



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

DECISIONS FILED

APRIL 1, 2011

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. JEROME C. GORSKI

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

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KA 09-02420

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HECTOR RIVERA, DEFENDANT-APPELLANT.

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

HECTOR RIVERA, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (John D. Doyle, J.), rendered July 28, 1992. 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: On a prior appeal, we affirmed the judgment convicting defendant of murder in the second degree under Penal Law § 125.25 (1) (*People v Rivera*, 206 AD2d 832, *lv denied* 84 NY2d 871). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel had failed to raise an issue on appeal that may have merit, i.e., that Supreme Court erred in responding to notes from the jury during its deliberations (*People v Rivera*, 70 AD3d 1517), and we vacated our prior order. We now consider the appeal de novo.

Contrary to defendant's contention, we conclude that the court fulfilled its "core responsibilities under CPL 310.30" (*People v Tabb*, 13 NY3d 852, 853). The record establishes that the court provided a nearly verbatim summary of the contents of the notes in open court, in the presence of defendant and defense counsel, before responding to the notes (*see People v Bonner*, 79 AD3d 1790, 1791; *People v Salas*, 47 AD3d 513, *lv denied* 10 NY3d 844). Defendant therefore was required to register an objection in order to preserve for our review his challenge to the procedure employed by the court in responding to the jury notes, "at a time when any error by the court could have been obviated by timely objection" (*People v Starling*, 85 NY2d 509, 516; *see People v Ramirez*, 15 NY3d 824, 825-826; *cf. People v Kisoan*, 8 NY3d 129, 134). We decline to exercise our power to address defendant's 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 deprived of the right to be present during sidebar discussions with prospective jurors. The decision of the Court of Appeals in *People v Antommarchi* (80 NY2d 247, *rearg denied* 81 NY2d 759) does not apply herein because defendant's trial was conducted before that decision was issued (see *People v Mitchell*, 80 NY2d 519, 528). Thus, applying the law in effect at that time, defendant had no right to be present at bench conferences unless they "concern[ed] the very same witnesses and events which were to be involved in the case to be tried" (*id.* at 529; see *People v Sloan*, 79 NY2d 386, 392; *People v Siler*, 197 AD2d 842, 843-844, *lv denied* 82 NY2d 903). Here, a prospective juror notified the court that she recognized an individual in the courtroom. The prosecutor asked to approach the bench, and an off-the-record discussion ensued between the court, the prosecutor and defense counsel. The court then summoned the prospective juror to the bench and, after a further off-the-record discussion, the court excused the prospective juror. Although defendant asserts that the unidentified individual was "likely the [victim]'s mother, [or] one of the People's witnesses," defendant provides no record support for that assertion, and thus it is based on sheer speculation (see *People v Davilla*, 249 AD2d 179, 180-181, *lv denied* 92 NY2d 924, *cert denied* 526 US 1122). Defendant has the burden of establishing his absence from a material stage of the trial (see *People v Velasquez*, 1 NY3d 44, 47-48), i.e., the aforementioned bench conferences, and here he failed to meet that burden. Had he met that burden, the remedy to review his present contention would be a reconstruction hearing with respect to those bench conferences, because there is no factual record to enable this Court to review defendant's claimed violation of his *Sloan* rights (see *Davilla*, 249 AD2d at 180-181; see generally *People v Kinchen*, 60 NY2d 772, 773-774). As noted, however, defendant failed to meet his burden of establishing his absence from a material stage of the trial (see *Velasquez*, 1 NY3d at 47-48).

We further conclude that the court properly refused to suppress physical evidence obtained during the search of a vehicle and a yard. With respect to the vehicle, defendant failed to demonstrate any legitimate expectation of privacy therein and thus has no standing to challenge the search (see *People v Shire*, 77 AD3d 1358, 1359-1360, *lv denied* 15 NY3d 955). It is undisputed that defendant did not own the vehicle and that he was not in the vicinity of the vehicle at the time of the search, which took place on a public street more than four hours after defendant had left his apartment in it, shortly after the murder. Although defendant's sister testified at the suppression hearing that the vehicle was "a family car" and that "[w]e all take turns" driving the vehicle, that testimony is insufficient to meet defendant's burden of establishing a reasonable expectation of privacy in the vehicle (see *People v Di Lucchio*, 115 AD2d 555, 556-557, *lv denied* 67 NY2d 942; see also *People v Ortiz*, 83 NY2d 840, 843; *People v Rosario*, 64 AD3d 1217, *lv denied* 13 NY3d 941). In any event, the warrantless search of the vehicle was lawful inasmuch as it was based on the voluntary consent of the owner of the vehicle (see *People v*

Adams, 53 NY2d 1, 8, *rearg denied* 54 NY2d 832, *cert denied* 454 US 854; *People v Johnson*, 202 AD2d 966, 967, *lv denied* 84 NY2d 827).

As for the seizure of defendant's bicycle from the yard of an apartment building, it is well settled that, "where two or more individuals share a common right of access to or control of the property to be searched, any one of them has the authority to consent to a warrantless search in the absence of the others" (*People v Cosme*, 48 NY2d 286, 290; see *People v Sawyer*, 135 AD2d 1083, 1083-1084). "[A]lthough a party who shares premises with a defendant may not consent to a search of defendant's personal effects absent a common right of control over the item searched . . . , a different rule obtains where the defendant is absent from the premises In that event, one with a shared right of access to the premises may consent to the search of objects located therein, *including the personal effects of the absent defendant*" (*Sawyer*, 135 AD2d at 1084 [emphasis added]). Here, two of the tenants of the apartment building gave the police permission to enter the yard of the premises to search for defendant's bicycle, in defendant's absence. Once the police entered the yard, they observed bloodstains on the handlebars and along the crossbar of the bicycle. Thus, the bicycle was properly seized as evidence of a crime (see *People v Loomis*, 17 AD3d 1019, 1021, *lv denied* 5 NY3d 830; *People v Brown*, 226 AD2d 1108, *lv denied* 88 NY2d 964).

Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

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

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CA 10-01924

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

JERAD M. ZARNOCH, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFREY J. WILLIAMS, STEVEN J. KLOSEK, AND
VARICK RESTAURANT, INC., DOING BUSINESS
AS THE VARICK BAR AND GRILL,
DEFENDANTS-APPELLANTS.

LEONARD & CUMMINGS, LLP, BINGHAMTON (HUGH B. LEONARD OF COUNSEL), FOR
DEFENDANT-APPELLANT JEFFREY J. WILLIAMS.

GOZIGIAN, WASHBURN & CLINTON, COOPERSTOWN (EDWARD GOZIGIAN OF
COUNSEL), FOR DEFENDANTS-APPELLANTS STEVEN J. KLOSEK AND VARICK
RESTAURANT, INC., DOING BUSINESS AS THE VARICK BAR AND GRILL.

EDWARD C. COSGROVE, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeals from a judgment of the Supreme Court, Oneida County
(Anthony F. Shaheen, J.), entered January 27, 2010 in a personal
injury action. The judgment awarded plaintiff money damages upon a
jury verdict.

It is hereby ORDERED that the judgment so appealed from is
modified on the law by granting the post-trial motion of defendants
Steven J. Klosek and Varick Restaurant, Inc., doing business as The
Varick Bar and Grill, setting aside the verdict against those
defendants and dismissing the complaint against those defendants and
as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for
injuries he sustained when he was struck by a motorcycle operated by
defendant Jeffrey J. Williams, after Williams had consumed alcoholic
beverages at a restaurant owned and operated by defendants Steven J.
Klosek and Varick Restaurant, Inc., doing business as The Varick Bar
and Grill (collectively, Varick defendants). Williams and the Varick
defendants each appeal from a judgment entered upon a jury verdict in
favor of plaintiff. We reject Williams' contention that Supreme Court
abused its discretion in permitting plaintiff's expert to testify
regarding the likelihood of plaintiff's need for future surgery. The
admissibility and scope of expert testimony rests within the sound
discretion of the court (*see De Long v County of Erie*, 60 NY2d 296,
307). "[A] witness may testify as an expert if it is shown that he
[or she] is skilled in the profession or field to which the subject
relates[] and that such skill was acquired from study, experience[] or

observation' " (*Karasik v Bird*, 98 AD2d 359, 362; see *Matott v Ward*, 48 NY2d 455, 459). Plaintiff established that his medical expert possessed "the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" and that the testimony was in the acceptable form of an opinion concerning the need for future medical treatment (*Matott*, 48 NY2d at 459; see *Inzinna v Brinker Rest. Corp.* [appeal No. 2], 302 AD2d 967, 968-969; *Wroblewski v National Fuel Gas Distrib. Corp.*, 247 AD2d 917, 918).

We agree with the Varick defendants, however, that the court erred in denying their post-trial motion to set aside the verdict, and we therefore modify the judgment accordingly. We conclude that the court erred in instructing the jury with respect to the special use doctrine. The special use doctrine creates an exception to the general rule that the duty to keep public sidewalks in a reasonably safe condition and repair lies with municipalities when " 'permission [has been] given, by a municipal authority, to [abutting landowners to] interfere with a street solely for private use and convenience in no way connected with the public use' " (*Kaufman v Silver*, 90 NY2d 204, 207, quoting *Clifford v Dam*, 81 NY 52, 56-57). When "the abutting landowner[s] 'derive[] a special benefit from that [public property] unrelated to the public use,' [they are] 'required to maintain' the used property in a reasonably safe condition to avoid injury to others" (*id.*, quoting *Poirier v City of Schenectady*, 85 NY2d 310, 315). A special use is typically characterized by " 'the installation of some object in the sidewalk or street or some variance in the construction thereof' " (*Weiskopf v City of New York*, 5 AD3d 202, 203, quoting *Granville v City of New York*, 211 AD2d 195, 197; see *Melamed v Rosefsky*, 291 AD2d 602; 1A NY PJI3d 2:111, at 649).

Here, the accident occurred when Williams attempted to drive his motorcycle away from The Varick Restaurant after he had parked it on the sidewalk. There is no indication in the record that the sidewalk had ever been altered in some way for the exclusive benefit of the Varick defendants, and plaintiff does not contend that he was injured by some defect in the structure or integrity of the sidewalk (*cf. Peretich v City of New York*, 263 AD2d 410). Further, the record establishes that the Varick defendants neither directed Williams to park on the sidewalk nor had the authority to do so (see Vehicle and Traffic Law § 1202 [a] [1] [b]; see also *Pulka v Edelman*, 40 NY2d 781, 783, *rearg denied* 41 NY2d 901). Thus, the Varick defendants had no duty to maintain, repair, supervise or control the sidewalk with respect to vehicles parked on it. Plaintiff's position on the sidewalk "was no different from that of any other passerby" using the public sidewalk (*Rodriguez v Oak Point Mgt.*, 87 NY2d 931, 932).

All concur except FAHEY, J., who dissents in part and votes to affirm in the following Memorandum: I respectfully dissent in part and would affirm the judgment inasmuch as I cannot agree with the majority that Supreme Court erred in instructing the jury with respect to the special use doctrine.

The accident giving rise to this action occurred on the night of May 5, 2005 while plaintiff was standing on a sidewalk outside two bars known colloquially as "The Stiefvater" and "The Varick." The Varick is owned and operated by defendants Steven J. Klosek and Varick Restaurant, Inc., doing business as The Varick Bar and Grill (collectively, Varick defendants). While plaintiff was standing on the sidewalk, defendant Jeffrey J. Williams exited The Varick and mounted his motorcycle, which was parked on the sidewalk. Seconds later, plaintiff was struck by the motorcycle and pinned against the building.

The accident caused plaintiff to sustain significant injuries, including a left tibial shaft fracture, a broken right ankle and a broken right foot, and plaintiff subsequently underwent four surgeries related to those injuries. Plaintiff commenced this action seeking damages for those injuries and, at trial, presented evidence establishing, inter alia, that motorcycles had been parked in front of The Varick on prior occasions. Indeed, according to one of plaintiff's witnesses, motorcycles were regularly present on the sidewalk in front of The Varick on Thursdays, and plaintiff's accident occurred on a Thursday. The trial testimony also established that The Varick catered in part to motorcyclists and used the area of the sidewalk where the accident occurred as a motorcycle parking area.

During its charge to the jury, the court instructed the jury with respect to the special use doctrine, i.e., that the Varick defendants, as the owners of the land abutting the sidewalk, could be subject to liability to the extent the sidewalk was used for their own special benefit. The jury returned a verdict in favor of plaintiff and awarded him damages totaling approximately \$850,000. The Varick defendants subsequently moved to set aside the verdict on, inter alia, the ground that plaintiff failed to present evidence that would support a finding of special use. The court denied the post-trial motion.

"Generally, 'an owner of land abutting [a public sidewalk] does not, solely by reason of being an abutter, owe to the public a duty to keep the [sidewalk] in a safe condition' " (*Keenan v Munday*, 79 AD3d 1415, 1417). Nevertheless, under the special use doctrine, "where the neighboring landowner derives a special benefit from that public property which is unrelated to the public use, the landowner is required to maintain the property in a reasonably safe condition so as to avoid injury to others" (*id.*; see *Kaufman v Silver*, 90 NY2d 204, 207).

"A special use has been characterized as involving 'the installation of some object in the sidewalk or street or some variance in the construction thereof' " (*Weiskopf v City of New York*, 5 AD3d 202, 203). The historical roots of the special use doctrine, however, rest in a desire to authorize the imposition of liability upon the owner of abutting land for injuries arising out of circumstances where that landowner *interferes* " 'with a street solely for private use and convenience in no way connected with the public use' " (*Kaufman*, 90 NY2d at 207, quoting *Clifford v Dam*, 81 NY 52, 56-57). Indeed, types

of uses that have qualified as special uses include, inter alia, the placement on a sidewalk of a newspaper vending machine (see *Gerdowsky v Crain's N.Y. Bus.*, 188 AD2d 93, 95), newspaper racks (see *Curtis v City of New York*, 179 AD2d 432, *lv denied* 80 NY2d 753) and outdoor café seating (see *MacLeod v Pete's Tavern*, 87 NY2d 912, 914; *Taubenfeld v Starbucks Corp.*, 48 AD3d 310, 311, *lv denied* 10 NY3d 713), as well as the use of a sidewalk as a driveway (see *Campos v Midway Cabinets, Inc.*, 51 AD3d 843; see also *Murnan v Town of Tonawanda*, 34 AD3d 1296). Consequently, I cannot agree with the majority to the extent that it concludes that the alteration of a sidewalk is a predicate to the special use of that sidewalk.

I also respectfully disagree with the majority to the extent that it concludes that the special use doctrine applies only where an injury is caused by a defective condition *in* the sidewalk. At the core of the special use doctrine is the authorization of liability for *interference* with a street or sidewalk solely for private use. The fact that a dangerous condition is *on*, but not *in*, a sidewalk is not dispositive of the question whether the special use doctrine applies (see *e.g. Montalvo v Western Estates*, 240 AD2d 45, 46-48; *Gerdowsky*, 188 AD2d at 95).

Finally, I respectfully disagree with the majority's conclusion that the court erred in charging the jury on the special use doctrine. There were several references in the testimony at trial to motorcycles having been parked on the sidewalk in front of The Varick on prior occasions. Indeed, plaintiff presented evidence that motorcycles were regularly present on the sidewalk in front of The Varick on the day of the week that the accident occurred, and the evidence also established that The Varick used that part of the sidewalk where the accident occurred as a parking area for motorcycles. Consequently, in my view, plaintiff presented evidence that would support a finding of special use (*cf. Warren v Leone*, 298 AD2d 980; see generally *Kaufman*, 90 NY2d at 207-208), and I would therefore affirm.

Patricia L. Morgan

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

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CA 10-01884

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

CHRISTINE KOLODZIEJCZAK, INDIVIDUALLY AND
AS PARENT AND LEGAL GUARDIAN OF CLAIRE
KOLODZIEJCZAK, AN INFANT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

RAYMOND KOLODZIEJCZAK, RAY KOLO EXCAVATING, INC.,
DEFENDANTS-APPELLANTS,
AND SCOTT KOLODZIEJCZAK, DEFENDANT.

FISHMAN & TYNAN, ESQS., MERRICK (JOHN FISHMAN OF COUNSEL), FOR
DEFENDANT-APPELLANT RAYMOND KOLODZIEJCZAK.

LEVENE GOULDIN & THOMPSON, LLP, VESTAL (DANIEL R. NORTON OF COUNSEL),
FOR DEFENDANT-APPELLANT RAY KOLO EXCAVATING, INC.

DAVIDSON & O'MARA, PC, ELMIRA (RANSOM P. REYNOLDS, JR., OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered June 21, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Raymond Kolodziejczak and the cross motion of defendant Ray Kolo Excavating, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting that part of the motion of defendant Raymond Kolodziejczak for summary judgment dismissing the negligent supervision cause of action against him and granting the cross motion of defendant Ray Kolo Excavating, Inc. for summary judgment dismissing the amended complaint and cross claim against it and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action, individually and on behalf of her daughter, seeking damages for injuries sustained by her daughter when two of her fingers were severed by a log splitter (splitter). The accident occurred when plaintiff's daughter was adjusting a crooked piece of wood on the splitter and plaintiff's infant son simultaneously lowered the handle on the splitter to activate it. Plaintiff asserted, inter alia, causes of action for negligent supervision and negligent entrustment against defendants Raymond Kolodziejczak, her children's grandfather (grandfather) and the owner of the property on which the accident occurred, and Ray Kolo Excavating, Inc. (Kolo). Supreme Court denied the motion of the

grandfather for summary judgment dismissing the amended complaint against him and the cross motion of Kolo for, inter alia, summary judgment dismissing the amended complaint and cross claim against it.

We conclude that the court erred in denying that part of the grandfather's motion seeking summary judgment dismissing the negligent supervision cause of action against him, and we therefore modify the order accordingly. Insofar as the amended complaint alleges that the grandfather had a duty to supervise plaintiff's daughter, it is well established that a grandparent who exercises temporary custody and control of a child may be liable for any injury sustained by the child that was caused by the grandparent's negligence (*see Appell v Mandel*, 296 AD2d 514; *Adolph E. v Lori M.*, 166 AD2d 906; *Costello v Marchese*, 137 AD2d 482, 483). Here, the grandfather met his initial burden on the motion with respect to his alleged negligent supervision of plaintiff's daughter by submitting evidence establishing that he did not supervise or control plaintiff's daughter at any relevant time, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Insofar as the amended complaint alleges that the grandfather had a duty to supervise plaintiff's son, we note that "[p]roperty owners 'have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control' " (*Lasek v Miller*, 306 AD2d 835, 835, quoting *D'Amico v Christie*, 71 NY2d 76, 85). Nevertheless, we conclude that the grandfather met his initial burden on the motion with respect to his allegedly negligent supervision of plaintiff's son by submitting evidence that the grandfather had no reason to perceive a need to control plaintiff's son, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562).

We further conclude, however, that the court properly denied that part of the grandfather's motion seeking summary judgment dismissing the negligent entrustment cause of action against him. We reject the grandfather's contention that his actions merely furnished the occasion by which the accident was made possible, i.e., his actions were not a proximate cause of the accident. "Questions concerning . . . proximate cause are generally . . . for the jury" (*Prystajko v Western N.Y. Pub. Broadcasting Assn.*, 57 AD3d 1401, 1403 [internal quotation marks omitted]). The grandfather failed to establish as a matter of law that his actions in permitting plaintiff's son and the father of the children, defendant Scott Kolodziejczak, to operate the splitter on the grandfather's property in the presence of plaintiff's daughter were not a proximate cause of the accident.

Kolo contends that the court erred in denying its cross motion for, inter alia, summary judgment dismissing the amended complaint and cross claim against it because Kolo did not owe a duty of care to plaintiff's daughter. We agree, and we therefore further modify the order accordingly. "[B]efore a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the

plaintiff" (*Pulka v Edelman*, 40 NY2d 781, 782, rearg denied 41 NY2d 901; see *Clementoni v Consolidated Rail Corp.*, 30 AD3d 986, 987, affd 8 NY3d 963). "The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the courts" (*Sanchez v State of New York*, 99 NY2d 247, 252; see *Galasso v Wegmans Food Mkts., Inc.*, 53 AD3d 1145).

With respect to the negligent supervision cause of action against Kolo, a special relationship such as a master-servant relationship may give rise to a duty to control the conduct of another (see *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8, rearg denied 72 NY2d 953). Here, however, because the negligent supervision cause of action against the grandfather must be dismissed and the grandfather is the only link between Kolo and the accident, Kolo cannot be held liable to plaintiff under a theory of negligent supervision.

With respect to the negligent entrustment cause of action against Kolo, we note that "[t]he question of duty . . . is best expressed as 'whether the plaintiff's interests are entitled to legal protection against the defendant's conduct' " (*Pulka*, 40 NY2d at 782). We conclude that Kolo met its initial burden by submitting the grandfather's affidavit in which he indicated that the accident occurred during his personal pursuit on property with which Kolo had no involvement (see generally *Zuckerman*, 49 NY2d at 562). In opposition to the cross motion, plaintiff failed to raise a triable issue of fact whether Kolo had any involvement in the accident (see generally *id.*).

All concur except CARNI and MARTOCHE, JJ., who dissent in part and vote to reverse the order insofar as appealed from in accordance with the following Memorandum: We respectfully dissent in part. We agree with the majority that Supreme Court erred in denying that part of the motion of defendant Raymond Kolodziejczak (hereafter, grandfather) for summary judgment dismissing the negligent supervision cause of action against him, inasmuch as the grandfather had no reason to perceive a need to control plaintiff's son. We further agree with the majority that the court erred in denying the cross motion of defendant Ray Kolo Excavating, Inc. (Kolo) for, inter alia, summary judgment dismissing the amended complaint and cross claim against it. We conclude, however, that the court also erred in denying that part of the grandfather's motion seeking summary judgment dismissing the negligent entrustment cause of action against him. We note that the grandfather and Kolo do not appeal from that part of the order denying plaintiff's motion for discovery inasmuch as they are not aggrieved by it. We therefore would reverse the order insofar as appealed from.

Generally, a parent or, in this case, a grandparent, may be liable for injuries to a third-party resulting from the entrustment of an instrument made dangerous by the age, intelligence, infirmity, disposition or training of the child using the instrument (see generally *Nolechek v Gesuale*, 46 NY2d 332, 338). The rationale is that the person responsible for the child "owes a duty to protect third[-]parties from harm that is clearly foreseeable from the child's improvident use or operation of a dangerous instrument, where such use

is found to be subject to [that person's] control" (*Rios v Smith*, 95 NY2d 647, 653; see *LaTorre v Genesee Mgt.*, 90 NY2d 576, 581). We cannot conclude that the evidence supports the determination that the grandfather entrusted a dangerous instrument, i.e., the log splitter (splitter), to plaintiff's son. Rather, the evidence establishes that the child's father was supervising him with respect to the operation of the splitter. It would be inconsistent to conclude that the use of the splitter by plaintiff's son was subject to the grandfather's control and also to conclude, as the majority does, that the grandfather had no reason to perceive a need to control plaintiff's son.

Patricia L. Morgan

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

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CA 10-01183

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

CHARLES R. KIRBY AND BRANDY L. KIRBY,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

SUBURBAN ELECTRICAL ENGINEERS CONTRACTORS, INC.,
DEFENDANT-APPELLANT,
MARQUIP WARD UNITED, LLC, ET AL., DEFENDANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (SCOTT P. ROGOFF OF COUNSEL), FOR
DEFENDANT-APPELLANT.

ANTHONY F. ENDIEVERI, CAMILLUS, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered March 12, 2010 in a personal injury action. The order, insofar as appealed from, granted in part plaintiffs' motion for leave to renew and upon renewal denied the cross motion of defendant Suburban Electrical Engineers Contractors, Inc. for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs and plaintiffs' motion is denied.

Memorandum: Supreme Court erred in granting that part of plaintiffs' motion seeking leave to renew their opposition to the cross motion of defendant Suburban Electrical Engineers Contractors, Inc. (Suburban) for summary judgment dismissing the amended complaint against it and, upon renewal, denying the cross motion. Although a court has discretion to "grant renewal, in the interest of justice, upon facts [that] were known to the movant[s] at the time the original motion was made" (*Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376), it may not exercise that discretion unless the movants establish a "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]; see *Robinson v Consolidated Rail Corp.*, 8 AD3d 1080; *Greene v New York City Hous. Auth.*, 283 AD2d 458). Here, plaintiffs failed to demonstrate that their purported new evidence was not in existence or not available at the time of Suburban's cross motion (see *Patel v Exxon Corp.*, 11 AD3d 916). In support of their motion for leave to renew, plaintiffs submitted the affidavits of two employees of International Paper, where the machine that caused the injury at issue was located. We conclude, however, that the information presented in those affidavits could have been discovered and presented earlier with

due diligence (*see Ford v Lasky*, 300 AD2d 536). Indeed, the evidence submitted in support of the motion for leave to renew "was within the purview of plaintiff[s'] knowledge at the time" of Suburban's cross motion (*Tibbits v Verizon N.Y., Inc.*, 40 AD3d 1300, 1303). The record establishes that a private investigator for plaintiffs met with one of those employees, Daniel Scharrett, in 2006 and obtained a statement from him, ostensibly in the form of an affidavit. Although the court concluded that Scharrett's statement was not in admissible form because it was not properly sworn, Scharrett was known to plaintiffs and available to speak to their investigator in 2006. Plaintiffs filed a note of issue in August 2008, indicating their readiness for trial. Plaintiffs thereafter requested that the investigator locate Scharrett for the purpose of deposing him or to subpoena him for trial. The dissent's reliance upon *De Cicco v Longendyke* (37 AD3d 934) is misplaced. Here, plaintiffs had already secured a purported affidavit from Scharrett prior to Suburban's cross motion and did not submit an affidavit attesting to their efforts to obtain additional information from Scharrett for the purpose of defeating the cross motion.

All concur except FAHEY, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent. I cannot agree with the majority that Supreme Court erred in granting that part of plaintiffs' motion seeking leave to renew their opposition to the cross motion of defendant Suburban Electrical Engineers Contractors, Inc. (Suburban) for summary judgment dismissing the amended complaint against it. I therefore would affirm as a matter of law.

This appeal arises from a November 10, 2004 incident in which Charles R. Kirby (plaintiff) was injured during the course of his employment with International Paper at one of its plants. The accident occurred after plaintiff lifted a safety gate on a "slitter" machine (hereafter, slitter) on a production line containing knives and arbors that cut cardboard to a certain length and width before it was stacked and prepared for shipping. The slitter should have stopped running when the safety gate was lifted, but it did not. Plaintiff, unaware of the malfunction of the slitter, put his left hand into that machine to unclog a significant cardboard jam in the trim chute, and one of the arbors cut off most of that hand.

In October 2004, shortly before the accident, a "knife and stacker" device (hereafter, stacker) was installed on the same production line as the slitter by Suburban and defendants Marquip Ward United, LLC "and/or" Marquip Ward United, Inc. (collectively, Marquip defendants). Suburban assembled and ran the wiring for the stacker, while the Marquip defendants completed the "technical work" by "working out the bugs to the machine" and making it "run again." Shortly after the accident, an investigation confirmed that the slitter continued to operate when the safety gate was raised, which was an obvious malfunction inasmuch as the safety gate is designed to stop the slitter within a few seconds of the time at which it is opened.

Plaintiffs subsequently commenced this action seeking damages for

injuries sustained by plaintiff in the accident. Plaintiffs filed a note of issue in August 2008, and Suburban moved to strike, *inter alia*, the note of issue. The court denied the motion but, *inter alia*, ordered that defendants were entitled to depose Daniel Scharrett, one of plaintiff's coworkers, within 60 days of December 24, 2008 and that any additional depositions were also to be completed within that time period.

Scharrett was never deposed, and the Marquip defendants and Suburban eventually moved and cross-moved, respectively, for summary judgment dismissing the amended complaint. The court granted the motion and cross motion in June 2009, determining that, in opposition to the motion and cross motion, plaintiffs failed to raise a triable issue of fact whether defendants created or exacerbated the dangerous condition, *i.e.*, the faulty safety gate, by improperly connecting the wires to the circuit box attached to the slitter.

Plaintiffs moved for leave to renew their opposition to the motion and cross motion in August 2009. In support of their motion, plaintiffs submitted the affidavit of a private investigator who explained why Scharrett had never been deposed. According to that private investigator, Scharrett traveled with a carnival. The investigator had located Scharrett in North Carolina in October 2006, but plaintiffs' attorney was not present and thus did not interview him at that time. The investigator unsuccessfully searched for Scharrett for several months beginning in approximately November 2008 for the purpose of facilitating his deposition and finally located him subsequent to the determination of the summary judgment motion and cross motion through the use of an Internet search engine for public records databases.

Plaintiffs' attorney thereafter met with Scharrett and, as a result of that meeting, Scharrett executed an affidavit that led to further conferences between plaintiffs and their expert engineer, as well as contact between plaintiffs' attorney and other coworkers of plaintiff. The further investigation that flowed from those meetings produced evidence that the negligence of Suburban in the installation of the stacker and incidental rewiring of parts of the production line caused the accident.

