



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

**DECISIONS FILED**

**NOVEMBER 16, 2012**

**HON. HENRY J. SCUDDER, PRESIDING JUSTICE**

**HON. NANCY E. SMITH**

**HON. JOHN V. CENTRA**

**HON. EUGENE M. FAHEY**

**HON. ERIN M. PERADOTTO**

**HON. EDWARD D. CARNI**

**HON. STEPHEN K. LINDLEY**

**HON. ROSE H. SCONIERS**

**HON. JOSEPH D. VALENTINO**

**HON. GERALD J. WHALEN**

**HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES**

**FRANCES E. CAFARELL, CLERK**

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

880

**KA 09-01305**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FLOYD L. SMART, DEFENDANT-APPELLANT.

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MARK D. FUNK, ROCHESTER, FOR DEFENDANT-APPELLANT.

FLOYD L. SMART, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (William F. Kocher, A.J.), rendered May 13, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of incarceration of 15 years to life and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). He was sentenced as a persistent felony offender to an indeterminate term of incarceration of 20 years to life. On appeal, defendant contends that the court reporter's readback of certain testimony in response to a jury note violated the procedures set forth in CPL 310.30 and constituted an improper delegation of judicial authority (*see generally People v O'Rama*, 78 NY2d 270, 276-277; *People v Ahmed*, 66 NY2d 307, 310, *rearg denied* 67 NY2d 647). Defendant further contends that, by sending a note to the jury during deliberations, County Court violated defendant's fundamental right to be present at a material stage of trial (*see generally People v Mehmedi*, 69 NY2d 759, 760, *rearg denied* 69 NY2d 985). We note at the outset that, contrary to defendant's contention, the court did not thereby commit mode of proceedings errors such that preservation is not required. In responding to the jury note and directing the readback of testimony with respect to the note, the record establishes that the court fulfilled its "core responsibilities under CPL 310.30" (*People v Tabb*, 13 NY3d 852, 853; *see People v Geroyianis*, 96 AD3d 1641, 1643, *lv denied* 19 NY3d 996; *People v Bonner*, 79 AD3d 1790, 1790-1791, *lv denied* 17 NY3d 792). Prior to responding to the jury

note, the court read it into the record, solicited input from defense counsel, and described its proposed response. Then, when the jury clarified its request in the note, the court reporter read the relevant portion of the testimony into the record, under the supervision of the court and in the presence of defendant and the prosecutor. Defendant registered no objections. We thus conclude that defendant was required to preserve his contentions for our review, but he failed to do so (see *People v Ramirez*, 15 NY3d 824, 825-826; *People v Starling*, 85 NY2d 509, 516; *People v Rivera*, 83 AD3d 1370, 1370-1371, *lv denied* 17 NY3d 904; *cf. People v Kisoan*, 8 NY3d 129, 134-135). In any event, defendant's contentions are without merit (see *People v Hernandez*, 94 NY2d 552, 555-556; *People v Harris*, 76 NY2d 810, 812; *People v Gabot*, 176 AD2d 894, 894-895, *lv denied* 79 NY2d 947).

We reject defendant's further contention that the court erred in admitting the grand jury testimony of a witness after conducting a *Sirois* hearing (see *Matter of Holtzman v Hellenbrand*, 92 AD2d 405, 407-408). The People presented clear and convincing evidence establishing that misconduct by defendant and his mother, who acted at defendant's behest, caused the witness to be unavailable to testify at trial (see *People v Geraci*, 85 NY2d 359, 370-371; *People v Dickerson*, 55 AD3d 1276, 1277, *lv denied* 11 NY3d 924; *People v Major*, 251 AD2d 999, 999-1000, *lv denied* 92 NY2d 927).

Defendant's challenge in his pro se supplemental brief to the constitutionality of New York's discretionary persistent felony offender sentencing statute is unpreserved for our review (see *People v Rosen*, 96 NY2d 329, 333-335), and in any event is without merit (see *People v Quinones*, 12 NY3d 116, 122-131, *cert denied* \_\_\_ US \_\_\_, 130 S Ct 104; *People v Bastian*, 83 AD3d 1468, 1470, *lv denied* 17 NY3d 813).

We conclude, however, that, while the court did not abuse its discretion in sentencing defendant as a persistent felony offender, the sentence nevertheless is unduly harsh and severe. This Court "has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range" (*People v Delgado*, 80 NY2d 780, 783; see CPL 470.15 [6] [b]). That "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*Delgado*, 80 NY2d at 783). As a result, we may " 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " (*People v Patel*, 64 AD3d 1246, 1247). We conclude that a reduction in sentence is appropriate under the circumstances presented here. Although burglary in the second degree is classified as a violent felony offense (Penal Law §§ 70.02 [1] [b]; 140.25 [2]), defendant did not employ actual violence in the instant offense despite being confronted by the woman whose residence he unlawfully entered. With the possible exception of two misdemeanor convictions of resisting arrest and criminal possession of a weapon dating to the 1980s, and a 2001 felony conviction of burglary in the second degree, the circumstances of which are unknown, it does not appear that defendant, despite a

lengthy criminal record, has ever used or threatened violence in the commission of a crime. Therefore, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence imposed to an indeterminate term of incarceration of 15 years to life (see CPL 470.20 [6]; *People v Daggett*, 88 AD3d 1296, 1298, lv denied 18 NY3d 956; *People v Currier*, 83 AD3d 1421, 1423, amended on rearg 85 AD3d 1657). We note, in response to the dissent, that we are only modifying the minimum term of defendant's sentence. Because we are not vacating the court's discretionary sentencing of defendant as a persistent felony offender, the maximum term must remain unchanged. Given the lack of violence in defendant's criminal history, we conclude that 15 years is sufficient both as a minimum period of incarceration and for defendant to establish whether he has earned the right to parole.

We have reviewed defendant's remaining contentions in his pro se supplemental brief and conclude that none warrants reversal or further modification of the judgment.

All concur except SCUDDER, P.J., and MARTOCHE, J., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part and would affirm the judgment of conviction without reducing defendant's sentence. In our view, the sentence is not unduly harsh or severe and thus, under the circumstances of this case, we see no reason to reduce the sentence as a matter of discretion in the interest of justice.

Defendant was charged with burglary in the second degree (Penal Law § 140.25 [2]) and, following a jury trial, was convicted of that charge. The conviction arose out of an incident in which defendant, with two others, entered a home and stole several items of property. Defendant was identified by the resident as one of the people she saw running from her home when she returned there.

Prior to trial, a *Sirois* hearing was held in connection with the People's request to present at trial the grand jury testimony of a witness who allegedly was unavailable as a result of defendant's actions and threats (see *Matter of Holtzman v Hellenbrand*, 92 AD2d 405, 410). The People alleged that defendant made telephone calls to his mother from the Monroe County Jail, in which he encouraged his mother to keep the witness from testifying. The People further alleged that, during those conversations, defendant's mother had described her efforts at keeping the witness "high" to prevent her from coming to court. Defendant allegedly told his mother, "that is not enough," and he further told her that she needed to get the witness "out of town." The People alleged that they were unable to locate the witness and requested a hearing to determine her unavailability as a result of defendant's actions. In fact, at the *Sirois* hearing, an investigator with the Monroe County Sheriff's Office testified that he listened to telephone calls between defendant and his mother and that during one of the telephone calls defendant told his mother that if the witness "walks into the courtroom [he would] get 15 to life. If she doesn't [he would] probably get a misdemeanor or go scott free." County Court concluded that the People

proved by clear and convincing evidence that the witness's unavailability was the result of defendant's actions to keep the witness from testifying and granted the People's request to present that witness's grand jury testimony at trial.

Also prior to trial, defendant was offered a plea bargain pursuant to which he would be sentenced as a violent felony offender to a seven-year determinate term of imprisonment with five years of postrelease supervision. Defendant was advised that if he declined the offer and chose to go to trial, he was facing persistent felony offender (PFO) status if convicted with a sentence range of a minimum of 15 years to life and a maximum of 25 years to life.

After defendant was convicted he moved to set aside the verdict and, after hearing argument, the court denied the motion. The court then proceeded to the sentence phase. Defense counsel raised a question regarding the presentence report (PSI) and whether it had been updated since defendant's prior felony conviction in 2001. The court indicated that it did not see a need to "order anything further on the PSI" because, from the time of the prior PSI, defendant had been incarcerated except for a very brief period until he committed the instant offense. The court then reviewed defendant's prior criminal record and defense counsel advised the court that there was an offer, to "obviate the need" for a PFO hearing, that defendant would be incarcerated to "a straight 15 years['] determinate to a burglary two with five years['] post release supervision." Defense counsel added that he believed that the sentence would be illegal because it would "exceed the maximum on the C felony," i.e., if defendant were to violate the five years' postrelease supervision aspect of the offer, "he would be in jeopardy of another five years, which would make it beyond the maximum." Defense counsel added that, in any event, defendant would not accept the offer because it was contingent on defendant waiving his right to appeal, which was something defendant was not "prepared to do."

The People established at the PFO hearing that defendant was convicted of criminal possession of stolen property in the third and fourth degrees in 1994 (and was sentenced to terms of incarceration of 3½ to 7 years and 2 to 4 years, respectively), and that he was convicted of burglary in the second degree in 2001 (and was sentenced to a term of incarceration of 6 years followed by 5 years' postrelease supervision). A 1989 conviction of burglary in the second degree was reversed (*People v Smart*, 171 AD2d 1072). It was revealed that defendant was out of jail on the 2001 burglary conviction for less than four months before committing the instant offense. Defendant did not testify at the hearing.

The court, citing defendant's 25-year criminal history and 15 prior convictions, three of which were felonies (although one was reversed), and his "numerous" violations of probation and parole, found that PFO sentencing was warranted in this case and sentenced defendant to an indeterminate term of incarceration of 20 years to life.

"The power of the Appellate Division to reduce a sentence, which it finds unduly harsh or severe, in the interest of justice and impose a lesser one has long been recognized in this State" (*People v Thompson*, 60 NY2d 513, 520). The power originally was exercised as an inherent power (see *People v Miles*, 173 App Div 179, 183-184) and was later codified in section 543 of the Code of Criminal Procedure (see *Thompson*, 60 NY2d at 520). Upon adoption of the Criminal Procedure Law in 1971, the Legislature expressly authorized the practice without substantive change (see CPL 470.15 [6] [b]; 470.20 [6]). Notably, the Court of Appeals is without similar authority (see *People v Quinones*, 12 NY3d 116, 130 n 6, cert denied \_\_\_ US \_\_\_, 130 S Ct 104). Thus, any reduction of a sentence by the Appellate Division is not subject to further review.

We recognize that the Appellate Division has discretion in determining whether a sentence is unduly harsh or severe. We further recognize that we should exercise that discretion in "unique and narrow circumstances" (*People v Khuong Dinh Pham*, 31 AD3d 962, 967). For example, in *Khuong Dinh Pham*, the defendant had lived a crime-free, respectable life since the crime was committed and had no prior criminal record. Additionally, the defendant played a minor role in the crime of which he was convicted. Similarly, in *People v Wilt* (18 AD3d 971, 973, lv denied 5 NY3d 771), the factors weighing in favor of a sentence reduction were the defendant's youth, his lack of a criminal record, and his impaired emotional and mental health.

By contrast, here the People noted at sentencing that defendant's criminal record "consisted of approximately 11 misdemeanor convictions, five felony convictions, one of which is a violent felony offense for burglary in the second degree," and that defendant's "history and character demonstrate that society would best be served if he was sentenced to an extended period of incarceration and lifetime supervision" (see Penal Law § 70.10 [2]). The People asked that defendant be sentenced to the maximum term of 25 years to life as a persistent felony offender. Defense counsel's response to the People's request for the imposition of the maximum term of incarceration was to "continue to assert" defendant's innocence. Defendant was given an opportunity to speak and told the court that his "conviction is wrong." Defendant further told the court that he "never intended for [the witness] to not come to trial. In fact, I begged her to come to trial and tell the truth over and over and over, amongst other things, but she wouldn't do it." Notably, the uncontradicted testimony of several police officers at the *Sirois* hearing established the existence of numerous telephone calls involving defendant that concerned the victim, and established that defendant did not want the witness to testify at trial and took steps to ensure that she not do so. Ultimately, when the court sentenced defendant, it stated that, "if you're not a persistent felony offender, I don't know who is." The court further stated, while addressing defendant, that "when you do get out, I have this fear and concern that you're just going to continue this type of conduct . . . [A]pparently everything you have done since you were back in your teens has been criminal in nature." The PSI report confirms the court's assessment of defendant. Defendant was born on September 9,

1965, and had a juvenile criminal history. His first arrest as an adult occurred on December 16, 1982 and the PSI lists 24 arrests apart from the arrest in this case. Many of those arrests were for burglary, grand larceny and criminal possession of stolen property.

The majority, while recognizing that defendant was convicted of a violent felony offense, nevertheless concludes that, because no actual violence was employed during the commission of the offense, defendant's sentence should be reduced to the statutory minimum. In our view, that position not only usurps the discretion of the trial court in imposing a sentence, but it also usurps the authority of the Legislature in categorizing offenses. Penal Law § 140.25 contains two subdivisions, with the common element that a person knowingly enter or remain unlawfully in a building with intent to commit a crime therein. The first subdivision requires the additional element of the person or another participant in the crime: being armed with explosives or a deadly weapon; causing physical injury to any person not a participant in the crime; using or threatening the immediate use of a dangerous instrument; or displaying what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm (§ 140.25 [1] [a] - [d]). In the alternative, a person is also guilty of burglary in the second degree when he or she knowingly enters or remains unlawfully in a building with intent to commit a crime therein and that building is a dwelling (§ 140.25 [2]), the crime of which defendant here was convicted. Both categories of the crime of burglary in the second degree have been deemed violent felonies by the Legislature (see § 70.02 [1] [b]).

In *People v Johnson* (38 AD3d 1057, 1059), the defendant challenged the trial court's imposition of a sentence for burglary in the second degree as a violent felony offense on the ground that the legislative classification of burglary in the second degree as a violent felony where no violence was used or proven was unconstitutional or illegal. The defendant argued "that he was denied due process because he was not allowed to contest this classification" (*id.*). The Third Department concluded that it was "the Legislature's function to classify crimes and to 'distinguish among the ills of society which require a criminal sanction, and prescribe, as it reasonably views them, punishments appropriate to each' " (*id.*, quoting *People v Broadie*, 37 NY2d 100, 110). The Third Department further noted that, "[s]ince the 1981 amendments to Penal Law § 140.25 (2) (L 1981, ch 361), the Legislature determined 'to classify all burglaries of dwellings as class C or higher violent felonies . . . apparently based upon its assessment that the potential for violence was the same irrespective of the time of their commission,' abrogating the distinction between those committed at night and those committed during the day" (*id.*). In our view, the fact that defendant did not employ actual violence in committing the instant offense should not inure to his benefit; the Legislature has unequivocally indicated its intent that the crime committed by defendant be considered a violent felony offense, regardless of whether actual violence was employed.

In our view, reducing defendant's sentence improperly interferes with the broad province of the trial court, which not only considered

defendant's extraordinarily lengthy criminal history, his lack of remorse and his denial of his involvement in the crime, but also considered defendant's significant attempts to prevent a witness from testifying and the impact of the crime on the victim.

For all of the above-stated reasons, we cannot agree with the majority that the sentence imposed, which fell at the mid-point between the range of minimum and maximum sentencing, was unduly harsh or severe.

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

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CA 11-02167

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

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DAWN M. LORENZO AND FRANK D. LORENZO, AS  
PARENTS AND NATURAL GUARDIANS OF HUNTER  
LORENZO, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

KENNETH R. KAHN, M.D., ET AL., DEFENDANTS,  
LIANG BARTKOWIAK, M.D. AND KALEIDA HEALTH,  
DOING BUSINESS AS CHILDREN'S HOSPITAL OF  
BUFFALO, ALSO KNOWN AS WOMAN'S AND CHILDREN'S  
HOSPITAL OF BUFFALO, ALSO KNOWN AS KALEIDA  
HEALTH, INC., DEFENDANTS-APPELLANTS.  
(APPEAL NO. 1.)

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GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MARK SPITLER OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered January 19, 2011 in a medical malpractice action. The order, inter alia, granted those parts of the motion of defendants Liang Bartkowiak, M.D. and Kaleida Health, doing business as Children's Hospital of Buffalo, also known as Woman's and Children's Hospital of Buffalo, also known as Kaleida Health, Inc. to dismiss plaintiffs' complaint against them with the exception of two claims within the negligence causes of action.

It is hereby ORDERED that the order so appealed from is modified as a matter of discretion in the interest of justice by granting in its entirety that part of the motion seeking dismissal of the complaint with the exception of the allegation specified in the decision of this Court in *Lorenzo v Kahn* (74 AD3d 1711) and as modified the order is affirmed without costs.

Memorandum: Plaintiff parents commenced a medical malpractice action on their own behalf based on complications that arose during the delivery of their child, Hunter. Plaintiff mother asserted that she had sustained various physical injuries as a result of the complications, while plaintiff father asserted a cause of action that was derivative in nature. As relevant to the appeals now before us, the Hospital defendants, i.e., defendant Kaleida Health, doing business as Children's Hospital of Buffalo, also known as Woman's and

Children's Hospital of Buffalo, also known as Kaleida Health, Inc. and defendant Liang Bartkowiak, M.D., a medical resident at Kaleida Health, moved for summary judgment dismissing the complaint against them. Supreme Court denied the motion, and on appeal we modified the order by granting the motion in part (*Lorenzo v Kahn*, 74 AD3d 1711, 1711-1712).

Before that appeal was decided, plaintiffs commenced the instant medical malpractice action against the same defendants, this time as parents and natural guardians of Hunter (hereafter, *Hunter Lorenzo* action). Plaintiffs moved to consolidate the two actions, and plaintiffs' counsel asserted in support of the motion that the parties and the attorneys were identical in both actions, and that the "allegations stem from the same causes of action" and involve "common questions of law and fact[]." Plaintiffs' counsel further asserted that the bills of particulars in both actions were "virtually identical, especially with regard to the allegations of the negligence against the defendants. Therefore, both cases essentially rely on the same questions of law and facts." Additionally, plaintiffs' counsel asserted that plaintiffs should "have no need to take further depositions of the defendant parties or the nurses" because the allegations of negligence were "virtually identical." The court granted the motion to consolidate in February 2009, but that decision apparently was never reduced to an order.

The Hospital defendants thereafter moved for leave to amend their answers in the *Hunter Lorenzo* action to include the affirmative defenses of collateral estoppel, res judicata and law of the case. They also moved to dismiss the complaint in the *Hunter Lorenzo* action against them with the exception of, in accordance with our decision in the prior appeal (*id.*), the allegation that Dr. Bartkowiak was negligent in failing to intervene when her supervisor, defendant Kenneth R. Kahn, M.D., directed her to perform a midline episiotomy. In opposing the motion, plaintiffs submitted an additional supplement to the bill of particulars in that action, wherein they alleged that the Hospital defendants were negligent "in failing to inform Dr. Kahn that there were some possible troubling issues with the fetal monitoring strip; failing to advise Dr. Kahn of the baby's position, crowning and molding; and failing to keep Dr. Kahn apprised of any other facts over an approximate twenty-four hour period" (additional allegations). By the order in appeal No. 1, the court granted those parts of the motion for leave to amend the answers to include, inter alia, the affirmative defense of collateral estoppel and for dismissal of the complaint against the Hospital defendants with two exceptions within the negligence causes of action, i.e., the one set forth in the prior decision of this Court and the additional allegations. We note that the court also granted the motion to the extent that it sought dismissal of the derivative cause of action, and plaintiffs have not taken a cross-appeal from that part of the order.

Subsequently, Dr. Kahn and defendant University Gynecologists & Obstetricians, Inc. (collectively, UGO defendants) moved to compel plaintiffs to appear for depositions, and the Hospital defendants cross-moved for an order striking plaintiffs' additional supplement to

the bill of particulars on the ground that judicial estoppel prevented plaintiffs from adding new claims. Alternatively, they sought the relief sought by the UGO defendants. By the order in appeal No. 2, the court, inter alia, denied the cross motion to the extent that it sought to strike plaintiffs' additional supplement to the bill of particulars.

Addressing first the order in appeal No. 2, we conclude that the court erred in denying the cross motion with respect to the additional supplement to the bill of particulars. "Judicial estoppel may be invoked to prevent a party from 'inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding' " (*Zanghi v Laborers Intl. Union of N. Am., AFL-CIO*, 21 AD3d 1370, 1372), where the party had prevailed with respect to the earlier position (see *Zedner v United States*, 547 US 489, 504). Here, judicial estoppel applies because the position taken by plaintiffs in opposition to the cross motion in the *Hunter Lorenzo* action is " 'directly contrary to or inconsistent with' " the earlier position they assumed in their motion to consolidate the two actions (*Zanghi*, 21 AD3d at 1372), and they prevailed with respect to that position. Plaintiffs contend that, although there was a prior judicial ruling in their favor on the motion to consolidate, that ruling was never reduced to an order, and they therefore did not prevail. We reject that contention. We also cannot agree with the position of the dissent that plaintiffs did not prevail on their motion because the actions have not in fact been consolidated. Rather, judicial estoppel applies because plaintiffs prevailed on their motion to consolidate when the motion was granted in open court (*cf. Ferreira v Wyckoff Hgts. Med. Ctr.*, 81 AD3d 587, 588). In our view, an order is not necessary for the invocation of judicial estoppel by the Hospital defendants.

In view of our decision in appeal No. 2, we conclude in appeal No. 1 that the Hospital defendants are entitled to the full relief sought in that part of their motion seeking dismissal of the complaint in the *Hunter Lorenzo* action against them with the exception of the allegation that Dr. Bartkowiak was negligent in failing to intervene when her supervisor, defendant Dr. Kenneth R. Kahn, directed her to perform a midline episiotomy. We therefore modify the order in appeal No. 1 accordingly.

All concur except PERADOTTO and CARNI, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent because, in our view, the doctrine of judicial estoppel is inapplicable to this case. We would therefore affirm the order in appeal No. 2.

As noted by the majority, plaintiff parents commenced a medical malpractice action seeking damages for injuries sustained by plaintiff mother and, derivatively, by plaintiff father based upon complications that arose during the delivery of their son, Hunter. As relevant here, the Hospital defendants, i.e., defendant Kaleida Health, doing business as Children's Hospital of Buffalo, also known as Woman's and Children's Hospital of Buffalo, also known as Kaleida Health, Inc. and defendant Liang Bartkowiak, M.D., a medical resident at Kaleida

Health, moved for summary judgment dismissing the complaint against them. Supreme Court denied the motion, and on appeal this Court modified the order by granting the motion in part (*Lorenzo v Kahn*, 74 AD3d 1711, 1711-1712 [hereafter, *Dawn Lorenzo* action]).

While that appeal was pending, plaintiffs commenced this medical malpractice action on behalf of Hunter, seeking damages for injuries Hunter sustained as a result of defendants' alleged negligence in connection with his delivery (hereafter, *Hunter Lorenzo* action). Plaintiffs thereafter moved to consolidate the two actions. The record contains no papers submitted by defendants in opposition to the motion. Although the record reflects that the court granted the motion to consolidate in a February 2009 bench decision, it is undisputed that no order to that effect was ever entered. Further, it appears from the record that the two actions were not, in fact, consolidated.

After the issuance of this Court's decision in the *Dawn Lorenzo* action, the Hospital defendants sought leave to amend their answers in the *Hunter Lorenzo* action to include the affirmative defenses of collateral estoppel, res judicata, and law of the case. They also moved to dismiss the complaint in the *Hunter Lorenzo* action against them with the exception of the allegation that Dr. Bartkowiak was negligent in failing to intervene when her supervisor, defendant Kenneth R. Kahn, M.D., directed her to perform a midline episiotomy - the sole surviving allegation against the Hospital defendants in the *Dawn Lorenzo* action in accordance with this Court's decision (*id.* at 1712-1713). Plaintiffs opposed the motion and submitted an "additional supplement" to the bill of particulars in the *Hunter Lorenzo* action (hereafter, supplemental bill of particulars). In their supplemental bill of particulars, plaintiffs allege that the Hospital defendants were negligent in, inter alia, failing to inform Dr. Kahn "that there were some possible troubling issues with the fetal monitoring strips"; failing to advise Dr. Kahn of the baby's "position, crowning, and molding"; and failing to keep Dr. Kahn "apprised of any other facts over an approximate twenty-four hour period" (hereafter, new allegations).

