising a triable issue of fact whether plaintiff was a "faithless agent" who, for its own benefit, held back orders

that would have benefitted defendant and thus whether plaintiff forfeited its right to commissions resulting from those orders (*G.K. Alan Assoc., Inc.*, 44 AD3d at 102; *see Feiger*, 41 NY2d at 928). However, the issue of fact applies only with respect to orders for May 2007 and those orders that were "open" but finalized in June 2007 and, as the court properly determined, plaintiff is entitled to commissions earned in March and April 2007. While a faithless agent forfeits its right to compensation, such forfeiture is limited "to compensation paid *during the time period* of disloyalty" (*Phansalkar v Andersen Weinroth & Co., L.P.*, 344 F3d 184, 205; *see G.K. Alan Assoc., Inc.*, 44 AD3d at 103). We therefore modify the judgment accordingly.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

302

CA 09-01027

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND GORSKI, JJ.

DAWN M. LORENZO AND FRANK D. LORENZO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KENNETH R. KAHN, M.D., LIANG BARTKOWIAK, M.D.,
UNIVERSITY GYNECOLOGISTS & OBSTETRICIANS, INC.,
AND CHILDREN'S HOSPITAL OF BUFFALO,
DEFENDANTS-APPELLANTS.

BROWN & TARANTINO, LLC, BUFFALO (NICOLE SCHREIB MAYER OF COUNSEL), FOR DEFENDANTS-APPELLANTS KENNETH R. KAHN, M.D. AND UNIVERSITY GYNECOLOGISTS & OBSTETRICIANS, INC.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MARK SPITLER AND KATHERINE E. WILD OF COUNSEL), FOR DEFENDANTS-APPELLANTS LIANG BARTKOWIAK, M.D. AND CHILDREN'S HOSPITAL OF BUFFALO.

ROLAND M. CERCONE, PLLC, BUFFALO (ROLAND M. CERCONE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered January 14, 2009 in a medical malpractice action. The order, insofar as appealed from, denied in part the motions of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by granting those parts of the motion of defendants Liang Bartkowiak, M.D. and Children's Hospital of Buffalo seeking summary judgment dismissing the first causes of action against them except insofar as those causes of action, as amplified by the bill of particulars, allege that defendant Liang Bartkowiak, M.D. failed to intervene when directed to perform a midline episiotomy and seeking summary judgment dismissing the second causes of action against them and dismissing the first causes of action to that extent against those defendants and dismissing the second causes of action against those defendants; and by granting those parts of the motion of defendants Kenneth R. Kahn, M.D. and University Gynecologists & Obstetricians, Inc. seeking summary judgment dismissing the second causes of action against them insofar as those causes of action, as amplified by the bill of particulars, allege that those defendants failed to obtain the informed consent of plaintiff Dawn M. Lorenzo for a vaginal delivery and for care and treatment by a medical resident and dismissing those causes of action to that extent against those defendants, and as

modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this medical malpractice action asserting individual causes of action against each defendant. In the first causes of action asserted against each defendant, plaintiffs alleged that the respective defendants were negligent in their care and treatment of Dawn M. Lorenzo (plaintiff) while she was hospitalized for the birth of plaintiffs' child. Plaintiffs alleged in the second causes of action asserted against each defendant, as amplified by the bills of particulars, that the respective defendants failed to obtain the informed consent of plaintiff for a vaginal delivery instead of a cesarean section; for care and treatment by a medical resident; for an episiotomy; and for the use of forceps during delivery. Defendant Kenneth R. Kahn, M.D. is employed by defendant University Gynecologists & Obstetricians, Inc. (collectively, UGO defendants), and he supervised defendant Liang Bartkowiak, M.D., a medical resident employed by defendant Children's Hospital of Buffalo (collectively, Hospital defendants), during the birth of plaintiffs' child. It is undisputed that an episiotomy was performed on plaintiff during the course of the birth and that the child's birth was effectuated with the use of forceps. The Hospital defendants appeal from an order insofar as it denied those parts of their motion seeking summary judgment dismissing the first and second causes of action asserted against them, and the UGO defendants appeal from the same order insofar as it denied those parts of their motion seeking summary judgment dismissing the second causes of action asserted against them.

Addressing first the motion of the Hospital defendants, we note that it is well settled that, "[i]n general, a hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee, and may not be held concurrently liable unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of [the attending physician's orders]" (*Toth v Bloshinsky*, 39 AD3d 848, 850). Likewise, "[a] resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene" (*Soto v Andaz*, 8 AD3d 470, 471; *see Muniz v Katlowitz*, 49 AD3d 511, 513). Although the Hospital defendants established their entitlement to judgment as a matter of law with respect to the first causes of action against them, we nevertheless conclude that plaintiffs raised an issue of fact insofar as those causes of action, as amplified by the bill of particulars, allege that Dr. Bartkowiak was negligent in failing to intervene when Dr. Kahn directed her to perform a midline episiotomy. Supreme Court erred, however, in failing to dismiss the remaining claims of negligence against the Hospital defendants set forth in the first causes of action against them, and we therefore modify the order accordingly.

With respect to the second causes of action against the Hospital defendants, alleging that they failed to obtain plaintiff's informed

consent (*see* Public Health Law § 2805-d [1]), we conclude that the court erred in denying those parts of the motion of the Hospital defendants with respect to the second causes of action against them, and we therefore further modify the order accordingly. Indeed, "[l]ack of informed consent means the failure of the person providing the professional treatment . . . to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits as a reasonable medical . . . practitioner under similar circumstances would have disclosed" (*id.*) and, here, Dr. Kahn was the person providing the professional treatment to plaintiff (*see Brandon v Karp*, 112 AD2d 490, 492-493).

With respect to the motion of the UGO defendants insofar as it sought summary judgment dismissing the second causes of action against them, we conclude that the court properly denied those parts of the motion insofar as the UGO defendants failed to establish their entitlement to judgment as a matter of law with respect to the use of forceps during delivery, and plaintiffs raised issues of fact whether those defendants failed to disclose the alternatives to and the reasonably foreseeable risks and benefits of an episiotomy (§ 2805-d [1]); whether a reasonably prudent person in plaintiff's position would have consented to the use of forceps if she had been fully informed (*cf. Brandon*, 112 AD2d at 492); and whether the lack of informed consent was a proximate cause of plaintiff's injuries (*see* § 2805-d [3]). We further conclude, however, that the court should have granted those parts of the motion of the UGO defendants with respect to the second causes of action against them, insofar as those causes of action, as amplified by the bill of particulars, allege that the UGO defendants failed to obtain the informed consent of plaintiff for a vaginal delivery and for her care and treatment by a medical resident. We therefore further modify the order accordingly.

SCUDDER, P.J., and LINDLEY, J., concur; PERADOTTO, J., concurs in the result and dissents in part in accordance with the following Memorandum: I respectfully dissent in part because, in my view, Supreme Court erred in denying those parts of the motion of defendants Kenneth R. Kahn, M.D. and University Gynecologists & Obstetricians, Inc. (collectively, UGO defendants) seeking summary judgment dismissing the informed consent causes of action against them insofar as those causes of action, as amplified by the bill of particulars, are premised upon the performance of an episiotomy.

The UGO defendants established their entitlement to judgment as a matter of law with respect to plaintiffs' informed consent causes of action by establishing that Dawn M. Lorenzo (plaintiff) consented to the performance of an episiotomy after being informed of the risks and benefits of, as well as any alternatives to, that procedure (*see* Public Health Law § 2805-d [1]; *Bengston v Wang*, 41 AD3d 625, 626; *Ericson v Palleschi*, 23 AD3d 608; *Lucenti v St. Elizabeth Hosp.*, 289 AD2d 983). In support of their motion, the UGO defendants submitted a "Surgical Procedure(s) Request" form, signed by plaintiff, which provided that plaintiff consented to the following procedures: "Vaginal delivery, possible Cesarian Section, possible episiotomy."

The form further stated that "[t]he nature and purpose of the operation(s) or the procedure(s) to treat the stated condition, its likelihood for success, alternative options (if any), the possible risks, consequences and effects associated with the operation(s) related to the procedure(s), . . . and the possibility of complications even during recuperation have been fully explained to me."

In opposition to the motion of the UGO defendants, plaintiffs failed to raise a triable issue of fact whether a reasonably prudent patient would have withheld consent to the performance of an episiotomy had the risks been explained (*see Orphan v Pilnik*, 66 AD3d 543, 544). Plaintiffs' expert merely opined that "[plaintiff], in her position, definitely would not have given consent" to the performance of an episiotomy *by a resident*. In any event, an expert's opinion of what a particular patient would or would not have done is insufficient to raise an issue of fact with respect to informed consent (*see id.*). Indeed, the relevant standard to be applied in informed consent cases is "not a subjective one to be asserted after the medical procedure has been performed; it is objective and measured by what a reasonably prudent person in this patient's circumstances, having sufficient knowledge of the risks incident to the surgical procedures would have decided at that time" (*Dries v Gregor*, 72 AD2d 231, 236). Significantly, although plaintiffs' expert discussed some of the risks involved in the performance of an episiotomy, he did not opine that those risks were unreasonable or that such risks would not have been undertaken by a reasonably prudent and informed patient under the circumstances presented.

I therefore would further modify the order by granting those parts of the motion of the UGO defendants seeking summary judgment dismissing the second causes of action against them insofar as those causes of action, as amplified by the bill of particulars, allege that those defendants failed to obtain the informed consent of plaintiff for an episiotomy and dismissing those causes of action to that extent against those defendants.

GORSKI, J., dissents in part in accordance with the following Memorandum: I respectfully dissent in part. With respect to the potential liability in negligence of defendant Liang Bartkowiak, M.D., a resident, I agree with the majority that there is an issue of fact whether the performed procedure so "greatly deviate[d] from normal practice that the resident should be held liable for failing to intervene" (*Soto v Andaz*, 8 AD3d 470, 471). I further conclude, however, that there is also an issue of fact whether Dr. Bartkowiak committed acts of negligence for which she can be held personally liable despite her status as a resident. As the majority notes in quoting from *Soto*, "[a] resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene" (*id.* at 471). Thus, a resident's shield from liability is limited to situations in which the resident is acting under the "*direct supervision*" of the

primary physician (*id.* [emphasis added]; *see Toth v Bloshinsky*, 39 AD3d 848, 850; *Filippone v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 253 AD2d 616, 618-619). The shield from liability is not based simply on one's status as a resident but, rather, it exists because at the time of alleged malpractice a more experienced primary physician was in a direct and immediate position to keep a patient from harm. Where the primary physician is not in such a position, however, I see no reason why the resident should not be held responsible for his or her actions or inactions.

Here, the record establishes that Dr. Bartkowiak was overseeing the delivery of Dawn M. Lorenzo (plaintiff) hours before the primary physician, defendant Kenneth R. Kahn, M.D., became directly involved in the birth of plaintiffs' child. In my view, it is not possible from this record, which plaintiffs' expert has stated contains one of the most poorly documented deliveries he has seen, to determine what effect the actions or inactions of Dr. Bartkowiak had on plaintiff's condition or the decision of the primary physician to order a forceps delivery and an episiotomy. In addition, in my view it is not possible at this juncture of the litigation to parse out, as a matter of law, what actions were independently performed by Dr. Bartkowiak as opposed to the actions that were "direct[ly] supervis[ed]" such that it is appropriate to hold only the primary physician liable (*Soto*, 8 AD3d at 471). Indeed, I am unable to determine at this juncture whether an independent act of negligence on the part of Dr. Bartkowiak was a proximate cause of plaintiff's injuries (*cf. Filippone*, 253 AD2d at 619). I therefore would affirm that part of the order denying those parts of the motion of Dr. Bartkowiak and defendant Children's Hospital of Buffalo seeking summary judgment dismissing the first causes of action, for negligence, against them.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

441/09

KA 07-02677

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered August 31, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree. The judgment was affirmed by order of this Court entered March 20, 2009 in a memorandum decision (60 AD3d 1396), and defendant on May 20 2009 was granted leave to appeal to the Court of Appeals from the order of this Court (12 NY3d 855), and the Court of Appeals on May 4, 2010 reversed the order and remitted the case to this Court for consideration of issues raised but not determined on the appeal to this Court in an opinion (14 NY3d 483),

Now, upon remittitur from the Court of Appeals and having considered the issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: On a prior appeal in *People v Johnson* (60 AD3d 1396), we affirmed the judgment convicting defendant, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [3]). We rejected the contention of defendant that his waiver of the right to appeal was invalid, and we concluded that the waiver of the right to appeal encompassed his challenges to the severity of the sentence and to Supreme Court's denial of his request for youthful offender status (*Johnson*, 60 AD3d 1396). The Court of Appeals reversed our order and remitted the case to this Court for consideration of those challenges (*People v Johnson*, 14 NY3d 483, ___).

Upon remittitur, we reject the challenge by defendant to the court's denial of his request for youthful offender status (*see People v Bell*, 56 AD3d 1227, *lv denied* 12 NY3d 781; *cf. People v Shrubsall*,

167 AD2d 929, 930). "It is well established that the decision whether to grant youthful offender status 'rests within the sound discretion of the court and depends upon all the attending facts and circumstances of the case' " (*People v Jock*, 68 AD3d 1816, *lv denied* 14 NY3d 801). Here, defendant, who did not have a criminal record, beat one of his former teachers outside the school that he attended. Defendant used a wooden board to strike the victim in the head and face before he took the keys to her vehicle and drove away in that vehicle. We thus conclude that the record amply supports the court's denial of youthful offender status. The sentence is not unduly harsh or severe.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

472

CA 09-02417

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

DAVID A. BARTO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NS PARTNERS, LLC, DEFENDANT-RESPONDENT,
AND FERGUSON ELECTRIC CONSTRUCTION CO., INC.,
DEFENDANT-APPELLANT.

NS PARTNERS, LLC, THIRD-PARTY PLAINTIFF,

V

WALTER S. JOHNSON BUILDING COMPANY, INC.,
THIRD-PARTY DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ROBERT D. LEARY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEWIS & LEWIS, P.C., BUFFALO (MARK CANTOR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

GOLDBERG SEGALLA LLP, BUFFALO (TROY FLASCHER OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered September 3, 2009 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant Ferguson Electric Construction Co., Inc. for summary judgment dismissing the complaint and cross claims against it.

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 and cross claims against defendant Ferguson Electric Construction Co., Inc. are dismissed.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained when he grabbed a live wire while working on a hotel construction project. Defendant NS Partners, LLC (NS Partners), the hotel owner, hired third-party defendant, Walter S. Johnson Building Company, Inc. (Johnson), as the general contractor for the project. Johnson in turn hired defendant Ferguson Electric Construction Co., Inc. (Ferguson) to perform electrical work on the project, and plaintiff, an employee of Johnson, was installing acoustic ceiling tiles in the hotel’s catering

prep area at the time of the accident. Ferguson moved for summary judgment dismissing the complaint and cross claims against it, and Supreme Court denied the motion with the exception of "the claims asserted under Labor Law § 241 (6)[,] which were not opposed by the Plaintiff." We note at the outset that, although plaintiff did not assert a Labor Law § 200 cause of action or claim against Ferguson in the complaint, the bill of particulars includes such a claim. Thus, plaintiff has asserted a cause of action, as amplified by the bill of particulars, for common-law negligence and the violation of Labor Law § 200 (*see generally Cantineri v Carrere*, 60 AD3d 1331).

We agree with Ferguson that the court erred in denying that part of its motion with respect to the Labor Law § 200 and common-law negligence cause of action against it (*see generally Bateman v Walbridge Aldinger Co.*, 299 AD2d 834, 836, *lv denied* 100 NY2d 502), inasmuch as Ferguson established its entitlement to judgment as a matter of law and plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Ferguson, one of two electrical subcontractors working on the project, met its initial burden on the motion by demonstrating that it did not have "the authority to control the activity bringing about the injury" (*Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1156), nor did it have the " 'right or authority to control the work site' " (*Riordan v BOCES of Rochester*, 4 AD3d 869, 870). Ferguson further established that it neither created nor had actual or constructive notice of the allegedly dangerous condition of the wire (*see McNabb v Oot Bros., Inc.*, 64 AD3d 1237, 1240). Ferguson submitted evidence establishing, inter alia, that it had no employees working in the catering prep area where the accident occurred in the two weeks prior thereto and, indeed, it had refused to work in that area because of payment issues. Ferguson also submitted evidence demonstrating that Johnson's employees performed all of the relevant work in the catering prep area, including demolishing the old ceiling and using the existing lights as temporary lighting for the installation of the new ceiling.

In opposition to that part of the motion with respect to Labor Law § 200 and common-law negligence, plaintiff submitted no evidence with respect to Ferguson's alleged creation of the condition. With respect to actual notice, plaintiff offered only inadmissible hearsay statements and thus failed to raise a triable issue of fact (*see Becovic v Poisson & Hackett*, 49 AD3d 435*; Robinson v Barone*, 48 AD3d 1179, 1180; *see also Capasso v Kleen All of Am., Inc.*, 43 AD3d 1346). Plaintiff likewise failed to raise a triable issue of fact with respect to constructive notice because he submitted no evidence that Ferguson's employees entered the catering prep area in the days leading up to the accident, and thus "constructive notice may not be imputed" to Ferguson (*Applegate v Long Is. Power Auth.*, 53 AD3d 515, 516; *see generally Boyd v Lepera & Ward*, 275 AD2d 562, 564).

We further conclude that the court erred in denying that part of the motion of Ferguson seeking dismissal of all cross claims asserted against it. NS Partners asserted cross claims for contribution,

common-law and contractual indemnification, breach of contract, and failure to procure insurance naming NS Partners as an additional insured on Ferguson's insurance policy, while Johnson asserted one cross claim against Ferguson for common-law "contribution and/or indemnification." Ferguson met its initial burden with respect to contribution, and in opposition NS Partners and Johnson were "required to show that [Ferguson] owed [them] a duty of reasonable care independent of its contractual obligations . . . or that a duty was owed plaintiff as an injured party and that a breach of this duty contributed to the alleged injuries" (*Phillips v Young Men's Christian Assn.*, 215 AD2d 825, 827). NS Partners and Johnson "failed to assert an independent duty owed to [them]," i.e., independent of Ferguson's contractual obligations (*id.*). Further, as discussed above, Ferguson did not breach any duty owed to plaintiff in this case. Thus, the court should have dismissed the cross claims insofar as they seek contribution (*see Zemotel v Jeld-Wen, Inc.*, 50 AD3d 1586, 1587). Because Ferguson did not direct or supervise the injury-producing work, the court also should have dismissed the cross claims insofar as they seek common-law indemnification (*see Colyer v K Mart Corp.*, 273 AD2d 809, 810; *see also Myers v T.C. Serv. of Spencerport, Inc.*, 16 AD3d 1105; *Szafranski v Niagara Frontier Transp. Auth.*, 5 AD3d 1111, 1113).

With respect to NS Partners' cross claim for contractual indemnification, the agreement between Johnson and Ferguson provided that Ferguson would indemnify the owner, NS Partners, "from any loss because of injury or damage to person or property *arising or resulting from* the performance of the work hereunder" (emphasis added). Inasmuch as Ferguson established that the accident did not arise or result from its work, NS Partners' contractual indemnification cross claim must also be dismissed (*see Sorrento v Rice Barton Corp.*, 17 AD3d 1005, 1006).

Finally, with respect to Ferguson's alleged failure to procure insurance naming NS Partners as an additional insured, Ferguson met its initial burden by submitting a certificate of liability insurance naming Johnson and Namwest, the parent company of NS Partners, as additional insureds on a primary basis. In opposition to the motion, NS Partners failed to submit any evidence that Ferguson failed to procure the required insurance or obtained inadequate insurance coverage. Thus, that cross claim also should have been dismissed.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 09-02469

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

WYNIT, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SMARTPARTS, INC. AND RBS ASSET FINANCE INC., DOING BUSINESS AS RBS BUSINESS CAPITAL, DEFENDANTS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (DOUGLAS J. NASH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

METZ LEWIS LLC, PITTSBURGH, PENNSYLVANIA (KENNETH S. KORNACKI, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), BUCHANAN INGERSOLL & ROONEY PC, BUFFALO, FOR DEFENDANT-RESPONDENT RBS ASSET FINANCE INC., DOING BUSINESS AS RBS BUSINESS CAPITAL.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 25, 2009. The order, inter alia, granted the motion of defendant RBS Asset Finance Inc., doing business as RBS Business Capital, to dismiss the amended complaint against it.

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

Memorandum: Plaintiff appeals from an order granting the motion of defendant RBS Asset Finance Inc., doing business as RBS Business Capital (RBS), seeking dismissal of the amended complaint against it pursuant to, inter alia, CPLR 3211 (a) (4) on the ground that there is another action pending. We affirm for reasons stated in the decision at Supreme Court. We add only that, as the court properly determined, the other action commenced by RBS in Pennsylvania involves the same parties to this action and, unlike this action, encompasses all of the disputes between the parties. Thus, the court did not abuse its discretion in dismissing the action sua sponte against defendant Smartparts, Inc., the remaining defendant, inasmuch as the Pennsylvania action will be dispositive with respect to that defendant as well.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 09-02372

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

DANIEL G. TRONOLONE, ESQ., AS GUARDIAN OF THE PROPERTY OF RONALD H.B., AN INCAPACITATED PERSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD F. JANKOWSKI, DEFENDANT-APPELLANT.

ROBSHAW & ASSOCIATES, P.C., WILLIAMSVILLE (JEFFREY F. VOELKL OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBERT J. PIERCE, ELMA, TRONOLONE & SURGALLA, P.C., BUFFALO (JOHN B. SURGALLA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered January 27, 2009. The order and judgment, among other things, granted plaintiff's motion for summary judgment.

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

Memorandum: Plaintiff, as guardian of the property of an incapacitated person (IP), commenced this action for conversion, fraud and breach of fiduciary duty. According to plaintiff, defendant, who had been appointed guardian of the IP's person but not the IP's property, had taken money from the IP's house. We conclude that Supreme Court properly granted plaintiff's motion for summary judgment. We note at the outset that defendant does not contend on appeal that the court erred in denying his cross motion for leave to amend his answer and thus is deemed to have abandoned any such contention (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Defendant admitted in his answer that he found the money in question in the IP's house but asserted that, with the IP's knowledge and consent, he gave $46,000 in cash and $6,600 in savings bonds to the grandson of defendant's deceased wife to hold in trust for the IP. He also admitted the allegations in the complaint that he was the guardian of the IP's person and that he knew that plaintiff was the guardian of the IP's property. The contention of defendant that there is an issue of fact whether he was authorized by the IP to have the money held in trust for the IP's benefit is without merit. It is undisputed that, at the time defendant found the money, the IP had been adjudged to be mentally incapacitated. In any event, plaintiff

established in support of his motion that, after becoming guardian of the IP's property, he instructed defendant to inform him in the event that defendant discovered any money, stocks or bonds at any of the properties owned by the IP. It is further undisputed that defendant did not do so until approximately seven years later, at which point about one half of the money was missing. When plaintiff asked defendant to return the missing funds, defendant informed plaintiff that he had given the funds to his deceased wife's grandson. The grandson, however, denied having received the funds. We thus conclude that plaintiff met his initial burden on the motion, and we further conclude that defendant failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, we reject the contention of defendant that he raised a triable issue of fact by the statement in his opposing affidavit that the funds were given to him by the IP's aunt. That self-serving statement contradicts defendant's prior admissions "and appear[s] to be tailored to avoid the consequences of [those prior admissions]" (*Garcia v Good Home Realty, Inc.*, 67 AD3d 424, 425; *see Rosenblatt v Venizelos*, 49 AD3d 519).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 09-02607

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

JOSEPH B. SITTS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLISON L. SITTS, DEFENDANT-APPELLANT.

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

PETER M. HOBAICA LLC, UTICA (GEORGE E. CURTIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered July 16, 2009 in a divorce action. The order, among other things, awarded primary physical custody of the parties' children to plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by awarding primary physical custody of the children to defendant and by vacating the second through sixth ordering paragraphs and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking, inter alia, a divorce and primary physical custody of the parties' children. After a bifurcated trial on the issues of custody and visitation, Supreme Court awarded the parties joint legal custody of the children, with primary physical custody of the children to plaintiff. The best interests of the children must be the primary consideration in determining the issue of custody (*see Eschbach v Eschbach*, 56 NY2d 167, 171), and we agree with defendant that the award of primary physical custody to plaintiff is not in the best interests of the parties' children.

It is well settled that "[t]he authority of the Appellate Division in matters of custody is as broad as that" of the trial court (*Matter of Louise E. S. v W. Stephen S.*, 64 NY2d 946, 947). Although, as a general rule, the custody determination of the trial court is entitled to great deference (*see Eschbach*, 56 NY2d at 173-174), "[s]uch deference is not warranted . . . where the custody determination lacks a sound and substantial basis in the record" (*Fox v Fox*, 177 AD2d 209, 211-212), and that is the case here. The record establishes that defendant was the children's primary caregiver throughout the marriage. In addition to maintaining a full-time job, defendant prepared the family's meals, bathed the children, made the necessary arrangements for day care, administered the children's

medications, read to the children, and put them to bed. By contrast, plaintiff's involvement with the children largely consisted of attending a few medical appointments and school conferences. The record also reflects that plaintiff spent a significant amount of time pursuing his own recreational interests, leaving the children in defendant's care. Moreover, at the time of the custody determination, plaintiff had not yet obtained a permanent residence for the children.

In rendering its decision with respect to physical custody of the children, the court focused on various matters that were irrelevant to a determination of the children's best interests in this case, including defendant's alleged marital infidelity. "A parent's infidelity or sexual indiscretions should be a consideration in a custody dispute only if it can be shown that such factor may adversely affect the child[ren]'s welfare" (*Pawelski v Buchholtz*, 91 AD2d 1200, 1200; *see Matter of Blank v Blank*, 124 AD2d 1010), and no such showing was made here. The court also improperly based its determination on defendant's relocation to Ithaca, which is approximately 65 miles from the former marital residence. The record reflects that defendant moved to Ithaca to obtain a new job only after plaintiff sent a letter to defendant's former supervisor criticizing defendant's work performance and alleging that defendant engaged in job-related misconduct. We note in any event that defendant's relocation is not a proper basis upon which to award primary physical custody to plaintiff under the circumstances of this case inasmuch as the children will need to travel between the parties' two residences regardless of which parent is awarded primary physical custody.

We therefore modify the order by awarding primary physical custody of the children to defendant and by vacating those ordering paragraphs providing for visitation, and we remit the matter to Supreme Court to set an appropriate visitation schedule.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

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

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CA 09-01064

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

KIMBERLY JOHNSON, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

FRANK CANTIE, DEBORAH CANTIE AND IROQUOIS
CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS.

SIEGEL, KELLEHER & KAHN, LLP, BUFFALO (MICHAEL A. IACONO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WATSON BENNETT COLLIGAN & SCHECHTER, L.L.P., BUFFALO (MELISSA A. DAY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS FRANK CANTIE AND DEBORAH CANTIE.

GOLDBERG SEGALLA LLP, BUFFALO (TROY S. FLASCHER OF COUNSEL), FOR DEFENDANT-RESPONDENT IROQUOIS CENTRAL SCHOOL DISTRICT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered May 12, 2009 in a personal injury action. The order granted the motions of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Kimberly Johnson (plaintiff) when she attempted to avoid being hit and kicked by the daughter of defendants Deborah Cantie and Frank Cantie. At the time of the incident, plaintiff was employed as a licensed occupational therapist by the West Seneca Central School District (WSCSD). The Canties' daughter is a severely autistic student who was attending school at Northwood Elementary (Northwood) in WSCSD pursuant to a cross-contract with the district in which she resided, defendant Iroquois Central School District (District). According to plaintiffs, the Canties and the District were negligent in failing to warn plaintiff of the violent behavior of the Canties' daughter, and the Canties were also negligent in failing to supervise their daughter in an adequate manner.

We conclude that Supreme Court properly granted the motions of the Canties and the District seeking summary judgment dismissing the complaint. With respect to the claim for negligent supervision against the Canties, the Canties met their initial burden of

establishing that they did not have the opportunity or the ability to control their daughter's behavior in the classroom, and plaintiff failed to raise a triable issue of fact in opposition to the Canties' motion (*see Davies v Incorporated Vil. of E. Rockaway*, 272 AD2d 503; *Dawes v Ballard*, 133 AD2d 662). At the time of the incident, the Canties had entrusted their daughter to the care and supervision of WSCSD in a classroom specifically designed for students with autism. The Canties were not present at the school when the incident occurred, and there is no evidence in the record that they, as opposed to plaintiff or the other professionals working with their daughter at Northwood, would have been able to restrain her or otherwise control her behavior (*see Dawes*, 133 AD2d at 662; *see also Miltz v Ohel, Inc.*, 165 Misc 2d 167, 169-170).

Plaintiff contends that the Canties were negligent in placing their daughter at Northwood rather than a more restrictive setting. We reject that contention inasmuch as the record establishes that it was the District, not the Canties, that recommended that the Canties' daughter be transferred to Northwood, and WSCSD accepted her placement with full knowledge of her particular needs and behavioral difficulties. Moreover, a school district has the duty to evaluate and properly place students with disabilities (*see* Education Law § 4402 [1]), and it is obligated to provide special education "in the least restrictive environment" (8 NYCRR 200.6 [a] [1]). We further conclude that plaintiffs failed to plead a cause of action for negligent misrepresentation and thus they may not rely on that theory to defeat the Canties' motion (*see generally Yaeger v UCC Constructors*, 281 AD2d 990, 991).

With respect to the claim for failure to warn of the aggressive tendencies of the Canties' daughter, it is well established that there is no duty to warn an individual about a condition of which he or she is actually aware or that may be readily observed by a reasonable use of his or her senses (*see Faery v City of Lockport*, 70 AD3d 1375; *Baggott v Corcoran*, 48 AD3d 1182; *Jones v W + M Automation, Inc.*, 31 AD3d 1099, 1101-1102, *lv denied* 8 NY3d 802). The Canties and the District met their burden of establishing their entitlement to judgment as a matter of law by submitting the deposition testimony of plaintiff in which she admitted that, prior to the incident, she was aware that the Canties' daughter had a tendency to use physical contact to express herself (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, plaintiff admitted that the behavior of the Canties' daughter on the date of the incident was the type of behavior that plaintiff expected from her and had observed on previous occasions. The bare assertion by plaintiff that she would have liked "more information" about the Canties' daughter from the Canties or the District was insufficient to defeat the motions for summary judgment (*see generally id.*).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CAF 09-02422

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

IN THE MATTER OF ROBERT STROUD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARY VAHL, RESPONDENT-APPELLANT.

CARL R. VAHL, OLEAN, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Cattaraugus County (James E. Euken, J.), entered September 29, 2009 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the provision referring the matter to the Support Magistrate and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Cattaraugus County, for further proceedings on the petition.

Memorandum: Petitioner father commenced this proceeding pursuant to Family Court Act article 4 seeking an order directing respondent mother to pay one half of the travel expenses related to his visitation with two of the parties' children who, at the time the proceeding was commenced, were 17 years, 11 months old and 20 years, 11 months old. The Support Magistrate denied the mother's motion seeking, inter alia, to dismiss the petition and referred the matter to Family Court upon determining that the petition concerned custody and visitation and thus was not within his jurisdiction (*see* § 439 [a]). Family Court denied the mother's objections to the order of the Support Magistrate and determined that the Support Magistrate had subject matter jurisdiction because travel expenses related to visitation with the children constituted child support. The court therefore referred the matter to the Support Magistrate.

We agree with the mother that the Support Magistrate does not have subject matter jurisdiction over the petition, and we therefore modify the order accordingly. "Support magistrates shall not be empowered to hear, determine or grant any relief with respect to . . . issues of . . . custody [and] visitation" (Family Ct Act § 439 [a]), and travel expenses related to visitation are properly considered custody and visitation issues pursuant to Family Court Act article 6 (*see e.g. Matter of Wellington v Riccardo*, 70 AD3d 1513; *Matter of Henderson v Henderson*, 20 AD3d 421).

We further conclude that the father is not entitled to reimbursement for travel expenses related to visitation that are incurred after the children reach the age of 18. " 'The right to visitation is an incident of custody and is . . . extinguished when a child reaches the age of majority' " (*Matter of Osmundson v Held-Cummings*, 20 AD3d 922, 923, *lv denied* 5 NY3d 711; *see People ex rel. Minardi v Cesnavicius*, 208 AD2d 663). The petition, however, does not specify which of the travel expenses sought are attributable to visitation that occurred before the older child reached the age of majority. We therefore remit the matter to Family Court for further proceedings on the petition consistent with our decision.

We have reviewed the mother's remaining contentions and conclude that they are without merit.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

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CA 09-02328

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

DUANE PIERI, SR. AND GALE PIERI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

B&B WELCH ASSOCIATES, DEFENDANT-APPELLANT.

CARTER, CONBOY, CASE, BLACKMORE, MALONEY & LAIRD, P.C., ALBANY (LEAH W. CASEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (KEITH N. BOND OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Drury, J.), entered April 24, 2009 in a personal injury action. The judgment awarded plaintiffs damages against defendant upon a jury verdict.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Duane Pieri, Sr. (plaintiff) while working at an apartment complex (complex) owned by defendant. Plaintiff was injured while servicing a lift station at the complex, which consists of, inter alia, a tank into which sewage from the complex flows and is processed before it is ejected into a municipal sewage system. The tank for the lift station is approximately 15 feet in depth and contains two pumps and four floats that maintain the sewage level. Supreme Court granted those parts of defendant's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims, as well as the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.5. Defendant appeals from a judgment entered upon a jury verdict finding it liable pursuant to Labor Law § 240 (1).

At the time of the accident, plaintiff worked part-time for Belmont Management Company (Belmont), which managed the complex, and he was "on-call" to handle problems that Belmont's part-time maintenance worker could not handle. Plaintiff had previously worked for Belmont for approximately 15 years as a maintenance supervisor and he was familiar with the lift station. During the course of that employment, plaintiff had purchased, on behalf of Belmont, a three-legged, aluminum tripod with a harness to be used for working "down in

the pit" of the lift station. The base radius of the tripod would allow it to be placed over the opening to the tank. Plaintiff fell into the tank while kneeling at the side of the pit as he reached for a line to one of the floats in the tank in an effort to resolve a pump malfunction that threatened to overflow the lift station.

We reject the contention of defendant that the court erred in denying that part of its motion for summary judgment dismissing the Labor Law § 240 (1) claim on the ground that plaintiff was performing only routine maintenance at the time of the accident. "[D]elineating between routine maintenance and repairs is frequently a close, fact-driven issue" (*Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 987). That distinction depends upon "whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work" (*Craft v Clark Trading Corp.*, 257 AD2d 886, 887; *see Buckmann v State of New York*, 64 AD3d 1137, 1139), and whether the work involved the replacement of components damaged by normal wear and tear (*see Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53; *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528). "Where a person is investigating a malfunction . . ., efforts in furtherance of that investigation are protected activities" (*Short v Durez Div.-Hooker Chems. & Plastic Corp.*, 280 AD2d 972, 973), but work consisting of remedying a common problem is generally considered routine maintenance (*see e.g. Abbatiello*, 3 NY3d at 53; *Barbarito v County of Tompkins*, 22 AD3d 937, 938-939, *lv denied* 7 NY3d 701). Defendant contends that the injury-producing work constituted an inspection of the lift station, rather than the repair of that facility, but we note that "it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882). Here, plaintiff was injured while "troubleshooting" an uncommon lift station malfunction, which is a protected activity under Labor Law § 240 (1) (*see e.g. Parente v 277 Park Ave. LLC*, 63 AD3d 613, 614; *Pakenham*, 58 AD3d at 987-988).

Contrary to the further contention of defendant, the court properly concluded as a matter of law that plaintiff's failure to use the tripod and harness was not the sole proximate cause of the accident, and thus the court properly refused to instruct the jury on sole proximate cause with respect to those devices. It is well settled that, "[w]here . . . the 'actions [of the worker are] the sole proximate cause of his or her injuries . . .[,] liability under Labor Law § 240 (1) [does] not attach' " (*Lovall v Graves Bros., Inc.*, 63 AD3d 1528, 1529, quoting *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960, *rearg denied* 92 NY2d 875). Moreover, "where an [owner] has made available adequate safety devices and a[worker] has been instructed to use them," he or she may not recover under section 240 (1) (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 37).

Nevertheless, the mere presence of a safety device somewhere at a work site does not satisfy the requirements of Labor Law § 240 (1) (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524, *rearg denied* 65 NY2d 1054; *Williams v City of Niagara Falls*, 43 AD3d 1426).

Here, defendant failed to present evidence that plaintiff had been instructed to use the tripod and harness (*see Beamon v Agar Truck Sales, Inc.*, 24 AD3d 481, 483), or that " 'plaintiff, based on his training, prior practice, and common sense, knew or should have known' " to use the tripod and harness (*Gimeno v American Signature, Inc.*, 67 AD3d 1463, 1464, *lv dismissed* 14 NY3d 785; *see Smith v Picone Constr. Corp.*, 63 AD3d 1716, 1717). Further, defendant failed to present evidence that would have permitted the jury to find "that plaintiff . . . knew . . . that he was expected to use [the tripod and harness]; 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*, 4 NY3d at 40). The contention of defendant that the court erred in admitting in evidence and relying upon testimony of its expert elicited on cross-examination is raised for the first time in its reply brief, and thus it is not properly before us (*see generally Local No. 4, Intl. Assn. of Heat & Frost & Asbestos Workers v Buffalo Wholesale Supply Co., Inc.*, 49 AD3d 1276, 1278).

Finally, we reject defendant's further contention that the court erred in instructing the jury that "repairing can also include inspection of an integral part of the structure in furtherance of repairing an apparent malfunction." That instruction is consistent with PJI 2:217 and the decision of the Court of Appeals in *Prats* (100 NY2d at 881-882; *see Caraciolo v 800 Second Ave. Condominium*, 294 AD2d 200, 201-202).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 09-01688

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALBERT SCERBO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered August 12, 2009. The judgment convicted defendant, upon a nonjury verdict, of sexual abuse in the first degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is affirmed and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him following a bench trial of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]) after the verdict following his first trial was set aside by County Court based on juror misconduct (*People v Scerbo*, 59 AD3d 1066, *lv denied* 12 NY3d 821). Defendant, a music teacher, was charged in an indictment with 35 counts based on allegations that he engaged in sexual contact with 17 female students between the ages of 6 and 15 over a four-year period. At the first trial, County Court dismissed several counts of the indictment and defendant was convicted of only two of the remaining counts, which concerned Jane Doe #1. The People took an appeal, whereupon we, inter alia, agreed with the court that juror misconduct necessitated a new trial on the two counts with respect to Jane Doe #1 (*id.* at 1068). At the second trial, the court found defendant guilty of the two counts with respect to Jane Doe #1 (hereafter, victim).