Plaintiffs submitted the foregoing evidence in support of their motion for leave to renew. The court granted that part of the motion with respect to Suburban's cross motion and, upon renewal, denied the cross motion. In doing so, the court properly relied on *De Cicco v Longendyke* (37 AD3d 934). In *De Cicco*, the Third Department determined that the court did not abuse its discretion in granting the plaintiff's motion to renew his opposition to the defendant's motion for summary judgment, concluding that the plaintiff was reasonably justified in failing to present certain evidence in opposition to the motion because of the relocation of the nonparty witness from whom that evidence was obtained (*id.* at 935).

As the Third Department declined to do in *De Cicco*, we should not interfere with the court's proper exercise of discretion in

determining the motion for leave to renew. Even assuming, arguendo, that the evidence discovered after plaintiffs' investigator located Scharrett in 2009 could have been presented at the time Suburban's cross motion was made (*cf. Foxworth v Jenkins*, 60 AD3d 1306), I cannot agree with the majority that plaintiffs failed to offer a reasonable justification for their failure to submit that evidence in opposition to the cross motion (*see Matter of Lutheran Med. Ctr. v Daines*, 65 AD3d 551, 553, *lv denied* 13 NY3d 712; *see generally* CPLR 2221 [e] [3]). The record establishes that Scharrett's work with a traveling carnival limited plaintiffs' ability to interview him carefully and completely during the early stages of this case and that plaintiffs reinvigorated their efforts to contact Scharrett well before the motion and cross motion for summary judgment were filed. Although an Internet search led to the discovery of Scharrett's whereabouts in relatively short order, that technology, while no longer nascent, is far from established, and the apparent lack of familiarity and expertise of plaintiffs' attorney with that science does not support denial of the renewal motion.

Consequently, in view of Scharrett's transient lifestyle, I cannot conclude that the court abused its discretion in determining that plaintiffs were reasonably justified in failing to present the evidence that flowed from the 2009 meeting with Scharrett in opposition to Suburban's cross motion (*see De Cicco*, 37 AD3d at 935). Motions for leave to renew are addressed to the sound discretion of the court, and the majority's decision here is contrary to the ends of justice and incompatible with the judicial flexibility that CPLR 2221 is intended to provide (*see* Mem of NY State Bar Assn Comm on CPLR, Bill Jacket, L 1999, ch 281, at 6-7; *see e.g. Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 100, *lv dismissed* 13 NY3d 900; *Matter of Gold v Gold*, 53 AD3d 485, 487; *see generally Garland v RLI Ins. Co.*, 79 AD3d 1576, 1577-1579 [Sconiers, J., dissenting]). Indeed, "[t]he fundamental and overriding purpose of CPLR 2221 should be to give courts and litigants every reasonable opportunity to obtain the legally correct and just result based on the merits of the case" (*Garland*, 79 AD3d at 1578-1579).

Finally, I conclude that the court properly denied Suburban's cross motion for summary judgment upon renewal. Although " 'a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party' " (*Cumbo v Dormitory Auth. of State of N.Y.*, 71 AD3d 1513, 1514, quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138; *see Church v Callanan Indus.*, 99 NY2d 104, 111), " 'a defendant who undertakes to render services and then negligently creates or [exacerbates] a dangerous condition may be liable for any resulting injury' " (*Cumbo*, 71 AD3d at 1514, quoting *Espinal*, 98 NY2d at 141-142). Here, Suburban submitted evidence that it did not work on the slitter and thus met its initial burden of establishing that it did not create or exacerbate the allegedly dangerous condition (*see generally Espinal*, 98 NY2d at 141-142). In opposition to the cross motion, however, plaintiffs raised a triable issue of fact whether Suburban created the allegedly dangerous

condition giving rise to plaintiff's injury (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

192

CA 09-02609

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

DOREEN DENGLER AND CHARLES DENGLER,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

MEMORANDUM AND ORDER

STEVEN J. POSNICK, M.D.,
DEFENDANT-APPELLANT-RESPONDENT,
HIGHLAND HOSPITAL, UNIVERSITY OF ROCHESTER
AND STRONG PARTNERS HEALTH SYSTEMS, INC.,
DEFENDANTS-RESPONDENTS.

HIRSCH & TUBIOLO, P.C., ROCHESTER (CHRISTOPHER S. NOONE OF COUNSEL),
FOR DEFENDANT-APPELLANT-RESPONDENT.

LACY KATZEN LLP, ROCHESTER (PETER T. RODGERS OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS-APPELLANTS.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (DANIEL P. PURCELL OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered November 12, 2009 in a medical malpractice action. The order and judgment, *inter alia*, granted plaintiffs' motion for partial summary judgment on liability against defendant Steven J. Posnick, M.D. and granted the cross motion of defendants Highland Hospital, University of Rochester and Strong Partners Health Systems, Inc. for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying that part of plaintiffs' motion seeking partial summary judgment on liability against defendant Steven J. Posnick, M.D., and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this medical malpractice action to recover damages for a burn injury sustained by Doreen Dengler (plaintiff) while she was undergoing arthroscopic surgery on her right shoulder. Defendant Steven J. Posnick, M.D. was plaintiff's private physician, and he performed the surgery at defendant Highland Hospital. Posnick was assisted by a surgical resident and nursing staff, all of whom were employed by Highland Hospital, which was owned, operated or controlled by defendants University of Rochester and Strong Partners Health Systems, Inc. (collectively, Hospital defendants). Posnick and the surgical resident conceded that the burn

occurred during surgery and that it was "most likely" caused by the overheating of an instrument. Both physicians denied that they were negligent and contended that the instrument was defective. Plaintiffs moved for partial summary judgment on liability based on the theory of *res ipsa loquitur*. Posnick cross-moved for summary judgment dismissing the complaint against him, and the Hospital defendants cross-moved for summary judgment dismissing the complaint against them. Supreme Court granted that part of plaintiffs' motion with respect to Posnick, denied Posnick's cross motion and granted the Hospital defendants' cross motion.

We agree with Posnick on his appeal that the court erred in granting that part of plaintiffs' motion with respect to him, and we therefore modify the order and judgment accordingly. "In New York it is the general rule that submission of the case on the theory of *res ipsa loquitur* is warranted only when the plaintiff can establish the following elements: (1) the event must be of a kind [that] ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [internal quotation marks omitted]; see *Morejon v Rais Constr. Co.*, 7 NY3d 203, 209; *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494). "Res ipsa loquitur does not create a presumption in favor of the plaintiff but merely permits the inference of negligence to be drawn from the circumstance of the occurrence . . . The rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may—but is not required to—draw the permissible inference" (*Dermatossian*, 67 NY2d at 226; see *Morejon*, 7 NY3d at 209). "[O]nly in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment . . . That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*Morejon*, 7 NY3d at 209; see *Lau v Ky*, 63 AD3d 801; *Simmons v Neuman*, 50 AD3d 666).

Here, the evidence submitted by plaintiffs in support of their motion established that the inference of negligence is not inescapable and that this is not "the exceptional case in which no facts are left for determination" (*Morejon*, 7 NY3d at 212; see *Champagne v Peck*, 59 AD3d 1130; cf. *Thomas v New York Univ. Med. Ctr.*, 283 AD2d 316; *Salter v Deaconess Family Medicine Ctr.* [appeal No. 2], 267 AD2d 976). The burden thus never shifted to defendants to raise a triable issue of fact, and we do not address plaintiffs' contentions concerning the sufficiency of Posnick's opposing papers (see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Contrary to the further contention of Posnick, however, the court properly denied his cross motion seeking summary judgment dismissing the complaint against him because, "[o]nce a plaintiff's proof establishes the . . . three [elements of *res ipsa loquitur*], a prima facie case of negligence exists and plaintiff is entitled to have *res ipsa loquitur* charged to the jury" (*Kambat*, 89 NY2d at 494).

We reject the contention of plaintiffs on their cross appeal that the court erred in granting the cross motion of the Hospital defendants for summary judgment dismissing the complaint against them. "As a general rule, a hospital will not be held vicariously liable for the malpractice of a treating physician who is not an employee of the hospital" (*Litwak v Our Lady of Victory Hosp. of Lackawanna*, 238 AD2d 881, 881; *see generally Hill v St. Clare's Hosp.*, 67 NY2d 72, 79; *Lorenzo v Kahn*, 74 AD3d 1711, 1712-1713), and "a hospital is protected from liability where its professional staff follows the orders of private physicians selected by the patient" (*Litwak*, 238 AD2d at 882 [internal quotation marks omitted]; *see Lorenzo*, 74 AD3d at 1712-1713; *Nagengast v Samaritan Hosp.*, 211 AD2d 878, 880). "The only recognized exception is where the hospital staff knows that the [physician's] orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders" (*Nagengast*, 211 AD2d at 880 [internal quotation marks omitted]; *see Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265 n 3, *rearg denied* 22 NY2d 973). Here, there is no dispute that the resident and the nurses were following Posnick's orders, and there is no evidence that any of Posnick's orders were clearly contraindicated by normal practice (*cf. Lorenzo*, 74 AD3d at 1712-1713). Thus, the Hospital defendants established their entitlement to judgment as a matter of law, and plaintiffs failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We reject plaintiffs' further contention that the Hospital defendants had concurrent control of the instrument causing the injury (*cf. Schroeder v City & County Sav. Bank of Albany*, 293 NY 370, 374, *rearg denied* 293 NY 764). Also contrary to plaintiffs' contention, the Hospital defendants were not liable for spoliation of evidence (*see generally MetLife Auto & Home v Joe Basil Chevrolet*, 1 NY3d 478, 483-484). The Hospital defendants had no duty to preserve the allegedly defective instrument inasmuch as neither Posnick nor plaintiffs offered to pay the costs associated with the preservation of evidence, issued a subpoena duces tecum or obtained an order compelling preservation (*see e.g. MetLife Auto & Home*, 1 NY3d at 483; *Brown v DePuy AcroMed, Inc.*, 21 AD3d 1431, 1433; *cf. Millard v Alliance Laundry Sys., LLC*, 20 AD3d 866, 867).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

199

KA 10-00554

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TREVOR J. LACROCE, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (AARON D. CARR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 1, 2010. The judgment convicted defendant, upon his plea of guilty, of rape 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 rape in the first degree (Penal Law § 130.35 [3]), defendant contends that he was denied effective assistance of counsel. To the extent that defendant's contention survives his guilty plea (*see People v Bethune*, 21 AD3d 1316, *lv denied* 6 NY3d 752), we conclude that it is without merit. "Defense counsel negotiated 'an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Gross*, 50 AD3d 1577, quoting *People v Ford*, 86 NY2d 397, 404).

Defendant further contends that County Court abused its discretion in failing to adjourn sentencing to enable him to appear with the assistant public defender who represented him during the plea and pre-plea proceedings (hereafter, plea counsel), and instead to require him to appear at sentencing with an assistant public defender who was available at that time (hereafter, substitute counsel). We reject that contention. It is well established that "[t]he granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*People v Diggins*, 11 NY3d 518, 524; *see People v Elliott*, 62 AD3d 1098, 1099, *lv denied* 12 NY3d 924), and we perceive no abuse of discretion here. After the People articulated their understanding of the negotiated sentence, substitute counsel informed the court that defendant had indicated that he was not satisfied with her representation, and he requested the presence of plea counsel. Upon further inquiry by the court, defendant said that he wished to ask plea counsel certain questions, namely, whether he

would be allowed to pay the mandatory fees and surcharges after his release from prison and in what manner he could obtain copies of the transcripts from his various court appearances. In response to defendant's questions, substitute counsel requested that the surcharge and the fees be deferred until defendant's release from prison, and the court explained to defendant that his assigned appellate counsel would obtain the transcripts for purposes of an appeal. Thus, the record reflects that the court and substitute counsel adequately addressed defendant's concerns, and there is no indication that defendant was not satisfied with those responses or that he still wished to speak with plea counsel prior to sentencing. Furthermore, there is no indication in the record that substitute counsel "failed to handle the matter in a competent and professional manner" (*People v Rodriguez*, 126 AD2d 580, 581, *lv denied* 69 NY2d 954), or that she was not "sufficiently familiar with the case and defendant's background to provide meaningful representation" (*People v Michael A.M.*, 299 AD2d 931, 932; *cf. People v Susankar*, 34 AD3d 201, 202, *lv denied* 8 NY3d 849; *People v Jones*, 15 AD3d 208, 209). Indeed, the record reflects that defendant was sentenced in accordance with the plea agreement negotiated by plea counsel (see generally *Rodriguez*, 126 AD2d at 581; *People v Sprow*, 104 AD2d 1056, 1057; *cf. People v Darkel C.*, 68 AD3d 1129). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

220

KA 03-02239

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EMMANUEL D. LITTLE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered July 25, 2003. 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 modified as a matter of discretion in the interest of justice and on the law by reducing the conviction of murder in the second degree (Penal Law § 125.25 [2]) to manslaughter in the second degree (§ 125.15 [1]) and vacating the sentence imposed on count two of the indictment and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for sentencing on the conviction of manslaughter in the second degree.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]), defendant contends that the evidence is legally insufficient to support the conviction. It is undisputed that defendant killed the victim by firing a single shot at close range on a street in the City of Rochester shortly before midnight. There were no witnesses to the shooting. In confessing to the police that he killed the victim and in his testimony at trial, defendant asserted that he acted in self-defense after the victim, a person previously unknown to him but from whom he had attempted to purchase marijuana, threatened to kill him. A prosecution witness testified, however, that defendant informed him following the murder that he had killed the victim while attempting to take a necklace from him. Regardless of defendant's motive, there was no evidence that anyone other than the victim was endangered. Although defendant was indicted for both intentional and depraved indifference murder, defense counsel moved for a trial order of dismissal at the close of the People's proof with respect to the depraved indifference murder

count, contending that the evidence was legally insufficient to support that charge because "the only evidence adduced in the case is that there was one shot, fired directly at the deceased." The basis for defense counsel's motion is supported by the line of cases, beginning with *People v Hafeez* (100 NY2d 253) and culminating in *People v Suarez* (6 NY3d 202, 208) and *People v Feingold* (7 NY3d 288). As the Court of Appeals stated in *People v Payne* (3 NY3d 266, 272, *rearg denied* 3 NY3d 767), "a one-on-one shooting . . . can almost never qualify as depraved indifference murder." Notably, *Hafeez* was decided by the Court of Appeals on the very day that the presentation of evidence in defendant's trial began.

We initially conclude that, if defendant had not submitted proof at trial, defense counsel's motion for a trial order of dismissal at the close of the People's proof would have been sufficient to preserve for our review defendant's contention that the evidence was legally insufficient to support the depraved indifference murder count (*cf. People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Defense counsel's motion essentially "anticipat[ed] the change in the law brought by" the *Hafeez/Suarez/Feingold* line of cases (*People v Jean-Baptiste*, 11 NY3d 539, 544). We reject the People's contention that the motion would not have been sufficient to preserve for our review a contention that the evidence was legally insufficient under *Feingold* (7 NY3d at 294), in which the Court of Appeals made it clear that "depraved indifference to human life is a culpable mental state." The Court of Appeals has also expressly stated that "it is incorrect to suggest that an argument under *Suarez* is fundamentally different from one based on *Feingold*" (*People v Taylor*, 15 NY3d 518, 522). Thus, where, as here, a motion for a trial order of dismissal would have been sufficient to preserve for our review a contention that evidence is legally insufficient to support a conviction of depraved indifference murder under *Suarez*, it would also be sufficient to preserve for our review a contention that it is legally insufficient under *Feingold* as well (*see Taylor*, 15 NY3d at 522).

As defendant correctly concedes, however, defendant's challenge to the legal sufficiency of the evidence with respect to the depraved indifference murder count is unpreserved for our review because defense counsel failed to renew his motion for a trial order of dismissal after presenting evidence (*see Hines*, 97 NY2d at 61). Nevertheless, under the circumstances of this case, we exercise our power to address the unpreserved contention as a matter of discretion in the interest of justice (*see CPL 470.15 [3] [c]; [6] [a]*). Although we acknowledge that the People advance plausible reasons why we should not do so, we cannot agree with the People's reasoning where, as here, a defendant is convicted of a crime that he plainly did not commit (*see generally People v DeCapua*, 37 AD3d 1189, *lv denied* 8 NY3d 893; *People v Packer*, 31 AD3d 1169, *lv denied* 7 NY3d 869).

As set forth above, this was a classic one-on-one shooting involving the potential of harm to only one individual, which the Court of Appeals made clear in *Payne* and *Suarez* would not support a

conviction of depraved indifference murder. While we agree with the People that the jury could reasonably have concluded that defendant acted recklessly rather than intentionally (*cf. People v Rodriguez*, 43 AD3d 1317, *lv denied* 9 NY3d 1038), the scenario presented herein does not evince the additional mens rea of depraved indifference necessary for a conviction under Penal Law § 125.25 (2) (*see Feingold*, 7 NY3d 294). Thus, there is legally insufficient evidence of depraved indifference murder in this case under the law set forth by the Court of Appeals in the line of cases from *Hafeez* through *Feingold*.

The People contend that the evidence is legally sufficient to support the conviction under the law in effect at the time of defendant's trial (*see People v Register*, 60 NY2d 270, *cert denied* 466 US 953), and that we must apply that law in assessing the legal sufficiency of the evidence herein. Even assuming, *arguendo*, that the definition of depraved indifference murder set forth in *Register* was still the prevailing law at the time of defendant's trial (*cf. Hafeez*, 100 NY2d at 259), we nevertheless reject the People's contention. As a general rule, a defendant "is entitled to the application of current principles of substantive law upon his direct appeal from the judgment of conviction" (*People v Collins*, 45 AD3d 1472, 1473, *lv denied* 10 NY3d 861, citing *Policano v Herbert*, 7 NY3d 588, 603-604). In *People v Jones* (64 AD3d 1158, 1159, *lv denied* 13 NY3d 860), we applied that general rule in a case involving the legal sufficiency of the evidence of depraved indifference murder. The People contend that, by stating in *Jean-Baptiste* (11 NY3d at 542) that *Feingold* "should apply to cases brought on direct appeal in which the defendant has adequately challenged the sufficiency of the proof as to his depraved indifference murder conviction," the Court of Appeals was implicitly stating that *Feingold* applies only in such circumstances, *i.e.*, where the sufficiency of the proof was adequately challenged to preserve the issue for review by an appellate court. We reject that contention. We do not interpret that statement in *Jean-Baptiste* to mean that the general rule concerning the law to be applied on direct appeals does not apply in cases in which we review a defendant's contention concerning the legal sufficiency of the evidence as a matter of discretion in the interest of justice.

The review of the legal sufficiency of the evidence in *Jean-Baptiste* was on the law, inasmuch as defendant's challenge to the legal sufficiency of the evidence was preserved for appellate review. The Court's statement in *Jean-Baptiste* (11 NY3d at 542) that the proof had been "adequately challenged" was made in response to the People's contention that, under cases such as *People v Dekle* (56 NY2d 835), the defendant had not objected to the jury charge and thus the legal sufficiency of the evidence had to be assessed in terms of the charge, which reflected the law in effect at the time of the defendant's trial. In rejecting the People's contention, the Court in *Jean-Baptiste* concluded that, in cases in which a defendant preserved the legal sufficiency issue by a motion for a trial order of dismissal, "defense counsel did not additionally have to take an exception to the court's depraved indifference murder charge" (*id.* at 544). We do not interpret the Court's statement as applying to cases in which we

choose to exercise our authority to review an issue as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). In the absence of an express directive from the Court of Appeals to the contrary, we decline to adopt the sweeping new rule proposed by the People and thereby to depart from our established practice. Indeed, we note that, in *Jones* (64 AD3d at 1159), we implicitly rejected the contention now raised by the People. *Jones* was decided after *Jean-Baptiste*, yet we applied the current law of depraved indifference murder on defendant's appeal even though the issue had not been preserved by a motion for a trial order of dismissal.

While we conclude that the evidence is legally insufficient to support the conviction of depraved indifference murder, we further conclude that the evidence is legally sufficient to support the lesser included offense of manslaughter in the second degree because the evidence unequivocally establishes that defendant recklessly caused the victim's death (Penal Law § 125.15 [1]; see *People v Bolling*, 49 AD3d 1330). We therefore modify the judgment by reducing the conviction of murder in the second degree to manslaughter in the second degree (§ 125.15) and vacating the sentence imposed on count two of the indictment (see CPL 470.15 [2] [a]), and we remit the matter to County Court for sentencing on that conviction (see CPL 470.20 [4]).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

249

CA 10-02291

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

PHILIP D. RUPERT, JR., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GATES & ADAMS, P.C., DOUGLAS S. GATES,
ANTHONY J. ADAMS, JR., AND MICHAEL J. TOWNSEND,
DEFENDANTS-RESPONDENTS.

ALFRED P. KREMER, ROCHESTER, FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (ROBERT M. SHADDOCK OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (James P. Murphy, J.), entered August 20, 2010 in a legal malpractice action. The order granted the motion of defendants for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the amended complaint, as amplified by the bill of particulars and supplemental bill of particulars, against defendants Gates & Adams, P.C. and Douglas S. Gates concerning their investigation and valuation of plaintiff's separate property, their investigation of the payment of the sum of \$315,000 relative to a note held by plaintiff and their investigation of the deposit by plaintiff of approximately \$60,000 in pension monies into a joint account and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this legal malpractice action alleging, inter alia, that defendants were negligent in representing him during the trial of a matrimonial action and on a subsequent appeal. In a prior appeal concerning the instant legal malpractice action, we determined, inter alia, that Supreme Court (Sirkin, J.) erred in granting defendants' cross motion seeking summary judgment dismissing the complaint (*Rupert v Gates & Adams, P.C.*, 48 AD3d 1221). In this appeal, we conclude that Supreme Court (Murphy, J.) erred in granting those parts of defendants' subsequent motion for summary judgment dismissing the amended complaint against defendants Gates & Adams, P.C. and Douglas S. Gates insofar as the amended complaint, as amplified by the bill of particulars and what we deem to be a supplemental bill of particulars, alleges that those two defendants were negligent in their representation of plaintiff in the matrimonial action with respect to their investigation and valuation of plaintiff's separate property; their investigation of the payment of

the sum of \$315,000 relative to a note held by plaintiff; and their investigation of the deposit by plaintiff of approximately \$60,000 in pension monies into a joint account. We therefore modify the order accordingly. We agree with defendants Anthony J. Adams, Jr. and Michael J. Townsend to the extent that they contend, as an alternate ground for affirmance with respect to them (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130), that they cannot be held liable because they were not negligent in their limited involvement with the matrimonial action (*see Business Corporation Law* § 1505 [a]). We therefore conclude that the court did not err insofar as it granted summary judgment dismissing the amended complaint against those two defendants.

As a threshold issue, we reject plaintiff's contention that the court erred in entertaining defendants' present motion for summary judgment. Although plaintiff is correct that successive motions for summary judgment are generally disfavored (*see Giardina v Lippes*, 77 AD3d 1290, 1291, *lv denied* 16 NY3d 702), here much of the discovery relevant to the instant motion was conducted after defendants' prior cross motion for summary judgment, and there was thus a sufficient basis for the instant motion (*see id.*; *Taillie v Rochester Gas & Elec. Corp.*, 68 AD3d 1808, 1809-1810). There is no merit to plaintiff's further contention that the affidavit submitted by the attorney for defendants, to which various exhibits were attached, was insufficient to support the motion (*see CPLR* 3212 [b]; *Rivas v Metropolitan Suburban Bus Auth.*, 203 AD2d 349, 350).

Plaintiff further contends that the court erred in concluding that it was required to grant defendants' instant motion on the ground that the prior determination of Justice Sirkin that plaintiff's failure to perfect an appeal from the final judgment in the matrimonial action barred this legal malpractice action was the law of the case. We agree with plaintiff. Although our decision in the prior appeal does not so indicate (*Rupert*, 48 AD3d 1221), the issue whether this legal malpractice action is barred by plaintiff's failure to perfect an appeal from the judgment in the matrimonial action was before us on that appeal. As previously noted, we determined that Justice Sirkin erred in granting defendants' cross motion for summary judgment dismissing the complaint (*id.*). In so ruling on the merits of the cross motion, we necessarily rejected the very premise upon which the court denied the instant motion for summary judgment and, although the doctrine of law the case applies to courts of coordinate jurisdiction, it does not apply herein in light of the decision of this Court on the prior appeal (*see generally Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1798).

Addressing next those parts of the motion seeking summary judgment dismissing the amended complaint against Gates & Adams, P.C. and Douglas S. Gates (hereafter, defendants), we conclude that the vast majority of the allegations of legal malpractice in the amended complaint, as amplified by the bill of particulars and supplemental bill of particulars, are lacking in merit. Indeed, defendants met

their initial burden on the motion with respect thereto, and plaintiff failed to raise an issue of fact in opposition (see *Pignataro v Welsh*, 38 AD3d 1320, *lv denied* 9 NY3d 849; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Although certain allegations of malpractice have merit, they do not warrant the reinstatement of the amended complaint with respect to them. Specifically, plaintiff is correct that defendants erred in failing to contend in the matrimonial action that the court in that action should not value the entire contents of \$54,725 in household goods as an asset of plaintiff and should not double-count an assessment of moving expenses levied against plaintiff. In addition, defendants failed to obtain a proper valuation of certain Canadian real property owned by plaintiff. Nevertheless, we conclude that the court did not err in granting defendants' motion concerning those alleged errors because they could have been corrected on an appeal from the final judgment in the matrimonial action, and plaintiff consented to the dismissal on the merits of any appeal in the matrimonial action as part of the global settlement resolving a bankruptcy proceeding in which he was involved. In doing so, plaintiff precluded pursuit of the very means by which defendants' representation of plaintiff in the matrimonial action could have been vindicated (see e.g. *Rodriguez v Fredericks*, 213 AD2d 176, 178, *lv denied* 85 NY2d 812; cf. *N. A. Kerson Co. v Shayne, Dachs, Weiss, Kolbrenner, Levy*, 59 AD2d 551, *affd* 45 NY2d 730, *rearg denied* 45 NY2d 839). We therefore conclude that plaintiff, by virtue of his global settlement, waived the right to raise those shortcomings in this legal malpractice action.

We further conclude, however, that the foregoing waiver analysis does not apply with respect to plaintiff's aforementioned claims that defendants were negligent with respect to the investigation and valuation of plaintiff's separate property, their investigation of the payment of the sum of \$315,000 relative to a note held by plaintiff, and their investigation of the deposit by plaintiff of approximately \$60,000 in pension monies into a joint account. Defendants failed to meet their initial burden on those parts of the motion concerning those claims (see *Pignataro*, 38 AD3d 1320; see generally *Zuckerman*, 49 NY2d at 562). The waiver analysis based on plaintiff's global settlement does not apply to those purported deficiencies in defendants' representation of plaintiff in the matrimonial action because the appeal from the final judgment in the matrimonial action would not have permitted defendants or substitute counsel for plaintiff to address questions regarding the failure to trace plaintiff's separate property into the marriage and to locate evidence both proving plaintiff's payment of \$315,000 on an outstanding note and demonstrating that \$60,000 of plaintiff's pension monies had been transferred to a joint account to be shared with plaintiff's former wife. Finally, defendants will not be heard to contend that plaintiff's involvement with the preparation of the matrimonial action for trial bars him from raising those deficiencies. An attorney generally is not permitted to shift to the client the legal responsibility that the attorney was hired to undertake because of his or her superior knowledge (see *Northrop v Thorsen*, 46 AD3d 780, 783). Indeed, it is well settled that "[a]n attorney has the responsibility to investigate and prepare every phase of his [or her] client's case"

(*Rosenstrauss v Jacobs & Jacobs*, 56 AD3d 453, 453 [internal quotation marks omitted]).

Finally, we have reviewed plaintiff's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

250

CA 10-02279

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

CHRISTINE BATTAGLIA, PLAINTIFF-RESPONDENT,

V

ORDER

HELD'S JANITORIAL, INC. AND ISKALO
HOLDING CORPORATION, DEFENDANTS.

ISKALO ELECTRIC TOWER, LLC AND ISKALO
DEVELOPMENT CORP., APPELLANTS.

EUSTACE & MARQUEZ, WHITE PLAINS, MISCHEL & HORN, P.C., NEW YORK CITY
(SCOTT T. HORN OF COUNSEL), FOR APPELLANTS.

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (ANDREW J. CONNELLY OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered January 22, 2010 in a personal injury action. The order granted the motion of plaintiff for leave to file and serve an amended summons and complaint naming Iskalo Electric Tower, LLC and Iskalo Development Corp. as defendants in place of Iskalo Holding Corporation.

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

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

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TP 10-02213

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

IN THE MATTER OF COMEDY PLAYHOUSE, LLC,
PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE LIQUOR AUTHORITY, RESPONDENT.

MCCLUSKY LAW FIRM, LLC, ADAMS (JAMES P. MCCLUSKY OF COUNSEL), FOR
PETITIONER.