In appeal No. 1, the Hospital defendants appeal from an order granting those parts of their motion for leave to amend their answers to include, inter alia, the affirmative defense of collateral estoppel and for dismissal of the complaint against them with two exceptions within the negligence causes of action, i.e., the one set forth in the prior decision of this Court and the new allegations. Dr. Kahn and defendant University Gynecologists & Obstetricians, Inc. subsequently moved to compel plaintiffs to appear for depositions, and the Hospital defendants cross-moved for, inter alia, an order striking plaintiffs' supplemental bill of particulars on the basis of judicial estoppel. In appeal No. 2, the Hospital defendants appeal from an order that, inter alia, denied the cross motion to the extent that it sought to strike plaintiffs' supplemental bill of particulars.

With respect to appeal No. 2, we disagree with the majority that the court erred in denying that part of the cross motion seeking to

strike the supplemental bill of particulars on the ground of judicial estoppel. The doctrine of judicial estoppel provides that, " '[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he [or she] may not thereafter, simply because his [or her] interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him [or her]' " (*New Hampshire v Maine*, 532 US 742, 749, *reh denied* 533 US 968 [emphasis added], quoting *Davis v Wakelee*, 156 US 680, 689; see *Popadyn v Clark Constr. & Prop. Maintenance Servs., Inc.*, 49 AD3d 1335, 1336). Thus, "if a party assumes a position in one legal proceeding and prevails in maintaining that position, that party will not be permitted to assume a contrary position in another proceeding simply because the party's interests have changed" (*Kilcer v Niagara Mohawk Power Corp.*, 86 AD3d 682, 683 [emphasis added]).

The underlying purpose of judicial estoppel is to protect the integrity of the judicial process (see *New Hampshire*, 532 US at 749-750). Consequently, a key factor in determining the applicability of the doctrine of judicial estoppel is whether the party against whom the doctrine is asserted "has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled . . . . Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations . . . , and thus poses little threat to judicial integrity" (*id.* at 750-751 [internal quotation marks omitted]; see *Kilcer*, 86 AD3d at 226 ["A litigant should not be permitted to lead a tribunal to find a fact one way and then attempt to convince a court in a different proceeding that the same fact should be found otherwise; the litigant should be bound by the prior stance that he or she clearly asserted"]).

Here, we conclude that the doctrine of judicial estoppel is inapplicable because plaintiffs did not "prevail[]" on their motion to consolidate (*Kilcer*, 86 AD3d at 683; see *Pierre v Mary Manning Walsh Nursing Home Co., Inc.*, 93 AD3d 541, 542; *Kvest LLC v Cohen*, 86 AD3d 481, 482; *Ferreira v Wyckoff Hgts. Med. Ctr.*, 81 AD3d 587, 588). Although the justice to whom the case had been previously assigned apparently granted plaintiffs' consolidation motion from the bench, that decision was never reduced to an order and, more importantly, the record establishes that the two actions have not, in fact, been consolidated. Thus, it cannot be said that plaintiffs " 'succeeded in persuading [the] court to accept [their] earlier position' " (*Zedner v United States*, 547 US 489, 504).

In any event, we disagree with the majority that the position taken by plaintiffs in the *Hunter Lorenzo* action is " 'clearly inconsistent' " with (*New Hampshire*, 532 US at 750) or "directly contrary" to (*Tobias v Liberty Mut. Fire Ins. Co.*, 78 AD3d 928, 929) the position they assumed in their motion to consolidate the two actions. In his affirmation in support of consolidation, plaintiffs' counsel stated that the two actions were "virtually identical" and

"essentially rely on the same questions of law and facts," and that "the allegations of negligence against the defendants are *virtually identical*" (emphases added). Plaintiffs' counsel never asserted, however, that there were no claims that were unique to the *Hunter Lorenzo* action and, indeed, he averred that plaintiffs might offer additional expert opinions relative to the infant's injuries. In our view, plaintiffs' attorney was simply arguing that the two actions involved "common question[s] of law or fact" and should thus be consolidated for the convenience of the parties and the court (CPLR 602 [a]). He was not admitting that, on the merits, the two cases were indistinguishable in fact and/or law. Thus, the assertion of new allegations in the supplemental bill of particulars was not " 'clearly inconsistent' " with (*New Hampshire*, 532 US at 750) or "directly contrary" to (*Tobias*, 78 AD3d at 929) the position taken by plaintiffs in support of their consolidation motion (see generally *Private Capital Group, LLC v Hosseinipour*, 86 AD3d 554, 556), and the court did not err in denying defendants' cross motion to strike the supplemental bill of particulars.

We have examined the Hospital defendants' contention in appeal No. 1 and conclude that it is without merit. We would therefore affirm both orders.

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

920

CA 11-02169

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

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DAWN M. LORENZO AND FRANK D. LORENZO, AS  
PARENTS AND NATURAL GUARDIANS OF HUNTER  
LORENZO, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

KENNETH R. KAHN, M.D., ET AL., DEFENDANTS,  
LIANG BARTKOWIAK, M.D. AND KALEIDA HEALTH,  
DOING BUSINESS AS CHILDREN'S HOSPITAL OF  
BUFFALO, ALSO KNOWN AS WOMAN'S AND CHILDREN'S  
HOSPITAL OF BUFFALO, ALSO KNOWN AS KALEIDA  
HEALTH, INC., DEFENDANTS-APPELLANTS.  
(APPEAL NO. 2.)

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GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MARK SPITLER OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered October 21, 2011 in a medical malpractice action. The order, inter alia, denied the cross motion of defendants Liang Bartkowiak, M.D. and Kaleida Health, doing business as Children's Hospital of Buffalo, also known as Woman's and Children's Hospital of Buffalo, also known as Kaleida Health, Inc. to the extent that it sought to strike plaintiffs' additional supplement to the bill of particulars.

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

Same Memorandum as in *Lorenzo v Kahn* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Nov. 16, 2012]).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

931

CA 12-00560

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

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CHRISTOPHER J. ALF, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

THE BUFFALO NEWS, INC., DEFENDANT-RESPONDENT.

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CARTER LEDYARD & MILBURN LLP, NEW YORK CITY (JOHN J. WALSH OF COUNSEL), AND HARRIS BEACH PLLC, BUFFALO, FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (JOSEPH M. FINNERTY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered December 28, 2011 in a defamation action. The order, among other things, granted defendant's motion for summary judgment.

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

Memorandum: Plaintiff, the chairperson and sole shareholder of National Air Cargo Holdings, Inc., which wholly owns National Air Cargo, Inc. (NAC), commenced this defamation action after defendant published a series of articles stemming from a guilty plea by NAC in federal court. Supreme Court properly granted defendant's motion for summary judgment dismissing the amended complaint based on the defense of absolute privilege under Civil Rights Law § 74. That statute provides in relevant part that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding" (*id.*). The term "fair and true report" has been given a liberal interpretation (*see Cholowsky v Civiletti*, 69 AD3d 110, 114; *Becher v Troy Publ. Co.*, 183 AD2d 230, 233). " 'When determining whether an article constitutes a "fair and true" report, the language used therein should not be dissected and analyzed with a lexicographer's precision. This is so because a newspaper article is, by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of its author' " (*Becher*, 183 AD2d at 234, quoting *Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 68). A report is "fair and true" within the meaning of the statute if it is "substantially accurate" (*Holy Spirit Assn. for Unification of World Christianity*, 49 NY2d at 67; *see Tenney v Press-Republican*, 75 AD3d 868, 868; *Cholowsky*, 69 AD3d at 114).

The crux of the amended complaint is that the factual premise of the defamatory articles, i.e., that plaintiff and NAC admitted that they repeatedly and fraudulently overcharged the government by millions of dollars, was utterly false and defamatory. The statements referencing NAC only, and not plaintiff, were not "of and concerning" plaintiff, and the amended complaint therefore was subject to dismissal to the extent that the allegedly defamatory statements did not name plaintiff (*Carlucci v Poughkeepsie Newspapers*, 57 NY2d 883, 885), apart from the defense of absolute privilege under Civil Rights Law § 74. The statements "of and concerning" plaintiff set forth, inter alia, that plaintiff avoided any jail time based on a plea deal, and only one statement of the 36 allegedly defamatory statements set forth in the amended complaint directly asserted that plaintiff cheated the government. We agree with defendant that the articles read as a whole, including all of the allegedly defamatory statements (see *Miller v Journal-News*, 211 AD2d 626, 627), would lead the average reader to conclude that NAC, not plaintiff himself, had cheated the government.

We further agree with defendant in any event that the defense under Civil Rights Law § 74 applied to all of the allegedly defamatory statements. NAC pleaded guilty to only a single charge of falsifying a proof of delivery document, but the plea agreement also included a provision requiring NAC to pay almost \$28 million in fines and restitution. The prosecutor set forth the reasoning supporting the fines and restitution, i.e., that NAC agreed "for purposes of relevant conduct and for this plea agreement that the loss to the United States has been established by the government to be the sum of \$4,400,000 for the time period January 1999 to and including March 2002." The prosecutor further stated that NAC's owner would not "be processed by my office . . . for the criminal offenses that relate to the facts set forth in paragraph 4 of the [plea] agreement, which are the falsifications, proofs of delivery sent as confirmation of delivery dates."

In view of the agreement by NAC to the amount of the government's loss, together with its admission to submitting a false document to the government on at least one occasion, we conclude that the statements in the articles that NAC repeatedly overcharged the government, and that there would be no jail time for plaintiff and other company officials, were substantially accurate (see generally *Mills v Raycom Media, Inc.*, 34 AD3d 1352, 1353). Indeed, we note that the Department of Justice's own press releases were similar to the statements made in the newspapers articles that plaintiff alleges were defamatory. Plaintiff contends that the articles were false because NAC settled with the government to avoid being suspended as an air freight forwarder, and the dispute over air versus truck transport stemmed from a good-faith dispute over the applicable federal regulations. However, there is "no requirement that the publication report the plaintiff's side of the controversy" (*Cholowsky*, 69 AD3d at 115; see *Tenney*, 75 AD3d at 868-869; *Glendora v Gannett Suburban Newspapers*, 201 AD2d 620, 620, lv denied 83 NY2d 757).

All concur except CARNI and SCONIERS, JJ., who dissent in part and

vote to modify in accordance with the following Memorandum: We respectfully disagree with the conclusion of our colleagues that Supreme Court properly granted defendant's motion for summary judgment dismissing the amended complaint in its entirety, and we therefore dissent in part. We conclude that the statements that were "of and concerning" plaintiff were "reasonably susceptible of a defamatory connotation" (*James v Gannett Co.*, 40 NY2d 415, 419, *rearg denied* 40 NY2d 990; see *Bee Publs. v Cheektowaga Times*, 107 AD2d 382, 382-383, 386) and that defendant is not entitled to the protection afforded by Civil Rights Law § 74 for those statements. We thus would modify the order by denying defendant's motion to the extent that it concerns the statements pertaining specifically to plaintiff, and we would strike the affirmative defense of Civil Rights Law § 74 as to those statements.

On October 25, 2007, general counsel for National Air Cargo, Inc. (NAC), with approval from NAC's board of directors, pleaded guilty on behalf of NAC to one count of filing a false statement. The plea agreement was described by the Federal District Court as a "global settlement" in satisfaction of "all Federal offenses committed" by the corporation during the relevant time period. In the days and weeks following the plea, defendant published a series of articles reporting that the company, inter alia, admitted to "cheating" the United States military out of millions of dollars. Throughout the series of articles, defendant made numerous statements naming plaintiff specifically, and reporting that plaintiff had evaded serving jail time as a result of the plea deal by employing "the best lawyers money could buy" and a "dream team" of attorneys. An editorial published on November 8, 2007, asked "why in the name of decency should the leaders of National Air Cargo escape personal punishment for cheating the U.S. Defense Department—and, therefore, American troops and taxpayers—during wartime?" It went on to say, "there's no law that says companies and their leaders can't be moral, ethical, patriotic and plain honest." In another article, published March 2, 2008, defendant reported that "[t]he couple [referring to plaintiff and his wife] also maintains that it stopped cheating the government in 2005." Notably, plaintiff was not a named defendant in the federal criminal action against NAC and there was no admission of criminal liability on the part of plaintiff during the proceedings (see generally *Fraser v Park Newspapers of St. Lawrence*, 246 AD2d 894, 895-896).

"For a report to be characterized as 'fair and true' within the meaning of [Civil Rights Law § 74], . . . it is enough that the substance of the article be substantially accurate" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67). Because the various reports impute wrongdoing to plaintiff as an individual, they produce "a different effect on the mind of the reader from that which the pleaded truth would have produced" (*Dibble v WROC TV Channel 8*, 142 AD2d 966, 967 [internal quotation marks omitted]) and "suggest[] more serious conduct than that actually suggested in the official proceeding" (*Daniel Goldreyer, Ltd. v Van de Wetering*, 217 AD2d 434, 436). We therefore conclude that, with respect to the reports specifically concerning plaintiff, defendant did not act " 'as the agent of the public, reporting only that which

others could hear for themselves were they to attend the proceedings' " (*Dibble*, 142 AD2d at 968, quoting *Hogan v Herald Co.*, 84 AD2d 470, 477-478, *affd* 58 NY2d 630). Thus, in our view, defendant is not entitled, as a matter of law, to protection under Civil Rights Law § 74 for the statements pertaining to plaintiff specifically.

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

962

CA 12-00484

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

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THOMAS D. POLISOTO, M.D., AS ADMINISTRATOR OF  
THE ESTATE OF ROSEANN POLISOTO, DECEASED,  
PLAINTIFF-RESPONDENT,

V

ORDER

JAMES S. COLLINS, JR., M.D., ET AL., DEFENDANTS,  
AND JULIA CULLIGAN, PH.D., DEFENDANT-APPELLANT.

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PHELAN, PHELAN & DANEK, LLP, ALBANY (SYMA S. AZAM OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 9, 2011. The order, insofar as appealed from, denied the motion of defendant Julia Culligan, Ph.D. for summary judgment.

Now, upon reading and filing the stipulation of withdrawal signed by the attorneys for the parties on October 11 and 16, 2012,

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

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1026

**KA 11-00996**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARLOS DIAZ, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered March 21, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk under the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Although the risk assessment instrument (RAI) assessed defendant as a level two risk, the Board of Examiners of Sex Offenders recommended an upward departure based on the pattern of defendant's sexual offenses and his diagnosis of schizophrenia. County Court concluded that an upward departure was warranted and thus determined that defendant is a level three risk. That was error.

"A court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors[, ] . . . [the court determines that] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Abraham*, 39 AD3d 1208, 1209 [internal quotation marks omitted]; *see People v Grady*, 81 AD3d 1464, 1464). Here, the court erred by basing its upward departure on factors already taken into account by the RAI, i.e., the short period of time between defendant's offenses and defendant's pattern of touching the victims under their clothing, targeting strangers and using forcible compulsion. Additionally, the court erred in relying on defendant's alleged mental illness to justify the upward departure inasmuch as the record contains no admissible evidence that defendant

in fact suffers from a mental illness, and the record is devoid of evidence that the alleged mental illness is " 'causally related to any risk of reoffense' " (*People v Perkins*, 35 AD3d 1167, 1168; see *Grady*, 81 AD3d at 1465; see generally Correction Law § 168-n [3]; *People v Hayward*, 52 AD3d 1243, 1244). Thus, we conclude that defendant is properly classified as a level two risk (see *Perkins*, 35 AD3d at 1168), and we therefore modify the order accordingly.

All concur except FAHEY, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent and would affirm. Here, County Court determined that defendant was a level three risk based upon two prior sexual offenses committed by him. The first of defendant's sexual offenses occurred when he was in an inpatient psychiatric unit. Defendant pushed his victim, a social worker, into a restroom and touched her buttocks and vaginal areas. The second sexual offense also involved defendant's use of aggression against his victim. In that incident, defendant followed a woman who was a stranger to him into a building and onto an elevator. When the woman exited the elevator with defendant, he told her that he needed a hug. The woman refused, and defendant then pinned her against a wall, pulled up her dress, and touched her vagina and anus under her clothing.

Shortly before defendant's release from incarceration, the Board of Examiners of Sex Offenders (Board) prepared a risk assessment instrument (RAI), wherein it assigned defendant points under the following risk factors: 1 (use of violence [forcible compulsion]); 2 (sexual contact with victim [under clothing]); 7 (relationship with victim [stranger]); 8 (age of first sexual misconduct 20 or less); 9 (number of prior crimes [prior violent felony or misdemeanor sex crime]); 10 (recency of prior offense less than three years); and 11 (drug or alcohol abuse [history of abuse]). The Board determined that defendant had a risk assessment score of 105 points, which placed him at the high end of the range for a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 et seq.). The Board, however, recommended an upward departure from the presumptive risk level based on the pattern of defendant's sexual offenses, his diagnosis of schizophrenia, and his history of marijuana abuse. Relying on the Board's case summary, the court determined that defendant is a level three risk based on defendant's conviction of "forcibly sexually abusing two women who were strangers to him," his "diagnosis of a serious mental disorder and [his] history of abuse of marijuana."

"A court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors . . . [,] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Hueber*, 81 AD3d 1466, 1467, lv denied 17 NY3d 701, cert denied \_\_\_ US \_\_\_, 132 S Ct 294 [internal quotation marks omitted]). " 'The People bear the burden of establishing the appropriate risk level classification by clear and convincing evidence [and] [s]uch evidence may consist of reliable hearsay including, among other things, the presentence investigation report, [RAI] and case

summary' " (*People v McFall*, 93 AD3d 962, 963; see Correction Law § 168-n [3]; *People v Pettigrew*, 14 NY3d 406, 409).

Here, the People met their burden of establishing that an aggravating factor not accounted for in the RAI existed, warranting an upward departure from the presumptive risk level. Although the court relied upon factors accounted for in the RAI, i.e., defendant's drug abuse, use of forcible compulsion and his targeting of strangers, as a basis for the upward departure, the court also relied on a factor not accounted for in the RAI, i.e., defendant's serious mental disorder. In my view, that factor supports the court's determination to make an upward departure. There should be no dispute that schizophrenia is marked by a breakdown of thought processes and poor emotional responses and typically manifests itself in disorganized thinking and social dysfunction. That disorder, coupled with the nature of defendant's attacks—he appears to struggle with social boundaries and is prone to preying on women who are alone—compels the conclusion that defendant should be subjected to greater scrutiny so long as he is free within the community.

Finally, I cannot agree with the majority that the record does not support the conclusion that defendant's significant mental disorder is causally related to his risk of reoffense. While there is no requirement that the unsigned case summary to which the majority refers always be credited, it "meet[s] the 'reliable hearsay' standard for admissibility at SORA proceedings" and thus was properly considered by the court (*People v Mingo*, 12 NY3d 563, 573; see *Pettigrew*, 14 NY3d at 408-409). In my view, the connection between defendant's schizophrenia and his risk of reoffending implied in the case summary is neither unduly speculative nor undermined by other more compelling evidence (*cf. Mingo*, 12 NY3d at 572-573). I would thus affirm.

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

1037

CA 12-00273

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

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CAITLIN G. MURPHY, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NOAH COMINSKY, DEFENDANT,  
AND LAWRENCE VANDERBOGART, DEFENDANT-APPELLANT.

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THE LAW OFFICES OF EDWARD M. EUSTACE, WHITE PLAINS (CHRISTOPHER YAPCHANYK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JAMES W. CUNNINGHAM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 25, 2011. The order, insofar as appealed from, denied the motion of defendant Lawrence Vanderbogart to dismiss the complaint against him pursuant to CPLR 3211 (a) (7).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendant Lawrence Vanderbogart's motion to dismiss the second cause of action against him and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when her face was bitten by a dog during a party at which alcohol, furnished by defendants, was served. The party was hosted by a minor (host) while his parents were out of town, and the dog belonged to the host's family. For her first cause of action against Lawrence Vanderbogart (defendant), plaintiff alleged that defendant violated General Obligations Law §§ 11-100 and 11-101 (Dram Shop Act) by providing alcohol to minors. Plaintiff further alleged that, as a result of their intoxication, the minors attending the party became rowdy, thereby agitating the dog and causing it to bite plaintiff, and that, as a result of the host's intoxication, he failed to exercise a reasonable degree of care with respect to the dog and the dangers it posed to the guests. In her second cause of action against defendant, plaintiff alleged that he was negligent in providing alcohol to minors. Defendant moved to dismiss the complaint against him on the ground that it failed to state a cause of action (see CPLR 3211 [a] [7]), and Supreme Court denied the motion.

Defendant contends that because plaintiff may recover for injuries sustained as a result of a dog bite only under a theory of

strict liability (see e.g. *Petrone v Fernandez*, 12 NY3d 546, 550), the court erred in denying his motion. We conclude that the court properly denied defendant's motion to dismiss the first cause of action against him, alleging that he violated the Dram Shop Act. New York's Dram Shop Act affords a person injured "by reason of the intoxication" of another person an independent cause of action against the party that unlawfully sold, provided or assisted in procuring alcoholic beverages for such intoxicated person (General Obligations Law §§ 11-100 [1]; 11-101 [1]). The statute requires only "some reasonable or practical connection between the [furnishing] of alcohol and the resulting injuries; proximate cause, as must be established in a conventional negligence case, is not required" (*Oursler v Brennan*, 67 AD3d 36, 43 [internal quotation marks omitted]; see *Adamy v Ziriakus* [appeal No. 1], 231 AD2d 80, 88, *affd* 92 NY2d 396; *McNeill v Rugby Joe's*, 298 AD2d 369, 370; *Bartkowiak v St. Adalbert's R. C. Church Socy.*, 40 AD2d 306, 310). Accepting the facts alleged in the complaint as true and according plaintiff the benefit of all favorable inferences, as we must in the context of this motion to dismiss, we conclude that plaintiff has stated a legally cognizable cause of action against defendant for a violation of the Dram Shop Act (see generally *Leon v Martinez*, 84 NY2d 83, 87-88).

We further conclude, however, that the court erred in denying defendant's motion to dismiss the second cause of action against him, alleging negligence on defendant's part. There is no common law cause of action for the negligent provision of alcohol in this state (see *Rust v Reyer*, 91 NY2d 355, 358-359; *D'Amico v Christie*, 71 NY2d 76, 84-87; *O'Neill v Ithaca Coll.*, 56 AD3d 869, 872; *McGlynn v St. Andrew Apostle Church*, 304 AD2d 372, 373, *lv denied* 100 NY2d 508). We therefore modify the order accordingly.

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

**1043**

**CA 12-00002**

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

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LORI HOOVER, PLAINTIFF-RESPONDENT,  
AND JESSICA BOWERS,  
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

NEW HOLLAND NORTH AMERICA, INC., FORMERLY  
KNOWN AS FORD NEW HOLLAND, INC., CASE NEW  
HOLLAND, INC., NIAGARA FRONTIER EQUIPMENT  
SALES, INC., FORMERLY KNOWN AS NIAGARA  
FORD NEW HOLLAND, INC.,  
DEFENDANTS-APPELLANTS-RESPONDENTS,  
ET AL., DEFENDANTS.

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CNH AMERICA LLC, THIRD-PARTY  
PLAINTIFF-APPELLANT,

V

KYLE P. ANDREWS, TREASURER OF NIAGARA  
COUNTY, AS TEMPORARY ADMINISTRATOR FOR  
THE ESTATE OF GARY HOOVER, DECEASED,  
THIRD-PARTY DEFENDANT-RESPONDENT.  
(APPEAL NO. 1.)

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PHILLIPS LYTTLE LLP, BUFFALO (PAUL F. JONES OF COUNSEL), AND NIXON  
PEABODY LLP, FOR DEFENDANTS-APPELLANTS-RESPONDENTS AND THIRD-PARTY  
PLAINTIFF-APPELLANT.

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

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

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Appeal and cross appeal from a judgment of the Supreme Court,  
Niagara County (Richard C. Kloch, Sr., A.J.), entered September 30,  
2011. The judgment, inter alia, awarded plaintiff Jessica Bowers  
money damages upon a jury verdict.