Defendant contends that the evidence from both the first and second trials is legally insufficient to establish sexual gratification and thus that reversal is required. We note at the outset that we reject the People's contention that we do not have the authority to review the legal sufficiency of the evidence at the first trial. The Double Jeopardy Clause precludes a second trial if the evidence from the first trial is determined by the reviewing court to

be legally insufficient (*see Burks v United States*, 437 US 1, 18; *Matter of Suarez v Byrne*, 10 NY3d 523, 532-533, *rearg denied* 11 NY3d 753). Here, the verdict from the first trial was set aside on the ground of juror misconduct and, because the prior appeal was taken by the People, our review pursuant to CPL 470.15 (1) was limited to any question of law or fact that may have adversely affected the appellant, i.e., the People. Thus, on the prior appeal defendant was prohibited from raising an alternative ground for affirmance, including whether the evidence from the first trial was legally insufficient (*see People v Karp*, 76 NY2d 1006, 1008-1009; *People v Goodfriend*, 64 NY2d 695, 697-698; *People v Woodruff*, 4 AD3d 770, 773).

We also reject the People's contention that defendant failed to preserve for our review his contention that the evidence from the first trial was legally insufficient with respect to sexual gratification in connection with the conviction of sexual abuse and endangering the welfare of a child. Although defendant did not raise that ground in his motion for a trial order of dismissal during the first trial, his "contention is nevertheless reviewable for purposes of double jeopardy analysis on appeal from the judgment of conviction upon retrial" (*People v Smith*, 8 AD3d 965, 966). We conclude, however, that the evidence was legally sufficient at the first trial with respect to the two crimes of which defendant was convicted, which were the same two crimes of which he was convicted following the second trial (*see generally People v Bleakley*, 69 NY2d 490, 495), and thus "the retrial did not violate the prohibition against double jeopardy" (*Smith*, 8 AD3d at 966). A person is guilty of sexual abuse in the first degree under Penal Law § 130.65 (3) "when he or she subjects another person to sexual contact . . . [w]hen the other person is less than eleven years old." Sexual contact is defined as "any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing" (§ 130.00 [3]). The allegation of sexual gratification also formed the basis of endangering the welfare of a child, the other count of which defendant was convicted at the first trial (*see People v Guerra*, 178 AD2d 434, 435). A person is guilty of endangering the welfare of a child under Penal Law § 260.10 (1) when "[h]e [or she] knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child" less than 17 years old.

With respect to the legal sufficiency of the evidence at the first trial concerning the element of sexual gratification, the evidence established that defendant touched the victim's stomach, then moved his hands to the victim's vaginal area and moved his hand as he touched that area. Sexual gratification may be inferred from defendant's conduct (*see People v Graves*, 8 AD3d 1045, *lv denied* 3 NY3d 674; *People v Anthony D.*, 259 AD2d 1011, *lv denied* 93 NY2d 1001). Although defendant testified that he did not knowingly have sexual contact with any of the children and thus contends that any contact was merely incidental, the jury was entitled to discredit that testimony. Indeed, "the fact that the evidence might be subject to an

interpretation different from that found by the jury does not mean that the People failed to prove their case beyond a reasonable doubt" (*People v Shoemaker*, 227 AD2d 720, 721, *lv denied* 88 NY2d 1024). Because the evidence at the first trial was legally sufficient with respect to the conviction of sexual abuse, it necessarily also was legally sufficient with respect to the conviction of endangering the welfare of a child.

At the second trial, defendant preserved for our review his contention concerning the alleged legal insufficiency of the evidence with respect to the sexual contact element, i.e., sexual gratification, of the count of sexual abuse in the first degree, but he did not move for a trial order of dismissal with respect to endangering the welfare of a child (*see People v Gray*, 86 NY2d 10, 19). In any event, the evidence at the second trial is legally sufficient to establish sexual gratification on both counts. The evidence at the second trial established that defendant placed his hand on the victim's vaginal area, and that he touched the victim's stomach before touching that area. Again, we note that defendant's sexual gratification may be inferred from defendant's touching of the child's intimate area (*see Graves*, 8 AD3d at 1045; *Anthony D.*, 259 AD2d at 1011).

Defendant further contends that the verdict from the first trial was against the weight of the evidence, as is the verdict from the second trial. Contrary to the People's contention, we likewise have the authority to review the weight of the evidence at the first trial in order to determine whether defendant's double jeopardy rights were violated. That is, if the verdict were against the weight of the evidence at the first trial, a retrial would be barred (*see* CPL 470.20 [5]; *People v Romero*, 7 NY3d 633, 644 n 2). Viewing the evidence in light of the elements of the crimes as charged to the jury in the first trial and, with respect to the second trial, in light of the elements of the crimes in the bench trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdicts are not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

According to the testimony of defendant at both trials, he did not have sexual contact with the victim, nor did he have her sit on his lap for sexual gratification. Based on that credible testimony, and under the circumstances of this case, we conclude that a finding other than guilt would not be unreasonable here, and we therefore must " 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*id.* at 495; *see Romero*, 7 NY3d at 643). We are mindful, however, that "[g]reat deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*Bleakley*, 69 NY2d at 495).

There was evidence presented at both trials that defendant would sit in the back of his classroom when movies were played and that at least some of the lights were turned off and the door was shut. Contrary to the People's contention, we find that evidence innocuous. First, when a teacher and his or her students all are faced in the

same direction in order to watch a movie, most teachers logically would be seated in the back of the classroom to keep an eye on the students, to ensure that they do not misbehave. Second, it is of course logical that the classroom lights would be turned off while a movie was played. Third, it is logical that a teacher would close the classroom door when a movie was played or, indeed, during a music class, to prevent excessive noise from interfering with other classes.

The victim, unlike many of the other girls who testified at the first trial, testified that she sat on defendant's lap only one time. She further testified that defendant was her teacher for two years and that he placed her hand on her private area that one time, which made her both "mad" and "sad." After that incident, she did not again sit on his lap. At the first trial, the additional evidence that lent credibility to the victim's testimony was the testimony of a former secretary at the school. She testified that she went to defendant's classroom during one of defendant's classes and that the door was locked. When she asked defendant why his classroom door was locked, he did not answer her question. Moreover, one of defendant's students testified that, when defendant called on her to sit on his lap, she informed him that her father had told her not to do so. In response, defendant stated, "I told you not to tell your parents." In addition, defendant did not address the specific allegations of the victim at the first trial, and simply stated that he did not have sexual contact with any of the children.

At the second trial, the additional evidence that lent credibility to the victim's testimony was again the testimony of the former school secretary concerning defendant's failure to explain why the classroom door was locked. In addition, the victim testified that at times students would ask defendant if they could sit in his lap, but at other times defendant would call on students to sit with him. That testimony of the victim contradicted the testimony of defendant that he did not encourage the students to sit on his lap. Also at the second trial, defendant testified that he had sustained an injury to his left leg in 1996 that continued to cause him pain and discomfort. He testified that the victim jumped on his left knee when she sat on his lap, which caused him to experience a "great deal of discomfort." He therefore moved her to his right knee, but he denied that he knowingly came in contact with her genital area. A logical trier of fact necessarily would question why defendant would allow children to sit on his lap given the level of discomfort in his leg. In addition, the victim did not state during her testimony that defendant had moved her from his left leg to his right leg.

Although, as previously noted, a different finding would not have been unreasonable, we cannot conclude that the triers of fact "failed to give the evidence the weight it should be accorded" (*id.* at 495). Finally, we reject defendant's contentions that the indictment was improperly amended and that the sentence is unduly harsh and severe.

All concur except CENTRA, J.P., who concurs in the result in the following Memorandum: I concur in the result and in the majority's analysis of the issues with the exception of the preservation analysis

of the legal sufficiency of the evidence at the first trial. Quoting from *People v Smith* (8 AD3d 965, 966), the majority concludes that, despite the fact that defendant at the first trial failed to preserve for our review his contention with respect to the alleged legal insufficiency of the evidence concerning sexual gratification, we may nevertheless review that contention " 'for purposes of double jeopardy analysis.' " It is well settled that a contention that double jeopardy rights were violated need not be preserved for our review (*see People v Michael*, 48 NY2d 1, 6-8) but, in my view, a defendant must first preserve for our review the underlying issue concerning the alleged legal insufficiency of the evidence before we may determine whether the defendant's double jeopardy rights were violated (*see People v Farakesh*, 244 AD2d 568, *lv denied* 91 NY2d 1007; *see generally People v Gray*, 86 NY2d 10, 19).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

564

CA 09-02581

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

LESLIE BOXHORN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALLIANCE IMAGING, INC., DEFENDANT.

ALLIANCE IMAGING, INC., THIRD-PARTY PLAINTIFF,

V

SIEMENS MEDICAL SYSTEMS, INC.,
AND MEDICAL COACHES, INCORPORATED, THIRD-PARTY
DEFENDANTS-RESPONDENTS.

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

LITTLETON JOYCE UGHETTA PARK & KELLY, LLP, NEW YORK CITY (JOSEPH LIPARI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT SIEMENS MEDICAL SYSTEMS, INC.

DAMON MOREY LLP, BUFFALO (VINCENT SACCOMANDO OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT MEDICAL COACHES, INCORPORATED.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered February 20, 2009 in a personal injury action. The order denied the motion of plaintiff for leave to amend the complaint to add the third-party defendants as defendants.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion is granted upon condition that plaintiff shall serve the amended complaint within 30 days after service of the order of this Court with notice of entry.

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she sustained on May 24, 2005. On March 11, 2008, defendant filed a third-party complaint and, on October 24, 2008, plaintiff moved for leave to amend the complaint to add the third-party defendants as defendants. We conclude that Supreme Court abused its discretion in denying the motion (*see generally Torvec, Inc. v CXO on the GO of Del., LLC*, 38 AD3d 1175). In the absence of prejudice or surprise, leave to amend a pleading should be freely granted (*see* CPLR 3025 [b]; *McCaskey, Davies & Assoc. v New York City*

Health & Hosps. Corp., 59 NY2d 755, 757). In support of her motion, plaintiff established that the relation-back doctrine applied for purposes of computing the statute of limitations because her claims against the third-party defendants related back to those asserted in the third-party complaint, which was timely served (*see* CPLR 203 [f]; *Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 478).

In opposition to the motion, the third-party defendants failed to establish that they would be prejudiced by the delay in amending the complaint (*see Rodschat v Herzog Supply Co.*, 208 AD2d 1167, 1167-1168). While the amended complaint added a new theory of recovery against them, i.e., strict products liability, that theory arose out of the same transaction set forth in the original complaint (*see Presutti v Suss*, 254 AD2d 785, 786; *Walker v Pepsico, Inc.*, 248 AD2d 1015). We further reject the contention of the third-party defendants that the motion should be denied because plaintiff failed to set forth a reasonable excuse for her delay in seeking leave to amend the complaint. No such excuse was required where, as here, there was no extended delay in seeking leave to amend, nor was the motion made on the eve of trial (*see Sweeney v Purcell Constr. Corp.*, 20 AD3d 872, 873-874; *Oil Heat Inst. of Long Is. Trust v RMTS Assoc.*, 4 AD3d 290, 293; *Blake v Wieczorek*, 305 AD2d 989, 990).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

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

567

CA 09-00893

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

JULIE J. MANCUSO, PLAINTIFF-APPELLANT,

V ORDER

TODD B. KOCH, M.D., DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

HOGAN WILLIG, AMHERST (JENNIFER L. FAY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (GREGORY T. MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered March 5, 2009 in a medical malpractice action. The order denied the motion of plaintiff to set aside the jury verdict and for a new trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

568

CA 09-00894

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

JULIE J. MANCUSO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TODD B. KOCH, M.D., DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

HOGAN WILLIG, AMHERST (JENNIFER L. FAY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (GREGORY T. MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered March 24, 2009 in a medical malpractice action. The judgment dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages arising from a surgical procedure performed by defendant to repair a spiral fracture of a metacarpal bone in her left hand. It is undisputed that the bone did not heal properly following the procedure, resulting in malunion such that plaintiff's middle finger crossed over plaintiff's ring finger upon flexion. Plaintiff contended at trial that defendant was negligent in performing the surgery and in failing thereafter to perform corrective surgery. She now appeals from a judgment dismissing the complaint upon a jury verdict in defendant's favor.

We reject at the outset the contention of plaintiff that Supreme Court committed reversible error by refusing to allow her to present evidence concerning defendant's alleged failure to inform her following the initial surgery of the option of having further corrective surgery. As the court properly determined, plaintiff was "precluded from adducing any evidence at trial with respect thereto" (*Jones v LeFrance Leasing Ltd. Partnership*, 61 AD3d 824, 825), based on her failure to include that theory of negligence in her bill of particulars. In any event, the court allowed plaintiff to present evidence concerning defendant's alleged failure to provide proper follow-up care, and the record establishes that there was extensive testimony on the issue whether defendant discussed further surgical intervention. Thus, even assuming, arguendo, that the court erred in

refusing to allow plaintiff to present evidence concerning defendant's alleged failure to inform her of the option of further corrective surgery, we conclude that reversal is not warranted based on that alleged error. There is no possibility that " 'the excluded matter would have had a substantial influence in bringing about a different verdict' " (*Brown v County of Albany*, 271 AD2d 819, 820, *lv denied* 95 NY2d 767; *see generally Wall v Shepard*, 53 AD3d 1050, 1051).

Plaintiff failed to preserve for our review her further contention that the court erred in limiting her presentation of evidence concerning the alleged misrepresentation of the educational credentials of defendant's expert. In any event, the record establishes that plaintiff's counsel had a full opportunity to cross-examine the expert concerning his educational background and the alleged misrepresentations, and thus any further proof on the issue would have been cumulative (*see Shafran v St. Vincent's Hosp. & Med. Ctr.*, 264 AD2d 553, 555-556).

Plaintiff further contends that the court demonstrated bias in favor of defendant when the court itself questioned defendant's expert concerning the risks associated with plaintiff's surgery. According to plaintiff, the court thereby indicated to the jury that the malunion experienced by plaintiff is an accepted risk of the surgery. Although we note that the court could have crafted the wording of its question in a more neutral manner, it cannot be said that the court overstepped its "broad authority to[, inter alia,] elicit and clarify testimony . . . when necessary" (*Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1132, *lv denied* 11 NY3d 708 [internal quotation marks omitted]; *see Hemmerling v Barnes* [appeal No. 2], 269 AD2d 752). Moreover, any possible prejudice was minimal inasmuch as plaintiff's own expert agreed that the malunion was a risk of the surgery. In this case, the jury was properly charged with the issue whether the malunion was the result of either defendant's negligence or the risks associated with the surgical procedure in question in the absence of negligence.

Contrary to plaintiff's contention, the court did not abuse its discretion in providing the jury with a general verdict sheet (*see Johnson v Artkraft Strauss Sign Corp.*, 45 AD2d 482, 483). Also contrary to plaintiff's contentions, the court properly allowed defendant to testify concerning his habit of checking for malunion during surgery of the type performed on plaintiff, and the court properly included a habit instruction in its jury charge. Defendant testified that he had performed approximately 3,000 hand surgeries and that he is "very obsessive" about checking for malunion during surgery of that nature. That testimony was sufficient to demonstrate the requisite "deliberate repetitive practice" that serves as a proper foundation for the admission thereof (*Halloran v Virginia Chems.*, 41 NY2d 386, 392).

We have considered plaintiff's remaining contentions and conclude

that they are without merit.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

572

CA 09-02612

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

RICHARD BENEVENTO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND CITY OF BUFFALO BOARD OF PARKING, DEFENDANTS-APPELLANTS.

LAW OFFICES OF DOUGLAS COPPOLA, BUFFALO (PATRICIA STROMAN WALKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COLLINS & BROWN, LLC, BUFFALO (LUKE A. BROWN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 8, 2009 in a personal injury action. The order, insofar as appealed from, denied in part defendants' motion for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained when the bucket of a backhoe near where he was standing swivelled and struck him. Plaintiff was a member of a construction crew that was assigned to dig holes in which trees were to be planted as part of a parking ramp construction project. Supreme Court denied defendants' motion for summary judgment dismissing the amended complaint with respect to the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-9.5 (c), but the court otherwise granted defendants' motion. We reject the contention of defendants that the court should have granted their motion in its entirety. Pursuant to that regulation, all persons other than the pitman and the excavating crew are prohibited from standing within range of the back of a power shovel bucket while the shovel is in operation, and the bucket must rest on the ground when the excavating machine is not "in use." We agree with defendants that plaintiff was engaged in excavation work within the meaning of 12 NYCRR 23-1.4 (b) (19) at the time of the accident and was therefore permitted to stand within range of the back of the bucket when the excavating machine, i.e., the backhoe, was in use.

Here, however, the deposition testimony of plaintiff describing the operation of the backhoe and his location at the time of the

accident in relation to the backhoe differs markedly from the deposition testimony of the backhoe operator. According to plaintiff, after the backhoe operator had removed a scoop of dirt from the excavation site, plaintiff signaled to the operator and told him that he was going to sweep some dirt back into the hole. Plaintiff testified, "I already told him I was going to do that, he should have stopped." Plaintiff submitted the affidavit of a construction and excavation safety expert who opined that, following plaintiff's signal to stop, the backhoe bucket should have been placed on the ground until the backhoe operator received further instructions from plaintiff. According to that expert, pursuant to custom and practice in the construction industry, as reflected in 12 NYCRR 23-9.5 (c), the operator should have placed the bucket on the ground and waited until plaintiff had finished sweeping the dirt.

The backhoe operator, on the other hand, testified at his deposition that he received no signal from plaintiff and that, shortly before striking plaintiff with the backhoe bucket once the operator began to dig again, he observed plaintiff standing away from the excavation site and speaking with a coworker.

Accepting plaintiff's version of the events, as we must for summary judgment purposes (*see generally Rizk v Cohen*, 73 NY2d 98, 103), we reject defendants' contention that, notwithstanding plaintiff's signal, 12 NYCRR 23-9.5 (c) was not violated simply because the backhoe operator continued to operate and move the bucket through the excavation site. Indeed, under defendants' interpretation of the regulation, a backhoe operator could avoid the worker safety purposes of the regulation by keeping the bucket moving at all times. The backhoe operator could thus contend that the bucket was "in use" and therefore did not have to be on the ground, notwithstanding signals from coworkers or appropriate practice or custom in the industry. Rather, we conclude that a jury could find, under the circumstances described by plaintiff, that "the regulation requires that the bucket of the backhoe rest on the ground" (*Webber v City of Dunkirk*, 226 AD2d 1050, 1051). We therefore further conclude on the record before us that there is a material issue of fact whether the backhoe was "in use" at the time of the accident, and thus whether the regulation in question applies (*see id.*).

All concur except CENTRA, J.P., and LINDLEY, J., who dissent and vote to reverse the order insofar as appealed from in accordance with the following Memorandum: We respectfully dissent and would reverse the order insofar as appealed from, grant defendants' motion for summary judgment in its entirety and dismiss the amended complaint. We cannot agree with the majority on the record before us that there is an issue of fact whether defendants violated 12 NYCRR 23-9.5 (c) (*see generally O'Donnell v Buffalo-DS Assoc., LLC*, 67 AD3d 1421, 1423, *lv denied* 14 NY3d 704), and we thus would grant that part of defendants' motion with respect to the Labor Law § 241 (6) claim. We agree with the majority that plaintiff was a member of an excavating crew and was engaged in excavating work at the time he was injured. Defendants therefore established as a matter of law that they did not violate that portion of the regulation that provides that "[n]o person

other than the pitman and the excavating crew shall be permitted to stand within range of the back of a power shovel or within range of the swing of the dipper bucket while the shovel is in operation" (12 NYCRR 23-9.5 [c]). We disagree with the majority, however, that there is a triable issue of fact whether defendants violated that portion of the regulation that provides that, "[w]hen an excavating machine is not in use, the blade or dipper bucket shall rest on the ground or grade" (*id.*). At the time of the accident, plaintiff and a backhoe operator were digging holes in which to plant trees along the side of a parking ramp. The backhoe operator would dig dirt from the hole and then swivel the bucket to dump the dirt into a dump truck. Plaintiff stood nearby to sweep up any spilled dirt. Accepting plaintiff's version of the accident as true as we must on this motion by defendants for summary judgment (*see Rizk v Cohen*, 73 NY2d 98, 103), we note that, according to plaintiff's deposition testimony, plaintiff signaled to the backhoe operator that he was going to sweep the area after the backhoe operator dumped a bucket of dirt and that the backhoe operator responded, "okay." However, after emptying the bucket of dirt into the dump truck, the backhoe operator swivelled the bucket back to the hole where plaintiff was standing in accordance with his signal to the backhoe operator, and the backhoe operator struck plaintiff. Thus, while plaintiff's deposition testimony established that the backhoe should not have been in use at the time of the accident, it undisputably was in use for purposes of defendants' motion, i.e., accepting plaintiff's version of the accident as true. Although the regulation provides that when an excavating machine *is not* in use, the bucket must rest on the ground, here it was in use and thus the regulation was not violated.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

581

KA 08-00893

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RACHEL L. HUNT, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, 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 (Frederick G. Reed, J.), rendered February 29, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, grand larceny in the fourth degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]). Defendant failed to preserve for our review her contention that County Court erred in considering matters outside the record when sentencing her (*see People v Garson*, 69 AD3d 650, 652; *People v Rodriguez*, 61 AD3d 460, *lv denied* 12 NY3d 920; *People v Campbell*, 54 AD3d 959, *lv denied* 12 NY3d 756). In any event, that contention is without merit. "A sentencing court may consider any relevant information, subject only to the due process requirement that the information is 'reliable and accurate' " (*People v Thomas*, 206 AD2d 708, 709, quoting *People v Outley*, 80 NY2d 702, 712). We conclude that the court's sentencing remarks, which were based on information elicited at trial and which sought to discourage defendant from continuing a relationship with her boyfriend, whom she aided in the commission of the crimes at issue, reflected proper sentencing goals, one of which is defendant's rehabilitation (*see generally United States v Grayson*, 438 US 41, 45). To the extent that defendant challenges the severity of the sentence, we conclude that it is not unduly harsh or severe.

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). Although a different finding would not have been unreasonable, the jury was

entitled to discredit the testimony of defendant and her boyfriend concerning the extent of defendant's involvement in the crimes. According deference to the jury's resolution of credibility issues (*see People v Johnson*, 70 AD3d 1188, 1189-1190; *People v Brown*, 70 AD3d 1341; *People v Pearson*, 69 AD3d 1226, 1228), we conclude that the jury was justified in finding defendant guilty beyond a reasonable doubt (*see Danielson*, 9 NY3d at 348-349).

Defendant failed to preserve for our review her contention that the court erred in allowing the People to present evidence of uncharged crimes at trial (*see People v Cala*, 50 AD3d 1581, *lv denied* 10 NY3d 957; *People v Hyatt*, 50 AD3d 436, *lv denied* 10 NY3d 960; *People v Cabus*, 40 AD3d 540, *lv denied* 9 NY3d 1005), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (CPL 470.15 [6] [a]).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

591

TP 09-00945

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

IN THE MATTER OF ANDREW OPHARDT, PETITIONER,

V MEMORANDUM AND ORDER

JULIO VASQUEZ, COMMISSIONER, COMMUNITY DEVELOPMENT OF CITY OF ROCHESTER, AND CITY OF ROCHESTER, RESPONDENTS.
(PROCEEDING NO. 1.)

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR PETITIONER.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR RESPONDENTS.

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 [Harold L. Galloway, J.], entered May 6, 2009) to annul a determination of respondents. The determination found that petitioner violated various provisions of the New York State Uniform Fire Prevention and Building Code.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination that he violated six provisions of the New York State Uniform Fire Prevention and Building Code ([Building Code] 19 NYCRR 1219.1 *et seq.*; *see* Executive Law § 377). Supreme Court granted declaratory relief in favor of respondents and transferred the "[a]rticle 78 claims" to this Court pursuant to CPLR 7804 (g). We consolidated the transferred proceeding with petitioner's appeal from the order and judgment.

Addressing first the appeal, we note that petitioner's challenges to the sufficiency of the appearance tickets and to the residency of the assistant building inspector who inspected the two properties in question are not proper subjects of declaratory relief, and they therefore should have been addressed as challenges to the determination pursuant to CPLR 7803 (3). Although no appeal lies as of right from a nonfinal order in a CPLR article 78 proceeding (*see* CPLR 5701 [b] [1]), we nevertheless treat the notice of appeal as an

application for permission to appeal with respect to those two issues, and we grant petitioner such permission (*see* CPLR 5701 [c]; *Matter of Legacy at Fairways, LLC v McAdoo*, 67 AD3d 1460, 1461; *Matter of Custom Topsoil, Inc. v City of Buffalo*, 63 AD3d 1511).

Petitioner contends on appeal that the court erred in determining that the Municipal Code Violations Bureau (MCVB) has jurisdiction to adjudicate the violations of the Building Code in question because they constituted misdemeanor offenses pursuant to Executive Law § 382 (2). We reject that contention inasmuch as the record establishes that petitioner was charged only with violations of the Building Code pursuant to Executive Law § 382 (1) (*see generally* Penal Law § 10.00 [3]). Executive Law § 381 (1) provides local governments with the authority to enforce the Building Code. Pursuant to the City's Municipal Code § 13A-1, the City Court was authorized to establish the MCVB "to assist in the disposition of certain Municipal Code offenses [that] are designated as or constituted a 'violation,' as that term is defined in [Penal Law § 10.00 (3)]" and, pursuant to Municipal Code § 13A-2 (1), the MCVB had jurisdiction to adjudicate the six violations in question. In addition, because petitioner was charged with only violations pursuant to Executive Law § 382 (1) rather than misdemeanor offenses pursuant to section 382 (2), respondents were not required to allege as an element of the violations that petitioner had been served with an order to remedy those violations. They also were not required to serve petitioner with notice of the violations personally or by registered or certified mail (*see* § 382 [2]). We reject petitioner's further contention that respondents lack authority to enforce the Building Code unless the District Attorney delegates his or her prosecutorial authority to respondents inasmuch as Executive Law § 381 (2) specifically authorizes local governments to enforce the Building Code.

We reject the contention of petitioner that the appearance tickets issued with respect to each violation did not sufficiently apprise him of the Building Code violations with which he was charged. Each appearance ticket specified the location on the property where the violation was observed and the Building Code section alleged to be violated, and each appearance ticket contained a phrase describing the violation. In addition, three of the six appearance tickets specified the required remedy.

We agree with petitioner that the assistant building inspector was a public officer within the meaning of Public Officers Law § 3 (1) and that she therefore was subject to the residency requirement of that statute (*see Matter of Cathy v Prober*, 195 AD2d 999, *lv denied* 82 NY2d 660; *Bowman v Squillace*, 74 AD2d 887, 888, *appeal dismissed* 50 NY2d 928; *Matter of Haller v Carlson*, 42 AD2d 829). We nevertheless conclude that the acts of the assistant building inspector are not thereby rendered null and void because the residency requirement of Public Officers Law § 3 (1) is not jurisdictional in nature (*see Matter of Haggerty v Himelein*, 89 NY2d 431, 437 n; *Mileto v Sleight*, 178 Misc 2d 562, 563-564, *appeal dismissed* 260 AD2d 977, *lv denied* 94 NY2d 756), and because respondents have the authority to prosecute the

Building Code violations in question.

With respect to the transferred proceeding, we conclude that there is substantial evidence in the record to support the determination that petitioner received the Notices and Orders advising him that he was in violation of the Building Code (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181). We note that, because petitioner was not charged with misdemeanor offenses pursuant to Executive Law § 382 (2), service by registered or certified mail was not required. Petitioner contends that the determination with respect to four of the Building Code violations, concerning the eaves and driveway at the Wilder Street property and the gutters at both properties, is not supported by substantial evidence. We reject that contention. The Hearing Officer was entitled to weigh the strength of the conflicting inferences to be drawn from the evidence presented at the hearing and to credit the testimony of the assistant building inspector (*see Matter of Broich v Village of Southampton*, 70 AD3d 822; *Matter of Oglesby v New York City Hous. Auth.*, 66 AD3d 905, 908; *Matter of Leone v Kelly*, 27 AD3d 294). That testimony, in conjunction with the photographs of the Building Code violations observed by the assistant building inspector, constitutes "such relevant proof as a reasonable mind may accept as adequate to support [the] conclusion" that petitioner violated the Building Code provisions in question (*300 Gramatan Ave. Assoc.*, 45 NY2d at 180; *see Matter of Langler v County of Cayuga*, 68 AD3d 1775; *Matter of Barbato v New York State Dept. of Health*, 65 AD3d 821, 823, *lv denied* 13 NY3d 712).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

592

CA 09-01337

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

IN THE MATTER OF ANDREW OPHARDT,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JULIO VASQUEZ, COMMISSIONER, COMMUNITY
DEVELOPMENT OF CITY OF ROCHESTER, AND CITY OF
ROCHESTER, RESPONDENTS-DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

DAVIDSON FINK LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered February 19, 2009 in a proceeding pursuant to CPLR article 78 and a declaratory judgment action. The order and judgment, among other things, determined that the Municipal Code Violations Bureau has jurisdiction to adjudicate violations of the New York State Uniform Fire Prevention and Building Code.

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

Same Memorandum as in *Matter of Ophardt v Vasquez* ([proceeding No. 1] ___ AD3d ___ [June 11, 2010]).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

593

CA 09-02500

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

LIEBEL & MERLE SALES, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

POLYMER CONVERSIONS, INC., DEFENDANT-RESPONDENT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (JOHN K. ROTTARIS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BLAIR & ROACH, LLP, TONAWANDA (J. MICHAEL LENNON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered March 5, 2009 in a breach of contract action. The order, insofar as appealed from, denied the cross motion of plaintiff for partial summary judgment on the third and fourth causes of action.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, to recover unpaid commissions pursuant to a manufacturer's representative agreement. We conclude that Supreme Court erred in denying those parts of plaintiff's cross motion for partial summary judgment on liability with respect to the third cause of action, for earned commissions pursuant to Labor Law § 191-b, and the fourth cause of action, for attorney's fees, costs, disbursements and double damages pursuant to Labor Law § 191-c. Labor Law § 191-c (1) provides that, "[w]hen a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated." "Pursuant to [section 191-c (3)], the prevailing party in an action to recover commissions earned pursuant to a contract between a principal and a sales representative 'shall be entitled to an award of reasonable attorney's fees, court costs, and disbursements,' as well as double damages" (*Zeman v Falconer Elecs., Inc.*, 55 AD3d 1240, 1242). Inasmuch as the court granted that part of the cross motion for partial summary judgment on liability with respect to the first cause of action, for breach of contract, i.e., failure to pay commissions due, the court should have also granted those parts of the cross motion for partial summary

judgment on liability with respect to the third and fourth causes of action. We therefore reverse the order insofar as appealed from and grant the cross motion in its entirety.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

595

CA 09-02502

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

TOM GREENAUER DEVELOPMENT, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BURKE BROTHERS CONSTRUCTION, INC., DAVID BURKE, INDIVIDUALLY, PATRICK BURKE, INDIVIDUALLY, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

FARNER & FARNER, BUFFALO (MICHAEL R. SHANNON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (BERNADETTE CLOR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered September 11, 2009 in a breach of contract action. The order, insofar as appealed from, denied the cross motion of defendants Burke Brothers Construction, Inc., David Burke, individually, and Patrick Burke, individually, for, inter alia, summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, the alleged breach of certain contracts between plaintiff and defendant Burke Brothers Construction, Inc. (Burke Brothers). Burke Brothers and defendants David Burke, individually, and Patrick Burke, individually (collectively, individual defendants), cross-moved for, inter alia, summary judgment dismissing the breach of contract cause of action against the individual defendants. Supreme Court properly denied that part of the cross motion. Evidence concerning the relationship between Burke Brothers and the individual defendants is within their exclusive knowledge (*see Denkensohn v Davenport*, 130 AD2d 860, 862; *see also Cruceta v Funnel Equities*, 286 AD2d 747), and plaintiff is entitled to further discovery to determine whether there are grounds to pierce the corporate veil and whether the individual defendants may be held liable for the alleged breach of certain contracts by Burke Brothers (*see First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 293-294). Further, Burke Brothers and the individual defendants failed to establish their entitlement to judgment as a matter of law dismissing as time-barred that part of the

breach of contract cause of action seeking damages in the amount of $53,904.94 for work performed under a contract executed between plaintiff and Burke Brothers in 1994. That part of the breach of contract cause of action accrued upon the alleged breach of that contract (*see Matter of Village of Jordan v Memphis Constr. Co.*, 109 AD2d 1055, 1056). The submissions of Burke Brothers and the individual defendants in support of the cross motion raise triable issues of fact whether that breach occurred in 1999 and thus whether the action, commenced in 2004, is timely with respect to that part of the breach of contract cause of action (*see* CPLR 213 [2]).

The court properly denied that part of the cross motion seeking summary judgment dismissing the causes of action based upon quantum meruit and unjust enrichment. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388). Plaintiff, however, alleges that it performed work in addition to that covered by the contract, and thus the quantum meruit and unjust enrichment causes of action "may proceed inasmuch as 'there is a bona fide dispute' whether the additional work was outside the scope of [that contract]" (*Pulver Roofing Co., Inc. v SBLM Architects, P.C.*, 65 AD3d 826, 828).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

599

KA 08-02462

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLARENCE R. BROWN, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Elma A. Bellini, J.), rendered September 22, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree (two counts) and promoting prostitution in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentence imposed for burglary in the second degree under count two of the indictment shall run concurrently with the sentence imposed for burglary in the second degree under count three of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of burglary in the second degree (Penal Law § 140.25 [2]) and one count of promoting prostitution in the fourth degree (§ 230.20), arising from his burglary of two homes and his having offered the services of prostitutes to the resident of one of those homes. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we reject defendant's contention that the evidence is legally insufficient to support the conviction. With respect to the first burglary, the victim testified that defendant came inside his house "immediately" after he opened the door, that he could not prevent defendant from doing so, and that defendant dragged him back inside after he attempted to leave. Thus, there is a valid line of reasoning and permissible inferences based on the evidence at trial that could lead a rational person to find that defendant "enter[ed] or remain[ed] unlawfully" on the premises (§ 140.25; *see generally People v Bleakley*, 69 NY2d 490, 495). With respect to the second burglary, the evidence, i.e., the testimony of the victim and defendant's two accomplices, is legally sufficient to support the jury's finding that defendant had burglarized the home. Finally, with respect to the

conviction of promoting prostitution, the testimony that defendant offered the services of prostitutes is legally sufficient to establish that defendant "advance[d] . . . prostitution" (§ 230.20), inasmuch as the evidence established that he "solicit[ed] patrons for prostitution" (§ 230.15 [1]). Whether an act of prostitution actually took place is of no moment (*see People v Simone-Taylor*, 148 AD2d 933, *lv denied* 74 NY2d 669).

We reject the further contention of defendant that County Court erred in its *Molineux* ruling. The testimony in question concerned prior instances in which defendant had engaged in promotion of prostitution and thus was relevant on the issues of common scheme or plan, intent and identity, and we conclude that the probative value of the testimony exceeded its potential for prejudice (*see People v Molyneaux*, 49 AD3d 1220, 1221, *lv denied* 10 NY3d 937; *see generally People v Alvino*, 71 NY2d 233, 242-243). Contrary to defendant's contention, the decision of the Court of Appeals in *Alvino* does not support the proposition that the jury should have been charged that it should consider such testimony only if it found that other evidence offered by the People with respect to the prostitution count was insufficient. Indeed, we note that the court's *Molineux* charge was taken from the pattern Criminal Jury Instructions. Also contrary to defendant's contention, no *Huntley* hearing was required with respect to the letter sent by defendant to a police detective inasmuch as it is undisputed that defendant wrote the letter voluntarily, with no involvement of law enforcement officials (*see generally People v Pike*, 254 AD2d 727, 727-728).

Inasmuch as defendant made only "conclusory allegations that his prior conviction was unconstitutionally obtained . . . [and did not] support his allegations with facts," he was not entitled to a hearing on the constitutionality of his prior conviction before the court sentenced him as a second felony offender (*People v Konstantinides*, 14 NY3d 1, 15). We conclude, however, that the imposition of consecutive terms of imprisonment on the burglary convictions renders the sentence unduly harsh (*see* CPL 470.15 [6] [b]). We therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentence imposed for burglary in the second degree under count two of the indictment shall run concurrently with the sentence imposed for burglary in the second degree under count three of the indictment (*see* CPL 470.15 [6] [b]). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

610

CA 09-02573

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

THE RESOURCE CENTER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NYSARC, INC., DEFENDANT-RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (EDWARD S. BLOOMBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, ALBANY (DANIEL J. HURTEAU OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered June 17, 2009. The order, among other things, denied plaintiff's motion for summary judgment and granted defendant's motion for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking a determination that it had properly disaffiliated from defendant and was entitled to keep its assets. Plaintiff was founded in 1958 to serve mentally handicapped persons in Chautauqua County and, since 1959, plaintiff has been a chapter affiliated with both defendant, a not-for-profit corporation, and defendant's predecessor. According to defendant's bylaws and rules, all property held by one of defendant's chapters is held in trust for defendant. In 2006, plaintiff's members voted to disaffiliate from defendant.

We conclude that Supreme Court properly denied plaintiff's motion for summary judgment seeking, inter alia, a determination that it has the right to disaffiliate from defendant and granted defendant's motion for partial summary judgment determining, inter alia, that all of plaintiff's assets and programs shall be retained by defendant for the benefit of the children and adults formerly served by plaintiff in the event that plaintiff continues its efforts to disaffiliate from defendant. Contrary to plaintiff's contention, the record establishes that in 1959 plaintiff's members agreed to affiliate with defendant and to be bound by defendant's rules, including the rule that all of the property held by one of defendant's chapters is held in trust for defendant (*see generally Associated Gen. Contrs. of Am., N.Y. State Ch. v Lapardo Bros. Excavating Contrs.*, 43 Misc 2d 825). Therefore, the court is correct that, upon plaintiff's disaffiliation from

defendant, plaintiff will cease to have any interest in such property because "the interest of a member in the property of a corporation shall terminate upon the termination of his membership" (Not-For-Profit Corporation Law § 516 [a]).

Also, contrary to the contention of plaintiff, it does not have equitable title to its real property, facilities and equipment. Since 1959, plaintiff has at all times held itself out as one of defendant's chapters and has received the benefits of being such a chapter without objecting to the applicability of defendant's bylaws and rules. It therefore is not inequitable to require plaintiff to comply with defendant's bylaws and rules (*see generally Episcopal Diocese of Rochester v Harnish*, 11 NY3d 340, 352). Finally, we reject the further contention of plaintiff that defendant's rules pertaining to dissolution of a chapter are not applicable to plaintiff's disaffiliation from defendant, inasmuch as it is beyond dispute that disaffiliation will terminate plaintiff's status as one of defendant's chapters.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

613

CA 09-02516

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

SEVENSON ENVIRONMENTAL SERVICES, INC. AND
THE GOODYEAR TIRE AND RUBBER COMPANY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SIRIUS AMERICA INSURANCE COMPANY, ALSO
KNOWN AS SIRIUS INSURANCE COMPANY,
DEFENDANT-APPELLANT,
AND THOMAS JOHNSON, INC., DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (TIMOTHY E. DELAHUNT OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM D. CHRIST OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

SLIWA & LANE, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered May 20, 2009 in a declaratory judgment action. The judgment granted those parts of the cross motions of plaintiffs and defendant Thomas Johnson, Inc. seeking a declaration that defendant Sirius America Insurance Company, also known as Sirius Insurance Company, is obligated to defend and indemnify plaintiffs in the underlying action.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and those parts of the cross motions seeking summary judgment declaring that defendant Sirius America Insurance Company, also known as Sirius Insurance Company, is obligated to defend and indemnify plaintiffs in the underlying action are denied.

