SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 19, 2013

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

DECISIONS FILED JULY 19, 2013

_____	57	OP 12 01570	COUNTY OF ONONDAGA V JOHN J. BRUNETTI
_____	182	CA 12 01501	VELOCITY INVESTMENTS, LLC V EVE MARIE COCINA
_____	401	CA 12 02019	JOANNE WILK V DAVID M. JAMES, M.D.
_____	419	KA 09 02479	PEOPLE V DWIGHT DELEE
_____	575	CAF 12 01060	Mtr of CAYDEN L. R.
_____	599	KA 10 01043	PEOPLE V NATHAN BAXTER
_____	602	CA 12 02058	KELLEY BUTTERFIELD V JAMES R. CAPUTO, M.D.
_____	611	KA 10 01873	PEOPLE V DAYVON UNDERDUE
_____	623	CA 12 02242	THOMAS V. CASE V ANTONE R. CASE
_____	625	CA 13 00036	JOHN W. GRACE V MICHAEL R. LAW
_____	632	CA 12 01853	CANANDAIGUA EMERGENCY SQUAD, INC. V ROCHESTER AREA HEALTH MAINTENANCE O
_____	634	CA 12 01577	GRANT MEABON V TOWN OF POLAND
_____	635	CA 12 01578	GRANT MEABON V TOWN OF POLAND
_____	635.1	CA 12 02035	POLYFUSION ELECTRONICS, INC. V PROMARK ELECTRONICS, INC.
_____	652	CA 12 02244	SCOTT J. PIATT V ROSS A. HORSLEY, M.D.
_____	655	CA 12 01323	CHRISTOPHER A. MILCZARSKI V MICHAEL K. WALASZEK
_____	656	CA 12 02134	CHRISTOPHER A. MILCZARSKI V MICHAEL K. WALASZEK
_____	659	CA 12 02391	ANGELA RAWLINS V ST. JOSEPH'S HOSPITAL HEALTH CENT
_____	660	CA 12 02218	ONEIDA INDIAN NATION V HUNT CONSTRUCTION GROUP, I
_____	663	TP 12 02248	MARK DONVITO V NIRAV R. SHAH, M.D., M.P.H.
_____	678	CA 12 02300	5 AWNINGS PLUS, INC. V MOSES INSURANCE GROUP, INC
_____	679	CA 12 00806	DEIRDRE LOY V LOUIS L. LOY
_____	687	KA 12 01691	PEOPLE V TERRYL NOYES
_____	695	OP 12 02197	JAAN A. AARISMAA, IV V HON. DENNIS F. BENDER

_____	720	CA 12 02394	MISERENDINO, SEEGERT & ESTOFF, P.C. V PHILIP CELNIKER
_____	736	KA 11 02035	PEOPLE V DAMITRIA S. JONES
_____	740	CAF 12 00935	CHRISTY S. V PHONESAVANH S.
_____	741	CAF 12 00936	Mtr of MANELIN S.
_____	746	CA 13 00059	BRANDYWINE PAVERS, LLC V PAT J. BOMBARD
_____	756	KA 12 00108	PEOPLE V RONALD J. LARKINS
_____	781	KA 12 00993	PEOPLE V CHEYENNE J. KOONS
_____	782	KA 12 00586	PEOPLE V CHARLES L. JONES
_____	785	KA 12 01052	PEOPLE V TEARA FATICO
_____	786	KA 12 01017	PEOPLE V TREVON A. LUGG
_____	787	KA 12 01762	PEOPLE V BRYAN SMITH
_____	789	KA 10 00056	PEOPLE V BLAIR CHATTLEY
_____	791	TP 13 00268	ANTOINE FREEMAN V BRIAN FISCHER
_____	796	KA 11 02182	PEOPLE V LAMONT HINES
_____	797	KA 10 02074	PEOPLE V CHARLES GREENE
_____	798	KA 12 01344	PEOPLE V GERALD J. STAUDER
_____	799	KA 12 00047	PEOPLE V DONTE LEE
_____	800	KA 11 00358	PEOPLE V MICHAEL L. SCHROCK
_____	808	TP 13 00271	CESAR ROSA V BRIAN FISCHER
_____	809	TP 12 01670	JOHN FALBO, JR. V BARBARA J. FIALO
_____	810	CA 12 00538	JOHN COLVIN V RONNIE COVINGTON
_____	811	CA 12 00391	CLIFFORD GRAHAM V KEVIN WALSH
_____	812	KA 12 00990	PEOPLE V STANLEY BETHUNE
_____	813	KA 12 01270	PEOPLE V RUSSELL YOUNG
_____	814	KA 12 00683	PEOPLE V ANDREW HAYHURST
_____	815	KA 12 01646	PEOPLE V BENNIE COGER
_____	816	KA 11 02403	PEOPLE V DANIEL W. BROTZ
_____	817	KA 11 00140	PEOPLE V RONALD WHITE
_____	818	CAF 12 02057	JUAN C. LARA V MICHELLE B. SULLIVAN