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

Memorandum: CNH America LLC (incorrectly sued as New Holland

North America, Inc., formerly known as Ford New Holland, Inc. and Case New Holland, Inc.) and Niagara Frontier Equipment Sales, Inc., formerly known as Niagara Ford New Holland, Inc. (defendants) appeal and Jessica Bowers (plaintiff) cross-appeals from a judgment entered following a jury trial on liability and damages in this products liability action. On October 2, 2004, Gary Hoover (Gary) was using a tractor-driven post hole digger (digger) owned by Peter Smith. Gary was assisted by his wife, former plaintiff Lori Hoover (Lori), who set the auger so that a straight hole would be dug. When Lori left for work, plaintiff, who was then 16 years old, began performing the same task. While Gary was operating the digger, plaintiff's coat became caught in the driveline that connected the tractor's power take off with the digger. Plaintiff was violently dragged into the driveline, and her right arm was severed above the elbow. Smith had removed a plastic shield that covered the area of the driveline near the gearbox after the shield had become damaged beyond repair during use. The shield had covered, inter alia, a bolt that protruded from the driveline. Defendants contend on their appeal that they were entitled to judgment as a matter of law and that Supreme Court therefore erred in denying their pretrial motion for summary judgment dismissing the amended complaint against them, their motion for a directed verdict during trial, and their posttrial motion for judgment notwithstanding the verdict or an order setting aside the verdict as against the weight of the evidence. They contend in the alternative that the court erred in denying their posttrial motion to the extent that they sought an order striking the award of damages for past lost wages and a reduction in other categories of damages. Plaintiff contends on her cross appeal that the court erred in denying her posttrial motion to increase the award of damages for past pain and suffering. We affirm.

" 'In order to establish a prima facie case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury' " (*Adams v Genie Indus., Inc.*, 14 NY3d 535, 542; see *Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106-107). "It is well settled that a manufacturer, who has designed and produced a safe product, will not be liable for injuries resulting from substantial alterations or modifications of the product by a third party which render the product defective or otherwise unsafe" (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 532), including "the material alteration of a product that destroys the functional utility of a key safety feature" (*Bouter v Durand-Wayland, Inc.*, 221 AD2d 902, 902; see *Felle v W.W. Grainger, Inc.*, 302 AD2d 971, 972). However, a modification will defeat a products liability claim only where it "(a) rendered 'a safe product defective' . . . ; and (b) caused the injuries" (*Lamey v Foley*, 188 AD2d 157, 168; see generally *Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 479).

Assuming that defendants met their initial burden on their motion for summary judgment dismissing the amended complaint against them, we conclude on this record that plaintiffs submitted sufficient evidence to defeat that motion and on their direct case at trial to make out a

prima facie case of defective design of the digger. Specifically, the proof was sufficient to establish that, inter alia, a protruding bolt that attached the driveline to the gearbox was an entanglement hazard; the plastic gearbox shield used to guard against the protruding bolt could be damaged by normal use or foreseeable misuse of the digger; and there were design alternatives that would have reduced or eliminated the hazards in the subject product and would have resulted in only a nominal increase in cost. Thus, plaintiffs presented sufficient evidence that the digger was defectively designed, and we further conclude that they presented sufficient evidence that Smith's removal of the damaged gearbox shield did not constitute a substantial modification. We further reject defendants' contentions that the proof was insufficient to establish that the defective design of the digger was a substantial factor in causing plaintiff's injuries or that an alternative design would have prevented the accident. Likewise, the verdict was not against the weight of the evidence because it cannot be said that the verdict could not have been reached on any fair interpretation of the evidence (see *Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *Campo v Neary*, 52 AD3d 1194, 1197).

As to the damages, we reject defendants' contention that the jury awards for past and future pain and suffering "deviate[] materially from what would be reasonable compensation" (CPLR 5501 [c]; see generally *Caprara v Chrysler Corp.*, 52 NY2d 114, 126-127, *rearg denied* 52 NY2d 1073). We likewise reject plaintiff's contention on her cross appeal that the award for past pain and suffering was inadequate. We further conclude that the awards for past and future lost wages and future medical care are supported by legally sufficient evidence and, contrary to defendants' contentions, are not speculative (see *Huff v Rodriguez*, 45 AD3d 1430, 1433; *Kirschhoffer v Van Dyke*, 173 AD2d 7, 9-10). We have reviewed defendants' remaining contentions and conclude that they are without merit.

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

**1044**

**CA 12-00563**

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

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LORI HOOVER AND JESSICA BOWERS,  
PLAINTIFFS-RESPONDENTS,

V

ORDER

NEW HOLLAND NORTH AMERICA, INC., FORMERLY  
KNOWN AS FORD NEW HOLLAND, INC., CASE NEW  
HOLLAND, INC., NIAGARA FRONTIER EQUIPMENT  
SALES, INC., FORMERLY KNOWN AS NIAGARA  
FORD NEW HOLLAND, INC.,  
DEFENDANTS-APPELLANTS,  
ET AL., DEFENDANTS.

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CNH AMERICA LLC, THIRD-PARTY  
PLAINTIFF-APPELLANT,

V

KYLE P. ANDREWS, TREASURER OF NIAGARA  
COUNTY, AS TEMPORARY ADMINISTRATOR FOR  
THE ESTATE OF GARY HOOVER, DECEASED,  
THIRD-PARTY DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

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PHILLIPS LYTTLE LLP, BUFFALO (PAUL F. JONES OF COUNSEL), AND NIXON  
PEABODY LLP, FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFF-  
APPELLANT.

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

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Appeal from an order of the Supreme Court, Niagara County  
(Richard C. Kloch, Sr., A.J.), entered September 30, 2011. The order,  
inter alia, denied in part the posttrial motions of the parties.

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

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1064

CA 12-00050

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

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IN THE MATTER OF KIMBERLY MARSHALL,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

PITTSFORD CENTRAL SCHOOL DISTRICT, BRENT  
KECSCKEMETY, EDMUND STAROWICZ, JR., RAY  
BROWN, KIM MCCLUSKI, IRENE FELDMAN NAROTSKY,  
ALKA PHATAK, PETER SULLIVAN AND MARY ALICE  
PRICE, SUPERINTENDENT, RESPONDENTS-RESPONDENTS.

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VAN LOON MENARD, ROCHESTER (NATHAN A. VAN LOON OF COUNSEL), FOR  
PETITIONER-APPELLANT.

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

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Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered October 5, 2011 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the petition.

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

Memorandum: Petitioner appeals from a judgment that granted respondents' motion to dismiss her petition, in which she alleged that she is entitled to tenured status as a teacher with respondent Pittsford Central School District (PCSD) and reinstatement as an employee. We affirm.

Petitioner was hired as a probationary fourth grade teacher with PCSD in September 2007, with the expectation that her probationary period would last for three years. At the end of her third probationary year, however, petitioner was informed that she would not be recommended to the Board of Education of PCSD (Board) for tenure. In lieu of termination, petitioner entered into a *Juul* agreement with PCSD (see *Matter of Juul v Board of Educ. of Hempstead School Dist. No. 1*, 76 AD2d 837, 838, *affd for reasons stated* 55 NY2d 648, 649), which granted her a fourth probationary year in exchange for the waiver of her right to a claim of tenure by estoppel. The *Juul* agreement was signed by petitioner, the Pittsford District Teacher's Association (PDTA) president, and respondent Mary Alice Price, the PCSD Superintendent (Superintendent). The agreement was neither

presented to nor ratified by the Board. Toward the end of her fourth probationary year, petitioner was again informed by the Superintendent that she would not be recommended for tenure, and she was further informed that her appointment as a probationary teacher with PCSD would end on June 30, 2011. The Board subsequently voted to deny petitioner tenure, and petitioner's service as a probationary teacher ended on or about June 30, 2011. Petitioner thereafter commenced this CPLR article 78 proceeding seeking, inter alia, reinstatement as an employee teacher with PCSD with tenure, and judgment "declaring" that she has tenure with PCSD.

We note at the outset that this is properly only a proceeding pursuant to CPLR article 78 rather than a hybrid declaratory judgment action/CPLR article 78 proceeding "inasmuch as petitioner does not 'challenge the constitutionality of any statutes or regulations' " (*Matter of Zehner v Board of Educ. of Jordan-Elbridge Cent. School Dist.*, 91 AD3d 1349, 1349). Thus, Supreme Court properly limited its determination to whether the PCSD's action to deny tenure was made in violation of lawful procedure, or was arbitrary and capricious or an abuse of discretion.

Although we agree with petitioner that a *Juul* agreement not approved by a school board is an impermissible abdication of a school board's responsibility to act as trustee (see Education Law § 1710) and manager (see § 1804 [1]) of the school district, we nevertheless agree with respondent that petitioner is equitably estopped from disaffirming the agreement despite the Board's failure to authorize or ratify it. "Equitable estoppel 'is imposed by law in the interest of fairness to prevent the enforcement of rights which would work a fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought' " (*Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 893, quoting *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184, rearg denied 57 NY2d 674). Although the applicability of equitable estoppel " 'is ordinarily a question of fact for trial' " (*id.*), under these circumstances, the applicability of that doctrine can be resolved as a matter of law.

The Education Law requires that a superintendent make a recommendation to a board of education as to whether to appoint on tenure a teacher who reaches the expiration of his or her probationary term (see § 3012 [2]), and "[t]he board of education may not grant tenure in the absence of a positive recommendation of the Superintendent" (*Matter of Yanoff v Commissioner of Educ. of State of N.Y.*, 66 AD2d 910, 920, *lv denied* 47 NY2d 711). Here, the Superintendent unequivocally stated that she did not intend to recommend petitioner for tenure at the end of her third probationary year based on petitioner's evaluations and input from the Principal. Thus, in place of a recommendation by the Superintendent to the Board that petitioner be denied tenure, the parties entered into the *Juul* agreement. The agreement expressly provides that "the Superintendent . . . has informed [petitioner] that she will not be recommended for tenure at the end of her probationary period (June 30, 2010); and . . .

. the Superintendent has informed [petitioner] that she is willing to recommend an extension of her probationary period for one year." The agreement further provides that petitioner "accepts the extension of her probationary period until June 30, 2011," and that she "agrees that she waives any right to claim status as tenured teacher by estoppel, acquiescence or any other reason as a result of this extension." We cannot agree with our concurring colleague that the *Juul* agreement is an employment contract. An employment contract typically would include terms of employment, including compensation (see generally Education Law § 3011 [1]). Instead, we conclude that petitioner's "waiver [of her right to a claim of tenure] serves as the quid pro quo for countervailing benefits" (*Matter of Abramovich v Board of Ed. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450, 455, rearg denied 46 NY2d 1076, cert denied 444 US 845; see *Juul*, 76 AD2d at 838), i.e., " 'something for something' " (Black's Law Dictionary 1367 [9th ed 2009]). Rather than setting forth the terms of employment, the agreement provides only that petitioner waived a tenure right in exchange for a fourth probationary year to "demonstrate [her] competence as a teacher rather than be dismissed" (*Juul*, 76 AD2d at 838).

" 'Parties cannot accept benefits under a contract fairly made and at the same time question its validity' " (*R.A.C. Holding v City of Syracuse*, 258 AD2d 877, 878, quoting *Svenska Taendsticks Fabrik Aktiebolaget v Bankers Trust Co.*, 268 NY 73, 81). Inasmuch as the record establishes that the *Juul* agreement was fairly made, we conclude that petitioner is estopped from challenging its validity, including the waiver of her right to tenure by estoppel contained therein (see *id.*; see also *Lordi v County of Nassau*, 20 AD2d 658, 659-660, *affd* 14 NY2d 699; *Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13, *lv denied* 12 NY3d 715).

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

All concur except FAHEY, J., who concurs in the result in the following Memorandum: I respectfully concur in the result reached by the majority, namely, the affirmance of the judgment granting respondents' motion to dismiss the petition. I agree with petitioner and the majority that a *Juul* agreement (see *Matter of Juul v Board of Educ. of Hempstead School Dist. No. 1*, 76 AD2d 837, 838, *affd for reasons stated* 55 NY2d 648, 649) not approved by a school board is an impermissible abdication of a school board's responsibility to act as trustee (see Education Law § 1710) and manager (see § 1804 [1]) of the school district. I write separately, however, because unlike the majority I conclude that a *Juul* agreement is an employment contract and should be characterized as such.

The agreement at issue here had a distant genesis in the agreement before the Second Department and the Court of Appeals in *Juul*. There, a teacher nearing the end of his probationary period was offered an additional year of probation by the school board in exchange for his agreement to waive his tenure rights (*id.* at 837).

The teacher signed an agreement that, according to the record on appeal in *Juul*, was approved by the school board, and during the next school year the teacher was informed by the district superintendent of that administrator's intent to recommend that the teacher be denied tenure (*id.* at 837-838).

The teacher subsequently commenced a CPLR article 78 proceeding contending that the subject agreement was a nullity. The Second Department rejected that contention, concluding that "under certain circumstances a probationary teacher who is aware that a board of education intends to deny him tenure[] may validly waive his right to tenure and be employed for an additional year without acquiring tenure as a *quid pro quo* for reevaluation and reconsideration of the tenure determination at the end of the extra year" (*id.* at 838). The Second Department determined that, "in [those] circumstances, [the teacher's] open, knowing and voluntary waiver is valid and should be enforced" (*id.* [emphasis added]; see *Matter of Feinerman v Board of Coop. Educ. Servs. of Nassau County*, 48 NY2d 491, 496-497 [holding that a probationary teacher may waive an expectation of tenure]), and the Court of Appeals subsequently affirmed for reasons stated at the Second Department (55 NY2d 648).

Although the Education Law does not define an employment contract (see § 2), Education Law § 3011 (1) supports respondents' position that the *Juul* agreement is not an employment contract because it describes some of the terms of an employment contract, and the agreement at issue does not address all of those terms. Section 3011 (1) concerns the employment of teachers and requires a school board employing a teacher to cause a written contract to be made with that teacher "detail[ing] the agreement between the parties, and particularly *the length of the term of employment, the amount of compensation and the time when such compensation shall be due and payable*" (emphasis added). The agreement at issue considers an extension of petitioner's probationary period, but does not address any issue of petitioner's compensation.

The fact remains that the obvious and direct effect of the agreement at issue was to secure and extend petitioner's employment with respondent Pittsford Central School District (PCSD), and I thus conclude that it is an employment contract that includes a waiver. As a practical matter, based on the intent of respondent Mary Alice Price, the PCSD superintendent (Superintendent), not to recommend petitioner for tenure at the end of petitioner's third probationary year, petitioner would have been terminated had she not signed the agreement at issue (see *Matter of Yanoff v Commissioner of Educ. of State of N.Y.*, 66 AD2d 919, 920, *lv denied* 47 NY2d 711 ["(T)he board of education may not grant tenure in the absence of a positive recommendation of the Superintendent"]; see also Education Law § 3031).

Like the majority and as noted, I further conclude that a *Juul* agreement not approved by a school board is an impermissible abdication of a school board's responsibility to act as trustee (see Education Law § 1710) and manager (see § 1804 [1]) of the school

district. It is beyond the power of a board of education to surrender those duties conferred upon it by the Education Law (see e.g. *Board of Educ., Great Neck Union Free School Dist. v Areman*, 41 NY2d 527, 533 [recognizing that "a board of education has the right to inspect teacher personnel files and has no power to bargain away such right"]; *Matter of Cohoes City School Dist. v Cohoes Teachers Assn.*, 40 NY2d 774, 777 ["(T)he authority and responsibility vested in a school board under the several provisions of the Education Law to make tenure decisions cannot be relinquished"]), and contracting with and employing teachers is one of the powers of a board of education (see § 1709 [16]).

During a probationary period, a teacher is an at-will employee whose services may be terminated at any time (see *Haviland v Yonkers Pub. Schools*, 21 AD3d 527, 529). Pursuant to the Education Law, however, the termination of such an employee is contingent upon the recommendation of the superintendent (see § 3012 [1] [a] ["The service of a person appointed to (a probationary position referenced in that section) may be discontinued at any time during such probationary period, *on the recommendation of the superintendent of schools, by a majority vote of the board of education or the trustees of a common school district*" (emphasis added)]; *Appeal of Janes*, 33 Ed Dept Rep 6 [Decision No. 12,957] ["Education Law § 3012 provides that the services of a probationary teacher may be discontinued at any time during the probationary appointment *upon recommendation of the superintendent*" (emphasis added)]). Here, through the agreement at issue the Superintendent granted petitioner an extra year of probation at the conclusion of her appointed probation period of three years without the knowledge and approval of the Board and without taking a position before the Board on her tenure status (compare § 3012 [1] [a] [providing for a three-year probationary period] with § 3012 [2] [requiring the superintendent to recommend or deny tenure "(a)t the expiration of the probationary term of a person appointed for such term" (emphasis added)]). In doing so, the Superintendent effectively denied the Board, i.e., the body that controls the employment of teachers, the opportunity to determine whether to override the Superintendent's recommendation to extend petitioner's probationary appointment and continue its investment in petitioner as a probationary employee, or to deny petitioner tenure at that juncture and pursue other means of filling her position.

Put differently, when the three-year probationary period to which petitioner was entitled under Education Law § 3012 (1) (a) expired, the Superintendent, not the Board, made the decision to lengthen the probationary period and employ petitioner for a fourth year. I conclude that the administrative handling and approval of a *Juul* agreement is contrary to the Education Law's proviso that "[t]he . . . board of education of every union free school district shall have power, and it shall be its duty . . . [t]o contract with and employ such persons as by the provisions of this chapter are qualified teachers" (§ 1709 [16]). To hold otherwise would countenance the usurpation of the power of an elected body by the bureaucracy that it is intended to supervise.

Having concluded that the agreement at issue is an employment contract, I now turn to respondents' contention that petitioner is estopped from disaffirming it despite the Board's failure to authorize or ratify it. " '[T]he doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances' " (*Townley v Emerson Elec. Co.*, 269 AD2d 753, 753-754), and " '[e]stoppel is ordinarily a question of fact for trial' " (*Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 893). Under these circumstances, however, the issue of the applicability of the doctrine of equitable estoppel can be resolved as a matter of law against petitioner for the reasons set forth by the majority.

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

1073

**KA 11-00583**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DEQWAUN L. NEWKIRK, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 21, 2010. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon 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 a nonjury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the evidence is legally insufficient to establish that he possessed the loaded firearm found by the police in the basement of a suspected drug house in which he was located when the police executed a search warrant (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject that contention. The evidence at trial established that defendant was the only person in the house when the police entered, and an officer testified that, immediately before the police gained entry, he heard the sounds of someone inside running down and then up the basement stairs. When questioned by the police, defendant admitted that he had purchased the firearm in question, a photograph of which was on the screen saver of defendant's cell phone, and it was later determined that defendant's DNA was on the firearm. That evidence, when viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that defendant possessed the firearm (*see* § 10.00 [8]; *People v Manini*, 79 NY2d 561, 573-574; *People v Sierra*, 45 NY2d 56, 59-60).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1078

**KA 07-01569**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LUIS A. VELAZQUEZ, JR., DEFENDANT-APPELLANT.

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EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DONALD M. THOMPSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered June 8, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree (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 trial of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and two counts of criminal possession of a weapon in the third degree (§ 265.02 [1], [former (4)]). Defendant failed to preserve for our review his contention that County Court erred in submitting to the deliberating jury, upon its request, a written portion of the court's final instructions (see CPL 470.05 [2]; *People v Williams*, 8 AD3d 963, 964, *lv denied* 3 NY3d 683, *cert denied* 543 US 1070), and we reject defendant's contention that the court thereby committed a "mode of proceedings error" such that preservation is not required (see generally *People v Becoats*, 17 NY3d 643, 650-651, *cert denied* \_\_\_ US \_\_\_, 132 S Ct 1970; *People v Mehmedi*, 69 NY2d 759, 760, *rearg denied* 69 NY2d 985).

In any event, we conclude that defendant's contention lacks merit. The jury sent a note to the court requesting "the description of each count and the law that applies to the count." The court discussed the note with counsel outside the presence of the jury, and both defense counsel and the prosecutor consented to the submission, in writing, of the court's "charges on the five indicted counts" should the jury make such a request. After the court clarified the jury's request through the foreperson, the court provided the written

portion of the charge to the jury, with defendant's consent. That was a proper response to the jury's request (see *People v Owens*, 69 NY2d 585, 590-591; see also *People v Martell*, 91 NY2d 782, 785-786; *People v Johnson*, 81 NY2d 980, 981-982).

Defendant further contends that the court erred in failing to poll the jury on the issue whether they wanted the charges orally re-read or submitted to them in writing, rather than relying on the foreperson's statement that the jury preferred to have the charges in writing. Because defendant did not object to the court's reliance on the foreperson's statement or request that the jury be polled, his contention is not preserved for our review (see CPL 470.05 [2]). Even if defendant objected, however, we perceive no abuse of discretion by the court in relying upon the foreperson's statement (see *People v Jones*, 52 AD3d 1252, 1252, *lv denied* 11 NY3d 738), inasmuch as the foreperson acts as the "jury's spokesperson" (*People v Burgess*, 280 AD2d 264, 265, *lv denied* 96 NY2d 798). We note that the foreperson's statement that the jury wished to receive the court's charge in writing was made in open court, in the presence of the entire jury, and the record does not reflect that any of the jurors expressed disagreement with the foreperson's statement.

We also reject defendant's contention that the conviction of intentional murder and criminal possession of a weapon in the second degree is not supported by legally sufficient evidence. A conviction is supported by legally sufficient evidence when, viewing the facts in the light most favorable to the People, " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349; see generally *People v Bleakley*, 69 NY2d 490, 495). A witness who knew defendant testified that she saw him standing over the bleeding victim, gun in hand, almost immediately after the shots were fired. When that witness told defendant that she was going to call the police, defendant pointed the gun at her before he fled. Defendant's subsequent flight to Massachusetts is evidence of consciousness of guilt and further supports the jury's finding of guilt (see generally *People v Yazum*, 13 NY2d 302, 304-305, *rearg denied* 15 NY2d 679). Finally, the fact that the victim was shot in the head, neck and chest, and that several shots were fired from close range, established the intent to kill element of murder in the second degree. We further conclude that, viewing the evidence in light of the elements of the crimes of intentional murder and criminal possession of a weapon in the second degree as charged to the jury (see *Danielson*, 9 NY3d at 349), the verdict is not against the weight of the evidence with respect to those crimes (see generally *Bleakley*, 69 NY2d at 495).

We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1079

**CAF 11-01914**

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

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IN THE MATTER OF DARRELL A. GUNN,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LYNN M. QUINN, RESPONDENT-RESPONDENT.

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

LYNN M. QUINN, RESPONDENT-RESPONDENT PRO SE.

DONALD VANSTRY, ATTORNEY FOR THE CHILD, SYRACUSE, FOR JAYDEN K.Q.

---

Appeal from an order of the Family Court, Onondaga County (Gina M. Glover, R.), entered September 8, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner father appeals from an order dismissing his petition seeking visitation with his son. The Referee dismissed the petition for "lack of jurisdiction." The evidence in the record establishes that respondent mother did not sign the stipulation referring the matter to the Referee to hear and determine the matter. Thus, we agree with the father that the Referee was without jurisdiction to dismiss the petition (*see Matter of Walker v Bowman*, 70 AD3d 1323, 1324; *see also* CPLR 2104). In light of our determination, we need not address the father's remaining contentions.

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1084

CAF 11-01903

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

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IN THE MATTER OF MALINDA A. PRINZING,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

PAUL G. GUCK AND DORIS M. GUCK,  
RESPONDENTS-RESPONDENTS.

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IN THE MATTER OF JASON R. GUCK,  
PETITIONER-RESPONDENT,

V

CARL E. PRINZING AND MALINDA A. PRINZING,  
RESPONDENTS-APPELLANTS.

-----  
IN THE MATTER OF PAUL G. GUCK,  
PETITIONER-RESPONDENT,

V

CARL E. PRINZING AND MALINDA A. PRINZING,  
RESPONDENTS-APPELLANTS.  
(APPEAL NO. 1.)

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TYSON BLUE, MACEDON, FOR PETITIONER-APPELLANT AND RESPONDENTS-  
APPELLANTS.

ELIZABETH A. SAMMONS, ATTORNEY FOR THE CHILDREN, WILLIAMSON, FOR DAVID  
P. AND ALYSSA P.

-----  
Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered September 19, 2011. The order, among other things, granted Paul G. Guck, Doris M. Guck and Jason R. Guck visitation with the subject children.