JEAN MARIE CHO, NEW YORK STATE LIQUOR AUTHORITY, ALBANY (MARK D.
FRERING 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, Jefferson County [Hugh A. Gilbert, J.], entered October 7, 2010) to review a determination of respondent. The determination sustained a charge that petitioner had violated Alcoholic Beverage Control Law § 128 and imposed a civil penalty.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the petition is granted and the charge against petitioner is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that it violated Alcoholic Beverage Control Law § 128. Although this proceeding was improperly transferred to this Court pursuant to CPLR 7804 (g) because no substantial evidence question is raised herein, we nevertheless consider the merits in the interest of judicial economy (*see Matter of La Rocco v Goord*, 19 AD3d 1073; *Matter of CVS Discount Liq. v New York State Liq. Auth.*, 207 AD2d 891, 892).

Petitioner is owned and operated by Michael Kinnie, who holds a license from respondent for the sale of liquor on petitioner's premises in the Village of Sackets Harbor (Village). Approximately three months after Kinnie was elected mayor of the Village, respondent charged petitioner with violating Alcoholic Beverage Control Law § 128, alleging that Kinnie was "assigned duties directly relating to the operation or management of the police department" in contravention of the statute. After a hearing, the Administrative Law Judge (ALJ) concluded that respondent failed to sustain the charge. Respondent directed a review of the ALJ's findings and alternate findings were

issued. The "reviewer" for respondent concluded, inter alia, that Alcoholic Beverage Control Law § 128 (2) precluded Kinnie from holding a liquor license because his duties included the operation or management of the police department. Respondent adopted the alternate findings, sustained the charge against petitioner and imposed a civil penalty of \$5,000.

We agree with petitioner that respondent's determination conflicts with the clear language of Alcoholic Beverage Control Law § 128 (see generally *Matter of Destiny USA Dev., LLC v New York State Dept. of Env'tl. Conservation*, 63 AD3d 1568, 1569, lv denied 14 NY3d 703). Pursuant to that statute, "it shall be unlawful for any police commissioner, police inspector, captain, sergeant, roundsman, patrolman or other police official or subordinate of any police department in the state, to be either directly or indirectly interested in the manufacture or sale of alcoholic beverages or to offer for sale, or recommend to any licensee any alcoholic beverages" (§ 128 [1]). The statute further provides that "[n]o elective village officer shall be subject to the limitations set forth in subdivision one of . . . section [128] unless such elective village officer shall be assigned duties directly relating to the operation or management of the police department" (§ 128 [2]). Here, respondent determined that Kinnie was in violation of section 128 (2) because his duties as Village Mayor included the operation and management of the police department. That was error. The relevant question is whether Kinnie, as the Village Mayor, falls within the class of persons set forth in Alcoholic Beverage Control Law § 128 (1), i.e., whether he is a "police commissioner, police inspector, captain, sergeant, roundsman, patrolman or other police official or subordinate of any police department in the state . . ." We conclude that he does not fall within that class of persons.

In support of its determination, respondent relied upon Village Law former § 188, pursuant to which "[t]he mayor [of a village was an] . . . ex officio member[] of the police department[] and [had] all the powers conferred upon policemen by [former] article [seven of the Village Law]" (see *Harrell v Goldin*, 124 NYS2d 627, 629-630; 1970 Ops Atty Gen 8). When the Village Law was recodified in 1972, however, the Legislature repealed section 188 and enacted, inter alia, section 4-400 (see L 1972, ch 892, §§ 1, 3). Pursuant to the recodified Village Law, the village mayor is no longer an ex officio member of the police department nor vested with all the powers conferred upon the police (see § 4-400; see also 1974 Ops Atty Gen 7).

Indeed, in 1974, shortly after the recodification of the Village Law, the Attorney General opined that a village mayor, if otherwise qualified, was eligible to hold a liquor license (see 1974 Ops Atty Gen 7). The Attorney General reasoned that the newly-amended Village Law "removed all police status from the mayor . . . of a village" and that the "administrative responsibilities" set forth in Village Law § 4-400 (1) (b) and (e) did not "fall within the purview of Alcoholic Beverage Control Law[] § 128" (*id.* at 8). We find that reasoning persuasive, particularly in light of the fact that it was "a contemporaneous interpretation" of the newly-enacted provisions of the

Village Law (*Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151, 158). We thus conclude that Kinnie was not a "police commissioner . . . or other police official" within the meaning of Alcoholic Beverage Control Law § 128 (1) and that he therefore was not prohibited from holding a liquor license while serving as Village Mayor (see 1974 Ops Atty Gen 7).

We therefore annul the determination, grant the petition and dismiss the charge against petitioner. In light of our conclusion, we need not address petitioner's further contention that the civil penalty is shocking to one's sense of fairness.

Patricia L. Morgan

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

266

CAF 10-00543

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

IN THE MATTER OF ROBERT D. SECRIST,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

KRISTA BROWN, RESPONDENT-RESPONDENT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF
COUNSEL), FOR PETITIONER-APPELLANT.

STEVEN J. LORD, ATTORNEY FOR THE CHILDREN, ARCADE, FOR KYLA B. AND
JADE B.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered February 24, 2010 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking visitation.

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

Memorandum: Petitioner father, who is incarcerated, appeals from an order dismissing his petition seeking visitation with the parties' children without a hearing. Although generally "[a] determination of the [children's] best interests should only be made after a full evidentiary hearing," no such hearing is required where "there is sufficient information before the court to enable it to undertake an independent comprehensive review of the [children's] best interests" (*Matter of Mills v Sweeting*, 278 AD2d 943, 944). Here, the father was incarcerated for killing respondent mother's boyfriend, and the Attorney for the Child informed Family Court at the initial appearance that there was an order of protection in effect prohibiting the father from having contact with his children for a period of 100 years. The father was represented by counsel, who did not dispute the existence of the order of protection. Under the circumstances of this case, we conclude that the court properly dismissed the father's visitation petition without a hearing (see *Matter of Amir J.-L.*, 57 AD3d 669, lv dismissed 12 NY3d 905, rearg denied 13 NY3d 769). We reject the father's contention that he was denied effective assistance of counsel (see generally *Matter of Amanda T.*, 4 AD3d 846). In light of the order of protection, there was nothing counsel could have done to

obtain visitation for the father unless the order of protection was vacated or modified in criminal court.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

267

CAF 09-02488

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

IN THE MATTER OF ALEXANDER M.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CINDY M., RESPONDENT,
AND MICHAEL M., RESPONDENT-APPELLANT.

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

DENISE J. MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

A.J. BOSMAN, ATTORNEY FOR THE CHILD, ROME, FOR ALEXANDER M.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered November 23, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent father had neglected the subject child and ordered that the subject child remain in the care and custody of petitioner.

It is hereby ORDERED that said appeal insofar as it concerned disposition is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Respondent father appeals from an order adjudicating the child at issue in this appeal to be a neglected child. We agree with the father that Family Court erred in finding that the child was neglected based on his purported threats to remove the child from the hospital, which he made during a telephone call to hospital staff. The evidence of those purported threats did not establish that the child's "physical, mental or emotional condition . . . [was] in imminent danger of becoming impaired" (Family Ct Act § 1012 [f] [i]; see *Nicholson v Scoppetta*, 3 NY3d 357, 369; see also *Matter of Anna F.*, 56 AD3d 1197, 1198; *Matter of Casey N.*, 44 AD3d 861, 862). We conclude, however, that the court properly found that the father neglected the child based on his continued failure to address his illegal drug use. The prior orders in this proceeding detail the father's long-standing inability or refusal to deal with his drug usage (see *Matter of Carlana B.*, 61 AD3d 752, lv denied 13 NY3d 703; *Matter of Douglas QQ.*, 273 AD2d 711, 713; see generally *Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 78-80). The court stated that it would take judicial notice of those prior orders, and the father did not object (see *Matter of Kayla J.*, 74 AD3d 1665, 1667-1668; *Matter of Andrew U.*, 22 AD3d 926, 926-927; *Matter of*

Catherine KK., 280 AD2d 732, 734). Finally, the father's appeal from the order insofar as it concerned disposition is moot, inasmuch as superseding permanency orders have since been entered (see *Matter of Dustin B.*, 71 AD3d 1426; see also *Matter of Giovanni K.*, 62 AD3d 1242, lv denied 12 NY3d 715).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

268

CAF 10-00365

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

IN THE MATTER OF NORMAN E. GREEN,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JACQUELINE BONTZOLAKES, RESPONDENT-APPELLANT.
(PROCEEDING NOS. 1 AND 3.)

IN THE MATTER OF JACQUELINE BONTZOLAKES,
PETITIONER-APPELLANT,

V

NORMAN E. GREEN, RESPONDENT-RESPONDENT.
(PROCEEDING NO. 2.)

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

NORMAN E. GREEN, PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT PRO
SE.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO, FOR NYDAYA G.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 7, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded sole custody of the parties' child to petitioner Norman E. Green and visitation to respondent Jacqueline Bontzolakes.

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

Memorandum: The mother of the child at issue, the respondent in proceeding Nos. 1 and 3 and the petitioner in proceeding No. 2, appeals from an order that, following a hearing, granted the petitions in proceeding Nos. 1 and 3. The father, by those petitions, alleged that the mother violated the provisions of a prior order of custody and visitation and sought to modify that order by awarding him sole custody of the parties' daughter and granting visitation to the mother. Family Court also denied the mother's petition in proceeding No. 2 seeking modification of the visitation provisions of the prior order. Contrary to the mother's contention, the court properly awarded the father sole custody of the child (*see Matter of Dubuque v*

Bremiller, 79 AD3d 1743). " 'Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*id.* at 1744). We see no basis to disturb the court's determination.

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

Patricia L. Morgan

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

271

CAF 10-02227

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

IN THE MATTER OF MARGARET HARVEY,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS BENEDICT, RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF
COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered February 2, 2010 in a proceeding pursuant to Family Court Act article 4. The order confirmed the decision and order of the Support Magistrate granting in part the petition seeking a modification of respondent's child support obligation.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Cayuga County, for further proceedings in accordance with the following Memorandum: Petitioner mother commenced this proceeding seeking an order modifying the child support obligation of respondent father and directing him to contribute toward the payment of college expenses for the parties' daughter. Following a hearing, Family Court granted in part the petition, and the father appealed. Family Court Act § 424-a (a) provides that, "in all child support proceedings . . . , there shall be compulsory financial disclosure by both parties of their respective financial states" Pursuant to that statute, each party must submit a sworn statement of net worth, as well as a recent pay stub, the most recent state and federal tax returns and a copy of his or her W-2 statement. The statute further provides that "[n]o showing of special circumstances shall be required before such disclosure is ordered and such disclosure may not be waived by either party or by the court" (*id.*). Here, neither party submitted a sworn statement of net worth, and the mother failed to submit a recent pay stub or her tax returns. We therefore reverse the order and remit the matter to Family Court for a new hearing on the petition following the parties' compliance with the financial disclosure requirements of section 424-a (a).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

273

CA 09-01153

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

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES HIGH, RESPONDENT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL),
FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered April 2, 2009 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. We conclude that petitioner met its burden of establishing by clear and convincing evidence that respondent suffers from a mental abnormality (*see Matter of State of New York v Farnsworth*, 75 AD3d 14, 29-30, *appeal dismissed* 15 NY3d 848; *see generally* § 10.03 [i]). We further conclude that the jury's determination with respect to the issue of mental abnormality is entitled to great deference because the jury had the best opportunity to evaluate the weight and credibility of conflicting expert testimony (*see Matter of State of New York v Donald N.*, 63 AD3d 1391, 1394). Petitioner also established by clear and convincing evidence that respondent has such an inability to control his behavior that he "is likely to be a danger to others and to commit sex offenses if not confined" (§ 10.07 [f]). Thus, it cannot be said that Supreme Court erred in determining that respondent required confinement and should be committed to a secure treatment facility (*see id.*). Respondent's contention that the court erred in permitting testimony during the disposition hearing with respect to the use of the STATIC-99 tool is not preserved for our review (*see generally* CPLR 4017; CPLR 5501 [a] [3]) and, in any event, his challenge to that testimony goes to the weight thereof rather than its admissibility (*see Matter of State of New York v Fox*, 79 AD3d 1782,

1784; see also *Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1140-1142).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

276

CA 10-02251

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

IDA G. CARTHON, AS ADMINISTRATRIX OF THE
ESTATE OF ELIGE CARTHON, JR., DECEASED,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BUFFALO GENERAL HOSPITAL @ DEACONESS SKILLED
NURSING FACILITY DIVISION AND KALEIDA HEALTH,
DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered March 16, 2010 in a wrongful death action. The order denied the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the first and second causes of action except insofar as they allege ordinary negligence on the part of defendants and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiff, as administratrix of the estate of her husband (decedent), commenced this action seeking damages for his wrongful death. Decedent was a resident of a nursing home owned and operated by defendants when he died at age 68 while eating dinner at the facility. Decedent suffered from several ailments, including alcohol-related dementia and complications from a stroke, which left him unable to speak and with difficulty in swallowing. The care plan in effect for decedent at the time of his death called for him to be supervised while eating. According to plaintiff, decedent died as a result of choking on food during dinner. Following discovery, defendants moved for summary judgment dismissing the complaint on the grounds that the causes of action sound in medical malpractice rather than in ordinary negligence and that defendants established that the care they provided to decedent did not deviate from the accepted standard of medical care. Supreme Court denied the motion. We note at the outset that, in moving for summary judgment, defendants did not address the third cause of action, which alleges the violation of specified sections of the Public Health Law. We therefore do not address that cause of action either.

We agree with defendants that the complaint, as amplified by the bill of particulars, alleges several claims sounding in medical malpractice and that the court erred in denying their motion with respect to those claims. We therefore modify the order accordingly. For instance, the complaint, as amplified by the bill of particulars, alleges that defendants failed to "enact and follow an appropriate care plan" for decedent, failed to "change and/or adjust [decedent's] care plan," failed to "update and follow an appropriate plan of care pursuant to a comprehensive assessment," failed to "provide adequate staffing," and failed to "provide adequate services to maintain [decedent's] physical well-being." Those claims "sound in medical malpractice because they challenge the [nursing home's] assessment of [decedent's] need for supervision" (*Smee v Sisters of Charity Hosp. of Buffalo*, 210 AD2d 966, 967). We further agree with defendants that they met their initial burden on the motion with respect to those claims of medical malpractice by submitting the affidavit of their expert physician, who averred that defendants did not deviate from the accepted standard of medical care in the treatment and assessment of decedent (*see Elliot v Long Is. Home, Ltd.*, 12 AD3d 481, 482), and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Even assuming, arguendo, that a registered nurse is qualified to render a medical opinion with respect to the relevant standard of care (*cf. Elliot*, 12 AD3d at 482), we conclude that the affidavit of a registered nurse submitted by plaintiff in opposition to the motion is insufficient to raise a triable issue of fact (*see Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436).

We conclude, however, that the court properly denied the motion with respect to the remaining claims, which sound in ordinary negligence inasmuch as they are based on allegations that defendants' employees failed to carry out the directions of the physicians responsible for decedent's care plan (*see Fields v Sisters of Charity Hosp.*, 275 AD2d 1004). The complaint, as amplified by the bill of particulars, alleges that defendants failed to provide proper supervision and assistance to decedent at dinner on the night in question, thus causing him to choke to death, and that they failed to follow their own "aspiration precautions" for the nursing home residents. Although defendants met their initial burden of establishing that their employees adequately supervised decedent while he was eating, we conclude that plaintiff raised a triable issue of fact sufficient to defeat the motion (*see generally Zuckerman*, 49 NY2d at 562). In opposition to the motion, plaintiff submitted, *inter alia*, an incident report signed by the nursing home floor manager stating that the certified nursing assistant assigned to supervise decedent at dinner was passing trays in the dining room when the incident occurred.

We reject defendants' alternative contention that the court erred in denying its motion because decedent died of natural causes while he happened to be eating. Even assuming, arguendo, that defendants met their initial burden of establishing that decedent died of a heart attack or a stroke, we conclude that the evidence submitted by

plaintiff in opposition to the motion is sufficient to raise a triable issue of fact whether decedent choked to death. Indeed, the medical records submitted by plaintiff indicate that one of the paramedics who attempted to resuscitate decedent removed large pieces of food from his trachea, and one of defendants' employees testified that decedent appeared to be choking and that several other employees attempted the Heimlich Maneuver.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

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KA 07-01266

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAWRENCE PRESHHA, JR., DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered April 25, 2007. The judgment convicted defendant, upon a jury verdict, of sodomy in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of sodomy in the first degree (Penal Law former § 130.50 [1], [3]). The victim, who was 12 years old at the time of the trial, testified that the conduct at issue occurred six years earlier, during a period in which he lived with defendant for approximately four months. The victim testified that, after the sodomy occurred, defendant physically abused him by punching and kicking him, slamming him against a wall and threatening him, and throwing him down the stairs. The victim disclosed the conduct at issue five years after it occurred. In his testimony at trial, defendant denied that the conduct occurred, and he denied that he had physically abused the victim.

We reject defendant's contention that County Court erred in allowing the victim to testify that defendant had physically abused him on one occasion prior to the date of the conduct at issue. That *Molineux* evidence was relevant to establish the element of forcible compulsion (see *People v Cook*, 93 NY2d 840, 841), and to explain the victim's delay in reporting the abuse (see *People v Bennett*, 52 AD3d 1185, 1187, *lv denied* 11 NY3d 734). Although the court agreed with defendant that the evidence was "incredibly prejudicial," the court nevertheless properly balanced the probative value of the evidence against its potential for prejudice to defendant (see *People v Alvino*, 71 NY2d 233, 242; *People v Mosley*, 55 AD3d 1371, *lv denied* 11 NY3d

856).

We agree with defendant, however, that the court erred in failing to issue a limiting instruction to the jury when the evidence was admitted and during the final jury charge, to minimize the prejudicial effect of the admission of the evidence (*see People v Greene*, 306 AD2d 639, 642-643, *lv denied* 100 NY2d 594). While defendant failed to preserve his contention for our review (*see People v Sommerville*, 30 AD3d 1093, 1094-1095), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). "In a case such as this, where the finding of guilt rests squarely on the jury's assessment of the credibility of the victim and defendant, we cannot say that the error was harmless and did not affect the jury's verdict" (*Greene*, 306 AD2d at 643; *see generally People v Crimmins*, 36 NY2d 230, 241-242; *cf. Mosley*, 55 AD3d at 1372). We therefore agree with defendant that, under the circumstances of this case, he was denied a fair trial based on the court's failure to give a limiting instruction, and we thus reverse the judgment and grant a new trial (*see Greene*, 306 AD2d at 643).

Finally, defendant contends that the prosecutor engaged in misconduct during the trial. Defendant failed to preserve for our review his contention with respect to many of the instances of prosecutorial misconduct (*see People v Scission*, 60 AD3d 1391, 1392, *lv denied* 12 NY3d 859, *rearg denied* 13 NY3d 749), and we need not determine whether he was denied a fair trial based on the alleged instances that are preserved for our review inasmuch as we are granting a new trial in any event (*cf. People v Milczakowskyj*, 73 AD3d 1453, 1454, *lv denied* 15 NY3d 754; *People v Mott*, 94 AD2d 415, 418-419). Nonetheless, we note that the prosecutor improperly questioned defendant on cross-examination regarding, e.g., the fact that he impregnated three women within a short amount of time and his failure to pay child support (*see People v Reid*, 281 AD2d 986, *lv denied* 96 NY2d 923). Defendants "may be cross-examined with respect to prior conduct that affects their credibility" (*People v Brazeau*, 304 AD2d 254, 256 [internal quotation marks omitted], *lv denied* 100 NY2d 579; *see People v Walker*, 83 NY2d 455, 461), but "persistent questioning of a defendant on collateral matters which tends to impugn his [or her] character without being probative of the crime charged constitutes improper and prejudicial cross-examination" (*People v Hicks*, 102 AD2d 173, 182; *see People v Bhupsingh*, 297 AD2d 386, 387-388). The prosecutor also improperly attempted to refresh the recollection of defendant during cross-examination when in fact she was attempting to place the contents of a certain document in evidence that otherwise was inadmissible (*see People v Carrion*, 277 AD2d 480, 481, *lv denied* 96 NY2d 757; *People v Kellogg*, 210 AD2d 912, 913-914, *lv denied* 86 NY2d 737). Finally, the prosecutor remarked during summation that the victim was "so cute" and the "most conscientious, respectful kid [she had] ever seen." Such remarks improperly appealed to the sympathy of the jury (*see People v Ballerstein*, 52 AD3d 1192, 1194; *People v Bowie*, 200 AD2d 511, 512-513, *lv denied* 83 NY2d 869, 877), and improperly vouched for the credibility of the victim (*see People v Moye*, 12 NY3d 743; *Ballerstein*, 52 AD3d at 1194). We thus take this

opportunity to admonish the prosecutor that her " 'mission is not so much to convict as it is to achieve a just result' " (*People v Bailey*, 58 NY2d 272, 277), and that she is "charged with the responsibility of presenting competent evidence fairly and temperately, not to get a conviction at all costs" (*Mott*, 94 AD2d at 418; see *Bhupsingh*, 297 AD2d at 388).

All concur except SCUDDER, P.J., and SCONIERS, J., who dissent and vote to affirm in the following Memorandum: We agree with the majority that County Court properly exercised its discretion in allowing the victim to testify that defendant had physically abused him on one occasion prior to the sexual assault that is the basis for defendant's conviction of two counts of sodomy in the first degree (Penal Law former § 130.50 [1], [3]), one count of which is based on the age of the victim. We also agree that the court erred in failing to give a limiting instruction to the jury at the time the evidence was offered and during the final jury charge, to minimize whatever prejudice may have resulted from the admission of that testimony. We nevertheless respectfully disagree with the majority that reversal is warranted. First, as the majority acknowledges, defendant failed to preserve this issue for our review (see *People v Wright*, 5 AD3d 873, 876, lv denied 3 NY3d 651; *People v Williams*, 241 AD2d 911, lv denied 91 NY2d 837), and we cannot agree with the majority that we should exercise our power to address the issue as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Second, even assuming, arguendo, that defendant preserved the issue for our review, we conclude that the court's error is harmless (see generally *People v Crimmins*, 36 NY2d 230, 241-242). We therefore vote to affirm.

The victim testified that, before committing the sexual assault, defendant tied him to the bed and placed duct tape over his mouth. After committing the sexual assault, defendant grabbed the six-year-old victim by the neck, slammed him against the wall, kicked him and threatened to kill both the victim and the victim's family if he reported what had happened. He then threw the victim down the stairs, followed him down the stairs, kicked him again, and left the apartment. Thus, even if we were to exercise our power to review this issue as a matter of discretion in the interest of justice, we conclude that the victim's testimony, together with the evidence regarding the victim's behavior in the period that followed the sexual assault, constitutes overwhelming evidence of defendant's guilt and that there is not a significant probability that defendant would have been acquitted if the court had given the appropriate limiting instruction with respect to the incident of physical abuse that preceded the sexual assault (see *id.*).

We note with respect to the lack of preservation that, although defendant objected to the victim's testimony regarding the incident of physical abuse that occurred prior to the sexual assault, he failed to request a limiting instruction either at the time of the testimony or to request that such an instruction be included in the court's jury charge, nor did he object to the lack of a limiting instruction in the court's charge (see CPL 470.05 [2]; *Wright*, 5 AD3d at 876; see

generally People v Scission, 60 AD3d 1391, 1392, *lv denied* 12 NY3d 859, *rearg denied* 13 NY3d 749). Inasmuch as defendant had various opportunities in which to request a limiting instruction or to object to the absence of such an instruction, thus affording the court the opportunity to rectify the error, we conclude that the lack of preservation renders the court's error a particularly inappropriate ground on which to grant a new trial as a matter of discretion in the interest of justice. In addition, with respect to harmless error analysis, although the credibility of the victim and defendant was certainly a key issue at trial, we disagree with the majority that the jury's verdict was based solely on its assessment of the credibility of those witnesses. The People also presented the testimony of the victim's grandmother and that of an expert that demonstrated, *inter alia*, that the victim's behavior following the attack and his delay in revealing the assault to others were consistent with the behavior of a child who had been sexually assaulted.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

292

CA 10-00141

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

FRANK G. CYZOWSKI,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM J. ELKOVITCH, D.D.S.,
DEFENDANT-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR
DEFENDANT-APPELLANT.

COTE & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (David Michael Barry, J.), entered January 4, 2010 in a dental malpractice action. The order denied the respective motions of the parties for summary judgment.

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

Memorandum: Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint in this dental malpractice action. In support of the motion, defendant submitted his own deposition as well as the deposition of plaintiff, which present differing versions of the symptoms allegedly presented by plaintiff at an August 11, 2003 examination. Moreover, the experts who submitted affidavits on behalf of defendant address the issue of alleged malpractice based on defendant's description of the symptoms presented by plaintiff, without taking into account plaintiff's version of his symptoms. As defendant correctly concedes in his brief on appeal, the nature of plaintiff's symptoms is central to the issue of whether defendant properly diagnosed plaintiff's disease or referred him to a specialist in a timely fashion. Thus, defendant is not entitled to summary judgment dismissing the complaint at this juncture of the litigation (*see Fagan v Panchal*, 77 AD3d 705; *Padilla v Verczky-Porter*, 66 AD3d 1481, 1482-1483; *Matter of Kreinheder v Withiam-Leitch*, 66 AD3d 1485). Finally, we note that plaintiff's cross appeal from the order insofar as it denied his cross motion for

a ruling in limine and for partial summary judgment was deemed abandoned and dismissed pursuant to 22 NYCRR 1000.12 (b).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

302

KA 09-02537

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CAMERON K. STRASSER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered June 25, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree (five counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of five counts of burglary in the third degree (Penal Law § 140.20). We reject defendant's contention that County Court erred in failing to conduct an evidentiary hearing before denying his motion to withdraw his plea. The court afforded defendant the requisite "reasonable opportunity to present his contentions" in support of that motion (*People v Tinsley*, 35 NY2d 926, 927; *see People v Irvine*, 42 AD3d 949, *lv denied* 9 NY3d 962), and the court did not abuse its discretion in concluding that no further inquiry was necessary. Defendant's contention that the plea was coerced by defense counsel is belied by his statements during the plea colloquy that no one forced him to plead guilty and that he was satisfied with the representation of defense counsel (*see Irvine*, 42 AD3d 949; *People v Nichols*, 21 AD3d 1273, 1274, *lv denied* 6 NY3d 757). We reject defendant's further contention that the court erred in refusing to assign new counsel for the motion to withdraw his plea, inasmuch as the record does not demonstrate that defense counsel took a position adverse to defendant (*see People v McKoy*, 60 AD3d 1374, 1374-1375, *lv denied* 12 NY3d 856), or that he coerced defendant into pleading guilty (*cf. People v Ulloa*, 300 AD2d 60, 61-62).

Entered: April 1, 2011

Patricia L. Morgan
Clerk of the Court

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

307

CAF 10-00765

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

IN THE MATTER OF TUMARIO B., JR.

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

VALERIE L., RESPONDENT-APPELLANT.

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT.

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

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA, FOR TUMARIO B., JR.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered March 30, 2010 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 modified in the interest of justice by remitting the matter to Family Court, Onondaga County, for further proceedings in accordance with the memorandum and as modified the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her son based on a finding of permanent neglect and granting custody and guardianship of the child to petitioner. We reject the mother's contention that Family Court abused its discretion in refusing to enter a suspended judgment (*see Matter of Elijah D.*, 74 AD3d 1846). The record supports the court's determination that the best interests of the child would be served by freeing the child for adoption by the foster parents, who have cared for the child since birth (*see Matter of Shirley A.S.*, 81 AD3d 1471). "Freeing the child for adoption provided him with prospects for permanency and some sense of the stability he deserved, rather than the perpetual limbo caused by unfulfilled hopes of returning to [the mother's] care" (*Matter of Raine QQ.*, 51 AD3d 1106, 1107, *lv denied* 10 NY3d 717; *see Matter of Mikia H.*, 78 AD3d 1575, *lv dismissed in part and denied in part* 16 NY3d 760).

We conclude, however, that the matter should be remitted for the court to determine, following a further hearing if necessary, whether post-termination visitation between the mother and child would be in

the child's best interests (see *Matter of Seth M.*, 66 AD3d 1448, *lv denied* 13 NY3d 922; *Matter of Josh M.*, 61 AD3d 1366; *Matter of Bert M.*, 50 AD3d 1509, 1511, *lv denied* 11 NY3d 704). Although the mother raises this issue for the first time on appeal, we nevertheless address it in the interest of justice. We note that the adoptive parents appear to support such visitation, as does the Attorney for the Child. In fact, the adoptive parents currently arrange for regular visits between the mother and one of her daughters, who was also adopted by them, and thus it may be in the best interests of the subject child to participate in those visits as well.