COMBINED CIVIL/CRIMINAL DECISION INDEX FOR JULY 19, 2013

Case Name / Cal No	Docket No	Term Date	Decided	Lower Court Number
5 AWNINGS PLUS, INC., v MOSES INSURANCE GROUP, INC.,				
678	CA 12-02300	05/17/2013	07/19/2013	(145570/2011)
AARISMAA, IV, JAAN A. v BENDER, HON. DENNIS F.				
695	OP 12-02197	05/20/2013	07/19/2013	
BAXTER, NATHAN, PEOPLE v				
599	KA 10-01043	05/14/2013	07/19/2013	(I2009-0306-1)
BETHUNE, STANLEY, PEOPLE v				
812	KA 12-00990	06/19/2013	07/19/2013	(I2002-0322)
BRANDYWINE PAVERS, LLC, v BOMBARD, PAT J.				
746	CA 13-00059	05/22/2013	07/19/2013	(10-6447)
BROTZ, DANIEL W., PEOPLE v				
816	KA 11-02403	06/19/2013	07/19/2013	(I09-04-082)
BUTTERFIELD, KELLEY v CAPUTO, M.D., JAMES R.				
602	CA 12-02058	05/14/2013	07/19/2013	(2009-3595)
CANANDAIGUA EMERGENCY SQUAD, INC., v ROCHESTER AREA HEALTH MAINTENANCE O,				
632	CA 12-01853	05/15/2013	07/19/2013	(2009/000111)
CASE, THOMAS V. v CASE, ANTONE R.				
623	CA 12-02242	05/15/2013	07/19/2013	(297-2003)
CHATTLEY, BLAIR, PEOPLE v				
789	KA 10-00056		07/19/2013	(I2007-2172)
COGER, BENNIE, PEOPLE v				
815	KA 12-01646	06/19/2013	07/19/2013	(I99-16)
COLVIN, JOHN v COVINGTON, RONNIE				
810	CA 12-00538	06/19/2013	07/19/2013	(45926)
COUNTY OF ONONDAGA, v BRUNETTI, JOHN J.				
57	OP 12-01570	06/20/2013	07/19/2013	
DELEE, DWIGHT, PEOPLE v				
419	KA 09-02479	04/03/2013	07/19/2013	(I2009-0348-1)
DONVITO, MARK v SHAH, M.D., M.P.H., NIRAV R.				
663	TP 12-02248	05/17/2013	07/19/2013	(2012-4772)
FALBO, JR., JOHN v FIALO, BARBARA J.				
809	TP 12-01670	06/19/2013	07/19/2013	(32-11-540)
FATICO, TEARA, PEOPLE v				
785	KA 12-01052	06/17/2013	07/19/2013	(S2011-409A)
FREEMAN, ANTOINE v FISCHER, BRIAN				
791	TP 13-00268	06/18/2013	07/19/2013	(21,262-12)
GRACE, JOHN W. v LAW, MICHAEL R.				
625	CA 13-00036	05/15/2013	07/19/2013	(I2011-04732)
GRAHAM, CLIFFORD v WALSH, KEVIN				
811	CA 12-00391	06/19/2013	07/19/2013	(2011-7267)
GREENE, CHARLES, PEOPLE v				
797	KA 10-02074	06/18/2013	07/19/2013	(SS10-121)
HAYHURST, ANDREW, PEOPLE v				
814	KA 12-00683	06/19/2013	07/19/2013	(S34357)
HINES, LAMONT, PEOPLE v				
796	KA 11-02182	06/18/2013	07/19/2013	(I2009-02644)
JONES, DAMITRIA S., PEOPLE v				
736	KA 11-02035	05/22/2013	07/19/2013	(I2010-2013)
JONES, CHARLES L., PEOPLE v				
782	KA 12-00586	06/17/2013	07/19/2013	(S35191)
KOONS, CHEYENNE J., PEOPLE v				
781	KA 12-00993	06/17/2013	07/19/2013	(S2010-127W 128W)
LARA, JUAN C. v SULLIVAN, MICHELLE B.				
818	CAF 12-02057	06/20/2013	07/19/2013	(V701-0111/C AND D)
LARKINS, RONALD J., PEOPLE v				
756	KA 12-00108	05/23/2013	07/19/2013	(I2010-155)
LEE, DONTE, PEOPLE v				
799	KA 12-00047	06/18/2013	07/19/2013	(S33143)
LOY, DEIRDRE v LOY, LOUIS L.				
679	CA 12-00806	05/17/2013	07/19/2013	(77880)
LUGG, TREVON A., PEOPLE v				
786	KA 12-01017	06/17/2013	07/19/2013	(S08-218)
MEABON, GRANT v TOWN OF POLAND,				
635	CA 12-01578	05/15/2013	07/19/2013	(K1-2010-1709)
MEABON, GRANT v TOWN OF POLAND,				
634	CA 12-01577	05/15/2013	07/19/2013	(K1-2010-1709)
MILCZARSKI, CHRISTOPHER A. v WALASZEK, MICHAEL K.				
655	CA 12-01323	05/16/2013	07/19/2013	(136140)