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

Same Memorandum as in *Matter of Guck v Prinzing* (\_\_\_ AD3d \_\_\_ [Nov. 16, 2012]).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1085

CAF 12-00067

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

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IN THE MATTER OF JASON R. GUCK,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

MALINDA A. PRINZING AND CARL E. PRINZING,  
RESPONDENTS-APPELLANTS.

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IN THE MATTER OF PAUL G. GUCK,  
PETITIONER-RESPONDENT,

V

MALINDA A. PRINZING AND CARL E. PRINZING,  
RESPONDENTS-APPELLANTS.  
(APPEAL NO. 2.)

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TYSON BLUE, MACEDON, FOR RESPONDENTS-APPELLANTS.

ELIZABETH A. SAMMONS, ATTORNEY FOR THE CHILDREN, WILLIAMSON, FOR DAVID  
P. AND ALYSSA P.

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Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered January 4, 2012. The order adjudged that respondent Malinda A. Prinzing is in civil contempt and sentenced her to 60 days in jail.

It is hereby ORDERED that said appeal by respondent Carl E. Prinzing is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: In appeal No. 1, respondent parents appeal from an order that awarded visitation of the parents' two children to the mother's teenage son and the mother's parents, and in appeal No. 2 they appeal from an order that sentenced the mother to 60 days in jail for civil contempt based upon a prior finding that she willfully failed to obey the visitation order. We note at the outset that, because the father is not aggrieved by the contempt order against the mother, his appeal from the order in appeal No. 2 is dismissed (see CPLR 5511). The parents' sole contention in appeal No. 1 and the mother's sole contention in appeal No. 2 is that Domestic Relations Law § 72, which allows grandparents to commence a special proceeding seeking visitation with infant grandchildren, is unconstitutional as applied to this case because the subject children's family is intact

and properly functioning. Because the parents did not raise that contention in Family Court, it is unpreserved for our review (see *Melahn v Hearn*, 60 NY2d 944, 945; *Matter of State of New York v Company*, 77 AD3d 92, 101, *lv denied* 15 NY3d 713). In fact, the parents initially consented to an order providing for grandparent visitation, and they acknowledged in open court that it was in the children's best interests to spend time with their grandparents, with whom the children had previously resided. By consenting to the visitation order, the parents waived any challenge to the applicability of Domestic Relations Law § 72.

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1096

**KA 10-02498**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

LAQUANT K. ASHER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered August 24, 2010. 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 modified on the law by reducing the conviction of assault in the second degree (Penal Law § 120.05 [7]) to assault in the third degree (§ 120.00 [1]) and vacating the sentence, and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Monroe County, for sentencing on the conviction of assault in the third degree (see *People v Skinner*, 94 AD3d 1516).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1099

**KA 10-01864**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES BEARD, ALSO KNOWN AS "POPS,"  
DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered March 9, 2010. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts each of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]), defendant contends that the evidence is legally insufficient to support his conviction. Defendant contends that the People failed to establish that he had constructive possession of the controlled substance (drugs) because there is no evidence that he controlled the premises where the drugs were sold or that he exercised control over the unknown suspect who participated in the drug sales. That contention is unpreserved for our review inasmuch as it was not specifically raised in support of defendant's motion for a trial order of dismissal (*see People v Latorre*, 94 AD3d 1429, 1429-1430, *lv denied* 19 NY3d 998; *People v Jones*, 92 AD3d 1218, 1218, *lv denied* 19 NY3d 962; *see generally People v Gray*, 86 NY2d 10, 19). In any event, that contention lacks merit because the evidence is legally sufficient to establish that defendant "exercised 'dominion or control' over the [drugs] by a sufficient level of control . . . over the [unknown suspect] from whom the [drugs were] seized" (*People v Manini*, 79 NY2d 561, 573, quoting Penal Law § 10.00 [8]; *see* Penal Law § 220.39). There is likewise no merit to defendant's further contention, which is preserved for our review, that the evidence is legally insufficient to

establish defendant's identity (see *Jones*, 92 AD3d at 1218). "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Hines*, 97 NY2d 56, 62, rearg denied 97 NY2d 678 [internal quotation marks omitted]; see generally *People v Bleakley*, 69 NY2d 490, 495). Here, we conclude that the trial evidence, although largely circumstantial, could lead a rational person to conclude that defendant was the individual who arranged the drug sales (see *Latorre*, 94 AD3d at 1430; *Jones*, 92 AD3d at 1218). Further, although a different result would not have been unreasonable (see *People v Danielson*, 9 NY3d 342, 348; *Bleakley*, 69 NY2d at 495), we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (see *Danielson*, 9 NY3d at 349), the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that he is entitled to a new trial because County Court violated his right to counsel. "Under our State and Federal Constitutions, an indigent defendant in a criminal case is guaranteed the right to counsel" (*People v Medina*, 44 NY2d 199, 207; see US Const, 6th Amend; NY Const, art I, § 6; *People v Linares*, 2 NY3d 507, 510). That "right does not begin and end with the assignment of counsel" (*Linares*, 2 NY3d at 510). Rather, trial courts bear the "ongoing duty" to " 'carefully evaluate serious complaints about counsel' " (*id.* at 510, quoting *Medina*, 44 NY2d at 207; see *People v Sides*, 75 NY2d 822, 824). Although "[t]he right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option[,] . . . the right to be represented by counsel of one's own choosing is a valued one, and a defendant may be entitled to new assigned counsel upon showing 'good cause for a substitution' " (*Sides*, 75 NY2d at 824, quoting *Medina*, 44 NY2d at 207). Thus, trial courts are obligated to conduct, at the very least, a " 'minimal inquiry' " when a defendant voices " 'seemingly serious' " complaints about his or her assigned defense counsel (*People v Porto*, 16 NY3d 93, 100, quoting *Sides*, 75 NY2d at 824-825).

Here, we conclude that defendant articulated complaints about his assigned counsel that were sufficiently serious to trigger the court's duty to engage in an inquiry regarding those complaints (see *Sides*, 75 NY2d at 824-825). Before jury selection, defendant advised the court that he was not comfortable proceeding with his assigned attorney because he had never spoken to the attorney before that time, he had not been informed that his trial was commencing that day, and he had not been informed of certain pretrial hearings conducted in his absence. The court interrupted defendant and engaged in an off-the-record discussion with the attorneys. Thereafter, the court explained to defendant that the trial was "going to have to go forward" with his assigned counsel because "[t]he District Attorney's Office has brought up a confidential witness all the way from the State of Texas and

they're ready to go today," the District Attorney's office had "spent a lot of money" to secure the confidential witness, and there were 50 prospective jurors in the courthouse. The court then proceeded to explain the jury selection process and, when the court asked defendant whether he would permit defense counsel to handle certain juror issues at the bench, outside of defendant's presence, defendant reiterated that he did not "feel comfortable" with defense counsel. The court replied that "if [defendant could] afford to hire [his] own attorney, [he could] do so, but if [he could not] afford to do that, then the Public Defender's Office . . . has designated [defense counsel] as [his] trial attorney and so [defense counsel would] be [his] trial attorney."

Defendant's allegations—in particular, the allegation that he had never previously spoken to his assigned counsel and that he was unaware his trial was commencing that day—are serious on their face and should not have been "summarily dismiss[ed]" by the court, especially in light of the fact that defendant's allegations are either supported by or uncontradicted by the record (*Sides*, 75 NY2d at 825; *cf. People v Augustine*, 89 AD3d 1238, 1240-1241, *lv denied* 19 NY3d 957). Indeed, the record established that an assistant public defender other than defendant's assigned counsel met with defendant before trial and reviewed with him critical evidence, i.e., the police surveillance videotapes, prepared an extensive omnibus motion, and argued the motion. Additionally, the record does not contradict defendant's allegations that he was not apprised of a change in the trial date and that a hearing was conducted in his absence. Specifically, although the record establishes that defendant was present when the court initially scheduled the trial date, there is no evidence that he subsequently received notice of the change in the trial date. Moreover, the minutes of the court clerk indicate that an audibility hearing was held, but no transcript of that proceeding is included in the record. Thus, there is no evidence that defendant was present at that hearing.

We therefore conclude, based on the record before us, that the court violated defendant's fundamental right to counsel by failing to make any inquiry concerning his serious complaints regarding his assigned counsel (*see Sides*, 75 NY2d at 824-825; *cf. People v Haith*, 44 AD3d 369, 370, *lv denied* 9 NY3d 1034; *People v Reese*, 23 AD3d 1034, 1035, *lv denied* 6 NY3d 779; *People v England*, 19 AD3d 154, 154-155, *lv denied* 5 NY3d 805). The court did not, for example, ask defendant to explain his position or ask defense counsel, on the record, to address defendant's allegations that they had never met or that defendant had not been advised of the new trial date. Instead, as noted above, the court advised defendant that the trial would proceed with his assigned counsel because the District Attorney's office had arranged for the appearance of a confidential witness, who had traveled from Texas, and prospective jurors were waiting. While "[t]he court might well have found upon limited inquiry that defendant's [complaints regarding his assigned counsel were] without genuine basis, . . . it could not so summarily dismiss [his complaints]" (*Sides*, 75 NY2d at 825; *see People v Graham*, 169 AD2d 512, 512-513, *lv denied* 77 NY2d 906; *see generally People v Branham*, 59 AD3d 244, 245; *People v Rodriguez*, 46 AD3d 396,

397, *lv denied* 10 NY3d 844).

We reject the People's contention that the court had no duty to conduct an inquiry regarding defendant's complaints because his assertions were "conclusory" (*cf. People v Watkins*, 77 AD3d 1403, 1404, *lv denied* 15 NY3d 956). To the contrary, defendant's complaints were highly specific and factual in nature. Additionally, we note that the court failed to give defendant an opportunity to explain his complaints. Indeed, the court cut defendant off, admonished him not to interrupt, and advised him that, unless he could afford to hire his own attorney, there would be no substitution of counsel (*see Branham*, 59 AD3d at 245; *Rodriguez*, 46 AD3d at 397; *cf. People v Rodriguez*, 166 AD2d 903, 904, *lv denied* 77 NY2d 910).

In light of our conclusion, there is no need to address defendant's remaining contentions.

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

1114

CAF 11-02095

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

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IN THE MATTER OF FRANK ODDO,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

NATHANIA COLLINS, RESPONDENT-APPELLANT.

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LEONARD G. TILNEY, JR., LOCKPORT, FOR RESPONDENT-APPELLANT.

THOMAS J. CASERTA, JR., NIAGARA FALLS, FOR PETITIONER-RESPONDENT.

ANGELA STAMM-PHILIPPS, ATTORNEY FOR THE CHILD, LOCKPORT, FOR AVIANNA O.

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Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered June 15, 2011. The order, among other things, awarded petitioner residential custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Respondent mother appeals from an order modifying the parties' existing custody arrangement by, inter alia, transferring residential custody of the child from the mother to petitioner father. In the absence of an in camera hearing with the child (*see Matter of Lincoln v Lincoln*, 24 NY2d 270, 271-272), we are unable to determine whether a change in custody is in the best interests of the child. We therefore remit the matter to Supreme Court to give the court the opportunity, at a minimum, to conduct a *Lincoln* hearing with the child, who is now old enough to provide insight as to her interaction with each of her parents in the home (*see Matter of Tamara FF. v John FF.*, 75 AD3d 688, 690; *Matter of Flood v Flood*, 63 AD3d 1197, 1199). We note that the order entered June 15, 2011 remains in effect pending the court's order upon further proceedings (*see Matter of Matthews v Matthews*, 56 AD3d 1268, 1269).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1119

CA 11-00590

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

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

V

MEMORANDUM AND ORDER

EDWARD TREAT, RESPONDENT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (William D. Walsh, A.J.), entered December 22, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order continued the confinement of respondent in a secure treatment facility.

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

Memorandum: Respondent was previously deemed to be a dangerous sex offender requiring civil confinement and was committed to a secure treatment facility (see Mental Hygiene Law § 10.01 *et seq.*). Respondent now appeals from an order, entered after an evidentiary hearing, determining that he should remain in confinement (see § 10.09 [d]). We affirm.

We reject the contention of respondent that Supreme Court's determination that he continues to be a dangerous sex offender requiring civil confinement is not supported by the requisite clear and convincing evidence (see Mental Hygiene Law § 10.09 [h]). Two expert reports admitted in evidence established that respondent continues to be a dangerous sex offender with a mental abnormality who should remain confined and, other than respondent's self-serving testimony at the hearing, there was no evidence to the contrary. Moreover, respondent did not preserve for our review his contention that good cause was not shown for the court's decision to allow the expert reports to be admitted in evidence without also requiring that the experts who generated those reports testify (see generally § 10.08 [g]; *Matter of State of New York v Reeve*, 87 AD3d 1378, 1378, 1v denied 18 NY3d 804; *Matter of State of New York v Muench*, 85 AD3d 1581, 1582), and we decline to exercise our power to review that contention in the interest of justice (*cf. Muench*, 85 AD3d at 1582).

Viewing the evidence, the law, and the circumstances of this case as a whole and at the time of the representation, we further conclude that respondent received effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147; *Matter of State of New York v Company*, 77 AD3d 92, 100, lv denied 15 NY3d 713).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1130

**KA 07-01554**

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND VALENTINO, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID BINION, DEFENDANT-APPELLANT.

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KIMBERLY J. CZAPRANSKI, INTERIM CONFLICT DEFENDER, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered November 29, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree (four counts), attempted criminal possession of a weapon in the third degree and criminal possession of a weapon in the fourth 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 four counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1], [former (4)]), one count of attempted criminal possession of a weapon in the third degree (§§ 110.00, 265.02 [1]) and two counts of criminal possession of a weapon in the fourth degree (§ 265.01 [former (4)]). The conviction arose from defendant's possession of guns in his residence and a vehicle in which he was a passenger. During the initial police investigation of a report of shots fired in the vicinity of defendant's residence, a police sergeant and a police officer each had a face-to-face conversation with a different unidentified citizen informant. Facts developed in the investigation and the information provided by the two unidentified citizen informants provided the basis for the issuance of a search warrant for defendant's residence.

Defendant contends the search warrant was not issued upon probable cause and thus that County Court erred in refusing to suppress the guns recovered from his residence by the police. Contrary to defendant's contention concerning the warrant application, the court properly denied his motion for a *Franks/Alfinito* hearing (see *Franks v Delaware*, 438 US 154; *People v Alfinito*, 16 NY2d 181) because he failed to make "a substantial preliminary showing that a

false statement knowingly and intentionally, or with reckless disregard of the truth, was included by the affiant in the warrant affidavit, and . . . [that such] statement [was] necessary to the finding of probable cause" (*Franks*, 438 US at 155; see *People v Tambe*, 71 NY2d 492, 504-505). Additionally, at the *Darden* hearing, the People established the unavailability of the informants despite diligent efforts to locate them (see *People v Carpenito*, 80 NY2d 65, 68). Thereafter, the court properly considered extrinsic evidence of the informants' existence in reaching its determination that the two informants existed (see *People v Fulton*, 58 NY2d 914, 916; cf. *People v Phillips*, 242 AD2d 856, 856). We note that the court's assessment of the witnesses' credibility at the *Darden* hearing is entitled to great deference (see generally *People v Prochilo*, 41 NY2d 759, 761).

Contrary to defendant's further contention, we conclude that the hearsay information supplied in the search warrant affidavit satisfied the two prongs of the *Aguilar-Spinelli* test and that the search warrant was issued upon probable cause (see generally *People v DiFalco*, 80 NY2d 693, 696-699). Consequently, we reject defendant's contention that the guns recovered from his residence should have been suppressed.

In contending that the court erred in refusing to suppress the guns found in the vehicle in which he was a passenger, defendant asserts that the stop of the vehicle, the pat frisk of his person, his detention at the scene, the search of the vehicle and his arrest were improper. Contrary to defendant's contention, a traffic stop is lawful where, as here, "a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, . . . [regardless of] the primary motivation of the officer" (*People v Robinson*, 97 NY2d 341, 349). We further conclude that defendant's removal from the vehicle and the pat frisk of his person were justified. Based on concern for officer safety, the police may properly " 'require a driver who commits a traffic violation and any passenger to exit the vehicle even though they lack any particularized reason for believing the driver possesses a weapon' " (*People v Robinson*, 74 NY2d 773, 774, cert denied 493 US 966). Here, at the time of the traffic stop, the police observed the furtive movements of the driver and defendant in the vehicle and, upon identifying defendant, they were aware that other police officers were simultaneously executing a search warrant for guns at his residence. "Thus, '[c]onsidering the totality of the circumstances . . . , [we conclude that] there was an ample measure of reasonable suspicion necessary to justify' " the removal of defendant from the vehicle and the limited frisk for weapons (*People v Goodson*, 85 AD3d 1569, 1570, lv denied 17 NY3d 953; see *Robinson*, 74 NY2d at 774-775).

We conclude that defendant's detention at the scene of the traffic stop was lawful and did not constitute a de facto arrest. Defendant was placed in the back seat of a patrol vehicle without handcuffs after the police observed him leaving a residence subject to a search warrant, and they observed his furtive movements and those of the driver. The nonarrest detention was necessary due to the

suspicion of criminal activity, pursuant to which the police sought the consent of the vehicle's owner to search the vehicle (see generally *People v Abdur-Rahman*, 278 AD2d 884, 885, lv denied 96 NY2d 825). Furthermore, the police action in detaining defendant was reasonable based on the need for officer safety (see *People v Drake*, 93 AD3d 1158, 1160) and the needs of law enforcement to ensure that defendant did not interfere with execution of the search warrant (see generally *People v Jackson*, 88 AD3d 451, 451-452, lv denied 18 NY3d 884). Upon obtaining the consent of the vehicle owner to search the vehicle (see *People v Quagliata*, 53 AD3d 670, 671, lv denied 11 NY3d 834; see also *People v Calloway*, 71 AD3d 1493, 1493, lv denied 15 NY3d 748), the police recovered two handguns from the interior of the vehicle, whereupon "reasonable suspicion ripened into probable cause to arrest defendant" (*People v Coon*, 212 AD2d 1009, 1010, lv denied 85 NY2d 937; see *People v Williams*, 17 AD3d 1043, 1044, lv denied 5 NY3d 811).

Also contrary to defendant's contention, the court did not err in reopening the suppression hearing to clarify the timing of the vehicle owner's consent to search the vehicle before rendering a decision on defendant's suppression motion (see *People v Ramirez*, 44 AD3d 442, 443, lv denied 9 NY3d 1008; *People v Cestano*, 40 AD3d 238, 238-239, lv denied 9 NY3d 921).

We further conclude that the court properly admitted in evidence the guns recovered from the vehicle. "Mere identification by one familiar with the object[s] . . . will be sufficient [to authenticate evidence] 'when the object[s] possess[ ] unique characteristics or markings' and any material alteration would be readily apparent" (*People v McGee*, 49 NY2d 48, 60), and there were no testimonial, out-of-court statements that would implicate defendant's right of confrontation (cf. *Bullcoming v New Mexico*, \_\_\_ US \_\_\_, \_\_\_, 131 S Ct 2705, 2710).

Finally, the imposition of consecutive sentences was not illegal given that two distinct acts were involved (see *People v Laureano*, 87 NY2d 640, 643; *People v Brown*, 80 NY2d 361, 363-364).

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

1132

CAF 11-00654

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND VALENTINO, JJ.

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IN THE MATTER OF YASIN TISDALE,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JUDY ANDERSON, RESPONDENT-APPELLANT.  
(APPEAL NO. 1.)

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MINDY L. MARRANCA, BUFFALO, FOR RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR NASIR Y.T.  
AND NADIA S.-Y.T.

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Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered February 7, 2011 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner sole custody of the parties' children.

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

Memorandum: Yasin Tisdale, the petitioner in appeal No. 1 and the respondent in appeal No. 2 (father), commenced the proceeding in appeal No. 1 pursuant to Family Court Act article 6 seeking to modify the custody provisions in a prior order by awarding him sole custody of the parties' two children. Judy Anderson, the respondent in appeal No. 1 and the petitioner in appeal No. 2 (mother), filed the petition in appeal No. 2 seeking sole custody of the children. By the order in appeal No. 1, Family Court granted the father's request for a temporary change in the residence of the children with the mother in New York to the father in Virginia and determined, following a full evidentiary hearing, that it was in the children's best interests that the father have sole custody and that they reside with him in Virginia. By the order in appeal No. 2, the court dismissed the mother's petition.

Even assuming, arguendo, that the court erred in appeal No. 1 by granting the father's request for a temporary change in the physical residence of the children without conducting an evidentiary hearing, we conclude that any such error is harmless because the court subsequently conducted the requisite hearing (*see Matter of Owens v Garner*, 63 AD3d 1585, 1585-1586; *Matter of Darryl B.W. v Sharon M.W.*,

49 AD3d 1246, 1247).

With respect to the court's custody determination in appeal Nos. 1 and 2, we conclude that "[t]he mother . . . failed to preserve for our review her contention that the father failed to establish a change of circumstances warranting review of the prior order" (*Matter of Canfield v McCree*, 90 AD3d 1653, 1654; see *Matter of Deegan v Deegan*, 35 AD3d 736, 736-737). We note in any event that, "in her petition, the mother alleged that there had been such a change of circumstances" (*Stilson v Stilson*, 93 AD3d 1222, 1223). Contrary to the mother's further contention, there is a sound and substantial basis in the record to support the court's determination following the hearing that it was in the children's best interests to award sole custody to the father, and thus that determination will not be disturbed (see *Capodiferro v Capodiferro*, 77 AD3d 1449, 1450; *Owens*, 63 AD3d at 1586; *Wideman v Wideman*, 38 AD3d 1318, 1319).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1133

**CAF 11-00655**

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND VALENTINO, JJ.

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IN THE MATTER OF JUDY ANDERSON,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

YASIN TISDALE, RESPONDENT-RESPONDENT.  
(APPEAL NO. 2.)

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MINDY L. MARRANCA, BUFFALO, FOR PETITIONER-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR NASIR Y.T.  
AND NADIA S.-Y.T.

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Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered February 7, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of custody.

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

Same Memorandum as in *Matter of Tisdale v Anderson* (\_\_\_ AD3d \_\_\_ [Nov. 16, 2012]).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

**1142**

**CA 12-00061**

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND VALENTINO, JJ.

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KAREN MCGRATH AND STEVEN FOLEY,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOWN OF IRONDEQUOIT, DEFENDANT-APPELLANT.  
(APPEAL NO. 1.)

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LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

MICHAEL J. TUOHEY, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered July 13, 2011. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Memorandum: These consolidated appeals arise from an action for, inter alia, private nuisance, which plaintiffs commenced to recover damages arising from the cost of repairs to their parcel of real property, as well as the diminution of the value of their property. Plaintiffs alleged that defendant's adjacent parcel of property collapsed, causing the subsidence of plaintiffs' property. Defendant contends in appeal No. 1 that Supreme Court erred in denying that part of its motion for summary judgment dismissing the private nuisance cause of action, and defendant contends in appeal No. 2 that the court erred in granting plaintiffs' motion for leave to amend their complaint.

We reject defendant's contention in appeal No. 1 that the court should have granted that part of its motion for summary judgment dismissing the private nuisance cause of action. In support of that part of the motion, defendant contended that the sloped land was a naturally occurring event for which it could not be held liable, and that it was immune from this type of action pursuant to the municipal immunity doctrine set forth in *Weiss v Fote* (7 NY2d 579, 584, rearg denied 8 NY2d 934). We agree with the court that defendant failed to meet its initial burden on either prong of the motion (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Defendant's further contentions with respect to appeal No. 1 are not properly before us

inasmuch as they are raised for the first time on appeal (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Contrary to the contention of defendant in appeal No. 2, the court did not abuse its discretion in granting plaintiffs' motion for leave to amend their complaint inasmuch as defendant failed to demonstrate that it will be prejudiced by the amendment, and the amendment is not palpably insufficient on its face (see *Hogarth v City of Syracuse* [appeal No. 1], 238 AD2d 887, 887, *lv dismissed* 90 NY2d 935, *lv denied* 93 NY2d 812).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1143

CA 12-00062

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND VALENTINO, JJ.

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KAREN MCGRATH AND STEVEN FOLEY,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOWN OF IRONDEQUOIT, DEFENDANT-APPELLANT.  
(APPEAL NO. 2.)