Patricia L. Morgan

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

312

CA 10-01419

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

BURKE, ALBRIGHT, HARTER & RZEPKA, LLP AND
BURKE, ALBRIGHT, HARTER & REDDY, LLP,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

ROBERT H. SILLS AND AUDREY ELAINE SILLS, AS
CO-EXECUTORS OF THE ESTATE OF ANGELINE V.
SILLS, DECEASED, DEFENDANTS-RESPONDENTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JENNIFER L. NUHFER OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered April 12, 2010. The order, among other things, denied in part 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 action to recover fees for legal services rendered to defendants' deceased mother (decedent), and defendants asserted counterclaims for, inter alia, legal malpractice. Following discovery, plaintiffs moved for partial summary judgment dismissing the counterclaims, and defendants cross-moved for leave to serve a second amended answer asserting additional counterclaims for fraud and breach of fiduciary duty. Plaintiffs contend that Supreme Court erred in denying that part of their motion with respect to the legal malpractice counterclaim because the only evidence establishing such a counterclaim consists of the audio and video recordings of decedent, which are inadmissible under the Dead Man's Statute (CPLR 4519). We reject that contention inasmuch as plaintiffs "cannot establish [their] entitlement to summary judgment dismissing [that counterclaim] by pointing to alleged gaps in the [defendants'] proof" (*Tully v Anderson's Frozen Custard, Inc.* [appeal No. 2], 77 AD3d 1474, 1475). In any event, we note that CPLR 4519 bars only testimony of communications with a decedent that are offered "against the executor, administrator or survivor of the deceased person" (emphasis added) and, here, the video and audio recordings of decedent would be offered by defendants as co-executors of decedent's estate in support of their

counterclaims. In addition, those recordings are admissible "as evidence of the decedent's testamentary capacity" (*Matter of Burack*, 201 AD2d 561, 561).

We reject plaintiffs' further contention that the court erred in granting the cross motion. Contrary to plaintiffs' contention, the proposed counterclaims for fraud and breach of fiduciary duty are not duplicative of the legal malpractice counterclaim. The proposed counterclaims are based on allegations that plaintiffs intended to deceive decedent, whereas the "legal malpractice [counterclaim] is based on negligent conduct" (*Moormann v Perini & Hoerger*, 65 AD3d 1106, 1108). We reject plaintiffs' further contention that defendants failed to support the proposed counterclaims with admissible evidence. " '[L]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a [pleading] is committed to the sound discretion of the court' " (*Palaszynski v Mattice*, 78 AD3d 1528, 1528). Here, the evidence submitted by defendants in support of the cross motion establishes that the proposed counterclaims are not patently lacking in merit.

We have reviewed plaintiffs' remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

314

CA 10-02134

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

DANIEL E. OZIMEK AND NANCY J. OZIMEK,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

MEMORANDUM AND ORDER

HOLIDAY VALLEY, INC., WIN-SUM SKI CORP., AND
SODEXHO, INC., DEFENDANTS-APPELLANTS-RESPONDENTS.

DAMON MOREY LLP, BUFFALO (STEVEN M. ZWEIG OF COUNSEL), FOR
DEFENDANTS-APPELLANTS-RESPONDENTS HOLIDAY VALLEY, INC. AND WIN-SUM SKI
CORP.

AHMUTY, DEMERS & MCMANUS, ALBERTSON (ERIN D. ROACH OF COUNSEL), FOR
DEFENDANT-APPELLANT-RESPONDENT SODEXHO, INC.

FESSENDEN, LAUMER & DEANGELO, JAMESTOWN (J. KEVIN LAUMER OF COUNSEL),
FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeals and cross appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered January 6, 2010 in a personal injury action. The order granted in part the motions of defendants for summary judgment by dismissing plaintiffs' Labor Law § 241 (6) cause of action and denied the cross motion of plaintiffs 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 defendant Sodexho, Inc. seeking summary judgment dismissing the Labor Law § 200 and common-law negligence claims against it and dismissing those claims against it and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries allegedly sustained by Daniel E. Ozimek (plaintiff) when he fell from a ladder while working on a commercial freezer at a ski resort owned and operated by Holiday Valley, Inc. and Win-Sum Ski Corp. (collectively, Win-Sum defendants). The freezer was operated by defendant Sodexho, Inc. (Sodexho). Plaintiffs asserted, inter alia, claims for violations of Labor Law §§ 200, 240 (1) and § 241 (6) and common-law negligence. The Win-Sum defendants and Sodexho filed separate motions for summary judgment dismissing the amended complaint against them and for summary judgment on their respective cross claims for indemnification. Plaintiffs cross-moved for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim. Supreme Court granted those parts of

the motions of the Win-Sum defendants and Sodexho for summary judgment dismissing the Labor Law § 241 (6) claim against them and denied plaintiffs' cross motion.

With respect to the appeals of the Win-Sum defendants and Sodexho and plaintiffs' cross appeal, we conclude that Supreme Court properly denied the motions and cross motion with respect to the Labor Law § 240 (1) claim. Initially, we agree with plaintiffs that they met their initial burden on the cross motion of establishing that plaintiff was engaged in repair work that is covered under the statute. As defendants correctly note, "[i]t is well settled that the statute does not apply to routine maintenance in a non-construction, non-renovation context" (*Koch v E.C.H. Holding Corp.*, 248 AD2d 510, 511, *lv denied* 92 NY2d 811; see *Jehle v Adams Hotel Assoc.*, 264 AD2d 354, 355; *Howe v 1660 Grand Is. Blvd.*, 209 AD2d 934, *lv denied* 85 NY2d 803). "Where a person is investigating a malfunction, however, efforts in furtherance of that investigation are protected activities under Labor Law § 240 (1)" (*Short v Durez Div.-Hooker Chems. & Plastic Corp.*, 280 AD2d 972, 973; see *Craft v Clark Trading Corp.*, 257 AD2d 886, 887). "Here, plaintiff was injured while 'troubleshooting' an uncommon [freezer] malfunction, which is a protected activity under [the statute]" (*Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1729), and "no viable issue has arisen challenging the characterization of plaintiff's work" (*Craft*, 257 AD2d at 887).

We further conclude, however, that defendants raised a triable issue of fact whether plaintiff's actions were the sole proximate cause of his injuries. Plaintiffs submitted, inter alia, the deposition testimony of plaintiff, who testified that he fell to the ground when the ladder on which he was standing slid out from under him, thereby establishing that the ladder failed to provide "proper protection" pursuant to Labor Law § 240 (1) (see *Dowling v McCloskey Community Services Corp.*, 45 AD3d 1232, 1233; *Blair v Cristani*, 296 AD2d 471). Defendants, however, raised a triable issue of fact by submitting the affidavit of a witness who averred that plaintiff admitted that "he fell because he missed [the ladder] while descending [from the area in which he was working] and [that the witness] saw the ladder standing erect after plaintiff fell" (*Hamill v Mutual of Am. Inv. Corp.*, 79 AD3d 478, 479; see *Antenucci v Three Dogs, LLC*, 41 AD3d 205; *Arigo v Spencer*, 39 AD3d 1143, 1144-1145; *Anderson v Schul/Mar Constr. Corp.*, 212 AD2d 493).

We agree with Sodexho on its appeal that the court erred in denying those parts of its motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against it, and we therefore modify the order accordingly. It is well settled that, unlike other sections of the Labor Law, "section 200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352; see *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877). Thus, where, as here, "a plaintiff's injuries stem not from the manner in which the work was being performed[] but, rather, from a dangerous condition on the premises, [an owner or]

general contractor may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition" (*Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708; see *Lane v Fratello Constr. Co.*, 52 AD3d 575). Defendants, as the parties seeking summary judgment dismissing those claims, were required to "establish as a matter of law that they did not exercise any supervisory control over the general condition of the premises or that they neither created nor had actual or constructive notice of the dangerous condition on the premises" (*Perry v City of Syracuse Indus. Dev. Agency*, 283 AD2d 1017, 1017; see generally *Hennard v Boyce*, 6 AD3d 1132, 1133). Sodexho met its initial burden by establishing that it did not control the premises upon which the accident occurred, and plaintiffs failed to raise a triable issue of fact with respect to Sodexho's alleged control (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude, however, that the court properly denied those parts of the motion of the Win-Sum defendants for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against them. It is undisputed that the Win-Sum defendants controlled the premises upon which the accident occurred, and they "failed to meet their burden of establishing in support of their motion that they had no constructive notice of the condition, i.e., they failed to establish as a matter of law that the condition was not visible and apparent or that it had not existed for a sufficient length of time before the accident to permit [the Win-Sum] defendants or their employees to discover and remedy it" (*Finger v Cortese*, 28 AD3d 1089, 1091; see generally *Merrill v Falletti Motors, Inc.*, 8 AD3d 1055; cf. *Gilbert v Evangelical Lutheran Church in Am.*, 43 AD3d 1287, 1288, lv denied 9 NY3d 815).

We have considered the remaining contentions of the parties and conclude that they are without merit.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

316

CA 10-00102

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

BOY SCOUTS OF AMERICA,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

CAYUGA COUNTY COUNCIL NO. 366, BOY SCOUTS OF AMERICA, CAYUGA YOUTH TRUST, MICHAEL FERRO, WALTER LOWE, CHARLES BOULEY, JR., AND DONALD GRILLO, DEFENDANTS-APPELLANTS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (ANGELA C. WINFIELD OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (S. PAUL BATTAGLIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Ann Marie Taddeo, J.), entered December 29, 2009. The order, inter alia, granted in part the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously vacated on the law without costs and the matter is remitted to Supreme Court, Cayuga County, for further proceedings pursuant to N-PCL 511.

Memorandum: Defendants appeal and plaintiff cross-appeals from an order that, inter alia, granted that part of plaintiff's motion for summary judgment seeking an order directing defendants to turn over to plaintiff the property of defendant Cayuga County Council No. 366, Boy Scouts of America (hereafter, Cayuga Council), including property that had previously been transferred by the Cayuga Council to defendant Cayuga Youth Trust. We agree with defendants on their appeal that Supreme Court erred in ordering a transfer of substantially all of the Cayuga Council's property to plaintiff without first providing the requisite notice to the Attorney General (see generally *Wiggs v Williams*, 36 AD3d 570; *St. Andrey Bulgarian E. Orthodox Cathedral Church v Bosakov*, 272 AD2d 55). Where, as here, a Type B corporation pursuant to N-PCL 201 (b) is disposing of substantially all of its assets, the disposition requires judicial approval (see N-PCL 510 [a] [3]). N-PCL 511 sets forth the procedure for obtaining judicial approval and requires that the court, upon receiving a petition for approval of a disposition, "shall direct that a minimum of [15] days['] notice be given by mail or in person to the [A]ttorney

[G]eneral" (N-PCL 511 [b] [emphasis added]). Here, the record establishes that no such notice was provided to the Attorney General. We therefore vacate the order and remit the matter to Supreme Court for further proceedings in accordance with N-PCL 511. In view of our determination, we do not address plaintiff's cross appeal.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

317

CA 10-01163

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

FRANK MCGUIRE, ET AL., PLAINTIFFS,
AND MCGUIRE CHILDREN, LLC,
PLAINTIFF-RESPONDENT,

V

ORDER

WILLIAM L. HUNTRESS, ACQUEST HOLDINGS, INC.,
ACQUEST DEVELOPMENT, LLC, ACQUEST GOVERNMENT
HOLDINGS OPP, LLC, ACQUEST GOVERNMENT HOLDINGS,
U.S. GEOLOGICAL, LLC, AND LINCOLN PARK
ASSOCIATES, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

HAGERTY & BRADY, BUFFALO (MICHAEL A. BRADY OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (KRISTA GOTTLIEB OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered November 10, 2009. The order granted in part and denied in part defendants' motion for a trial order of dismissal pursuant to CPLR 4401.

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

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

318

CA 10-01165

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

FRANK MCGUIRE, ET AL., PLAINTIFFS,
AND MCGUIRE CHILDREN, LLC,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM L. HUNTRESS, ACQUEST HOLDINGS, INC.,
ACQUEST DEVELOPMENT, LLC, ACQUEST GOVERNMENT
HOLDINGS OPP, LLC, ACQUEST GOVERNMENT HOLDINGS,
U.S. GEOLOGICAL, LLC, AND LINCOLN PARK
ASSOCIATES, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

HAGERTY & BRADY, BUFFALO (MICHAEL A. BRADY OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (KRISTA GOTTLIEB OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered January 19, 2010. The judgment dismissed the amended complaint of plaintiff McGuire Children, LLC and the counterclaim of defendants.

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

Memorandum: Defendants appeal from a judgment following a nonjury trial that dismissed the amended complaint of plaintiff McGuire Children, LLC (McGuire Children) and dismissed defendants' counterclaim for an award of attorneys' fees against McGuire Children based on the general release executed by plaintiffs. The court determined, *inter alia*, that defendant William L. Huntress breached a fiduciary duty that he owed to McGuire Children but that McGuire Children failed to establish that they sustained any damages as a result of that breach. We affirm.

The facts relevant to this appeal are essentially undisputed. Beginning in 1997, Huntress and plaintiff Frank McGuire, personally and through their various business entities, were involved in a series of real estate ventures. The two formed a number of limited liability companies that invested in property that was to be leased to the federal government (hereafter, Government Property LLCs). McGuire loaned Huntress the funds to purchase the properties, and Huntress was responsible for managing their development. A separate Government

Property LLC was formed for each project. In addition to being entitled to repayment of the loans with interest, McGuire also received equity interests in the Government Property LLCs. For estate planning purposes, McGuire thereafter assigned his equity interests in the Government Property LLCs to McGuire Children, an LLC owned by his children. There were thus two members of the Government Property LLCs: Huntress and McGuire Children.

By 2001, the Government Property LLCs were experiencing financial difficulties, and some of the properties still had not been developed. In October 2001, the parties reached an oral agreement whereby Huntress would pay off the loans he obtained from McGuire with interest and release McGuire from any obligations with respect to the Government Property LLCs, in exchange for which Huntress would receive McGuire Children's equity interests in the Government Property LLCs. Pursuant to that agreement, McGuire Children would receive nothing for its equity interests in the Government Property LLCs. During that time, Huntress was negotiating with a third party, iStar Financial (iStar), to sell several of the Government Property LLCs in order to obtain funds to satisfy the loans to McGuire. Huntress did not disclose such negotiations to McGuire or McGuire Children, who were not aware that iStar was interested in purchasing the properties. Huntress thereafter closed his deal with McGuire and McGuire Children, using funds loaned from iStar to pay off the loans from McGuire in March 2002, on the same day that he closed his deal with iStar. Plaintiffs executed a general release providing that, inter alia, if any of them commenced a lawsuit against defendants concerning matters covered by the release, such party would be liable for attorneys' fees and court costs incurred by defendants.

Upon learning of the deal between Huntress and iStar, plaintiffs commenced this action for, inter alia, fraud and breach of fiduciary duty. Following the liability portion of the bifurcated nonjury trial, Supreme Court determined that, by failing to disclose his dealings with iStar, Huntress breached a fiduciary duty that he owed to McGuire Children. The court determined after the damages portion of the bifurcated trial, however, that McGuire Children sustained no damages as a result of that breach of fiduciary duty. The court also dismissed defendants' counterclaim for an award of attorneys' fees pursuant to the general release.

Defendants contend that the fiduciary duty that Huntress owed to McGuire Children ceased in October 2001, when Huntress and McGuire orally agreed that Huntress would buy out the equity interests of McGuire Children, despite the fact that the deal did not close until five months later, in March 2002. We reject that contention. As the court properly determined, Huntress continued to owe fiduciary duties to McGuire Children, as the minority member of the Government Property LLCs, until those LLCs were actually dissolved (*see Matter of Beverwyck Abstract L.L.C.*, 53 AD3d 903; *Madison Hudson Assoc. LLC v Neumann*, 44 AD3d 473, 482-483). The cases upon which defendants rely in support of their contention are distinguishable because they involve at-will agency and partnership relationships (*see Beverwyck Abstract L.L.C.*, 53 AD3d at 904).

We reject the further contention of defendants that reliance is an element of a cause of action for breach of fiduciary duty. The elements of such a cause of action are "the existence of a fiduciary duty, misconduct by the defendant[s] and damages that were directly caused by the defendant[s'] misconduct" (*Kurtzman v Bergstol*, 40 AD3d 588, 590; see *Colello v Colello*, 9 AD3d 855, 859). We reject defendant's contention that the First Department in *Littman v Magee* (54 AD3d 14) held otherwise. The court's reference to a reliance element in that case was only with respect to the plaintiff's fraud claim, not her claim for breach of fiduciary duty (see *id.* at 17). We thus conclude that plaintiffs were not required to establish that, in deciding to sell McGuire Children's equity interests in the Government Property LLCs, they relied on the assumption that Huntress was not intending to sell the properties to a third party.

Finally, we conclude that the court properly determined that the general release was voidable as a result of the breach of fiduciary duty by Huntress. " '[A] general release will not insulate a tortfeasor from allegations of breach of fiduciary duty, where he has not fully disclosed alleged wrongdoing' " (*Littman*, 54 AD3d at 17; see *Blue Chip Emerald v Allied Partners*, 299 AD2d 278, 280). Indeed, it would be unjust to allow a party who has committed a wrong to collect attorneys' fees from the party that has been wronged.

Patricia L. Morgan

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

325

KA 08-00139

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALTON A. DUNN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., 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 (John J. Ark, J.), rendered November 15, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]), defendant contends that Supreme Court erred in refusing to suppress statements that he made while in custody at the police station, before he was advised of his *Miranda* warnings. Although defendant is correct that he had not been Mirandized when two investigators initially questioned him in an interview room, defendant did not make any inculpatory statements at that time. In fact, he consistently denied involvement in the crime. Defendant was left alone for approximately one hour before one of the two investigators returned to the interview room, at which time *Miranda* warnings were administered and the questioning continued. Defendant made the incriminating statements at issue during the second interrogation. Contrary to defendant's contention, we conclude that there was a sufficiently "definite, pronounced break in the interrogation" to dissipate the taint resulting from the initial *Miranda* violation (*People v Chapple*, 38 NY2d 112, 115; see *People v Paulman*, 5 NY3d 122, 130-131; *People v Smith*, 275 AD2d 951, lv denied 96 NY2d 739), and that the court therefore properly refused to suppress the incriminating statements at issue. We reject defendant's further challenge to the severity of the sentence.

Entered: April 1, 2011

Patricia L. Morgan
Clerk of the Court

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

330

KA 09-01819

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PAUL R. CURRIER, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, 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, A.J.), rendered August 11, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, criminal trespass in the second degree (two counts), attempted gang assault in the second degree, assault in the second degree, conspiracy in the fourth degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and as a matter of discretion in the interest of justice by reversing those parts convicting defendant of criminal trespass in the second degree and dismissing those counts of the indictment, and by reducing the sentence imposed for burglary in the second degree to a determinate term of incarceration of six years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, one count each of burglary in the second degree (Penal Law § 140.25 [2]), attempted gang assault in the second degree (§§ 110.00, 120.06) and assault in the second degree (§ 120.05 [2]), and two counts of criminal trespass in the second degree (§ 140.15 [1]). The crimes arise from a beating administered to the victim by defendant and a group of his friends, all of whom unlawfully entered the victim's house while the victim was sleeping. The theory of the prosecution was that defendant was upset with the victim for the manner in which he treated defendant's younger brother earlier in the evening. Defendant contends that he was denied a fair trial by prosecutorial misconduct. Defendant failed to preserve for our review his contention that certain comments made by the prosecutor denigrated the defense (*see People v Jones*, 63 AD3d 1582, 1583, lv denied 13 NY3d 797), and we decline to exercise our power to review those alleged instances of misconduct as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). With respect to defendant's contention that the prosecutor engaged in misconduct by

asking allegedly improper leading questions, we note that those questions involved preliminary matters and thus were permissible "to carry the witness quickly to matters material to the [relevant] issue[s]" (Prince, Richardson on Evidence § 6-227 [Farrell 11th ed]).

We agree with defendant, however, that the prosecutor improperly circumvented the *Sandoval* ruling issued by County Court by cross-examining defendant's girlfriend concerning his arrest record. Nevertheless, we conclude that the court alleviated any prejudice arising from that isolated instance of prosecutorial misconduct by its curative instruction in which the court informed the jury that the prosecutor was mistaken with respect to the number of defendant's arrests and directed it not to consider such evidence (see *People v Murry*, 24 AD3d 1319, 1320, lv denied 6 NY3d 815). We otherwise reject defendant's contention that he was deprived of a fair trial by prosecutorial misconduct (see generally *People v Rubin*, 101 AD2d 71, 77-78).

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his contention that the evidence of physical injury is legally insufficient to support the conviction of assault in the second degree and attempted gang assault (see *People v Hines*, 97 NY2d 56, 61, rearg denied 97 NY2d 678). In any event, we conclude that 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 victim suffered the requisite "substantial pain" as a result of the attack (Penal Law § 10.00 [9]; see *People v Goico*, 306 AD2d 828, 828-829). In addition, viewing the evidence in light of the elements of the crime of assault in the second degree 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). By failing to object to the verdict before the jury was discharged, defendant failed to preserve for our review his contention that the verdict is repugnant (see *People v Alfaro*, 66 NY2d 985, 987; *People v Louder*, 74 AD3d 1845).

Although not raised by defendant, the People correctly point out that the counts charging defendant with criminal trespass in the second degree are lesser included offenses of burglary in the first degree (see *People v Greene*, 291 AD2d 410, lv denied 98 NY2d 651). We note in any event that preservation of this issue is not required (see *People v Mitchell*, 216 AD2d 863, lv denied 86 NY2d 798). We therefore modify the judgment by reversing those parts convicting defendant of criminal trespass in the second degree. Finally, we agree with defendant that the sentence imposed for burglary in the second degree is unduly harsh and severe. Thus, as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]), we modify the judgment by reducing the sentence for that count to a determinate term of incarceration of six years.

Entered: April 1, 2011

~~Clerk of the Court~~

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

331

KA 10-00726

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT R. DUNHAM, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, 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 (Spencer J. Ludington, A.J.), rendered July 15, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted forgery in the second degree and grand larceny 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 his plea of guilty, of attempted forgery in the second degree (Penal Law §§ 110.00, 170.10 [1]) and grand larceny in the fourth degree (§ 155.30 [8]). We reject defendant's contention that his waiver of the right to appeal was not knowing and voluntary. Although "a trial court need not engage in any particular litany when apprising a defendant pleading guilty of the individual rights abandoned, it must make certain that a defendant's understanding of the terms and conditions of a plea agreement is evident on the face of the record" (*People v Lopez*, 6 NY3d 248, 256; see *People v McDonald*, 270 AD2d 955, lv denied 95 NY2d 800). "The record must establish that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256). Here, the record establishes that defendant indicated that he had spoken with defense counsel and understood that he was waiving his right to appeal as a condition of the plea. Further, defendant's monosyllabic affirmative responses to questioning by County Court do not render his plea unknowing and involuntary (see *People v VanDeViver*, 56 AD3d 1118, lv denied 11 NY3d 931, rearg denied 12 NY3d 788), and the fact that defendant was not informed that he could challenge County Court's suppression ruling on appeal did not render the plea involuntary (see generally *People v Kemp*, 94 NY2d 831). In any event, defendant's challenge to the court's suppression ruling is encompassed by his waiver of the right to appeal (see *id.* at 833). Additionally, that challenge is without merit (see *People v*

Steward, 88 NY2d 496, 501-502, *rearg denied* 88 NY2d 1018; *People v Scaccia*, 6 AD3d 1105, 1105-1106, *lv denied* 3 NY3d 681). Although defendant's contention that his plea was involuntary survives his waiver of the right to appeal, defendant failed to preserve that contention by moving to withdraw the plea or set aside the conviction (see *People v Busch*, 60 AD3d 1393, *lv denied* 12 NY3d 913), 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]). Finally, although defendant's contention that the court failed to apprehend the extent of its sentencing discretion survives his waiver of the right to appeal and does not require preservation (see *People v Schafer*, 19 AD3d 1133), that contention is without merit. The sentence imposed was in accordance with the plea agreement, and there is no support for defendant's contention in the record before us.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

333

OP 10-02073

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

IN THE MATTER OF TODD M. SMITH, PETITIONER,

V

MEMORANDUM AND ORDER

HON. JAMES C. TORMEY, DISTRICT ADMINISTRATIVE JUDGE, FIFTH JUDICIAL DISTRICT, COUNTY OF ONONDAGA, AND ONONDAGA COUNTY BAR ASSOCIATION ASSIGNED COUNSEL PROGRAM, INC., AS PARTIES INTERESTED IN THE DETERMINATION, RESPONDENTS.

GARY H. COLLISON, LIVERPOOL, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT HON. JAMES C. TORMEY, DISTRICT ADMINISTRATIVE JUDGE, FIFTH JUDICIAL DISTRICT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF COUNSEL), FOR RESPONDENTS COUNTY OF ONONDAGA AND ONONDAGA COUNTY BAR ASSOCIATION ASSIGNED COUNSEL PROGRAM, INC., AS PARTIES INTERESTED IN THE DETERMINATION.

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]) to annul an administrative review of fee award.

It is hereby ORDERED that the petition is unanimously granted in part and the determination is annulled on the law without costs.

Memorandum: Petitioner commenced this original CPLR article 78 proceeding seeking, inter alia, to annul the administrative determination of respondent District Administrative Judge (hereafter, Administrative Judge) that Onondaga County Court (hereafter, County Court), which presided over the criminal proceeding in question, had no authority to appoint petitioner as assigned counsel in the criminal proceeding or to award legal fees to petitioner. We agree with petitioner that the Administrative Judge exceeded his authority pursuant to 22 NYCRR 127.2 (b) and thus grant that part of the petition seeking to annul the administrative determination (see CPLR 7803 [2]; 7806).

This proceeding arises from petitioner's representation of the defendant in a high profile murder prosecution in County Court. Given the complex nature of the case, the defendant's retained counsel requested that petitioner assist with the defense, and petitioner

agreed to do so. At the time, petitioner was not on a panel list of respondent Onondaga County Bar Association Assigned Counsel Program, Inc. (hereafter, ACP), a not-for-profit corporation responsible for providing legal services to indigent persons in Onondaga County. After the defendant exhausted her financial resources during pretrial proceedings, County Court appointed the defendant's retained counsel as assigned counsel, and petitioner continued to serve as co-counsel. Meanwhile, petitioner applied to be placed on the ACP panel list for misdemeanors, and his application was granted. Two weeks after the jury returned its verdict in the at-issue criminal proceeding, petitioner was placed on the ACP panel list for felonies. After the completion of the trial, County Court determined that the defendant lacked the means to retain counsel and ordered that petitioner therefore "continue to represent [her] at County expense . . . [u]ntil the matter is completed." Petitioner requested that ACP compensate him for services rendered to the defendant during the trial, and also submitted an affidavit of extraordinary circumstances seeking compensation in excess of the statutory maximum (see County Law § 722-b [2] [b]). ACP denied petitioner's request for payment because petitioner was "off panel". Upon petitioner's appeal to ACP's Executive Committee, the Executive Committee affirmed the denial of petitioner's request for compensation.

Petitioner thereafter moved in County Court for an order pursuant to County Law § 722-b and 22 NYCRR 1022.12 granting fees in excess of the statutory limits for assigned counsel. Respondent County of Onondaga (hereafter, County) and ACP opposed the motion, contending that petitioner was ineligible for appointment as assigned counsel, and that County Court was obligated to assign counsel pursuant to the plan adopted by the County and set forth in ACP's handbook. County Court granted petitioner's motion and ordered that ACP compensate petitioner for his services rendered from the time petitioner was first included on an ACP panel list through the conclusion of the criminal proceeding.

The County and ACP requested that the Administrative Judge review County Court's order pursuant to 22 NYCRR 127.2 (b). The Administrative Judge thereupon rendered an administrative determination granting the application of the County and ACP, determining that petitioner "never timely applied to be appointed for ACP nor was he qualified to be appointed by ACP as a second-seated counsel." Noting that it was not within County Court's "purview to appoint a person that is not on the ACP panel in accordance with § 722-b of County Law," the Administrative Judge concluded that "there was no authority to award any fees" to petitioner. He further concluded that "any legal fee award" to petitioner would have been "excessive." In reaching his determination, the Administrative Judge rejected the contention of petitioner that administrative review should be limited to "review of payments for extraordinary circumstances only," concluding instead that he was vested with the authority to review compensation pursuant to 22 NYCRR 127.2. That was error.

As an initial matter, we reject the contention of the County and

ACP that this Court lacks the power to review the administrative determination. "[A]lthough our authority to review the merits of orders awarding compensation to assigned counsel is extremely curtailed . . . , we do have the authority to review challenges related to the court's power to assign and compensate counsel pursuant to a plan or statute" (*Goehler v Cortland County*, 70 AD3d 57, 61; see *Matter of Harvey v County of Rensselaer*, 83 NY2d 917, 918; *Matter of Parry v County of Onondaga*, 51 AD3d 1385, 1387; *Matter of Legal Aid Socy. of Orange County v Patsalos*, 185 AD2d 926). Here, the Administrative Judge set aside the compensation award on the ground that County Court had no authority under the ACP plan or County Law § 722-b to assign petitioner or to award him fees. Thus, the determination directly implicated County Court's power to assign and compensate counsel pursuant to a plan or statute, bringing the review of the determination within our purview (see generally *Matter of Director of Assigned Counsel Plan of City of N.Y.[Bodek]*, 87 NY2d 191; *Goehler*, 70 AD3d at 61). Stated differently, because the determination of the Administrative Judge was a judicial or quasi-judicial action, as opposed to a strictly administrative action, prohibition lies (see Siegel, NY Prac § 559 [4th ed]).