COMBINED CIVIL/CRIMINAL DECISION INDEX FOR JULY 19, 2013

Case Name / Cal No	Docket No	Term Date	Decided	Lower Court Number
MILCZARSKI, CHRISTOPHER A. v WALASZEK, MICHAEL K.				
656	CA 12-02134	05/16/2013	07/19/2013	(136140)
MISERENDINO, SEEGERT & ESTOFF, P.C., v CELNIKER, PHILIP				
720	CA 12-02394	05/21/2013	07/19/2013	(2010-4271, 10500)
NOYES, TERRYL, PEOPLE v				
687	KA 12-01691	05/20/2013	07/19/2013	(IOS2437)
ONEIDA INDIAN NATION, v HUNT CONSTRUCTION GROUP, INC.,				
660	CA 12-02218	05/16/2013	07/19/2013	(2008-5453)
PIATT, SCOTT J. v HORSLEY, M.D., ROSS A.				
652	CA 12-02244	05/16/2013	07/19/2013	(I-2008-36286)
POLYFUSION ELECTRONICS, INC., v PROMARK ELECTRONICS, INC.,				
635.1	CA 12-02035	05/15/2013	07/19/2013	(2008-011270)
R., CAYDEN L., MTR. OF				
575	CAF 12-01060	05/13/2013	07/19/2013	(B-1090-11)
RAWLINS, ANGELA v ST. JOSEPH'S HOSPITAL HEALTH CENTER,				
659	CA 12-02391	05/16/2013	07/19/2013	(2008-2540)
ROSA, CESAR v FISCHER, BRIAN				
808	TP 13-00271	06/19/2013	07/19/2013	(21,264-12)
S., CHRISTY v S., PHONESAVANH				
740	CAF 12-00935	05/22/2013	07/19/2013	(NN-01880-11)
S., MANELIN, MTR. OF				
741	CAF 12-00936	05/22/2013	07/19/2013	(NN-01880-11)
SCHROCK, MICHAEL L., PEOPLE v				
800	KA 11-00358		07/19/2013	(I06-115)
SMITH, BRYAN, PEOPLE v				
787	KA 12-01762	06/17/2013	07/19/2013	(I1983-1200-SO1)
STAUDER, GERALD J., PEOPLE v				
798	KA 12-01344	06/18/2013	07/19/2013	(I2011-525)
UNDERDUE, DAYVON, PEOPLE v				
611	KA 10-01873	05/15/2013	07/19/2013	(I2009-0679-1)
VELOCITY INVESTMENTS, LLC, v COCINA, EVE MARIE				
182	CA 12-01501	02/19/2013	07/19/2013	(2007/1915)
WHITE, RONALD, PEOPLE v				
817	KA 11-00140		07/19/2013	(I2008-2094X)
WILK, JOANNE v JAMES, M.D., DAVID M.				
401	CA 12-02019	04/02/2013	07/19/2013	(2005-8135)
YOUNG, RUSSELL, PEOPLE v				
813	KA 12-01270	06/19/2013	07/19/2013	(Out of State SORA)

COMBINED CIVIL/CRIMINAL DECISION INDEX FOR JULY 19, 2013 TERM

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
ALLEGANY COUNTY					
PIATT, SCOTT J. v HORSLEY, M.D., ROSS A.	652	CA 12-02244	05/16/2013	07/19/2013	(I-2008-36286)
Total Cases Listed for this county = 1					
CATTARAUGUS COUNTY					
SCHROCK, MICHAEL L., PEOPLE v	800	KA 11-00358		07/19/2013	(I06-115)
Total Cases Listed for this county = 1					
CAYUGA COUNTY					
LARKINS, RONALD J., PEOPLE v	756	KA 12-00108	05/23/2013	07/19/2013	(I2010-155)
Total Cases Listed for this county = 1					
CHAUTAUQUA COUNTY					
MEABON, GRANT v TOWN OF POLAND,	634	CA 12-01577	05/15/2013	07/19/2013	(K1-2010-1709)
MEABON, GRANT v TOWN OF POLAND,	635	CA 12-01578	05/15/2013	07/19/2013	(K1-2010-1709)
Total Cases Listed for this county = 2					
ERIE COUNTY					
CHATTLEY, BLAIR, PEOPLE v	789	KA 10-00056		07/19/2013	(I2007-2172)
GRACE, JOHN W. v LAW, MICHAEL R.	625	CA 13-00036	05/15/2013	07/19/2013	(I2011-04732)
HAYHURST, ANDREW, PEOPLE v	814	KA 12-00683	06/19/2013	07/19/2013	(S34357)
HINES, LAMONT, PEOPLE v	796	KA 11-02182	06/18/2013	07/19/2013	(I2009-02644)
JONES, DAMITRIA S., PEOPLE v	736	KA 11-02035	05/22/2013	07/19/2013	(I2010-2013)
JONES, CHARLES L., PEOPLE v	782	KA 12-00586	06/17/2013	07/19/2013	(S35191)
LEE, DONTE, PEOPLE v	799	KA 12-00047	06/18/2013	07/19/2013	(S33143)
MISERENDINO, SEEGERT & ESTOFF, P.C., v CELNIKER, PHILIP	720	CA 12-02394	05/21/2013	07/19/2013	(2010-4271, 10500)
NOYES, TERRYL, PEOPLE v	687	KA 12-01691	05/20/2013	07/19/2013	(IOS2437)
POLYFUSION ELECTRONICS, INC., v PROMARK ELECTRONICS, INC.,	635.1	CA 12-02035	05/15/2013	07/19/2013	(2008-011270)
SMITH, BRYAN, PEOPLE v	787	KA 12-01762	06/17/2013	07/19/2013	(I1983-1200-SO1)
VELOCITY INVESTMENTS, LLC, v COCINA, EVE MARIE	182	CA 12-01501	02/19/2013	07/19/2013	(2007/1915)
WHITE, RONALD, PEOPLE v	817	KA 11-00140		07/19/2013	(I2008-2094X)
WILK, JOANNE v JAMES, M.D., DAVID M.	401	CA 12-02019	04/02/2013	07/19/2013	(2005-8135)
Total Cases Listed for this county = 14					
JEFFERSON COUNTY					
R., CAYDEN L., MTR. OF	575	CAF 12-01060	05/13/2013	07/19/2013	(B-1090-11)