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LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

MICHAEL J. TUOHEY, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 12, 2011. The order granted the motion of plaintiffs for leave to amend the complaint.

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

Same Memorandum as in *McGrath v Town of Irondequoit* ([appeal No. 1] \_\_\_ AD3d \_\_\_ [Nov. 16, 2012]).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1146

CA 12-00302

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND VALENTINO, JJ.

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BRIAN W. HINT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ALFRED L. VAUGHN AND MELANIE P. HEMENWAY,  
DEFENDANTS-APPELLANTS.

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

WILLIAM MATTAR, P.C., WILLIAMSVILLE (APRIL J. ORLOWSKI OF COUNSEL),  
FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Wyoming County (Michael F. Griffith, A.J.), entered October 26, 2011 in a personal injury action. The order denied the motion of defendants 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, as amplified by the bill of particulars, with respect to the permanent loss of use category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident when the vehicle he was driving was struck by a vehicle operated by defendant Alfred L. Vaughn and owned by defendant Melanie P. Hemenway. Defendants thereafter moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident within the meaning of Insurance Law § 5102 (d), and Supreme Court denied the motion in its entirety. We agree with defendants that they established as a matter of law that plaintiff did not sustain a serious injury under the permanent loss of use category, i.e., he did not sustain a "total loss of use" of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 297), and we therefore modify the order accordingly. We further conclude, however, that the court properly denied defendants' motion with respect to the remaining categories of serious injury allegedly sustained by plaintiff. Although defendants met their initial burden of proof with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury (see *Roll v Gavitt*, 77 AD3d 1412, 1412), plaintiff raised triable issues of

fact in opposition to the motion by submitting an affirmation from his treating physician and an affidavit from his treating chiropractor, both of which contain the requisite objective medical findings (see generally *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351; *Chmiel v Figueroa*, 53 AD3d 1092, 1093). We further conclude that defendants failed to meet their initial burden of proof with respect to the 90/180-day category of serious injury inasmuch as the affirmed report of their examining neurologist did not specifically relate any of the neurologist's findings to that category for the relevant period of time (see *Scinto v Hoyte*, 57 AD3d 646, 647; *Daddio v Shapiro*, 44 AD3d 699, 700). Plaintiff's deposition testimony, which defendants also submitted in support of their motion, was insufficient to establish that plaintiff had no injury in the 90/180-day category (see *Scinto*, 57 AD3d at 647; *Greenidge v Righton Limo, Inc.*, 43 AD3d 1109, 1109-1110).

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

1148

KA 08-00330

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENLEY PECK, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered January 8, 2008. The appeal was held by this Court by order entered December 23, 2011, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (90 AD3d 1500). The proceedings were held and completed (Jeffrey R. Merrill, A.J.).

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 burglary in the third degree (Penal Law § 140.20). This Court previously held the case, reserved decision and remitted the matter to County Court "to conduct an inquiry to determine whether there was a legitimate basis for defendant's termination from the drug treatment program, including whether defendant's postplea arrests were without foundation" (*People v Peck*, 90 AD3d 1500, 1501). We conclude that, upon remittal, the court conducted a sufficient inquiry pursuant to *People v Outley* (80 NY2d 702, 713) to satisfy itself that defendant's postplea arrest in Camillus, New York had a legitimate basis and thus constituted a violation of the conditions of the drug treatment program and the plea agreement (see *People v Fiammegta*, 14 NY3d 90, 97; *People v Marshall*, 231 AD2d 893, 894-895, lv denied 89 NY2d 866). Inasmuch as we conclude that defendant's arrest in Camillus justified his removal from the drug treatment program, we need not address defendant's remaining contentions.

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1149

KA 12-00851

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

CORNELL B. WEATHERS, DEFENDANT-RESPONDENT.  
(APPEAL NO. 1.)

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

LESLIE R. LEWIS, NEW HARTFORD, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Barry M. Donalby, A.J.), dated September 14, 2011. The order granted that part of the motion of defendant to suppress certain physical evidence.

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

Memorandum: In each appeal, the People appeal from an order granting those parts of the respective motions of defendants seeking suppression of all of the physical evidence recovered from their residence (premises). We affirm. We conclude that Supreme Court properly determined that the police lacked exigent circumstances to enter the premises without a warrant (*see People v Hunter*, 92 AD3d 1277, 1280-1281; *see generally People v McBride*, 14 NY3d 440, 446, *cert denied* \_\_\_ US \_\_\_, 131 S Ct 327). The evidence at the suppression hearing established that the police received information from an informant that a suspect was going to the premises to purchase cocaine. The police observed that suspect, for whom they had a warrant to search his person and residence, enter the premises and then exit approximately five minutes later with another man. The other man drove away, and the suspect walked toward his residence. The police apprehended the suspect and arrested him. Upon executing the warrant, the police found cocaine on the suspect's person and at his residence. Thereafter, the police forcibly entered the premises without a warrant and secured the premises until a warrant could be obtained. A police investigator testified that the police entered the premises without a warrant because they were concerned that the occupants of the premises would dispose of any cocaine located there. At the time of the entry, however, the police had no reason to believe that anyone remained at the premises because the police waited approximately 30 minutes after the suspect's arrest before entering

the premises and did not keep the premises under surveillance during that time. Thus, there is no evidence that the police had "a reasonable belief that [any] contraband [was] about to be removed . . . [or] information indicating that the possessors of [any] contraband [were] aware that the police [were] on their trail" (*People v Lewis*, 94 AD2d 44, 49). Finally, we do not address the People's contention concerning the independent source theory, which is raised for the first time on appeal and thus is not properly before us (see *People v Johnson*, 64 NY2d 617, 619 n 2; *People v Dodt*, 61 NY2d 408, 416; see also *People v Hunter*, 17 NY3d 725, 727-728).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1150

**KA 12-00855**

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

ROBIN HARVEY, DEFENDANT-RESPONDENT.  
(APPEAL NO. 2.)

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

REBECCA L. WITTMAN, UTICA, FOR DEFENDANT-RESPONDENT.

---

Appeal from an order of the Supreme Court, Oneida County (Barry M. Donalby, A.J.), dated September 14, 2011. The order granted that part of the motion of defendant to suppress certain physical evidence.

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

Same Memorandum as in *People v Weathers* (\_\_\_ AD3d \_\_\_ [Nov. 16, 2012]).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1156

**KA 12-00749**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER T. WALKER, JR., DEFENDANT-APPELLANT.

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THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered May 26, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]), defendant contends that County Court abused its discretion in denying his recusal motion made at sentencing. Even assuming, arguendo, that defendant's contention survives his valid waiver of the right to appeal (*cf. People v Mahipat*, 49 AD3d 1243, 1244), we conclude that it is without merit. The court was not required to recuse itself from sentencing defendant based on the fact that it had presided over the codefendant's trial (*see People v Bennett*, 238 AD2d 898, 899-900, *lv denied* 90 NY2d 855, 90 NY2d 890, *cert denied* 524 US 918). "Moreover, none of [the] court's remarks . . . was indicative of bias against defendant and, therefore, recusal was not warranted on [that] basis" (*People v Casey*, 61 AD3d 1011, 1014, *lv denied* 12 NY3d 913; *see People v Johnson*, 294 AD2d 908, 908, *lv denied* 98 NY2d 677). Finally, defendant's valid waiver of the right to appeal encompasses his contention concerning the denial of his request for youthful offender status (*see People v Rush*, 94 AD3d 1449, 1449, *lv denied* 19 NY3d 967; *People v Farewell*, 90 AD3d 1502, 1502, *lv denied* 18 NY3d 957).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1157

**KA 08-01429**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NORMAN BOUNDS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 25, 2008. The judgment convicted defendant, upon a jury verdict, of intimidating a victim or witness in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of intimidating a victim or witness in the third degree (Penal Law § 215.15), defendant contends that he was deprived of a fair trial by prosecutorial misconduct. Specifically, defendant contends that the prosecutor engaged in misconduct by arranging for the arrest of a woman who was in the courthouse waiting to testify on defendant's behalf, thereby interfering with his right to present a defense. We reject that contention. It is well settled that "[d]ue process may be violated when the prosecution's conduct deprives a defendant of exculpatory testimony . . . [,but the prosecution's] conduct is not a deprivation of a defendant's right to call witnesses where the proposed evidence is not shown to be exculpatory" (*People v Dixon*, 93 AD3d 894, 895 [internal quotation marks omitted]). Here, because defense counsel decided not to call the woman as a witness, it has not been established that her testimony, if given, would have been exculpatory. Moreover, inasmuch as the arrest of the potential witness was clearly lawful—indeed, defendant does not dispute that fact and instead challenges the timing of the arrest—we perceive no basis to conclude that the prosecutor acted improperly by having the witness arrested before she was able to testify. Although defendant had a right to call the woman as a witness, the police were not obligated to wait until after she testified to place her under arrest.

Defendant's further contention that he was deprived of a fair

trial by an improper comment made by the prosecutor during his summation is unpreserved for our review (see CPL 470.05 [2]) and, in any event, that contention lacks merit. Finally, although we agree with defendant that County Court erred in admitting in evidence a stun gun found in the vehicle that defendant was driving a day after the charged crimes were committed, we conclude that the *Molineux* error is harmless (see *People v Talyor*, 97 AD3d 1139, 1141, lv denied 19 NY3d 1029; *People v Baker*, 21 AD3d 1435, 1436, lv denied 6 NY3d 773). The proof of guilt is overwhelming, and there is no significant probability that defendant would have been acquitted if the stun gun had not been admitted in evidence (see generally *People v Kello*, 96 NY2d 740, 744; *People v Crimmins*, 36 NY2d 230, 241-242).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1158

**KA 11-02473**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY DEWIEL, DEFENDANT-APPELLANT.

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THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO  
OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 15, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that he was denied his rights pursuant to CPL 380.50 (2) (e) at sentencing. That contention is encompassed by defendant's valid waiver of the right to appeal (see *People v Collier*, 71 AD3d 909, 910, lv denied 15 NY3d 773; see generally *People v Lanzara*, 59 AD3d 936, 937, lv denied 12 NY3d 855). Also, defendant's contention is unreserved for our review inasmuch as it is " 'addressed merely to the adequacy of the procedures [County Court] used to arrive at its sentencing determination,' " and defendant failed to raise it in a timely manner before the court (*People v Daniqua S.D.*, 92 AD3d 1226, 1227, quoting *People v Callahan*, 80 NY2d 273, 281).

Defendant's contention that he was denied effective assistance of counsel does not survive his plea or his valid waiver of the right to appeal because defendant "failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance' " (*People v Wright*, 66 AD3d 1334, 1334, lv denied 13 NY3d 912; see *People v Rizek* [appeal No. 1], 64 AD3d 1180, 1180, lv denied 13 NY3d 862). In any event, defendant's contention lacks merit inasmuch as he "receive[d] an advantageous plea

and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404). Finally, defendant failed to preserve for our review his contention that the court erred in failing to recuse itself (see *People v Pett*, 74 AD3d 1891, 1892; *People v Lebron*, 305 AD2d 799, 800, lv denied 100 NY2d 583). In any event, that contention is without merit (see generally *People v Moreno*, 70 NY2d 403, 405-406; *People v Crane*, 294 AD2d 867, 867, lv denied 98 NY2d 767; *People v Brunner*, 182 AD2d 1123, 1123, lv denied 80 NY2d 828).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1163

CA 11-01904

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

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IN THE MATTER OF THE APPLICATION OF MAUREEN BOSCO, ACTING EXECUTIVE DIRECTOR OF CENTRAL NEW YORK PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,  
FOR AN ORDER AUTHORIZING THE INVOLUNTARY TREATMENT OF QUINTON F., A PATIENT AT CENTRAL NEW YORK PSYCHIATRIC CENTER, RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (CRAIG P. SCHLANGER OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered August 9, 2011. The order granted the application of petitioner seeking authorization to administer medication to respondent over his objection.

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

Memorandum: Respondent appeals from an order granting the application of petitioner seeking authorization to administer medication to respondent over his objection. The order has since expired, rendering this appeal moot (*see Matter of Bosco v Michael N.*, 93 AD3d 1207, 1207; *Matter of Rene L.*, 27 AD3d 1136, 1136-1137), and this case does not fall within the exception to the mootness doctrine (*see Matter of McGrath*, 245 AD2d 1081, 1082; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1165

CA 11-01975

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

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

V

MEMORANDUM AND ORDER

BRIAN HUNTER, RESPONDENT-APPELLANT.

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EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER  
(NEIL J. ROWE OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

---

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 30, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, determined that respondent is a dangerous sex offender requiring confinement and committed him 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 entered following a jury trial that, inter alia, determined that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committed him to a secure treatment facility. Respondent contends that Supreme Court erred in denying that part of his pretrial motion requesting that the report of a court-appointed psychiatric examiner be provided to the court and the Attorney General only in the event that respondent decided to call the examiner as a witness at trial. According to respondent, such a disclosure would violate his right to due process and equal protection. We reject that contention. Mental Hygiene Law § 10.06 (e) provides that, any time after the filing of a sex offender civil management petition and prior to trial, the court shall order an evaluation of the respondent by a psychiatric examiner upon the respondent's request. The statute further provides that, "[f]ollowing the evaluation, such psychiatric examiner shall report his or her findings in writing to the respondent or counsel for the respondent, to the attorney general, and to the court" (*id.* [emphasis added]). We conclude that respondent did not meet his burden of establishing that the statute is unconstitutional beyond a reasonable doubt (*see generally Dalton v Pataki*, 5 NY3d 243, 255, *rearg denied* 5 NY3d 783, *cert denied* 546 US 1032). Indeed, the statute goes beyond the due process required in a civil confinement

proceeding inasmuch as a respondent is entitled to the appointment of a psychiatric examiner simply upon request and without a showing of necessity (*cf. Goetz v Crosson*, 967 F2d 29, 36-37). Respondent failed to preserve for our review his further contention that his privilege against self-incrimination was violated and, in any event, that contention is without merit (*see* § 10.08 [a]).

We reject respondent's contention that the admission in evidence of testimony from his criminal trial at this civil proceeding violated his right of confrontation. Mental Hygiene Law § 10.08 (g) specifically allows the admission of such evidence, and the right of confrontation applicable in criminal cases does not apply to this civil proceeding (*see Matter of State of New York v Wilkes* [appeal No. 2], 77 AD3d 1451, 1451-1452). Finally, contrary to respondent's contention, petitioner established by clear and convincing evidence that respondent has an inability to control his behavior such that he "is likely to be a danger to others and to commit sex offenses if not confined" (§ 10.07 [f]).

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

1167

CA 12-00472

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

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NOUREEN ZAHID CHOHAN,  
PLAINTIFF-APPELLANT-RESPONDENT,

V

ORDER

ZAHID MUNIR CHOHAN,  
DEFENDANT-RESPONDENT-APPELLANT.

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BRIAN R. WELSH, PLLC, WILLIAMSVILLE (BRIAN R. WELSH OF COUNSEL), FOR  
PLAINTIFF-APPELLANT-RESPONDENT.

PALMER, MURPHY & TRIPI, BUFFALO (THOMAS A. PALMER OF COUNSEL), FOR  
DEFENDANT-RESPONDENT-APPELLANT.

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Appeal and cross appeal from a judgment of the Supreme Court,  
Erie County (Tracey A. Bannister, J.), entered May 18, 2011 in a  
divorce action. The judgment, inter alia, equitably distributed the  
marital property and awarded "additional" maintenance to plaintiff.

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

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1175

**KA 10-00829**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JUMAN L. SHACKELFORD, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

---

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered August 20, 2008. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of assault in the first degree (Penal Law § 120.10 [3]), defendant contends that his plea was not knowingly entered because the factual allocution failed to establish that he acted with depraved indifference. Defendant's contention is not preserved for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665; *People v Granger*, 96 AD3d 1667, 1667). In any event, the allocution was sufficient to establish that defendant acted with depraved indifference when he fired numerous shots from his 9 millimeter handgun into a house in which he had reason to believe people would be present (*see generally People v Suarez*, 6 NY3d 202, 214; *People v Payne*, 3 NY3d 266, 271-272, *rearg denied* 3 NY3d 767). Contrary to the further contention of defendant, defense counsel's statements regarding his competency at sentencing do not cast doubt on the voluntariness of the plea. Defendant was asked a number of questions during the plea proceedings to which he responded coherently and rationally, and there is no indication that defendant was unable to understand the implications of his decision to accept the plea offer (*see generally People v Wilcox*, 45 AD3d 1320, 1320, *lv denied* 10 NY3d 772).

Defendant's contention that he was denied effective assistance of counsel does not survive the plea "because defendant failed to demonstrate that 'the plea bargaining process was infected by [the]

allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance' " (*People v Wright*, 66 AD3d 1334, 1334, lv denied 13 NY3d 912; see *People v Paduano*, 84 AD3d 1730, 1731). Finally, we reject defendant's contention that the pretrial identification procedure was unduly suggestive (see *People v Sylvester*, 32 AD3d 1226, 1226-1227, lv denied 7 NY3d 929; *People v Cunningham*, 15 AD3d 945, 945-946, lv denied 4 NY3d 829).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1176

KA 09-00593

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DANIEL S. UBBINK, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered January 30, 2009. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the second degree (four counts) and stalking in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of stalking in the fourth degree (Penal Law § 120.45 [2]) and four counts of criminal contempt in the second degree (§ 215.50 [3]). Contrary to defendant's contention, he was not denied due process based on Supreme Court's failure, sua sponte, to conduct a competency hearing pursuant to CPL 730.30 (2) (see *People v Chicherchia*, 86 AD3d 953, 954, lv denied 17 NY3d 952). "A defendant is presumed competent . . . , and the court is under no obligation to issue an order of examination . . . unless it has 'reasonable ground . . . to believe that the defendant [is] an incapacitated person' " (*People v Morgan*, 87 NY2d 878, 880). Where the court has " 'reasonable ground for believing that a defendant is in such state of idiocy, imbecility, or insanity that he [or she] is incapable of understanding the charge, indictment or proceedings or of making his [or her] defense,' " it must direct that the defendant be examined (*People v Tortorici*, 92 NY2d 757, 765, cert denied 528 US 834). "[T]he decision to order a competency examination . . . lies within the sound discretion of the trial court" (*People v Williams*, 35 AD3d 1273, 1274, lv denied 8 NY3d 928). There is no indication in the record that the court " 'receive[d] information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted [the court] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense' " so as

to warrant a competency examination, much less a competency hearing (*People v Arnold*, 113 AD2d 101, 103).

We reject the further contention of defendant that he was denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147; *People v Tuszynski*, 71 AD3d 1407, 1408, lv denied 15 NY3d 810; *People v Lewis*, 67 AD3d 1396, 1396-1397, lv denied 14 NY3d 772). Also without merit is defendant's contention that the court abused its discretion when it denied defendant's repeated requests for new counsel during the trial. "The right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option" (*People v Sides*, 75 NY2d 822, 824; see *People v Kirkland*, 177 AD2d 946, 946-947, lv denied 79 NY2d 859). Rather, defendant must demonstrate good cause for the substitution, "such as a conflict of interest or other irreconcilable conflict with counsel" (*Sides*, 75 NY2d at 824; see *People v Medina*, 44 NY2d 199, 207-208). Prior to trial, the court twice granted defendant's request for new counsel. The court did not abuse its discretion in denying defendant's mid-trial requests for the appointment of new trial counsel inasmuch as defendant failed to demonstrate good cause for the substitution (see *People v Sawyer*, 57 NY2d 12, 19, rearg dismissed 57 NY2d 776, cert denied 459 US 1178).

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

1180

CAF 12-00203

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

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IN THE MATTER OF MICHAEL S., JR.,  
RESPONDENT-APPELLANT.

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MONROE COUNTY ATTORNEY,  
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

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TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR  
RESPONDENT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (SCOTT WILLIAM  
WESTERVELT OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered December 29, 2011 in a proceeding pursuant to Family Court Act article 7. The order, among other things, placed respondent in the custody of the Commissioner of Health and Human Services of Monroe County for a period of 12 months.

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

Memorandum: Respondent appeals from a dispositional order entered in a violation of probation proceeding pursuant to Family Court Act § 779. The order revoked respondent's probation and imposed a placement outside of his home for a period of 12 months. Respondent's appeal from the dispositional order brings up for review the denial of respondent's motion to dismiss the violation petition (see CPLR 5501 [a] [1]; *Matter of James L.* [appeal No. 2], 74 AD3d 1775, 1775). We conclude that Family Court erred in denying that motion. In the absence of the filing of a declaration of delinquency pursuant to Family Court Act § 779-a, which tolls a disposition of probation pending a final determination on the violation petition, the court's authority to enter a dispositional order expired on the date on which the order of probation expired (see §§ 779, 779-a).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1181

**CAF 11-02158**

PRESENT: SMITH, J.P., FAHEY, SCONIERS, AND WHALEN, JJ.

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IN THE MATTER OF STEFAN R. MCDONALD,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MONIQUE S. TERRY, RESPONDENT-RESPONDENT.

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IN THE MATTER OF MONIQUE S. TERRY,  
PETITIONER-RESPONDENT,

V

STEFAN R. MCDONALD, RESPONDENT-APPELLANT.

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ALLEN & O'BRIEN, ROCHESTER (STUART L. LEVISON OF COUNSEL), FOR  
PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF  
COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR JALEN M.  
AND XAVIER M.

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Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered October 7, 2011 in proceedings pursuant to Family Court Act article 6. The order, inter alia, awarded Monique S. Terry sole custody of the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified as a matter of discretion in the interest of justice by vacating the fourth ordering paragraph in the order and reinstating the weekly access schedule set forth in the order entered January 25, 2010, and as modified the order is affirmed without costs.

Memorandum: On appeal from an order that, inter alia, granted respondent-petitioner mother sole custody and primary physical residence of the parties' children with access to petitioner-respondent father, the father contends that Family Court's decision is replete with evidence of bias towards him, and that such bias unjustly affected the court's determination to award custody to the mother. We reject that contention. "It is well settled that '[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his [or her] participation in the case' "

(*Board of Educ. of City School Dist. of City of Buffalo v Pisa*, 55 AD2d 128, 136, quoting *United States v Grinnell Corp.*, 384 US 563, 583). In this case, the father does not contend that the court's alleged bias stemmed from " 'an extrajudicial source' " or " 'some basis other than what the judge learned from [her] participation in the case' " (*id.*), nor in any event would the record support such a contention (see *Matter of Amy L.W. v Brendan K.H.*, 37 AD3d 1060, 1061; *Matter of Angie M.P.*, 291 AD2d 932, 933, *lv denied* 98 NY2d 602). We reject the father's further contention that the court erred in awarding sole custody of the parties' children to the mother. A court's "determination following a hearing that the best interests of [the] children would be served by an award of sole custody to [one of the parents] is entitled to great deference" (*Matter of Goossen v Goossen*, 72 AD3d 1591, 1591; see *Eschbach v Eschbach*, 56 NY2d 167, 173), "particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625). Nevertheless, as a matter of discretion in the interest of justice, we modify the order by vacating the fourth ordering paragraph and reinstating the parties' prior weekly access schedule as set forth in the order entered January 25, 2010.

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1183

CA 12-00417

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

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JAN M. HAYES, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TEXAS ROADHOUSE HOLDINGS, LLC AND TEXAS  
ROADHOUSE MANAGEMENT CORP.,  
DEFENDANTS-APPELLANTS.

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DONNA LAW FIRM, P.C., MINNEAPOLIS, MINNESOTA (LESLIE A. GELHAR, OF THE  
MINNESOTA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND GOLDBERG  
SEGALLA LLP, BUFFALO, FOR DEFENDANTS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered January 31, 2012 in a personal injury action. The order denied defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she tripped and fell over a curb separating a sidewalk and a landscaped area on the premises of a restaurant owned and maintained by defendant Texas Roadhouse Holdings, LLC and allegedly operated by defendant Texas Roadhouse Management Corp. Plaintiff alleged in her complaint that defendants were negligent, inter alia, in installing the curb between a bench outside the restaurant and the door to that facility, and in failing to warn of a tripping hazard in the area of the bench. Supreme Court denied defendants' motion for summary judgment dismissing the complaint, and we affirm.