On the merits, we agree with petitioner that the Administrative Judge exceeded his authority pursuant to 22 NYCRR 127.2 (b). That rule provides that the appropriate administrative judge may review an order of a trial judge "with respect to a claim for compensation *in excess of the statutory limits* . . . [and] may *modify the award* if it is found that the award reflects an abuse of discretion by the trial judge" (emphasis added). Thus, under the plain language of the rule, an administrative judge's authority is limited to modifying an excess compensation award if the amount awarded is determined to be an abuse of discretion. Here, the Administrative Judge determined that the court had "no authority to award any fees to an attorney who is not appointed by the [c]ourt prior to rendering the services, and who was not qualified by the accepted rules to handle a case such as this." That determination is outside the purview of 22 NYCRR 127.2 (b). We therefore grant that part of the petition seeking to annul the administrative determination (see CPLR 7803 [2]).

Petitioner's second request for relief, i.e., a judgment "determining that the [p]etitioner be paid for his services . . . in accordance with" County Court's March order, is rendered unnecessary by our annulment of the administrative determination. Although the County and ACP contend that County Court's appointment of petitioner as assigned counsel was unauthorized inasmuch as petitioner was not "qualified" under ACP rules and therefore was not "assigned *in accordance with* a plan of a bar association conforming to the requirements of [County Law § 722]" (County Law § 722-b [1] [emphasis added]), the validity of that contention is not an issue that is properly before us in this proceeding. Rather, the County and/or ACP should have commenced a CPLR article 78 proceeding seeking a writ of prohibition on the ground that County Court was acting in the absence or in excess of its jurisdiction pursuant to County Law § 722 (see generally *Matter of McNamara v Tormey*, 42 AD3d 971, 972), or should

have sought leave to appeal from County Court's order (see CPLR 5701 [c]). The County and/or ACP failed to do so, and the time within which to seek leave to appeal or to commence a CPLR article 78 proceeding has expired (see CPLR 217 [1]; 5513 [b]). We therefore conclude that the County and ACP are bound by County Court's order, and that relief in the form of mandamus is unnecessary.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

336

CA 10-01348

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

NICKOLAS VIELE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

LORRAINE VYVERBERG, DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (JOSEPH A. WILSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (William P. Polito, J.), entered March 5, 2010 in a personal injury action. The judgment awarded plaintiff the sum of \$82,440.62 against defendant.

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

Memorandum: Defendant appeals from a judgment awarding plaintiff approximately \$82,000 in this premises liability case, following separate trials on liability and damages. We reject defendant's contention that reversal is required on the ground that Supreme Court erred in omitting from the verdict sheet in the trial on liability a question whether the premises where plaintiff was injured were maintained in a reasonably safe condition. "[A]ny alleged error in the verdict sheet does not warrant reversal inasmuch as 'no basis exists to warrant a finding of juror confusion or inconsistency in the verdict' " (*Maurer v Tops Mkts., LLC* [appeal No. 3], 70 AD3d 1504, 1505; see *Williams v Brosnahan*, 295 AD2d 971, 974; *Szeztaye v LaVacca*, 179 AD2d 555, 555-556). We reject defendant's further contention that the court erred in failing to include in its charge to the jury at the trial on liability the issue whether defendant had actual or constructive notice of the condition that caused plaintiff's injury. Rather, the court properly charged the jury that defendant could be held liable only if the jury found that she created the dangerous or defective condition. "Although landowners ordinarily must have actual or constructive notice of a defective condition before they may be held liable . . . , such notice is not required where the landowner creates the defective condition" (*Merlo v Zimmer*, 231 AD2d 952, 953; see *Cook v Rezende*, 32 NY2d 596, 599), and here, based on the proof at the trial on liability, the issue properly before the jury was whether defendant created the defective condition, not whether she had actual

or constructive notice thereof.

Defendant's contention that the court erred in permitting all or at least a portion of the testimony of plaintiff's liability expert at the trial on liability is likewise without merit. "The determination whether to permit expert testimony is a mixed question of law and fact addressed primarily to the discretion of the trial court . . . , and the court's determination should not be disturbed absent an abuse of discretion" (*Curtin v J.B. Hunt Transp., Inc.* [appeal No. 2], 79 AD3d 1608, 1610 [internal quotation marks omitted]; see *Kettles v City of Rochester*, 21 AD3d 1424, 1426). Based on this record, it cannot be said that the court abused its discretion in permitting plaintiff's liability expert to testify at the trial on liability. We have reviewed defendant's remaining contentions and conclude that they are either unpreserved for our review or without merit.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

342

CA 10-02257

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

LAURIE M. UNSER, FORMERLY KNOWN AS LAURIE M.
FOX, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID FOX, DEFENDANT-APPELLANT.

KALIL & EISENHUT, LLC, UTICA (KEITH A. EISENHUT OF COUNSEL), FOR
DEFENDANT-APPELLANT.

MICHAEL G. PUTTER, ROME, FOR PLAINTIFF-RESPONDENT.

Appeal from a corrected order of the Supreme Court, Oneida County (David A. Murad, J.), entered September 30, 2010. The corrected order awarded plaintiff a judgment for maintenance arrears.

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

Memorandum: By an "amended notice of appeal," defendant in this post-divorce action appeals from a corrected order that, inter alia, "continued" certain ordering paragraphs in a prior order dated September 28, 2009 and sua sponte issued the instant corrected order based on an "obvious typographical error." We conclude that Supreme Court thereby incorporated those prior specified ordering paragraphs into the "corrected order," which is the sole document before us on this appeal. The court, inter alia, granted the motion of plaintiff, the ex-wife of defendant, seeking a money judgment for her unpaid share of defendant's New York State retirement benefits, directed the entry of a wage deduction order against defendant to enforce the parties' stipulation regarding his retirement benefits, and awarded attorney's fees to plaintiff. We conclude that the court erred in granting plaintiff's motion.

The parties' judgment of divorce, entered in 1996, incorporated a stipulation placed on the record concerning the rights of plaintiff to defendant's retirement benefits. During the course of the parties' marriage, defendant was employed as a police officer by the City of Little Falls, and he became vested in the New York State retirement system. With respect to defendant's pension, the parties' stipulation provided that, "as of the date that they would be entitled to have it at the point of [defendant's] retirement," plaintiff was entitled to share in the pension "[p]ursuant to the Majauskas formula" (*Majauskas*

v Majauskas, 61 NY2d 481). Thereafter, a qualified domestic relations order (QDRO) was entered, which provided that, "at such time as [defendant] has retired from and is actually receiving a retirement allowance from the New York State and Local Retirement Systems, [plaintiff] shall be awarded that proportion of 50 percent of each retirement check of the participant for which number of months the parties were married and where the participant did accrue retirement benefits . . . pursuant to and in accordance with the formula devised in the case" of *Majauskas*.

Defendant retired from his employment as a police officer with the City of Little Falls in March 2005, and the parties began to receive their proportionate shares of defendant's pension. Simultaneous to his retirement as a police officer, defendant became employed as a court officer with the Herkimer County Sheriff's Department. Defendant and plaintiff were then 50 and 46 years of age, respectively. At that time, defendant's employment did not affect his pension because he earned less than the amount permitted under Retirement and Social Security Law § 212 (2) (see § 212 [1]). In August 2007, however, the State assumed jurisdiction over court officers in Herkimer County, whereupon defendant's salary was increased to \$43,802, thus exceeding the \$30,000 then permitted by section 212 (2). As a result, defendant's retirement benefits for 2008, including the payments to plaintiff as alternate payee, were suspended as of September 2008, when his total earnings exceeded \$30,000, subject to reinstatement in January 2009. Plaintiff thereafter moved, inter alia, for a money judgment for 2008 arrears in the amount of \$3,084.44 and a wage deduction order to enforce her future rights to the pension.

We conclude that the court erred in granting plaintiff's motion. "By its very nature, a pension right jointly owned as marital property is subject to modification by future actions of the employee" (*Olivo v Olivo*, 82 NY2d 202, 209). Plaintiff is not entitled "to a fixed sum or even to a particular methodology of calculating [defendant's] pension benefit" (*id.* at 210) but, rather, she is entitled only "to share in defendant's pension," whatever that amount may be (*Bottari v Bottari*, 245 AD2d 731, 733). As the Court of Appeals explained in *Olivo*, "[w]hat the nonemployee [ex-]spouse possesses, in short, is the right to share in the pension as it is ultimately determined . . . [and] actually obtained" (*Olivo*, 82 NY2d at 210). Thus, pursuant to *Olivo*, the right of plaintiff to a share of defendant's pension is contingent on the amount of pension benefits that are "actually obtained" (*id.*). Thus, because defendant is not eligible to receive pension benefits for a portion of the year 2008, plaintiff likewise has no right to receive such benefits. The fact that the continued employment of defendant with the Sheriff's Department may reduce plaintiff's pension benefits is of no moment. Indeed, defendant did not have to retire from his job as a police officer with the City of Little Falls when he did, and if he had elected to continue working in that position plaintiff would have received nothing from his pension until such time as he eventually retired. Contrary to plaintiff's contention, there is no provision in the parties' stipulation or in the QDRO that affords her a right to a fixed and continuing amount of

pension benefits once such benefits are initially payable. It necessarily follows that, because plaintiff was not entitled to a money judgment for 2008 arrears, she was not entitled to a wage deduction order to collect lost payments going forward, nor was she entitled to an award of attorney's fees.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

343

CA 10-02088

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

DAVID A. BISHOP, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ASHLEY R. CURRY AND ROSEMARY CURRY,
DEFENDANTS-APPELLANTS.

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

STAMM LAW FIRM, WILLIAMSVILLE (BRIAN G. STAMM OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 24, 2010 in a personal injury action. The order denied the motion of defendants for summary judgment, or in the alternative, for sanctions on the ground of spoliation of evidence.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was struck by a motor vehicle driven by Ashley R. Curry (defendant) upon exiting a bus and attempting to catch another bus across the street. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff's own negligence was the sole proximate cause of the accident and, in the alternative, for sanctions based on plaintiff's spoliation of evidence. Supreme Court properly denied defendants' motion.

It is well established that, in moving for summary judgment, a "party must affirmatively establish the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980). Here, defendants failed to meet their initial burden in support of their motion inasmuch as they failed to establish as a matter of law that defendant could not have seen plaintiff in time to stop or to take evasive maneuvers to avoid hitting him (see generally *Esposito v Wright*, 28 AD3d 1142). Also, defendant could not recall the speed at which she was traveling before she observed plaintiff in her lane of travel (see generally *Veras v Vezza*, 69 AD3d 611, 612). Therefore, defendants "failed to submit evidence sufficient to establish, prima facie, that the [plaintiff's] alleged negligence was the sole proximate cause of the accident, that [defendant] kept a proper

lookout, and that [her] alleged negligence, if any, did not contribute to the happening of the accident" (*Topalis v Zwolski*, 76 AD3d 524, 525; see *Veras*, 69 AD3d 611; *Ryan v Budget Rent a Car*, 37 AD3d 698).

We reject defendants' alternative contention that the court erred in denying their motion to the extent that it sought to strike the complaint as a sanction for plaintiff's alleged spoliation of evidence, i.e., the loss of one of the accident scene photographs that were marked during depositions. Of primary importance is the fact that defendants provided no evidence that plaintiff was responsible for the loss of that photograph. In any event, defendants also failed to establish any prejudice arising from the loss of that photograph, inasmuch as there are other photographs of the accident scene (see generally *Jennosa v Vermeer Mfg. Co.*, 64 AD3d 630, 631-632; *Kirschen v Marino*, 16 AD3d 555, 555-556).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

347

KA 10-00015

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN J. DOVE, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered November 24, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [2]). We reject defendant's contention that County Court abused its discretion in denying his request to adjourn sentencing in order to obtain a psychiatric evaluation (*see People v Dockery*, 174 AD2d 432, *lv denied* 78 NY2d 1010). "The granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*People v Patterson*, 177 AD2d 1042, *lv denied* 79 NY2d 1049, 1052; *see Matter of Anthony M.*, 63 NY2d 270, 283). Here, a psychiatric evaluation would not have altered the terms of defendant's plea bargain. Moreover, defendant had approximately eight months between the date that he was arrested and the date of sentencing to obtain such an evaluation (*see People v Brown*, 305 AD2d 1068, 1069-1070, *lv denied* 100 NY2d 579).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

355

CAF 10-00441

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

IN THE MATTER OF RONALD WASHINGTON,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

ERIE COUNTY CHILDREN'S SERVICES,
RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered January 20, 2010 in a proceeding pursuant to Family Court Act article 6. The order denied the petition for custody and freed the child for adoption.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating those parts of the order denying the custody petition, determining that petitioner is a "notice father" and freeing the child for adoption, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Erie County, for further proceedings on the custody petition before a different judge in accordance with the following Memorandum: Petitioner is the biological father of a child who was the subject of a permanent neglect petition filed against the child's mother. Following a series of delays related to providing the father with notice that he may be the father of the child, who was in foster care, he was adjudicated the child's father. The father thereafter commenced this proceeding pursuant to article 6 of the Family Court Act seeking custody of the child. Family Court heard testimony with respect to the father's custody petition following the dispositional hearing in the permanent neglect proceeding against the mother. In its order, which addressed both the permanent neglect proceeding against the mother and the custody proceeding, the court stated that the father's "[p]etition for custody is hereby denied[] [inasmuch as the c]ourt does not find it in the best interest[s] of the child to be removed from the only home he has ever known and placed with a Notice Father with whom he has had limited and superficial contact" With respect to the custody proceeding between the father and a third party, i.e., Erie County Children's Services, we note that the court failed to make the requisite findings of extraordinary circumstances

before determining the best interests of the child (*see generally Matter of Ricky Ralph M.*, 56 NY2d 77, 80; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 548). Instead, despite its reference to the custody petition, the court treated the custody matter between the father and respondent as though it had before it only the permanent neglect petition with respect to the mother. Indeed, the court addressed the best interests of the child in the context of the permanent neglect proceeding against the mother by freeing the child for adoption (*see generally Family Ct Act* §§ 631, 634). That was error. We further conclude that, by determining that the father was a "notice father" and thus that his consent is not required for the adoption of the child (*see Domestic Relations Law* § 111 [1] [d]), the court thereby deprived the father of his parental rights without due process (*see Matter of Jaleel F.*, 63 AD3d 1539, 1540-1541). Although there was reference to the father as a "notice father" during the proceedings, that reference was correct only in the context of the permanent neglect proceeding against the mother inasmuch as he was entitled to notice of that proceeding (*see Social Services Law* § 384-c [2] [a]). The issue whether the father's consent is required before the child may be adopted was not before the court. " '[A] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one' and may not be accomplished without stern adherence to the dictates of due process" (*Ricky Ralph M.*, 56 NY2d at 81, quoting *Lassiter v Department of Social Servs. of Durham County, N.C.*, 452 US 18, 27).

We therefore modify the order accordingly, and we remit the matter to Family Court for further proceedings on the custody petition before a different judge following a de novo hearing, if necessary.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

357

CA 10-02255

PRESENT: SCUDDER, P.J., SCONIERS, GORSKI, AND MARTOCHE, JJ.

TIMOTHY M. KOBEL AND LISA H. KOBEL,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NIAGARA MOHAWK POWER CORPORATION,
DEFENDANT-APPELLANT,
TELERGY, INC., INDIVIDUALLY AND AS
SUCCESSOR BY MERGER TO A NEW YORK
CORPORATE ENTITY OF THE SAME NAME,
ET AL., DEFENDANTS.

HISCOCK & BARCLAY, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (R. CHARLES MINER OF
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered July 1, 2010 in a personal injury action. The order, inter alia, denied in part the motion of defendant Niagara Mohawk Power Corporation for summary judgment dismissing plaintiffs' complaint and all cross claims against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Niagara Mohawk Power Corporation in part and dismissing the Labor Law § 241 (6) claim against it insofar as that claim is based upon the alleged violation of 12 NYCRR 23-1.7 (b) (1) and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries allegedly sustained by Timothy M. Kobel (plaintiff) when he slipped and fell backwards while working at the bottom of a manhole. We reject the contention of Niagara Mohawk Power Corporation (defendant) that Supreme Court erred in denying those parts of its motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against it. "A defendant may bear responsibility under Labor Law § 200 and for common-law negligence if it had actual or constructive notice of the allegedly dangerous condition on the premises [that] caused the . . . plaintiff's injuries, regardless of whether [it] supervised [plaintiff's] work" (*Konopczynski v ADF Constr. Corp.*, 60 AD3d 1313, 1314-1315 [internal quotation marks omitted]; see *Riordan v BOCES of*

Rochester, 4 AD3d 869, 870). "Here, defendant failed to meet its initial burden because it failed to establish that it had no [actual or] constructive notice of the allegedly hazardous conditions in the floor" of the manhole (*Konopczynski*, 60 AD3d at 1315). The evidence submitted by defendant in support of the motion establishes that plaintiff's "injuries . . . resulted from a hazardous condition existing at the work site, rather than from the manner in which the work [was] being performed" (*McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582).

We reject defendant's further contention that the court erred in denying that part of its motion for summary judgment dismissing the Labor Law § 241 (6) claim against it insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (d). That regulation protects workers from, inter alia, being required or permitted to work in areas where the "working surface . . . is in a slippery condition." There is no requirement that the work surface be elevated before an employer's duty under the regulation is triggered (see *Cottone v Dormitory Auth. of State of N.Y.*, 225 AD2d 1032, 1033), and the regulation is sufficiently specific to support a Labor Law § 241 (6) claim (see *Tronolone v New York State Dept. of Transp.*, 71 AD3d 1488). Contrary to defendant's contention, 12 NYCRR 23-1.7 (d) does not apply only to unexpected and unanticipated slipping hazards.

We agree with defendant, however, that the court erred in denying that part of its motion for summary judgment dismissing the Labor Law § 241 (6) claim against it insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (b) (1), and we therefore modify the order accordingly. Although that regulation is sufficiently specific to support a Labor Law § 241 (6) claim (see *Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543, 544), the sump hole that plaintiff stepped into cannot be considered sufficiently large to constitute a hazardous opening within the meaning of the regulation (see *id.*; see generally *Pitts v Bell Constructors, Inc.*, 81 AD3d 1475; *Salazar v Novalex Contr. Corp.*, 72 AD3d 418, 422-423).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

364

CA 10-01712

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

JAMES J. FORTI AND LINDA A. FORTI,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

PORTVILLE FOREST PRODUCTS, INC.,
DEFENDANT-APPELLANT.

DIBBLE & MILLER, P.C., ROCHESTER (G. MICHAEL MILLER OF COUNSEL), FOR
DEFENDANT-APPELLANT.

THOMAS F. BRINKWORTH, BUFFALO, FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered February 19, 2010. The judgment awarded plaintiffs the sum of \$89,500 against defendant.

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

Memorandum: Defendant appeals from a judgment entered following a nonjury trial that awarded plaintiffs \$89,500 in damages and costs resulting from defendant's actions in cutting down trees on plaintiffs' property. We affirm. Defendant contends that it had the right to cut down and remove trees from plaintiffs' property because, when Forestlands, Inc. (Forestlands) sold the subject property to plaintiffs in 1994, it reserved its timber rights. The president of Forestlands is also defendant's president. We reject defendant's contention inasmuch as the correction deed that was issued in 1995 omitted any reservation of timber rights to Forestlands. Contrary to defendant's contention, that deed constituted the final agreement between plaintiffs and Forestlands. " '[U]nder the merger doctrine, the land sale contract merged with the deed of conveyance and thereby extinguished the obligations and provisions of the contract upon the closing of title' " (*Stollsteimer v Kohler*, 77 AD3d 1259, 1260; see *Franklin Park Plaza, LLC v V & J Natl. Enters., LLC*, 57 AD3d 1450, 1451-1452; *Summit Lake Assoc. v Johnson*, 158 AD2d 764, 766). Although the original deed issued upon closing of the sale in 1994 reserved Forestlands' timber rights, the correction deed did not do so, and we conclude that the correction deed is controlling. Contrary to defendant's further contention, the record does not establish that the correction deed was executed upon Forestlands' "honest and excusable

mistake." We have reviewed defendant's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

377

CA 10-02096

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

KAREN DEBRINE, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

ROBERT L. VANHARKEN AND PHILIP R. VANHARKEN,
DEFENDANTS-APPELLANTS-RESPONDENTS.

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

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered June 23, 2010 in a personal injury action. The order denied the motion of plaintiff for partial summary judgment on the issue of liability and the cross motion of defendants for partial summary judgment dismissing plaintiff's claim for lost earnings.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion on the issue of defendants' negligence and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle that she was operating collided with a vehicle operated by Philip R. VanHarken (defendant) and owned by defendant Robert L. VanHarken. Supreme Court, *inter alia*, denied plaintiff's motion for partial summary judgment on the issue of liability, *i.e.*, negligence and serious injury (*see generally Ruzycki v Baker*, 301 AD2d 48, 51-52), and we conclude that the court erred in denying that part of plaintiff's motion for partial summary judgment on the issue of defendants' negligence only. We therefore modify the order accordingly. The evidence submitted by plaintiff in support of her motion, including defendant's deposition testimony, established that defendant struck her vehicle after defendant entered the roadway from a driveway. Plaintiff thus established that defendant "was negligent in failing to see that which, under the circumstances, he should have seen, and in [pulling out] in front of [plaintiff's] vehicle when it was hazardous to do so" (*Stiles v County of Dutchess*, 278 AD2d 304, 305; *see Garza v Taravella*, 74 AD3d 1802, 1804), and defendants failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of*

New York, 49 NY2d 557, 562). Plaintiff failed, however, to establish that she was not negligent in operating her vehicle and that defendant's negligence was the sole proximate cause of the accident. We therefore reject her further contention that she was entitled to partial summary judgment on those issues (see *Leahey v Fitzgerald*, 1 AD3d 924, 926; cf. *Hillman v Eick*, 8 AD3d 989, 990).

Contrary to defendants' contention, the court properly denied their cross motion for partial summary judgment seeking dismissal of plaintiff's claim for lost earnings. That claim is based upon the allegation that plaintiff sustained a brachial plexus injury in the accident. Although defendants met their initial burden of establishing that plaintiff did not sustain such an injury or, alternatively, that the alleged injury was not sustained in the accident, plaintiff raised a triable issue of fact (see generally *Zuckerman*, 49 NY2d at 562).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

391

KA 07-02491

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TUREMAIL MCCULLOUGH, DEFENDANT-APPELLANT.

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

TUREMAIL MCCULLOUGH, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered October 29, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, assault in the second degree and grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]), assault in the second degree (§ 120.05 [6]) and grand larceny in the third degree (§ 155.35). Defendant contends in his main brief that Supreme Court erred in admitting in evidence the testimony of a police investigator that improperly bolstered the identification testimony of an eyewitness. That contention is not preserved for our review (see *People v Newman*, 71 AD3d 1509, *lv denied* 15 NY3d 754; *People v Cala*, 50 AD3d 1581, *lv denied* 10 NY3d 957; *People v Slaughter*, 27 AD3d 1188, *lv denied* 7 NY3d 795), 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]).

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his contention in his pro se supplemental brief that the assault conviction is not supported by legally sufficient evidence (see *People v Lane*, 7 NY3d 888, 889; *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit (see generally *People v Chiddick*, 8 NY3d 445, 446-447; *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). Defendant's challenge to the legal sufficiency of the evidence before the grand jury, i.e., that the testimony of an eyewitness was improperly bolstered, is not properly before us on this "appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence" (CPL 210.30 [6]; see *People v Afrika*, 79 AD3d 1678, 1679; *People v Lee*, 56 AD3d 1250, 1251, lv denied 12 NY3d 818).

We agree with defendant, however, that the court erred in failing to conduct a sufficient inquiry into his complaint regarding a conflict of interest with defense counsel. On the day of sentencing, defendant requested new counsel and indicated that he had filed a grievance regarding defense counsel's actions, including his alleged failure to investigate certain allegations and to respond appropriately to defendant's requests. At that time, defense counsel asked the court to assign new counsel to investigate defendant's claims. The court, however, did not address defendant's request for new counsel, nor did it conduct any inquiry concerning his allegations. It is well settled that "it is incumbent upon a defendant to make specific factual allegations of 'serious complaints about counsel' . . . If such a showing is made, the court must make at least a 'minimal inquiry,' and discern meritorious complaints from disingenuous applications by inquiring as to 'the nature of the disagreement or its potential for resolution' " (*People v Porto*, 16 NY3d 93, 100). Here, the court proceeded to sentence defendant without seeking input from defense counsel regarding whether the grievance created an adversarial situation and without inquiring with respect to the other issues raised. The court also sentenced defendant without directing defense counsel to continue his representation of defendant. Furthermore, although there is no rule requiring that a defendant who has filed a grievance against his attorney be assigned new counsel, the court was required to make an inquiry to determine whether defense counsel could continue to represent defendant in light of the grievance (see *People v Smith*, 25 AD3d 573, 574-576, lv denied 6 NY3d 853). We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court for the assignment of new counsel and resentencing.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

392

KA 04-01470

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALONZO WOODARD, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered April 15, 2004. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), assault in the second degree, assault in the third degree (four counts) and unlawful imprisonment in the first degree (two 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 reducing the conviction of assault in the second degree to attempted assault in the second degree and vacating the sentence imposed on the fourth count of the indictment and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for sentencing on the conviction of attempted assault in the second degree.

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]), one count of assault in the second degree (§ 120.05 [2]), and four counts of assault in the third degree (§ 120.00 [1]). Supreme Court properly refused to suppress the showup identifications of defendant by the two victims. Although showup identification procedures are generally disfavored (see *People v Ortiz*, 90 NY2d 533, 537), such procedures are permitted "where [they are] reasonable under the circumstances--that is, when conducted in close geographic and temporal proximity to the crime--and the procedure used was not unduly suggestive" (*People v Brisco*, 99 NY2d 596, 597; see *Ortiz*, 90 NY2d at 537; *People v Jackson*, 78 AD3d 1685, lv denied 16 NY3d 743). Here, the showup identification procedure took place at the scene of the crime, within 90 minutes of the commission of the crime and in the course of a continuous, ongoing investigation (see *Brisco*, 99 NY2d at 597; see *People v Wall*, 38 AD3d

1341, *lv denied* 9 NY3d 852; *People v Boyd*, 272 AD2d 898, *lv denied* 95 NY2d 850). Inasmuch as the two victims were placed in different police vehicles and remained apart throughout the showup identification procedure, "it cannot be said that the [victims] were in such proximity while viewing [defendant] that there was an increased likelihood that if one of them made an identification the other[] would concur" (*People v Pross*, 302 AD2d 895, 896, *lv denied* 99 NY2d 657 [internal quotation marks omitted]; see also *People v McGee*, 294 AD2d 937, *lv denied* 98 NY2d 699). We further note that the People presented testimony at the *Wade* hearing that, prior to the showup identification procedure, one of the victims spontaneously identified defendant as one of the perpetrators. Thus, the court properly refused to suppress the showup identification of that victim on the additional ground that the showup identification procedure was merely confirmatory (see *People v Buskey*, 13 AD3d 1058; *People v Burroughs*, 11 AD3d 1028, *lv denied* 3 NY3d 755; *People v Santiago*, 2 AD3d 263, *lv denied* 2 NY3d 765).

Defendant's challenges to the legal sufficiency of the evidence are not preserved for our review inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (see *People v Lane*, 7 NY3d 888, 889; *People v DeLee*, 79 AD3d 1664; *People v Baker*, 67 AD3d 1446, *lv denied* 14 NY3d 769). Nevertheless, we agree with defendant that the evidence of physical injury is legally insufficient to support his conviction of assault in the second degree, and we therefore exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Although the victim testified that defendant and the codefendants attempted to electrocute him by dousing him with water and then touching the frayed end of an electrical cord to his skin multiple times, the victim further testified that he felt only a "little shock." Thus, as the People correctly concede, they failed to present evidence establishing either physical impairment or substantial pain (see Penal Law § 10.00 [9]; *People v Lewis*, 294 AD2d 847). We reject defendant's further contention, however, that the electrical cord did not constitute a " 'dangerous instrument' " (§ 10.00 [13]). Under the circumstances in which it was used, the electrical cord was "readily capable of causing death or other serious physical injury" (*id.*; see generally *People v Still*, 26 AD3d 816, 817, *lv denied* 6 NY3d 853; *People v Molnar*, 234 AD2d 988, *lv denied* 89 NY2d 1038; *People v Wade*, 232 AD2d 290, *lv denied* 89 NY2d 989). We therefore modify the judgment by reducing defendant's conviction of assault in the second degree to the lesser included offense of attempted assault in the second degree (§§ 110.00, 120.05 [2]; see CPL 470.15 [2] [a]), and we remit the matter to Supreme Court for sentencing on the fourth count of the indictment. Viewing the evidence in light of the elements of the crime of burglary in the first degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to the counts of the indictment charging that crime is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495).