Memorandum: Plaintiffs, Sevenson Environmental Services, Inc. (Sevenson) and The Goodyear Tire and Rubber Company (Goodyear), commenced this action seeking, inter alia, a declaration that defendant Sirius America Insurance Company, also known as Sirius Insurance Company (Sirius), is obligated to defend and indemnify them in an underlying personal injury action. We note at the outset that we determined on a prior appeal that, inter alia, Sirius validly disclaimed coverage for defendant Thomas Johnson, Inc. (TJI) in the underlying action based on TJI’s late notice of the construction

accident from which the underlying action arose (*Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co.*, 64 AD3d 1234, *lv dismissed* 13 NY3d 893). We now agree with Sirius on this appeal that Supreme Court erred in agreeing with plaintiffs that Sirius is estopped from denying coverage to plaintiffs as additional insureds under the policy issued to TJI and thus in granting those parts of the cross motions of plaintiffs and TJI seeking a declaration that Sirius is obligated to defend and indemnify plaintiffs in the underlying action.

The first issue before us is whether plaintiffs are in fact named additional insureds. In support of their cross motion, plaintiffs submitted a certificate of insurance providing that "Sevenson . . ., the Project's Owner and Engineer, and their respective officers, employees and agents are named as additional insureds on a direct, primary and non-contributory basis." They also submitted an additional insured endorsement naming persons or organizations "as on file with company." In opposition to the motion, Sirius raised an issue of fact by submitting an affidavit from an employee of its third-party claims administrator, UTC Risk Management Services, Inc. (UTC), who averred that TJI's underwriting file did not contain any request or notice to name plaintiffs as additional insureds on the policy. Although Sirius contends on appeal that it is entitled to summary judgment declaring that it is not obligated to defend or indemnify plaintiffs in the underlying action (*see* CPLR 3212 [b]), we conclude that the fact that UTC did not locate any documentation in TJI's underwriting file is, by itself, insufficient to establish as a matter of law that neither Sirius nor one of its agents possesses documentation naming plaintiffs as additional insureds (*cf. Tribeca Broadway Assoc., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198; *ADF Constr. Corp. v Home Insulation & Supply*, 237 AD2d 915, 916).

Contrary to the court's determination in granting judgment in favor of plaintiffs, we conclude that there is an issue of fact whether Sirius is estopped from denying additional insured coverage to plaintiffs. It is well established that a certificate of insurance, by itself, does not confer insurance coverage, particularly under the circumstances of this case, in which the certificate expressly provides that it "is issued as a matter of information only and confers no rights upon the certificate holder [and] does not amend, extend or alter the coverage afforded by the policies listed below," e.g., the general liability policy. "A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (*Tribeca Broadway Assoc., LLC*, 5 AD3d at 200; *see School Constr. Consultants, Inc. v ARA Plumbing & Heating Corp.*, 63 AD3d 1029, 1030-1031; *Home Depot U.S.A., Inc. v National Fire & Mar. Ins. Co.*, 55 AD3d 671, 673).

Nevertheless, an insurance company that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying coverage to that party where the party reasonably relies on the certificate of insurance to its detriment (*see Lenox Realty v Excelsior Ins. Co.*, 255 AD2d 644, 645-646, *lv*

denied 93 NY2d 807; *Bucon, Inc. v Pennsylvania Mfg. Assn. Ins. Co.*, 151 AD2d 207, 210-211). For estoppel based upon the issuance of a certificate of insurance to apply, however, the certificate must have been issued by the insurer itself or by an agent of the insurer (*see Tribeca Broadway Assoc., LLC*, 5 AD3d at 200; *Niagara Mohawk Power Corp. v Skibeck Pipeline Co.*, 270 AD2d 867, 869; *Lenox Realty*, 255 AD2d at 646; *see also American Ref-Fuel Co. of Hempstead v Resource Recycling*, 248 AD2d 420, 423-424).

We conclude that plaintiffs did not meet their initial burden on the cross motion with respect to estoppel of establishing that the certificate of insurance was issued by Sirius or an authorized agent of Sirius. Plaintiffs submitted evidence that Overdorf Associates Agency, Inc. (Overdorf), TJI's insurance broker, issued the certificate of insurance naming them as additional insureds on the TJI policy. An employee of Overdorf testified at his deposition that North Island Facilities, Ltd. (NIF) authorized him to issue the certificate of insurance, and that NIF is an agent of record for Sirius. It is undisputed, however, that Overdorf is not an authorized agent of Sirius, and we conclude that the deposition testimony of Overdorf's employee, by itself, is insufficient to establish an agency relationship between Sirius and NIF.

Finally, we reject the further contention of Sirius that it is entitled to summary judgment on the issue of estoppel pursuant to CPLR 3212 (b). In opposition to plaintiffs' cross motion on the issue of estoppel, Sirius submitted an affidavit from an employee of UTC stating that neither NIF nor Overdorf is an agent of Sirius. Sirius, however, failed to present evidence or deposition testimony from any person from its own company or from NIF addressing the precise nature of the relationship between the two companies.

In light of our determination that there are issues of fact with respect to whether plaintiffs are indeed named additional insureds under the insurance policy and, if not, whether Sirius is estopped from denying coverage based upon the certificate of insurance, we decline to address the remaining issues raised by Sirius on appeal.

To the extent that the court determined that Sirius failed to provide timely notice of its disclaimer to Sevenson and/or Goodyear as claimants, we conclude that such a determination is premature. Pursuant to Insurance Law § 3420 (a) (2), an injured claimant has a direct cause of action against an insurer only after the injured claimant first obtains a judgment against the insured (*see Lang v Hanover Ins. Co.*, 3 NY3d 350, 354-355). Here, neither Goodyear nor Sevenson has obtained a judgment against TJI, and thus both plaintiffs "have failed to fulfill the condition precedent" to seek relief directly from Sirius (*id.* at 355).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

614

CA 09-02369

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

IN THE MATTER OF LESTER HOMAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF CATTARAUGUS DEPARTMENT OF SOCIAL
SERVICES, RESPONDENT-RESPONDENT.

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (F. DAVID RUSIN OF COUNSEL), FOR PETITIONER-APPELLANT.

STEPHEN D. MILLER, OLEAN, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered September 22, 2009. The order, among other things, denied petitioner's motion seeking a determination that respondent does not have a valid Medicaid lien against settlement proceeds received by petitioner.

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

Memorandum: Supreme Court properly denied petitioner's motion seeking a determination that respondent, County of Cattaraugus Department of Social Services (DSS), does not have a valid Medicaid lien against the proceeds received by petitioner as supplemental uninsured/underinsured motorist (SUM) coverage under his mother's insurance policy (*Homan v County of Cattaraugus Dept. of Social Servs.*, 24 Misc 3d 1243[A], 2009 NY Slip Op 51854[U]). It is undisputed that petitioner sustained severe and permanent injuries while operating his mother's motor vehicle when a vehicle operated by an uninsured driver struck the vehicle operated by petitioner. It also is undisputed that the only recovery received by petitioner to date has been from his mother's SUM coverage, for the $25,000 policy limit. Petitioner contends that, because the settlement with his mother's insurer was for pain and suffering only, DSS is not entitled to assert a lien for medical expenses against the proceeds. In addition, he contends that, pursuant to the decision of the Supreme Court in *Arkansas Dept. of Health & Human Servs. v Ahlborn* (547 US 268), DSS has only a right of subrogation against the tortfeasor, not a right to a lien against the settlement proceeds. We reject both of petitioner's contentions.

Even before the Supreme Court issued its decision in *Ahlborn*, it

was settled in New York that "a Medicaid lien may not be effectively nullified by the mere expedient of the plaintiff[']s] attorney announcing that the settlement relates to pain and suffering only" (*Carpenter v Saltone Corp.*, 276 AD2d 202, 211; *see Simmons v Aiken*, 100 AD2d 769, 769-770). The Supreme Court subsequently held in *Ahlborn* that federal law prohibits a Medicaid lien from being paid in its entirety from settlement proceeds before any other payments are made in the event that only a portion thereof may fairly be allocated to medical expenses. We conclude that the decision in *Ahlborn* does not permit a plaintiff to avoid a Medicaid lien altogether by settling with the tortfeasor for pain and suffering only. Also contrary to petitioner's contention, *Ahlborn* does not limit DSS to a right of subrogation rather than a lien inasmuch as, in *Ahlborn*, the DSS lien was in fact enforced by the Court, albeit not to the extent sought by DSS. We thus conclude that the court herein, pursuant to *Ahlborn*, properly concluded that a hearing is required to determine the total value of plaintiff's loss, from which the proportionate share of DSS of the settlement proceeds may then be calculated (*see Harris v City of New York*, 16 Misc 3d 674).

Finally, petitioner's remaining contention is raised for the first time on appeal and thus is not properly before us (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

622

KA 08-02121

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONNELL JEFFERSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered September 10, 2008. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to the contention of defendant, County Court's assessment of ten points under the risk factor for his conduct while confined is supported by evidence establishing that defendant's record while incarcerated included at least three Tier III violations and more than ten Tier II violations (*see People v Catchings*, 56 AD3d 1181, *lv denied* 12 NY3d 701; *People v Peterson*, 8 AD3d 1124, *lv denied* 3 NY3d 607; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 16 [2006]). In any event, we note that defendant's presumptive classification as a level two risk would not change even if the court had not assessed those ten points (*see generally People v Clark*, 66 AD3d 1366, *lv denied* 13 NY3d 713).

Defendant failed to preserve for our review his further contention that he was entitled to a downward departure from his presumptive risk level (*see id.*; *People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708). "In any event, that contention lacks merit inasmuch as defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" (*People v*

Regan, 46 AD3d 1434, 1435).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

629

CAF 09-00738

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND PINE, JJ.

IN THE MATTER OF ADELYN RAMIREZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIC L. VELAZQUEZ, RESPONDENT-RESPONDENT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR PETITIONER-APPELLANT.

ANDREW M. DUNN, ATTORNEY FOR THE CHILDREN, ONEIDA, FOR MADELYN V., ERIC V. AND LOUIS V.

Appeal from an order of the Family Court, Oneida County (John E. Flemma, J.H.O.), entered March 5, 2009 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion and dismissed the petition.

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

Memorandum: Family Court erred in granting the motion of respondent father at the close of petitioner mother's proof to dismiss the petition seeking permission for the parties' three children to relocate with the mother from Utica to New York City. We conclude that the mother established a prima facie case that the relocation would be in the best interests of the children (*see generally Matter of Tropea v Tropea*, 87 NY2d 727, 740-741). The 20-year-old mother is the primary caretaker of the three children, and her parents, who were moving to New York City, provided extensive assistance to the mother and would continue to do so if she were to relocate (*see Matter of Scialdo v Cook*, 53 AD3d 1090, 1092). Furthermore, the mother had several family members in the New York City area who were available to assist her with housing and child care. Although the father exercised alternate weekend visitation with the children, the mother established that he did not work to support the children, that he sold marihuana and that, based upon an incident of domestic violence, the court issued an order of protection in favor of the mother (*see Matter of Pamela H. v Cordell W.*, 43 AD3d 1319). We therefore reverse the order, deny the motion, reinstate the petition and remit the matter to

Family Court for further proceedings on the petition.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

630

CA 09-02563

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND PINE, JJ.

IN THE MATTER OF TERRY L. STEVENS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ALLIED BUILDERS, INC., CHARLES W. PECORELLA, MATTEO PECORELLA, JOHN J. PETRONIO, CARL V. PETRONIO, AND GARY L. NANNI,
RESPONDENTS-RESPONDENTS.

GATES & ADAMS, P.C., ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR PETITIONER-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered March 12, 2009 in a proceeding pursuant to Business Corporation Law § 1104-a. The order, insofar as appealed from, granted those parts of respondents' motion to dismiss the petition, for summary judgment dismissing the petition in part and for summary judgment on the first counterclaim.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety, the petition is reinstated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Petitioner commenced this dissolution proceeding pursuant to Business Corporation Law § 1104-a. We conclude that Supreme Court erred in granting those parts of respondents' motion to dismiss the petition based on petitioner's lack of standing, for summary judgment dismissing the petition insofar as it alleges that petitioner was wrongfully terminated and oppressed and for summary judgment on the first counterclaim, seeking an order determining that petitioner is obligated to sell his shares pursuant to certain terms of the Option Agreement. It cannot be said that those terms apply to this proceeding.

"Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324; *see Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 171-172). Section 7 (a) of the Option Agreement provided, in relevant part, that petitioner "shall not sell,

transfer, assign, give, bequeath, hypothecate, pledge, create a security interest in, or lien on, encumber, place in trust (voting or other) or otherwise dispose of all or any portion of the shares of the capital stock . . . whether voluntarily or through any bankruptcy or other insolvency proceedings, adjudication of insanity, death or otherwise . . . .” Section 7 (c) gave respondent shareholders the option to purchase if there was a transfer of stock pursuant to section 7 (a), and section 7 (e) provided for the purchase price. Section 8 of the Option Agreement also gave respondent shareholders the option to purchase for that same price upon the termination of petitioner from the corporation for any reason prior to the period ending 10 years from the date of the Option Agreement. Further, section 8 (c) provided that the provisions of section 8 applied to dissolution proceedings pursuant to Business Corporation Law § 1104-a.

We agree with petitioner that section 8 of the Option Agreement is no longer in effect because it expired by its own terms. Contrary to respondents’ contention, the effective time period of section 8 was not extended by the later amendments to the Option Agreement. Those amendments did not amend that section and specifically provided that all other terms of the Option Agreement remained in effect.

We further agree with petitioner that section 7 of the Option Agreement does not apply to dissolution proceedings. First, to construe section 7 in that way would render section 8 (c) meaningless. It is well settled that courts “should construe [a contract] so as to give full meaning and effect to the material provisions” (*Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582), and they should not construe a contract in such a way that would render a provision meaningless (*see Matter of Columbus Park Corp. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 80 NY2d 19, 31, *rearg denied* 80 NY2d 925). Second, section 7 is not so broad as to include dissolution proceedings (*see Matter of Pace Photographers [Rosen]*, 71 NY2d 737, 747-748). Respondents’ reliance on *Matter of El-Roh Realty Corp.* (48 AD3d 1190) is misplaced. In that case, the shareholders’ agreement “prohibited the transfer of any shares, ‘including, without limitation, transfers that are voluntary, involuntary, by operation of law or with or without valuable consideration’ ” (*id*. at 1191). A dissolution proceeding pursuant to Business Corporation Law § 1104-a, however, is an involuntary transfer (*see* § 1104-a [b]), and section 7 (a) of the Option Agreement does not prohibit involuntary transfers except as explicitly listed, e.g., through bankruptcy.

We therefore reverse the order insofar as appealed from, deny respondents’ motion in its entirety, reinstate the petition, and remit the matter to Supreme Court to determine the fair value of petitioner’s shares in compliance with Business Corporation Law § 1118.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

634

CA 09-02548

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND PINE, JJ.

ALLSAFE TECHNOLOGIES, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES BENZ, DOING BUSINESS AS DIGITAL CARD SYSTEMS, DEFENDANT-APPELLANT.

EDWARD J. SNYDER, II, WEST SENECA (TIMOTHY D. GALLAGHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered May 21, 2009 in a breach of contract action. The order, insofar as appealed from, denied that part of defendant's motion to dismiss the complaint.

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

Memorandum: Plaintiff commenced this breach of contract action alleging that defendant, Charles Benz, doing business as Digital Card Systems, failed to pay for products that he ordered and received from plaintiff. In his answer, defendant alleged, inter alia, that he has never conducted business as Digital Card Systems and that, rather, Digital Card Systems, Inc., a subsidiary of Liska Biometry, Inc., purchased the products from plaintiff. Defendant further alleged that he is a resident of the Commonwealth of Massachusetts and that Supreme Court lacked personal jurisdiction over him. The court properly denied defendant's motion seeking, inter alia, to dismiss the complaint on the ground that the court lacked personal jurisdiction inasmuch as plaintiff met its burden of demonstrating that "facts 'may exist' to exercise personal jurisdiction over the defendant" (*Ying Jun Chen v Lei Shi*, 19 AD3d 407, 408).

We nevertheless conclude that the court erred in denying defendant's motion insofar as it sought to dismiss the complaint on the ground that plaintiff failed to join a necessary party, i.e., Digital Card Systems, Inc. (*see* CPLR 3211 [a] [10]; *Matter of Spence v Cahill*, 300 AD2d 992, *lv denied* 1 NY3d 508). The record establishes that Digital Card Systems, Inc. ordered the products in question from plaintiff and made a partial payment. We therefore conclude that Digital Card Systems, Inc. ought to be a party inasmuch as "complete relief" may not be accorded between the parties to this action without joining Digital Card Systems, Inc. (CPLR 1001 [a]). Although we

cannot conclude on the record before us that the court had jurisdiction to order Digital Card Systems, Inc. "summoned" (CPLR 1001 [b]), under the facts presented here, we conclude that the court abused its discretion in permitting the action to proceed without Digital Card Systems, Inc. as a party (*see Spence*, 300 AD2d 992; *see generally Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals*, 5 NY3d 452, 459).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

635

CA 09-01229

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND PINE, JJ.

ROBERT K. ANDERSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GREAT EASTERN MALL, L.P. AND KAUFMANN'S
DEPARTMENT STORE, INC., DEFENDANTS-RESPONDENTS.

CELLINO & BARNES, P.C., ROCHESTER (ROBERT L. VOLTZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

PETRONE & PETRONE, P.C., BUFFALO (JAMES H. COSGRIFF, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT KAUFMANN'S DEPARTMENT STORE, INC.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered February 26, 2009 in a personal injury action. The order granted defendants' motions for summary judgment dismissing the complaint and the cross claims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motions in part and reinstating the complaint insofar as the complaint, as amplified by the bills of particulars, alleges that defendants had actual or constructive notice of the dangerous condition and reinstating the cross claims and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped on ice and fell in front of the entrance to a store owned by defendant Kaufmann's Department Store, Inc. We note at the outset that plaintiff does not contend that Supreme Court erred in granting those parts of defendants' motions for summary judgment dismissing the complaint and the cross claims insofar as the complaint, as amplified by the bills of particulars, alleges that defendants created the dangerous condition, and he therefore has abandoned any issues with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984). We agree with plaintiff, however, that the court erred in granting those parts of the motions for summary judgment dismissing the complaint insofar as the complaint, as amplified by the bills of particulars, alleges that defendants had actual or constructive notice of the dangerous condition and for summary judgment dismissing the cross claims. We therefore modify the order accordingly. "[A] plaintiff is not required to prove that the

defendants knew or should have known of the existence of a particular defect where they had actual notice of a recurrent dangerous condition in that location" (*Hale v Wilmorite, Inc.*, 35 AD3d 1251, 1251-1252; *see Chrisler v Spencer*, 31 AD3d 1124). "A defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition" (*Brown v Linden Plaza Hous. Co., Inc.*, 36 AD3d 742; *see Chrisler*, 31 AD3d 1124).

Defendants failed to meet their initial burden of establishing that they did not have actual notice of an ongoing and recurring dangerous condition, and they therefore failed to establish that they did not have actual or constructive notice of the dangerous condition (*see Chrisler*, 31 AD3d 1124; *Migli v Davenport*, 249 AD2d 932). In support of their motions, defendants submitted the deposition testimony of plaintiff, who testified that he fell as he was walking underneath a canopy. Plaintiff and his family members, who witnessed the accident, believed that the ice had formed from water dripping from a nearby drain, from snow melting from the canopy, or from snow melting from a nearby snow pile. Defendants also submitted the deposition testimony of their employees, who testified that they had observed water coming from the nearby drain and ice accumulation near that drain. The employees also testified that snow on top of the canopy would slide off onto the sidewalks and water would drip from the canopy onto the sidewalk near where plaintiff fell. Finally, the employees testified that they would sometimes push the snow off of the sidewalks into a pile and that the snow would melt from the pile and form ice in front of the store. We thus conclude that there is a triable issue of fact whether "there was in fact a 'recurring dangerous condition in the area of the slip and fall that was routinely left unaddressed' " (*Hale*, 35 AD3d at 1252).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

637

CA 09-02001

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND PINE, JJ.

MICHAEL GRUNINGER AND NINA GRUNINGER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF EPSTEIN & HARTFORD, WILLIAMSVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 30, 2009. The order, among other things, granted the motion of defendants Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company for summary judgment.

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

Memorandum: Plaintiffs commenced this action pursuant to Insurance Law § 3420 (a) (2), alleging that defendants Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company (collectively, Nationwide defendants) are obligated to satisfy the judgment that plaintiffs obtained against defendant Jeffrey Harmer in the underlying personal injury action (*see* Insurance Law § 3420 [a] [2]). Harmer was insured under a homeowners' policy issued by the Nationwide defendants. In the underlying action, plaintiffs sought damages for injuries sustained by Michael Gruninger (plaintiff) when he was shot by Harmer while they were deer hunting. As a result of that incident, Harmer pleaded guilty to assault in the third degree (Penal Law § 120.00 [3]). After they were notified of the underlying incident, the Nationwide defendants issued a letter in which they disclaimed coverage based on, inter alia, a provision in the homeowners' policy that excluded coverage for bodily injury "caused by or resulting from an act or omission [that] is criminal in nature and committed by an insured." Plaintiffs appeal from an order that, inter alia, granted the Nationwide defendants' motion for summary judgment dismissing the complaint and denied plaintiffs' cross motion for

summary judgment on the complaint. We affirm.

In *Slayko v Security Mut. Ins. Co.* (98 NY2d 289, 292), the defendant's insured had pleaded guilty to assault in the second degree (Penal Law § 120.05 [4]), arising from an incident in which he pointed a shotgun at the plaintiff and pulled the trigger, incorrectly believing that the gun was unloaded. The Court of Appeals concluded that a provision in the insurance policy issued by the defendant excluding coverage for liability " 'arising directly or indirectly out of instances, occurrences or allegations of criminal activity by the insured' " did not violate public policy and that it properly excluded coverage for the plaintiff's injuries (*Slayko*, 98 NY2d at 294-296).

Here, plaintiffs correctly concede that the shooting incident falls within the criminal act exclusion in the homeowners' policy and, based on the Court's decision in *Slayko*, such an exclusion is not barred by public policy. Plaintiffs contend, however, that this case is of the sort anticipated by the Court when it acknowledged in *Slayko* that "[a] case may arise in which a broad criminal activity exclusion . . . facially applies, yet works an injustice because the prohibited act involves little culpability or seems minor relative to the consequent forfeiture of coverage" (*id*. at 294). We reject that contention. Pursuant to Penal Law § 120.00 (3), "[a] person is guilty of assault in the third degree when . . . [w]ith criminal negligence, he [or she] causes physical injury to another person by means of a deadly weapon or a dangerous instrument." Contrary to plaintiffs' contention, criminal negligence as defined in Penal Law § 15.05 (4) is not synonymous with the common-law negligence standard applied in civil cases (*see* PJI 2:10), and not every hunting accident would be excluded under the criminal activity exclusion inasmuch as such accidents do not necessarily involve criminal negligence.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

645

CAF 09-02237

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

IN THE MATTER OF WLODEK KOSS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTINE L. MICHAUD, RESPONDENT-APPELLANT.

ABBIE GOLDBAS, ATTORNEY FOR THE CHILDREN,
APPELLANT.

CHRISTINE L. MICHAUD, RESPONDENT-APPELLANT PRO SE.

ABBIE GOLDBAS, ATTORNEY FOR THE CHILDREN, UTICA, APPELLANT PRO SE.

Appeals from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered January 20, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, found that respondent willfully violated an order of visitation.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, the Attorney for the Children and respondent mother appeal from an order imposing sanctions, but holding them in abeyance, upon a finding that the mother interfered with the visitation rights of petitioner father. "We agree with [the mother] that Family Court's finding[] that [she] willfully violated the order of visitation on [a] certain date . . . do[es] not have a sound and substantial basis in the record" (*Matter of Stuttard v Stuttard*, 2 AD3d 1415, 1416; *cf. Matter of De Felice v De Felice*, 303 AD2d 1017; *Matter of Watts v Watts*, 290 AD2d 822, 824, *lv denied* 97 NY2d 614). The order on appeal, read in conjunction with the underlying decision, indicates that the allegations in the petition were determined to be unfounded, with the exception of the allegation that the mother breached her duty to foster the relationship of the parties' two children with the father when she permitted one of the children to decide for herself whether to accompany the father for Christmas visitation. The evidence in the record establishes, however, that the mother prepared the child's backpack for that visitation, placed it by the front door, and unequivocally told the child in question that she would be going with the father for visitation. The mere fact that the mother made equivocal statements to a babysitter outside the presence of the child

is insufficient to establish that the mother willfully interfered with the father's relationship with the child and thus willfully violated the order of visitation. We therefore reverse the order and dismiss the petition.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

651

CA 09-02359

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

JENNIFER D. MARTINO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. STOLZMAN, DEFENDANT-RESPONDENT,
MICHAEL OLIVER AND SUSAN OLIVER,
DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

JUDITH A. ROST, PLAINTIFF-RESPONDENT,

V

MICHAEL A. STOLZMAN, JENNIFER D. MARTINO,
GINA L. AVINO, DEFENDANTS-RESPONDENTS,
MICHAEL OLIVER AND SUSAN OLIVER,
DEFENDANTS-APPELLANTS.
(ACTION NO. 2.)

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (SARAH RERA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JENNIFER D. MARTINO AND GINA L. AVINO.

CHIACCHIA & FLEMING LLP, HAMBURG (LISA A. BALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT JENNIFER D. MARTINO.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR DEFENDANT-RESPONDENT MICHAEL A. STOLZMAN.

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

Appeals from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 18, 2009 in personal injury actions. The order denied the motion of defendants Michael Oliver and Susan Oliver seeking, inter alia, dismissal of the claim in action No. 1 and the cause of action against them in action No. 2 asserting a violation of General Obligations Law § 11-101.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion in part and dismissing the claim in action No. 1 and the cause of action against defendants Michael Oliver

and Susan Oliver in action No. 2 asserting the violation of General Obligations Law § 11-101 and as modified the order is affirmed without costs.

Memorandum: Action No. 1 was commenced by plaintiff, Jennifer D. Martino, who is also a defendant in action No. 2, and action No. 2 was commenced by plaintiff, Judith A. Rost. The plaintiff in each action seeks damages for injuries sustained as the result of an automobile accident that occurred shortly after midnight on January 1, 2007. Michael A. Stolzman, a defendant in each action, was leaving a party hosted by defendants Michael Oliver and Susan Oliver, also defendants in each action. It is undisputed that Stolzman backed his automobile, in which Rost was a passenger, out of the Olivers' driveway and into the path of an oncoming automobile operated by Martino and owned by Gina L. Avino, a defendant only in action No. 2. We conclude that Supreme Court erred in denying those parts of the Olivers' motion seeking dismissal of the claim in action No. 1 and the cause of action against the Olivers in action No. 2 asserting a violation of General Obligations Law § 11-101 for failure to state a cause of action (*see* CPLR 3211 [a] [7]). We therefore modify the order accordingly.

In determining a motion under CPLR 3211 (a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint . . . and the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one . . . Affidavits and other evidentiary material may also be considered to establish conclusively that plaintiff has no cause of action . . . Any facts in the complaint and submissions in opposition to the motion to dismiss are accepted as true, and the benefit of every possible favorable inference is afforded to the plaintiff" (*Gibraltar Steel Corp. v Gibraltar Metal Processing*, 19 AD3d 1141, 1142 [internal quotation marks omitted]). General Obligations Law § 11-101 requires as a predicate for liability the commercial sale of alcohol for profit (*see D'Amico v Christie*, 71 NY2d 76, 84) and, in applying the appropriate standard of review with respect to the Olivers' motion, we conclude that the Olivers established as a matter of law that they did not sell alcohol at the party hosted by them and thus had no expectation of pecuniary gain (*see generally id.*; *Casselberry v Dominick*, 143 AD2d 528, 529, *lv denied* 73 NY2d 706).

We further conclude, however, that the court properly denied those parts of the Olivers' motion seeking summary judgment dismissing the claim in action No. 1 and the cause of action in action No. 2 asserting that the Olivers were negligent. "[I]t is fundamental that a duty of reasonable care owed by the tort-feasor . . . is elemental to any recovery in negligence . . ., and that foreseeability of injury does not determine the existence of duty. Whether a duty of care exists is a question of law to be determined by the courts, which have the responsibility, in fixing the orbit of duty, of limiting the legal consequences of wrongs to a controllable degree" (*Badou v New Jersey Tr. Rail Operations*, 221 AD2d 303, 304 [internal quotation marks omitted]; *see Clementoni v Consolidated Rail Corp.*, 30 AD3d 986, 987,

affd 8 NY3d 963).

The Olivers correctly concede that they had a common-law duty as social hosts to control and supervise intoxicated guests on their property or in an area under their control (*see D'Amico*, 71 NY2d at 85; *Aquino v Higgins*, 68 AD3d 1650, 1651), but they contend that they had no duty to prevent Stolzman from leaving their property prior to the accident because they were unaware that he was intoxicated. Nevertheless, the record establishes that Stolzman had a blood alcohol content of .14% following the accident, which is nearly twice the legal limit (*see* Vehicle and Traffic Law § 1192 [2]). We thus conclude on the record before us that there is an issue of fact whether the Olivers knew or should have known that Stolzman left the party in a dangerous state of intoxication. We also reject the contentions of the Olivers that the allegedly unsafe condition giving rise to the accident was not on property owned or maintained by them (*cf. Haymon v Pettit*, 9 NY3d 324, 328, *rearg denied* 10 NY3d 745; *Galindo v Town of Clarkstown*, 2 NY3d 633, 636-637), and that they had no duty to direct traffic from their driveway, from which the view of oncoming traffic was obstructed (*cf. Lasek v Miller*, 306 AD2d 835). The Olivers both had an opportunity to control or at least to guide Stolzman as he exited their driveway in his automobile and acknowledged that sightlines near the end of their driveway were limited at the time of the accident. Indeed, they acknowledged that they had in the past guided visitors through a dangerous portion of their driveway. Finally, we conclude that the remaining contention of the Olivers is without merit.

All concur except SMITH and PERADOTTO, JJ., who dissent in part and vote to reverse in accordance with the following Memorandum: We respectfully dissent in part because we disagree with the majority's conclusion that there is an issue of fact with respect to the negligence of homeowners Michael Oliver and Susan Oliver, defendants in both actions. In our view, the Olivers established their entitlement to summary judgment as a matter of law with respect to negligence, inasmuch as they had no duty to prevent their guest, Michael A. Stolzman, a defendant in both actions, from leaving their house or to assist him in pulling out of their driveway in his vehicle. We therefore would reverse the order, grant the motion of the Olivers in its entirety and dismiss the complaint in action No. 1 against them and the amended complaint in action No. 2 against them.

"It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff . . . In the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman*, 40 NY2d 781, 782, *rearg denied* 41 NY2d 901). The majority relies on *D'Amico v Christie* (71 NY2d 76, 85) for the proposition that the Olivers had a common-law duty as social hosts to control and supervise intoxicated guests on their property or in an area under their control. In this case, however, the accident occurred on a public highway, not on the Olivers' property (*see id.* at 86). Although the majority implies that the Olivers had a duty to prevent Stolzman from leaving their property

if they were aware or should have been aware that he was intoxicated, the majority cites no authority for that novel proposition. In our view, requiring social hosts to prevent intoxicated guests from leaving their property would inappropriately expand the concept of duty. Indeed, as the Court of Appeals wrote in *D'Amico*, "[w]hile recognizing the moral desirability that drinking be controlled and supervised, we cannot create a new legal duty that would require [social hosts] to respond in damages, as an insurer, for . . . injuries" sustained as a result of such drinking (*id.*).

We also cannot agree with the majority that the Olivers had a duty to warn Stolzman of the allegedly unsafe condition giving rise to the accident, i.e., the presence of vehicles parked on the roadway, or to guide or direct Stolzman out of their driveway. "An owner or occupier of land generally owes no duty to warn or protect others from a dangerous condition on adjacent property unless the owner created or contributed to such a condition" (*Haymon v Pettit*, 9 NY3d 324, 328, *rearg denied* 10 NY3d 745). "The reason for such a rule is obvious--a person who lacks ownership or control of property cannot fairly be held accountable for injuries resulting from a hazard on the property" (*Galindo v Town of Clarkstown*, 2 NY3d 633, 636). In this case, Stolzman's view of the roadway was allegedly obstructed by the presence of vehicles parked on the side of the roadway itself, and the Olivers had no ownership of or control over that property (*see id.*). As the Court of Appeals reasoned in *Galindo* (2 NY3d at 637), "it would create an 'unreasonably onerous' burden to require a landowner to evaluate and warn others about a danger caused by a condition existing on neighboring land."

The majority likewise cites no authority for its conclusion that, because Stolzman's view of oncoming traffic was allegedly obstructed, the Olivers had a duty to direct Stolzman as he exited their driveway. The fact that the Olivers were aware of the potential obstruction and had the "opportunity" to guide Stolzman as he exited their driveway does not create a duty on the part of the Olivers to do so. It is well established that "[f]orseeability should not be confused with duty" (*Pulka*, 40 NY2d at 785; *see also D'Amico*, 71 NY2d at 87). In *Pulka*, the Court of Appeals held that the operators of a parking garage were not liable in negligence for an injury to a pedestrian struck by a car being driven out of the garage and across an adjacent sidewalk by a garage patron (40 NY2d at 781-782). Specifically, the Court concluded that evidence that garage patrons often drove their cars out of the garage and across the sidewalk without stopping did not impose a duty on the part of the garage to take measures to control the conduct of its patrons "for the protection of off-premises pedestrians" (*id.* at 783). As the Court wrote, "it must be stressed that not all relationships give rise to a duty. One should not be held legally responsible for the conduct of others merely because they are within our sight or environs. Neither should one be answerable merely because there are others whose activities are such as to cause one to envision damages or injuries as a consequence of those activities" (*id.* at 785-786).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

654

CA 09-01854

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

ERICA Y. DARRISAW, AS ADMINISTRATRIX OF THE ESTATE OF DOLORES N. SCHUYLER, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STRONG MEMORIAL HOSPITAL, A DIVISION OF UNIVERSITY OF ROCHESTER, AND JANE DOE, AN EMPLOYEE OF STRONG MEMORIAL HOSPITAL, DEFENDANTS-RESPONDENTS.

HITE & BEAUMONT, P.C., ALBANY (C.A. KRENZER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (CHRISTIAN C. CASINI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered November 10, 2008 in a medical malpractice action. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff's decedent in this negligence action was injured when she fell at defendant hospital, fracturing her ankle. Decedent was seated in a chair in her hospital room, and she refused the offer of defendant nurse to assist her in leaving the chair in order to walk around the nurses' station. According to decedent, defendant nurse touched her arm while she was attempting to stand. Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. In support of their motion, defendants submitted the deposition testimony of decedent in which she stated that defendant nurse did not apply force to her arm in any way that caused her to fall. When asked if she knew what caused her to fall, decedent stated that she did not know, but that she may have been startled by defendant nurse's light touch to her elbow. Defendants thus established their entitlement to judgment as a matter of law, and plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). " 'Since it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer

speculation' " (*McGill v United Parcel Serv., Inc.*, 53 AD3d 1077, 1077; *see Robinson v Lupo*, 261 AD2d 525, 525-526).

We further conclude that plaintiff improperly contended for the first time in opposition to defendants' motion that defendants failed to provide decedent with adequate supervision, and we therefore do not address that contention. Plaintiff alleged in the complaint that decedent was injured specifically because defendant nurse "carelessly and negligently grabbed [decedent's] arm causing her to fall to the floor." We therefore conclude that there is no reference in the complaint to the adequacy of the supervision provided to decedent. "[A] new theory, presented for the first time in opposition to a motion for summary judgment, cannot bar relief which is otherwise appropriate" (*Yaeger v UCC Constructors*, 281 AD2d 990, 991 [internal quotation marks omitted]; *see Marchetti v East Rochester Cent. School Dist.*, 26 AD3d 881). Even assuming, arguendo, that plaintiff may be deemed to have raised that theory of liability in the bill of particulars, we similarly conclude that it should not be addressed. It is well settled that "a bill of particulars is intended to amplify the pleadings, limit the proof, and prevent surprise at trial . . . Whatever the pleading pleads, the bill must particularize since the bill is intended to [afford] the adverse party a more detailed picture of the claim . . . being particularized . . . A bill of particulars may not be used to allege a new theory not originally asserted in the complaint" (*Linker v County of Westchester*, 214 AD2d 652, 652 [internal quotation marks omitted]; *see Melino v Tougher Heating & Plumbing Co.*, 23 AD2d 616, 616-617). "[T]he pleading here gives not the slightest indication" of a theory of liability of negligent supervision (*Melino*, 23 AD2d at 617).

All concur except PERADOTTO and GREEN, JJ., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part. In our view, Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges negligent supervision.

As noted by the majority, plaintiff's decedent in this negligence action was injured when she fell at defendant hospital, fracturing her ankle. Decedent was sitting in a chair in her hospital room when defendant nurse (nurse) informed her that decedent needed to take a walk. The nurse offered to assist decedent in getting up from the chair, but decedent declined that offer. While decedent was in the process of standing up, the nurse touched decedent's right elbow. According to decedent, the nurse's actions startled her and she fell to the floor.

In our view, defendants failed to establish as a matter of law that they provided decedent with adequate supervision or that any failure to supervise decedent in a proper manner was not a proximate cause of her fall (*see generally Zuckerman v City of New* York, 49 NY2d 557, 562; *M.S. v County of Orange*, 64 AD3d 560, 561-562). In support of their motion, defendants contended only that decedent's deposition

testimony established that the nurse did not apply sufficient force to decedent's arm to cause decedent to fall, and that decedent did not know what caused her to fall. Defendants did not so much as assert, let alone establish, that they provided adequate assistance to decedent in ascending from the chair or that they adequately supervised decedent to prevent her from falling. Indeed, the nurse testified at her deposition that she did not assist decedent in getting up from the chair even though decedent told her that another hospital employee had helped her walk to the chair and that decedent required the assistance of a cane in ambulating. Defendants also submitted the deposition testimony of decedent, in which she stated that the nurse did not catch her or lower her to the ground. Thus, in our view, by their own submissions defendants raised an issue of fact whether the nurse should have done more to assist decedent in getting up from the chair or in preventing decedent from falling.