We note at the outset that "[i]t is beyond dispute that landowners and business proprietors have a duty to maintain their properties in [a] reasonably safe condition" (*Di Ponzio v Riordan*, 89 NY2d 578, 582). In support of their contention that the curb was in a reasonably safe condition at the time of plaintiff's fall and thus that they were not negligent in installing the curb at that location, defendants submitted evidence establishing that the curb complied with applicable building codes, zoning ordinances, and zoning standards. Evidence of a defendant's compliance with industry standards, however,

does not establish as a matter of law that such defendant was not negligent (*see Baity v General Elec. Co.*, 86 AD3d 948, 950-951). "[C]ompliance with customary or industry practices is not dispositive of due care but constitutes only some evidence thereof" (*Miner v Long Is. Light. Co.*, 40 NY2d 372, 381). Likewise, compliance with applicable regulations is not dispositive on the issue of negligence; "such compliance does not necessarily preclude a jury from finding that the . . . [device governed by the regulations] was part of or contributed to any inherently dangerous condition existing in the area of [plaintiff's] fall" (*Bamrick v Orchard Brooke Living Ctr.*, 5 AD3d 1031, 1032).

The issue before us is thus whether defendants established as a matter of law that the curb was not inherently dangerous (*see Powers v St. Bernadette's R.C. Church*, 309 AD2d 1219, 1219). The determination of such an issue "depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [internal quotation marks omitted]), and we conclude that defendants failed to meet their initial burden on the motion (*see Maio v John Andrew, Inc.*, 85 AD3d 741, 742; *Powers*, 309 AD2d at 1219; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although plaintiff's deposition testimony establishes that she did not notice the curb before tripping on it, plaintiff also testified at her deposition that she did not look for the curb immediately before the accident, and that she was following two friends into the restaurant at that time. Photographs submitted by defendants in support of the motion show that the curb was in proximity to a bench on which plaintiff sat immediately before her fall, and that the curb is the same color as the sidewalk where plaintiff was walking at the time of her accident. Inasmuch as defendants failed to meet their initial burden of establishing that the curb was not inherently dangerous as a matter of law, we need not consider the sufficiency of plaintiff's opposing papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

We further conclude that defendants failed to establish as a matter of law that the hazard posed by the curb was open and obvious and thus that they had no duty to warn plaintiff of a tripping hazard. It is well established that there is no duty to warn of an open and obvious dangerous condition (*see Tagle v Jakob*, 97 NY2d 165, 169), "because 'in such instances the condition is a warning in itself'" (*Mazurek v Home Depot U.S.A.*, 303 AD2d 960, 962). "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances . . . A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*Calandrino v Town of Babylon*, 95 AD3d 1054, 1056 [internal quotation marks omitted]; *see Gordon v Pitney Bowes Mgt. Servs., Inc.*, 94 AD3d 813, 814-815; *Katz v Westchester County Healthcare Corp.*, 82 AD3d 712, 713; *see also Gustin v Association of Camps Farthest Out*, 267 AD2d 1001, 1002). "Some visible hazards, because of their nature or location, are likely to be overlooked . . . , and the facts here simply do not warrant concluding as a matter of

law that the [curb] was so obvious that it would necessarily be noticed by any careful observer, so as to make any warning superfluous" (*Juoniene v H.R.H. Constr. Corp.*, 6 AD3d 199, 200-201; see *Surujnaraine v Valley Stream Cent. High School Dist.*, 88 AD3d 866, 866-867; *Cassone v State of New York*, 85 AD3d 837, 838-839; *Shah v Mercy Med. Ctr.*, 71 AD3d 1120, 1120; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72).

Contrary to defendants' further contention, the court properly concluded that they are not entitled to summary judgment on the ground that they lacked notice of the alleged dangerous condition on the restaurant premises. Actual or constructive notice of a defective condition is not required where defendants created the dangerous condition (see *Cook v Rezende*, 32 NY2d 596, 599; *Viele v Vyverberg*, 83 AD3d 1428, 1429) and, here, there is no dispute that defendants created the curb at issue.

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

1186

CA 12-00466

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

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JOHN O'DONNELL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ROBERT FERGUSON, INDIVIDUALLY AND AS CHIEF OF POLICE OF TOWN OF EVANS, ROBERT R. CATALINO, II, INDIVIDUALLY AND AS SUPERVISOR OF TOWN OF EVANS, AND THOMAS A. PARTRIDGE, THOMAS A. CSATI, KAREN C. ERICKSON AND JOSEPH GOVENETTIO, INDIVIDUALLY AND AS MEMBERS OF TOWN BOARD OF TOWN OF EVANS, DEFENDANTS-RESPONDENTS.

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CHIACCHIA & FLEMING, LLP, HAMBURG (CHRISTEN ARCHER PIERROT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, MURPHY & SCHOEPERLE, LLP, BUFFALO (STEPHEN P. BROOKS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered November 23, 2011. The order, inter alia, precluded plaintiff from offering evidence on the issue of whether he was a part-time employee.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking to preclude plaintiff from offering evidence that, after this Court's determination in *Matter of O'Donnell v Ferguson* (273 AD2d 905, 906, lv denied 96 NY2d 701) that plaintiff was not a part-time employee, defendants made statements and engaged in conduct that was inconsistent with that determination, and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiff, a former police officer employed by the Town of Evans, commenced this action seeking damages pursuant to 42 USC § 1983 and Labor Law § 201-d for defendants' allegedly illegal termination of his employment. In 1998, defendants terminated plaintiff's employment without affording him notice or a hearing. Plaintiff subsequently commenced a CPLR article 78 proceeding seeking, inter alia, reinstatement to his position and, on a prior appeal, we modified the judgment by dismissing the petition in its entirety on the ground that plaintiff "was a 'special' police officer appointed pursuant to Town Law § 158 (1) who served at the pleasure of the Town Board [of the Town of Evans (Town Board)] and therefore was not entitled to the protections of Town Law § 155" (*Matter of O'Donnell v Ferguson*, 273 AD2d 905, 906, lv denied 96 NY2d 701). In a prior appeal with respect

to this action, we determined that the doctrine of collateral estoppel did not preclude this action because "none of the issues relating to the federal constitutional causes of action and the cause of action under Labor Law § 201-d was decided in the prior proceeding" (*O'Donnell v Ferguson*, 23 AD3d 1005, 1007). We further noted that "[d]efendants are incorrect to the extent that they contend that, as an 'at-will' employee, plaintiff could be terminated for a constitutionally impermissible or statutorily proscribed purpose" (*id.*).

In another prior appeal with respect to this action, we determined that Supreme Court abused its discretion in refusing to allow plaintiff to present evidence of defendant Robert Ferguson's September 2007 deposition testimony that plaintiff was a part-time employee, which evidence was contrary to our determination in the CPLR article 78 proceeding in 2000 that plaintiff was not entitled to the protections of Town Law § 155 because he was not a part-time employee (*O'Donnell v Ferguson*, 68 AD3d 1681, 1682).

In the instant appeal, plaintiff appeals from an order that, inter alia, granted defendants' motion in limine to preclude him from presenting further evidence on the issues whether he was a part-time employee and whether he was entitled to formal charges and a hearing prior to termination. We note at the outset that, although the parties do not address the issue of the appealability of an order determining a motion in limine, the order in this case is appealable (*see Franklin Corp. v Prahler*, 91 AD3d 49, 54). "Generally, an order ruling [on a motion in limine], even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" (*Innovative Transmission & Engine Co., LLC v Massaro*, 63 AD3d 1506, 1507 [internal quotation marks omitted]; *see Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 224). Here, however, the order precluded the introduction of evidence on the issue whether defendants were liable for punitive damages. "[B]ecause the court's order 'has a concretely restrictive effect on the efforts of plaintiff[] to . . . recover [punitive] damages, . . . defendant[s'] motion . . . [was] the functional equivalent of a motion for partial summary judgment dismissing the complaint insofar as it sought [such] damages' " (*Franklin*, 91 AD3d at 54). "[A]n order that . . . 'limits the legal theories of liability to be tried' or the scope of the issues at trial . . . is appealable" (*Scalp & Blade*, 309 AD2d at 224).

Contrary to plaintiff's contention, the court did not abuse its discretion by precluding plaintiff from relitigating the issue whether plaintiff was a part-time employee entitled to the protections of Town Law § 155. That issue was decided in defendants' favor on a prior appeal (*O'Donnell*, 273 AD2d at 906), and "[t]he doctrine of collateral estoppel precludes a party from relitigating 'an issue which has previously been decided against him [or her] in a proceeding in which he [or she] had a fair opportunity to fully litigate the point' " (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455; *see Pinnacle Consultants v Leucadia Natl. Corp.*, 94 NY2d 426, 431-432).

Nevertheless, although the court has broad discretion to rule on the admissibility of evidence (see *Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1132, *lv denied* 11 NY3d 708), we agree with plaintiff that the court abused its discretion by granting that part of defendants' motion in limine seeking to preclude plaintiff from offering evidence that, after our 2000 determination that plaintiff was not a part-time employee, defendants made statements and engaged in conduct that was inconsistent with our 2000 determination (see *O'Donnell*, 68 AD3d at 1682). We therefore modify the order accordingly. In this case, the record on appeal includes the entire transcript of Ferguson's deposition testimony, in which Ferguson admitted that plaintiff was a part-time employee. He further admitted both that, after we issued our determination in 2000, another police officer with the same employment classification as plaintiff was presented with formal charges and the opportunity for a hearing prior to termination, and that the Town of Evans unsuccessfully attempted to change the employment classification of certain police officers. The record also includes copies of the formal charges offered to the other police officer, resolutions of the Town Board dated April 17, 2002, appointing certain individuals to the position of "Special Policemen pursuant to Section 158 of the Town Law," and subsequent resolutions of the Town Board dated June 5, 2002, reappointing those same individuals to positions as "part-time Police Officers." We conclude that plaintiff should be permitted to present that evidence as well as any similar evidence of defendants' statements and actions after our determination in 2000 that were inconsistent with that determination for the purpose of demonstrating defendants' intent with respect to their conduct toward plaintiff (see *id.*).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1192

CA 12-00521

PRESENT: SCUDDER, P.J., SCONIERS, VALENTINO, AND WHALEN, JJ.

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JANERIO ALDRIDGE, M.D., HASHMAT ASHRAF,  
M.B.B.S., F.R.C.S., LUJEAN JENNINGS, PH.D.,  
M.D., AND BUFFALO THORACIC SURGICAL  
ASSOCIATES, P.C.,  
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

MEMORANDUM AND ORDER

RICHARD F. BRODMAN, M.D. AND BUFFALO  
CARDIOTHORACIC SURGICAL, PLLC,  
DEFENDANTS-RESPONDENTS-APPELLANTS.

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RICHARD F. BRODMAN, M.D. AND BUFFALO  
CARDIOTHORACIC SURGICAL, PLLC, THIRD-PARTY  
PLAINTIFFS-APPELLANTS,

V

KALEIDA HEALTH, THIRD-PARTY DEFENDANT-RESPONDENT.

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PHILLIPS LYTTLE LLP, BUFFALO (LISA MCDUGALL OF COUNSEL), FOR  
PLAINTIFFS-APPELLANTS-RESPONDENTS.

JAECKLE, FLEISCHMANN & MUGEL, LLP, BUFFALO (CHARLES C. SWANEKAMP OF  
COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS AND THIRD-PARTY  
PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (ROBERT J. LANE, JR., OF COUNSEL), FOR  
THIRD-PARTY DEFENDANT-RESPONDENT.

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Appeal and cross appeal from an order of the Supreme Court, Erie  
County (John A. Michalek, J.), entered July 5, 2011. The order, among  
other things, granted third-party defendant's motion for summary  
judgment dismissing the third-party complaint.

It is hereby ORDERED that the order so appealed from is  
unanimously modified on the law by denying in part the motion of  
third-party defendant for summary judgment dismissing the third-party  
complaint and reinstating the first cause of action in the third-party  
complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiffs appeal and defendants-third-party  
plaintiffs (defendants) cross-appeal from an order that, inter alia,  
granted that part of plaintiffs' motion seeking summary judgment

dismissing defendants' counterclaims, granted the motion of defendants for summary judgment dismissing plaintiffs' "third converted and amended complaint" (complaint), and granted the motions of third-party defendant, Kaleida Health (Kaleida), for summary judgment dismissing the complaint and the third-party complaint.

The individual plaintiffs are cardiothoracic surgeons and the sole shareholders of plaintiff Buffalo Thoracic Surgical Associates, P.C. Prior to the events giving rise to the instant appeal and cross appeal, plaintiffs had privileges to perform surgery at hospitals operated by Kaleida. Defendant-third-party plaintiff Richard F. Brodman, M.D. is also a cardiothoracic surgeon, and he formed defendant-third-party plaintiff Buffalo Cardiothoracic Surgical, PLLC (BCS) for the purpose of providing cardiothoracic surgery services at Kaleida's hospitals. In 2003, Kaleida entered into separate contracts with Brodman and BCS, whereby Brodman became the Chief of Service of cardiothoracic surgery, and physicians associated with BCS became the exclusive providers of cardiothoracic surgery services at Kaleida's hospitals. Subsequently, plaintiffs rejected defendants' offer to join BCS, and Kaleida terminated plaintiffs' privileges to perform surgeries at its hospitals. In January 2005, Brodman resigned from his position with Kaleida, Kaleida terminated its contracts with defendants for cause, and plaintiffs regained their privileges to perform surgery at Kaleida's hospitals.

In their complaint, plaintiffs asserted three causes of action against defendants, one of which has since been dismissed. In the remaining two causes of action, plaintiffs asserted that defendants committed unfair trade practices, and that they engaged in tortious interference with plaintiffs' business relationships. In their counterclaims, defendants asserted that plaintiffs engaged in tortious interference with contractual relations between defendants and Kaleida and between defendants and other members and employees of BCS. In their third-party action, defendants sought contractual indemnification from Kaleida.

Contrary to plaintiffs' contentions, the court properly granted the motions of defendants and Kaleida for summary judgment dismissing plaintiffs' remaining two causes of action because defendants and Kaleida established that plaintiffs did not sustain any damages as a result of defendants' conduct, and plaintiffs failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Defendants and Kaleida met their initial burdens by submitting deposition testimony and answers to interrogatories in which plaintiffs admitted that they could not identify the loss of any patients or referrals because of defendants' alleged unfair trade practices and/or tortious interference with plaintiffs' business relationships. In their responding papers, plaintiffs submitted tax returns establishing that they experienced lower revenues during the period in which defendants allegedly committed the conduct underlying plaintiffs' second and third causes of action, but plaintiffs failed to offer any evidence connecting the decline in revenues to defendants' conduct. Contrary to plaintiffs' contention, "plaintiff[s] failed to raise a triable issue of fact as to whether

defendant[s'] alleged [conduct] was a proximate cause of plaintiff[s'] losses" (*Gerber Trade Fin., Inc. v Skwiersky, Alpert & Bressler, LLP*, 12 AD3d 286, 286, lv denied 4 NY3d 705). "Where a party has failed to come forward with evidence sufficient to demonstrate damages flowing from the [defendants' conduct] and relies, instead, on wholly speculative theories of damages, dismissal of the . . . [causes of action at issue] is in order" (*Lexington 360 Assoc. v First Union Natl. Bank of N. Carolina*, 234 AD2d 187, 190).

We further conclude that the court properly granted that part of plaintiffs' motion for summary judgment dismissing defendants' counterclaims for tortious interference with contractual relations. Contrary to defendants' contention, plaintiffs established that they did not intentionally induce a third party "to breach [a contract with defendants] or otherwise render performance impossible" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94), and defendants failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Contrary to the contention of defendants, the court properly granted those parts of Kaleida's motion for summary judgment dismissing the third-party complaint to the extent that it seeks contractual indemnification with respect to plaintiffs' second and third causes of action. Although we have concluded herein that the second and third causes of action were properly dismissed, defendants would nevertheless be entitled to recover attorneys fees incurred in defending against them. However, attorneys fees are not recoverable inasmuch as those causes of action allege that defendants committed intentional torts. "Indemnification agreements are unenforceable as violative of public policy . . . to the extent that they purport to indemnify [parties] for damages flowing from the intentional causation of injury" (*Austro v Niagara Mohawk Power Corp.*, 66 NY2d 674, 676).

We further conclude that the court properly granted that part of Kaleida's motion for summary judgment dismissing the third-party complaint to the extent that it seeks contractual indemnification of BCS with respect to plaintiffs' first cause of action. Again, defendants seek attorneys fees incurred in defending BCS against that cause of action, before that cause of action was dismissed. Nevertheless, defendants are not entitled to recover those fees because plaintiffs' first cause of action alleges that defendants committed culpable conduct, and the independent contractor agreement between Kaleida and BCS does not provide that Kaleida must indemnify BCS for BCS's own conduct. Kaleida thus met its initial burden, and defendants failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

We agree with defendants, however, that the court erred in granting that part of Kaleida's motion for summary judgment dismissing the third-party complaint to the extent that it seeks contractual indemnification of Brodman with respect to plaintiffs' first cause of action. We therefore modify the order accordingly. In support of the motion, Kaleida submitted its employment agreement with Brodman, which included the provision that Kaleida "shall be obligated to indemnify and hold harmless [Brodman] from and against any and all third party

claims, damages, judgments, costs, expenses, interest and penalties (including, without limitation, attorneys' fees) unless it is determined that [Brodman] did not act reasonably within the scope of his employment." Kaleida did not establish as a matter of law that Brodman's conduct with respect to plaintiff's first cause of action was not reasonably within the scope of his employment (*see generally Zuckerman*, 49 NY2d at 562).

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

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

1195

**KA 09-00927**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHNNIE LANE, DEFENDANT-APPELLANT.

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

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

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Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (M. William Boller, A.J.), dated April 8, 2009. The order denied the motion of defendant to vacate his conviction pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order that denied, without a hearing, his motion pursuant to CPL 440.10 to vacate the judgment convicting him upon a jury verdict of, inter alia, three counts of murder in the second degree (Penal Law § 125.25 [1], [3]), and one count each of manslaughter in the first degree (§ 125.20) and attempted murder in the second degree (§§ 110.00, 125.25 [1]). On defendant's direct appeal, we modified the judgment by directing that the sentences imposed on certain counts run concurrently, but we otherwise affirmed the judgment (*People v Lane*, 221 AD2d 948, lv denied 87 NY2d 975, cert denied 519 US 829). Here, we conclude that Supreme Court properly denied defendant's motion pursuant to CPL 440.10. In support of the motion, defendant presented the sworn written recantation of a trial witness who stated that, contrary to his testimony at trial, defendant never made any admissions to him about participating in the crimes at issue. Instead, the witness claimed to have heard a secondhand account of defendant's involvement in those crimes. The witness also asserted that the Erie County District Attorney's office paid him \$2,500 to testify falsely that he heard about defendant's participation firsthand.

"There is no form of proof so unreliable as recanting testimony" (*People v Shilitano*, 218 NY 161, 170, rearg denied 218 NY 702), and such testimony is "insufficient alone to warrant vacating a judgment

of conviction" (*People v Thibodeau*, 267 AD2d 952, 953, *lv denied* 95 NY2d 805). "Consideration of recantation evidence involves the following factors: (1) the inherent believability of the substance of the recanting testimony; (2) the witness's demeanor both at trial and at the evidentiary hearing; (3) the existence of evidence corroborating the trial testimony; (4) the reasons offered for both the trial testimony and the recantation; (5) the importance of facts established at trial as reaffirmed in the recantation; and (6) the relationship between the witness and defendant as related to a motive to lie" (*People v Wong*, 11 AD3d 724, 725-726). Other relevant factors, however, are whether the recantation refutes the eyewitness testimony of another witness (*see People v Davenport*, 233 AD2d 771, 773, *lv denied* 89 NY2d 1091; *see also People v Avery*, 80 AD3d 982, 985, *lv denied* 17 NY3d 791), whether the accusations in the recantation "were highly improbable and were specifically denied by the former prosecutor" (*People v Cintron*, 306 AD2d 151, 152, *lv denied* 100 NY2d 641), and whether the allegedly false testimony at trial prejudiced defendant (*see People v Friedgood*, 58 NY2d 467, 471-472; *People v Stevens*, 275 AD2d 902, 902, *lv denied* 96 NY2d 807; *Thibodeau*, 267 AD2d at 953; *People v Cutting*, 210 AD2d 791, 792-793, *lv denied* 85 NY2d 971).

Coupled with abundant eyewitness testimony at trial placing defendant at the scene of the crimes, there was the trial testimony of multiple friends of defendant, not merely the witness at issue, stating that defendant bragged to them about committing the crimes. In addition, evidence presented at trial established that shell casings and bullets were recovered that matched the gun found in defendant's home; defendant gave a written statement to the police attesting to his involvement in the crimes; and two witnesses came forward and told the police that defendant was involved in the crimes, before the police even suspected defendant's involvement. Therefore, the conviction was not affected by the allegedly false testimony. Finally, defendant's motion was properly denied on the additional ground that he failed to set forth a reason for delaying filing his CPL 440.10 motion with the information regarding the allegedly false testimony. Due diligence in uncovering an error is required, and any unjustifiable delay is inexcusable (*see CPL 440.10 [3] [a]*). Defendant has provided no reason for the 14-year delay in bringing the allegedly false testimony to the court's attention.

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

1198

KA 07-00625

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DERRICK J. STIMUS, DEFENDANT-APPELLANT.

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KIMBERLY J. CZAPRANSKI, INTERIM CONFLICT DEFENDER, ROCHESTER, FOR DEFENDANT-APPELLANT.

DERRICK J. STIMUS, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered January 31, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance 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 criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends in his main and pro se supplemental briefs that the plea was not knowing and voluntary. Although defendant preserved that contention for our review by his motion to withdraw his plea (*cf. People v Moore*, 6 AD3d 1076, 1076-1077, *lv denied* 3 NY3d 661), his contention is without merit. Defendant advised County Court that he understood the rights that he was waiving by pleading guilty; that he was satisfied with the services of his attorney; and that he understood that, by pleading guilty, he forfeited the right to contend on appeal that his arrest was not based upon probable cause. We therefore conclude that defendant's plea was knowing and voluntary (*see generally People v Harris*, 61 NY2d 9, 19).

Defendant also contends in his main and pro se supplemental briefs that the court erred in denying his motion to withdraw his plea without conducting a further inquiry into his allegations that he was denied the right to effective assistance of counsel. "The court afforded defendant the requisite 'reasonable opportunity to present his contentions' in support of that motion . . . and [it] did not abuse its discretion in concluding that no further inquiry was needed"

(*People v Strasser*, 83 AD3d 1411, 1411, quoting *People v Tinsley*, 35 NY2d 926, 927). Defendant's vague allegations that he was denied effective assistance of counsel were rejected by the court, which had presided over the pretrial proceedings and the plea. Defendant was represented by different attorneys employed by the Public Defender's Office in connection with the plea and sentencing, at which time he made the motion to withdraw his plea. Because the court determined that the motion to withdraw the plea was without merit, we reject defendant's further contention that the court erred in failing to assign new counsel to represent him with respect to the motion (see generally *People v Porto*, 16 NY3d 93, 100-101).

We have reviewed defendant's remaining contentions in his pro se supplemental brief and conclude that none requires reversal or modification.

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

1199

**KA 08-02020**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TYRONE L. MEMBERS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered August 15, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), criminal possession of a weapon in the second degree (four counts) and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court improperly accepted the verdict from 11 jurors. Shortly before 6:00 p.m. on a Friday, after the parties were released for a dinner break, the jury sent a note to the court indicating that it had reached a verdict. The jurors' dinners arrived and within minutes the jurors knocked on the locked door vigorously when one of the jurors experienced a seizure. That juror was rushed to the hospital. When the parties thereafter reassembled in the courtroom, defendant objected to the substitution of an alternate juror and moved for a mistrial. The court, over the objection of defendant, took the verdict of guilty from the remaining 11 jurors, polled them, accepted their verdict, and directed that they return on Monday morning to ascertain whether the missing juror had rendered the same verdict.

Over the weekend, the court contacted the missing juror and on Monday relayed to counsel the substance of its ex parte conversations with that juror. Defendant renewed his motion for a mistrial. In the presence of the full jury, the court set forth the events of Friday evening and explained what had transpired: "I brought the jury back and went through kind of a questioning of each of the jurors as a group and individually. I took the verdict. Had the foreman announce

the verdict to the jury . . . And the foreman of the jury indicated that the verdict of the jury was guilty on all counts, all 7 charges in the indictment." The court asked the attorneys if that was a correct representation, and they agreed. Then the court asked the missing juror if that was his verdict, to which he replied, "Yes." At defendant's request, the jurors reaffirmed their verdict on all counts.