COMBINED CIVIL/CRIMINAL DECISION INDEX FOR JULY 19, 2013 TERM

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
Total Cases Listed for this county = 1					
LIVINGSTON COUNTY **********					
CASE, THOMAS V. v CASE, ANTONE R.	623	CA 12-02242	05/15/2013	07/19/2013	(297-2003)
Total Cases Listed for this county = 1					
MONROE COUNTY **********					
BETHUNE, STANLEY, PEOPLE v	812	KA 12-00990	06/19/2013	07/19/2013	(I2002-0322)
CANANDAIGUA EMERGENCY SQUAD, INC., v ROCHESTER AREA HEALTH MAINTENANCE O,	632	CA 12-01853	05/15/2013	07/19/2013	(2009/000111)
LARA, JUAN C. v SULLIVAN, MICHELLE B.	818	CAF 12-02057	06/20/2013	07/19/2013	(V701-0111/C AND D)
Total Cases Listed for this county = 3					
NIAGARA COUNTY **********					
5 AWNINGS PLUS, INC., v MOSES INSURANCE GROUP, INC.,	678	CA 12-02300	05/17/2013	07/19/2013	(145570/2011)
FATICO, TEARA, PEOPLE v	785	KA 12-01052	06/17/2013	07/19/2013	(S2011-409A)
MILCZARSKI, CHRISTOPHER A. v WALASZEK, MICHAEL K.	656	CA 12-02134	05/16/2013	07/19/2013	(136140)
MILCZARSKI, CHRISTOPHER A. v WALASZEK, MICHAEL K.	655	CA 12-01323	05/16/2013	07/19/2013	(136140)
STAUDER, GERALD J., PEOPLE v	798	KA 12-01344	06/18/2013	07/19/2013	(I2011-525)
Total Cases Listed for this county = 5					
ONEIDA COUNTY **********					
FALBO, JR., JOHN v FIALO, BARBARA J.	809	TP 12-01670	06/19/2013	07/19/2013	(32-11-540)
GREENE, CHARLES, PEOPLE v	797	KA 10-02074	06/18/2013	07/19/2013	(SS10-121)
LUGG, TREVON A., PEOPLE v	786	KA 12-01017	06/17/2013	07/19/2013	(S08-218)
S., CHRISTY v S., PHONESAVANH	740	CAF 12-00935	05/22/2013	07/19/2013	(NN-01880-11)
S., MANELIN, MTR. OF	741	CAF 12-00936	05/22/2013	07/19/2013	(NN-01880-11)
Total Cases Listed for this county = 5					
ONONDAGA COUNTY **********					
BAXTER, NATHAN, PEOPLE v	599	KA 10-01043	05/14/2013	07/19/2013	(I2009-0306-1)
BRANDYWINE PAVERS, LLC, v BOMBARD, PAT J.	746	CA 13-00059	05/22/2013	07/19/2013	(10-6447)
BUTTERFIELD, KELLEY v CAPUTO, M.D., JAMES R.	602	CA 12-02058	05/14/2013	07/19/2013	(2009-3595)
COUNTY OF ONONDAGA, v BRUNETTI, JOHN J.	57	OP 12-01570	06/20/2013	07/19/2013	
DELEE, DWIGHT, PEOPLE v	419	KA 09-02479	04/03/2013	07/19/2013	(I2009-0348-1)
DONVITO, MARK v SHAH, M.D., M.P.H., NIRAV R.	663	TP 12-02248	05/17/2013	07/19/2013	(2012-4772)
GRAHAM, CLIFFORD v WALSH, KEVIN	811	CA 12-00391	06/19/2013	07/19/2013	(2011-7267)
ONEIDA INDIAN NATION, v HUNT CONSTRUCTION GROUP, INC.,					