Contrary to the conclusion of the majority, plaintiff did not contend for the first time in opposition to defendants' motion that defendants failed to provide decedent with adequate supervision. Rather, decedent alleged in her bill of particulars that defendants "failed to prevent [her] from falling to the floor." We further disagree with the majority's conclusion that plaintiff raised a new theory of liability in her bill of particulars by alleging that defendants failed to prevent her from falling to the floor. The majority relies on, inter alia, *Linker v County of Westchester* (214 AD2d 652, 652) for the proposition that "[a] bill of particulars may not be used to allege a new theory not originally asserted in the complaint." In that case, the Second Department concluded that the motion court did not improvidently exercise its discretion in precluding the plaintiff from amending her bill of particulars in a negligence action to include references to the defendants' "intentional, willful, or wanton conduct since [such] claims were not previously pleaded" (*id.* at 652-653). Here, the complaint asserts a cause of action sounding in negligence based on the conduct of the nurse in touching decedent's arm and, as amplified by the bill of particulars, based on defendants' alleged failure to provide decedent with adequate supervision (*see generally Gross v Hertz Local Edition Corp.*, 72 AD3d 1518). Thus, the bill of particulars in this case did not allege a new theory of liability but, rather, appropriately specified "the acts or omissions constituting the negligence claimed" in the complaint (CPLR 3043 [a] [3]).

Inasmuch as defendants failed to meet their initial burden with respect to the claim that they failed to provide decedent with adequate supervision, we conclude that the burden never shifted to plaintiff to raise a triable issue of fact with respect to that claim (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). We therefore would modify the order by denying defendants' motion in part and reinstating the complaint insofar as the complaint, as amplified by the bill of particulars, alleges negligent supervision.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

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

655

CA 09-01993

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

SHANNON L. JOHNSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

YARUSSI CONSTRUCTION, INC., CARMEN BONGIOVANNI,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

LAW OFFICE OF JOHN J. FROMEN, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WILSER, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, ALBANY (BENJAMIN F. NEIDL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered April 8, 2009 in a personal injury action. The order granted the motion of defendants Yarussi Construction, Inc. and Carmen Bongiovanni for summary judgment and dismissed the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action to recover damages for injuries that she allegedly sustained when the motor vehicle she was driving collided with the rear end of a tractor-trailer owned by defendant Yarussi Construction, Inc. and operated by defendant Carmen Bongiovanni (collectively, defendants). Defendants moved for summary judgment dismissing the complaint against them on the grounds that they were not negligent and that plaintiff did not sustain a serious injury in the accident. We agree with plaintiff that Supreme Court erred in granting the motion of defendants on the ground that they were not negligent.

"It is well established that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle . . . The presumption of negligence imposes a duty [on that driver to] . . . submit a non-negligent explanation for the collision" (*Pitchure v Kandefer Plumbing & Heating*, 273 AD2d 790, 790; *see Herdendorf v Polino*, 43 AD3d 1429). Conversely, "[a] nonnegligent explanation for the collision, such as mechanical failure or the sudden and abrupt stop of the vehicle ahead, is sufficient to overcome the inference of negligence and preclude an award of summary judgment" (*Rodriguez-Johnson v Hunt*, 279 AD2d 781,

782; *see Herdendorf*, 43 AD3d at 1429-1430).

In support of their motion, defendants submitted the deposition testimony of Bongiovanni, who testified that the tractor-trailer was struck from behind while waiting for two cars to move so that he could negotiate a sharp right-hand turn into an access road. In addition, however, defendants submitted the deposition testimony of plaintiff, in which she testified that the tractor-trailer was stopped in the left of the two northbound lanes of travel, began to turn right from that lane, and then abruptly stopped again for no apparent reason. "Viewing the evidence in the light most favorable to the nonmoving part[y], as we must . . ., and given the divergent views of the manner in which the accident occurred, we conclude that there is an issue of fact" whether Bongiovanni's negligence was a proximate cause of the collision, which therefore precludes an award of summary judgment to defendants (*Graziadei v Mohamed*, 23 AD3d 1100, 1101; *see Ramadan v Maritato*, 50 AD3d 1620; *Heal v Liszewski*, 294 AD2d 911).

Finally, we reject the contention of defendants on appeal that the court erred in implicitly denying their motion with respect to the issue of serious injury. In view of its decision with respect to the negligence ground as the basis for the motion, the court determined that the remaining ground for defendants' motion was moot and thus did not reach it. Because that ground, i.e., whether plaintiff sustained a serious injury, is no longer moot, we remit the matter to Supreme Court to determine that issue and thus to decide defendants' motion (*see Murray v Lancaster Motorsports, Inc.*, 27 AD3d 1193, 1196).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

656

CA 09-02395

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

RAYMOND PINK AND MICHELLE PINK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MATTHEW RICCI, DEFENDANT-APPELLANT,
MARK WILBUR, CHRISTIN WILBUR, ROME YOUTH
HOCKEY ASSOCIATION, INC., WHITESTOWN YOUTH
HOCKEY ASSOCIATION, INC., CITY OF ROME,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CONWAY & KIRBY, LLP, LATHAM (ANDREW W. KIRBY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

GOLDBERG SEGALLA LLP, SYRACUSE (DAVID E. LEACH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MARK WILBUR AND CHRISTIN WILBUR.

ROEMER WALLENS & MINEAUX, LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ROME YOUTH HOCKEY ASSOCIATION, INC. AND WHITESTOWN YOUTH HOCKEY ASSOCIATION, INC.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered October 1, 2009 in a personal injury action. The order, inter alia, granted the motion of plaintiffs to compel defendant Matthew Ricci to comply with disclosure.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the directive that defendant Matthew Ricci fully respond to certain trial questioning and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Raymond Pink (plaintiff) when Matthew Ricci (defendant) allegedly struck him during a fight that also involved other fellow spectators at a youth hockey game. Defendant thereafter pleaded guilty to assault in connection with the fight. Plaintiffs moved, inter alia, to compel defendant to respond to plaintiffs' discovery demands, which included requests for copies of all court and police records from the criminal proceedings against defendant. In addition, plaintiffs sought to compel defendant to respond to

questioning during his deposition concerning the records sought and the criminal proceedings. Defendant cross-moved, inter alia, for a protective order with respect to the records involving the criminal proceedings (first cross motion), and thereafter cross-moved to dismiss his own counterclaim (second cross motion), which asserted that plaintiff and others acting in concert with him caused defendant to experience "a great deal of emotional stress, anxiety and, upon information and belief, physical injury." Plaintiffs did not oppose the second cross motion, and Supreme Court granted it. We conclude that the court properly granted plaintiffs' motion to compel and denied defendant's first cross motion. Defendant did not regain his statutory privilege of confidentiality by virtue of his having withdrawn his counterclaim inasmuch as his similar cross claims against the remaining defendants remain viable (*see Best v 2170 5th Ave. Corp.*, 60 AD3d 405; *Rodriguez v Ford Motor Co.*, 301 AD2d 372; *Lott v Great E. Mall*, 87 AD2d 978; *see generally Green v Montgomery*, 95 NY2d 693, 701; *Commercial Union Ins. Co. v Jones*, 216 AD2d 967). We further conclude, however, that the court erred in sua sponte directing defendant "to fully respond to . . . trial questioning on the issue of his arrest and criminal proceedings arising from the [fight]," and we therefore modify the order by vacating that directive. The admissibility of evidence at trial lies primarily within the discretion of the trial court rather than the motion court (*see generally Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1132, *lv denied* 11 NY3d 708; *Goldner v Kemper Ins. Co.*, 152 AD2d 936, *lv denied* 75 NY2d 704).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

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

672

CAF 09-01855

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

IN THE MATTER OF JAMES L., JR.,
RESPONDENT-APPELLANT.

LIVINGSTON COUNTY ATTORNEY,
PETITIONER-RESPONDENT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

CHARLES PLOVANICH, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered August 18, 2009 in a proceeding pursuant to Family Court Act article 7. The order denied respondent's motion to dismiss the petition.

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

Same Memorandum as in *Matter of James L.* ([appeal No. 2] ___ AD3d ___ [June 11, 2010]).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

673

CAF 09-01857

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

IN THE MATTER OF JAMES L., JR.,
RESPONDENT-APPELLANT.

LIVINGSTON COUNTY ATTORNEY,
PETITIONER-RESPONDENT.
(APPEAL NO. 2.)

MEMORANDUM AND ORDER

CHARLES PLOVANICH, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered August 18, 2009 in a proceeding pursuant to Family Court Act article 7. The order adjudicated respondent a person in need of supervision and placed respondent on probation for a period of 12 months.

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

Memorandum: In appeal No. 1, respondent appeals from an order denying his motion to dismiss the petition alleging that he is a person in need of supervision. We dismiss that appeal because no appeal lies as of right from such a nondispositional order (*see* Family Ct Act § 1112 [a]; *see also Matter of Anthony SS.*, 197 AD2d 767). In appeal No. 2, however, respondent appeals from a subsequent order adjudicating him a person in need of supervision and placing him on probation for one year, and that appeal brings up for review the prior order (*see Matter of Dora P.*, 68 AD2d 719, 728; CPLR 5501 [a] [1]).

We agree with respondent in appeal No. 2 that Family Court erred in denying his motion to dismiss the petition. The petition failed to specify what diversion services were offered pursuant to Family Court Act § 735 prior to the filing of the petition. The petition also failed to demonstrate that petitioner had "exert[ed] what the statute refers to as 'documented diligent attempts' to avoid the necessity of filing a petition" (*Matter of James S. v Jessica B.*, 9 Misc 3d 229, 232; *see* § 735 [d]). "[T]he failure to comply with such substantive statutory requirements constitutes a nonwaivable jurisdictional defect" requiring dismissal of the petition (*Matter of Leslie H. v Carol M.D.*, 47 AD3d 716, 717; *see Matter of Rajan M.*, 35 AD3d 863,

865).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

676

CA 09-01832

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

MICHAEL HENNER AND ELIZABETH HENNER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

EVERDRY MARKETING AND MANAGEMENT, INC.,
ET AL., DEFENDANTS,
AND GEMINI INSURANCE COMPANY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WHITE, FLEISCHNER & FINO, LLP, NEW YORK CITY (JANET FORD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered December 29, 2008. The order granted the motion of defendant Gemini Insurance Company to dismiss the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Plaintiffs commenced this action alleging, inter alia, that defendant Everdry Marketing and Management, Inc. (EMM) and its affiliates, including Everdry Management Services, Inc. (EMS), violated Navigation Law § 181 (5) by discharging petroleum on their property. In appeal No. 1, plaintiffs appeal from an order granting the motion of defendant Gemini Insurance Company (Gemini), which issued an insurance policy to EMS, seeking to dismiss the complaint against it on the ground that plaintiffs have "no viable cause of action against it." In appeal No. 2, plaintiffs appeal and defendants-respondents-appellants (collectively, CNA defendants), the insurers of "EMM and/or EMS" according to plaintiffs, cross-appeal from an order granting that part of the motion of the CNA defendants, treated as one for summary judgment by Supreme Court pursuant to CPLR 3211 (c), seeking to dismiss the complaint against them as the insurers of EMS. The court denied that part of the motion insofar as the CNA defendants alleged that plaintiffs failed to provide timely notice of the accident to them, as the insurers of EMM, of the claims under the Navigation Law.

With respect to appeal No. 1, we agree with plaintiffs that the court erred in granting the motion of Gemini to dismiss the complaint against it on the ground that plaintiffs have "no viable cause of action against it." Pursuant to Navigation Law article 12, a party injured by the discharge of petroleum may maintain an action directly against the insurer of the discharger (*see* § 190), "despite the failure of the insured to provide timely notice of the accident" (*General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 863-864; *see Vacca v State Farm Ins. Co.*, 15 AD3d 473, 474-475; *Utica Mut. Ins. Co. v Gath*, 265 AD2d 805). "Moreover, the insurer will be estopped from later raising a defense that it did not mention in the notice of disclaimer" (*Mount Vernon Fire Ins. Co. v Harris*, 193 F Supp 2d 674, 679 [ED NY]; *see General Acc. Ins. Group*, 46 NY2d at 864).

Here, it is undisputed that Gemini disclaimed coverage on the ground that its insured did not provide timely notice of the accident, and it also attempted to raise certain policy exclusions. Gemini did not, however, disclaim coverage on the ground relied upon in its motion and on appeal, i.e., that plaintiffs failed to provide it with timely notice of the accident. Consequently, Gemini is precluded from relying upon that defense (*see Government Empls. Ins. Co. v Jones*, 6 AD3d 534, 535; *Hazen v Otsego Mut. Fire Ins. Co.*, 286 AD2d 708; *Utica Mut. Ins. Co.*, 265 AD2d 805), and the court erred in granting Gemini's motion based on that defense.

Although plaintiffs further contend on appeal that the court erred in its determination with respect to the issue of the applicability of the exclusions in the Gemini policy, we note that the court in fact expressly stated that it had not "fully" analyzed that issue, although there may be "viable arguments" with respect to it. In view of our determination that the court erred in granting the motion of Gemini based on plaintiffs' failure to provide it with timely notice of the accident, however, the issue concerning the applicability of the policy exclusions is no longer moot. We therefore reverse the order in appeal No. 1 and remit the matter to Supreme Court to determine that issue and thus to decide the motion of Gemini for summary judgment dismissing the complaint against it based on the policy exclusions (*see Murray v Lancaster Motorsports, Inc.*, 27 AD3d 1193, 1196).

With respect to appeal No. 2, plaintiffs contend on their appeal that the court erred in granting that part of the motion of the CNA defendants as the insurers of EMS because, like Gemini, they did not disclaim coverage based on plaintiffs' allegedly untimely notice of the accident, while the CNA defendants contend on their cross appeal that the court erred in denying that part of their motion as the insurers of EMM. We agree with the CNA defendants that plaintiffs failed to preserve for our review their contention with respect to EMS by failing to raise it in opposition to the motion (*see Matter of Prudential Prop. & Cas. Ins. Co. v Ambeau*, 19 AD3d 999; *see also Matter of Aetna Cas. & Sur. Co. v Scirica*, 170 AD2d 448, *lv denied* 78 NY2d 851). In opposing the motion of the CNA defendants, plaintiffs attached a copy of the attorney's affirmation that they submitted in

opposition to the motion of Gemini at issue in appeal No. 1. In doing so, however, they specified the contentions in the affirmation that they were incorporating in opposition to the motion of the CNA defendants, and the contention in question was not mentioned by plaintiffs. Nevertheless, we conclude that " 'the issue . . . is one of law appearing on the face of the record that [the CNA defendants] could not have countered had it been raised in the court of first instance,' " and thus the issue may be raised for the first time on appeal (*Hoke v Hoke*, 27 AD3d 1055, 1055; *see Paul v Cooper*, 45 AD3d 1485, 1486; *Oram v Capone*, 206 AD2d 839).

For the reasons stated with respect to appeal No. 1, we conclude that the court properly denied that part of the motion seeking summary judgment dismissing the complaint against the CNA defendants as the insurers of EMM but erred in granting that part of the motion with respect to EMS, and we therefore modify the order in appeal No. 2 accordingly. Although the CNA defendants sent letters purporting to reserve their rights to disclaim coverage, a reservation of rights does not qualify as a timely disclaimer (*see Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029, *rearg denied* 47 NY2d 951; *NYAT Operating Corp. v GAN Natl. Ins. Co.*, 46 AD3d 287, *lv denied* 10 NY3d 715). Indeed, the CNA defendants did not meet their initial burden with respect to that part of their motion, inasmuch as the evidence submitted by them in support of their motion in fact established that they did not disclaim coverage based on plaintiffs' alleged untimely notice of the accident, and thus they waived that defense.

In view of our determination, we need not address plaintiffs' remaining contentions with respect to appeal No. 2.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

677

CA 09-01833

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

MICHAEL HENNER AND ELIZABETH HENNER,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

EVERDRY MARKETING AND MANAGEMENT, INC.,
ET AL., DEFENDANTS,
CONTINENTAL CASUALTY COMPANY, TRANSPORTATION
INSURANCE COMPANY, AND AMERICAN CASUALTY
COMPANY OF READING, PA,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

COLLIAU ELENIUS MURPHY CARLUCCIO KEENER & MORROW, NEW YORK CITY (DEAN J. VIGLIANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered June 12, 2009. The order denied in part the motion of defendants Continental Casualty Company, Transportation Insurance Company, and American Casualty Company of Reading, PA for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety and reinstating the complaint in its entirety against defendants Continental Casualty Company, Transportation Insurance Company, and American Casualty Company of Reading, PA and as modified the order is affirmed without costs.

Same Memorandum as in *Henner v Everdry Mktg. and Mgt., Inc.* ([appeal No. 1] ___ AD3d ___ [June 11, 2010]).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

679

CA 09-02113

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

MARGUERITE MCKEE, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

STEVEN PLONSKY AND REBECCA M. PLONSKY,
DEFENDANTS-RESPONDENTS.

CELLINO & BARNES, P.C., ROCHESTER (K. JOHN WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered July 22, 2009 in a personal injury action. The order granted the motion of defendants for summary judgment and denied the cross motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Marguerite McKee (plaintiff) when she lost control of her vehicle while following a vehicle driven by Steven Plonsky (defendant) and crashed into a telephone pole. We conclude that Supreme Court properly granted defendants' motion for summary judgment inasmuch as the negligent conduct of defendant was not a proximate cause of the accident.

The evidence submitted by defendants in support of their motion, including defendant's deposition testimony, was sufficient to meet their initial burden. According to defendant, his vehicle was stopped at an intersection waiting to make a left-hand turn when plaintiff approached from behind, lost control of her vehicle, and crashed into a telephone pole. Defendant testified that he observed plaintiff initially slow down as she approached his vehicle from behind but then suddenly sped up. Defendant was familiar with plaintiff inasmuch as they traveled the same route for a portion of their commute to work and had encountered each other several times in the past. Defendants also submitted the deposition testimony of an eyewitness who testified that defendant's vehicle was "very far ahead" of plaintiff's vehicle when defendant reached the intersection.

In opposition to the motion and in support of their cross motion for partial summary judgment on the issues of negligence, proximate cause and serious injury, plaintiffs submitted evidence establishing that defendant was negligent. Plaintiffs submitted the deposition testimony of plaintiff in which she confirmed that she had driven the route in question with defendant numerous times in the past, and she testified that she had observed him drive unsafely, including passing her at a high rate of speed. On the morning of the accident, plaintiff observed defendant weaving his vehicle from side to side behind her and, in response, plaintiff began weaving her vehicle to prevent defendant from passing her. Defendant thereafter passed plaintiff's vehicle on the right shoulder of the road at a speed of approximately 50 miles per hour, and plaintiff was forced into the left lane, across a double yellow line and into oncoming traffic. At that point, plaintiff called 911 to report defendant's driving and continued to follow him.

Plaintiff further testified that defendant had slowed down after passing her and that, as they approached the first intersection, defendant slammed on his brakes suddenly and "tried to get [her] to rear end him." As they proceeded to the intersection where the accident occurred, plaintiff told the 911 operator that she was going to "get up to [defendant] again" to get his license plate number. The operator advised plaintiff not to approach defendant's vehicle too closely. Plaintiff testified that defendant then "did something. I don't know what." After observing his brake lights, she unsuccessfully attempted to stop, lost control of her vehicle and slid into the telephone pole. Although defendant acknowledged in his deposition testimony that he passed plaintiff on the right, he justified his conduct on the basis that plaintiff had been driving slowly and weaving around in an attempt to prevent him from passing her. Defendant was charged with speeding, reckless driving and assault in the third degree as a result of his conduct, and he pleaded guilty to disorderly conduct in satisfaction of all charges.

Although we conclude that defendant's conduct was negligent and reprehensible, plaintiff is not entitled to summary judgment where that conduct was not a proximate cause of the accident. "As a general rule, the question of proximate cause is to be decided by the finder of fact" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 312, *rearg denied* 52 NY2d 784, 829). "There are certain instances, [however], where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law" (*id*. at 315). This case presents such an instance. Defendant was driving erratically and recklessly and had passed plaintiff's vehicle approximately one mile from the place where the accident occurred and approximately 1½ minutes before it occurred. That distance and lapse of time was sufficient to break the causal chain as a matter of law.

Moreover, plaintiff's conduct in following closely behind defendant and attempting to catch him constituted a superseding cause of the accident (*see generally Ohdan v City of New York*, 268 AD2d 86, 89-90, *lv denied* 95 NY2d 769, *appeal dismissed* 95 NY2d 885). Although plaintiff allegedly attempted to catch up to defendant's vehicle

because defendant was driving recklessly, we conclude that defendant's conduct " 'did nothing more than . . . furnish the condition or give rise to the occasion by which the injury was made possible and [that] was brought about by the intervention of a new, independent and efficient cause,' " i.e., plaintiff's own negligent conduct in following plaintiff too closely (*Barnes v Fix*, 63 AD3d 1515, 1516, *lv denied* 13 NY3d 716). Plaintiff's conclusory statement that defendant "did something" before plaintiff observed his brake lights and collided with the telephone pole is insufficient to meet plaintiff's burden of raising a triable issue of fact (*see generally Pensabene v Incorporated Vil. of Val. Stream*, 202 AD2d 486).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

684

KA 09-00475

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY G. WORKMAN, SR., DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Niagara County Court (Sara S. Sperrazza, J.), rendered December 11, 2008. Defendant was resentenced upon his conviction of rape in the first degree (two counts), rape in the second degree (two counts), criminal sexual act in the second degree and sexual abuse in the second degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

685

KA 08-01923

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER E. FULLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered November 30, 2007. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

686

KA 09-01365

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CORNELIUS CROSS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered June 12, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

687

KA 09-01459

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEPHEN N. POTTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered June 24, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and resisting arrest.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

688

KA 08-02637

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SPENCER HILL, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered February 27, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him of robbery in the second degree (Penal Law § 160.10 [1]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. Viewing the evidence in light of the elements of the crime of robbery in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that an acquittal would not have been unreasonable based on the questionable credibility of the victim's testimony (*see id.* at 348; *People v Alexis*, 65 AD3d 1160; *People v Griffin*, 63 AD3d 635, 638). However, "giving 'appropriate deference to the jury's superior opportunity to assess the witnesses' credibility' " (*People v Marshall*, 65 AD3d 710, 712, *lv denied* 13 NY3d 940), we conclude that the jury was entitled to credit the victim's version of events over defendant's version.

As we determined on the appeal of the codefendant (*People v Wedlington*, 67 AD3d 1472, 1474, *lv denied* 14 NY3d 897), we similarly conclude herein that defendant failed to preserve for our review his contention that County Court erred in failing to give an adverse inference instruction to the jury pursuant to Penal Law § 450.10 (10). We further conclude in any event that defendant's contentions with respect thereto lack merit, for the same reasons as those set forth in our decision in *Wedlington.* Finally, the court did not abuse its discretion in imposing a five-year period of postrelease supervision rather than the minimum period of 2½ years (*see* Penal Law § 70.45 [2] [f]), and we decline to exercise our power to modify the judgment as a

matter of discretion in the interest of justice by imposing a lesser period of postrelease supervision (*see* CPL 470.15 [6] [b]).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

691

KA 09-01326

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY BANKS, DEFENDANT-APPELLANT.

LOREN D. LOBBAN, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered May 19, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Niagara County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the seventh degree (§ 220.03), defendant contends that County Court erred in submitting its charge in writing to the jury during its deliberations. We conclude that defendant waived that contention inasmuch as the court did so only after obtaining his consent (*see generally People v Pollard*, 70 AD3d 1403; *People v Backus*, 67 AD3d 1428, *lv denied* 13 NY3d 936). Defendant failed to preserve for our review his further contentions that the court erred in submitting the charge in writing absent a request by the jury (*see* CPL 470.05 [2]), and that his right of confrontation was violated by the admission in evidence of an out-of-court statement (*see People v Vaughan*, 48 AD3d 1069, *lv denied* 10 NY3d 845, *cert denied* ___ US ___, 129 S Ct 252). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Even assuming, arguendo, that defendant preserved for our review his contention that the court erred in responding to a note from the jury during its deliberations, we conclude that the court's response addressed the jury's inquiry and was a proper statement of the law (*see People v Osborne*, 63 AD3d 1707, 1708, *lv denied* 13 NY3d 748). Defendant also failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see*

People v Hines, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678), and in any event that challenge is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). 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 Bleakley*, 69 NY2d at 495). Finally, we reject the contention of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

692

KAH 08-01509

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CALVIN POWELL, PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-RESPONDENT.

DENNIS CLAUS, LIVERPOOL, FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered June 5, 2008 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

693

CAF 09-01376

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

IN THE MATTER OF MAJERAE T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CRYSTAL T., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR MAJERAE T.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered May 13, 2009 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, granted the motion of petitioner for summary judgment and adjudged that the subject child is a neglected child.

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

Memorandum: Following the termination of the parental rights of respondent mother with respect to her older child on the ground of mental illness, petitioner moved for summary judgment on its neglect petition with respect to the mother's younger child pursuant to Family Court Act § 1012 (f) (i). Petitioner contended that the reasoning for terminating the mother's parental rights with respect to the older child applied equally to the neglect petition concerning the younger child. Family Court granted the motion and placed the child in the care and custody of petitioner for a period of one year.

The mother contends on appeal that there are issues of fact concerning whether her younger child was neglected by virtue of the mother's mental condition and thus that summary judgment on the neglect petition was inappropriate. We reject that contention. At the hearing conducted on the issue whether to terminate the mother's parental rights with respect to the older child, petitioner presented evidence establishing that the mother previously was diagnosed as having bipolar disorder, attention deficit disorder, posttraumatic stress disorder, reactive attachment disorder and psychotic disorder "not otherwise specified." Petitioner further established that the

mother suffers from a thyroid condition and lead poisoning, that she possibly suffers from a form of autism, and that she is presently dependent on marihuana. In addition, petitioner established that the mother does not follow medical advice, does not take the medication that is prescribed for her, and has not completed the various mental health, substance abuse and anger management treatment programs that petitioner arranged for her to attend. She is also aggressive and has threatened to "blow up" Child and Family Services. In the opinion of the court-appointed psychologist assigned to evaluate the mental health of the mother and her ability to parent, the mother is unable to care for her own needs and is unable to meet the needs of any child placed in her care. The court was entitled to credit that opinion (*see Matter of Shahida M.*, 59 AD3d 976, *lv denied* 12 NY3d 708). We conclude that the evidence before the court with respect to the older child "demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [her] care" (*Matter of Daniella HH.*, 236 AD2d 715, 716; *see Matter of Jovon J.*, 51 AD3d 1395, 1396; *Matter of Hannah UU.*, 300 AD2d 942, 944, *lv denied* 99 NY2d 509). Thus, the court properly determined that petitioner was entitled to summary judgment on the neglect petition concerning the younger child.

We reject the mother's contention that the record contains triable issues of fact that preclude summary judgment. Specifically, the mother contends that the court erred in relying on the court-ordered psychological evaluation and in failing to take into consideration her statement to a social worker that she was seeing a mental health provider. We reject that contention. In view of the failure of the mother to meet with the psychologist in order to be evaluated, the psychologist was entitled to rely on her medical, psychological, educational and agency records in determining whether she was able to parent her children (*see* Social Services Law § 384-b [6] [e]). Although some of those records were prepared six years prior to the date on which the hearing was conducted, the date on which those records were prepared does not create an issue of fact with respect to the mother's mental condition at the time of the hearing inasmuch as the psychologist based his report on all of the mother's records, which included more recent psychological records, records from petitioner, and records from the aforementioned treatment programs that the mother failed to complete. In addition, the mother's condition is longstanding and developmental in nature, and there is no evidence in the record that the mother's condition has ever changed. Finally, the statement by the mother to a social worker during the initial investigation of the neglect petition concerning the younger child that the mother was seeing a mental health provider is unsubstantiated, and thus is insufficient to raise a triable issue of fact to defeat petitioner's motion (*see Matter of Scott JJ.*, 280 AD2d 4, 6-7; *Matter of Baby Girl F.*, 277 AD2d 235, 236; *Matter of Jimmy A.*, 218 AD2d 734).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

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

695

CAF 09-00640

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

IN THE MATTER OF MICHAEL T. PORTER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JULIE A. NESBITT, RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR MIKAELA P.

Appeal from an order of the Family Court, Monroe County (Julie A. Gordon, R.), entered February 27, 2009 in a proceeding pursuant to Family Court Act article 6. The order granted the petition and transferred primary physical residence of the parties' child to petitioner.

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

Memorandum: Respondent mother appeals from an order granting the petition seeking to modify a prior custody order. By the order on appeal, Family Court transferred primary physical residence of the parties' child from the mother to petitioner father. We agree with the mother that the father failed to establish the requisite change in circumstances to warrant modification of the existing custody order to ensure that the child's best interests were served (*see Betro v Carbone*, 50 AD3d 1583, 1584). The father alleged in his petition that the mother had emotionally and physically abandoned the parties' child, the mother's relationship with the child had deteriorated, and the child had expressed her desire to live with the father. The evidence presented at the hearing on the petition, however, focused on the mother's work schedule and changes in the mother's residence. There was no showing at the hearing that the mother's work schedule had changed substantially since the entry of the prior custody order. In addition, although it was undisputed that the mother was forced to change residences after ending her relationship with her live-in boyfriend, the child remained in the same school district and maintained her customary summer camp schedule during the time that it took for the mother to secure a new permanent residence. "A long-term custodial arrangement . . . should not be modified unless it is demonstrated that 'the custodial parent is unfit or perhaps less

fit' " (*Matter of Stevenson v Stevenson*, 70 AD3d 1515), and it cannot be said that the changes in the residence of the mother rendered her either unfit or less fit.

We reject the contention of the Attorney for the Child that the mother was unfit because she allowed the child to travel to Pennsylvania without her. The evidence presented at the hearing concerning the circumstances of that trip "was scant and, in any event, insufficient to justify a change in custody" (*Matter of Witherow v Bloomingdale*, 40 AD3d 1203, 1205). Indeed, there was no showing that the individuals caring for the child in Pennsylvania "put the child at risk in any fashion while [she was] in their care" (*id.* at 1204-1205). Finally, although the child wished to reside with her father, it is well settled that "the 'established custodial arrangement should not be changed solely to accommodate the desires of the child' " (*Betro*, 50 AD3d at 1584, quoting *Fox v Fox*, 177 AD2d 209, 211).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

696

CAF 09-00543, CAF 09-00544

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

IN THE MATTER OF ELIZABETH W., MICHAEL W.,
NATHANIEL W., AND RICHARD W.
---------- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

THERESA W. AND PAUL W., RESPONDENTS-APPELLANTS.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENTS-APPELLANTS.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR ELIZABETH W., MICHAEL W., NATHANIEL W., AND RICHARD W.

Appeals from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered February 18, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents neglected their children.

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

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondents appeal from an order adjudging that they neglected their four children. Contrary to the contention of respondents and the Attorney for the Children, we conclude that petitioner established by a preponderance of the evidence that the physical, mental or emotional condition of the children had been impaired as "a consequence of the failure of [respondents] to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368; *see* Family Ct Act § 1046 [b] [i]). With respect to respondent mother, petitioner established that she repeatedly subjected the children to unnecessary and demeaning physical examinations and gave them an herbal remedy that she knew to be toxic (*see generally Matter of Morgan P.*, 60 AD3d 1362; *Matter of Andrew B.*, 49 AD3d 638, 639-640, *lv denied* 10 NY3d 714). With respect to respondent father, petitioner established that he knew or reasonably should have known that the mother was harming the children "and that a reasonably prudent parent would have acted differently and, in so doing, prevented the [harm]" (*Matter of Cory S.*, 70 AD3d 1321, 1322 [internal quotation marks

omitted]).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

698

CA 09-02620

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

CYNTHIA J., INDIVIDUALLY AND AS LEGAL GUARDIAN OF MICHAEL P.J., AN INFANT, PLAINTIFF-RESPONDENT,

V ORDER

DAVID C. PLACHE, M.D., DEFENDANT-APPELLANT, ET AL., DEFENDANT.

CONNORS & VILARDO, LLP, BUFFALO (AMY C. MARTOCHE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an amended order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered June 10, 2009 in a medical malpractice action. The amended order, insofar as appealed from, granted plaintiff's motion and barred defendant David C. Plache, M.D. from being present during the deposition of plaintiff's infant.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

699

OP 09-02287

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

IN THE MATTER OF GANNETT CO., INC., PETITIONER,

V MEMORANDUM AND ORDER

CRAIG J. DORAN, ONTARIO COUNTY COURT JUDGE,
RESPONDENT.

NIXON PEABODY LLP, ROCHESTER (CHRISTOPHER D. THOMAS OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) seeking, inter alia, to compel respondent to release the transcripts of a *Sandoval* hearing in a criminal action.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding in this Court pursuant to CPLR 506 (b) (1), seeking to annul the determination of respondent that, inter alia, excluded the press and the public from the courtroom during a pretrial *Sandoval* hearing in a criminal action, and seeking the immediate release of the transcript from that hearing. Petitioner alleged that respondent exceeded his authority by, inter alia, denying its request for an adjournment to enable petitioner's counsel to appear in order to oppose the closure of the courtroom, in failing to notify the press that the courtroom would be closed, and in failing to make specific findings on the record to support the closure of the courtroom. We conclude that the instant proceeding is moot and does not fall within the exception to the mootness doctrine, inasmuch as the underlying criminal action has long since been concluded and an unredacted transcript of the closed pretrial *Sandoval* hearing was furnished to petitioner by the time petitioner commenced this proceeding (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715; *Matter of Daily Gazette Co. v Lomanto*, 263 AD2d 811).

Under the three-prong exception to the mootness doctrine set forth in *Matter of Hearst Corp.* (50 NY2d at 714-715), a case that is moot may nonetheless be considered on the merits where it is

demonstrated that there is: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (*see generally Matter of Codey [Capital Cities, Am. Broadcasting Corp.]*, 82 NY2d 521, 527-528; *Matter of Schermerhorn v Becker*, 64 AD3d 843, 845). Here, the petition "presents no questions the fundamental underlying principles of which have not already been declared by [the courts of this state]" (*Hearst Corp.*, 50 NY2d at 715), and thus petitioner failed to establish the applicability of the third prong of the three-prong exception to the mootness doctrine, i.e., that this proceeding presents a novel issue. Indeed, the Court of Appeals has specifically recognized that the public's First Amendment right of access to criminal trials extends to *Sandoval* hearings (*see Matter of Capital Newspapers Div. of Hearst Corp. v Clyne*, 56 NY2d 870, 873), and the Court of Appeals outlined the procedures that a court must follow before closing a criminal proceeding to the public in *Matter of Gannett Co. v De Pasquale* (43 NY2d 370, *rearg denied* 43 NY2d 846, a*ffd* 443 US 368), and *Matter of Westchester Rockland Newspapers v Leggett* (48 NY2d 430). In the absence of an exception to the mootness doctrine, we have no discretion to reach the merits of the petition (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811, *cert denied* 540 US 1017; *Wisholek v Douglas*, 97 NY2d 740, 742).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

701

CA 10-00127

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

IN THE MATTER OF THE ESTATE OF RONALD WOOLWORTH, DECEASED.

---------- OPINION AND ORDER

JOAN WOOLWORTH, AS ADMINISTRATRIX OF THE ESTATE OF RONALD WOOLWORTH, DECEASED, PETITIONER-APPELLANT;

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT.

HARRIS BEACH PLLC, BUFFALO (COLLEEN E. BUONOCORE OF COUNSEL), FOR PETITIONER-APPELLANT.

KEVIN C. CARACCIOLI, MEXICO, FOR RESPONDENT.

Appeal from an order of the Surrogate's Court, Oswego County (John J. Elliott, S.), entered August 25, 2009. The order, insofar as appealed from, denied that part of the petition seeking approval of a supplemental needs trust.

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

Opinion by GREEN, J.: Petitioner, as administratrix of the estate of her husband, Ronald Woolworth (decedent), commenced this proceeding seeking, inter alia, an order confirming the settlement of an action seeking damages for decedent's wrongful death and conscious pain and suffering, and approving petitioner's proposed distribution of the proceeds of that settlement. Surrogate's Court granted the relief sought in the petition, with the exception of the proposal that the Surrogate approve a supplemental needs trust (SNT) funded by petitioner's entire share of the net proceeds of the settlement. We conclude that the Surrogate should have granted the petition in its entirety, thereby approving the proposed SNT for the benefit of petitioner, who without dispute is a disabled person eligible for an SNT.

I

Decedent died intestate on March 15, 2006, survived by petitioner and two adult daughters. Pursuant to SCPA 702 (1), the Surrogate granted petitioner limited letters of administration to prosecute a cause of action in decedent's favor for wrongful death and/or

conscious pain and suffering. She thereafter commenced an action alleging negligence and medical malpractice against physicians who treated decedent and the medical facility where he sought treatment in the months preceding his death. That action settled before trial for $737,500. Supreme Court authorized the settlement and ordered that the balance remaining after payment of attorney's fees, disbursements and uncovered medical expenses was payable to petitioner as administratrix of decedent's estate.

The balance, which was the amount of $516,876.60, constituted decedent's entire estate. Pursuant to EPTL 4-1.1 (a) (1), petitioner's share was calculated to be $283,438.30 and each daughter's share was calculated to be $116,719.15. Petitioner thereafter sought, inter alia, permission to distribute the shares of the daughters directly to them, and to have her entire share deposited into an SNT. After the petition was filed, the Surrogate and petitioner's attorney exchanged correspondence concerning the proposed SNT. The attorney explained in a letter to the Surrogate that petitioner receives benefits from the Oswego County Department of Social Services (DSS), and she did not want her inheritance to affect her eligibility for such benefits. The attorney also forwarded to the Surrogate a "Waiver and Consent" executed by DSS consenting to the establishment and terms of the proposed SNT. The Surrogate responded in a letter stating, inter alia, that, "[w]hile [he] underst[ood] the underlying reason for the request, the present sheltering of 'available resources' and payback to the government providers only a future possibility, [he could] not in good conscience approve the transfer of the entire balance[, i.e., petitioner's intestate share] to [an SNT]." The Surrogate further stated that he was willing to approve an SNT funded with only $100,000 of petitioner's share, and he would add a provision for an annual accounting to the proposed trust instrument. In response, petitioner's attorney agreed to add the annual accounting provision but would not consent to the Surrogate's proposed limitation of $100,000 to fund the trust because that limitation would effectively render petitioner ineligible for Medicaid. In his final correspondence with petitioner's attorney concerning the SNT, the Surrogate wrote:

> "In the end, I believe that I have a responsibility to the public fisc that takes priority. I recognize that to have someone pay from their own resources when somehow, [some way] we can get the 'government' to pay is an old-fashioned thought but it is a thought that I agree with."

The Surrogate further stated that, "[i]f [his] only choice is to establish a trust with the entire amount or to decline the request [his] inclination would be the latter."

Consistent with that "inclination," the Surrogate denied the petition to the extent that it sought the approval of an SNT funded by petitioner's entire share of the net proceeds of the settlement. We now conclude that the order insofar as appealed from should be

reversed and the petition granted in its entirety.