The court's attempt to avoid a mistrial at the conclusion of this double homicide trial is understandable. However, "under our State Constitution a person accused of a crime is entitled to determination by a jury of 12" (*People v Page*, 88 NY2d 1, 5; see NY Const, art I, § 2), unless he or she waives that constitutional right in writing and in open court (see *People v Gajadhar*, 9 NY3d 438, 441). It is undisputed that defendant did not waive that right here. Additionally, the verdict must be unanimous (see *People v Garvin*, 90 AD2d 682, 683; see also *People v DeCillis*, 14 NY2d 203, 205). "The verdict of a juror should be free and untrammelled . . . [and] the court must not attempt to coerce or compel the jury to agree upon a particular verdict, or any verdict" (*People v Faber*, 199 NY 256, 259; see *People v LaValle*, 3 NY3d 88, 124). Moreover, when "the trial court record[s] and accept[s] the verdict, the verdict [becomes] final and binding" (*People v Johnson*, 287 AD2d 274, 274, lv denied 97 NY2d 705; see CPL 310.80; see also *People v Khalek*, 91 NY2d 838, 840).

We conclude that the court erred in accepting the verdict from 11 jurors. When the juror became unavailable, the court could have recessed the proceeding over the weekend and reconvened on Monday for the rendition of the verdict (see *People v Monroig*, 223 AD2d 730, 731, lv denied 88 NY2d 1022; *People v Webster*, 205 AD2d 312, 312, lv denied 84 NY2d 834). Alternatively, the court could have inquired whether defendant would waive in open court and in writing his constitutional right to be judged by 12 jurors (see *Gajadhar*, 9 NY3d at 441). Either postponement of the rendition of the verdict or defendant's written waiver pursuant to *Gajadhar* would have avoided the result we must reach. The judgment of conviction must be reversed and a new trial granted.

In view of the fact that we are granting a new trial, we need not address defendant's remaining contention regarding the court's ex parte communications with the ill juror.

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

1202

CAF 11-01551

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

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IN THE MATTER OF JOSHUA BURRELL,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ANGELA D. BURRELL, RESPONDENT-APPELLANT.

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CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (JON E. BONAVILLA OF COUNSEL), FOR PETITIONER-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILD, GENESEO, FOR BRIANNA B.

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Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered July 8, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner primary physical custody of the subject child.

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

Memorandum: Respondent mother appeals from an order awarding petitioner father primary physical custody of the parties' child. We agree with Family Court that the father established the requisite change in circumstances to warrant an inquiry into whether the best interests of the child would be served by modifying the existing custody arrangement (*see Matter of Simonds v Kirkland*, 67 AD3d 1481, 1482). The father established that the mother left the child without adult supervision on several occasions late at night while she ran errands and that the child had indicated to both parents that she had been touched sexually or otherwise inappropriately by her half brother. Although we note that the statement of the child to her parents that she was touched sexually or otherwise inappropriately by her half brother was not corroborated (*cf. Matter of Nikki O. v William N.*, 64 AD3d 938, 938-939, *lv dismissed* 13 NY3d 825), the mother admitted that, upon hearing that statement, she enrolled the child's half brother in counseling. In our view, the mother's conduct in leaving the child without adult supervision late at night while she ran errands, coupled with the child's statement of the touching by the half brother, constituted the necessary change in circumstances. We further conclude that the court properly considered the totality of the circumstances in determining that it was in the best interests of the child for the father to have primary physical custody (*see*

*generally Eschbach v Eschbach, 56 NY2d 167, 171-174; Matter of Brothers v Chapman, 83 AD3d 1598, 1598-1599, lv denied 17 NY3d 707).*

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1205

CA 12-00356

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

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IN THE MATTER OF CLAIROL DEVELOPMENT, LLC AND  
CRANE-HOGAN STRUCTURAL SYSTEMS, INC.,  
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

VILLAGE OF SPENCERPORT, JACK CROOKS, VILLAGE OF  
SPENCERPORT BUILDING INSPECTOR, THEODORE WALKER,  
VILLAGE OF SPENCERPORT MAYOR, KEITH O'TOOLE,  
DEPUTY ATTORNEY VILLAGE OF SPENCERPORT, ZONING  
BOARD OF APPEALS FOR VILLAGE OF SPENCERPORT,  
ZONING BOARD OF APPEALS FOR TOWN OF OGDEN,  
RESPONDENTS-APPELLANTS.

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GALLO & IACOVANGELO, LLP, ROCHESTER (ANTHONY M. SORTINO OF COUNSEL),  
FOR RESPONDENTS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR  
PETITIONERS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered October 14, 2010 in a proceeding pursuant to CPLR article 78. The order granted petitioners' motion for leave to amend their pleadings.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of petitioners' motion with respect to the proposed first and second causes of action and as modified the order is affirmed without costs.

Memorandum: Respondents appeal from an order in a proceeding pursuant to CPLR article 78 that granted petitioners' motion for leave to amend their petition. We reject respondents' contention that Supreme Court erred in failing to examine the merits of the proposed amendment before granting the motion. A court "should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face" (*Landers v CSX Transp., Inc.*, 70 AD3d 1326, 1327 [internal quotation marks omitted]; see *Lucido v Mancuso*, 49 AD3d 220, 229), and here the court properly determined that the proposed amendment was not clearly and patently insufficient on its face. Contrary to respondents' contention, the one-year and 90-day period contained in General Municipal Law § 50-i is a statute of limitations to which the tolling provision of CPLR 205 (a) applies, rather than a condition precedent

to commencing a proceeding or an action (see *Campbell v City of New York*, 4 NY3d 200, 201-202; *Matter of Billman v Port Jervis School Dist.*, 84 AD3d 1367, 1370). Thus, petitioners' failure to plead compliance with the one-year and 90-day period did not render the proposed amended pleading insufficient on its face.

Nevertheless, we agree with respondents that the court erred in granting petitioners' motion with respect to certain of the proposed causes of action in the amended pleading. We therefore modify the order accordingly. Proposed new causes of action are not time-barred if those causes of action " 'merely add[ ] . . . new theor[ies] of recovery arising out of transactions already at issue in th[e] litigation' " (*C-Kitchens Assoc., Inc. v Travelers Ins. Cos. [Travelers Ins. Co.]*, 15 AD3d 905, 906; see CPLR 203 [f]). The relation back doctrine, however, is inapplicable where the causes of action "are based upon events that occurred after the filing of the initial petition, rather than upon the transactions giving rise to the [causes of action] in the initial petition" (*Matter of New York Foundling Hosp., Inc. v Novello*, 47 AD3d 1004, 1006, *lv denied* 10 NY3d 708). Petitioners' proposed first and second causes of action, which relate to respondents' alleged coercion in seeking consulting and electric fees, and respondents' alleged failure to accept a street dedication and release a letter of credit, do not relate back to the initial petition, which was based solely upon respondents' alleged failure to issue a building permit, and they are otherwise time-barred based on petitioners' failure to comply with the requirements in General Municipal Law § 50-i. We conclude, however, that the third cause of action related back to the petition, and it was also a proper subject of the proposed amendment (see generally *Matter of Upstate Land & Props., LLC v Town of Bethel*, 74 AD3d 1450, 1452; *Matter of Bolin v Nassau County Bd. of Coop. Educ. Servs.*, 52 AD3d 704, 705). To the extent that the third cause of action asserts the violation of 42 USC § 1983 and seeks attorneys' fees pursuant to 42 USC § 1988, we note that respondents do not contend that compliance with the notice of claim requirements in General Municipal Law §§ 50-e and 50-i is necessary to recover with respect to that cause of action (see *Felder v Casey*, 487 US 131, 134; *Burton v Matteliano*, 81 AD3d 1272, 1275, *lv denied* 17 NY3d 703; *Pendleton v City of New York*, 44 AD3d 733, 738). We also note that the claims pursuant to 42 USC §§ 1983 and 1988 are subject to a three-year statute of limitations (see *Rimany v Town of Dover*, 72 AD3d 918, 921, *lv denied* 15 NY3d 705), and respondents do not contend that those claims are time-barred by that period of limitations.

Finally, respondents' contention that petitioners failed to provide reasoning for their delay in filing their motion for leave to amend is raised for the first time in respondents' reply brief and thus is not properly before us (see generally *Hann v Black*, 96 AD3d 1503, 1505).

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

1210

CA 12-00248

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

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IN THE MATTER OF THE ESTATE OF CARMEN J.  
RUSSO, DECEASED.

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DONALD J. RAISER, EXECUTOR OF THE ESTATE  
OF CARMEN J. RUSSO, DECEASED,  
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAMIE LYNN RHOAT, OBJECTANT-APPELLANT.

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ZDARSKY, SAWICKI & AGOSTINELLI, LLP, BUFFALO (GERALD T. WALSH OF  
COUNSEL), FOR OBJECTANT-APPELLANT.

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

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Appeal from an order of the Surrogate's Court, Erie County  
(Barbara Howe, S.), entered September 6, 2011. The order, inter alia,  
dismissed the objections.

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

Memorandum: Objectant appeals from an order of Surrogate's Court  
that dismissed her objections in their entirety, admitted the will of  
decedent, objectant's father, to probate and issued letters  
testamentary to petitioner. We affirm.

Preliminary letters testamentary were issued to petitioner upon  
his petition seeking to probate decedent's will. Objectant filed  
objections to, inter alia, the probate, alleging that petitioner was  
disqualified to serve as executor of her father's estate based upon a  
conflict of interest in connection with decedent's interest in Tread  
City Tire, Inc. (TCT) and decedent's classic car collection.  
Petitioner moved for summary judgment, opposing the objections on the  
ground that no conflict of interest existed. In response to  
objectant's allegation that decedent had an ownership interest in TCT,  
petitioner provided evidence in the form of corporate tax returns and  
the affidavit of a third party that established that all of the shares  
of TCT were owned by the third party and that decedent managed the  
business. Petitioner was employed by TCT as a salesperson. The  
accountant for the corporation advised petitioner that decedent owed  
\$50,000 to TCT. Based on the above evidence and the accountant's  
statement concerning decedent's debt, petitioner determined that it  
would not benefit the estate to bring an action with respect to

decedent's alleged interest in TCT. It is undisputed that, following decedent's death, petitioner was the manager of Tread City, Inc. (TCI), a new corporation formed by the third party who owned the shares of TCT. Petitioner expected that, in addition to his salary from TCI, he would have an ownership interest in the corporation at some time in the future.

With respect to decedent's classic car collection, one car was specifically bequeathed to petitioner, and petitioner established that he obtained two appraisals for each of the classic cars. Two were sold at prices higher than the appraisal price, with objectant's consent, and the remaining cars in the collection were placed in a classic car consignment program.

It is well established that "a decedent's choice of executor should be given great deference and not [be] disregarded unless that executor is not legally qualified to act as a fiduciary . . . A potential conflict of interest on the part of a fiduciary, without actual misconduct, is not sufficient to render the fiduciary unfit to serve" (*Matter of Palma*, 40 AD3d 1157, 1158). We conclude that petitioner established his entitlement to judgment and that objectant failed to raise an issue of fact whether there has been actual misconduct (*cf. Matter of Duke*, 87 NY2d 465, 475). Indeed, objectant failed to make any specific allegation of conflict or misconduct (*cf. id.*).

In any event, we note that the Surrogate has the authority, either sua sponte or upon petition, to seek an intermediate or a final account (*see* SCPA 2205 [1]), and may suspend, modify or revoke the letters testamentary in the event that actual misconduct is revealed (*see* SCPA 711).

All concur except FAHEY, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent and would reverse the order, deny the motion, reinstate the objections and remit the matter to Surrogate's Court for a hearing. In my view, petitioner failed to meet his initial burden on his motion for summary judgment (*cf. Matter of Palma*, 40 AD3d 1157, 1158-1159; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

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

1212

CA 12-00630

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

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WELLS FARGO BANK, N.A., PLAINTIFF,

V

MEMORANDUM AND ORDER

ALI A. ZHRAN, ALSO KNOWN AS ALI ZHRAN,  
DEFENDANT.

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ALI A. ZHRAN, ALSO KNOWN AS ALI ZHRAN,  
THIRD-PARTY PLAINTIFF-RESPONDENT,

V

MICHAEL VISCOME, ET AL., THIRD-PARTY DEFENDANTS,  
AND RUPP, BAASE, PFALZGRAF, CUNNINGHAM &  
COPPOLA, LLC, THIRD-PARTY DEFENDANT-APPELLANT.

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MARK R. UBA, WILLIAMSVILLE, FOR THIRD-PARTY DEFENDANT-APPELLANT.

MYERS, QUINN & SCHWARTZ, LLP, WILLIAMSVILLE (JAMES I. MYERS OF  
COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 28, 2011. The order, insofar as appealed from, denied in part the motion of third-party defendant Rupp, Baase, Pfalzgraf, Cunningham & Coppola, LLC to dismiss the third-party complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the third-party complaint against third-party defendant Rupp, Baase, Pfalzgraf, Cunningham & Coppola, LLC is dismissed.

Memorandum: Third-party defendant Rupp, Baase, Pfalzgraf, Cunningham & Coppola, LLC (Rupp Baase) appeals from an order denying those parts of its motion to dismiss the second and fifth causes of action in the third-party complaint against it. Rupp Baase moved for dismissal of the third-party complaint against it based on documentary evidence, i.e., the retainer agreement between defendant-third-party plaintiff (defendant) and Rupp Baase, and the failure to state a cause of action (see CPLR 3211 [a] [1], [7]). We agree with Rupp Baase that the retainer agreement constitutes documentary evidence and " 'resolves all factual issues as a matter of law, and conclusively disposes of the [defendant's] claim[s]' " against it, including the

claim in the fifth cause of action for malpractice (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383; see *Leon v Martinez*, 84 NY2d 83, 88). Additionally, we agree with Rupp Baase that the fraud claim against it arises from the same set of facts as the claim in the fifth cause of action for malpractice and does not allege distinct damages, and thus the fraud claim against it must be dismissed for failure to state a cause of action as well (see *Sitar v Sitar*, 50 AD3d 667, 670; *Iannucci v Kucker & Bruh, LLP*, 42 AD3d 436, 436-437). Finally, the claim for punitive damages should be dismissed, because defendant "failed to allege conduct that was directed to the general public or that evinced the requisite high degree of moral turpitude or wanton dishonesty" (*Englert v Schaffer*, 61 AD3d 1362, 1363 [internal quotation marks omitted]).

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

**1213.1**

**CA 11-01738**

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

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VIRGINIA S. PAUL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DAVID G. COOPER, AS ADMINISTRATOR OF THE ESTATE OF ERNEST R. COOPER, DECEASED, UNITED REFINING HOLDINGS, INC., DOING BUSINESS AS KWIK FILL GAS STATION, UNITED REFINING COMPANY OF PENNSYLVANIA, UNITED REFINING CO., AND UNITED REFINING, INC., DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 1.)

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MICHAEL J. CROSBY, HONEOYE FALLS, FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, ROCHESTER (DAVID F. BOWEN OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVID G. COOPER, AS ADMINISTRATOR OF THE ESTATE OF ERNEST R. COOPER, DECEASED.

MACDONALD & HAFNER, ESQS., BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS UNITED REFINING HOLDINGS, INC., DOING BUSINESS AS KWIK FILL GAS STATION, UNITED REFINING COMPANY OF PENNSYLVANIA, UNITED REFINING CO., AND UNITED REFINING, INC.

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Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered May 20, 2011. The order adjudicated plaintiff to be in default and dismissed the complaint.

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

Same Memorandum as in *Paul v Cooper* ([appeal No. 2] \_\_\_ AD3d \_\_\_ [Nov. 16, 2012]).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1213.2

CA 12-01183

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

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VIRGINIA S. PAUL, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DAVID G. COOPER, AS ADMINISTRATOR OF THE ESTATE OF ERNEST R. COOPER, DECEASED, UNITED REFINING HOLDINGS, INC., DOING BUSINESS AS KWIK FILL GAS STATION, UNITED REFINING COMPANY OF PENNSYLVANIA, UNITED REFINING CO., AND UNITED REFINING, INC., DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 2.)

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MICHAEL J. CROSBY, HONEOYE FALLS, FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, ROCHESTER (DAVID F. BOWEN OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVID G. COOPER, AS ADMINISTRATOR OF THE ESTATE OF ERNEST R. COOPER, DECEASED.

MACDONALD & HAFNER, ESQS., BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS UNITED REFINING HOLDINGS, INC., DOING BUSINESS AS KWIK FILL GAS STATION, UNITED REFINING COMPANY OF PENNSYLVANIA, UNITED REFINING CO., AND UNITED REFINING, INC.

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Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered March 2, 2012. The order settled the record for the appeal taken from an order entered May 20, 2011.

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

Memorandum: Plaintiff appeals from two orders entered in connection with her personal injury action. Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she was struck by a motor vehicle operated by Ernest R. Cooper, who is now deceased. On a prior appeal, we held that Supreme Court erred in granting that part of the motion of certain defendants for summary judgment dismissing plaintiff's claims against them (*Paul v Cooper*, 45 AD3d 1485, 1486). The court thereafter issued a series of orders, including an order granting the motion of plaintiff's trial attorney to withdraw from representing her and granting her trial attorney a lien upon the proceeds of the action, and an order granting a motion to dismiss plaintiff's claim for lost wages due to plaintiff's violation of the court's discovery orders. The matter was then

scheduled for trial. Plaintiff appeared in court on the trial date but was unprepared to proceed due to, inter alia, her failure to have witnesses available. In appeal No. 1, plaintiff appeals from an order finding her to be in default and dismissing the complaint.

Plaintiff sought to include in the record on appeal in appeal No. 1 numerous documents concerning the court's prior orders, contending that they necessarily affected the finding of default. In appeal No. 2, she appeals from an order in which the court refused to settle the record on appeal in appeal No. 1 "in the form proposed by plaintiff."

Addressing first the order in appeal No. 2, we conclude that the court erred in determining that the prior nonfinal orders and related motion papers submitted by plaintiff should not be included in the record in appeal No. 1. The complete record on appeal must include "all necessary and relevant motion papers" as well as "any other reviewable order" when the appeal is from a final order or judgment (22 NYCRR 1000.4 [a] [2]; see generally *Matter of Lavar C.*, 185 AD2d 36, 39). Plaintiff is permitted to appeal from the final order entered on her default for the sole purpose of securing review, pursuant to CPLR 5501 (a) (1), of any prior contested nonfinal order that necessarily affected the final order (see *James v Powell*, 19 NY2d 249, 256 n 3, rearg denied 19 NY2d 862). When plaintiff moved to settle the record on appeal, she sought to include the court's prior orders and related documents in the record, contending that those orders necessarily affected the final order entered on her default. Without examining the prior orders and related papers, we cannot review the propriety of the court's determination that the order entered on default was not necessarily affected by those documents. Thus, although "the notice of appeal from the [final order] does not have to recite that the appeal is also taken from the nonfinal order[s], to obtain review of the nonfinal order[s] the record submitted must contain the papers on which the order[s] were based, and the briefs may argue the validity of the order[s]" (*Austrian Lance & Stewart v Jackson*, 50 AD2d 735, 736). Consequently, we reverse the order in appeal No. 2 and grant plaintiff's motion, thereby directing that the record in appeal No. 1 be expanded to include the materials that were submitted to the court in appeal No. 2.

With respect to appeal No. 1, having reviewed the court's prior nonfinal order relieving plaintiff's counsel, we agree with the court that the order did not necessarily affect the finding of default (see CPLR 5501). Thus, that nonfinal order is not reviewable (see *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 81 AD3d 260, 265, quoting Siegel, NY Prac § 530, at 910 [4th ed], *mod on other grounds* \_\_\_ NY3d \_\_\_ [Oct. 23, 2012]). We further conclude, however, that the court's other prior nonfinal order dismissing plaintiff's claim for lost wages necessarily affects the final order and thus is reviewable (see *Karlin v IVF Am.*, 93 NY2d 282, 290), because dismissal of that claim "necessarily removed that legal issue from the case (i.e., there was no further opportunity during the litigation to raise the question decided by the prior [nonfinal] order)" (*Siegmund Strauss, Inc.*, \_\_\_ NY3d at \_\_\_). Nevertheless, we conclude that plaintiff's contentions concerning that order are without merit. The record reflects that

plaintiff refused to comply with discovery demands as late as five days before trial, and thus the court did not abuse its discretion in dismissing the claim for lost wages (see *Carpenter v Browning-Ferris Indus.*, 307 AD2d 713, 715-716). We have considered plaintiff's remaining contentions and conclude that they are without merit.

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1214

**KA 11-02493**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID M. CONDES, DEFENDANT-APPELLANT.

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WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a resentence of the Cayuga County Court (Thomas G. Leone, J.), rendered September 1, 2011. Defendant was resentenced upon his conviction of unlawful imprisonment in the second degree, rape in the first degree (four counts), criminal sexual act in the first degree (three counts), attempted assault in the second degree, unlawful imprisonment in the first degree, aggravated sexual abuse in the first degree (two counts), assault in the third degree, and attempted aggravated sexual abuse in the first degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of, inter alia, four counts of rape in the first degree (Penal Law § 130.35 [1]), and he appeals from a resentence on those convictions. At resentencing, County Court imposed defendant's original prison sentence without imposing a period of postrelease supervision, in accordance with Penal Law § 70.85. Defendant contends that the resentence constitutes cruel and unusual punishment. Where, as here, defendant appeals from a resentence conducted to address an error in failing to impose a period of postrelease supervision, this Court is without authority to reduce the period of incarceration imposed (*see People v Lingle*, 16 NY3d 621, 635; *People v Howard*, 96 AD3d 1701, 1702).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1215

**KA 11-02038**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY SISLER, DEFENDANT-APPELLANT.

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EDWARD P. PERLMAN, CONFLICT DEFENDER, LOCKPORT, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered July 24, 2009. The judgment convicted defendant, upon his plea of guilty, of sexual abuse 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 by reducing the sentence to a determinate term of imprisonment of four years and a period of postrelease supervision of three years and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends that County Court erred in imposing an enhanced sentence without affording him an opportunity to withdraw his plea. That contention is not preserved for our review because defendant did not object to the enhanced sentence, nor did he move to withdraw the plea or to vacate the judgment of conviction (*see People v Sprague*, 82 AD3d 1649, 1649, *lv denied* 17 NY3d 801; *People v Vaillant*, 77 AD3d 1389, 1390), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We agree with defendant, however, that the sentence of a determinate term of incarceration of seven years followed by a period of three years of postrelease supervision is unduly harsh and severe under the circumstances of this case. As a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), we therefore modify the judgment by reducing the sentence to a determinate term of imprisonment of four years and a period of three years of postrelease supervision.

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1218

**KA 11-00695**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ARCHANGEL L. SOLER, JR., DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 16, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of burglary in the third degree (Penal Law § 140.20) and grand larceny in the fourth degree (§ 155.30 [1]), defendant contends that the verdict is against the weight of the evidence. Although an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348), we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.* at 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that he was denied effective assistance of counsel because defense counsel did not facilitate defendant's request to appear before the grand jury. We reject that contention, inasmuch as "defendant failed to establish that he was prejudiced by the failure of his attorney to effectuate his appearance before the grand jury" (*People v Simmons*, 10 NY3d 946, 949; *see also People v Ponder*, 42 AD3d 880, 881, *lv denied* 9 NY3d 925). Indeed, defendant never informed County Court why he wished to testify, nor did he explain how his testimony would have affected the outcome of the grand jury proceedings. Instead, defendant stated that he wanted to prove that his constitutional rights had been violated, but he did not specify which rights had been violated or how they had been violated. Thus, "there is no claim that had [defendant] testified in the grand jury, the outcome would have been different" (*Simmons*, 10 NY3d at 949; *see People v Rojas*, 29 AD3d 405, 406, *lv denied* 7 NY3d 794). We also note that defendant

did not testify at trial (see *People v Sutton*, 43 AD3d 133, 136, *affd* 10 NY3d 946). Defendant's remaining contentions regarding defense counsel's alleged ineffectiveness are without merit.