Defendant's constitutional challenge to the persistent felony offender statute is not properly before us inasmuch as there is no indication in the record that the Attorney General was given the requisite notice of that challenge (see Executive Law § 71 [3]; *People v Schaurer*, 32 AD3d 1241). In any event, that contention is not preserved for our review (see *People v Perez*, 67 AD3d 1324, 1326, *lv denied* 13 NY3d 941; *People v Phillips*, 56 AD3d 1168, *lv denied* 11 NY3d 928), and it is without merit (see *People v Porto*, 16 NY3d 93, 102; see generally *People v Quinones*, 12 NY3d 116, 122-131, *cert denied* ___ US ___, 130 S Ct 104; *People v Rivera*, 5 NY3d 61, 66-68, *cert denied* 546 US 984).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

395

KA 09-02128

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFREY P. ERLE, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JEFFREY P. ERLE, DEFENDANT-APPELLANT PRO SE.

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 August 17, 2009. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (three counts), rape in the first degree (two counts), rape in the third degree (two counts) and attempted criminal sexual act 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 of, inter alia, two counts of rape in the first degree (Penal Law § 130.35 [1], [2]), defendant contends that the indictment was fatally defective because it lacked sufficient specificity to enable him to prepare a defense. We conclude that defendant failed to preserve his contention for our review (*see People v Soto*, 44 NY2d 683; *People v Adams*, 59 AD3d 928, *lv denied* 12 NY3d 813). "In any event, that contention lacks merit inasmuch as the time frames set forth in the indictment, [e.g., on or about a day in June 2008], were sufficiently specific in view of the nature of the offense[s] and the age of the victim" (*Adams*, 59 AD3d at 929 [internal quotation marks omitted]; *see People v Franks*, 35 AD3d 1286, *lv denied* 8 NY3d 922; *People v Risolo*, 261 AD2d 921; *see generally People v Morris*, 61 NY2d 290, 295-296).

Defendant further contends that County Court erred in admitting in evidence the medical report of a physician who testified at trial because it was based entirely on inadmissible hearsay. Defendant objected to the admission in evidence of that report only with respect to its relevance, however, and he therefore failed to preserve his present contention for our review (*see People v Billip*, 65 AD3d 430,

lv denied 13 NY3d 834; *People v Nicholopoulos*, 289 AD2d 1087, *lv denied* 97 NY2d 758). 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]). The sentence is not unduly harsh or severe.

In his pro se supplemental brief defendant contends that the conviction is not supported by legally sufficient evidence because the dates of the incidents as alleged in the indictment were inconsistent with the dates of the incidents as established at trial. We reject that contention. The indictment alleged that the incident upon which the first count was based occurred on a day in June 2008, and it set forth time periods for the remaining counts that referred to the time period for the first count. The victim testified at trial, however, that the incident upon which the first count was based occurred "towards the end of May" 2008. Where, as here, time is not an essential element of an offense, "the prosecution is not required to prove the exact date and time the charged offenses occurred" (*People v Glover*, 185 AD2d 458, 460; see *People v Cunningham*, 48 NY2d 938, 940). We thus conclude that the variance between the dates alleged in the indictment and the dates established at trial does not render the evidence legally insufficient to support the conviction (see *People v Jones*, 37 AD3d 1111, *lv denied* 8 NY3d 986; *People v Davis*, 15 AD3d 920, *lv denied* 4 NY3d 885, 5 NY3d 787; *People v Morgan*, 246 AD2d 686, 687, *lv denied* 91 NY2d 975). Defendant failed to preserve for our review his remaining challenges to the legal sufficiency of the evidence (see *People v Gray*, 86 NY2d 10, 19).

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, contrary to the contention of defendant in his pro se supplemental brief, the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury . . . , and the testimony of the victim . . . was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]; see *People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982). Finally, we reject the further contention of defendant in his pro se supplemental brief that the court erred in permitting the People to elicit testimony that defendant threatened the victim with a knife. That testimony was admissible "to explain the victim's failure to make a prompt complaint" (*People v Chase*, 277 AD2d 1045, *lv denied* 96 NY2d 733), "to develop the necessary background and [to] complete the victim's narrative" (*People v Shofkom*, 63 AD3d 1286, 1287, *lv denied* 13 NY3d 799, *appeal dismissed* 13 NY3d 933).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

401

KA 07-02188

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DALE BRADLEY, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered September 14, 2007. 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: Defendant appeals from a judgment convicting her upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to the contention of defendant, County Court properly weighed the probative value of the evidence of her prior bad acts against any prejudice to her (see generally *People v Ventimiglia*, 52 NY2d 350; *People v Molineux*, 168 NY 264). Although "the court should have expressly recited its discretionary balancing [of those factors] . . ., viewed in the context of the combined [*Molineux/Ventimiglia* and *Sandoval*] hearings and defense counsel's opposition [to the evidence] based on its prejudicial effect, the court's proper exercise of its discretion is implicit" (*People v Milot*, 305 AD2d 729, 731, *lv denied* 100 NY2d 585; see *People v Meseck*, 52 AD3d 948, 950; cf. *People v Westerling*, 48 AD3d 965, 968). Furthermore, " 'any prejudice to defendant was minimized by [the court's] limiting instructions' " (*People v Carson*, 4 AD3d 805, 806, *lv denied* 2 NY3d 797). Defendant failed to address in her brief on appeal any other issues with respect to the *Molineux/Ventimiglia* evidence, and thus she is deemed to have abandoned any contentions with respect thereto (see generally *People v Butler*, 2 AD3d 1457, 1458, *lv denied* 3 NY3d 637; *People v Jansen*, 145 AD2d 870, 871, *lv denied* 73 NY2d 923).

We agree with defendant, however, that the court erred in refusing to instruct the jury with respect to posttraumatic stress disorder insofar as it was relevant to the defense of justification.

Prior to trial, defendant served a notice pursuant to CPL 250.10 indicating that she intended to introduce evidence that she suffered from battered woman syndrome. At trial, defendant's psychiatric expert testified regarding that syndrome and posttraumatic stress disorder, as did the People's expert in rebuttal. After the close of proof, the prosecutor requested that the court not instruct the jury on posttraumatic stress disorder insofar as it was relevant to the defense of justification, based solely on the lack of specificity in the CPL 250.10 notice. As the Court of Appeals recently noted, that "statutory notice provision is grounded on principles of fairness and is intended 'to prevent disadvantage to the prosecution as a result of surprise' . . . [I]t 'was designed to allow the prosecution an opportunity to acquire relevant information from any source—not merely from an independent examination of the defendant—to counter the defense' " (*People v Diaz*, 15 NY3d 40, 46). Thus, inasmuch as the People had sufficient notice to prepare a response to the defense of justification, the court erred in refusing to give the instruction on that ground. Contrary to defendant's further contention, however, reversal is not required. Defense counsel was permitted to introduce relevant evidence and argue to the jury regarding both battered woman syndrome and posttraumatic stress disorder and, "[b]ecause there was overwhelming evidence disproving the justification defense and no reasonable possibility that the verdict would have been different had the charge been correctly given, the error in the . . . court's justification charge [is] harmless" (*People v Petty*, 7 NY3d 277, 286; see generally *People v Crimmins*, 36 NY2d 230, 241-242).

Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

403

CA 10-02141

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

MICHAEL STOPANI AND WENDY STOPANI,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ALLEGANY CO-OP INSURANCE COMPANY,
DEFENDANT-APPELLANT.

TRAYNOR, SKEHAN AND MARKS, ROCHESTER (JEFFREY H. MARKS OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from an order (denominated decision) of the Supreme Court, Monroe County (William P. Polito, J.), entered July 13, 2010 in a breach of contract action. The order granted the motion of plaintiffs to dismiss defendant's ninth affirmative defense.

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

Memorandum: In this breach of contract action involving a dispute over fire insurance coverage, plaintiffs moved to dismiss the ninth affirmative defense alleging that defendant insurer properly disclaimed coverage based on plaintiffs' failure to submit sworn proof of loss within the time limit set forth in the insurance policy. We agree with defendant that Supreme Court erred in granting the motion. Pursuant to CPLR 3211 (b), a plaintiff may move to dismiss a defense on the ground that it has no merit (*see Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723). When reviewing a motion to dismiss an affirmative defense, "all of defendant's allegations must be deemed to be true and defendant is entitled to all reasonable inferences to be drawn from the submitted proof" (*Grunder v Recckio*, 138 AD2d 923, 923). The motion must be denied if there is any doubt with respect to the availability of a defense (*see Nahrebeski v Molnar*, 286 AD2d 891).

Here, pursuant to the insurance policy, plaintiffs were required to submit proof of loss within 60 days of defendant's demand for such proof. Defendant submitted evidence in support of the motion establishing that plaintiffs received its demand for proof of loss in the mail on March 6, 2009. Specifically, defendant's claims manager averred in an affidavit that plaintiff Michael Stopani called her on that day and acknowledged receipt of the demand letter, which was sent

by defendant two days earlier via regular first class mail. On March 9, 2009, plaintiffs received another copy of the demand letter sent to them by certified mail. It is undisputed that plaintiffs did not submit proof of loss to defendant until May 8, 2009, which was more than 60 days from their alleged receipt of the first letter but fewer than 60 days from their admitted receipt of the second letter.

As a general rule, "[w]hen an insurer gives its insured written notice of its desire that proof of loss under a policy of fire insurance be furnished and provides a suitable form for such proof, failure of the insured to file proof of loss within 60 days after receipt of such notice, or within any longer period specified in the notice, is an absolute defense to an action on the policy" (*Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201, 209-210; see *Turkow v Erie Ins. Co.*, 20 AD3d 649, 649-650). Where, as here, the insurer's demand for proof of loss is sent by two different methods on the same day, the 60-day period should be measured from the date the insured first receives the demand letter. This rule is consistent with the reciprocal principle that "the moment from which the timeliness of an insurer's disclaimer is measured is the date on which it *first* receives information that would disqualify the claim" (*2540 Assoc. v Assicurazioni Generali*, 271 AD2d 282, 283 [emphasis added]). If the rule were otherwise, an insured could extend indefinitely the time within which he or she is required to submit proof of loss by simply refusing to accept the demand letter sent by certified mail. Because defendant alleged that plaintiffs failed to submit proof of loss within 60 days of their first receipt of the demand letter, it cannot be said that defendant's ninth affirmative defense lacks merit.

With respect to the court's conclusion that, even if the 60-day period is measured from plaintiffs' first receipt of the demand letter on March 6, 2009, the delay is "de minimis and excusable under contract law," we agree with defendant that such a conclusion is contrary to the rule that the failure to comply with a demand for proof of loss within 60 days serves as "an absolute defense to an action on the policy" (*Igbara Realty Corp.*, 63 NY2d at 210).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

405

CA 10-01471

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

LETITIA HOUSTON, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KATHLEEN GEERLINGS, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (ALISON M.K. LEE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered April 21, 2010 in a personal injury action. The order granted the motion of defendant 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 complaint, as amplified by the bill of particulars, with respect to the significant limitation of use and 90/180-day categories of serious injury within the meaning of Insurance Law § 5102 (d) insofar as they relate to plaintiff's right shoulder injury and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a three-car chain reaction motor vehicle accident that occurred after the vehicle driven by defendant jumped a curb while exiting a parking lot. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and Supreme Court granted the motion.

At the outset, we reject plaintiff's contention that defendant improperly submitted unsworn medical reports that were not obtained from plaintiff's counsel in support of defendant's motion (*see Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 27). In any event, "[a]lthough '[those] reports were unsworn, the . . . medical opinion[] relying on those . . . reports [is] sworn and thus competent evidence' " (*Harris v Carella*, 42 AD3d 915, 916, quoting *Brown v Dunlap*, 4 NY3d 566, 577 n 5). We further conclude that, even though plaintiff did not plead the aggravation or exacerbation of a preexisting injury, defendant herself raised that issue in her motion papers and thus plaintiff could properly rely on that theory in opposition to the motion (*see generally Mazurek v Home Depot U.S.A.*,

303 AD2d 960, 961; *Martin v Volvo Cars of N. Am.*, 241 AD2d 941, 943).

Plaintiff does not challenge that part of the order granting defendant's motion with respect to the significant disfigurement category of serious injury, and we therefore deem any challenge with respect thereto abandoned (see *Ciesinski v Town of Aurora*, 202 AD2d 984). We conclude that defendant met her initial burden of establishing that plaintiff did not sustain a serious injury under any category relating to her neck or lumbar spine, and plaintiff did not raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, the evidence submitted by plaintiff in opposition to the motion concerned the alleged injury to her right shoulder only.

We further conclude that defendant met her initial burden of establishing that plaintiff did not sustain a serious injury relating to her right shoulder under the permanent consequential limitation of use category. Defendant submitted evidence that any alleged injuries to plaintiff's right shoulder had resolved within 21 months following the subject motor vehicle accident (see *Dilone v Tak Leu Cheng*, 56 AD3d 397; *Curtis v Brent*, 51 AD3d 464; *Snow v Harrington*, 40 AD3d 1237, 1238; see generally *Gaddy v Eyler*, 79 NY2d 955, 957-958). In opposition to the motion, plaintiff failed to raise a triable issue of fact whether any limitation of use of her right shoulder was permanent (see generally *Zuckerman*, 49 NY2d at 562).

We agree with plaintiff, however, that the court erred in granting those parts of the motion with respect to the significant limitation of use and 90/180-day categories of serious injury insofar as they relate to plaintiff's right shoulder injury, and we therefore modify the order accordingly. With respect to the significant limitation of use category, we conclude that defendant failed to meet her initial burden of establishing that plaintiff did not sustain a serious injury under that category. Although defendant submitted reports from physicians discussing the range of motion of plaintiff's right shoulder, those reports fail to compare plaintiff's range of motion to what would be considered normal. Thus, those reports are "insufficient to establish that [any] decreased range of motion in the plaintiff's right [shoulder] was so mild, minor[] or slight as to be considered insignificant within the meaning of [Insurance Law § 5102 (d)]" (*Diorio v Butler*, 69 AD3d 787, 787-788; see *McCarthy v Gagne*, 61 AD3d 942; cf. *Roll v Gavitt*, 77 AD3d 1412). Indeed, defendant submitted evidence that, following the motor vehicle accident, plaintiff underwent surgery for a rotator cuff tear to her right shoulder and that, although plaintiff had preexisting injuries to her right shoulder, the accident may have exacerbated those preexisting injuries.

Finally, with respect to the 90/180-day category, we conclude that defendant failed to meet her initial burden of establishing that plaintiff was able to perform substantially all of the material acts that constituted her usual and customary daily activities during no less than 90 days of the 180 days following the accident (see Insurance Law § 5102 [d]). "To qualify as a serious injury under the

90/180[-day] category, there must be objective evidence of a medically determined injury or impairment of a non-permanent nature . . .[,] as well as evidence that plaintiff's activities were curtailed to a great extent" (*Zeigler v Ramadhan*, 5 AD3d 1080, 1081 [internal quotation marks omitted]). Defendant's own submissions included objective medical evidence that plaintiff may have sustained an injury to her right shoulder that, at the very least, exacerbated a preexisting injury. Defendant also submitted evidence that plaintiff was confined to her bed for 2½ months following the accident and was unable to perform daily grooming activities, to do simple chores or to play with her children for three to four months following the accident.

Inasmuch as defendant failed to meet her initial burden of establishing that plaintiff did not sustain a serious injury relating to her right shoulder that was causally related to the accident under those two categories of serious injury, the burden never shifted to plaintiff to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Patricia L. Morgan

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

406

CA 10-02068

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

STATE OF NEW YORK EX REL. KEVIN GRUPP AND
ROBERT MOLL, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

DHL EXPRESS (USA), INC., DHL WORLDWIDE
EXPRESS, INC., AND DPWN HOLDINGS (USA), INC.
(FORMERLY KNOWN AS DHL HOLDINGS (USA), INC.),
DEFENDANTS-APPELLANTS.

ORRICK, HERRINGTON & SUTCLIFFE LLP, NEW YORK CITY (J. PETER COLL, JR.,
OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JOHN L. SINATRA, JR., OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered May 5, 2010. The order denied the motion of defendants to dismiss the amended complaint.

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

Memorandum: Plaintiffs commenced this qui tam action pursuant to the New York False Claims Act ([FCA] State Finance Law §§ 187 *et seq.*), seeking to recover, inter alia, treble damages for losses that the State of New York sustained with respect to a contract in which defendants agreed to provide air and ground shipping services to the State. Plaintiffs, two former ground shipping subcontractors of defendants, alleged that defendants overbilled the State for shipping by charging a jet fuel surcharge for shipments that were transported by truck, rather than the lower diesel fuel surcharge. After the Attorney General declined to intervene, plaintiffs chose to continue prosecuting the action. Defendants appeal from an order that, inter alia, denied their pre-answer motion to dismiss the amended complaint. We agree with defendants that this action is preempted by the Airline Deregulation Act of 1978 ([ADA] 49 USC § 41713 [b] [1]) and the Federal Aviation Administration Authorization Act ([FAAAA] 49 USC § 14501 [c] [1]), and we therefore reverse.

The ADA provides that, with certain exceptions, "a State . . . may not enact or enforce a law . . . related to a price, route, or service of an air carrier that may provide air transportation under

[the Economic Regulation] subpart" of Title 49 of the United States Code (49 USC § 41713 [b] [1]). By nearly identical language, the FAAAA preempts state regulation of motor carriers of property (see 49 USC § 14501 [c] [1]). Although "we are guided by the 'starting presumption that Congress does not intend to supplant state law' unless its intent to do so is 'clear and manifest' " (*Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 113, cert denied ___ US ___, 129 S Ct 999, quoting *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645, 654-655), it is well settled that a cause of action relates to rates, routes or services within the meaning of the ADA and thus is preempted whenever the underlying state action can be classified as "having a connection with or reference to airline 'rates, routes, or services' " (*Morales v Trans World Airlines, Inc.*, 504 US 374, 384). The same rule applies to motor shipping rates pursuant to the FAAAA. Inasmuch as the causes of action in the amended complaint seek damages based upon defendants' allegedly improper use of certain shipping rates, they unquestionably have a connection to airline and motor freight rates and therefore are preempted.

Contrary to the contention of plaintiffs, the so-called market participant exception to the preemption doctrine does not apply herein. In what is known as the *Boston Harbor* case (*Building & Constr. Trades Council of the Metro. Dist. v Associated Bldrs. & Contrs. of Mass./R.I., Inc.*, 507 US 218, 226-229), the United States Supreme Court concluded that the preemption doctrine will not apply when a state obtains goods or services in a proprietary capacity, acting in the same manner as a private entity seeking to obtain necessary goods and services. "In distinguishing between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power, the key under *Boston Harbor* is to focus on two questions. First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?" (*Cardinal Towing & Auto Repair, Inc. v City of Bedford, Tex.*, 180 F3d 686, 693). Here, the broad scope of the FCA demonstrates that its primary goal is to regulate the actions of those who engage in business with the State, and thus the statute enforces a general policy.

Furthermore, although "the ADA permits state-law-based court adjudication of routine breach[]of[]contract claims" (*American Airlines, Inc. v Wolens*, 513 US 219, 232), the preemption doctrine applies to "confine[] courts, in breach[]of[]contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement" (*id.* at 233). Here, plaintiffs seek treble damages for defendants' alleged false claims in setting airline and truck shipping rates and thus the action falls squarely within the preemption doctrine. "Simply calling this a contract dispute does not gainsay that the dispute is over the rates

charged by an air carrier during a specified time period" (*Strategic Risk Mgt. v Federal Express Corp.*, 253 AD2d 167, 172, lv denied 94 NY2d 757).

Defendants' remaining contentions are moot in light of our resolution of the preemption issue.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

407

CA 10-00376

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

DEBORAH FERRENTINO, PLAINTIFF-APPELLANT,

V

ORDER

THERESA A. KEEL, DEFENDANT,
AND SUZANNE K. VARLEY, DEFENDANT-RESPONDENT.

LAW OFFICE OF WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (C. DANIEL
MCGILLICUDDY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 31, 2009 in a personal injury action. The order, inter alia, granted the motion of defendant Suzanne K. Varley for summary judgment and dismissed the complaint.

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

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

408

CA 10-02067

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

CYNTHIA A. WEBB, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SALVATION ARMY, DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR
DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 16, 2010 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint insofar as it alleges that defendant was negligent in failing to provide adequate lighting in the parking lot and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell in defendant's parking lot after stepping on a small boot of a doll. The boot measured 1.75 inches in both height and width. According to plaintiff, the presence of the doll boot in the parking lot constituted a dangerous condition of which defendant knew or should have known, and the accident was also caused by inadequate lighting in the parking lot. Defendant moved for summary judgment dismissing the complaint on the ground that, because "there is no proof of how long the tiny doll boot lay on the parking lot surface," defendant lacked actual or constructive notice of the allegedly dangerous condition. Defendant further contended that the lighting conditions of the parking lot did not cause plaintiff to fall inasmuch as she admitted in her deposition testimony that she was looking straight ahead when she stepped on the boot.

We conclude that Supreme Court properly denied the motion for summary judgment dismissing the complaint insofar as it alleges that defendant lacked constructive notice of the allegedly dangerous condition. We note at the outset that, at oral argument on the motion, the court clarified that plaintiff was abandoning any issues with respect to defendant's alleged actual notice. "Where, as here, only constructive notice is asserted, a defendant may meet its burden

of affirmatively demonstrating a lack of such notice by offering proof of regularly recurring maintenance or inspection of the premises" (*Kropp v Corning, Inc.*, 69 AD3d 1211, 1212; see *Babb v Marshalls of MA, Inc.*, 78 AD3d 976; *Braudy v Best Buy Co., Inc.*, 63 AD3d 1092). We further note that defendant does not challenge the allegation that the doll boot constituted a dangerous condition. Although defendant submitted evidence that, pursuant to a general unwritten policy, the manager in charge of the store at closing would inspect the parking lot for debris, defendant failed to submit evidence establishing that the general policy was followed on the night before plaintiff's accident (see *Johnson v Panera, LLC*, 59 AD3d 1118). Thus, defendant failed to meet its initial burden of establishing as a matter of law that the doll boot had not been in the parking lot for a sufficient period of time to permit an employee to discover and remove it (see *id.*; *Cooper v Carmike Cinemas, Inc.*, 41 AD3d 1279; *Mancini v Quality Mkts.*, 256 AD2d 1177). Defendant's contention that the doll boot was not visible and apparent 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 agree with defendant, however, that the court erred in denying the motion for summary judgment dismissing the complaint insofar as it alleges that defendant failed to provide adequate lighting in the parking lot, and we therefore modify the order accordingly. Defendant met its initial burden of establishing that the allegedly poor lighting in the parking lot was not a cause of the accident. In support of its motion, defendant submitted the deposition testimony of plaintiff wherein she acknowledged that she was not looking down as she was walking and that she had walked only "a little distance" after getting out of her vehicle before she fell (see *Reyes v La Ronda Cocktail Lounge*, 27 AD3d 397; *Christoforou v Lown*, 120 AD2d 387, 390-391). Plaintiff failed to raise a triable issue of fact in opposition (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

413

KA 08-00025

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAYSHAWN P. HANDY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered October 18, 2007. The judgment convicted defendant, upon a jury verdict, of assault 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 following a jury trial of assault in the second degree (Penal Law § 120.05 [7]), defendant contends that County Court erred in denying his request for an adverse inference charge concerning the failure of the People to preserve an alleged videotape of the assault. Contrary to defendant's contention, an adverse inference charge was not warranted inasmuch as defendant failed to establish that the alleged videotape was discoverable evidence that the People were required to preserve (see *People v James*, 93 NY2d 620, 644; *People v Kelly*, 62 NY2d 516, 520). There is no support in the record for defendant's assertion that the alleged videotape was exculpatory and thus his contention that the alleged videotape was *Brady* material is merely speculative (see *People v Ross*, 282 AD2d 929, 931, *lv denied* 96 NY2d 907; *People v Scattareggia*, 152 AD2d 679, 679-680).

Contrary to defendant's further contention, 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 defendant intended to cause injury to another person (see Penal Law § 120.05 [7]; *People v Cooper*, 50 AD3d 1570, *lv denied* 10 NY3d 957; *People v Amin*, 294 AD2d 863, *lv denied* 98 NY2d 672, 674; see generally *People v Bleakley*, 69 NY2d 490, 495). Further, viewing the evidence in light of the elements of the crime of assault in the second degree 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, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

414

KA 10-02011

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RICHARD M. WILDRICK, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, BATAVIA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered July 21, 2009. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree, sexual abuse in the second degree and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is reversed as a matter of discretion in the interest of justice and on the law, counts five and eight of the indictment are dismissed, and a new trial is granted on the remaining counts of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [3]), sexual abuse in the second degree (§ 130.60 [2]), and two counts of endangering the welfare of a child (§ 260.10 [1]). We agree with defendant that the two counts of endangering the welfare of a child of which he was convicted are time-barred inasmuch as the acts charged therein occurred more than two years prior to the filing of the indictment (see Penal Law § 260.10; CPL 30.10 [2] [c]; *People v Heil*, 70 AD3d 1490). Although defendant failed to preserve that issue for our review, we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We therefore dismiss the fifth and eighth counts of the indictment (see *People v Wise*, 49 AD3d 1198, 1200, lv denied 10 NY3d 940, 966).

Contrary to the further contention of defendant, the conviction of sexual abuse in the first and second degrees 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 those crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict convicting him of those crimes is not against the weight of the evidence (see generally *Bleakley*, 69

NY2d at 495).

We further agree with defendant, however, that County Court erred in denying his renewed application for subpoenas duces tecum with respect to the victims' school records. Defendant renewed his pretrial application for the subpoenas duces tecum after the People elicited testimony at trial from the mother of the victims to the effect that the victims' behavior had changed after the crimes took place. Specifically, the mother testified that the younger victim's behavior at school was "[u]p and down, all over the place" until he reported the sexual abuse two years later. According to the mother, after the younger victim reported the sexual abuse, it was as though a "light switch[ed]. Everything got better. He liked school. Everything changed." The mother further testified that she communicated with the victims' teachers and school counselors "[e]very single day" during the two-year period at issue. Based on the mother's testimony concerning the victims' behavior at school, we conclude that the court erred in failing to conduct an in camera review of the victims' school records to determine whether disclosure of at least a portion of those records was appropriate.

The purpose of a subpoena duces tecum is to "compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. The relevant and material facts in a criminal trial are those bearing upon 'the unreliability of either the criminal charge or of a witness upon whose testimony it depends' " (*People v Kozlowski*, 11 NY3d 223, 242, rearg denied 11 NY3d 904, cert denied ___ US ___, 129 S Ct 2775, quoting *People v Gissendanner*, 48 NY2d 543, 550). A defendant is not, however, required to show that the records sought are " 'actually' relevant and exculpatory" (*id.*, quoting *Gissendanner*, 48 NY2d at 550). Rather, a defendant need only "proffer a good faith factual predicate sufficient for a court to draw an inference that specifically identified materials are reasonably likely to contain information that has the potential to be both relevant and exculpatory" (*id.* at 241; see *Gissendanner*, 48 NY2d at 550). Here, the school records had the potential not only to contradict and therefore to impeach the mother's testimony, but they also had the potential to reveal information "relevant and material to the determination of guilt or innocence" (*Gissendanner*, 48 NY2d at 548). Indeed, if the mother's testimony concerning the alleged change in behavior was not borne out by the school records, the records would undermine her testimony as well as the children's accusations of sexual abuse, thus tending to support the theory of the defense that the accusations were fabricated. We thus conclude that defendant "sufficiently established that the children's records were material to his defense and that the court erred in withholding the records from him" (*People v Thurston*, 209 AD2d 976, 977, lv denied 85 NY2d 915). That error cannot be deemed harmless inasmuch as the proof of guilt, which consists largely of the victims' accusations, is not overwhelming, and it cannot be said that there is no significant probability that the jury would have acquitted defendant if not for the error (see generally *People v Grant*, 7 NY3d 421, 424; *People v Crimmins*, 36 NY2d 230, 241-242; cf. *People v*

Morris, 153 AD2d 984, *lv denied* 75 NY2d 922). We therefore reverse the judgment of conviction with respect to the remaining counts of the indictment of which defendant was convicted, i.e., sexual abuse in the first and second degrees, and we grant a new trial on those counts (see *Thurston*, 209 AD2d at 976-977).