II

An SNT "is a 'discretionary trust established for the benefit of a person with a severe and chronic or persistent disability' (EPTL 7-1.12 [a] [5]) that is designed to enhance the quality of the disabled individual's life by providing for special needs without duplicating services covered by Medicaid or destroying Medicaid eligibility" (*Cricchio v Pennisi*, 90 NY2d 296, 303; *see Matter of Abraham XX.*, 11 NY3d 429, 434). It is a planning device authorized by federal and state law to shelter the assets of a severely disabled person "for the dual purpose of securing or maintaining eligibility for state-funded services, and enhancing the disabled person's quality of life with supplemental care paid by his or her trust assets" (*Abraham XX.*, 11 NY3d at 434). The SNT is designed to "address[ ] the unique and difficult situation faced by severely disabled individuals with assets that are sufficient to end their Medicaid eligibility but insufficient to account for their medical costs" (*id*. at 437).

Under the pertinent statutes, 42 USC § 1396p (d) (4) (A) and Social Services Law § 366 (2) (b) (2) (iii) (A), neither the corpus nor the income of an SNT is considered a resource or income available to the disabled trust beneficiary (*see Abraham XX.*, 11 NY3d at 435; *Cricchio*, 90 NY2d at 303; *Matter of Kennedy*, 3 Misc 3d 907, 909-910; *Matter of Goldblatt*, 162 Misc 2d 888, 889; *see also* 18 NYCRR 360-4.5 [b] [5] [i] [a]).

Such favorable treatment is extended to an SNT as long as the trust documents are in conformance with the requirements of EPTL 7-1.12 (a) (5) (*see Cricchio*, 90 NY2d at 303), as well as the applicable regulations of the Department of Social Services (*see* Social Services Law § 366 [2] [b] [2] [iii], [iv]). In addition, an SNT is exempted from the general rules governing available resources and Medicaid eligibility when the recipient is "disabled," as that term is defined in the Social Security Act (42 USC § 1382c [a] [3]), and the SNT contains

> "[t]he assets of such a disabled individual which was established for the benefit of the disabled individual while such individual was under sixty-five years of age by a parent, grandparent, legal guardian, or court of competent jurisdiction, if upon the death of such individual the state will receive all amounts remaining in the trust up to the total value of all medical assistance paid on behalf of such individual" (Social Services Law § 366 [2] [b] [iii] [A]; *see* 42 USC § 1396p [d] [4] [A]).

Here, there is no dispute that petitioner is disabled and under 65 years of age, or that the proposed SNT is in conformance with the requirements of EPTL 7-1.12 (a) (5) and provides the State of New York with the remainder interest described in Social Services Law § 366 (2)

(b) (iii) (A). Petitioner, however, is an adult with no parent, grandparent, or legal guardian to establish the SNT for her benefit, and she therefore sought the assistance of the Surrogate with respect to the SNT. We recognize that the decision whether to establish or approve an SNT is a discretionary determination for the Surrogate (*see Matter of Mental Hygiene Legal Serv. v Bishop*, 298 AD2d 644, 646; *Perez v Rodino*, 184 Misc 2d 855, 857), and that the Surrogate had a legitimate concern that "the ultimate goal of Medicaid [is] that the program 'be the payer of last resort' " (*Matter of Costello v Geiser*, 85 NY2d 103, 106; *see Cricchio*, 90 NY2d at 305). We conclude, however, that the Surrogate abused its discretion in conditioning its approval of the SNT upon petitioner's agreement to limit the funding of the trust to $100,000.

The federal and state legislation governing the establishment and operation of SNTs allows a disabled person who receives a lump sum of money to maintain Medicaid eligibility by transferring the funds into an SNT, provided that, in exchange, the state is given a priority interest in the balance of the SNT upon the beneficiary's death (*see* Rosenberg, *Supplemental Needs Trusts for People with Disabilities*: *The Development of a Private Trust in the Public Interest*, 10 BU Pub Int LJ 91, 136). The SNT thus represents a "bargain struck between the SNT beneficiary and the State" (*Abraham XX.*, 11 NY3d at 436). The terms of that bargain are set forth by the Court of Appeals in *Abraham XX.*:

> "The SNT is available only to applicants under the age of 65 with severe disabilities as defined by statute. Unless the applicant placed excess assets in the Medicaid SNT for supplemental care, he or she would no longer be eligible for Medicaid, thus relieving the State of a substantial financial burden. In order to further Medicaid's purpose of providing medical assistance to needy persons, the State agrees to continue paying Medicaid costs——in instances where it would otherwise be relieved of this obligation——in exchange for the *possibility* of reimbursement upon the recipient's death. The State in a sense is like an insurer calculating risk. For every recipient who depletes the trust before death, the State can expect some trusts to have sufficient assets upon a recipient's death to offset the additional cost of continuing Medicaid payments for these severely disabled individuals who otherwise would be ineligible. Moreover, the State's right to reimbursement occurs only upon the death of the beneficiary——at a time when the life——enhancing purpose of the trust can no longer be effectuated. The Medicaid SNT reflects a policy decision to balance the needs of the severely disabled and the State's need for funds to sustain the system" (*id*. at 436-437).

In refusing to approve the funding of the proposed SNT with a sum greater than $100,000, the Surrogate skewed the balance fashioned by the Legislature in favor of the State and to the detriment of petitioner. By placing that limitation on the funding of the SNT, the Surrogate ensured that petitioner would lose her eligibility for Medicaid, a result that is inconsistent with the public policy underlying SNTs and the Surrogate's function in approving and supervising their establishment:

> "[I]t is appropriate for the [Surrogate] to seek assurance that a proposed [SNT] complies with the controlling law and rules regarding Medicaid eligibility . . . This is consistent with the function of the [Surrogate] to assure that the best interests of the incapacitated person are promoted. It would be a clear dereliction of that duty for the [Surrogate] to deliberately overlook provisions of a proposed [SNT] if such provisions were inconsistent with statutory guidelines and thus would bar an incapacitated person from receiving Medicaid benefits by its establishment. To do so would permit the diverting of assets from the ownership or title of the incapacitated person to another legal entity with no consequent benefit to the incapacitated person" (*Matter of McMullen*, 166 Misc 2d 117, 119; *see Goldblatt*, 162 Misc 2d at 890).

Finally, we note that none of the pertinent statutes or regulations supports a limitation upon the amount of money that may be used to fund an SNT, and that none of the cases construing those statutes and regulations has in fact imposed such a limitation (*see e.g. Abraham XX.*, 11 NY3d at 433 [$2.17 million]; *Sanango v New York City Health & Hosps. Corp.*, 6 AD3d 519 [approximately $1.8 million]; *Mental Hygiene Legal Serv.*, 298 AD2d at 646 [approximately $250,000]; *Matter of Kamp*, 7 Misc 3d 615 [approximately $187,000]). Indeed, it appears that Congress considered and rejected a limitation on the amount of money used to fund an SNT (*see* Rosenberg, 10 BU Pub Int LJ at 129). In our view, the proposed SNT funded by petitioner's entire intestate share appropriately protects the needs and interests of both petitioner and the State, consistent with the purpose of the Medicaid SNT and the public policy underlying its creation.

Accordingly, we conclude that the order insofar as appealed from should be reversed and the petition granted in its entirety.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

704

KA 08-01684

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FRANKIE C. COLON-VELAZQUEZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered May 16, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (three counts).

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

705

KA 09-01023

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NORBERT F. BRAND, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered December 5, 2007. The judgment convicted defendant, upon a jury verdict, of felony driving while intoxicated and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (ii)]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3]), defendant contends that County Court erred in refusing to suppress physical evidence and his statements to the police. We reject that contention, although our reasoning differs from that of the court.

We agree with defendant that the court erred in concluding that the police officer who forcibly detained him was justified in doing so because the officer had a reasonable suspicion to believe that defendant committed the offense of leaving the scene of a motor vehicle accident involving property damage, a traffic infraction (*see* Vehicle and Traffic Law § 600 [1]). Contrary to the further contention of defendant, however, we conclude that the officer did not violate his constitutional rights by forcibly detaining him. "Where a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, . . . CPL [140.50 (1)] authorizes a forcible stop and detention of that person" (*People v De Bour*, 40 NY2d 210, 223; *see People v Moore*, 6 NY3d 496, 498-499). Here, based on the information known to the officer when he initially detained defendant, we conclude that he had a reasonable suspicion to believe that defendant had committed the crime of driving while intoxicated, which is either a

misdemeanor or a felony depending on the prior record of the defendant (*see* Vehicle and Traffic Law § 1193 [1]).

The further contention of defendant that his statements to the police were not sufficiently corroborated at trial is without merit (*see People v Booden*, 69 NY2d 185, 187-188; *see generally* CPL 60.50; *People v Chico*, 90 NY2d 585, 589-590; *People v Daniels*, 37 NY2d 624, 629). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, 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 Bleakley*, 69 NY2d at 495).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

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

706

KA 07-00806

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RABI R. SANCHEZ, DEFENDANT-APPELLANT.

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered November 16, 2006. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree, sexual abuse in the first degree, and sexual misconduct.

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 criminal sexual act in the first degree (Penal Law § 130.50 [2]), sexual abuse in the first degree (§ 130.65 [2]), and sexual misconduct (§ 130.20 [2]). Defendant contends that County Court erred in refusing to suppress his statements to the police on the ground that the People failed to establish that he understood the *Miranda* warnings that were given to him in English and thus that he did not voluntarily waive his *Miranda* rights. We reject that contention. "The court credited the testimony of the police that defendant understood the *Miranda* warnings and responded with appropriate answers to the questions he was asked" (*People v Gerena*, 49 AD3d 1204, 1205, *lv denied* 10 NY3d 958), and the record supports the court's determination (*see People v Madrid*, 52 AD3d 530, 531, *lv denied* 11 NY3d 790; *People v Alexandre*, 215 AD2d 488, *lv denied* 86 NY2d 789). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

707

KA 07-01648

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JENNIFER GILBERT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered June 21, 2007. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

708

KA 09-00222

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LANCE AIKEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 7, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

709

KA 08-01683

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FRANKIE C. COLON-VELAZQUEZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered May 16, 2007. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree, burglary in the first degree and criminal possession of a weapon in the third degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

710

KA 09-00510

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BASKWALI WILLIAM, DEFENDANT-APPELLANT.

JEREMY D. SCHWARTZ, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered February 17, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts) and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]). Defendant contends that the evidence is not legally sufficient to support the conviction of criminal possession of a controlled substance in the third degree under the second count of the indictment (§ 220.16 [12]). Defendant failed to preserve that contention for our review inasmuch as his motion for a trial order of dismissal was not specifically directed at the alleged error raised on appeal (*see People v Gray*, 86 NY2d 10, 19). In any event, we reject defendant's contention (*see generally People v Bleakley*, 69 NY2d 490, 495). The People presented evidence establishing that defendant was discovered by the police in a room within three feet of drugs that were in open view and thus that he possessed them pursuant to the drug factory presumption (*see* § 220.25 [2]). Furthermore, under "the particular facts of this case, the jury could . . . infer that, if the drugs to which the statutory presumption applied were part of the drug factory's supply, all the contraband found must have been controlled by the factory's operatives" (*People v Bundy*, 90 NY2d 918, 920), including defendant. Viewing the evidence in light of the elements of criminal possession of a controlled substance in the third degree under the second count of the indictment as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect thereto is not against the weight of the evidence (*see*

generally Bleakley, 69 NY2d at 495).

Contrary to the further contention of defendant, County Court properly denied his request for a jury instruction on criminal possession of a controlled substance in the seventh degree as a lesser included offense of the second count of the indictment "because there was no reasonable view of the evidence to support a finding that the weight of the crack cocaine [possessed by defendant] was less than" one-half ounce (*People v Evans*, 37 AD3d 847, 848, *lv denied* 9 NY3d 843; *see People v Highsmith*, 248 AD2d 961, *lv denied* 91 NY2d 1005, 1008; *People v Palmer*, 216 AD2d 883, *lv denied* 86 NY2d 799; *see generally People v Glover*, 57 NY2d 61, 63).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

711

KA 10-00250

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN BRYANT, DEFENDANT-APPELLANT.

BRUCE F. FREEMAN, ROCHESTER, 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 October 29, 2004. The judgment convicted defendant, upon a jury verdict, of murder in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the first degree (Penal Law § 125.27 [1] [a] [vi]; [b]). The indictment, as amplified by the bill of particulars, alleged that defendant acted as an accessory to the act of killing, procured the commission of the killing by making an agreement with one or more people to kill the victim for a sum of money, and paid such money upon performance of the agreement. Defendant contends that County Court erred in allowing the jury to consider a theory of prosecution that was not included in the indictment, as amplified by the bill of particulars, i.e., that he committed the killing pursuant to an agreement, when in fact it was alleged only that he procured the commission of the killing pursuant to an agreement. Defendant is correct that the court erred in charging the jury that the People had to prove beyond a reasonable doubt that "the defendant committed the killing or procured the commission of the killing pursuant to an agreement" in accordance with the precise language of the statute and instead should have charged the jury only that defendant "procured [the] commission of the killing" (§ 125.27 [1] [a] [vi]). Nevertheless, we conclude that reversal is not required based on the court's error because the People's theory throughout the case was that defendant procured the commission of the killing by making an agreement with one or more persons to kill the victim for a sum of money (*see People v Grega*, 72 NY2d 489, 495-497). Thus, "[d]efendant was in fact tried and convicted of only [that] crime[] and theor[y] charged in the indictment[, as amplified by the bill of particulars]" (*id.* at 497).

Defendant further contends that the People presented evidence based on the theory that defendant was an accomplice in the commission of the killing and that the court erred in submitting that uncharged theory to the jury. We reject that contention. Defendant fails to recognize that the element of the crime of murder in the first degree that "he [or she] causes the death of such person" is separate and distinct from the element of the crime that he or she "committed the killing or procured [the] commission of the killing pursuant to an agreement" (Penal Law § 125.27 [1] [a] [vi]). Here, the People charged defendant as an accomplice under the former element and presented evidence based on that theory, and the court properly charged the jury based on that element. The People did not charge defendant as an accomplice with respect to the separate element of committing the killing, nor did the court so charge the jury.

Finally, we reject the contention of defendant that the court erred in admitting evidence of his prior bad acts, including his attempt to hire someone other than the individuals named in the bill of particulars to kill the victim. That evidence was relevant to establish defendant's motive and intent (*see People v Kelly*, 71 AD3d 1520; *People v Harvey*, 270 AD2d 959, 960, *lv denied* 95 NY2d 835, *lv dismissed* 95 NY2d 853), and the court, following a *Ventimiglia* hearing, properly balanced the probative value of the evidence against its potential for prejudice (*see People v Norman*, 40 AD3d 1128, 1129, *lv denied* 9 NY3d 924; *see generally People v Alvino*, 71 NY2d 233, 242).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

713

KA 08-01142

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT E. ANTHONY, DEFENDANT-APPELLANT.

ROBERT L. GOSPER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

ROBERT E. ANTHONY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered May 19, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), assault in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]). By failing to object to County Court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his contention that the ruling constitutes an improvident exercise of discretion (*see People v Walker*, 66 AD3d 1331, *lv denied* 13 NY3d 942). 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 reject the further contention of defendant that he was denied effective assistance of counsel. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147; *People v Workman*, 277 AD2d 1029, 1032, *lv denied* 96 NY2d 764).

Contrary to defendant's contention, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is

against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, the sentence is not unduly harsh or severe.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

715

CA 09-02297

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

IN THE MATTER OF THE DISSOLUTION OF EL-ROH REALTY CORP., A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF NEW YORK, PURSUANT TO ARTICLE 11 OF THE BUSINESS CORPORATION LAW.

PHILIPPE R. SCHWIMMER, INDIVIDUALLY AND AS HOLDER OF FIFTY PERCENT OF THE OUTSTANDING VOTING SHARES OF EL-ROH REALTY CORP., PETITIONER-APPELLANT; MEMORANDUM AND ORDER

JOAN ROTH AND LOIS ROTH, RESPONDENTS-RESPONDENTS.

IN THE MATTER OF THE DISSOLUTION OF EL-ROH REALTY CORP., A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF NEW YORK, PURSUANT TO ARTICLE 11 OF THE BUSINESS CORPORATION LAW.

PHILIPPE R. SCHWIMMER, INDIVIDUALLY AND AS HOLDER OF FIFTY PERCENT OF THE OUTSTANDING VOTING SHARES OF EL-ROH REALTY CORP., PETITIONER-APPELLANT;

JOAN ROTH AND LOIS ROTH, RESPONDENTS-RESPONDENTS. (APPEAL NO. 1.)

MACKENZIE HUGHES LLP, SYRACUSE (CARTER H. STRICKLAND OF COUNSEL), FOR PETITIONER-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM G. BAUER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered April 10, 2009 in a proceeding pursuant to Business Corporation Law article 11. The order, among other things, denied petitioner's motion for summary judgment.

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

Memorandum: These consolidated appeals arise from two proceedings pursuant to Business Corporation Law article 11 in which petitioner sought dissolution of El-Roh Realty Corp. (El-Roh). Petitioner owned one half of the voting shares of El-Roh and respondents owned the other half. Petitioner filed her first

dissolution petition in 2006 (hereafter, 2006 petition), and respondents asserted a counterclaim seeking specific performance of that part of the shareholders' agreement (agreement) requiring petitioner to offer to sell her shares to El-Roh and the remaining shareholders in the event that she attempted to transfer shares in violation of the agreement. In support of the counterclaim, respondents contended that petitioner triggered the part of the agreement in question by commencing the dissolution proceeding. We previously reversed the order that, inter alia, dismissed the 2006 petition, reinstated the petition and granted respondents' motion for a stay of the proceeding pending determination of the counterclaim (*Matter of El-Roh Realty Corp.* [appeal No. 1], 48 AD3d 1190, 1192), and we affirmed the order that, inter alia, granted respondents' motion for partial summary judgment on the counterclaim (*Matter of El-Roh Realty Corp.* [appeal No. 2], 48 AD3d 1193). We concluded that Supreme Court prematurely dismissed the petition because, in the event that respondents or El-Roh declined to purchase petitioner's shares, petitioner would be left without a remedy (*id.*).

During the pendency of the appeals from those two orders, petitioner filed a second dissolution petition in 2007 (hereafter, 2007 petition). The first cause of action in the 2007 petition sought dissolution of El-Roh on virtually the same grounds alleged in the 2006 petition, and the second cause of action sought to dissolve the corporation pursuant to Business Corporation Law § 1104 (c) on the additional ground that the shareholders had failed to hold an annual meeting for more than two years and thus failed to elect a board of directors in violation of El-Roh's bylaws. On a subsequent appeal, we modified the order dismissing the 2007 petition by reinstating the second cause of action and by granting respondents' motion to stay the proceeding pending determination of the counterclaim asserted in respondents' answer to the 2006 petition (*Matter of El-Roh Realty Corp.*, 55 AD3d 1431, 1433-1434).

Thereafter, El-Roh's independent accountants submitted a valuation of petitioner's shares, after which El-Roh and respondents indicated that they would purchase petitioner's shares based on that valuation. Petitioner refused to sell her shares and moved for, inter alia, summary judgment on the 2006 and 2007 petitions. In support of the motion, petitioner contended that she is entitled to dissolution because respondents failed to purchase the shares pursuant to her offer within the time limits set forth in the agreement.

In appeal No. 1, petitioner appeals from an order that, inter alia, denied that motion. At the outset, we agree with petitioner that the court erred in denying the motion pursuant to the doctrine of law of the case. "The doctrine of . . . 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as [j]udges and courts of [coordinate] jurisdiction are concerned" (*Martin v City of Cohoes*, 37 NY2d 162, 165, *rearg denied* 37 NY2d 817; *see United States v United States Smelting Ref. & Min. Co.*, 339 US 186, 198; *Insurance Group Comm. v Denver & R.G.W.R. Co.*, 329 US 607,

612; *Messinger v Anderson*, 225 US 436, 444). The doctrine applies, however, "only to issues that have been judicially determined" (*Edgewater Constr. Co., Inc. v 81 & 3 of Watertown, Inc.* [appeal No. 2], 24 AD3d 1229, 1231) and, here, none of the court's prior rulings specifically addressed petitioner's present contention.

Contrary to the further contention of petitioner, however, respondents' acceptance of her offer to sell her shares was not untimely pursuant to the terms of the agreement. Pursuant to well-settled rules of contract interpretation, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162). The contract must be "read as a whole to determine its purpose and intent" (*id.*), and it "should be interpreted in a way [that] reconciles all its provisions, if possible" (*Green Harbour Homeowners' Assn., Inc. v G.H. Dev. & Constr., Inc.*, 14 AD3d 963, 965; *see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324). "Effect and meaning must be given to every term of the contract . . ., and reasonable effort must be made to harmonize all of its terms . . . Moreover, the contract must be interpreted so as to give effect to, not nullify, its general or primary purpose" (*Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 89, *lv denied* 97 NY2d 603; *see Niagara Frontier Transp. Auth. v Euro-United Corp.*, 303 AD2d 920, 921, *amended on rearg* 306 AD2d 952; *Reda v Eastman Kodak Co.* [appeal No. 2], 233 AD2d 914, 914-915; *see generally Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 171-172).

Here, the primary purpose of the agreement and the intent of the shareholders who prepared it was to preserve the closely-held nature of El-Roh, which the agreement accomplished by granting the corporation and each shareholder the right to purchase shares of capital stock if a shareholder attempted to transfer his or her shares outside the corporation. The agreement set up a process whereby any proposed transfer of shares of capital stock was deemed an offer by the owner to sell to the corporation all of his or her shares of capital stock. The price for the sale was to be determined by mutual yearly agreement of the shareholders at the annual shareholders' meeting, after they reviewed a report prepared by El-Roh's independent accountants. Where, as here, no such agreement had been made within the 12 months preceding the date of the attempted transfer, "the [p]urchase [p]rice and all component parts thereof shall be calculated by the independent certified public accountants then engaged by the [c]orporation." The corporation and the remaining shareholders were required to purchase the stock at the price determined by that process within 120 days after the corporation received notice of the offer.

We agree with respondents that the only reasonable interpretation of those provisions in the agreement that gives effect to all provisions and the intent of the shareholders is that the corporation and shareholders are entitled to know the purchase price of the shares before determining whether to purchase them. There is no support in the agreement for petitioner's contention to the contrary. It would be commercially unreasonable and absurd to require respondents to

agree to purchase petitioner's shares without knowing the price (*see Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170). Consequently, the court properly determined that petitioner's offer could be accepted within 120 days from the date upon which the accountants' report was issued, and that respondents' acceptance therefore was timely. Petitioner's remaining contention with respect to appeal No. 1 is moot in light of our determination.

In appeal No. 2, petitioner appeals from an order that denied her motion for, inter alia, an order declaring that the 2003 amendment to the agreement rendered the acceptances by respondents of her offer to sell her shares defective based on their failure to comply with the requisite method of payment, as well as for an order directing that the proceeds from a life insurance policy on the life of her predecessor in interest in El-Roh be paid to the shareholders in proportion to their ownership interest. Petitioner contended in support of the motion that the 2003 amendment voided the original provisions in the agreement with respect to the method of payment for her shares. We conclude that the court properly rejected that contention pursuant to the doctrine of law of the case. The court determined that issue in a prior order that, inter alia, granted respondents' motion for partial summary judgment on the counterclaim, which we affirmed on appeal (*El-Roh Realty Corp.*, 48 AD3d 1190). Consequently, the contention of petitioner was "previously raised and decided against [her] . . .[, and thus] 'reconsideration of [the] issue[] is barred by the doctrine of law of the case' " (*Matter of Suzuki-Peters v Peters*, 37 AD3d 726, *lv denied* 9 NY3d 814; *see Matter of Shondel J. v Mark D.*, 18 AD3d 551, *affd* 7 NY3d 320).

Contrary to the further contention of petitioner, the 2003 amendment to the agreement does not require that the corporation pay, as a dividend to the shareholders in proportion to their ownership interest, the proceeds from the life insurance policy on the life of her predecessor in interest. Although the 2003 amendment altered certain provisions of the agreement with respect to the transfer of capital stock, it did not change the method of disbursing the proceeds of the life insurance policy of a shareholder. Rather, the shareholders agreed to negotiate in good faith with respect to those proceeds. "Because the parties to the agreement left for future negotiation an essential term, i.e., [the disposition of the proceeds from the life insurance policy of a shareholder, that part of] letter agreement is 'a mere agreement to agree' and is thus unenforceable" (*Uniland Partnership of Del. L.P. v Blue Cross of W. N.Y. Inc.*, 27 AD3d 1131, 1132, *lv denied* 7 NY3d 713, quoting *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109). Thus, there was no enforceable agreement to pay the proceeds from such policies to the shareholders, and the original provisions of the agreement continued to govern the disbursement of the proceeds from the life insurance policy in question.

We have considered petitioner's remaining contention with respect to appeal No. 2, and conclude that it is without merit.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

716

CA 09-02298

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

IN THE MATTER OF THE DISSOLUTION OF EL-ROH REALTY CORP., A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF NEW YORK, PURSUANT TO ARTICLE 11 OF THE BUSINESS CORPORATION LAW.

PHILIPPE R. SCHWIMMER, INDIVIDUALLY AND AS HOLDER OF FIFTY PERCENT OF THE OUTSTANDING VOTING SHARES OF EL-ROH REALTY CORP., PETITIONER-APPELLANT; MEMORANDUM AND ORDER

JOAN ROTH AND LOIS ROTH, RESPONDENTS-RESPONDENTS.

IN THE MATTER OF THE DISSOLUTION OF EL-ROH REALTY CORP., A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF NEW YORK, PURSUANT TO ARTICLE 11 OF THE BUSINESS CORPORATION LAW.

PHILIPPE R. SCHWIMMER, INDIVIDUALLY AND AS HOLDER OF FIFTY PERCENT OF THE OUTSTANDING VOTING SHARES OF EL-ROH REALTY CORP., PETITIONER-APPELLANT;

JOAN ROTH AND LOIS ROTH, RESPONDENTS-RESPONDENTS. (APPEAL NO. 2.)

MACKENZIE HUGHES LLP, SYRACUSE (CARTER H. STRICKLAND OF COUNSEL), FOR PETITIONER-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM G. BAUER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered October 8, 2009 in a proceeding pursuant to Business Corporation Law article 11. The order denied the motion of petitioner for, inter alia, a declaration with respect to the effect of a certain amendment of the shareholders' agreement.

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

Same Memorandum as in *Matter of El-Roh Realty Corp.* ([appeal No. 1] ___ AD3d ___ [June 11, 2010]).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

717

CA 10-00121

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

NEIL GOLDSTEIN, D.D.S., AND PATTI GOLDSTEIN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BROOKWOOD BUILDING CORPORATION, DEFENDANT,
WEYERHAEUSER COMPANY, DEFENDANT-RESPONDENT,
AND SPALL REALTY CORPORATION,
DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered October 26, 2009. The order, among other things, denied the motion of defendant Spall Realty Corporation for summary judgment.

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

Memorandum: Plaintiffs commenced this action alleging that they sustained damages to their property as well as personal injuries as a result of mold in the basement of their newly-constructed home. Supreme Court properly denied that part of the motion of defendant Spall Realty Corporation (Spall Realty) for summary judgment dismissing the second amended complaint against it. Even assuming, arguendo, that Spall Realty met its initial burden of establishing that plaintiffs commenced the action against it after the three-year statute of limitations set forth in CPLR 214-c (2) had expired, we conclude that plaintiffs met their burden of establishing the applicability of the relation-back doctrine (*see generally Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 678). We reject Spall Realty's contention that plaintiffs failed to establish that the third prong of that doctrine applied, i.e., that Spall Realty "knew or should have known that but for a mistake by the plaintiff[s] as to the identity of the proper parties, the action would have been brought against [it] as well" (*Morel v Schenker*, 64 AD3d 403, 403; *see Buran v Coupal*, 87 NY2d 173, 178; *see also Brock v Bua*, 83 AD2d 61, 69). "[P]laintiffs established that their failure to include [Spall Realty] as a defendant was a mistake and not . . . the result of a strategy to

obtain a tactical advantage" (*Brown v Aurora Sys.*, 283 AD2d 956, 957; *see generally Buran*, 87 NY2d at 181). Plaintiffs had discussed the construction of their new home with Spall Realty, but their construction contract was with defendant Brookwood Building Corporation (Brookwood), and plaintiffs were required to make all payments to Brookwood. Plaintiffs were not aware that Brookwood had no employees and that Brookwood had entered into a contract with Spall Realty to perform project management work on the construction of the home, including hiring all the subcontractors.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

719

CA 10-00060

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

HEIDI M. POE, PLAINTIFF-RESPONDENT,

V ORDER

MARK C. POE, DEFENDANT-APPELLANT.

BOYLAN, BROWN, CODE, VIGDOR & WILSON, LLP, ROCHESTER (SANFORD R. SHAPIRO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BARNEY & AFFRONTI, LLP, ROCHESTER (BRIAN J. BARNEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Philip B. Dattilo, Jr., R.), entered April 16, 2009 in a divorce action. The order, among other things, determined the equitable distribution of the marital property.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

721

CA 10-00339

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

ESMERALDA GARZA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. TARAVELLA, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

HAGELIN KENT LLC, BUFFALO (JOHN E. ABEEL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered September 29, 2009 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant Michael A. Taravella for summary judgment and granted in part the cross motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when her vehicle collided with a vehicle operated by Michael A. Taravella (defendant) and owned by defendant Carolyn A. Wozniak. Defendant moved for summary judgment dismissing the complaint against him on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and plaintiff cross-moved for partial summary judgment on liability. Contrary to the contention of defendant, we conclude that Supreme Court properly denied those parts of his motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. Although we agree with defendant that he met his initial burden on those parts of the motion by submitting the report of the physician who examined plaintiff at his request establishing that plaintiff's injuries had resolved, we conclude that plaintiff raised a triable issue of fact in opposition. Plaintiff submitted the affidavit of her treating chiropractor and the affirmations of her treating physicians indicating that she sustained neck and back injuries as a result of the accident and that those injuries required surgery, would continue to limit her cervical ranges of motion and rendered her permanently disabled. Defendant's contention that those submissions failed to

establish that plaintiff's injury was not the result of a preexisting condition 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).

We reject defendant's further contention that plaintiff failed to explain a six-month gap in treatment. "[P]laintiff adequately explained the significant gap in her treatment history by stating in her affidavit that she stopped treatment [for] about [six] months after the subject accident because . . . she could not afford to personally pay for further treatment" (*Jules v Barbecho*, 55 AD3d 548, 549; *see Francovig v Senekis Cab Corp.*, 41 AD3d 643, 644; *Black v Robinson*, 305 AD2d 438, 439-440; *see generally Pommells v Perez*, 4 NY3d 566, 574). Contrary to defendant's contention, there is no evidence in the record establishing that plaintiff knew that her medical bills would be paid by no-fault insurance during that six-month period (*cf. McConnell v Freeman*, 52 AD3d 1190, 1191).

We conclude that the court properly granted that part of plaintiff's cross motion for partial summary judgment on the issue of defendant's negligence. The evidence submitted by plaintiff in support of her cross motion, including defendant's deposition testimony, established that defendant struck the side of her vehicle after entering the roadway from a driveway and that his view of oncoming traffic was obstructed. "The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed" (Vehicle and Traffic Law § 1143). "Defendant testified at [his] deposition that [he] saw plaintiff for the first time when [he] had already begun to pull out into the roadway and that [he] drove into the roadway despite the fact that [his] vision of the roadway was obscured by a legally parked vehicle. Plaintiff thus established that defendant was negligent as a matter of law in failing to see that which [he] should have seen" (*Whitcombe v Phillips*, 61 AD3d 1431; *see Mazza v Manzella*, 49 AD3d 609; *Ferrara v Castro*, 283 AD2d 392), and defendant failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

722

CA 09-02115

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

MICHELLE T. STEGURA, PLAINTIFF-RESPONDENT,

V ORDER

SCOTT M. FOX, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (DANIEL J. GUARASCI OF COUNSEL), FOR DEFENDANT-APPELLANT.

BERGEN & SCHIFFMACHER, LLP, BUFFALO (TODD M. SCHIFFMACHER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 5, 2009 in a personal injury action. The order, among other things, granted plaintiff's motion for partial summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 16, 2010 and filed in the Erie County Clerk's Office on March 3, 2010,

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

724

CA 09-02102

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

ALICE YARGEAU AND ANDREW YARGEAU,
PLAINTIFFS-RESPONDENTS,

V ORDER

LASERTRON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

PINSKY & SKANDALIS, SYRACUSE (GEORGE SKANDALIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 29, 2009 in a personal injury action. The order denied the motion of defendant for partial summary judgment and granted the motion of plaintiffs to compel disclosure.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

725

CA 09-02211

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

ALICE YARGEAU AND ANDREW YARGEAU,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LASERTRON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

PINSKY & SKANDALIS, SYRACUSE (GEORGE SKANDALIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 7, 2009 in a personal injury action. The order, insofar as appealed from, upon reconsideration denied the motion of defendant for partial summary judgment and granted the motion of plaintiffs to compel disclosure.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' motion and vacating the fourth ordering paragraph and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Alice Yargeau (plaintiff) while playing the "Cyber Sport" game at defendant's entertainment facility. According to plaintiffs, the "Cyber Car" in which plaintiff was seated was rear-ended by another Cyber Car, and they asserted causes of action for negligence, breach of warranty and strict products liability.

Plaintiffs made discovery demands in February 2009, April 2009 and May 2009 to which defendant responded on May 26, 2009. Plaintiffs thereafter moved to compel defendant to produce documents requested in their earlier demands. Specifically, plaintiffs contended that defendant should be required to produce documents concerning the design and manufacture of the Cyber Car. Defendant alleged, however, that it did not have such information because the Cyber Car was designed and manufactured by another corporation over which defendant had no control.

We conclude that Supreme Court erred in granting plaintiffs' motion, and we therefore modify the order accordingly. We agree with

defendant that plaintiffs failed to comply with 22 NYCRR 202.7 (a). Pursuant to that regulation, a movant seeking to compel disclosure is required to serve and file "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." "The affirmation of the good faith effort 'shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions' " (*Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055, 1057, quoting 22 NYCRR 202.7 [c]). It is well established that the failure to file that affirmation or a deficiency in that affirmation may justify denial of a motion to compel (*see Natoli v Milazzo*, 65 AD3d 1309, 1310-1311; *Kane v Shapiro, Rosenbaum, Liebschutz, & Nelson, L.L.P.*, 57 AD3d 1513; *Amherst Synagogue*, 30 AD3d at 1056-1057). The failure to include the good faith affirmation may be excused, however, where "any effort to resolve the present dispute non-judicially would have been 'futile' " (*Carrasquillo v Netsloh Realty Corp.*, 279 AD2d 334, 334; *see Diamond State Ins. Co. v Utica First Ins. Co.*, 67 AD3d 613; *Qian v Dugan*, 256 AD2d 782-783). In *Carrasquillo*, the Court determined that such efforts would have been futile "[u]nder the unique circumstances of [that] case and in light of the frequency with which both sides have resorted to judicial intervention in discovery disputes in the three years prior to the instant motion" (279 AD2d at 334). In *Diamond State Ins. Co.*, the effort was deemed futile "in light of [the] defendant's multiple delays and violations of repeated court orders, its numerous improper objections to practically every demand for disclosure made by [the] plaintiff, its unjustifiable limitation of the search of its files, its continued refusal to produce responsive documents and its utter failure to account for its behavior" (67 AD3d at 613). In *Qian*, any effort would have been futile because, "[d]espite having been made aware of the ways in which [the] defendant viewed the proffered summary of [the] testimony [in question] as incomplete, [the] plaintiff still made no attempt to redress [those] defects prior to trial" (256 AD2d at 782).

Under the circumstances of this case, however, we cannot conclude that plaintiffs' efforts would have been futile. The affirmation of plaintiffs' attorney established that plaintiffs made a good faith effort to obtain the initial responses from defendant, but it did not establish that they had made any good faith effort to resolve the "present dispute," i.e., the alleged inadequacy of defendant's responses (*Carrasquillo*, 279 AD2d at 334). Indeed, this is not a case where there had been multiple disputes or defendant had continuously refused to respond.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

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

726

KA 09-01045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL R. PERNA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Niagara County Court (Richard C. Kloch, Sr., A.J.), rendered October 24, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the probation component of the split sentence of incarceration and probation previously imposed upon his conviction of possessing a sexual performance by a child (Penal Law § 263.16) and sentencing him to an indeterminate term of incarceration. As a preliminary matter, we note that the contention of defendant that his plea was not knowing, voluntary and intelligent is not properly before us inasmuch as defendant did not appeal from the original judgment (*see People v Dexter*, 71 AD3d 1504). The valid waiver by defendant of the right to appeal does not encompass the sentence imposed following his violation of probation (*see id.* at 1504-1505), and thus we may review defendant's contention concerning the sentence. We conclude, however, that the sentence is not unduly harsh or severe.

We reject the further contention of defendant that the People failed to prove by a preponderance of the evidence that he violated the conditions of his probation (*see generally* CPL 410.70 [3]). " 'A violation of probation proceeding is summary in nature and a sentence of probation may be revoked if the defendant has been afforded an opportunity to be heard' " (*People v Bost*, 39 AD3d 1027, 1028; *see People v DeMarco*, 60 AD3d 1107, 1108). Here, a declaration of delinquency was filed alleging that defendant violated the conditions of probation prohibiting him from residing with a child less than 17

years old and from accessing the Internet, and a violation hearing was conducted. County Court was entitled to credit the testimony of the probation officer at the hearing that he visited defendant at the residence listed as his residence on the sex offender registration form and that a one-year-old child resided there. Although defendant presented evidence that he was staying at that residence only on a temporary basis, the court's credibility determination is entitled to great deference (*see DeMarco*, 60 AD3d 1108). The court was also entitled to credit the testimony of the probation officer that defendant admitted to him that he accessed the Internet by means of a video game device, rather than the testimony of defendant that he had not accessed the Internet.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

727

KA 09-00749

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER M. SHAPARD, DEFENDANT-APPELLANT.

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

CHRISTOPHER M. SHAPARD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a resentence of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 9, 2009. Defendant was resentenced, as a persistent felony offender, upon his conviction of assault in the second degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

728

KA 09-01369

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KEVIN M. BAKER, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT R. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered May 28, 2009. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree and criminal sexual act in the second degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

729

KA 09-00852

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL DOZIER, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (JAMES W. MANSOUR, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered February 24, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of two counts of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). We reject the contention of defendant that Supreme Court abused its discretion in denying his motion to withdraw his guilty plea inasmuch as the record does not support his assertion that the plea was the product of coercion (*see People v Jones*, 71 AD3d 1573; *People v Spikes*, 28 AD3d 1101, 1102, *lv denied* 7 NY3d 818). Furthermore, the record "establish[es] that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty," and we thus reject defendant's challenge to the validity of the waiver of the right to appeal (*People v Lopez*, 6 NY3d 248, 256). That valid waiver encompasses defendant's challenge to the severity of the sentence (*see id.*).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

730

KA 09-01190

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EDWELL NAZARIO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered April 21, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Lococo*, 92 NY2d 825, 827).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

731

KA 09-01046

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL PERNA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered July 21, 2008. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

733

KA 10-00030

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARYN A. CONSILIO, DEFENDANT-APPELLANT.