COMBINED CIVIL/CRIMINAL DECISION INDEX FOR JULY 19, 2013 TERM

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
	660	CA 12-02218	05/16/2013	07/19/2013	(2008-5453)
RAWLINS, ANGELA v ST. JOSEPH'S HOSPITAL HEALTH CENTER,					
	659	CA 12-02391	05/16/2013	07/19/2013	(2008-2540)
UNDERDUE, DAYVON, PEOPLE v					
	611	KA 10-01873	05/15/2013	07/19/2013	(I2009-0679-1)
YOUNG, RUSSELL, PEOPLE v					
	813	KA 12-01270	06/19/2013	07/19/2013	(Out of State SORA)

Total Cases Listed for this county = 11

ONTARIO COUNTY **********

BROTZ, DANIEL W., PEOPLE v					
	816	KA 11-02403	06/19/2013	07/19/2013	(I09-04-082)
LOY, DEIRDRE v LOY, LOUIS L.					
	679	CA 12-00806	05/17/2013	07/19/2013	(77880)

Total Cases Listed for this county = 2

ORLEANS COUNTY **********

COGER, BENNIE, PEOPLE v					
	815	KA 12-01646	06/19/2013	07/19/2013	(I99-16)

Total Cases Listed for this county = 1

SENECA COUNTY **********

AARISMAA, IV, JAAN A. v BENDER, HON. DENNIS F.					
	695	OP 12-02197	05/20/2013	07/19/2013	
COLVIN, JOHN v COVINGTON, RONNIE					
	810	CA 12-00538	06/19/2013	07/19/2013	(45926)

Total Cases Listed for this county = 2

STEUBEN COUNTY **********

KOONS, CHEYENNE J., PEOPLE v					
	781	KA 12-00993	06/17/2013	07/19/2013	(S2010-127W 128W)

Total Cases Listed for this county = 1

WYOMING COUNTY **********

FREEMAN, ANTOINE v FISCHER, BRIAN					
	791	TP 13-00268	06/18/2013	07/19/2013	(21,262-12)
ROSA, CESAR v FISCHER, BRIAN					
	808	TP 13-00271	06/19/2013	07/19/2013	(21,264-12)

Total Cases Listed for this county = 2

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

57

OP 12-01570

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

IN THE MATTER OF COUNTY OF ONONDAGA AND ONONDAGA COUNTY BAR ASSOCIATION ASSIGNED COUNSEL PROGRAM, INC., PETITIONERS,

V MEMORANDUM AND ORDER

HON. JOHN J. BRUNETTI, JUDGE OF COURT OF CLAIMS, ACTING JUSTICE OF SUPREME COURT, AND HON. JOSEPH E. FAHEY, JUDGE OF CRIMINAL COURT AND CHRISTINA CAGNINA, RESPONDENTS.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS HON. JOHN J. BRUNETTI, JUDGE OF COURT OF CLAIMS, ACTING JUSTICE OF SUPREME COURT, AND HON. JOSEPH E. FAHEY, JUDGE OF CRIMINAL COURT.

CHRISTINA CAGNINA, SYRACUSE, RESPONDENT PRO SE.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to vacate the approval of respondent Christina Cagnina’s vouchers, and for other relief.

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

Memorandum: Petitioners commenced this original CPLR article 78 proceeding alleging that Hon. John J. Brunetti, Judge of Court of Claims, Acting Justice of Supreme Court, and Hon. Joseph E. Fahey, Judge of Criminal Court (respondents), acted in excess of their authority by approving vouchers that violated the plan for the payment of assigned counsel for indigent defendants put in place by petitioner Onondaga County Bar Association Assigned Counsel Program, Inc. (ACP) pursuant to County Law § 722 (3). Petitioners seek an order vacating the decision of respondents approving the vouchers and directing respondents to follow the plan of the ACP (ACP Plan) as approved by the Chief Administrative Judge, including its provisions for the compensation of counsel.

This proceeding is the latest in a series delineating the scope of the authority of the courts in the oversight of the County Law

article 18-B Assigned Counsel Program in Onondaga County (*see Roulan v County of Onondaga*, 21 NY3d 902; *Cagnina v Onondaga County*, 90 AD3d 1626; *Matter of Parry v County of Onondaga*, 51 AD3d 1385). This proceeding involves the payment of vouchers to assigned counsel, respondent Christina Cagnina. Although petitioners opposed payment of the vouchers submitted by Cagnina because they did not comply with the ACP Plan, Cagnina submitted the vouchers directly to respondents, who approved payment. Notably, this proceeding challenges the authority of respondents to approve vouchers that do not comply with the ACP Plan; it does not challenge the amount of the compensation awarded, a matter reviewable only before an administrative judge (*see Matter of Smith v Tormey*, 19 NY3d 533, 539-540). We reject petitioners' contention that respondents have a mandatory duty to follow the ACP Plan and that their failure to refuse to pay vouchers not in compliance with the Plan is arbitrary and capricious. Although ACP personnel may make recommendations to the trial court with respect to the payment of vouchers, the trial courts are not obligated to adhere to those recommendations. "The ACP Plan does not take away from the courts the ultimate authority to determine assigned counsel's compensation; it merely provides for a preliminary review and recommendation, which individual trial judges are free to accept or reject" (*Roulan*, 21 NY3d at 905).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

182

CA 12-01501

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

VELOCITY INVESTMENTS, LLC, PLAINTIFF-RESPONDENT,

V ORDER

EVE MARIE COCINA, DEFENDANT-APPELLANT.