Although we are granting a new trial on other grounds and thus need not address defendant's contention that reversal is required based on prosecutorial misconduct on summation, we nevertheless express our disapproval of several of the prosecutor's comments on summation, which exceeded the bounds of proper advocacy. For example, the prosecutor argued that, "in the [d]efendant's mind, he hadn't hurt the [victims]. He has given them a gift. He has given them the gift of his sexual encounter with them. He doesn't think that he has hurt these kids by touching them in their genital area when they are underage and forcing his hands upon them or making [one of the victims] touch him as well. He doesn't think he has hurt these kids because he has given them a gift." There is no basis in the record for such comments by the prosecutor, who thereby improperly inflamed the jury with those unsubstantiated comments (see generally *People v Ashwal*, 39 NY2d 105, 110; *People v Collins*, 12 AD3d 33, 39-40). Similarly, the prosecutor stated on summation that the older victim withheld certain details about the sexual abuse because the victim was "worried that the people are going to think that he might be gay," and in later repeating that statement, the prosecutor commented that "[i]t was awkward and embarrassing for [the older victim] to think, as mentioned, that people would think that [he] was gay because the [d]efendant made [him] touch him." Again, there is no basis in the record to support those comments (see *Ashwal*, 39 NY2d at 109-110; *Collins*, 12 AD3d at 39-40; *People v Clark*, 195 AD2d 988, 990). We thus take this opportunity to admonish the People that "summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his [or her] command. There are certain well-defined limits Above all [a prosecutor] should not seek to lead the jury away from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant" (*Ashwal*, 39 NY2d at 109-110).

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

All concur except SMITH, J.P., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part. I agree with the majority that counts five and eight, charging defendant with endangering the welfare of a child (Penal Law § 260.10 [1]), are time-barred and therefore must be dismissed. I respectfully disagree with the majority's further conclusion, however, that County Court erred in denying defendant's renewed application for subpoenas duces tecum with respect to the victims' school records, and I therefore vote to modify by affirming the remainder of the judgment.

Prior to trial, defendant sought the issuance of subpoenas duces

tecum to enable him to obtain the victims' school records. The court denied that pretrial application on the ground that defendant failed to make the requisite factual showing that it was reasonably likely that the records would contain information bearing upon the victims' credibility. When defendant renewed that application during trial, after the victims' mother testified, I conclude that the court properly denied his renewed application on the same ground.

"The proper purpose of a subpoena duces tecum, of course, is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding. The relevant and material facts in a criminal trial are those bearing upon 'the unreliability of either the criminal charge or of a witness upon whose testimony it depends' " (*People v Kozlowski*, 11 NY3d 223, 242, rearg denied 11 NY3d 904, cert denied ___ US ___, 129 S Ct 2775). Here, the mother of the victims testified that the behavior of the victims changed after they were sexually abused, and that those changes encompassed certain behavior at school. Defendant sought access to the victims' school records, indicating that the records might contain information establishing that the testimony of the victims and their mother was not credible. In support of his application, however, defendant proffered absolutely no factual information establishing that the victims' school records contained any information regarding the purported changes in the victims' behavior. Thus, defense counsel "made no pretense but that the records' contents would not directly bear on the hard issue of guilt or innocence; he cited no possible line of inquiry in which they might be employed beyond that of general credibility impeachment. Even on that score, no basis was presented, in the form of information from any extraneous source or otherwise, to suggest that [the school records of the victims contained evidence of an] act on which one could premise an inference that impeachable material tending to affect [the] credibility [of the victims and their mother] was to be found in their files. In short, nothing better than conjecture having been presented to the court, it acted well within its range of discretion in rejecting the application" (*People v Gissendanner*, 48 NY2d 543, 550). Indeed, "the simple answer to this contention is that there emerged not the slightest inkling that the [victims' school] records contained any exculpatory material" (*id.* at 551).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

415

KA 03-00695

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAMON FLORES, DEFENDANT-APPELLANT.

ANNA JOST, TONAWANDA, FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered March 6, 2003. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree, rape in the first degree (two counts), attempted sodomy in the first degree (two counts) and sodomy in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing that part convicting defendant of attempted sodomy 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, following a jury trial, of one count each of sexual abuse in the first degree (Penal Law § 130.65 [3]) and sodomy in the first degree (former § 130.50 [3]), and two counts each of rape in the first degree (§ 130.35 [3]) and attempted sodomy in the first degree (§ 110.00, former § 130.50 [3]). The evidence presented at trial established that, over the course of a month, defendant subjected a nine-year-old girl to various sexual acts on three separate occasions. Defendant's contention that he was denied his right to due process by preindictment delay is unpreserved for our review (*see People v Peck*, 31 AD3d 1216, *lv denied* 9 NY3d 992). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), particularly in view of the fact that the lack of preservation deprived the People of an opportunity to refute defendant's claims of prejudice and to demonstrate that there were legitimate reasons for the delay.

We reject defendant's further contention that the conviction of sexual abuse in the first degree and rape in the first degree under the first two counts of the indictment must be reversed because the

counts are "multiplicitous." The two counts are "non-inclusory concurrent counts, and thus both charges and convictions can stand" (*People v Scott*, 12 AD3d 1144, 1145, *lv denied* 4 NY3d 767). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of attempted sodomy in the first degree under count three of the indictment because he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] a)*), and we agree with defendant that reversal of the conviction of that count is required. We therefore modify the judgment accordingly. The victim testified that defendant told her to put her mouth on his penis but that he did not touch her, and she further testified that, when she told him that she would not do so, she merely walked away. While defendant thereafter physically restrained the victim and had intercourse with her by forcible compulsion, for which he was convicted of rape, the evidence is legally insufficient to establish that defendant came " 'dangerously close' " to committing sodomy (*People v Lamagna*, 30 AD3d 1052, 1053, *lv denied* 7 NY3d 814). We have considered defendant's remaining contentions concerning the alleged legal insufficiency of the evidence and conclude that they are without merit (*see generally People v Bleakley*, 69 NY2d 490, 495).

We also reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to hire an expert witness to refute the testimony offered at trial by the People's experts. Although we recently concluded in *People v Okongwu* (71 AD3d 1393, 1395) that defense counsel was ineffective based in part on the failure to obtain an expert witness, defendant's reliance on that case is misplaced. Here, in contrast to *Okongwu*, defense counsel effectively cross-examined the People's experts and raised certain areas of possible doubt arising from their testimony. We thus conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

We further conclude that defendant was not deprived of a fair trial by prosecutorial misconduct on summation. Contrary to defendant's contentions, none of the prosecutor's comments denigrated the defense (*see People v Jackson*, 239 AD2d 948, *lv denied* 90 NY2d 940, 942), and defendant was not entitled to his own copy of the videotape of the victim's testimony that was presented to the grand jury, which counsel was afforded an opportunity to view (*see People v Smith*, 289 AD2d 1056, 1058, *lv denied* 98 NY2d 641). Moreover, having reviewed the video, we conclude that it complies with the mandates of CPL 190.32. Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

416

KA 08-02185

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JASON FLEMING, DEFENDANT-APPELLANT.

MICHAEL CONROY, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered June 20, 2008. The order determined that defendant is a level one risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that said appeal is unanimously dismissed in part and the order otherwise is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level one risk pursuant to the Sex Offender Registration Act (*see* Correction Law § 168 *et seq.*). Defendant does not challenge his risk level designation, but instead contends only that he should not have been required to register as a sex offender because the crimes of which he was convicted under the Uniform Court of Military Justice have no equivalent registerable offenses in New York. "A challenge to the . . . initial determination [of the Board of Examiners of Sex Offenders] that a defendant is a registerable sex offender constitutes a challenge to a determination of an administrative agency and is not properly raised in the subsequent court proceeding involving the separate and distinct risk level determination," and thus the appeal must be dismissed to the extent that defendant raises that challenge (*People v Carabello*, 309 AD2d 1227, 1228; *see generally People v Reitano*, 68 AD3d 954, *lv denied* 14 NY3d 708; *People v Teagle*, 64 AD3d 549; *People v Rendace*, 58 AD3d 821; *People v Pride*, 37 AD3d 957, *lv denied* 8 NY3d 812). We affirm the order insofar as it determines that defendant is a risk level one.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

417

KA 08-00318

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DEVON CAPERS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered December 3, 2007. The judgment convicted defendant, upon his plea of guilty, of 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 his plea of guilty of robbery in the third degree (Penal Law § 160.05). We reject defendant's contention that County Court erred in imposing an enhanced sentence. First, defendant violated a condition of the plea agreement by failing to appear in court on the scheduled sentencing date, and thus the court properly imposed an enhanced sentence based on that violation (*see People v VanDeViver*, 56 AD3d 1118, 1119, *lv denied* 11 NY3d 931, 12 NY3d 788). Second, defendant was arrested after the plea and before sentencing for crimes allegedly committed during that interim period, also in violation of a condition of the plea agreement, and "the record establishes that the information supporting the arrest was reliable and accurate" (*People v Hall*, 38 AD3d 1289, 1290 [internal quotation marks omitted]). Indeed, the evidence introduced at the inquiry pursuant to *People v Outley* (80 NY2d 702, 713) established that an indictment had been issued upon the charges underlying the postplea arrest (*see People v Smith*, 248 AD2d 179, *lv denied* 91 NY2d 1013).

The record belies the further contention of defendant that the court informed him that he would not receive an enhanced sentence unless he violated all of the conditions of the plea agreement (*cf. People v Williams*, 195 AD2d 1040). Rather, the record establishes that the court indicated that an enhanced sentence could be imposed unless defendant did "everything" required by the conditions of the plea agreement. We thus conclude that the court properly enhanced the

sentence based upon defendant's failure to comply with the conditions of the plea agreement (see *People v Figgins*, 87 NY2d 840).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

418

KA 07-01053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FRANK RUSSELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered March 9, 2007. The judgment convicted defendant, upon a nonjury 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 modified on the law by reducing the period of postrelease supervision imposed for each count to a period of three years and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a bench trial of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that the verdict is against the weight of the evidence. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Here, "the People presented evidence that defendant did more than simply direct the undercover officers to a location where they could purchase crack cocaine" (*People v Brown*, 50 AD3d 1596, 1597). Indeed, they presented evidence that defendant offered to drive with the officers to make the purchase and that he obtained the crack cocaine from the supplier for them. Consequently, viewing the evidence in light of the elements of the crimes in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that County Court did not fail to give the evidence the weight it should be accorded (*see generally People v Poole*, 79 AD3d 1685, 1686; *Brown*, 50 AD3d at 1598).

We further reject defendant's contention that the court erred in failing to conduct a *Wade* hearing. "[A]lthough there is no categorical rule exempting from requested *Wade* hearings confirmatory

identifications by police officers by merely labeling them as such . . . , a hearing is not required where the defendant in a buy and bust operation is identified by a trained undercover officer who observed [the] defendant during the face-to-face drug transaction knowing [that the] defendant would shortly be arrested" (*People v Releford*, 73 AD3d 1437, 1438, *lv denied* 15 NY3d 808 [internal quotation marks omitted]; see *People v Wharton*, 74 NY2d 921, 922-923; see also *People v Boyer*, 6 NY3d 427, 432-433; *People v Stubbs*, 6 AD3d 1109, *lv denied* 3 NY3d 663).

We likewise reject defendant's contention that he was denied effective assistance of counsel. "[T]he failure of defense counsel to move to dismiss the indictment pursuant to CPL 30.30 did not constitute ineffective assistance of counsel inasmuch as such a motion would not have been successful" (*People v McDuffie*, 46 AD3d 1385, 1386, *lv denied* 10 NY3d 867), nor was defense counsel ineffective based on his failure to challenge the legality of defendant's arrest inasmuch as such a challenge also would have been unsuccessful (see *People v Garcia*, 75 NY2d 973, 974). Defendant's further contention that defense counsel was ineffective in failing to conduct a proper investigation of the case and to obtain certain records concerning defendant's medical treatment is based on matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL 440.10 (see *People v Cobb*, 72 AD3d 1565, 1567, *lv denied* 15 NY3d 803; *People v Washington*, 39 AD3d 1228, 1230, *lv denied* 9 NY3d 870).

Defendant also contends that he was denied effective assistance of counsel based on an alleged conflict of interest with defense counsel. That contention lacks merit. To prevail on such a contention, a defendant must prove that " 'the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation' " (*People v Konstantinides*, 14 NY3d 1, 10; see *People v Alicea*, 61 NY2d 23, 31). Even assuming, arguendo, that there was such a conflict of interest, we conclude that defendant failed to " 'demonstrate that the conduct of his defense was in fact affected by the operation of [that] conflict' " (*People v Cooper*, 79 AD3d 1684, 1685, quoting *Alicea*, 61 NY2d at 31). To the extent that defendant contends that the court erred in denying defense counsel's request to be relieved at sentencing, we conclude that it lacks merit. A conflict of personalities between a defendant and his or her attorney does not rise to the level of a conflict of interest impacting the defendant's right to a fair trial (see *Konstantinides*, 14 NY3d at 10).

Finally, with respect to defendant's challenge to the sentence imposed, along with an alleged trial tax imposed by the court, we note that "[t]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial" (*People v Brink*, 78 AD3d 1483, 1485 [internal quotation marks omitted]). Indeed, the record here " 'shows no retaliation or vindictiveness against the defendant for electing to proceed to trial' " (*People v Dorn*, 71 AD3d 1523, 1524; see *People v Powell*, ___ AD3d ___ [Feb. 10,

2011)). We reject defendant's challenge to the severity of concurrent determinate terms of incarceration imposed, but we agree with him that the sentence is illegal insofar as it includes an additional period of postrelease supervision of 3½ years with respect to each count (see Penal Law § 70.45 [2] [d]). We therefore modify the judgment by reducing the period of postrelease supervision to a period of three years (see *People v Smith*, 63 AD3d 1625, lv denied 13 NY3d 800; *People v Childres*, 60 AD3d 1278, 1279, lv denied 12 NY3d 913).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

420

KA 10-00552

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JESS STARKWEATHER, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN 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 February 9, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal contempt 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 criminal contempt in the second degree (Penal Law § 215.50 [3]). According to defendant, reversal is required because the superior court information (SCI) charging him with those offenses is jurisdictionally defective inasmuch as it fails to allege that he was aware that an order of protection was in effect when he had physical contact with the victim. We reject that contention. An SCI "is subject to the same rules as an indictment (CPL 200.15), and an indictment that states no more than the bare elements of the crime charged and, in effect, parrots the Penal Law is legally sufficient; the defendant may discover the particulars of the crime charged by requesting a bill of particulars" (*People v Price*, 234 AD2d 978, 978, *lv denied* 90 NY2d 862; *see People v Iannone*, 45 NY2d 589, 598-599; *see generally People v Fitzgerald*, 45 NY2d 574, 580, *rearg denied* 46 NY2d 837). Although the SCI in this case does not explicitly allege that defendant had knowledge of the order of protection when he violated it by having physical contact with the victim, the accusatory instrument is nevertheless jurisdictionally sufficient inasmuch as it alleges, in conformance with Penal Law § 215.50 (3), that defendant "intentionally disobeyed a mandate of a court; that is, the defendant intentionally disobeyed an Order of Protection." In any event, we note our agreement with the People that the SCI sufficiently alleges defendant's alleged knowledge of the order of protection because he could not have intentionally violated

the order of protection unless he knew of its existence.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

421

KA 10-00473

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES H. TATE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered March 26, 2009. 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 modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for further proceedings in accordance with the following 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]). We agree with defendant that County Court erred in calculating the duration of the order of protection issued against defendant without taking into account the jail time credit to which he is entitled (*see People v Bradford*, 61 AD3d 1419, 1421, *affd* 15 NY3d 329). Although defendant raises that contention for the first time on appeal and has thus failed to preserve it for our review, we nonetheless exercise our power to review it as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). We therefore modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify in the order of protection an expiration date in accordance with CPL 530.13 (*see Bradford*, 61 AD3d at 1421). Furthermore, as the People correctly concede, defendant's waiver of the right to appeal was invalid because County Court conflated the waiver of the right to appeal with the rights forfeited by defendant based on his guilty plea (*see generally People v Lopez*, 6 NY3d 248, 256-257; *People v Abrams*, 75 AD3d 927, *lv denied* 15 NY3d 918). The invalidity of defendant's waiver of the right to appeal, however, does not impact his final contention on appeal, i.e., that the order of protection is unduly harsh and severe, inasmuch as an

order of protection is not a part of the sentence (see *People v Nieves*, 2 NY3d 310, 315-317; *People v Tidd* [appeal No. 2], 81 AD3d 1405), the review of which would be encompassed by the waiver of the right to appeal (see *Lopez*, 6 NY3d at 255). Nevertheless, we reject defendant's contention with respect to the severity of the order of protection, taking into account the fact that the length of the order of protection will be modified upon remittal.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

422

KA 08-01897

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GEORGE BASTIAN, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., CONFLICT DEFENDERS,
WARSAW (ANNA JOST OF COUNSEL), FOR DEFENDANT-APPELLANT.

GEORGE BASTIAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered August 8, 2008. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree and scheme to defraud in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of grand larceny in the fourth degree (Penal Law § 155.30 [1]) and two counts of scheme to defraud in the first degree (§ 190.65 [1] [a], [b]). Defendant failed to preserve for our review his contention in his main brief that the conviction of grand larceny is not supported by legally sufficient evidence inasmuch as his motion for a trial order of dismissal was not directed at that count (see CPL 470.05 [2]; *People v Gray*, 86 NY2d 10, 19). In any event, we reject that contention, as well as the further contention of defendant that the evidence is legally insufficient to support the conviction of scheme to defraud (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 reject defendant's further contention in his main brief that the verdict is against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Defendant's contentions regarding the legal sufficiency of the evidence before the grand jury raised in his pro se supplemental brief are not properly before us because such contentions are "not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence" (*People v Pelchat*, 62 NY2d 97, 109). Contrary to defendant's contention in his pro se supplemental brief, we conclude

that he received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention in his main and pro se supplemental briefs that he was deprived of a fair trial by prosecutorial misconduct (*see People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849) and, in any event, that contention lacks merit. Although a remark by the prosecutor on summation was improper because it "play[ed] on the sympathies and fears of the jury" (*People v Ortiz-Castro*, 12 AD3d 1071, *lv denied* 4 NY3d 766), that misconduct was not so egregious as to deprive defendant of a fair trial (*see generally People v Galloway*, 54 NY2d 396, 401). In addition, contrary to defendant's contention, the prosecutor did not engage in misconduct by eliciting testimony that defendant had turned off the heat at a daycare center on the ground that he was angry with the proprietor of the daycare center. "[T]he challenged testimony was properly [elicited] since defendant opened the door to the prosecutor's limited redirect examination" by questioning the proprietor about calling the police to register a complaint against defendant (*People v Kirker*, 21 AD3d 588, 590, *lv denied* 5 NY3d 853; *see People v Wright*, 209 AD2d 231, *lv denied* 85 NY2d 945). We decline to exercise our power to review defendant's remaining contentions with respect to alleged instances of prosecutorial misconduct as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention in his main and pro se supplemental briefs, County Court's *Molineux* rulings were proper and the court properly denied his motion pursuant to CPL 330.30 based on the alleged *Molineux* errors. First, we conclude that the court properly admitted in evidence bad checks in addition to those at issue in this case to support their *Molineux* theory. The record establishes that defendant wrote those checks on the same closed account at approximately the same time as the checks at issue in this case. Thus, the additional checks were properly admitted in evidence where, as here, they were relevant to "the motive and state of mind [of defendant] . . . and [were] found [by the court] to be needed as background material . . . or to complete the narrative of the episode" (*People v Till*, 87 NY2d 835, 837 [internal quotation marks omitted]). Defendant failed to preserve for our review his contention that the People exceeded the scope of the court's *Molineux* ruling (*see People v Bermejo*, 77 AD3d 965, 965-966), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

"Defendant's constitutional challenge [in his main brief] to the persistent felony offender statute is not properly before us, inasmuch as there is no indication in the record that the Attorney General was given the requisite notice of that challenge" (*People v Perez*, 67 AD3d 1324, 1326, *lv denied* 13 NY3d 941; *see generally People v Brown*, 64 AD3d 611; *People v Mays*, 54 AD3d 778, *lv denied* 11 NY3d 927). In any event, it is well settled that defendant's contention that "New York's discretionary persistent felony offender sentencing scheme is constitutionally infirm . . . [is] unavailing" (*People v Quinones*, 12

NY3d 116, 122, *cert denied* ___ US ___, 130 S Ct 104), and we reject his contentions in his pro se supplemental brief that he was improperly adjudicated a persistent felon and that the sentence is unduly harsh and severe.

The remaining contentions expressly addressed herein are raised in defendant's pro se supplemental brief. We reject the contention of defendant that the court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds. "Contrary to defendant's contention, the People satisfied their obligation pursuant to CPL 30.30 when they announced their readiness for trial at defendant's arraignment on the misdemeanor charges" upon which defendant was originally prosecuted (*People v Piquet*, 46 AD3d 1438, 1438-1439, *lv denied* 10 NY3d 770). Although the People were properly charged with the delay between their request for an adjournment to present the matter to a grand jury and their statement of readiness on the resulting indictment, the total delay that resulted was less than six months, and thus defendant's statutory right to a speedy trial was not violated (*see People v Capellan*, 38 AD3d 393, *lv denied* 9 NY3d 873; *see generally People v Cooper*, 90 NY2d 292, 294). We reject the further contention of defendant concerning constitutional double jeopardy violations with respect to several of the checks at issue. Although defendant was not required to preserve that contention for our review (*see People v Biggs*, 1 NY3d 225, 231; *People v Michael*, 48 NY2d 1, 6-8), and in fact did not do so, "[o]n the record before us, [we perceive] no constitutional double jeopardy violation[s]" (*People v Dodge*, 38 AD3d 1324, 1325, *lv denied* 9 NY3d 874). Defendant's improper subpoena claims involve matters outside the record, and thus any such claims must be raised by way of a motion pursuant to CPL article 440 (*see generally People v Schrock*, 73 AD3d 1429, 1431, *lv denied* 15 NY3d 855).

We have considered the remaining contentions of defendant, including those raised in his pro se supplemental brief, and conclude that they are without merit.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

423

KA 08-01012

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VICTOR E. SANTIAGO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered February 7, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree and possession of burglar's tools.

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 burglary in the second degree (Penal Law § 140.25 [2]) and possession of burglar's tools (§ 140.35), defendant contends that County Court erred in refusing to suppress the victim's showup identification of him. Defendant contended following the suppression hearing that the showup procedure was "inherently suggestive" because the victim was "a young man who was shown no one else moments after an event." Thus, defendant failed to preserve for our review his present contentions that the showup procedure was unreasonable under the circumstances, that it was unduly suggestive because the 13-year-old identifying victim observed defendant exiting a police car in handcuffs, and defendant was in the presence of a police officer during the showup procedure (see CPL 470.05 [2]; *People v Morgan*, 302 AD2d 983, 984, *lv denied* 99 NY2d 631). In any event, we conclude that defendant's present contentions lack merit. The showup procedure was reasonable under the circumstances because it was conducted in "geographic and temporal proximity to the crime" (*People v Brisco*, 99 NY2d 596, 597; see *People v Kirkland*, 49 AD3d 1260, 1260-1261, *lv denied* 10 NY3d 958, 961, *cert denied* ___ US ___, 129 S Ct 1331; *People v Davis*, 48 AD3d 1120, 1122, *lv denied* 10 NY3d 957). Further, the showup procedure was not rendered unduly suggestive by the victim's observation of defendant exiting a police car in handcuffs or by the fact that defendant was in the presence of a police officer during the procedure (see *Davis*, 48 AD3d at 1122; see also *People v Grant*, 77

AD3d 558). Finally, it cannot be said that the identifying victim's young age rendered the showup procedure unduly suggestive (see generally *People v Smith*, 236 AD2d 639, 640, lv denied 90 NY2d 863).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

426

CA 10-02008

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

JAMES MAGUIRE, PLAINTIFF-RESPONDENT,

V

ORDER

TOWN OF CHEEKTOWAGA, DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ARTHUR A. HERDZIK OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered August 4, 2010. The amended order, insofar as appealed from, granted the cross motion of plaintiff for leave to serve an amended complaint asserting a cause of action pursuant to 42 USC § 1983 and adding John/Jane Doe as a defendant.

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

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

427

CA 10-02171

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

IN THE MATTER OF NORTH SYRACUSE CENTRAL SCHOOL
DISTRICT, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT-APPELLANT.

CAROLINE J. DOWNEY, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR
RESPONDENT-APPELLANT.

LAW OFFICES OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a resettled judgment (denominated order) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered June 15, 2010 in a proceeding pursuant to CPLR article 78. The resettled judgment prohibited respondent from taking further action on the complaint in New York State Division of Human Rights case no. 10125491.

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

Memorandum: In this CPLR article 78 proceeding, respondent appeals from a resettled judgment prohibiting it from taking further action on a racial and disability discrimination complaint filed by the mother of one of petitioner's students. We agree with respondent that Supreme Court erred in granting the petition. We note at the outset that, although respondent appealed only from the original judgment, we may nevertheless review the resettled judgment in the absence of a new notice of appeal inasmuch as the resettled judgment "simply clarif[ies] the original . . . judgment for the purpose of correctly expressing the decision of" the court (*Elda Dev. Corp. v Wall*, 101 AD2d 1000, 1001).

With respect to the merits of the appeal, "[t]he Court of Appeals has held that a writ of prohibition is not an appropriate vehicle to be used to bar [respondent] from conducting an investigation because the '[r]emedy for asserted error of law in the exercise of [respondent's] jurisdiction or authority lies first in administrative review' " (*Matter of Newfield Cent. School Dist. v New York State Div. of Human Rights*, 66 AD3d 1314, 1315-1316, quoting *Matter of Tessy*

Plastics Corp. v State Div. of Human Rights, 47 NY2d 789, 791). Thus, respondent " 'has jurisdiction to investigate complaints of discrimination and any error of law in the exercise of that jurisdiction must first be challenged by administrative review before judicial review pursuant to section 298 of the Executive Law is available . . . The extraordinary writ of prohibition does not lie to challenge [respondent's] initial acceptance of jurisdiction over a complaint of discrimination' " (*Matter of Wal-Mart Stores, Inc. v State of N.Y., Exec. Dept., Div. of Human Rights*, 41 AD3d 1276, 1276-1277, lv denied 9 NY3d 819; see *Matter of Diocese of Rochester v New York State Div. of Human Rights*, 305 AD2d 1000, 1001; *Randy-The Salon v New York State Div. of Human Rights*, 201 AD2d 901). Consequently, inasmuch as petitioner failed to establish " 'futility of the administrative remedy; irreparable harm in the absence of prompt judicial intervention; or a claim of unconstitutional action' " (*Newfield Cent. School Dist.*, 66 AD3d at 1316), the court erred in prohibiting respondent from taking further action on the complaint.

Entered: April 1, 2011

Patricia L. Morgan
Clerk of the Court

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

429

CA 10-01067

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

JOSEPH TIMMONS AND JENNIFER TIMMONS,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

BARRETT PAVING MATERIALS, INC.,
DEFENDANT-RESPONDENT-RESPONDENT.

MEMORANDUM AND ORDER

BARRETT PAVING MATERIALS, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT-RESPONDENT,

V

SCHNEIDER BROTHERS CORPORATION,
THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.
(ACTION NO. 1.)

BARRETT PAVING MATERIALS, INC.,
PLAINTIFF-RESPONDENT,

V

COLONY INSURANCE COMPANY, DEFENDANT-APPELLANT.
(ACTION NO. 2.)

COTE & VAN DYKE, LLP, SYRACUSE (JOANNE VAN DYKE OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS-RESPONDENTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (SABRINA A. VICTOR OF
COUNSEL), FOR DEFENDANT-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR
DEFENDANT-RESPONDENT-RESPONDENT, THIRD-PARTY PLAINTIFF-RESPONDENT-
RESPONDENT AND PLAINTIFF-RESPONDENT.

COHEN & LOMBARDO, P.C., BUFFALO (STUART B. SHAPIRO OF COUNSEL), FOR
THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

Appeals and cross appeal from a judgment of the Supreme Court,
Oswego County (Norman W. Seiter, Jr., J.), entered April 24, 2009.
The judgment, among other things, granted defendant/third-party
plaintiff Barrett Paving Materials, Inc.'s motion for summary judgment
in action No. 1 and denied defendant Colony Insurance Company's motion
for summary judgment in action No. 2.

It is hereby ORDERED that the judgment so appealed from is

unanimously affirmed without costs.

Memorandum: Plaintiffs Joseph Timmons and Jennifer Timmons (Timmons plaintiffs) commenced action No. 1 alleging, inter alia, Labor Law violations based on injuries sustained by Joseph Timmons (Timmons) when he was struck by a metal catwalk while working on property owned by Barrett Paving Materials, Inc. (Barrett), the defendant in action No. 1. Barrett in turn commenced a third-party action against Timmons' employer, Schneider Brothers Corporation (Schneider), seeking a declaration that Schneider was obligated to defend and indemnify it in action No. 1 and that it was an additional insured under a commercial general liability policy issued to Schneider by Colony Insurance Company (Colony). Thereafter, Barrett commenced action No. 2 against Colony, the defendant in that action, seeking, inter alia, a declaration that it is an additional insured under the policy issued to Schneider.