MICHAEL P. SCHIANO, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered January 27, 2009. The judgment convicted defendant, upon her plea of guilty, of burglary in the second degree, aggravated cruelty to animals, and criminal contempt in the first degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences imposed for criminal contempt in the first degree under counts five, seven, and nine of the indictment shall run consecutively with respect to each other and concurrently with the sentences imposed for burglary in the second degree under count one of the indictment and aggravated cruelty to animals under count three of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of one count each of burglary in the second degree (Penal Law § 140.25 [2]) and aggravated cruelty to animals (Agriculture and Markets Law § 353-a), and three counts of criminal contempt in the first degree (Penal Law § 215.51 [b] [iv] [two counts]; [d] [one count]). County Court's stated "intention" at sentencing was to impose an aggregate term of incarceration of 5 to 12 years pursuant to the terms of the plea agreement. The sentence actually imposed, however, and thus the commitment order specified that a minimum aggregate term of over 9 years was imposed, and the Department of Correctional Services calculated the sentence accordingly. We exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), in order to effectuate the sentence promised under the plea agreement (*see People v Parker*, 271 AD2d 63, 70-71, *lv denied* 95 NY2d 967; *People v Jones*, 99 AD2d 1, 3-4; *People v Jones*, 75 AD2d 734). We therefore modify the judgment by directing that the sentences imposed for criminal contempt in the first degree under counts five, seven,

and nine of the indictment shall run consecutively with respect to each other and concurrently with the sentences imposed for burglary in the second degree under count one of the indictment and aggravated cruelty to animals under count three of the indictment. The further challenge by defendant to the court's suppression ruling is precluded by her valid waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833; *People v Trueheart*, 71 AD3d 1446).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

736

CA 10-00220

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

ROBERT PIECHOCKI, III, PLAINTIFF-RESPONDENT,

V ORDER

TOWN OF ALEXANDER, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DADD, NELSON & WILKINSON, ATTICA (JAMES M. WUJCIK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered September 23, 2009 in a personal injury action. The order denied the motion of defendant Town of Alexander.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 25 and 29, 2010,

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

740

CA 10-00112

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

THE INDIUM CORPORATION OF AMERICA,
PLAINTIFF-APPELLANT,

V ORDER

MCP GROUP SA, ATLUMIN ENERGY, INC., GREGORY PHIPPS, DAVID PREISCHE, FAHEZAN SAYED, JACOB DIBARI, AND XIAOTAO XU,
DEFENDANTS-RESPONDENTS.

DEBEVOISE & PLIMPTON LLP, NEW YORK CITY (JYOTIN HAMID OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (JEFFREY J. CALABRESE OF COUNSEL), AND GETNICK LIVINGSTON ATKINSON & PRIORE, LLP, UTICA (MICHAEL E. GETNICK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered August 31, 2009. The order, among other things, granted defendants' cross motion to dismiss the complaint.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

741

CA 10-00304

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

ROCCO C. ORLANDO, PLAINTIFF-RESPONDENT,

V ORDER

ROGER C. GAUDA, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (DANIEL R. ARCHILLA OF COUNSEL), FOR DEFENDANT-APPELLANT.

MOSEY PERSICO, LLP, BUFFALO (SHANNON M. HENEGHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered April 28, 2009 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant for summary judgment and granted the cross motion of plaintiff for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on March 18, 2010,

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

742

CA 09-02342

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

IN THE MATTER OF ADA RODRIGUEZ,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

WESTERN REGIONAL OFF-TRACK BETTING
CORPORATION, RESPONDENT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRIAN A. MACDONALD OF COUNSEL), FOR RESPONDENT-APPELLANT.

SPADAFORA & VERRASTRO, LLP, BUFFALO (RICHARD E. UPDEGROVE OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 11, 2009. The order granted the application of claimant for leave to serve a late notice of claim.

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

Memorandum: Supreme Court did not abuse its discretion in granting claimant's application seeking leave to serve a late notice of claim on respondent pursuant to General Municipal Law § 50-e (5). In support of her application, claimant established that she was unaware of the severe or permanent nature of her injuries until after the expiration of the statutory time period, and we thus conclude that she thereby established a reasonable excuse for the delay (*see Matter of Greene v Rochester Hous. Auth.*, 273 AD2d 895; *More v General Brown Cent. School Dist.*, 262 AD2d 1030; *Matter of Esposito v Carmel Cent. School Dist.*, 187 AD2d 854). Further, it is undisputed that respondent had actual notice of claimant's accident inasmuch as the record establishes that respondent was immediately notified of the accident, prepared an accident report, and took photographs of the sidewalk where claimant fell and, finally, respondent failed to demonstrate any prejudice occasioned by claimant's 29-day delay in serving the notice of claim (*see Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434; *Matter of Bitetto v City of Yonkers*, 13 AD3d 367, 368; *Wetzel Servs. Corp. v Town of Amherst*, 207 AD2d 965).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

743

CA 09-02275

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

DEAN SCHREIBER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UNIVERSITY OF ROCHESTER MEDICAL CENTER AND
ITS AGENTS, SERVANTS AND/OR EMPLOYEES,
DEFENDANTS-RESPONDENTS.

COTE, LIMPERT & VAN DYKE, LLP, SYRACUSE (JOANNE VAN DYKE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (THOMAS C. BURKE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered August 21, 2009 in a medical malpractice action. The order granted in part the motion of defendants to strike the supplemental bill of particulars and to preclude plaintiff from presenting certain evidence at trial.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries allegedly arising from defendants' treatment of his right leg. More than six years after plaintiff served a bill of particulars and supplemental bill of particulars, Supreme Court issued an amended scheduling order directing plaintiff to provide a further supplemental bill of particulars by December 15, 2008 in the event that he is contending that his left leg was injured as a result of the surgery on his right leg. Plaintiff did not timely comply with that order. Indeed, approximately six months after the deadline set forth in the order, plaintiff served a supplemental bill of particulars and, four days later, on June 12, 2009, he served yet another supplemental bill of particulars alleging that his left leg was injured.

Defendants thereafter moved to strike the June 12, 2009 supplemental bill of particulars and to preclude plaintiff from presenting any evidence at trial concerning injury to his left leg. Supreme Court granted the motion to the extent of striking all references to "pain in the left leg of plaintiff . . ., the blood clot in the left leg . . ., and the entirety of paragraph 2" of that supplemental bill of particulars, and the court also precluded plaintiff from presenting evidence at trial "in support of any claims

as to injury to or pain in his left leg being caused by any treatment" by defendants. We affirm (*see* CPLR 3043 [c]). "It is well settled that a supplemental bill of particulars may be used for purposes of updating 'claims of continuing special damages and disabilities' (CPLR 3043 [b]), but may not be used for adding new injuries or damages" (*Kraycar v Monahan*, 49 AD3d 507, 507). We note in addition that plaintiff submitted the June 12, 2009 supplemental bill of particulars approximately six months after the court's deadline to do so, and provided no medical evidence suggesting that he suffered left leg injuries as a result of defendants' treatment (*see Daly-Caffrey v Licausi*, 70 AD3d 884; *Kraycar*, 49 AD3d at 507; *Licht v Trans Care N.Y., Inc.*, 3 AD3d 325, 326). The court also properly granted that part of defendants' motion seeking to preclude plaintiff from presenting evidence at trial concerning injury to his left leg. "[G]enerally, evidence of injuries or conditions not enumerated by the plaintiff in the bill of particulars will not be permitted at trial . . . [unless] it flows immediately and necessarily from the information conveyed in the bill of particulars[,] or . . . the record reveals that the defendant[s] should have known of such injury or condition," and neither exception applies here (*Acunto v Conklin*, 260 AD2d 787, 788-789; *see Conroe v Barmore-Sellstrom, Inc.*, 12 AD3d 1121, 1122-1123).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

746

CA 10-00068

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

MICHAEL ROACH, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF CATHERINE ROACH, DECEASED, ERIN K. ROACH, STEPHEN M. ROACH AND CHRISTOPHER D. ROACH, PLAINTIFFS-APPELLANTS,

V ORDER

COACH USA, INC., COACH CANADA, INC., ERIE COACH LINES COMPANY, INDIVIDUALLY AND DOING BUSINESS AS COACH CANADA, INC., TRENTWAY-WAGAR, INC., INDIVIDUALLY AND DOING BUSINESS AS COACH CANADA, INC., TRENTWAY-WAGAR (PROPERTIES) INC., RYAN A. COMFORT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

KELLY & LEONARD, L.L.P., BALLSTON SPA (LAWRENCE D'ALOISE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered March 24, 2009. The order granted the motion of defendants Coach USA, Inc., Coach Canada, Inc., Erie Coach Lines Company, individually and doing business as Coach Canada, Inc., Trentway-Wagar, Inc., individually and doing business as Coach Canada, Inc., Trentway-Wagar (Properties) Inc., and Ryan A. Comfort and determined that the law of Ontario, Canada concerning noneconomic damages applies to this action.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Butler v Stagecoach Group, PLC*, 72 AD3d 1581).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

747

CA 10-00069

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

MICHAEL ROACH, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF CATHERINE ROACH, DECEASED, ERIN K. ROACH, STEPHEN M. ROACH AND CHRISTOPHER D. ROACH, PLAINTIFFS-APPELLANTS,

V ORDER

COACH USA, INC., ET AL., DEFENDANTS, J&J HAULING, INC. AND THE ESTATE OF ERNEST D. ZEISET, JR., DECEASED, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

KELLY & LEONARD, L.L.P., BALLSTON SPA (LAWRENCE D'ALOISE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered March 24, 2009. The order granted the motion of defendants J&J Hauling, Inc. and the Estate of Ernest D. Zeiset, Jr., deceased, and determined that the law of Ontario, Canada concerning noneconomic damages applies to this action.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Butler v Stagecoach Group, PLC*, 72 AD3d 1581).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

748

CA 10-00070

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

LAURALEE DAVIDSON, PLAINTIFF-APPELLANT,

V ORDER

COACH USA, INC., COACH CANADA, INC., ERIE COACH LINES COMPANY, INDIVIDUALLY AND DOING BUSINESS AS COACH CANADA, INC., TRENTWAY-WAGAR, INC., INDIVIDUALLY AND DOING BUSINESS AS COACH CANADA, INC., TRENTWAY-WAGAR (PROPERTIES) INC., RYAN A. COMFORT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 3.)

KELLY & LEONARD, L.L.P., BALLSTON SPA (LAWRENCE D'ALOISE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered March 24, 2009. The order granted the motion of defendants Coach USA, Inc., Coach Canada, Inc., Erie Coach Lines Company, individually and doing business as Coach Canada, Inc., Trentway-Wagar, Inc., individually and doing business as Coach Canada, Inc., Trentway-Wagar (Properties) Inc., and Ryan A. Comfort and determined that the law of Ontario, Canada concerning noneconomic damages applies to this action.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Butler v Stagecoach Group, PLC*, 72 AD3d 1581).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

749

CA 10-00072

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

LAURALEE DAVIDSON, PLAINTIFF-APPELLANT,

V ORDER

COACH USA, INC., ET AL., DEFENDANTS,
J&J HAULING, INC. AND THE ESTATE OF
ERNEST D. ZEISET, JR., DECEASED,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 4.)

KELLY & LEONARD, L.L.P., BALLSTON SPA (LAWRENCE D'ALOISE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered March 24, 2009. The order granted the motion of defendants J&J Hauling, Inc. and the Estate of Ernest D. Zeiset, Jr., deceased, and determined that the law of Ontario, Canada concerning noneconomic damages applies to this action.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Butler v Stagecoach Group, PLC*, 72 AD3d 1581).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

750

TP 09-02568

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

IN THE MATTER OF STEVEN ALSTER, PETITIONER,

V ORDER

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

STEVEN ALSTER, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered December 16, 2009) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

751

TP 10-00263

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

IN THE MATTER OF ANWATZ HAQUE, PETITIONER,

V ORDER

JOHN LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, AND P. PICCOLO, CAPTAIN, RESPONDENTS.

ANWATZ HAQUE, PETITIONER PRO SE.

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

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, Seneca County [Dennis F. Bender, A.J.], entered February 1, 2010) to review a determination of respondents. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

752

KA 09-01285

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY MARKEL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered April 9, 2009. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree and attempted robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Lococo*, 92 NY2d 825, 827).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

753

KA 09-00583

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN REES, DEFENDANT-APPELLANT.

JAMES L. DOWSEY, III, WEST VALLEY, FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Cattaraugus County Court (Larry M. Himelein, J.), rendered March 2, 2009. Defendant was resentenced upon his conviction of sexual abuse in the first degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law, the original sentence is reinstated and the matter is remitted to Cattaraugus County Court for proceedings pursuant to CPL 470.45.

Memorandum: County Court erred in resentencing defendant to a period of postrelease supervision after defendant had been conditionally released from the previously imposed determinate sentence of incarceration and the maximum expiration date of that sentence had passed (*see People v Williams*, 14 NY3d 198, 217-220; *People v Peterkin*, 71 AD3d 1402). We therefore conclude that reversal is required.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

754

KA 08-00521

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALBERT C. SOMMERS, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 1, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

755

KA 09-01188

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

VINCENT PAONE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 27, 2009. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

756

KA 07-01957

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARRINE O. DEACON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered July 11, 2007. The judgment convicted defendant, upon a jury verdict, of 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 criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, 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 Bleakley*, 69 NY2d at 495).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

757

KA 09-01578

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA ANN DUGAN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 24, 2009. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of grand larceny in the third degree (Penal Law § 155.35), defendant contends that her right to due process was violated when Supreme Court allegedly conditioned its sentencing commitment on her payment of a portion of the restitution amount by the date of sentencing. Defendant failed to preserve that contention for our review (*see generally People v Riley*, 9 AD3d 902, *lv denied* 3 NY3d 741), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to the further contention of defendant, her waiver of the right to appeal was knowingly, intelligently and voluntarily entered (*see People v Lopez*, 6 NY3d 248, 256), and her challenge to the severity of the sentence is encompassed by that valid waiver (*see People v Hidalgo*, 91 NY2d 733, 737; *People v Billins*, 68 AD3d 1794, *lv denied* 14 NY3d 797).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

758

KA 07-00127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB ROUSE, DEFENDANT-APPELLANT.

MARK D. FUNK, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered November 22, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]). County Court properly refused to admit in evidence that part of a statement made by a codefendant to police investigators in which he indicated that he shot his weapon in the direction of the victim's vehicle when he observed the vehicle almost hit his brother. Contrary to defendant's contention, that part of the codefendant's statement is not admissible as a declaration against penal interest because it was not "disserving to the [codefendant]" (*People v Brensic*, 70 NY2d 9, 16, *mot to amend remittitur granted* 70 NY2d 722; *see generally People v Geoghegan*, 51 NY2d 45, 49). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish the underlying felony of attempted robbery and thus to support the conviction (*see People v Montanez*, 57 AD3d 1366, 1366-1367, *lv denied* 12 NY3d 857; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Curry*, 294 AD2d 608, 609-610, *lv denied* 98 NY2d 674; *see generally Bleakley*, 69 NY2d at 495). Finally, the sentence is not unduly harsh or severe.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

759.1

KA 09-00196

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SARA N. RODRIGUES, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (NICOLE L. KYLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered November 24, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (four counts), robbery in the second degree (six counts), burglary in the first degree (three counts), burglary in the second degree, assault in the second degree (two counts), conspiracy in the fourth degree, grand larceny in the fourth degree (three counts), criminal possession of stolen property in the fourth degree (three counts), petit larceny (four counts), criminal possession of stolen property in the fifth degree (four counts), unlawful imprisonment in the second degree (two counts) and making a false sworn statement in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of burglary in the first degree under count 12 of the indictment, assault in the second degree under counts 15 and 16 of the indictment and petit larceny under counts 20, 24, 28 and 30 of the indictment and dismissing counts 12, 15, 16, 20, 24, 28 and 30 of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, four counts of robbery in the first degree (Penal Law § 160.15 [3]); six counts of robbery in the second degree (§ 160.10 [1], [2] [a]); three counts of burglary in the first degree (§ 140.30 [2], [3]); one count of burglary in the second degree (§ 140.25 [1] [d]); two counts of assault in the second degree (§ 120.05 [6]); and four counts of petit larceny (§ 155.25). We reject the contention of defendant that the evidence is legally insufficient to establish her accessorial liability (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to the further contention of defendant, we conclude that the testimony of her accomplices was sufficiently corroborated (*see generally People v Besser*, 96 NY2d 136, 143-144; *People v Delgado*, 50 AD3d 915, 917).

We agree with defendant, however, that counts 15 and 16 of the indictment, for assault in the second degree, and counts 20, 24, 28 and 30, for petit larceny, must be dismissed as lesser inclusory concurrent counts. We therefore modify the judgment accordingly. Although defendant concedes that she failed to preserve that contention for our review, preservation is not required, and those counts "must be dismissed as a matter of law because 'a verdict of guilty upon the greater [count] is deemed a dismissal of every lesser [inclusory concurrent count]' " (*People v Moore*, 41 AD3d 1149, 1152, *lv denied* 9 NY3d 879, 992, quoting *People v Lee*, 39 NY2d 338, 390). "[C]oncurrent counts are inclusory when the offense charged in one is greater than that charged in the other and when the latter is a lesser offense included within the greater" (*People v Scott*, 61 AD3d 1348, 1350, *lv denied* 12 NY3d 920, 13 NY3d 799; *see* CPL 300.30 [4]). Here, assault in the second degree and petit larceny are lesser inclusory concurrent counts of robbery in the second degree (*see People v McTyere*, 90 AD2d 987; *People v Thorpe*, 72 AD2d 590; *see generally Scott*, 61 AD3d at 1350).

As the People correctly concede, we further conclude that defendant should have been convicted of only one of the two counts of burglary in the first degree under Penal Law § 140.30 (2). "Regardless of how many persons are injured by the defendant inside the dwelling, the defendant can . . . be convicted of [only] one count of burglary [in the first degree under section 140.30 (2) where] there has been only one entry" (*People v Perrin*, 56 AD2d 957, 958; *see also People v Daniels*, 165 AD2d 610, 614-615, *lv denied* 78 NY2d 1010). Consequently, count 12 of the indictment, for burglary in the first degree under section 140.30 (2), must be dismissed, and we therefore further modify the judgment accordingly.

Viewing the evidence in light of the elements of the crimes under the remaining counts as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The record belies the contention of defendant that she was penalized for exercising her right to trial (*see People v Pena*, 50 NY2d 400, 411-412, *rearg denied* 51 NY2d 770, *cert denied* 449 US 1087). The sentence with respect to the remaining counts is not unduly harsh or severe. We have considered the remaining contention of defendant with respect to her defense of duress and conclude that it is without merit.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

759

KA 09-00833

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL PRUCHNICKI, JR., DEFENDANT-APPELLANT.

SHAW & SHAW, P.C., HAMBURG (JAMES M. SHAW OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered April 9, 2009. The judgment convicted defendant, upon a nonjury verdict, of attempted rape in the first degree, sexual abuse in the first degree (two counts), and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of sexual abuse in the first degree under count three of the indictment and dismissing that count of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, one count of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]) and two counts of sexual abuse in the first degree (§ 130.65 [1]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, the appellate court must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, quoting *Bleakley*, 69 NY2d at 495).

Contrary to the contention of defendant, Supreme Court did not violate his constitutional right of confrontation by improperly curtailing his cross-examination of the victim concerning her possible motivation to lie (*see generally People v Chin*, 67 NY2d 22, 27-29). The court permitted defendant to inquire whether the victim knew before the incident in question that she was the subject of a Child

Protective Services (CPS) investigation and whether the victim had previously stated that her allegations were made in retaliation for that investigation. Inasmuch as defendant was afforded an opportunity to explore the victim's alleged bias or interest, there was no infringement of the right of confrontation (*see People v Valentine*, 48 AD3d 1268, 1269, *lv denied* 10 NY3d 871). The court also properly permitted the People to present the limited testimony of a CPS caseworker to rebut defendant's testimony that the victim was aware of the CPS investigation prior to reporting the sexual assault (*see People v Alvino*, 71 NY2d 233, 248).

We reject defendant's further contention that the court erred in admitting in evidence the testimony of the sister of the victim with respect to the victim's disclosure to her of the attempted rape. "[E]vidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place" (*People v McDaniel*, 81 NY2d 10, 16). To be admissible, the complaint must be made promptly " 'at the first suitable opportunity' " (*id.* at 17, quoting *People v O'Sullivan*, 104 NY 481, 486). "[P]romptness is a relative concept dependent on the facts" (*id.*) and, here, the testimony of the victim's sister established that the victim called her sister within 1½ hours of the incident (*cf. People v Workman*, 56 AD3d 1155, 1157, *lv denied* 12 NY3d 789). Although the victim had an opportunity to inform her mother of the incident prior to calling her sister, we conclude that the complaint was made at the first suitable opportunity in light of the testimony of the victim that she was embarrassed and knew that her mother would become angry if she was informed of the incident (*see People v Felix*, 32 AD3d 1177, *lv denied* 7 NY3d 925).

Defendant failed to preserve for our review all but one of his present objections to alleged instances of prosecutorial misconduct (*see generally People v Gibson*, 280 AD2d 903, *lv denied* 96 NY2d 862), and we conclude that any alleged misconduct was not so pervasive or egregious as to deprive defendant of a fair trial (*see People v Whaley*, 70 AD3d 570, 571; *People v Lombardi*, 68 AD3d 1765, *lv denied* 14 NY3d 802). Moreover, where, as here, "a case is tried without a jury, absent a showing of prejudice, the [court] is presumed to have considered only competent evidence adduced at trial in reaching the verdict" (*People v Concepcion*, 266 AD2d 227, *lv denied* 94 NY2d 917).

We agree with defendant, however, that count three of the indictment charges the same crime as count two, and count three therefore should be dismissed as multiplicitous (*see People v Moffitt*, 20 AD3d 687, 690-691, *lv denied* 5 NY3d 854; *People v Demetsenare*, 243 AD2d 777, 779-780, *lv denied* 91 NY2d 833). One of those two counts charging defendant with sexual abuse in the first degree was based upon his forcible touching of the victim's breast, and the other count was based upon his forcible touching of the victim's genital area. In view of the victim's testimony, however, we conclude that defendant's actions "constituted but a single, uninterrupted occurrence of forcible compulsion" (*Moffitt*, 20 AD3d at 690). We therefore modify the judgment by reversing that part convicting defendant of sexual

abuse in the first degree under count three of the indictment and dismissing that count of the indictment.

Defendant failed to preserve his remaining contentions for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

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

760

CA 10-00253

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

LISA EIBL, AS PARENT AND NATURAL GUARDIAN OF
TRAIVON EIBL, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN SNYDER, BARBARA CASTRICONE,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

LAW OFFICES OF LAURIE G. OGDEN, ROCHESTER (DAVID F. BOWEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (Tracey A. Bannister, J.), entered April 21, 2009 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendants Steven Snyder and Barbara Castricone for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her son when he was bitten by a dog in an apartment owned by Steven Snyder and Barbara Castricone (collectively, defendants). Supreme Court granted that part of the motion of defendants for summary judgment "with respect to the allegation that [they] had actual notice of the vicious propensities of the [dog in question]" and denied that part of the motion seeking summary judgment "to the extent that [they] had constructive notice of the vicious propensities of [that dog] . . . ." We agree with defendants that the court should have granted the motion in its entirety. We therefore reverse the order insofar as appealed from, grant the motion in its entirety and dismiss the complaint against defendants.

In support of their motion, defendants established that they had no actual or constructive notice that the dog in question had vicious propensities (*see Petrone v Fernandez*, 12 NY3d 546, 550; *Bernstein v Penny Whistle Toys, Inc.*, 10 NY3d 787), and plaintiff failed to raise a triable issue of fact in opposition (*see Yeostros v Jackson*, 258 AD2d 886). "The fact that others may have been on notice of the dog's

allegedly vicious [propensities] does not establish that" defendants, who were not aware of the presence of the dog in the apartment and had received no complaints with respect to the dog, were also on notice (*Smedley v Ellinwood*, 21 AD3d 676, 676). Finally, even assuming, arguendo, that plaintiff raised a triable issue of fact whether defendants had constructive knowledge that the dog was in the apartment, we conclude that "[k]nowledge of the existence of the dog, in and of itself, 'does not support the inference that [defendants] knew of its vicious propensities' " (*LePore v DiCarlo*, 272 AD2d 878, 879, *lv denied* 95 NY2d 761).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

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

761

CA 10-00156

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

JACQUELYN E. MURAD,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPHINE RUSSO, DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

CITY OF UTICA,
PLAINTIFF-APPELLANT-RESPONDENT,

V

JOSEPHINE RUSSO, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

LINDA SULLIVAN FATATA, CORPORATION COUNSEL, UTICA (ARMOND J. FESTINE OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (STEPHANIE A. PALMER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered July 2, 2009. The order, among other things, denied those parts of the motion of plaintiff in action No. 1 and the cross motion of plaintiff in action No. 2 seeking declarations concerning their entitlement to the proceeds of an insurance policy covering the defendant in action Nos. 1 and 2.

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

Memorandum: In these consolidated actions, Supreme Court, inter alia, denied those parts of the motion of Jacquelyn E. Murad, the plaintiff in action No. 1, and the cross motion of City of Utica, the plaintiff in action No. 2, seeking declarations concerning their entitlement to the proceeds of an automobile insurance policy covering the defendant in action Nos. 1 and 2. Murad was injured during the course of her duty as an officer of the Utica Police Department when the vehicle operated by defendant collided with Murad's vehicle. We affirm. "It is, of course, beyond our province to 'perform useless or futile acts,' and we are thus to refrain from 'resolv[ing] disputed legal questions unless [to do so] would have an immediate practical

effect on the conduct of the parties' " (*Burnett v Columbus McKinnon Corp.*, 69 AD3d 58, 64, quoting *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 530). Here, although the record establishes that defendant's insurer was amenable to settling the actions for the limits of the policy in question, it cannot be said with certainty that such settlements would occur. Consequently, the issue is not ripe for our review, and it would be "merely advisory" to grant the declaratory relief sought by plaintiffs (*New York Pub. Interest Research Group*, 42 NY2d at 531; *see Burnett*, 69 AD3d at 64).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

762

CA 09-01748

PRESENT: SMITH, J.P., FAHEY, CARNI, GREEN, 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,

V MEMORANDUM AND ORDER

BYRON W. BROWN, AS MAYOR OF CITY OF BUFFALO, H. MCCARTHY GIPSON, AS COMMISSIONER OF POLICE, AND CITY OF BUFFALO, RESPONDENTS-APPELLANTS. (APPEAL NO. 1.)

HODGSON RUSS LLP, BUFFALO (JOSEPH S. BROWN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LAW OFFICES OF W. JAMES SCHWAN, BUFFALO (W. JAMES SCHWAN OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered November 25, 2008. The order, inter alia, granted petitioners' application to enjoin respondents from implementing a certain program pending the decision of an arbitrator or December 18, 2008, whichever occurred first.

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

Memorandum: In appeal No. 1, respondents appeal from an order entered November 25, 2008 that, inter alia, granted petitioners' application to enjoin respondents from implementing a Field Training Officer Program within the police department of respondent City of Buffalo until such time as the arbitrator rendered a decision with respect to the grievances filed by petitioners or December 18, 2008, whichever occurred first. In appeal No. 2, respondents appeal from an order entered January 28, 2009 that, inter alia, continued the preliminary injunction granted by the November 25, 2008 order until such time as the arbitrator rendered a decision with respect to the grievances or December 18, 2009, whichever occurred first.

We dismiss appeal No. 1 inasmuch as the order appealed from has expired by its express terms, and thus the appeal is moot. We also

dismiss appeal No. 2 as moot for the same reason.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

763

CA 09-01749

PRESENT: SMITH, J.P., FAHEY, CARNI, GREEN, 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,

V MEMORANDUM AND ORDER

BYRON W. BROWN, AS MAYOR OF CITY OF BUFFALO, H. MCCARTHY GIPSON, AS COMMISSIONER OF POLICE, AND CITY OF BUFFALO, RESPONDENTS-APPELLANTS. (APPEAL NO. 2.)

HODGSON RUSS LLP, BUFFALO (JOSEPH S. BROWN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LAW OFFICES OF W. JAMES SCHWAN, BUFFALO (W. JAMES SCHWAN OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered January 28, 2009. The order, inter alia, continued a preliminary injunction pending the decision of an arbitrator or December 18, 2009, whichever occurred first.

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

Same Memorandum as in *Matter of Meegan v Brown* ([appeal No. 1] ___ AD3d ___ [June 11, 2010]).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

764

CA 10-00340

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

CLYDE COLEMAN AND VERTRELL COLEMAN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ISG LACKAWANNA SERVICES, LLC, ISG LACKAWANNA, LLC, AND ISG, INC.,
DEFENDANTS-RESPONDENTS.

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

DAMON MOREY LLP, BUFFALO (THOMAS J. DRURY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered April 20, 2009 in a personal injury action. The order granted defendants' motion for summary judgment and denied plaintiffs' cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the Labor Law § 241 (6) cause of action insofar as it is premised upon the alleged violation of 12 NYCRR 23-2.1 (b) and reinstating the derivative cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Clyde Coleman (plaintiff) when he was operating a diesel-powered water blasting unit (unit) at defendants' facility. We note at the outset that the only issues not abandoned by plaintiffs' appeal concern the Labor Law § 241 (6) cause of action insofar as it is premised upon the alleged violation of 12 NYCRR 23-1.10 (b) and 12 NYCRR 23-2.1 (b) (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

We reject the contention of plaintiffs that Supreme Court erred in granting that part of defendants' motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it is premised upon the alleged violation of 12 NYCRR 23-1.10 (b). Defendants met their burden of establishing that 12 NYCRR 23-1.10 (b) is not applicable to the facts of this case because the unit is not an electrical or pneumatic hand tool (*see Szafranski v Niagara Frontier Transp. Auth.*, 5 AD3d 1111, 1113). We agree with plaintiffs, however,

that the court erred in dismissing the Labor Law § 241 (6) cause of action insofar as it is premised upon the alleged violation of 12 NYCRR 23-2.1 (b), and we therefore modify the order accordingly. Section 241 (6) applies to "[a]ll areas in which . . . demolition work is being performed" and, pursuant to the Industrial Code, demolition work means "work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment" (12 NYCRR 23-1.4 [b] [16]; *see Wade v Atlantic Cooling Tower Servs., Inc*., 56 AD3d 547, 549; *Pino v Robert Martin Co.*, 22 AD3d 549, 551-552; *Lozo v Crown Zellerbach Corp*., 142 AD2d 949). Defendants failed to establish as a matter of law that plaintiff's work was not "incidental to or associated with the . . . dismantling" of the skin mill at their facility (*see Ruiz v 8600 Roll Rd.*, 190 AD2d 1030, 1031; *cf. Rosen v General Elec. Co.*, 204 AD2d 978; *Meehan v Mobil Oil Corp*., 184 AD2d 1021, *lv denied* 85 NY2d 804, *lv dismissed* 80 NY2d 925). Further, contrary to defendants' contention, 12 NYCRR 23-2.1 (b) is sufficiently specific to support the Labor Law § 241 (6) cause of action (*see Scally v Regional Indus. Partnership*, 9 AD3d 865, 868; *Kvandal v Westminister Presbyt. Socy. of Buffalo*, 254 AD2d 818), and defendants failed to establish that the regulation is not applicable to the facts of this case (*cf. Scally*, 9 AD3d at 868).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

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

768

CA 10-00234

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

ALYSIA J. LAUFFER AND KENNETH S. LAUFFER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JENNIFER L. MACEY AND PATRICIA A. MACEY,
DEFENDANTS-APPELLANTS.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JEFFREY FREEDMAN ATTORNEYS AT LAW, BUFFALO (BRIAN D. KNAUTH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered May 15, 2009 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

It is hereby ORDERED that the order 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: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Alysia J. Lauffer (plaintiff) when the motor vehicle she was operating was rear-ended by a vehicle owned by defendant Patricia A. Macey and operated by defendant Jennifer L. Macey. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under the four categories alleged in the complaint, as amplified by the bill of particulars, i.e., permanent loss of use, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories. We conclude that Supreme Court erred in granting the motion only insofar as plaintiffs alleged that plaintiff sustained a serious injury under the permanent loss of use category and that the court should have granted the motion in its entirety. Defendants met their initial burden on the motion by submitting an affirmed report of a physician who examined plaintiff at their request and concluded that there was no objective evidence that plaintiff sustained a serious injury as a result of the accident (*see e.g. McConnell v Freeman*, 52 AD3d 1190, 1191; *Lux v Jakson*, 52 AD3d 1253; *see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350; *Weaver v Town of Penfield*, 68 AD3d 1782, 1784). The certified medical records of one of plaintiff's treating physicians submitted by plaintiffs in opposition to the

motion were insufficient to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). None of the findings of that physician is based on objective evidence of an injury (*see e.g. Beaton v Jones*, 50 AD3d 1500, 1502; *Calucci v Baker*, 299 AD2d 897), and, in any event, to the extent that the physician concluded that plaintiff's symptoms were caused by the accident, that conclusion is speculative and conclusory (*see e.g. Alloway v Rodriguez*, 61 AD3d 591; *Innocent v Mensah*, 56 AD3d 379).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

769

CA 09-01406

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

FRANCES J. TAITT, PLAINTIFF-APPELLANT,

V ORDER

CHARLES D. SNELLING AND TIMOTHY BEEBE,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

GREEN & SEIFTER, ATTORNEYS, PLLC, SYRACUSE (JAMES L. SONNEBORN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SLYE & BURROWS, WATERTOWN (JAMES A. BURROWS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered May 29, 2009. The order denied the motion of plaintiff for judgment notwithstanding the verdict or, in the alternative, for a new trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

770

CA 09-01408

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

FRANCES J. TAITT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHARLES D. SNELLING AND TIMOTHY BEEBE,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

GREEN & SEIFTER, ATTORNEYS, PLLC, SYRACUSE (JAMES L. SONNEBORN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SLYE & BURROWS, WATERTOWN (JAMES A. BURROWS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered June 1, 2009. The judgment, upon a jury verdict, declared that defendant Charles D. Snelling is the owner of a certain parcel of real property.

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

Memorandum: Plaintiff appeals from a judgment entered upon a jury verdict declaring that Charles D. Snelling (defendant) is the owner of a disputed parcel of real property. Plaintiff failed to preserve for our review her contention that Supreme Court erred in admitting in evidence certain trial testimony of defendants in violation of the Dead Man's Statute (CPLR 4519), inasmuch as she failed to object to that testimony during trial (*see Matter of Myers*, 45 AD3d 955, 956-957). In any event, we cannot determine on the record before us whether defendant and plaintiff's deceased father-in-law participated in the kind of "personal transaction" required to disqualify defendant's testimony under the statute (CPLR 4519; *see Durazinski v Chandler*, 41 AD3d 918, 920; *see also Matter of Schrutt*, 206 AD2d 851, 852, *lv denied* 84 NY2d 810; *see generally Holcomb v Holcomb*, 95 NY 316, 325). Contrary to the further contention of plaintiff, the court properly denied her motion for judgment notwithstanding the verdict because defendant established by clear and convincing evidence that he adversely possessed the disputed property over a period of more than 20 years (*see Heumann v Old Forge Props., Inc.*, 34 AD3d 1204; *Chavoustie v Stone St. Baptist Church of Chaumont*, 171 AD2d 1055). The fact that defendant conceded in a letter to his attorney that he did not own the property at issue did not negate the element of hostility or otherwise divest him of title because that

statement was made subsequent to acquisition of title by adverse possession (*cf. City of Tonawanda v Ellicott Cr. Homeowners Assn.*, 86 AD2d 118, 124, *appeal dismissed* 58 NY2d 824).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

771

CA 10-00039

PRESENT: SMITH, J.P., FAHEY, GREEN, AND GORSKI, JJ.

C.P. WARD, INC., AND KBH CONSTRUCTION COMPANY, INC.,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

DELOITTE & TOUCHE LLP, AND DELOITTE & TOUCHE USA LLP,
DEFENDANTS-APPELLANTS-RESPONDENTS.

DELOITTE & TOUCHE LLP, AND DELOITTE & TOUCHE USA LLP,
THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

RICHARD A. ASH AND ANTHONY SCLAMO,
THIRD-PARTY DEFENDANTS-RESPONDENTS.

KRAMER LEVIN NAFTALIS & FRANKEL LLP, NEW YORK CITY (MICHAEL J. DELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

CAPUDER FAZIO GIACOIA LLP, NEW YORK CITY (DOUGLAS CAPUDER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS AND THIRD-PARTY DEFENDANT-RESPONDENT RICHARD A. ASH.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered September 17, 2009 in an accounting malpractice action. The order, among other things, granted in part defendants' motion for summary judgment and denied plaintiffs' cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion of defendants seeking summary judgment dismissing the second amended complaint in its entirety against defendant Deloitte & Touche USA LLP and dismissing the second amended complaint in its entirety against that defendant and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this accounting malpractice action seeking damages allegedly resulting from, inter alia, the failure of defendants-third-party plaintiffs (defendants) to adhere to applicable professional standards and to fulfill promises made to

plaintiffs in conducting the audit of plaintiffs' 1996 financial statements. We note at the outset that defendants made two motions each seeking different relief. We agree with defendants on their appeal that Supreme Court should have granted that part of their first motion seeking summary judgment dismissing the second amended complaint in its entirety against defendant Deloitte & Touche USA LLP (Deloitte USA), and we therefore modify the order accordingly. Defendants met their initial burden by submitting evidence that plaintiffs engaged only defendant Deloitte & Touche LLP (Deloitte) to audit their financial statements and that Deloitte alone conducted the audits (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiffs failed to raise a triable issue of fact whether Deloitte USA may be liable for the actions of Deloitte (*see generally Fresh Del Monte Produce N.V. v Eastbrook Caribe A.V.V.*, 44 AD3d 551, 552).