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1220

**KA 09-00667**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARMEN G. MONTERO, DEFENDANT-APPELLANT.

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DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 27, 2008. The judgment convicted defendant, upon a jury verdict, of rape in the second degree (two counts), promoting prostitution in the second degree (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of two counts each of rape in the second degree (Penal Law § 130.30 [1]) and promoting prostitution in the second degree (§ 230.30 [2]), and one count of endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review her contention that she was deprived of a fair trial by prosecutorial misconduct (see CPL 470.05 [2]; *People v Beggs*, 19 AD3d 1150, 1151, *lv denied* 5 NY3d 803), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Contrary to defendant's further contention, we conclude that she was not deprived of her right to effective assistance of counsel. It is well settled that a defendant receives effective assistance of counsel "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147). "Isolated errors in counsel's representation generally will not rise to the level of ineffectiveness, unless the error is so serious that defendant did not receive a fair trial" (*People v Henry*, 95 NY2d 563, 565-566 [internal quotation marks omitted]; see *People v Flores*, 84 NY2d 184, 188-189). Moreover, "[t]o prevail on a claim of ineffective assistance of counsel,

it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's alleged shortcomings (*People v Rivera*, 71 NY2d 705, 709; see *People v Taylor*, 1 NY3d 174, 177). Here, although defendant contends that there were errors in defense counsel's performance, she failed to demonstrate that defense counsel lacked strategic or other legitimate reasons for the challenged actions (see *Baldi*, 54 NY2d at 151). Additionally, defendant has failed to demonstrate that those isolated errors were so serious that she did not receive a fair trial (see *Henry*, 95 NY2d at 565-566).

Defendant also contends that Supreme Court erred in failing to instruct the jury that the trial testimony of her alleged accomplice must be corroborated by independent evidence (see CPL 60.22 [1]). Defendant's contention is not preserved for our review because she did not object to the court's charge, nor did she request that an accomplice charge be given (see CPL 470.05 [2]; *People v Weeks*, 15 AD3d 845, 846, *lv denied* 4 NY3d 892). "In any event, the failure of the court to give that instruction is of no moment, inasmuch as the testimony of the [accomplice] was in fact amply corroborated" (*People v Peoples*, 66 AD3d 1419, 1419, *lv denied* 14 NY3d 843).

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

1222

**KA 09-02409**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AMEER A. BURNETT, DEFENDANT-APPELLANT.

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BETH A. RATCHFORD, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered February 11, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of one count of burglary in the first degree (Penal Law § 140.30 [2]) in connection with an incident in which a 64-year-old man was brutally assaulted in his home. We reject defendant's contention that he was deprived of effective assistance of counsel as a result of defense counsel's failure to request a youthful offender adjudication at the time of sentencing. Where, as here, defendant received "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404), defense counsel's failure to seek youthful offender status does not constitute ineffective assistance of counsel (see *People v Hopper*, 39 AD3d 1030, 1032; *People v Gregory*, 290 AD2d 810, 812, lv denied 98 NY2d 675; see generally *People v Cox*, 75 AD3d 1136, 1136, lv denied 15 NY3d 919). Moreover, defendant's sentence is not unduly harsh or severe, and we decline to exercise our power to adjudicate defendant a youthful offender as a matter of discretion in the interest of justice (see *People v Phillips*, 289 AD2d 1021, 1022; see generally CPL 470.15 [6] [a]).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1223

CAF 12-00105

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

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IN THE MATTER OF MARY ELIZABETH CARTER,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

LANDIN L. WORK, RESPONDENT-RESPONDENT.

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CAROLYN KELLOGG JONAS, ESQ., ATTORNEY  
FOR THE CHILD, APPELLANT.

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CAROLYN KELLOGG JONAS, ATTORNEY FOR THE CHILD, WELLSVILLE, APPELLANT PRO SE.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR  
RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), entered June 17, 2011 in a proceeding pursuant to Family Court Act article 6. The order denied the petition to suspend the visitation between respondent and the child.

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

Memorandum: Petitioner mother commenced this proceeding seeking modification of a prior order of custody and visitation (prior order) by suspending all visitation between the child and respondent father. At the time the proceeding was commenced, Family Court issued an order to show cause suspending the father's visitation with the child, but the court later issued a temporary order reinstating visitation under certain conditions. After a hearing, the court denied the petition and reinstated visitation between the father and the child according to the schedule set forth in the prior order under certain conditions.

The Attorney for the Child (AFC) contends that the court erred in denying the petition and reinstating visitation between the father and the child. We reject that contention. It is well settled that visitation with the noncustodial parent is presumed to be in the child's best interests (*see Matter of Brown v Erbstoesser*, 85 AD3d 1497, 1499), and that denial of visitation is justified only for a compelling reason (*see Matter of Swett v Balcom*, 64 AD3d 934, 935, *lv denied* 13 NY3d 710). Here, we decline to disturb the decision of the court, which has a sound and substantial basis in the record (*see generally Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451, *lv denied* 17 NY3d 701). Although the

relationship between the father and the child is strained, there is nothing in the record establishing that visitation has been detrimental to the child (see *Brown*, 85 AD3d at 1499). To the contrary, the record supports the court's determination that visitation would be in the child's best interests and that resuming visitation offered the only hope of restoring the father-daughter relationship. In addition, the record suggests that the child's opposition to visitation was the product, at least in part, of parental alienation by the mother (see *Matter of Bond v MacLeod*, 83 AD3d 1304, 1306).

Finally, although we agree with the AFC that the court improperly disclosed the child's statement at the *Lincoln* hearing (see *Matter of Spencer v Spencer*, 85 AD3d 1244, 1246), we conclude that the error does not justify disturbing an otherwise valid determination (see *Matter of Rivera v LaSalle*, 84 AD3d 1436, 1437).

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

1224

CAF 11-00707

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

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IN THE MATTER OF PHILEMON GREENE,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

SHEILA HANSON, RESPONDENT-RESPONDENT.

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

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Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered March 4, 2011 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objections to the order of the Support Magistrate.

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

Memorandum: Petitioner father appeals from an order denying his objections to the order of the Support Magistrate, wherein the Support Magistrate found that the father had willfully violated a child support order and denied his petition seeking modification of that order. Family Court properly denied the father's objections. There is a statutory presumption that the father had sufficient means to support his minor children (*see* Family Ct Act § 437; *Matter of Powers v Powers*, 86 NY2d 63, 68-69), and the father's failure to pay support as directed in the support order constitutes "prima facie evidence of a willful violation" (§ 454 [3] [a]). The burden then shifted to the father to present "some competent, credible evidence of his inability to make the required payments" (*Powers*, 86 NY2d at 70). The father did not meet that burden inasmuch as he "failed to present evidence establishing that he made reasonable efforts to obtain gainful employment to meet his . . . support obligations" (*Matter of Christine L. M. v Wlodek K.*, 45 AD3d 1452, 1452 [internal quotation marks omitted]). Indeed, although the father testified that he has been a carpenter for 16 years, he did not testify that he made any efforts to obtain any carpentry work once he ceased to operate his construction company. The father likewise failed to demonstrate a substantial change in circumstances that would justify a downward modification of his support obligation because he presented no "evidence establishing that he diligently sought re-employment commensurate with his former employment" (*Matter of Leonardo v Leonardo*,

94 AD3d 1452, 1453, *lv denied* 19 NY3d 807).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1225

CAF 11-02256

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

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IN THE MATTER OF JEREMY WAWRZYNSKI,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

SHANTEL GOODMAN, RESPONDENT-APPELLANT.

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WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR  
RESPONDENT-APPELLANT.

GERALD J. VELLA, SPRINGVILLE, FOR PETITIONER-RESPONDENT.

JAY D. CARR, ATTORNEY FOR THE CHILD, OLEAN, FOR ZOEY W.

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Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered April 13, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied respondent's petition to modify a prior custody order.

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

Memorandum: Respondent mother appeals from an order that, *inter alia*, denied her petition seeking modification of a prior custody order that awarded sole custody of the subject child to petitioner father. Contrary to the mother's contention, there is a sound and substantial basis in the record for Family Court's determination that the mother failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the best interests of the subject child would be served by modifying the existing custody arrangement (*see Matter of Jackson v Beach*, 78 AD3d 1549, 1550; *Matter of Simonds v Kirkland*, 67 AD3d 1481, 1482).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1230

CA 12-00192

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

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IN THE MATTER OF JEFFREY M. CARSON AND  
PATRICIA A. CARSON, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN OF OSWEGO ZONING BOARD OF APPEALS,  
RESPONDENT-RESPONDENT.

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MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR  
PETITIONERS-APPELLANTS.

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR  
RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered October 19, 2011 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, dismissed the petition.

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

Memorandum: Petitioners, the owners of 50 lots in a subdivision in the Town of Oswego (Town), commenced this CPLR article 78 proceeding seeking in effect to annul respondent's determination that, inter alia, "affirmed" the Town Code Enforcement Officer's denial of petitioners' applications for building permits for 10 of their lots. Supreme Court, inter alia, dismissed the petition on the ground that petitioners failed to exhaust their administrative remedies. The court concluded that the relevant lots are subject to the Town's Subdivision Regulations (Subdivision Regulations) and thus that petitioners must follow the "Subdivision Review Procedure" set forth therein, which requires that they submit to a "review" by the Town's Planning Board (Planning Board) before any building permits may be issued. We affirm.

Petitioners contend that a subdivision map was filed with the Oswego County Clerk's Office in 1963 after the Town approved the subdivision, but before the enactment of the Subdivision Regulations, and that Town Law § 276 (2) requires the Town to pass a resolution in order to allow the Planning Board to review the previously filed subdivision map. Petitioners contend that, because the Town did not pass such a resolution, the Planning Board lacks jurisdiction to review the subdivision map. That contention is raised for the first time on appeal and therefore is not properly before us (*see Matter of Cave v*

*Zoning Bd. of Appeals of Vil. of Fredonia*, 49 AD2d 228, 230-231, lv denied 38 NY2d 710; see generally *Matter of City of Buffalo v Buffalo Police Benevolent Assn.*, 280 AD2d 895, 895). Petitioners further contend that the Subdivision Regulations do not apply to the lots at issue because the subdivision in which they are located was developed and thus that respondent's determination was arbitrary and capricious. The record establishes that the court reserved decision "pending receipt of relevant maps," which it apparently received. The stipulated record on appeal, however, does not include any maps, and we therefore are unable to determine whether the Subdivision Regulations apply here. Thus, we "are unable to determine the merits of petitioner[s'] contention[] inasmuch as the record on appeal is incomplete" (*Matter of Rodriguez v Ward*, 43 AD3d 640, 641).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1239

**KA 11-02401**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND WHALEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES G. JAMIESON, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered May 20, 2011. The judgment convicted defendant, upon his plea of guilty, of misdemeanor driving while intoxicated, vehicular manslaughter in the second degree and leaving the scene of a personal injury incident resulting in death without reporting.

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 vehicular manslaughter in the second degree (Penal Law § 125.12 [1]), leaving the scene of a personal injury incident resulting in death without reporting (Vehicle and Traffic Law § 600 [2] [a], [c] [ii]), and driving while intoxicated (§ 1192 [3]). We agree with defendant that his purported waiver of the right to appeal is unenforceable because the record does not establish that County Court " 'engaged in a full and adequate colloquy, and [that] defendant expressly waived [his] right to appeal without limitation' " (*People v Maracle*, 19 NY3d 925, 928; see *People v Jackson*, 99 AD3d 1240, \_\_\_). Nevertheless, based on our review of the record, we perceive no basis for reducing defendant's sentence as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

**1244**

**KA 08-02248**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND WHALEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JECAHN R. BURNETT, DEFENDANT-APPELLANT.

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

JECAHN R. BURNETT, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered October 3, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: On appeal from a judgment convicting him following a jury trial of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that Supreme Court erred in refusing his request to charge assault in the second degree under Penal Law § 120.05 (2) and (4) as lesser included offenses. We agree. According to the two-prong analysis used to determine whether a lesser included offense should be charged, defendant first "must establish that it is impossible to commit the greater crime without concomitantly committing the lesser offense by the same conduct. Second[ ], there must be a reasonable view of the evidence to support a finding that the defendant committed the lesser offense but not the greater" (*People v Van Norstrand*, 85 NY2d 131, 135; see *People v Green*, 56 NY2d 427, 429-430, rearg denied 57 NY2d 775). While a defendant's request to charge a lesser included offense need not be granted in every case (see *People v Scarborough*, 49 NY2d 364, 368), "[t]o warrant a refusal to submit it 'every possible hypothesis' but guilt of the higher crime must be excluded" (*People v Henderson*, 41 NY2d 233, 236; see *People v Shuman*, 37 NY2d 302, 304).

Here, as the People correctly concede, the first prong of the test was satisfied, i.e., the two second degree assault charges requested by defendant are lesser included offenses of assault in the first degree as charged in the indictment. Thus, we must determine

whether the second prong of the test was met. Viewing the evidence in the light most favorable to defendant, as we must (*see People v Daniels*, 97 AD3d 845, 848; *People v March*, 89 AD3d 1496, 1498, *lv denied* 18 NY3d 926), we conclude that the jury could reasonably have concluded that defendant intended to cause physical injury rather than serious physical injury to the victim, or that he recklessly caused physical injury to the victim. The court should therefore have charged assault in the second degree as a lesser included offense under subdivisions (2) and (4) of Penal Law § 120.05.

Defendant testified at trial that he was confronted, threatened and assaulted by the complainant, who the record shows was 6 feet tall and weighed 215 pounds, as compared to defendant, who was 5 feet 6 inches tall and weighed approximately 150 pounds. At one point, according to defendant, the complainant had him pinned to the ground and was threatening to kill him. Defendant further testified that, in an attempt to free himself, he struck the complainant with his pocket knife, which he carried with him at all times for protection purposes. After sustaining eight stab wounds and two lacerations, as per the testimony of the treating physician, the complainant said "I quit" and got off of defendant. The complainant then drove himself to the hospital where he was treated for his various wounds, only one of which could have been life threatening if left untreated.

Accepting defendant's testimony as true, and viewing all of the remaining evidence in the light most favorable to the defense, we cannot exclude " 'every possible hypothesis' but guilt" (*Henderson*, 41 NY2d at 236). Defendant's self-described actions were consistent both with intending to cause physical injury by means of a dangerous instrument and with recklessly causing physical injury by means of a dangerous instrument, the mens rea elements of the two requested lesser included offenses. Although defendant's testimony was inconsistent with that of the complainant, whom defendant stabbed repeatedly, "[q]uestions of intent are generally factual in nature" (*People v Mahoney*, 122 AD2d 815, 816, *lv denied* 68 NY2d 1002), and this case does not present an exception to the general rule. We thus conclude that the court should have submitted the requested lesser included offenses to the jury.

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that, contrary to defendant's contention, the evidence is legally sufficient to establish that the complainant sustained a serious physical injury (*see generally People v Bleakley*, 69 NY2d 490, 495).

In light of our conclusion that defendant is entitled to a new trial, we need not address defendant's remaining contentions, including those raised in his pro se supplemental brief.

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

**1249**

**CA 12-00307**

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND WHALEN, JJ.

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SUZANNE K. SAVAGE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ANDERSON'S FROZEN CUSTARD, INC.,  
DEFENDANT-APPELLANT,  
ET AL., DEFENDANTS.

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GOLDBERG SEGALLA LLP, BUFFALO, GANNON, ROSENFARB, BALLETTI & DROSSMAN,  
NEW YORK CITY (LISA L. GOKHULSINGH OF COUNSEL), FOR  
DEFENDANT-APPELLANT.

STAMM LAW FIRM, WILLIAMSVILLE (MELISSA A. STADLER OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 6, 2011 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Anderson's Frozen Custard, Inc. for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Anderson's Frozen Custard, Inc. is granted and the amended and supplemental complaint against it is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in an accident at a restaurant owned and operated by Anderson's Frozen Custard, Inc. (defendant). The accident occurred when plaintiff, after ordering food, attempted to sit down in a chair that slid out from beneath her, causing her to fall to the floor. Plaintiff was helped to her feet by a friend and sat down without incident in the same chair. She later went to the hospital and was treated for injuries to her back and shoulder. The amended and supplemental complaint (complaint) asserted claims against defendant for negligence, failure to warn, and breach of the implied warranty of fitness for a product's intended purpose. The complaint named other parties as defendants, including the chair's distributor and the contractor that sealed defendant's concrete floor, which plaintiff alleged was too slippery. Following discovery, defendants separately moved and cross-moved, respectively, for summary judgment dismissing all claims against them. According to Supreme Court's decision, plaintiff conceded at oral argument that two of the defendants were not negligent, and the court granted the motion of a third defendant, Alpha Contract Flooring, Inc. (Alpha), but the court

denied defendant's motion. The court determined that Alpha established that the floor was not improperly sealed or "inherently dangerous," and that, in response, plaintiff failed to raise an issue of fact. With respect to defendant's motion, however, the court stated that there "are obvious, material issues of fact that preclude summary judgment with regard to [defendant]." The court did not identify those issues of fact. We conclude that the court erred in denying defendant's motion.

Defendant met its initial burden with respect to the negligence and failure to warn claims by submitting evidence that the accident was not attributable to a defect in the chair or the concrete floor (see *Azzaro v Super 8 Motels, Inc.*, 62 AD3d 525, 526; see also *Zalko v Sunrise Adult Health Care Ctr.*, 7 AD3d 616, 617; *Portanova v Trump Taj Mahal Assoc.*, 270 AD2d 757, 759, lv denied 95 NY2d 765). The evidence established that the chair in question and many others like it had been purchased new by defendant shortly before the accident, and that they had been used on the recently sealed concrete floor for 17 days prior to the accident. Defendant's president testified at his deposition that, during those 17 days, the restaurant was visited by 6,000 to 7,000 patrons, not one of whom had a problem sitting in the chairs. There is no evidence that defendant was aware that its use of a non-defective chair on a non-defective floor created a dangerous condition, if indeed a dangerous condition had been created. Moreover, even assuming, arguendo, that the concrete floor was slippery, we conclude that "[t]he use of flooring material that is inherently slippery is not, by itself, actionable negligence" (NY PJI 2:91, Comment [F] at 624; see *Mroz v Ella Corp.*, 262 AD2d 465, 466).

In response to defendant's motion, plaintiff failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). As the court stated in its decision, the opinions offered by plaintiff's expert in his affidavit were insufficient to raise an issue of fact because, inter alia, there is no indication that he visited the scene of the accident or performed tests on the floor. Although plaintiff submitted letters from two insurance agents to the agent for defendant's insurer tending to show that defendant may have had notice that other similar "incidents" had previously occurred at the restaurant, those letters constituted hearsay, which may be considered in opposition to a motion for summary judgment only where "it is not the only proof relied upon by the opposing party" (*Biggs v Hess*, 85 AD3d 1675, 1676; see *Zimble v Resnick 72nd Street Assoc.*, 79 AD3d 620, 621). Here, plaintiff offered no other admissible evidence in opposition to defendant's motion tending to show that a dangerous condition existed in the restaurant or that defendant was aware of such condition.

Finally, we conclude that the court should have granted defendant's motion with respect to the claim for breach of the implied warranty of fitness for a product's intended purpose because defendant established that it is "outside the manufacturing, selling, or distribution chain" (*Quinones v Federated Dept. Stores, Inc.*, 92 AD3d 931, 932; see *Abato v Millar El. Serv. Co.*, 261 AD2d 873, 874), and plaintiff failed to raise an issue of fact (see generally *Zuckerman*,

49 NY2d at 562).

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court

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

1254

CA 12-00699

PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND WHALEN, JJ.

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CAROL A. WEINHEIMER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DREW WEINHEIMER, DEFENDANT-RESPONDENT.

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ANGE & ANGE, BUFFALO (GRACE MARIE ANGE OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered June 30, 2011. The judgment, inter alia, ordered defendant to pay maintenance to plaintiff in the amount of \$600 per month.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts and the law by increasing the award of maintenance to plaintiff to \$725 per month for the same term as that set by Supreme Court, Erie County, and as modified the judgment is affirmed without costs.

Memorandum: In this matrimonial action, plaintiff wife contends that Supreme Court failed to award her a sufficient amount of maintenance and erred in denying her request for child support on behalf of the parties' unemancipated child. Plaintiff further contends that the court should have awarded her attorney's fees following the trial that was held on the issues of maintenance and child support. We agree with plaintiff that the maintenance award should be modified, but we otherwise affirm.

In determining the income of defendant husband for purposes of awarding maintenance, the court averaged defendant's income over a period of years. Although the court did not abuse its discretion in determining defendant's income for maintenance purposes in that manner (see *Bragar v Bragar*, 277 AD2d 136, 137; *Lombardo v Lombardo*, 255 AD2d 653, 654-655), we find no basis in the record for the court's finding that defendant's average income was approximately \$48,000 per year. The court admitted in evidence defendant's pay stubs showing that his year-to-date earnings in 2010 were \$55,068. Defendant's tax records for the four prior years reflected gross incomes of \$58,999, \$63,580, \$53,981, and \$63,370. No evidence was admitted concerning defendant's income for any other years. Not including 2010 due to incomplete

data, defendant's average income was \$59,982. Because the court, in determining defendant's maintenance obligation, understated his income by 20%, we conclude that, based on all of the factors enumerated in Domestic Relations Law § 236 (B) (6) (a), the maintenance award should be increased to \$725 per month. Plaintiff does not challenge the term of maintenance as set by the court, and we perceive no basis to disturb that part of the award.

We reject plaintiff's further contention that the court erred in denying her request for an award of child support. During the pendency of this action, the parties resided together in the marital residence. The parties' only unemancipated child was a 17-year-old daughter who attended community college and did not live at home. The daughter worked part-time while attending college, and her tuition was paid by student loans. Although the daughter returned home for holidays, she remained in her apartment during the summer and worked full-time. "[T]he fact that the parties continue to reside together does not bar [an] award of child support, where . . . there has been a showing that the award is necessary to maintain the reasonable needs of the child during the litigation" (*Koerner v Koerner*, 170 AD2d 297, 298; see *Harari v Davis*, 59 AD3d 182, 182; see also *Salerno v Salerno*, 142 AD2d 670, 672). Here, however, plaintiff did not allege, much less establish, that the daughter's reasonable needs were not being met. In fact, the evidence demonstrated that, with a little financial assistance from both parents, all of the daughter's bills were being paid while she attended college and lived on her own. Plaintiff was therefore not entitled to an award of child support.

Finally, we reject plaintiff's contention that the court erred in failing to award her attorney's fees at the conclusion of the case (see Domestic Relations Law § 237 [a]; *O'Shea v O'Shea*, 93 NY2d 187, 190). As a preliminary matter, we note that, because plaintiff did not submit documentation identifying the services rendered by her attorney or the fees incurred, the court was precluded from awarding attorney's fees to her (see *Cervone v Cervone*, 74 AD3d 1268, 1269). In any event, we conclude that it would have been within the court's discretion to deny plaintiff's request. Although plaintiff earned only \$20,000 annually, she had previously been awarded interim attorney's fees, and the court's award of maintenance, which we hereby upwardly modify, reduced the disparity in the parties' incomes.

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

1257

**KA 11-01992**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN W. MYERS, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 23, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree, criminal mischief in the third degree and petit larceny.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, burglary in the third degree (Penal Law § 140.20) and petit larceny (§ 155.25), defendant contends that the conviction is not supported by legally sufficient evidence. We reject that contention. Initially, we conclude that defendant failed to preserve for our review his contention that the petit larceny and burglary convictions are not supported by legally sufficient evidence that property was stolen or that he intended to commit a crime, respectively, because his motion for a trial order of dismissal was not specifically directed at those issues (see *People v Gray*, 86 NY2d 10, 19). In any event, we conclude that the evidence is legally sufficient to support the conviction with respect to all of the charges (see generally *People v Bleakley*, 69 NY2d 490, 495). Based upon all the evidence at trial, including the circumstantial evidence that the church's collection boxes had recently been forcibly opened and were empty and that there was a single track of footprints in the snow leading from defendant's vehicle to the crime scene and then back to defendant, a rational trier of fact could determine that the elements of the crimes were proven beyond a reasonable doubt (see generally *People v Rossey*, 89 NY2d 970, 971-972). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see

*generally Bleakley, 69 NY2d at 495).*

Entered: November 16, 2012

Frances E. Cafarell  
Clerk of the Court