LAW OFFICES OF KENNETH HILLER, PLLC, AMHERST (SETH J. ANDREWS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MALEN & ASSOCIATES, P.C., WESTBURY (ADAM HUGHES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered August 10, 2011. The order granted in part the motion of defendant for attorneys' fees, costs and disbursements.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on April 8, 2013, and filed in the Erie County Clerk's Office on April 24, 2013,

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

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

401

CA 12-02019

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

JOANNE WILK, AS ADMINISTRATRIX OF THE ESTATE
OF STEVEN R. WILK, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. JAMES, M.D., ET AL., DEFENDANTS,
LOUIS R. BAUMANN, M.D., CARLO M. PERFETTO, M.D.
AND WESTERN NEW YORK UROLOGY ASSOCIATES, LLC,
DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HAMSHER & VALENTINE, BUFFALO (RICHARD P. VALENTINE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered August 23, 2012. The order denied the motion of defendants Louis R. Baumann, M.D., Carlo M. Perfetto, M.D. and Western New York Urology Associates, LLC, for summary judgment dismissing the amended complaint and all cross claims against them.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted, and the amended complaint and all cross claims against defendants Louis R. Baumann, M.D., Carlo M. Perfetto, M.D., and Western New York Urology Associates, LLC are dismissed.

Memorandum: Plaintiff, as administratrix of the estate of her husband (decedent), commenced this medical malpractice and wrongful death action seeking damages for the alleged negligence of defendants in their care and treatment of decedent. Defendants Louis R. Baumann, M.D., Carlo M. Perfetto, M.D., and Western New York Urology Associates, LLC (hereafter, defendants), appeal from an order denying their motion for summary judgment dismissing the amended complaint and all cross claims against them. We reverse.

At approximately 2:42 p.m. on February 16, 2004, decedent called the office of Dr. Perfetto, his treating urologist, and spoke to a secretary. Decedent told the secretary that he went to the emergency room the day before, that he “ha[d] stones,” and that he was “in a lot of pain.” The secretary relayed the message to a medical assistant, who called decedent back at 3:08 p.m. Decedent’s line was busy. The

medical assistant called decedent again at 4:26 p.m. and left a message for decedent. At 4:43 p.m., decedent returned the call and spoke to the medical assistant. The medical assistant's notes from that conversation indicate that decedent told her that he had gone to the emergency room the day before due to lower back pain and that he was told that he had "stones." Decedent also experienced urinary retention at that time, which was treated with a catheter. Decedent told the medical assistant that he had not urinated since being catheterized and that his back pain was a 7 out of 10 on the pain scale. Those notes were forwarded to Dr. Perfetto, and the medical assistant contacted the hospital to obtain decedent's X ray and CT scan results.

At 4:58 p.m., the medical assistant received a CT scan of decedent's abdomen taken on February 15, 2004 and forwarded it to Dr. Baumann, the on-call urologist. Western New York Urology Associates, LLC had a practice of "bring[ing]" patients who were unable to urinate into the office without speaking first with a physician. In accordance with that policy, the medical assistant advised decedent to come to the office for possible catheterization. At 5:23 p.m., the medical assistant notified Dr. Perfetto that decedent was on his way to the office. Dr. Perfetto reviewed the medical assistant's message as well as the CT scan report, and advised her that because the office lacked sufficient staff to assist him with the catheterization at that time, decedent should instead go to the emergency room to have a Foley catheter inserted. He further advised the medical assistant that decedent should make a follow-up appointment with him or the nurse practitioner. At 5:55 p.m., the medical assistant noted that she instructed decedent to go to Mercy Ambulatory Care Center (MACC) for "evaluation catheter insertion," notified MACC that he was coming, and further instructed decedent to schedule a follow-up appointment. Decedent arrived at MACC at 7:10 p.m., complaining of urinary retention and pain and pressure in his suprapubic area. Decedent's blood pressure was elevated; otherwise, he was hemodynamically stable. A Foley catheter was inserted and 1,000 cubic centimeters of urine were released. Thereafter, decedent's blood pressure returned to normal and, after consulting with Dr. Baumann, MACC discharged decedent with the catheter in place, and advised him to increase his fluid intake and to follow up with Dr. Perfetto the next day. Decedent, however, did not contact Dr. Perfetto. Instead, on February 18, 2004, decedent was transported via ambulance to the emergency room due to complaints of increased pain and inability to feel or move his legs, and was admitted for neurosurgical evaluation. An MRI revealed a spinal epidural hematoma at L2 through L5 and a clot at T11 through T12, and decedent underwent an emergency "T7-L4 laminectomy with the evacuation of intradural spinal hematoma."