We reject the contention of defendants on their appeal, however, that the court should have granted that part of their motion seeking summary judgment dismissing the second amended complaint in its entirety against Deloitte inasmuch as defendants failed to establish Deloitte's entitlement to judgment as a matter of law. "It is well established . . . that [a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Atkins v United Ref. Holdings, Inc*., 71 AD3d 1459, 1459-1460 [internal quotation marks omitted]). Defendants submitted the letters of engagement sent by Deloitte to each plaintiff, pursuant to which it agreed to "evaluate the fairness of presentation" of plaintiffs' 1996 financial statements in conformity with generally accepted accounting principles (GAAP), to conduct the audits in accordance with generally accepted auditing standards (GAAS) and to "design [its] audit[s] to provide reasonable assurance of detecting errors and irregularities that are material to the financial statements." In support of their motion, however, defendants "failed to submit any expert or qualified testimony or proof to establish . . . compliance [by Deloitte] with the applicable standard of care or adherence to GAAP and GAAS as required to establish its entitlement to judgment in its favor as a matter of law" (*Cumis Ins. Socy. v Tooke*, 293 AD2d 794, 798). Indeed, defendants' own submissions raise triable issues of fact with respect to the adherence of Deloitte to professional standards and the terms of its engagements with plaintiffs. Contrary to the contention of defendants, Deloitte is not relieved of liability based upon the assurances of plaintiffs' officers concerning the accuracy of the financial statements (*see generally Collins v Esserman & Pelter*, 256 AD2d 754, 757; *National Sur. Corp. v Lybrand*, 256 App Div 226, 235-236). In addition, even assuming, arguendo, that we agree with defendants "that there were other proximate causes of [plaintiffs'] harm for which [Deloitte] was not responsible, [we conclude that such] circumstance[s] would not . . . establish that [its alleged] negligence was not also a proximate cause of [plaintiffs'] harm" (*Bachmann, Schwartz & Abramson v Advance Intl.*, 251 AD2d 252, 253). Defendants, moreover, failed to demonstrate that Deloitte's alleged failure to detect and report the errors and irregularities in the financial statements was not a proximate cause of the damages allegedly sustained by plaintiffs (*see DG Liquidation v Anchin, Block*

& Anchin, 300 AD2d 70). Finally, "while plaintiff[s'] obligation to come forward with expert evidence on the duty of care in opposition was not triggered [because those parts of the motion with respect to the first and second causes of action against Deloitte were] not properly supported, plaintiff[s] in fact submitted [expert] affidavits [and reports that] supported [their] position that [Deloitte] departed from the requisite standard of care in performing the audits, creating a question of fact on that issue" (*Cumis Ins. Socy.*, 293 AD2d at 798-799).

Contrary to the further contention of defendants on their appeal, we conclude that the court properly denied that part of their motion to strike the reports of plaintiffs' experts. We reject defendants' contention that those reports are without foundation, speculative or lacking probative value (*see Edwards v St. Elizabeth Med. Ctr.*, 72 AD3d 1595). Contrary to defendants' contention, there is no basis for striking those reports for plaintiffs' failure to comply with CPLR 3101 (d) (1) (i) "where there is no evidence of intentional or willful failure to disclose and no prejudice to [defendants]" (*Ruzycki v Baker*, 9 AD3d 854, 855). The court also properly denied that part of defendants' motion seeking to strike the claims with respect to Deloitte's alleged errors in connection with the accounting of equipment repairs. Defendants failed to demonstrate any prejudice resulting from plaintiffs' delay in responding to their discovery demands concerning those claims (*see generally Schaaf v Pork Chop, Inc.*, 24 AD3d 1277). We have examined defendants' remaining contentions on their appeal and conclude that none has merit.

We reject the contention of plaintiffs on their cross appeal that the court erred in denying those parts of their cross motion seeking partial summary judgment dismissing defendants' fourth, fifth and sixth counterclaims based on "claims for which [defendants] have been able to produce working papers for the incomplete 1997 audit" of plaintiffs' financial statements. Although it is undisputed that Deloitte destroyed documents relating to that audit, defendants submitted evidence in opposition to the cross motion establishing that Deloitte did so before the instant action was commenced, " 'in good faith and pursuant to its normal business practices' " (*Woodhouse v Bombardier Motor Corp. of Am.*, 5 AD3d 1029, 1030).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

772

CA 10-00109

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

JON DENNIS FERRIS, SR.
AND SONJA FERRIS, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BENBOW CHEMICAL PACKAGING, INC.,
DEFENDANT-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

PORTER NORDBY HOWE LLP, SYRACUSE (ERIC C. NORDBY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered September 17, 2009 in a personal injury action. The order granted plaintiffs' motion for partial summary judgment.

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 sustained by Jon Dennis Ferris, Sr. (plaintiff). We conclude that Supreme Court properly granted plaintiffs' motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action. At the time of the accident, plaintiff was installing a pipe system for cleaning defendant's cylindrical storage tanks. Plaintiff was working on an A-frame ladder, which he had leaned against one of the tanks in the closed position, when the ladder partially slid out from underneath him. The ladder stopped sliding when it reached a seam in the concrete floor, causing the rung on which plaintiff was standing to break and plaintiff to fall. Plaintiffs met their initial burden of establishing "as a matter of law that [plaintiff] was injured as the result of a fall from an elevated work site and that defendant[] failed to provide a sufficient safety device" (*Aton v Syracuse Univ.*, 24 AD3d 1315, 1316). In support of the motion, plaintiffs submitted the deposition testimony of plaintiff, in which he testified that there were no operable safety devices available for his use on the work site that day. In opposition, defendant failed to raise a triable issue of fact whether plaintiff's own actions were the sole proximate cause of the accident (*see generally Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39; *Lovall v Graves Bros., Inc.*, 63

AD3d 1528, 1529). Contrary to defendant's contention, whether plaintiff was negligent in using the A-frame ladder in the closed position is irrelevant inasmuch as "contributory negligence will not exonerate a defendant who has violated [Labor Law § 240 (1)] and proximately caused a plaintiff's injury" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286; *see Whalen v ExxonMobil Oil Corp.*, 50 AD3d 1553).

We reject defendant's further contention that plaintiff was not engaged in an activity protected by Labor Law § 240 (1) at the time of the accident. Plaintiff's installation of a pipe system for cleaning the tanks constituted a significant physical change to the tanks that went beyond routine maintenance, and thus plaintiff was engaged in "altering" structures within the meaning of the statute (§ 240 [1]; *see Joblon v Solow*, 91 NY2d 457, 465; *Weininger v Hagedorn & Co.*, 91 NY2d 958, 959-960, *rearg denied* 92 NY2d 875).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

775

KA 10-00291

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHAWN M. ESSLER, DEFENDANT-APPELLANT.

CHARLES T. NOCE, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered May 7, 2009. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, as a class E felony.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

776

KA 09-01368

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RYAN M.E., DEFENDANT-APPELLANT.

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

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

Appeal from an adjudication of the Genesee County Court (Robert C. Noonan, J.), rendered June 22, 2009. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

777

KA 09-00793

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSEPH VEGA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered August 28, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

778

KA 09-00292

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MONTALVO, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered January 8, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing points under the risk factor for failure to accept responsibility and refusal of treatment. The case summary indicated that defendant believed that the victim fabricated the accusations and that defendant was removed from the sex offender treatment program for disciplinary reasons. The court properly relied on the case summary, "rather than upon the defendant's statements to the contrary, in finding that the prosecution proved by clear and convincing evidence that the defendant not only failed to accept responsibility for his crime, but also that he refused treatment" (*People v Mitchell*, 300 AD2d 377, 377, *lv denied* 99 NY2d 510). Even assuming, arguendo, that the court erred in assessing points under that risk factor, we conclude that defendant's presumptive classification as a level three risk would not change (*see People v Clark*, 66 AD3d 1366, *lv denied* 13 NY3d 713). Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level and, in any event, that contention lacks merit (*see id.* at 1366-1367; *People v Regan*, 46 AD3d 1434, 1435).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

779

KA 03-02419

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE GUITIERREZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), rendered May 15, 2003. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]). The record does not support defendant's contention that Supreme Court limited the jury to considering defendant's guilt under a theory of accessorial liability only. We note that, even if the court had done so, defendant would not have been prejudiced by that limitation inasmuch as the court would have removed the possibility of conviction as a principal, leaving only one theory of liability, i.e., accomplice liability, under which defendant could be convicted (*cf. People v Dockery*, 272 AD2d 247, 248, *lv denied* 95 NY2d 934). We reject defendant's further contention that the court erred in charging a theory of accessorial liability, in view of the fact that the evidence presented at trial supports that theory (*see generally People v Rivera*, 84 NY2d 766, 769-770; *People v Duncan*, 46 NY2d 74, 79-80, *rearg denied* 46 NY2d 940, *cert denied* 442 US 910, *rearg dismissed* 56 NY2d 646). Contrary to defendant's further contention, the court did not abuse its discretion in permitting the prosecutor to recall a witness well before the close of the People's case and, after a limited cross-examination of that witness, to address an identification issue that the prosecutor failed to address during his direct examination of that witness (*see People v Guiterrez*, 270 AD2d 184; *People v Ketchmore*, 132 AD2d 889, 891 n, *lv denied* 70 NY2d 752, 756; *see generally People v Dennis*, 55 AD3d 385, *lv denied* 12 NY3d

783).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

780

KA 09-00160

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT L. WILLIAMS, DEFENDANT-APPELLANT.

E. ROBERT FUSSELL P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered October 16, 2008. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that County Court erred in denying his request to include an instruction on the agency defense in the court's jury charge. We reject that contention, inasmuch as "there is no reasonable view of the evidence that supports the inference that defendant, in selling narcotics, was acting solely on behalf of the buyer such as to be a mere extension or instrumentality of the buyer" (*People v Pardner*, 37 AD3d 1069, 1070, *lv denied* 9 NY3d 849 [internal quotation marks omitted]; *see People v Ortiz*, 76 NY2d 446, 448, *remittitur amended* 77 NY2d 821). Indeed, the evidence presented at trial established that defendant told the buyer to call "any time [he] need[ed] something," and defendant offered his home as a potential meeting place for a second drug transaction (*see People v Croley*, 216 AD2d 690, *lv denied* 86 NY2d 793). In addition, the evidence at trial established that defendant directly profited from the drug sale (*see Ortiz*, 76 NY2d at 449; *People v Hunt*, 50 AD3d 1246, 1247-1248, *lv denied* 11 NY3d 789; *Croley*, 216 AD2d 690).

Defendant failed to preserve for our review his contention that Penal Law § 220.39 (1) is unconstitutional (*see* CPL 470.05 [2]) and, in any event, that contention is without merit (*see People v Broadie*,

37 NY2d 100, *cert denied* 423 US 950; *People v Chillis*, 60 AD2d 968, 969).

Finally, the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

781

KA 08-02242

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE SAFFORD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered April 3, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]) in connection with the armed robbery of a convenience store. Contrary to the contention of defendant, the evidence is legally sufficient to establish his identity as the perpetrator of the crime based solely on the fact that his fingerprints were found on a doorknob in a location of the convenience store that generally is not open to the public. "Fingerprint evidence alone is legally sufficient evidence to support a conviction under appropriate circumstances" (*People v Howell*, 46 AD3d 1464, 1464, *lv denied* 10 NY3d 841), and we conclude that such circumstances exist here. Although the sole eyewitness to the robbery was unable to identify defendant as the perpetrator, we conclude that the presence of defendant's fingerprints on the doorknob "may not be accounted for by any hypothesis of defendant's innocence" (*People v Rusho*, 291 AD2d 855, 856, *lv denied* 98 NY2d 680). Thus, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We note that, at trial, defendant did not dispute that his fingerprints were on the doorknob inside the store. Rather, the defense theory was that defendant touched the doorknob

when he was in the store applying for a job on a date prior to the robbery. There was no evidence to support that theory, however, and the jury was free to credit the theory of the People over that of the defense in any event (*see generally id.*).

Defendant failed to preserve for our review his contention that Supreme Court erred in failing to conduct a hearing to determine the chain of custody of a store surveillance videotape that was no longer viewable by the time of trial. We note with respect to the videotape that the People did not seek to have it admitted in evidence at trial, although they did present testimony concerning the videotape. In any event, any failure by the People to preserve the videotape so that it was viewable at trial was sufficiently addressed by the adverse inference charge given by the court (*see generally People v English*, 277 AD2d 1021, *lv denied* 96 NY2d 783). Indeed, defendant did not object to the charge as given, and he did not request any further relief.

Defendant further contends that he was deprived of his right to effective assistance of counsel because defense counsel did not honor his request to present the testimony of an alleged alibi witness. We reject that contention, inasmuch as the record demonstrates that there were legitimate strategic reasons for defense counsel's refusal to call that proposed witness (*see People v Cancer*, 16 AD3d 835, 840, *lv denied* 5 NY3d 826). Also contrary to the contention of defendant, defense counsel's single sarcastic reference, outside the presence of the jury, to the "infinite wisdom" of defendant in wanting to present alibi witnesses did not " 'seriously compromise[]' " his right to a fair trial (*People v Clark*, 6 AD3d 1066, 1067, *lv denied* 3 NY3d 638), nor did defense counsel thereby become a witness against defendant (*cf*. *People v Kellar*, 213 AD2d 1063). Finally, the sentence is not unduly harsh or severe.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

783

CAF 09-00816

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

IN THE MATTER OF SEAN H. AND GREGORY H.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KIESHA H., RESPONDENT-APPELLANT.

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

DENISE J. MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

ABBIE GOLDBAS, ATTORNEY FOR THE CHILDREN, UTICA, FOR SEAN H. AND GREGORY H.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered March 3, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent.

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

Memorandum: Respondent mother appeals from an order revoking a suspended judgment and terminating her parental rights with respect to her daughter and son who are the subjects of this proceeding. Contrary to the mother's contention, petitioner established by a preponderance of the evidence that the mother violated several conditions of the suspended judgment and that termination of her parental rights was in the best interests of the children (*see Matter of Giovanni K.*, 68 AD3d 1766, *lv denied* 14 NY3d 707; *Matter of Christopher J.*, 63 AD3d 1662, *lv denied* 13 NY3d 706). We reject the further contention of the mother that Family Court erred in denying her request for post-termination visitation and, in any event, should have received input from the children concerning her request before denying it. We note that the evidence before the court established that the young children loved their mother, missed her, and wanted to visit with her, and thus there was no need for the court to seek input from the children to determine their wishes (*cf. Matter of Derick Shea D.*, 22 AD3d 753). The mother failed, however, to establish that it was in the best interests of the children to have post-termination visitation with her (*see Matter of Diana M.T.*, 57 AD3d 1492, 1493, *lv denied* 12 NY3d 708). Indeed, because of the mother's actions, the children had visited with the mother only twice in the eight-month

period prior to the hearing.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

784

CAF 09-01572

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

IN THE MATTER OF MICAH H.

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

CONSTANCE H., RESPONDENT-APPELLANT.

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

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

MICHELLE R. POWERS, ATTORNEY FOR THE CHILD, SYRACUSE, FOR MICAH H.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered June 26, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her child. Contrary to the mother's contention, the record supports the determination of Family Court that a suspended judgment, i.e., "a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311), was not in the child's best interests (*see generally Matter of Shadazia W.*, 52 AD3d 1330, 1331, *lv denied* 11 NY3d 706; *Matter of Da'Nasjeion T.*, 32 AD3d 1242). Contrary to the further contention of the mother, the court properly denied her request for post-termination contact, inasmuch as she "failed to establish that such contact would be in the best interests of the child[ ]" (*Matter of Diana M.T.*, 57 AD3d 1492, 1493, *lv denied* 12 NY3d 708; *see Matter of Christopher J.*, 60 AD3d 1402).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

787

CAF 09-02630

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

IN THE MATTER OF APRIL J. SUTTON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH E. SUTTON, RESPONDENT-APPELLANT.

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

MARY M. IOCOVOZZI, HERKIMER, FOR PETITIONER-RESPONDENT.

TIMOTHY A. ROULAN, ATTORNEY FOR THE CHILDREN, ILION, FOR ISABELLA R.S. AND AMBER J.S.

Appeal from an order of the Family Court, Herkimer County (Henry A. LaRaia, J.), entered May 15, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded sole custody of the parties' children to petitioner.

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

Memorandum: Respondent father contends on appeal that Family Court erred in granting the petition seeking to modify a New York custody order pursuant to which the parties had joint custody of the parties' twin daughters, and the father had primary physical residence of the children in Virginia, where he resides. By the order on appeal, the court awarded petitioner mother sole custody of the children, with visitation to the father. The mother resides in New York. Contrary to the father's contention, the court did not err in concluding that it retained jurisdiction over the proceeding pursuant to Domestic Relations Law § 76-a. Although the children necessarily resided primarily in Virginia with their father, they visited the mother in New York several weeks each year. In addition, the children visited regularly with other relatives in New York and, shortly before the mother commenced this proceeding, the father filed a petition in the same court in New York seeking to modify child support. Thus, the children continued to have a "significant connection with this state" (§ 76-a [1] [a]; *see Bjornson v Bjornson*, 20 AD3d 497).

We also reject the father's contention that the court should have dismissed the petition on the ground that New York is an inconvenient forum (*see* Domestic Relations Law § 76-f). Although the record does not reflect that the court properly considered the requisite statutory

factors pursuant to section 76-f, we need not remit the matter to Family Court to do so because the record is sufficient for us to consider those factors (*cf*. *Schumaker v Opperman*, 187 AD2d 1033). Upon doing so, we conclude that New York is not an inconvenient forum and that Virginia is not a "more appropriate forum" (§ 76-f [3]). We note in particular that there was evidence at the hearing that the children were subject to mistreatment by the father in Virginia (§ 76-f [2] [a]), and there was substantial evidence in this state from which to make a custody determination inasmuch as the children spent a significant amount of time in New York (§ 76-f [2] [b], [f]). Moreover, psychological evaluations conducted in Virginia were admitted in evidence at the hearing, the Attorney for the Children traveled to Virginia to meet with the father and other individuals with knowledge of the children, and the court was able to conduct a *Lincoln* hearing with the children in New York. We further note that, although the court gave the father permission to conduct depositions of witnesses from Virginia, the father did not avail himself of that opportunity and, significantly, he also failed to seek the permission of the court to allow witnesses from Virginia "to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state" (§ 75-j [2]). Moreover, the court was familiar with the case because it had issued the prior custody order and thus was in a position to decide the custody issue expeditiously, and no custody petitions had been filed in Virginia (§ 76-f [2] [g], [h]).

We reject the father's contention that the court erred in admitting hearsay statements of the children in evidence at the hearing. "It is well settled that there is 'an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family [Court] Act § 1046 (a) (vi)' . . ., where, as here, the statements are corroborated" (*Matter of Mateo v Tuttle*, 26 AD3d 731, 732). Finally, contrary to the father's contention, there is ample support in the record for the court's determination that it is in the best interests of the children to award sole custody to the mother.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

790

CA 09-02276

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

IN THE MATTER OF NADIA TAFT AND CATHY MOYER,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

VILLAGE OF NEWARK PLANNING BOARD,
RESPONDENT-APPELLANT.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (PETER J. WEISHAAR OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Wayne County (Daniel J. Doyle, J.), entered July 9, 2009 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted in part the petition.

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

Memorandum: Petitioners commenced this proceeding seeking to annul respondent's determination denying their application for site plan approval of a 4,200 square-foot residence in an R-1 district to be used as a residence for the elderly, with 10 residents in addition to petitioners residing there. In seeking site plan approval, petitioners relied on section 170-8 of the Newark Code, which sets forth the permitted uses in such a district. In particular, they relied on subdivision (G), which allows "[o]ther uses [apart from, e.g., a one-family dwelling, a professional residence-office, or a school] upon the finding of [respondent] that such use is of the same general character as those permitted or which will not be detrimental to the other uses within the district or to the adjoining land uses." Supreme Court properly granted the petition to the extent of determining that the denial of the application was "arbitrary, capricious and an unwarranted exercise of [respondent's] discretion," and remitted the matter to respondent for further proceedings on the site plan application "limited solely to the factors set forth in Section 134-3 of the Newark Code." That section of the Newark Code is located in Chapter 134, entitled "Site Plan Review," and it sets forth the "Factors for consideration." We agree with the court that respondent's findings that the proposed use would be detrimental to the other uses in the district or to the adjoining land uses were not supported by the record and were therefore arbitrary and capricious (*see Matter of Lodge Hotel, Inc. v Town of Erwin Planning Bd.*, 62 AD3d 1257; *Matter of Greenlawn CVS v Planning Bd. of Town of Huntington*,

280 AD2d 601, 602, *lv denied* 96 NY2d 716). Where, as here, a denial is " 'based upon general objections or conclusory findings without evidentiary support in the record,' " the denial must be set aside as arbitrary and capricious (*Matter of Dodson v Planning Bd. of Town of Highlands*, 163 AD2d 804, 807; *see Matter of DeMarco v Village of Elbridge*, 251 AD2d 991, 992).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

791

CA 10-00106

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

PATRICIA J. FALK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRUCE R. FALK, DEFENDANT-APPELLANT.

PALMER, MURPHY & TRIPI, BUFFALO (THOMAS ALLAN PALMER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERYL A. BERZER, AMHERST (THOMAS R. LOCHNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 25, 2009. The order denied the motion of defendant to vacate the economic provisions of a judgment of divorce.

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

Memorandum: We affirm the order denying defendant's motion seeking to vacate the economic provisions of the judgment of divorce, but our reasoning differs from that of Supreme Court. The judgment of divorce incorporated but did not merge the parties' stipulation and, because the motion sought to revise the stipulation, the court erred in denying the motion on the merits. The court instead "should have denied the motion on the ground that 'a motion is not the proper vehicle for challenging a [stipulation] incorporated but not merged in[ ] a divorce judgment,' " and defendant should have commenced a plenary action seeking recission or reformation of the stipulation (*Gartley v Gartley*, 15 AD3d 995, 996).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

792

CA 09-02267

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

RICHARD LYMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST AND TOWN OF AMHERST POLICE DEPARTMENT, DEFENDANTS-RESPONDENTS.

SARLES FREY & JOSEPH, WILLIAMSVILLE (PHILIP A. MILCH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 13, 2009 in an action for, inter alia, false arrest. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for false arrest and imprisonment, as well as malicious prosecution, resulting from his arrest, upon the issuance of a warrant, for harassment in the second degree and assault in the third degree. We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint.

With respect to plaintiff's claim for false arrest, it is well established that "[a]n arrest made pursuant to a warrant valid on its face and issued by a court having jurisdiction of the crime and person is privileged" (*Boose v City of Rochester*, 71 AD2d 59, 66). Furthermore, with respect to false imprisonment, "[a] necessary element of [such a claim] is that the confinement was not privileged . . . A detention, otherwise unlawful, is privileged where the confinement was by arrest under a valid process issued by a court having jurisdiction" (*Davis v City of Syracuse*, 66 NY2d 840, 842 [internal quotation marks omitted]). Contrary to the contention of plaintiff, defendants established that the warrant for plaintiff's arrest was valid on its face, and plaintiff failed to raise a triable issue of fact in opposition. The warrant complied with the requirements of CPL 120.10 (2) (*see Boose*, 71 AD2d at 66), and plaintiff has not alleged that the issuing court lacked jurisdiction.

With respect to plaintiff's claim for malicious prosecution, defendants met their initial burden by establishing that plaintiff's arrest was supported by probable cause, the lack of which is a necessary element of a claim for malicious prosecution (*see Boose*, 71 AD2d at 65), and plaintiff failed to raise a triable issue of fact in opposition. "Where a warrant of arrest is issued by a court of competent jurisdiction, there is 'a presumption that the arrest was issued on probable cause' " (*Chase v Town of Camillus*, 247 AD2d 851, 852, quoting *Broughton v State of New York*, 37 NY2d 451, 458, *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929). The presumption of probable cause "can be overcome only upon a showing of fraud, perjury or the withholding of evidence" (*Brown v Roland*, 215 AD2d 1000, 1001, *lv dismissed* 87 NY2d 861), and plaintiff failed to make any such showing. Moreover, "information provided by an identified citizen accusing another of a crime is legally sufficient to provide the police with probable cause to arrest" (*People v Banks*, 151 AD2d 491, 491, *lv denied* 74 NY2d 805). Here, the application for an arrest warrant was supported by, inter alia, accusations made by identified citizen informants, a newspaper article detailing an earlier incident of domestic violence involving plaintiff, and a telephone call from an alleged doctor concerning plaintiff's purportedly violent nature. That evidence was sufficient to establish probable cause, even in the absence of the issuance of the warrant (*see generally Iorio v City of New York*, 19 AD3d 452; *Pomento v City of Rome*, 231 AD2d 875, 876-877).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

794

CA 09-02639

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

RODNEY GOLDEN AND AMY GOLDEN,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

JAMES P. BROWN AND LISA BROWN,
DEFENDANTS-APPELLANTS-RESPONDENTS.

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

BARRY J. DONOHUE, TONAWANDA, FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered October 26, 2009 in a personal injury action. The order, among other things, denied defendants' motion for summary judgment.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

795

KA 09-01201

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LICIA A. WALLACE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (William J. Watson, A.J.), rendered May 18, 2009. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

796

KA 09-00277

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PATRICK R. NILSEN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered January 15, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

798

KA 08-02469

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERT L. KIRKUP, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 22, 2008. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the second degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

799

KA 08-02609

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TYSOMOE T. GILLIAM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 14, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

800

KA 08-01374

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ORLANDO YELDER, JR., DEFENDANT-APPELLANT.

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

ORLANDO YELDER, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered January 17, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

801

KA 09-00540

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIUS HARRIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 11, 2009. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that County Court erred in refusing to suppress a witness's identification of defendant from a photo array and defendant's statements to the police. We reject that contention. The photo array was not unduly suggestive inasmuch as it did not "create a substantial likelihood that the defendant would be singled out for identification" (*People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833). We further conclude that defendant was not in custody at the time he made the statements to the police (*see People v Sanderson*, 68 AD3d 1716; *see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Defense counsel advised the court that he was not requesting a jury charge with respect to the voluntariness of defendant's statements to the police, and defendant therefore waived his further contention that he was deprived of due process by the court's failure to give such a charge (*see generally People v Carter*, 38 AD3d 1291).

The court properly determined that the inmate to whom defendant spoke concerning the crime "was not acting as an agent of the government because he was working independently of the prosecution and the information was not sought by the prosecutor but, rather, was passively received by the prosecutor" (*People v Davis*, 38 AD3d 1170, 1171, *lv denied* 9 NY3d 842, *cert denied* 552 US 1065). Defendant's contention that the evidence is not legally sufficient to support the

conviction is not preserved for our review (*see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). Defendant also failed to preserve for our review his contention that the court erred in failing to afford him youthful offender status inasmuch as he never requested youthful offender status (*see People v Ficchi*, 64 AD3d 1195, *lv denied* 13 NY3d 859; *see generally People v McGowen*, 42 NY2d 905, 906, *rearg denied* 42 NY2d 1015).

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

802

KA 10-00158

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

THOMAS R. KENNEDY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered April 29, 2009. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

803

KA 09-00274

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANKIE L. LOUDER, III, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (MELVIN BRESSLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered February 3, 2009. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that the cocaine discovered during a search of defendant's jail cell constituted dangerous contraband (*see People v Machuca*, 45 AD3d 1043, 1044, *lv denied* 10 NY3d 813). Defendant failed to preserve for our review his contention that the verdict is repugnant by failing to object to the verdict on that ground before the jury was discharged (*see People v Alfaro*, 66 NY2d 985, 987). 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]). Contrary to the further contention of defendant, County Court did not abuse its discretion in limiting his cross-examination of a prosecution witness (*see People v Ward*, 27 AD3d 1119, *lv denied* 7 NY3d 819, 871). Finally, the sentence is not unduly harsh or severe.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

804

KA 07-01488

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER M. MANCUSO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered May 1, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

805

CAF 09-00876

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

IN THE MATTER OF ELIJAH D.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ALLISON D., RESPONDENT-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR ELIJAH D.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered April 21, 2009 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, terminated the parental rights of respondent.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her son on the ground of permanent neglect. The child was placed in foster care 10 days after his birth as a result of positive toxicology reports indicating that a variety of substances were found in his system at birth, including prescribed medication that the mother ingested during her pregnancy. Contrary to the mother's contention, Family Court did not abuse its discretion in refusing to enter a suspended judgment (*see Matter of Arella D.P.-D.*, 35 AD3d 1222, *lv denied* 8 NY3d 809). Although the mother had made progress in completing the requirements of petitioner's plan for services and had discontinued the use of prescribed pain medication, that progress was made after the petition was filed, and she failed to complete those requirements during the 10 months from the time the petition was filed and the hearing was concluded (*cf. Matter of Christopher C.*, 58 AD3d 622, 623-624). The record supports our conclusion that " '[t]he progress made by [the mother] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child's unsettled familial status' " (*Matter of Roystar T.*, 72 AD3d 1569, 1569). The court's determination that it was in the child's best interests to be adopted by the foster parents with whom he had lived since his birth rather

than to be returned to the mother is entitled to great deference (*see Matter of Kyle S.*, 11 AD3d 935).

We reject the further contention of the mother that she was denied effective assistance of counsel. It is axiomatic that, "because the potential consequences are so drastic, the Family Court Act 'affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings' " (*Matter of James R.*, 238 AD2d 962, 963; *see Matter of Sarah A.*, 60 AD3d 1293, 1294-1295). The record establishes that the mother's attorney effectively cross-examined petitioner's witnesses. Furthermore, the mother's attorney called several witnesses and effectively demonstrated that the inability of the mother to care for her son was related to prescribed pain medication, that she was no longer taking that medication, that she had progressed in completing the requirements of petitioner's plan for services and that she visited her son consistently in the several months preceding the dispositional determination. We conclude that the mother failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" and that the mother received meaningful representation (*People v Benevento*, 91 NY2d 708, 712; *see generally James R.*, 238 AD2d 962).

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

806

CAF 09-01170

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

IN THE MATTER OF LAURA L. HORN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JEFFREY H. HORN, RESPONDENT-RESPONDENT.

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

GERALD J. VELLA, SPRINGVILLE, FOR RESPONDENT-RESPONDENT.

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILDREN, FREDONIA, FOR MITCHELL H., NATHANIEL H., OLIVIA H., CHRISTIAN H. AND HANNAH H.

Appeal from an order of the Family Court, Cattaraugus County (Lynn L. Hartley, J.H.O.), entered February 23, 2009 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion and dismissed the petition.

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

Memorandum: Petitioner mother appeals from an order dismissing, without prejudice, her petition seeking to modify a prior custody order entered upon consent of the parties. Contrary to the contention of the mother, Family Court properly granted respondent father's motion to dismiss the petition. "A party seeking a change in an established custody arrangement must show 'a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child' " (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417; *see Matter of Chrysler v Fabian*, 66 AD3d 1446, *lv denied* 13 NY3d 715) and, here, the mother failed to meet that burden. The court should not change an existing custody arrangement "merely because of changes in marital status, economic circumstances or improvements in moral or psychological adjustment, at least so long as the custodial parent has not been shown to be unfit, or perhaps less fit, to continue as the proper custodian" (*Obey v Degling*, 37 NY2d 768, 770; *see Di Fiore*, 2 AD3d 1417; *Fox v Fox*, 177 AD2d 209, 211). We conclude that the court's determination has a sound and substantial basis in the record, and we therefore will not disturb it (*see Matter of James D. v Tammy W.*, 45 AD3d 1358).

Finally, the record before us does not establish whether a

conflict of interest existed with respect to the attorney for the children's representation of all five children in question.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

808

CAF 09-00627

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

IN THE MATTER OF DEVRE S. AND DYLAN C.

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

DANNEN S., RESPONDENT,
AND CARLEE C., RESPONDENT-APPELLANT.

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR DEVRE S. AND DYLAN C.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered March 17, 2009 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, adjudged that respondent Carlee C. abused and neglected the subject children.

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

Memorandum: Respondent mother appeals from an order adjudging that respondents abused and neglected their two-week-old child and derivatively abused and neglected their 18-month-old child. At the outset, we reject the mother's contention that gaps in the transcript of the fact-finding hearing resulting from audibility problems are sufficiently significant to preclude meaningful appellate review (*see Matter of Savage v Cota*, 66 AD3d 1491; *cf. Matter of Jordal v Jordal*, 193 AD2d 1102). We reject the mother's further contention that the evidence is legally insufficient to support Family Court's findings. Petitioner presented the testimony of a physician establishing that the younger child sustained a fracture of the left humerus and a laceration of the liver and that none of the explanations offered by respondents was consistent with the nature and severity of those injuries. Petitioner therefore established a prima facie case of child abuse and neglect with respect to the younger child (*see* Family Ct Act § 1046 [a] [ii]), and the mother failed to rebut the presumption of parental responsibility (*see Matter of Philip M.*, 82 NY2d 238, 245-246). Petitioner also established by a preponderance of the evidence that the older child was derivatively abused and

neglected, inasmuch as the abuse and neglect of the younger child "is so closely connected with the care of [the older] child as to indicate that [he] is equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374, *cert denied* 540 US 1059). The abuse and neglect of the younger child further "demonstrates such an impaired level of judgment by the [mother] as to create a substantial risk of harm for any child in her care" (*Matter of Aaron McC.*, 65 AD3d 1149, 1150).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

809

CA 09-01667

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

KIMBERLY A. TRATT, PLAINTIFF-RESPONDENT,

V ORDER

COUNTY OF CAYUGA, COUNTY OF CAYUGA TREASURER'S OFFICE, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (MICHAEL J. LIVOLSI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered July 1, 2009. The order, insofar as appealed from, denied in part the motion of defendants County of Cayuga and County of Cayuga Treasurer's Office to dismiss the complaint against them.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

810

CA 10-00124

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, AND GREEN, JJ.

KENNETH L. HARRIS, PLAINTIFF-RESPONDENT,

V ORDER

CITY OF BUFFALO, BUFFALO PUBLIC SCHOOLS, BOARD OF EDUCATION OF CITY OF BUFFALO, LP CIMINELLI, INC., SCRUFARI CONSTRUCTION COMPANY, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered October 22, 2009. The order, inter alia, granted the motion of plaintiff for partial summary judgment.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on March 12, 2010,

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

811

CA 10-00162

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

GEORGE KONSTANTINOU, AS ADMINISTRATOR OF THE ESTATE OF STAVROS KONSTANTINOU, DECEASED, AND AS ADMINISTRATOR OF THE ESTATE OF LORIN KONSTANTINOU, DECEASED, PLAINTIFF-APPELLANT,

V

PHOENIX INSURANCE COMPANY, DEFENDANT-RESPONDENT.

MEMORANDUM AND ORDER

ANTHONY J. VILLANI, P.C., LYONS (ANTHONY J. VILLANI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Dennis M. Kehoe, A.J.), entered June 2, 2009. The order denied the motion of plaintiff for summary judgment and granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: This action arises from a motor vehicle accident that occurred when David Thurston, who was operating a Chevrolet Celebrity (Celebrity) owned and insured by his sister, Tynette Thurston, crashed into a vehicle driven by decedent Stavros Konstantinou and in which decedent Lorin Konstantinou was a passenger. Lorin Konstantinou sustained serious injuries that resulted in death, and Stavros Konstantinou sustained serious injuries but later died of unrelated causes. Stavros Konstantinou, individually and as administrator of Lorin Konstantinou's estate, commenced an action against, inter alia, the Thurston siblings and their mother, Brenda L. Henderson. After obtaining partial satisfaction of a judgment in favor of Stavros Konstantinou, as administrator of Lorin Konstantinou's estate, against the Thurston siblings and a judgment in favor of Stavros Konstantinou, individually, against the Thurston siblings, plaintiff commenced this action pursuant to Insurance Law § 3420 seeking to recover the unpaid balance of the judgments under an automobile insurance policy issued by defendant to Henderson. Supreme Court, inter alia, granted defendant's motion for summary judgment dismissing the complaint. We affirm.

The general coverage provision in Henderson's insurance policy provided: "*We* will pay damages for which the *insured* becomes legally responsible because of bodily injury or property damage caused by accident and arising out of the ownership, maintenance or use of *your car* or any *non-owned car*." The policy listed Henderson as the only named insured and a Chevrolet Lumina as the only covered vehicle. The policy defined "*your car*" as, inter alia, "any vehicle described on the declarations page of [the] policy." Thus, the Celebrity was not covered under the category "*your car*."

The policy also defined a "*non-owned car*" as "a land motor vehicle with at least four wheels designed to be used mainly on public roads, or a *trailer*. However, it must not be owned by or furnished or available for the regular use of *you* or a *relative.*" The policy further explained that "*You* and *your* mean the person [listed as the named insured on the declarations page, i.e., Henderson, and that] . . . *Relative* means *your* relative, residing in *your* household."

Contrary to plaintiff's contention, the court properly determined that the Thurston siblings were relatives of Henderson who resided in her household and that the Celebrity therefore was not a "non-owned car" for which defendant would be required to provide coverage with respect to the accident in question. A person is a resident of a household for insurance purposes if he or she " 'lives in the household with a certain degree of permanency and intention to remain' " (*Matter of State Farm Mut. Auto. Ins. Cos. v Jackson*, 31 AD3d 1171, 1171). Although Tynette Thurston lived at college at the time of the accident, defendant submitted evidence in support of the motion establishing that she was a resident of the household inasmuch as she lived with Henderson during the summers, received mail at Henderson's house, stayed there every other weekend, and listed that address on the Celebrity's title and insurance (*see Dutkanych v United States Fid. & Guar. Co.*, 252 AD2d 537, 538; *see also Matter of Prudential Prop. & Cas. Ins. Co. [Galioto]*, 266 AD2d 926). Thus, because the Celebrity was owned by a relative of Henderson who was a resident of her household, it was not a "non-owned car" under the terms of the policy entitled to coverage by defendant.

Moreover, it was undisputed that David Thurston was a relative of Henderson who was a resident of her household, and defendant submitted evidence in support of the motion establishing that the Celebrity was available for his regular use inasmuch as he had unrestricted access to the Celebrity while Tynette Thurston was at college and had used it several times prior to the accident (*see generally Newman v New York Cent. Mut. Fire Ins. Co.*, 8 AD3d 1059, 1060). Thus, the Celebrity also was not a "non-owned car" within the meaning of the policy because it was available for the regular use of a relative of Henderson who was a resident of her household.

Contrary to plaintiff's further contention, the Celebrity is not entitled to coverage under Henderson's policy with defendant on the ground that defendant failed to disclaim coverage in a timely manner. It is well established that "[d]isclaimer pursuant to [Insurance Law

§] 3420 (d) is unnecessary when a claim falls outside the scope of the policy's coverage portion. Under those circumstances, the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon failure to timely disclaim would create coverage where it never existed" (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188; *see State Farm Fire & Cas. Co. v Whiting*, 53 AD3d 1033, 1035; *see generally Zappone v Home Ins. Co.*, 55 NY2d 131, 137-139).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

813

CA 10-00073

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

THE NEW KAYAK POOL CORPORATION, NOW KNOWN AS KAYAK POOL CORPORATION, AND KAYAK KATALOGUE, CORP., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KAVINOKY COOK LLP, DEFENDANT-APPELLANT, AND HODGSON RUSS, LLP, DEFENDANT-RESPONDENT.

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF WILLIAM R. LINDSLEY, TOLEDO, OHIO (WILLIAM R. LINDSLEY, OF THE OHIO BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND BLOCK, COLUCCI & LONGO, P.C., BUFFALO, FOR PLAINTIFFS-RESPONDENTS.

HAGERTY & BRADY, BUFFALO (MICHAEL A. BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered April 7, 2009 in a legal malpractice action. The order denied the motion of defendant Kavinoky Cook LLP for summary judgment.

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

Memorandum: Plaintiffs commenced this legal malpractice action seeking damages arising from defendants' alleged malpractice in failing to ascertain the existence of insurance coverage for the parties sued by plaintiffs in the underlying trademark infringement action. The same attorney represented plaintiffs throughout the course of that action. That attorney began representing plaintiffs in 1999 when he was a partner in defendant Kavinoky Cook LLP (Kavinoky). When he subsequently joined defendant Hodgson Russ, LLP (Hodgson), plaintiffs executed a consent to change attorney form in June 2003, thereby substituting Hodgson for Kavinoky as plaintiffs' attorney of record in the underlying action. That action settled in February 2004 and the instant action was commenced in January 2007.