In action No. 1, Barrett moved, inter alia, for summary judgment dismissing the Labor Law § 240 (1), § 241 (6) and § 200 claims against it, as well as the separate Labor Law § 241 (6) cause of action against it, and for judgment in the third-party action declaring that Schneider must defend and indemnify it in the Timmons action. Supreme Court granted those parts of the motion with respect to the Labor Law and, although the Timmons plaintiffs also asserted a cause of action for common-law negligence, the court, apparently sua sponte, dismissed the complaint in its entirety. We note that the Timmons plaintiffs do not contend on appeal that Barrett did not seek that relief with respect to the common-law negligence cause of action, nor do they contend that Barrett was not entitled to it. The Timmons plaintiffs thus are deemed to have abandoned any contention with respect to the alleged viability of the common-law negligence cause of action (see *Ciesinski v Town of Aurora*, 202 AD2d 984).

Contrary to the Timmons plaintiffs' contention, the court properly granted that part of the motion with respect to Labor Law § 240 (1). It is well settled that Labor Law § 240 (1) "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501). "[F]or section 240 (1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268).

Here, the record establishes that, prior to the accident, Timmons and a coworker had tack-welded the catwalk to a building, following which the workers noticed that the outside portion of the catwalk was slightly higher than the inside portion. Timmons' coworker attempted to level the catwalk by pushing down on it with a manlift while Timmons, who was standing on a lower catwalk, prepared to weld a

support gusset underneath the tack-welded catwalk. As a result of the pressure exerted on the catwalk by the manlift, the tack-weld on the portion of the catwalk closest to Timmons broke and that end of the catwalk fell, striking Timmons in the head and pinning him between the upper catwalk and the handrail of the lower catwalk. "Since the [catwalk] was not an object being hoisted or secured, Labor Law § 240 (1) does not apply" (*id.* at 269; see *Bennett v SDS Holdings*, 309 AD2d 1212, 1213). We thus conclude that Timmons was "exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240 (1)" (*Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843).

With respect to Labor Law § 241 (6), the court properly concluded that the Industrial Code regulations relied upon by the Timmons plaintiffs are either insufficiently specific to support such a claim or cause of action or are inapplicable to the facts of this case. 12 NYCRR 23-1.5 "sets forth only a general safety standard and is thus incapable of supporting a Labor Law § 241 (6) claim" or cause of action (*McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1583 [internal quotation marks omitted]; see *Wilson v Niagara Univ.*, 43 AD3d 1292, 1293). In addition, 12 NYCRR 23-1.7 (a) does not apply here because there is no evidence that the area in which Timmons was working was "normally exposed to falling material or objects" within the meaning of that section (12 NYCRR 23-1.7 [a] [1]; see *Perillo v Lehigh Constr. Group, Inc.*, 17 AD3d 1136, 1138). Lastly, 12 NYCRR 23-2.3 also has no application to this case because it regulates "the final placing of structural steel members" (12 NYCRR 23-2.3 [a] [1]), which was not the task in which Timmons was engaged at the time of his accident (see *Smith v Le Frois Dev., LLC*, 28 AD3d 1133, 1134). In any event, even if the upper catwalk was a "structural steel member[]," 12 NYCRR 23-2.3 (a) (1) "does not require that hoisting ropes be used for the placing of structural steel members. Rather, the regulation applies only when hoisting ropes are actually used for the placing of structural steel members. Thus, because no hoisting ropes were used by [Timmons], the regulation is inapplicable" (*Hasty v Solvay Mill Ltd. Partnership*, 306 AD2d 892, 894).

With respect to Labor Law § 200, that statute "codifies the common-law duty of an owner or employer to provide employees with a safe place to work" (*Jock v Fien*, 80 NY2d 965, 967; see *Ross*, 81 NY2d at 505; *Lombardi v Stout*, 80 NY2d 290, 294). "An implicit precondition to this duty is that the party charged with that responsibility have the authority to control the activity bringing about the injury" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [internal quotation marks omitted]). "Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under . . . Labor Law § 200" (*id.*; see *Lombardi*, 80 NY2d at 295).

Here, Barrett established that it did not supervise or control the manner or method of the work performed by Timmons, and the Timmons plaintiffs failed to raise a triable issue of fact in opposition (see

Lovall v Graves Bros., Inc., 63 AD3d 1528, 1530; *Uzar v Louis P. Ciminelli Constr. Co., Inc.*, 53 AD3d 1078, 1079; *cf. Capasso v Kleen All of Am., Inc.*, 43 AD3d 1346, 1347-1348). Although there is evidence in the record that Barrett's plant superintendent oversaw the timing and sequence of the work, that his responsibilities included job safety, and that he could directly address an employee of Schneider if he observed an unsafe practice, it is well established that "monitoring and oversight of the timing and quality of the work is insufficient to raise a triable issue of fact with respect to supervision or control for the purposes of . . . Labor Law § 200" (*McCormick*, 78 AD3d at 1581). Similarly, "a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons is insufficient to raise a triable issue of fact" under Labor Law § 200 (*id.* at 1582).

The court also properly granted that part of Barrett's motion for summary judgment declaring that Schneider had a duty to defend Barrett in the Timmons action. We need not address that part of the motion with respect to indemnification in view of our decision that the complaint in action No. 1 was properly dismissed. Contrary to the contention of Schneider, a purchase order containing a defend and indemnify clause issued by Barrett to Schneider prior to the accident constituted a "written contract" within the meaning of Workers' Compensation Law § 11 (*see generally Mentasana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771; *Kay-Bee Toys Corp. v Winston Sports Corp.*, 214 AD2d 457, 458, *lv denied* 86 NY2d 705). The fact that the purchase order was not signed by a representative of Schneider is of no moment inasmuch as there is sufficient evidence in the record to establish as a matter of law that Schneider assented to the terms of the purchase order and intended to be bound thereby (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369, *rearg denied* 5 NY3d 746). Specifically, the prior course of conduct between the parties, Schneider's performance of the work set forth in the purchase order, and its procurement of insurance on Barrett's behalf in accordance with the purchase order establishes that Schneider "was aware of and had assented to the terms of . . . the purchase order" (*Kay-Bee Toys Corp.*, 214 AD2d at 459; *cf. Auchampaugh v Syracuse Univ.*, 67 AD3d 1164, 1165). There is no merit to the further contention of Schneider that the agreement is barred by the statute of frauds (*see General Obligations Law* § 5-701 [a] [1]).

With respect to action No. 2, we conclude that the court properly denied Colony's motion seeking a declaration that there is no coverage and, implicitly, no duty to provide a defense, under its insurance policy and granted Barrett's cross motion seeking a declaration that it is an additional insured under that policy. The policy's additional insured endorsement provides that a third party may be added as an additional insured "when [Schneider] and the [third party] . . . have agreed in writing in a contract or agreement that such person or organization be added as an 'additional insured' on [Schneider's] policy." Here, the purchase order, which required Schneider to add Barrett as an additional insured on its commercial

general liability policy, constitutes an agreement in writing for purposes of the additional insured endorsement.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

430

CA 10-01456

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

KRISTIN RAINEY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JASON RAINEY, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

MC GEE & GELMAN, BUFFALO (MICHAEL B. MULVEY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (MELISSA A. CAVAGNARO OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 16, 2009 in a postjudgment divorce action. The order, among other things, denied the motion of plaintiff for daycare arrears and attorney's fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and the facts by awarding plaintiff the amount of \$4,416.20 in daycare arrears and vacating those parts of the order providing that defendant's proceeds from the sale of the marital property are to be applied to the amount of child support owed and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: In this postjudgment divorce action, plaintiff mother moved, inter alia, for a determination of the amount of arrears owed by defendant father to her for maintenance and child support, including daycare arrears, pursuant to their judgment of divorce. In response, the father sought a downward modification of child support and maintenance. By the order in appeal No. 1, Supreme Court granted the mother's motion in part, determining that she was entitled to \$7,800 in maintenance arrears and to \$5,463.58 in child support arrears through October 30, 2009, with a credit to the father for his share of the proceeds of the sale of the marital residence. The court denied the mother's motion insofar as it sought arrears for that part of child support arrears for daycare expenses, prejudgment interest on the maintenance and child support arrears, and an award of attorney's fees. Although the court also denied the father's application for a downward modification of his child support and maintenance obligations, the father has not taken an appeal with respect to that denial.

Approximately four months later, the father still had not paid any amount to the mother for child support or maintenance. The mother

thus filed a second motion seeking a money judgment for the maintenance arrears pursuant to Domestic Relations Law § 244 as well as attorney's fees in the amount of \$1,500. By the order in appeal No. 2, the court, inter alia, determined that the offset for the father's share of the proceeds of the marital residence should be applied to the maintenance arrears and reduced them to \$912.38. The court denied the mother's motion with respect to a money judgment for the arrears and attorney's fees.

Addressing first the order in appeal No. 2, we agree with the mother that the court erred in offsetting the father's share of the proceeds from the sale of the marital residence from the amount of maintenance arrears. As previously noted, those proceeds had already been taken into account in calculating child support arrears. We reject the father's contention that the record does not provide a sufficient factual basis to enable this Court to decide that issue. At the hearing conducted by the court with respect to the mother's motion and the father's application for a downward modification in appeal No. 1, the father acknowledged that, pursuant to the parties' stipulation that was incorporated into their judgment of divorce, he owed \$260 per week for child support retroactive to the date of commencement of the divorce action, until the marital residence was sold in November 2008. Thereafter, the father owed \$240 per week for child support and \$150 per week for maintenance. Thus, through October 30, 2009, the date utilized by the court, the father owed \$23,920 in child support arrears. The parties stipulated that the father had paid a total of \$11,393.80 in child support through the time of the hearing, and the mother conceded in her submissions that he paid an additional \$175 between the date of the hearing and October 30, 2009. In addition, the parties stipulated that the father was entitled to a credit of \$6,887.62 for his share of the proceeds of the marital residence.

Taking into account the amount the father actually paid in child support through October 30, 2009, minus the credit for the proceeds of the sale of the marital home to the total child support payments, we agree with the court in appeal No. 1 that the father owed \$5,463.58 in child support arrears. Because that amount includes the credit for the father's share of the proceeds from the sale of the marital residence, however, the court erred in appeal No. 2 in thereafter crediting those proceeds against the father's maintenance arrears as well. We therefore modify the order in appeal No. 2 by awarding the mother the amount of \$7,800 for maintenance arrears. We further conclude in appeal No. 2 that the court erred in denying that part of the mother's motion for a money judgment in that amount, inasmuch as the court denied the father's application for a downward modification and, pursuant to Domestic Relations Law § 244, "the court is required to enter judgment for the full amount" of maintenance arrears (*Matter of Dox v Tynon*, 90 NY2d 166, 172). We therefore further modify the order in appeal No. 2 accordingly.

With respect to the order in appeal No. 1, we conclude that the court erred in failing to grant the mother's motion insofar as it sought an award for the father's unpaid portion of daycare expenses

incurred since commencement of the action. It is well settled that the " 'cancellation of accumulated child support arrears [is] absolutely prohibited' " (*Matter of Cook v Miller*, 4 AD3d 745, 746). The father acknowledged that he had paid only \$415 for his share of the daycare expenses, and he did not challenge the mother's assertion that she paid a total of \$6,039 for such expenses, of which, pursuant to the parties' stipulation, the father was responsible for \$4,831.20. The court cancelled the daycare arrears based on the fact that the father had lost his job in January 2009 and therefore was available to provide daycare himself, at no cost. The record demonstrates, however, that the overwhelming majority of the daycare arrears had accumulated prior to the father's loss of employment, and the father conceded that the parties had agreed to keep the child in daycare one day per week thereafter, which is the sole amount for which the mother seeks reimbursement. While the father testified that the mother had agreed to pay for that one day per week of daycare, the parties' stipulation provides that any changes to the parties' obligations must be in writing. We thus conclude that the mother is entitled to an award of \$4,416.20 for daycare arrears, and we modify the order in appeal No. 1 accordingly.

With respect to both appeals, we further conclude that the mother is entitled to prejudgment interest on the awards for maintenance and child support arrears, including daycare arrears, through January 2009, when the father was laid off from his job. We conclude that the father's failure to make the required support payments through that date was willful, and that an award of prejudgment interest therefore is mandated (see Domestic Relations Law § 244). We further find that, based upon "the relative financial circumstances of the parties and the relative merits of their positions" (*Saylor v Saylor*, 32 AD3d 1358, 1360), the court abused its discretion in denying those parts of the mother's motions in appeal Nos. 1 and 2 for an award of attorney's fees (see § 237 [b], [c]). We therefore remit the matter to Supreme Court to award plaintiff the proper amount of prejudgment interest in each appeal as well as attorney's fees incurred by her in each appeal, following a hearing if warranted (see *Gallousis v Gallousis*, 303 AD2d 363).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

431

CA 10-01457

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

KRISTIN RAINEY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JASON RAINEY, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

MCGEE & GELMAN, BUFFALO (MICHAEL B. MULVEY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (MELISSA A. CAVAGNARO OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 27, 2010 in a postjudgment divorce action. The order, among other things, denied the motion of plaintiff for the entry of a money judgment for maintenance arrears.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and the facts by vacating the second through fifth ordering paragraphs, and awarding plaintiff the amount of \$7,800 in maintenance arrears, together with a money judgment thereon, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the same Memorandum as in *Rainey v Rainey* ([appeal No. 1] ___ AD3d ___ [Apr. 1, 2011]).

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

432

CA 10-02241

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

EGW TEMPORARIES, INC., PLAINTIFF-RESPONDENT,

V

ORDER

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

RLI INSURANCE COMPANY, THIRD-PARTY PLAINTIFF,

V

TITAN WRECKING & ENVIRONMENTAL, LLC AND LEBIS
ENTERPRISES, INC., THIRD-PARTY DEFENDANTS.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

BLOCK & LONGO, P.C., BUFFALO (PHILIP A. MILCH OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered February 9, 2010. The order, *inter alia*, awarded plaintiff money damages against defendant RLI Insurance Company after a nonjury trial.

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

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

433

CA 10-02250

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

EGW TEMPORARIES, INC., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

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

RLI INSURANCE COMPANY, THIRD-PARTY PLAINTIFF,

V

TITAN WRECKING & ENVIRONMENTAL, LLC AND LEBIS
ENTERPRISES, INC., THIRD-PARTY DEFENDANTS.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

BLOCK & LONGO, P.C., BUFFALO (PHILIP A. MILCH OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered February 9, 2010. The judgment awarded plaintiff money damages against defendant RLI Insurance Company.

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

Memorandum: In November 2002, the Buffalo Municipal Housing Authority (BMHA) contracted with third-party defendant Lebis Enterprises, Inc. (Lebis) for asbestos abatement (BMHA project). Lebis, as a general contractor on the BMHA project, subcontracted the work to defendant Enviroclean Services, LLC (Enviroclean), which in turn hired workers from plaintiff, a temporary employment service, to complete the work. It is undisputed that Enviroclean failed to pay plaintiff for its services and that defendant-third-party plaintiff RLI Insurance Company (RLI) issued a payment bond for the BMHA project to third-party defendant Titan Wrecking & Environmental, LLC (Titan) and not to Lebis. Plaintiff commenced this action against RLI, alleging, inter alia, that because of a mutual mistake the bond had been issued to Titan instead of Lebis, and plaintiff sought reformation of the bond accordingly. Following a nonjury trial, Supreme Court found in favor of plaintiff based on the theory of mutual mistake between RLI and Lebis and awarded plaintiff damages against RLI in the amount of the balance owed to plaintiff for the

services provided. We affirm.

"A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake" (*Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443). A mutual mistake exists where " 'the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement' " (*id.*, quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573). "When an error is not in the agreement itself, but in the instrument that embodies the agreement, 'equity will interfere to compel the parties to execute the agreement which they have actually made, rather than enforce the instrument in its mistaken form' " (*Hadley v Clabeau*, 161 AD2d 1141). The party alleging that there is a mutual mistake must establish such mistake by clear and convincing evidence (*see Matter of Vadney*, 83 NY2d 885, 886-887; *see also* PJI 4:11).

Here, plaintiff established by the requisite clear and convincing evidence that RLI and Lebis and/or Titan intended to provide a bond for the BMHA project. Indeed, the bond that was issued by RLI stated that it covered the BMHA project, the value of the bond corresponded to the value of the contract between Lebis and the BMHA, and the date on which the bond was issued corresponded to the timing of the BMHA's agreement with Lebis. We thus conclude that Titan was named as the principal on the RLI bond by mutual mistake of the parties and that the court properly reformed the bond "to reflect that it is to benefit Lebis and not Titan"

We have examined RLI's remaining contentions and conclude that they lack merit.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

1525

CA 10-01439

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

PAGE ONE AUTO SALES, INC., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BROWN & BROWN OF NEW YORK, INC., DOING BUSINESS
AS BROWN & BROWN, SUCCESSOR IN INTEREST TO
RIEDMAN CORPORATION, DOING BUSINESS AS RIEDMAN
INSURANCE, DEFENDANT-RESPONDENT.

BOYLAN, BROWN, CODE, VIGDOR & WILSON, LLP, ROCHESTER (DAVID K. HOU OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (KATHERINE A. FIJAL OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 6, 2010. The order denied the motion of plaintiff for summary judgment and granted the cross motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by denying defendant's cross motion and reinstating the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiff, an automobile dealership, commenced this action seeking damages for the alleged breach by defendant, plaintiff's insurance broker, of its duty to procure an insurance policy containing "false pretense coverage," which is intended to cover losses in the event that plaintiff purchased automobiles with defective titles. We agree with plaintiff that Supreme Court erred in granting defendant's cross motion for summary judgment dismissing the complaint, and we therefore modify the order accordingly. " 'In New York, the duty owed by an insurance agent to an insurance customer is ordinarily defined by the nature of the request a customer makes to the agent' " (*Chase's Cigar Store v Stam Agency*, 281 AD2d 911, 912; *see Wied v New York Cent. Mut. Fire Ins. Co.*, 208 AD2d 1132, 1133). "Where . . . there is a specific request for insurance, the agent has a duty to obtain the requested coverage or to inform the client of his or her inability to do so" (*Herdendorf v Geico Ins. Co.*, 77 AD3d 1461, 1463; *see Murphy v Kuhn*, 90 NY2d 266, 270; *Twin Tiers Eye Care Assoc. v First Unum Life Ins. Co.*, 270 AD2d 918, *lv denied* 95 NY2d 758). "In such a case, it must be demonstrated that the coverage could have been procured prior to the occurrence of the insured event" (*Herdendorf*, 77 AD3d at 1463; *see American Motorists Ins. Co. v Salvatore*, 102 AD2d

342, 346).

Viewing the evidence in the light most favorable to the nonmoving party, as we must (*see Russo v YMCA of Greater Buffalo*, 12 AD3d 1089, *lv dismissed* 5 NY3d 746), we conclude that there are triable issues of fact whether defendant breached its duty to procure the insurance coverage requested by plaintiff (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Further, although the insured's receipt of the insurance policy at issue may in some cases provide a complete defense to the insured's action against an agent or broker for failing to procure certain coverage (*see e.g. Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 19 AD3d 1056, 1057-1058, *affd on other grounds* 7 NY3d 152; *Laconte v Bashwinger Ins. Agency*, 305 AD2d 845, 846), it does not provide such a defense in this case. Where, as here, there is evidence establishing that the insured made requests for the missing coverage subsequent to receipt of the policy, the broker has a renewed "duty to obtain the requested coverage or to inform the client of [its] inability to do so" (*Herdendorf*, 77 AD3d at 1463).

We further conclude, however, that the court properly denied plaintiff's motion for, *inter alia*, summary judgment on the complaint inasmuch as the record demonstrates that triable issues of fact exist with respect to both defendant's liability and the amount of damages recoverable by plaintiff (*see generally Zuckerman*, 49 NY2d at 562).

All concur except PERADOTTO, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent because, in my view, Supreme Court properly granted defendant's cross motion for summary judgment dismissing the complaint. Plaintiff, an automobile dealership, commenced this action seeking damages for the alleged breach by defendant, plaintiff's insurance broker, of its duty to procure an insurance policy containing "false pretense coverage," which is intended to cover losses in the event that plaintiff purchased automobiles with defective titles. Plaintiff subsequently moved for summary judgment on the complaint, and defendant cross-moved for summary judgment dismissing the complaint.

"It is now well settled 'that insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or [to] inform the client of the inability to do so' " (*Arthur Glick Truck Sales v Spadaccia-Ryan-Haas, Inc.*, 290 AD2d 780, 781, quoting *Murphy v Kuhn*, 90 NY2d 266, 270). It is equally well settled, however, that "an insured is conclusively presumed to know the contents of an insurance policy concededly received, even though the insured did not read or review it" (*Laconte v Bashwinger Ins. Agency*, 305 AD2d 845, 846; *see Chase's Cigar Store v Stam Agency*, 281 AD2d 911, 912; *Nicholas J. Masterpol, Inc. v Travelers Ins. Cos.*, 273 AD2d 817). Here, plaintiff submitted evidence in support of its motion establishing that it requested false pretense coverage for the 1999-2000 policy period and that its insurance broker advised plaintiff that he would procure such coverage. Plaintiff's submissions demonstrate that, in November or December 1999, the broker informed plaintiff's office manager that coverage "had been procured"

and that "the endorsements were coming." The office manager thereafter continued to contact the broker periodically to inquire about the endorsements, and she was repeatedly advised that the endorsements were on the way. The office manager acknowledged, however, that defendant had not provided documentary proof that it had obtained false pretense coverage by the time she left plaintiff's employ in April 2000, and plaintiff's general manager conceded that plaintiff never received the requested endorsements.

Notably, all of the losses at issue appear to have been sustained during the 2000-2001 policy period. Although the record indicates that plaintiff may not have received the new policy for that period before the losses occurred, the prior policy specifically excluded false pretense coverage, and the only policy change plaintiff discussed with defendant when the policy came up for renewal in June 2000 was a possible increase in limits for the coverage it already possessed. At his deposition, plaintiff's general manager suggested that plaintiff may not have made a specific request for false pretense coverage at the time of renewal because plaintiff "assumed" it had such coverage. In my view, however, any such assumption was unreasonable as a matter of law in light of the plain language of the policy in plaintiff's possession at that time, i.e., the 1999-2000 policy, and the fact that plaintiff had never received documentation confirming the false pretense coverage, despite numerous requests for it over a period of at least 10 months (*see Laconte*, 305 AD2d at 846; *see also Chase's Cigar Store*, 281 AD2d at 912-913; *Nicholas J. Masterpol, Inc.*, 273 AD2d at 818). Moreover, it is undisputed that plaintiff never paid for such coverage. I therefore conclude that, notwithstanding the broker's assurances in November or December 1999 that plaintiff had false pretense coverage, plaintiff knew or should have known that it did not have such coverage at the time plaintiff's office manager left in April 2000, if not sooner. Thus, in the absence of any evidence sufficient to overcome plaintiff's presumptive knowledge of the contents of the policy, it is my view that the court properly granted defendant's cross motion for summary judgment dismissing the complaint. I would therefore affirm the order.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court

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

1534.1

CA 10-01116

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

WALTER R. BAKOS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MARCO
CERCONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF LAWRENCE C. BROWN, ESQ., BUFFALO (LAWRENCE C. BROWN OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered July 21, 2009 in a breach of contract action. The order denied the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that defendant is obligated to perform under the homeowner's insurance policy that it issued to plaintiff. We conclude that Supreme Court properly denied those parts of defendant's motion to dismiss the first cause of action pursuant to CPLR 3211 (a) (1) and (7). That cause of action seeks a declaration that defendant is obligated to perform pursuant to the policy with respect to reimbursement for the reconstruction of plaintiff's home and that defendant "shall not be entitled to avail itself of the two-year contractual bar on suits concerning . . . any disputes [under the policy that] have not yet arisen"

The Loss Settlement provision of the policy states that defendant will pay the cost to repair or replace an insured building, "but not more than the least of the following amounts: (1) [t]he limit of liability under [the] policy that applies to the building; (2) [t]he replacement cost of that part of the building damaged with material of like kind and quality and for like use; or (3) [t]he necessary amount actually spent to repair or replace the damaged building." That provision further states that defendant "will pay no more than the actual cash value of the damage until actual repair or replacement is complete." Another provision in the policy states that "[n]o action can be brought against [defendant] unless there has been full compliance with all of the terms under [the Conditions] Section . . .

of [the] policy and the action is started within two years after the date of loss."

With respect to that part of the motion to dismiss the first cause of action based on documentary evidence, defendant was required to demonstrate "that the documentary evidence conclusively refutes plaintiff's . . . allegations" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591). Defendant contends that plaintiff's failure to complete the conditions precedent for the payment of replacement cost proceeds, i.e., full reconstruction of the home, conclusively refutes plaintiff's allegation that defendant has refused to acknowledge its obligations pursuant to the policy. We reject that contention inasmuch as plaintiff does not seek immediate payment of the replacement cost of his home (*see generally id.* at 590-591). Contrary to the further contention of defendant, it failed to submit any evidence establishing that plaintiff failed to provide defendant with timely notice that he intended to make a claim for the replacement cost of his home.

With respect to that part of its motion to dismiss the first cause of action for failure to state a cause of action, defendant contends that the contractual two-year limitations period expired before plaintiff completed all of the repairs to his home. We reject that contention. "[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning" (*White v Continental Cas. Co.*, 9 NY3d 264, 267) and, here, the plain language of the Loss Settlement provision of the policy does not impose any time limit on the reconstruction of the home. Contrary to defendant's contention, the contractual provision imposing a two-year limitation on legal action does not impose a time limit on reconstruction.

We further conclude that the court properly denied that part of defendant's motion to dismiss the second cause of action for failure to state a cause of action pursuant to CPLR 3211 (a) (7). Contrary to defendant's contention, plaintiff has "alleged facts that could give rise to a cause of action for breach of contract based upon a breach of the covenant of good faith and fair dealing" (*Millers Wood Dev. Corp. v HSBC Bank USA*, 300 AD2d 1015, 1017; *see generally New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319-320; *Medina v State Farm Mut. Auto. Ins. Co.*, 303 AD2d 987, 989).

All concur except PERADOTTO, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent because I agree with defendant that Supreme Court erred in denying its motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). Plaintiff commenced this action seeking, inter alia, a declaration that defendant is "obligated to perform its obligation under the [homeowners' insurance p]olicy" that it issued to plaintiff. According to plaintiff, defendant was obligated to provide coverage with respect to the reconstruction of plaintiff's residence, which was destroyed by fire. The Loss Settlement provision of the policy states that defendant will pay the cost to repair or replace an insured building, "but not more than the least of the following amounts: (1) [t]he limit of liability under [the] policy that applies to the

building; (2) [t]he replacement cost of that part of the building damaged with material of like kind and quality and for like use; or (3) [t]he necessary amount actually spent to repair or replace the damaged building." That provision further states that defendant "will pay no more than the actual cash value of the damage *until actual repair or replacement is complete*" (emphasis added). Another provision in the policy states that "[n]o action can be brought against [defendant] unless there has been full compliance with all of the terms under [the Conditions] Section . . . of [the] policy *and the action is started within two years after the date of loss*" (emphasis added).

"A declaratory judgment action is appropriate only when there is a substantial legal controversy between the parties that may be resolved by a declaration of the parties' legal rights" (*Rice v Cayuga-Onondaga Healthcare Plan*, 190 AD2d 330, 333). Here, it is undisputed that plaintiff has not completed the repair or reconstruction of his residence, and thus the policy's replacement cost coverage has not yet been triggered. "Replacement cost coverage inherently requires a replacement (a substitute structure for the insured) and costs (expenses incurred by the insured in obtaining the replacement); without them, the replacement cost provision becomes a mere wager" (*Harrington v Amica Mut. Ins. Co.*, 223 AD2d 222, 228, *lv denied* 89 NY2d 808). Thus, in my view, the issue whether defendant has failed or refused to perform its obligations under the replacement cost provision of the policy is not ripe for our review, and it would be "merely advisory" to grant the declaratory relief sought by plaintiff (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531; see generally *Matter of Town of Riverhead v Central Pine Barrens Joint Planning & Policy Commn.*, 71 AD3d 679, 680-681).

I further conclude that the second cause of action, for defendant's bad faith in refusing to waive the two-year contractual limitations period, "should have been dismissed because [plaintiff does] not allege conduct by defendant constituting the requisite 'gross disregard of the insured's interests' necessary to support such [a] cause[] of action" (*Cooper v New York Cent. Mut. Fire Ins. Co.*, 72 AD3d 1556, 1557). I would therefore reverse the order, grant defendant's motion and dismiss the complaint.

Patricia L. Morgan

Entered: April 1, 2011

Clerk of the Court