The day after the surgery, decedent's motor examination declined, and another MRI revealed a reaccumulation of the clot. As a result, on February 20, 2004, decedent underwent a second surgery for "re-exploration and re-evacuation of his intradural clot." Decedent's condition slowly improved, and he was scheduled to be transferred to a spinal cord injury rehabilitation center. At approximately noon on March 1, 2004, however, decedent's condition suddenly deteriorated,

and he died on March 3, 2004. The death certificate lists the immediate cause of death as "cerebral infarct with herniation" occurring within "hours" of decedent's death. The cerebral infarct was "due to or as a consequence of" shock with intestinal ischemia beginning "days" before decedent's death that, in turn, was "due to or as a consequence of" aortic dissection, which likewise began "days" prior to decedent's death. The death certificate also lists "spinal cord infarct [secondary to] hematoma" as another significant condition contributing to his death.

As plaintiff correctly concedes, defendants met their initial burden on the motion by establishing "the absence of any departure from good and accepted medical practice [and] that any departure was not the proximate cause of [decedent]'s alleged injuries" and eventual death (*Shichman v Yasmer*, 74 AD3d 1316, 1318; *see O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1140, *appeal dismissed* 13 NY3d 834). Dr. Perfetto and Dr. Baumann each submitted their own affidavit opining, with a reasonable degree of medical certainty, that they did not deviate from accepted urological practice, and that any acts or omissions on their part did not cause or contribute to decedent's death, which occurred over two weeks after their treatment of decedent (*see Lake v Kaleida Health*, 59 AD3d 966, 966; *Darling v Scott*, 46 AD3d 1363, 1364). The physicians' affidavits directly address each of the allegations of negligence in plaintiff's bills of particulars (*see Abbotoy v Kurss*, 52 AD3d 1311, 1312), and their opinions are supported by decedent's medical records and excerpts from the autopsy report (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325).

The burden thus shifted to plaintiff to "raise triable issues of fact by submitting a physician's affidavit both attesting to a departure from accepted practice and containing the attesting [physician's] opinion that the defendant[s'] omissions or departures were a competent producing cause of the injury" (*O'Shea*, 64 AD3d at 1141 [internal quotation marks omitted]; *see Moran v Muscarella*, 85 AD3d 1579, 1580). It is well settled that "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant[s'] . . . summary judgment motion" (*Alvarez*, 68 NY2d at 325). Thus, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, . . . [his or her] opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544).

We agree with defendants that the affidavit of plaintiff's urological expert is insufficient to defeat their motion inasmuch as it is vague, conclusory, speculative, and unsupported by the medical evidence in the record before us (*see DiGeronimo v Fuchs*, 101 AD3d 933, 936-937; *Foster-Sturrup v Long*, 95 AD3d 726, 728-729; *Moran v Muscarella*, 87 AD3d 1299, 1300). The crux of the opinion of plaintiff's expert, which Supreme Court relied upon in denying defendants' motion, is that defendants deviated from the standard of care in failing to order a CT scan with contrast of decedent's abdomen and pelvis on February 16, 2004 and that, but for such deviation,

defendants or other medical providers would have diagnosed the purported underlying cause of decedent's condition, i.e., an aortic dissection, in sufficient time to surgically correct that condition. However, even assuming, arguendo, that decedent's urological symptoms on February 16, 2004 were caused by an aortic dissection, we agree with defendants that the affidavit of plaintiff's expert fails to raise an issue of fact with respect to proximate cause (*see generally Bey v Neuman*, 100 AD3d 581, 582-583). Notably, plaintiff's expert does not opine that defendants should have diagnosed an aortic dissection allegedly existing on February 16, 2004 based upon decedent's complaints of pain and urinary retention on that date. Rather, plaintiff's expert asserts that, based upon those complaints and the February 15, 2004 CT scan showing an enlarged left kidney, "[a] reasonable differential diagnosis . . . would have included acute infarct of the left kidney." According to plaintiff's expert, in order to rule out that condition, defendants "had a duty to assure that, at a minimum, a CT [s]can of the abdomen and pelvis, with contrast, [was] performed on February 16, 2004." The expert contends that, if that CT scan had been performed on February 16, 2004, "then diagnosis of [decedent]'s aortic dissection . . . would, more probably than not, have been made." Significantly, however, the medical records indicate that it was a CT scan of decedent's head and chest, not a scan of his pelvis and abdomen, that revealed an aortic dissection on March 1, 2004. Thus, the opinion of plaintiff's expert that an abdominal and pelvic CT scan performed on February 16, 2004 would more likely than not have revealed an aortic dissection is speculative. Moreover, it is undisputed that decedent did not in fact have an infarct of his left kidney. Plaintiff is therefore seeking a determination that defendants were negligent in failing to order a diagnostic test to rule out a urological condition that decedent did not have because that test may incidentally have revealed an underlying and unsuspected cardiothoracic condition. We agree with defendants that the causal link between defendants' alleged negligence, i.e., the failure to order a CT scan with contrast of decedent's pelvis and abdomen to rule out a kidney infarct, and decedent's injuries, i.e., his deterioration and death allegedly from an aortic dissection that might have been disclosed on such a CT scan, is simply too attenuated to raise an issue of fact with respect to causation (*see generally Corsino v New York City Tr. Auth.*, 42 AD3d 325, 327). "[H]indsight reasoning," of course, is "insufficient to defeat summary judgment" (*Brown v Bauman*, 61 AD3d 540, 540-541 [internal quotation marks omitted]).