Supreme Court properly denied the motion of Kavinoky seeking summary judgment dismissing the amended complaint and cross claims against it. Kavinoky contends that the action against it is time-barred because it was commenced more than three years after the

attorney in question left Kavinoky and the consent to change attorney form was executed by plaintiffs (*see* CPLR 214 [6]). We reject that contention inasmuch as the statute of limitations was tolled by the doctrine of continuous representation during the time that the same attorney represented plaintiffs in the underlying action (*see Waggoner v Caruso*, 68 AD3d 1, 7, *affd* ___ NY3d ___ [May 11, 2010]; *HNH Intl., Ltd. v Pryor Cashman Sherman & Flynn LLP*, 63 AD3d 534, 535). We further conclude that Kavinoky failed to meet its burden of establishing as a matter of law that any alleged negligence on its part was not a proximate cause of plaintiffs' damages (*cf. Zulawski v Taylor* [appeal No. 2], 63 AD3d 1552, 1553-1554).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

818

KA 09-00532

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT D. SECRIST, DEFENDANT-APPELLANT.

JAMES L. DOWSEY, III, WEST VALLEY, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered March 3, 2008. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree and burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]) and burglary in the second degree (§ 140.25 [2]). Although defendant is correct that his challenge to the voluntariness of his plea survives his waiver of the right to appeal, defendant failed to preserve that challenge for our review because he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Connolly*, 70 AD3d 1510, 1511). Contrary to the contention of defendant, his use of prescription medication does not bring this case within the narrow exception to the preservation doctrine inasmuch as " 'nothing in the plea allocution cast significant doubt on defendant's guilt or otherwise called into question the voluntariness of the plea' " (*People v Lopez*, 71 NY2d 662, 666). To the extent that the contention of defendant that he was denied effective assistance of counsel survives the plea and his waiver of the right to appeal (*see People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), we conclude that it is without merit (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

819

KA 07-01380

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERICK LETMAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered May 17, 2007. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of two counts of assault in the second degree (Penal Law § 120.05 [2]). In addition to sentencing defendant to a term of incarceration, Supreme Court issued an order of protection for the victims. Defendant failed to preserve for our review his contention that the court failed to take into account jail time credit to which he is entitled in determining the duration of the order of protection (*see People v Nieves*, 2 NY3d 310, 315-317), 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]; *People v Owens*, 66 AD3d 1428, *lv denied* 14 NY3d 772).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

820

KA 08-02135

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS HERNANDEZ, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 30, 2007. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that County Court erred in denying his motion to withdraw his plea. We reject that contention, inasmuch as defendant's motion was " 'based upon generalized claims and conclusory allegations that are unsupported by the record' " (*People v Rouse*, 1 AD3d 958, 959, *lv denied* 1 NY3d 634). Although defendant's waiver of the right to appeal is not addressed by the People or defendant on appeal, we note that the record establishes that the waiver was knowing and intelligent (*see People v Lopez*, 6 NY3d 248, 256). We thus conclude that the waiver of the right to appeal encompasses defendant's further contention that the sentence is unduly harsh and severe (*see id.*).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

821

KA 09-00922

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEPHEN SIMON, ALSO KNOWN AS “LUCK,”
DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Erie County Court (Shirley Troutman, J.), entered March 26, 2009. The order, insofar as appealed from, denied the motion of defendant pursuant to CPL 440.30 (1-a) for DNA testing of certain evidence.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

824

CAF 09-00969

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

IN THE MATTER OF SERENITY P. AND AARON P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHAMEKA P., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR SERENITY P. AND AARON P.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered April 16, 2009 in a proceeding pursuant to Family Court Act article 10. The order adjudicated the subject children to be neglected.

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

Memorandum: Respondent mother appeals from an order adjudicating two of her children to be neglected based on her failure to provide adequate supervision for them (*see* Family Ct Act § 1012 [f] [i] [B]). Contrary to the contention of the mother, Family Court was entitled to draw "the strongest inference [against her] that the opposing evidence permits" based on her failure to testify at the fact-finding hearing (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79; *see Matter of Lavountae A.*, 57 AD3d 1382, *affd* 12 NY3d 832; *Matter of Jenny N.*, 262 AD2d 951). Also contrary to the mother's contention, petitioner met its burden of establishing by a preponderance of the evidence that the children were neglected (*see generally* § 1046 [b] [i]). "It is well established that 'a finding of neglect may be appropriate even when a child has not been actually impaired, in order to protect that child and prevent impairment' " (*Lavountae A.*, 57 AD3d at 1382, quoting *Denise J.*, 87 NY2d at 79), and that "[a] single incident 'where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm' can sustain a finding of neglect" (*Matter of Kayla W.*, 47 AD3d 571, 572; *see Matter of Ashanti R.*, 66 AD3d 1031). Here, the court properly found that the two children, ages one and three, were in imminent risk of harm when the mother left them unattended in a vehicle for at least

15 minutes while she went grocery shopping (*see Matter of Samuel D.-C.*, 40 AD3d 853, 853-854).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

826

CAF 09-01576

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

IN THE MATTER OF FRANCHESCA L.S. AND HARRY S.

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

HARRY W.S., RESPONDENT-RESPONDENT.

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

A.J. BOSMAN, ATTORNEY FOR THE CHILDREN, ROME, FOR FRANCHESCA L.S. AND HARRY S.

Appeal from an order of the Family Court, Oneida County (Julia M. Brouillette, R.), entered June 19, 2009. The order, insofar as appealed from, determined that petitioner failed to make reasonable efforts to effectuate the permanency plan of adoption for the subject children.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

828

CAF 09-01562

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

IN THE MATTER OF MADDISON B., ALSO KNOWN AS MADISON L.

---------- MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

KELLY L., RESPONDENT-APPELLANT.

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR MADDISON B., ALSO KNOWN AS MADISON L.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 25, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her daughter on the ground of abandonment and placing the child in petitioner's custody. Contrary to the contention of the mother, the fact that she visited her daughter on one occasion and had one telephone conversation with her in the six months preceding the filing of the petition did not preclude a finding of abandonment (*see* Social Services Law § 384-b [5] [a]). A parent who has had "almost no contact" with his or her child in the six-month period preceding the filing of the petition evinces an intent to forego his or her parental rights (*Matter of Dennis K.A.*, 63 AD3d 1638), and "it is by now well established that minimal, sporadic or insubstantial contacts will not be sufficient to defeat an otherwise viable claim of abandonment" (*Matter of Nahiem G.*, 241 AD2d 632, 633).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

829

CA 10-00300

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, AND PINE, JJ.

MICHAEL GUIFFRIDA, INDIVIDUALLY AND DOING BUSINESS AS THE STOMPING GROUNDS, HORAN & HORAN OF SYRACUSE, INC., ALFRED GUIFFRIDA, ANTOINETTE GUIFFRIDA AND LOUANNE GUIFFRIDA, PLAINTIFFS-RESPONDENTS,

MEMORANDUM AND ORDER

V

STORICO DEVELOPMENT, LLC, ROBERT DOUCETTE, RICHARD DEVITO, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

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

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (James P. Murphy, J.), entered July 14, 2009 in an action for conversion. The judgment awarded plaintiffs compensatory and treble damages.

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

Memorandum: Plaintiffs commenced this action against, inter alia, defendants-appellants (collectively, defendants), seeking damages for conversion as well as punitive damages arising from the allegedly wrongful eviction from premises leased by Michael Guiffrida, individually and doing business as the Stomping Grounds (plaintiff), from defendant Storico Development, LLC. Following a nonjury trial, Supreme Court found, inter alia, that plaintiff was wrongfully evicted. The court awarded plaintiffs compensatory damages in the amount of $79,245, and trebled those damages pursuant to RPAPL 853. On a prior appeal, we agreed with the court's determinations on the merits of plaintiffs' action, but we concluded that the court erred in calculating the amount of compensatory damages to which plaintiffs were entitled (*Guiffrida v Storico Dev., LLC*, 60 AD3d 1286, 1288). Specifically, plaintiff conceded that certain items of property had been returned to him before trial, but the court had included in its award the value of some of those items (*id.*). We therefore modified the judgment by vacating the amount of damages awarded, and we remitted the matter to Supreme Court "to recalculate compensatory and

treble damages consistent with our decision" (*id.*).

Contrary to the contention of defendants, we did not remit the matter for a de novo hearing on compensatory damages. As the court properly determined, the scope of our remittal was to determine the value of the items that had been returned to plaintiff and that had been erroneously included in the court's initial calculation of compensatory damages, and the court properly adhered to the scope of our remittal. We further conclude that the court's recalculation of damages is supported by the evidence from the hearing upon remittal. We have reviewed defendants' remaining contentions and conclude that they are without merit.

Entered: June 11, 2010 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

830

CA 10-00181

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

GILBERT H. ALLEN, AS ADMINISTRATOR OF THE ESTATE OF WARREN D. ALLEN, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

KALEIDA HEALTH, DOING BUSINESS AS DEGRAFF MEMORIAL HOSPITAL, NIAGARA LUTHERAN HOME AND REHABILITATION CENTER, INC., AND THE MCQUIRE GROUP, INDIVIDUALLY AND DOING BUSINESS AS NORTHGATE HEALTH CARE FACILITY, DEFENDANTS-RESPONDENTS.

SIEGEL, KELLEHER & KAHN, LLP, BUFFALO (ROBERT D. STEINHAUS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER, LLP, ROCHESTER (MARGARET E. SOMERSET OF COUNSEL), FOR DEFENDANT-RESPONDENT NIAGARA LUTHERAN HOME AND REHABILITATION CENTER, INC.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 10, 2009. The order, insofar as appealed from, denied in part plaintiff's motion to compel disclosure and for sanctions.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

835

KA 09-00204

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GILBERT ZARAGOSA, DEFENDANT-APPELLANT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered July 27, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the third degree.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

836

KA 07-01177

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN RODRIGUEZ, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Jeffery R. Merrill, A.J.), rendered June 15, 2004. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment that revoked the sentence of probation imposed upon his conviction of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]) and sentenced him to an indeterminate term of imprisonment. By failing to move to withdraw his admission to the violation of probation or to vacate the judgment revoking the sentence of probation on that ground, defendant failed to preserve for our review his contention that the admission was not voluntary (*see People v Obbagy*, 56 AD3d 1223, *lv denied* 11 NY3d 928; *People v Fontanez*, 19 AD3d 1070, *lv denied* 5 NY3d 788; *see generally People v Lopez*, 71 NY2d 662, 665). This case does not fall within the narrow exception to the preservation doctrine set forth in *Lopez* (71 NY2d at 666). The sentence is not unduly harsh or severe.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

837

KA 08-01518

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAROLD SIMCOE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 7, 2008. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a class D felony.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (ii)]). We reject the contention of defendant that his waiver of the right to appeal is void as against public policy (*see People v Muniz*, 91 NY2d 570, 573-575). Contrary to the further contention of defendant, the record establishes that his waiver of the right to appeal was knowingly, intelligently and voluntarily entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Grimes*, 53 AD3d 1055, *lv denied* 11 NY3d 789).

The contention of defendant that his plea was not knowing, intelligent and voluntary "because he did not recite the underlying facts of the crime but simply replied to County Court's questions with monosyllabic responses is actually a challenge to the factual sufficiency of the plea allocution," which is encompassed by the valid waiver of the right to appeal (*People v Bailey*, 49 AD3d 1258, 1259, *lv denied* 10 NY3d 932; *see People v Brown*, 66 AD3d 1385; *People v Peters*, 59 AD3d 928, *lv denied* 12 NY3d 820). In any event, that challenge lacks merit inasmuch as "there is no requirement that defendant recite the underlying facts of the crime to which he is pleading guilty" (*Bailey*, 49 AD3d at 1259; *see People v VanDeViver*, 56 AD3d 1118, *lv*

denied 11 NY3d 931, 12 NY3d 788).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

839

KA 08-02481

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDY L. DASH, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered October 27, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that his plea was coerced. Although that contention survives defendant's valid waiver of the right to appeal, defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve his contention for our review (*see People v Dozier*, 59 AD3d 987, *lv denied* 12 NY3d 815; *People v Allport*, 59 AD3d 1001, *lv denied* 12 NY3d 850). The further contention of defendant that County Court erred in accepting his *Alford* plea "survives his waiver of the right to appeal to the extent that his contention implicates the voluntariness of the plea" (*People v Dille*, 21 AD3d 1298, 1298, *lv denied* 5 NY3d 882; *see People v Ebert*, 15 AD3d 781). Defendant, however, also failed to preserve that contention for our review (*see People v Hinkle*, 56 AD3d 1210), and this case does not fall within the exception to the preservation requirement (*see Dille*, 21 AD3d 1298). In any event, defendant's contention lacks merit. When defendant denied entering or attempting to enter the dwelling or having an intent to commit a crime therein, the court " 'fulfilled its duty to conduct further inquiry to ensure that the plea was entered knowingly, voluntarily and intelligently' " (*People v McGrail*, 42 AD3d 962, 963, *lv denied* 9 NY3d 878). "Here, the record establishes that defendant's *Alford* plea was 'the product of a voluntary and rational choice, and the record . . . contains strong evidence of actual guilt' " (*People v Smith*, 26 AD3d 746, 747, *lv denied* 7 NY3d 763, quoting *Matter of Silmon v Travis*, 95

NY2d 470, 475).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

840

KA 08-01497

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN P. HENRY, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Cayuga County (Joseph D. Valentino, J.), rendered July 1, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fifth 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 criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). The contention of defendant that the evidence is legally insufficient to support the conviction is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19). Although defendant moved for a trial order of dismissal at the close of the People's case and renewed that motion after presenting evidence, the motion was not specifically directed at the alleged error raised on appeal (*see People v Hawkins*, 11 NY3d 484, 492; *Gray*, 86 NY2d at 19). In any event, defendant's contention is without merit. A police officer testified at trial that, when she announced her presence to defendant, she observed him make a motion after which she observed a blue container fall to the ground under the vehicle next to which defendant was standing. The officer further testified that a plastic bag containing 3.5 grams of white chunky substance was recovered on the ground in proximity to the blue container and that the substance tested positive for cocaine. Thus, " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349; *see also People v Robinson*, 26 AD3d 202, *lv denied* 7 NY3d 762). The further contention of defendant that Supreme Court erred in refusing to dismiss the indictment based on the legal insufficiency of the evidence before the grand jury is not reviewable on appeal from a judgment of conviction based on legally sufficient trial evidence (*see*

CPL 210.30 [6]; *People v Baker*, 67 AD3d 1446, *lv denied* 14 NY3d 769; *People v Lee*, 56 AD3d 1250, 1251, *lv denied* 12 NY3d 818).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The testimony of defendant that he never possessed any cocaine and that he never threw anything beneath the vehicle presented credibility issues for the jury to resolve, and its credibility determinations are entitled to great deference (*see generally id.*).

Defendant failed to preserve for our review his contention that the warrant obtained by the police to search, inter alia, the vehicle next to which he was standing was not supported by probable cause (*see generally People v Kendricks*, 23 AD3d 1119). In any event, that contention lacks merit. The warrant application was supported by the statements of multiple, experienced confidential informants with a history of reliability, and those statements indicated that the vehicle in question was used in the sale of cocaine. The police confirmed those statements with subsequent investigations and controlled buys. We thus conclude that the People satisfied both prongs of the *Aguilar-Spinelli* test by establishing that the confidential informants were reliable and had a basis of knowledge for the information they provided (*see People v Flowers*, 59 AD3d 1141, 1142). Defendant also failed to preserve for our review his contention that the police unconstitutionally searched him and seized the cocaine based on his compliance with the officer's directions (*see generally People v Mitchell*, 303 AD2d 422, 423, *lv denied* 100 NY2d 564, 597), 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]).

Defendant expressly consented to the court's approval of the *Sandoval* compromise offered by the People, and thus he waived his contention that the *Sandoval* ruling constitutes an abuse of discretion (*see generally People v Hansen*, 95 NY2d 227, 230 n 1). In any event, the court properly balanced the probative value of defendant's prior convictions against the risk of prejudice to defendant (*see People v McNair*, 45 AD3d 872, *lv denied* 10 NY3d 813; *People v Alston*, 27 AD3d 1141, 1142, *lv denied* 6 NY3d 892; *see generally People v Hayes*, 97 NY2d 203, 207-208).

Defendant further contends that he was denied effective assistance of counsel based on defense counsel's failure to object to certain testimony and to make various motions and arguments. We reject that contention. Defendant failed to demonstrate that those alleged errors were not strategic in nature (*see generally People v Rivera*, 71 NY2d 705, 709), and mere disagreement with trial strategy is insufficient to establish that defense counsel was ineffective (*see People v Knightner*, 11 AD3d 1002, 1005, *lv denied* 4 NY3d 745). Further, "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or

argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, the sentence is not unduly harsh or severe.

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

842

KA 08-01203

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ULYSEES PARRIS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered May 25, 2006. The judgment convicted defendant, upon a jury verdict, of attempted robbery in the second degree and attempted robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted robbery in the third degree (Penal Law §§ 110.00, 160.05). Defendant failed to renew his motion for a trial order of dismissal after presenting evidence, and he thus failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Vaughan*, 48 AD3d 1069, *lv denied* 10 NY3d 845, *cert denied* ___ US ___, 129 S Ct 252). In any event, that contention is without merit. " 'The applicable statutes do not require the use or display of a weapon nor actual injury or contact with a victim [for a person to be guilty of attempted robbery] . . . All that is necessary is that there be a threatened use of force . . ., which may be implicit from the defendant's conduct or gleaned from a view of the totality of the circumstances' " (*People v Mosley*, 59 AD3d 961, 961, *lv denied* 12 NY3d 918, 13 NY3d 861; *see* § 160.00; *People v Woods*, 41 NY2d 279, 282). We conclude that "the People presented evidence from which defendant's threatened use of force could be implied" (*Mosley*, 59 AD3d at 962), i.e., the testimony of the bank employee to whom defendant handed the slip of paper and demanded large bills and the testimony of the Sheriff's Deputy to whom defendant stated, after his arrest, that he went into the bank and informed the bank employee that "it was a

robbery.”

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

846

CAF 09-01907

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

IN THE MATTER OF LAURIE J. WHITING,
PETITIONER-RESPONDENT,

V ORDER

JOSEPH J. PALUMBO, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered September 14, 2009. The order, among other things, adjudged that respondent willfully failed to obey an order of child support.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

849

CA 10-00350

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

JODI S. LABAR, PLAINTIFF-RESPONDENT,

V ORDER

PHILLIPS MOSEZELL, DEFENDANT-APPELLANT.

KAPLAN, HANSON, MCCARTHY, ADAMS, FINDER & FISHBEIN, WILLIAMSVILLE (JENNIFER ADAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANDELMAN, WITKOWICZ & LEVITSKY, ROCHESTER (STEVEN M. WITKOWICZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered April 28, 2009 in an action for property damages. The order denied the motion of defendant to dismiss the complaint.

Now, upon the stipulation discontinuing action signed by the attorneys for the parties on March 26, 2010 and filed in the Monroe County Clerk’s Office on April 8, 2010,

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

850

CA 09-02524

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

CONNIE L. JOHNSON, PLAINTIFF-RESPONDENT,

V ORDER

JOSHUA G. ROSE AND EUGENE F. ROSE, JR.,
DEFENDANTS-APPELLANTS.

LEVENE, GOULDIN & THOMPSON, BINGHAMTON (MARIA LISI-MURRAY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF JACOB P. WELCH, CORNING (JACOB P. WELCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered May 14, 2009 in a personal injury action. The order, among other things, denied defendants' motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 22, 2010,

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

851

CA 09-02246

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

JANICE M. STOJEK, PLAINTIFF-APPELLANT,

V ORDER

CLEAR-ALL, DEFENDANT-RESPONDENT.

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered July 1, 2009 in a personal injury action. The order granted defendant’s motion for summary judgment and dismissed the complaint.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

854

CA 10-00044

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

LIONEL SWANSON, AN INFANT, BY AND THROUGH JENNIFER CHAFFEE, HIS PARENT AND NATURAL GUARDIAN, AND JENNIFER CHAFFEE, INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V ORDER

LOCKPORT MEMORIAL HOSPITAL, DEFENDANT, AND MICHAEL A. TORRES, M.D., DEFENDANT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEMPSEY & DEMPSEY, BUFFALO (PATRICK J. MALONEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered September 4, 2009. The order, insofar as appealed from, denied the motion of defendant Michael A. Torres, M.D. for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on April 8, 2010,

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

856

KA 09-00390

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MALCOLM YOUNG, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 5, 2009. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the fourth degree, attempted burglary in the third degree, criminal mischief in the fourth degree, resisting arrest and obstructing governmental administration in the second degree.

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

Memorandum: On appeal from a judgment convicting him after a nonjury trial of, inter alia, criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]) and attempted burglary in the third degree (§§ 110.00, 140.20), defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to move for a trial order of dismissal. "We reject that contention, inasmuch as such [a] . . . motion would have had no chance of success" (*People v Brown*, 67 AD3d 1369, 1370; *see People v Webb*, 60 AD3d 1291, 1292, *lv denied* 12 NY3d 930), and "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument' that has little or no chance of success" (*People v Caban*, 5 NY3d 143, 152). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Finally, we note that the certificate of conviction misspells defendant's name, and incorrectly recites that defendant was convicted of a class B felony under the second count of the indictment and was sentenced to an indeterminate term of imprisonment with a minimum of 1½ years under the third count of the indictment. The certificate of conviction therefore must be amended to include the proper spelling of defendant's name, and to recite that defendant was convicted of a

class C felony under the second count of the indictment and was sentenced to an indeterminate term of imprisonment with a minimum of 1a years under the third count of the indictment (*see generally People v Saxton*, 32 AD3d 1286).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

857

KA 09-00824

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN W. SMITH, III, DEFENDANT-APPELLANT.

CYNTHIA B. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered March 3, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of burglary in the third degree (Penal Law § 140.20), defendant contends that County Court erred in ordering him to pay a specified amount of restitution without conducting a hearing to determine the amount. Defendant failed to preserve that contention for our review (*see People v Hannig*, 68 AD3d 1779, *lv denied* 14 NY3d 801), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

860

KA 09-02036

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEN ADZAJLIC, DEFENDANT-APPELLANT.

RICHARD N. BACH, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered December 6, 2004. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]). Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665; *People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789) and, in any event, that challenge is encompassed by his valid waiver of the right to appeal (*see Grimes*, 53 AD3d at 1056).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

862

KA 08-00486

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS F. SAMPSON, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered March 7, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]), defendant contends that the prosecutor's peremptory challenges with respect to two prospective jurors constitute *Batson* violations. As defendant correctly concedes, he raises that contention with respect to one of the two prospective jurors for the first time on appeal and thus failed to preserve for our review his contention concerning that prospective juror (*see* CPL 470.05 [2]), and we decline defendant's request that we exercise our power to review the contention with respect to that prospective juror as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to the second prospective juror, we agree with Supreme Court that the prosecutor's explanation for exercising the peremptory challenge was race-neutral and not pretextual (*see generally People v Wedlington*, 67 AD3d 1472, 1473-1474, *lv denied* 14 NY3d 807; *People v Thompson*, 59 AD3d 1115, 1117, *lv denied* 12 NY3d 852, 860).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

864

KAH 09-00045

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ARCHIE SHANNON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SIBATU KHAHAIFA, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, AND GEORGE B. ALEXANDER,
COMMISSIONER, NEW YORK STATE DIVISION OF PAROLE,
RESPONDENTS-RESPONDENTS.

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered August 13, 2008. The judgment denied the petition for a writ of habeas corpus.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the grounds that, inter alia, the determination that he violated a condition of his parole was arbitrary and capricious, and the time assessment for the violation was excessive. We conclude that Supreme Court properly denied the petition.

Contrary to the contention of petitioner, the evidence adduced at the final parole revocation hearing "was sufficient to prove by a preponderance of the evidence that [he] violated a condition of parole" (*People ex rel. Peters v Walker*, 262 AD2d 1025, *lv denied* 93 NY2d 819). "While petitioner also seeks to challenge the length of his time assessment, habeas corpus relief is not appropriate because, even if his contention[] ha[s] merit, he would not be entitled to immediate release from prison" (*People ex rel. Muhammad v Bradt*, 68 AD3d 1391, 1392; *see People ex rel. Leggett v Leonardo*, 274 AD2d 699). For the same reason, we conclude that habeas corpus relief is not appropriate based on the contention of petitioner that he was denied effective assistance of counsel at the final parole revocation hearing (*see People ex rel. Santoro v Hollins*, 273 AD2d 829; *People ex rel. Kinzer v Williams*, 256 AD2d 1240; *see generally People ex rel. Douglas v Vincent*, 50 NY2d 901, 903). "Although this Court has the power to

convert a habeas corpus proceeding into a CPLR article 78 proceeding . . ., we decline to do so because we do not consider it appropriate on this record" (*People ex rel. Brown v McCoy*, 266 AD2d 805, *lv denied* 94 NY2d 760).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

865

CAF 09-01730

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF CORI A. BORUM,
PETITIONER-RESPONDENT,

V ORDER

DAVID BORUM, RESPONDENT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR RESPONDENT-APPELLANT.

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

MATTHEW D. CONLON, ATTORNEY FOR THE CHILD, GENEVA, FOR BIANCA H.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered June 22, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted sole custody of the subject child to petitioner.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

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

866

CAF 10-00216

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF ELIZABETH COOPER,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD L. COOPER,
RESPONDENT-RESPONDENT-APPELLANT.

LAW OFFICES OF PALMER, MURPHY & TRIPI, BUFFALO (DEANNE M. TRIPI OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered April 15, 2009 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, dismissed the petition.

It is hereby ORDERED that said cross appeal is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: In this support proceeding pursuant to Family Court Act article 4, petitioner mother appeals and respondent father cross-appeals from an order that granted the objections of the father and dismissed without prejudice the mother's petition for an award of child support. Initially, we agree with the mother that Family Court had jurisdiction over this support proceeding where, as here, the parties entered into a separation agreement that was not merged into the judgment of divorce (*see* § 461 [a]). Contrary to the further contention of the mother, however, the court properly dismissed her petition.

The court may modify a separation agreement with respect to child support only "upon a showing that the agreement was not fair and equitable when entered into, or that an unanticipated and unreasonable change in circumstances has occurred[,] resulting in a concomitant need" for increased support (*Merle v Merle*, 67 NY2d 359, 362; *see generally Matter of Boden v Boden*, 42 NY2d 210, 213). Contrary to the contention of the mother, she failed to establish or indeed, even to allege, that the agreement was unfair or that there was the requisite change in circumstances.

We conclude, however, that the cross appeal by the father must be dismissed because he is not an "aggrieved party" and thus lacks

standing to appeal (CPLR 5511). The court granted the father's objections and dismissed the petition, and the father thus received all the relief he requested. The fact that the order contains language or reasoning that the father deems adverse to his interests does not provide him with "a basis for standing to take an appeal" (*Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 472-473; *see Pramco III, LLC v Partners Trust Bank*, 52 AD3d 1224, 1225; *Sirius Am. Ins. Co. v Vigo Constr. Corp.*, 48 AD3d 450, 451-452).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

870

CA 09-02112

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

MARK JOHNSON, ALSO KNOWN AS WILLIAM UTSEY,
CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 105385.)

THE BERKMAN LAW OFFICE, LLC, BROOKLYN (DAVID TOLCHIN OF COUNSEL), FOR CLAIMANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Philip J. Patti, J.), entered December 9, 2008 in a personal injury action. The order denied claimant's motion to vacate the dismissal of the claim.

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

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

875.1

CAF 09-02618

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF MATTHEW STILES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JILL M. EDWARDS, RESPONDENT-APPELLANT.

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

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Timothy K. Mattison, J.H.O.), entered December 11, 2009 in a proceeding pursuant to Domestic Relations Law article 5-A. The order awarded custody of the parties' child to petitioner.

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

Memorandum: Petitioner father commenced this proceeding pursuant to Domestic Relations Law article 5-A, seeking custody of the parties' child after respondent mother took the child to Oregon, then to Georgia, and then back to Oregon. The father alleged that the mother's actions in doing so were in contravention of the stipulation of the parties, and that the mother had refused to return the child to New York. Contrary to the contention of the mother, Family Court "did not abuse its discretion in denying her request to testify by telephone" (*Shiva-Prasad v Shiva-Prasad*, 1 AD3d 971, 972). The mother contends for the first time on appeal that the court deprived her of the right to a fair hearing by proceeding in her absence, and thus that contention is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, that contention is without merit. The mother in fact appeared by counsel and, although she had notice of the hearing, she chose not to attend.

The record does not support the further contention of the mother that the court erred in awarding custody of the child to the father based solely upon her default in appearing. Rather, the record establishes that the court "properly placed great[ ] emphasis and concern upon the mother's failure to value and support the child's relationship with the father . . ., as shown by evidence in the record of her active interference with the father's scheduled parenting time on more than one occasion . . ., her failure to . . . comply with the

prior . . . order[s] relative to returning to the region . . ., and her failure to offer evidence of compelling circumstances requiring her relocation of the child to" Oregon, Georgia, and then back to Oregon (*Matter of Memole v Memole*, 63 AD3d 1324, 1327; *see Matter of Dunaway v Espinoza*, 23 AD3d 928, 929). Consequently, based "[o]n our review of the record, we find that the court had a sound and substantial basis for the change of custody and that the best interests of the child were served by the change" (*Matter of Gill v Gill*, 135 AD2d 1090, 1091).

Entered: June 11, 2010

Patricia L. Morgan
Clerk of the Court

MOTION NO. (121/91) KA 09-01579. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL J. HILL, DEFENDANT-APPELLANT. -- Motion for a writ of error coram nobis denied. PRESENT: PERADOTTO, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ. (Filed June 11, 2010.)

MOTION NO. (2004/94) KA 10-00882. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY BRITT, DEFENDANT-APPELLANT. -- Motion for a writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, SCONIERS, AND PINE, JJ. (Filed June 11, 2010.)

MOTION NO. (189/02) KA 99-05076. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V THOMAS J. GANT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ. (Filed June 11, 2010.)

MOTION NO. (774/05) KA 04-02232. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FELIPE BURGOS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., GREEN, PINE, AND GORSKI, JJ. (Filed June 11, 2010.)

MOTION NO. (1125/07) KA 06-01069. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN E. AKIN, DEFENDANT-APPELLANT. -- Motion for reargument, or in the alternative, leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, GREEN, AND PINE, JJ. (Filed June 11, 2010.)

MOTION NO. (331/08) KA 06-01222. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V RODNEY J. LOWMAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: MARTOCHE, J.P., FAHEY, PERADOTTO, AND PINE, JJ. (Filed June 11, 2010.)

MOTION NO. (1008/08) KA 04-02863. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES E. HATHAWAY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND GORSKI, JJ. (Filed June 11, 2010.)

MOTION NO. (1648/08) KA 99-02082. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEVE STROMAN, DEFENDANT-APPELLANT. -- Motion for reconsideration denied. PRESENT: SMITH, J.P., CENTRA, GREEN, AND PINE, JJ. (Filed June 11, 2010.)

MOTION NO. (708/09) KA 06-02790. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL D. SEELER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ. (Filed June 11, 2010.)

MOTION NO. (998/09) CA 08-01910. -- STANLEY A. GIZOWSKI, CLAIMANT-RESPONDENT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-APPELLANT-RESPONDENT. (CLAIM NO. 112634.) -- Motion for renewal of motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, GREEN, AND GORSKI, JJ. (Filed June 11, 2010.)

MOTION NO. (1284/09) CAF 08-01934. -- IN THE MATTER OF MARY LOUISE COAN,

PETITIONER-RESPONDENT, V THOMAS N. THOMPSON, RESPONDENT-APPELLANT. -- Motion for reargument granted and, upon reargument, the memorandum and order entered February 11, 2010 (70 AD3d 1426) is amended by deleting from the ordering paragraph the phrase “until June 18, 2006” and by deleting the second paragraph of the memorandum and substituting the following paragraph: “We conclude that the court abused its discretion in calculating the father’s child support obligation based on the presumptive amount. The court did not provide any “record articulation” to support its determination that the presumptive amount was necessary to provide for the expenses and the standard of living previously enjoyed by the family (*Matter of Cassano v Cassano*, 85 NY2d 649, 655). Petitioner mother testified at the fact-finding hearing that the household expenses were $15,000 per month, and the Support Magistrate attributed only $10,000 per month as expenses for the children. The Support Magistrate’s findings are entitled to great deference, and we conclude that the Support Magistrate’s calculation of the children’s expenses is supported by the record (*see generally Matter of Luther v Luther*, 35 AD3d 473). We therefore modify the order by providing in the seventh ordering paragraph that the father’s child support obligation is $10,000 per month and by vacating the amount of retroactive child support awarded in the eighth ordering paragraph. We remit the matter to Family Court to determine following a further hearing, if necessary, the amount of retroactive child support for the period of November 17, 2003 through February 28, 2005.” and the motion insofar as it sought in the alternative leave to appeal to the Court of Appeals is denied, and the cross motion for reargument is denied. PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, CARNI, AND GREEN, JJ. (Filed June 11, 2010.)

MOTION NO. (1401/09) KA 07-02521. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES L. RIVERS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ. (Filed June 11, 2010.)

MOTION NO. (1681/09) CA 09-01115. -- RUSSELL BARKER, PLAINTIFF-APPELLANT, V MOBILE PALLET TRUCK, INC., DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed June 11, 2010.)

MOTION NO. (1681.5/09) CA 09-00369. -- DAVID RYAN, ET AL., PLAINTIFFS, AND JESSICA RYAN, PLAINTIFF-RESPONDENT, V HECTOR B. SANTANA, M.D., JAMES B. TURCHIK, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ. (Filed June 11, 2010.)

MOTION NO. (42/10) CA 09-01825. -- WENDE MARRACINO AND FRANK MARRACINO, PLAINTIFFS-RESPONDENTS, V GARY J. ALEXANDER, D.D.S. AND ORCHARD PARK PROSTHODONTICS, LLP, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, AND GREEN, JJ. (Filed June 11, 2010.)

MOTION NO. (107/10) TP 09-01715. -- IN THE MATTER OF GUY MCEACHIN, PETITIONER, V BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF

CORRECTIONAL SERVICES, RESPONDENT. -- Motion for reargument granted and, upon reargument, the memorandum and order entered March 26, 2010 (71 AD3d 1558) is amended by deleting the ordering paragraph and substituting the following ordering paragraph "that the determination is unanimously confirmed without costs and the petition is dismissed" and by deleting the last paragraph of the memorandum. PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ. (Filed June 11, 2010.)

MOTION NO. (258/10) CA 09-00449. -- JOHN D. JUSTICE, CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 114445.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GREEN, AND GORSKI, JJ. (Filed June 11, 2010.)

MOTION NO. (260/10) CA 09-00831. -- JANICE BARTON, PLAINTIFF-APPELLANT, V JENNIFER L. KOHLER AND TERRY H. KOHLER, DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GREEN, AND GORSKI, JJ. (Filed June 11, 2010.)

MOTION NO. (293/10) KA 08-01505. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEPHEN SIMON, ALSO KNOWN AS "LUCK," DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND GORSKI, JJ. (Filed June 11, 2010.)

MOTION NO. (301/10) CA 09-02157. -- JOSEPH TUPPER, AS PRESIDENT AND ON BEHALF OF SYRACUSE PROPERTY OWNERS ASSOCIATION, 741 LIVINGSTON AVENUE, LLC,

STAMPEDE VI, LLC, HAMR, INC., 867 SUMNER AVE., L.L.C., JAKE AND BUCK, LLC, OCOMSTOCK, LLC, DAVID EADE AND BENJAMIN TUPPER, PLAINTIFFS-RESPONDENTS, V CITY OF SYRACUSE, COMMON COUNCIL OF CITY OF SYRACUSE AND PLANNING COMMISSION OF CITY OF SYRACUSE, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND GORSKI, JJ. (Filed June 11, 2010.)

MOTION NO. (452/10) CA 08-02505. -- IN THE MATTER OF ROMAN KEVILLY, PETITIONER-APPELLANT, V SUSAN CONNELL, SUPERINTENDENT, ONEIDA CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, SCONIERS, AND PINE, JJ. (Filed June 11, 2010.)

MOTION NO. (553/10) CA 09-01614. -- STEPHEN TURNER, PLAINTIFF-RESPONDENT, V CSX TRANSPORTATION, INC. AND CONSOLIDATED RAIL CORPORATION, DEFENDANTS-APPELLANTS. (APPEAL NO. 5.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND PINE, JJ. (Filed June 11, 2010.)

CAF 09-00938 -- IN THE MATTER OF THE ADOPTION OF NICOLE J. JOSHUA A.A. AND MICHELLE J.A., PETITIONERS-RESPONDENTS; STEPHEN H.J., RESPONDENT-APPELLANT. Motion for clarification denied. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND PINE, JJ. (Filed May 18, 2010.)

KA 07-01568. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSEPH

MALDONADO, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Monroe County, Francis A. Affronti, J. - Criminal Possession of Stolen Property, 4th Degree). PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ. (Filed June 11, 2010.)

KA 09-02047. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRENDAN MCANDREW, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Erie County, Christopher J. Burns, J. - Criminal Possession of Stolen Property, 4th Degree). PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ. (Filed June 11, 2010.)

KA 08-02206. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AARON MEE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Livingston County Court, Dennis S. Cohen, J. - Aggravated Unlicensed Operation of a Motor Vehicle, 1st Degree). PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ. (Filed June 11, 2010.)

KA 09-01288. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAIME PEREZ, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is

to be assigned. Memorandum: Defendant was convicted upon a guilty plea of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). However, upon our review of the record we conclude that there are nonfrivolous issues meriting this Court's consideration, specifically, whether County Court erred in denying defendant's motion to dismiss the indictment based on preindictment delay and the propriety of the court's ruling following the *Huntley* hearing. Therefore, we relieve counsel of his assignment and assign new counsel to brief these issues, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Wyoming County Court, Mark H. Dadd, J. - Promoting Prison Contraband, 1st Degree). PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ. (Filed June 11, 2010.)

KA 09-01364. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANK WISNIEWSKI, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon a guilty plea of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31), and was sentenced as a second felony drug offender to a determinate term of imprisonment of two and one-half years and two years postrelease supervision. Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38), and has submitted an affidavit in which he concludes that there are no nonfrivolous issues meriting this Court's consideration. A review of the

sentencing minutes reveals that the court did not ask defendant prior to sentencing whether he wished to controvert the allegations contained in the second felony offender statement as required by CPL § 400.21 (3). Therefore, a nonfrivolous issue exists as to the legality of the sentence. Accordingly, we relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Wyoming County Court, Michael F. Griffith, J. - Criminal Sale of a Controlled Substance, 5th Degree). PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ. (Filed June 11, 2010.)