Although the dissenting justice concludes that the result herein is inconsistent with an earlier decision issued by this Court in a separate appeal in this case (*see Wilk v James*, ___ AD3d ___ [June 7, 2013]), we note that this appeal involves different defendants who had different obligations with respect to the decedent as well as additional medical records that were not submitted in the earlier appeal.

We therefore reverse the order, grant the motion, and dismiss the amended complaint and all cross claims against defendants.

All concur except FAHEY, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent and would affirm for the reasons stated in the decision at Supreme Court. I add only that, in my view, the result reached by the majority is inconsistent with our decision in a separate appeal in this case (*Wilk v James*, ___ AD3d ___ [June 7, 2013]) in its application of the concept of differential diagnosis to other doctors and medical providers who were involved in this matter.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

419

KA 09-02479

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT R. DELEE, DEFENDANT-APPELLANT.

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

DWIGHT R. DELEE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered August 18, 2009. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree as a hate crime and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is modified on the law by reversing that part convicting defendant of manslaughter in the first degree as a hate crime (Penal Law §§ 125.20 [1]; 485.05 [1] [a]) and dismissing count one of the indictment and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of manslaughter in the first degree as a hate crime (Penal Law §§ 125.20 [1]; 485.05 [1] [a]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that the verdict is inconsistent insofar as the jury convicted him of manslaughter in the first degree as a hate crime but acquitted him of manslaughter in the first degree (§ 125.20 [1]). We agree with that contention and therefore modify the judgment accordingly.

Defendant was charged with killing the victim by shooting him with a rifle from close range. The victim was a young man who dressed as a woman and was known to be homosexual. The indictment charged defendant with three offenses: (1) murder in the second degree, alleging that he intentionally killed the victim due to his sexual orientation; (2) intentional murder in the second degree; and (3) criminal possession of a weapon in the third degree. The case proceeded to trial and, without objection from defendant or the People, County Court submitted several lesser included offenses to the jury. With respect to murder in the second degree as a hate crime, the court charged the lesser included

offenses of manslaughter in the first degree as a hate crime and manslaughter in the second degree as a hate crime. For murder in the second degree, the court charged the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree.

By its verdict, the jury found defendant guilty of manslaughter in the first degree as a hate crime and criminal possession of a weapon in the third degree. The jury acquitted defendant of all remaining charges, except for manslaughter in the second degree as a hate crime, which was not reached given the verdict on manslaughter in the first degree as a hate crime. After the verdict was rendered but before the jurors were discharged, defense counsel stated, "Judge so that we can preserve the record here. We need to raise a motion to vacate a conviction on the manslaughter in the first degree as a hate crime, as an inconsistent verdict with acquittal of manslaughter in the first degree." Defendant thereby preserved for our review his contention on appeal that the verdict is inconsistent in that respect (*see People v Horning*, 263 AD2d 955, 955, *lv denied* 94 NY2d 824; *cf. People v Carter*, 7 NY3d 875, 876). Although the court stated that it understood defense counsel's position, the court nevertheless discharged the jurors and did not direct them to reconcile their verdict. Defendant later moved to set aside the verdict with respect to manslaughter in the first degree as a hate crime, contending that it was inconsistent with the jury's finding of not guilty on the charge of manslaughter in the first degree. The court denied the motion without explanation. This appeal ensued.

"A verdict is inconsistent or repugnant . . . where the defendant is convicted of an offense containing an essential element that the jury has found the defendant did not commit" (*People v Trappier*, 87 NY2d 55, 58). "A verdict shall be set aside as repugnant only when it is inherently inconsistent when viewed in light of the elements of each crime as charged to the jury" (*People v Brown*, 102 AD3d 704, 704; *see People v Tucker*, 55 NY2d 1, 4, *rearg denied* 55 NY2d 1039), "without regard to the accuracy of those instructions" (*People v Muhammad*, 17 NY3d 532, 539). "The underlying purpose of this rule is to ensure that an individual is not convicted of 'a crime on which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all' " (*id.* at 539, quoting *Tucker*, 55 NY2d at 6).

Here, all of the elements of manslaughter in the first degree are elements of manslaughter in the first degree as a hate crime. The court thus properly instructed the jury that the only difference between the two crimes in this case is that manslaughter in the first degree as a hate crime has an added element requiring the People to prove that defendant intentionally selected the victim due to his sexual orientation. By acquitting defendant of manslaughter in the first degree, the jury necessarily found that the People failed to prove beyond a reasonable doubt at least one element of manslaughter in the first degree. To find defendant guilty of manslaughter in the first degree as a hate crime, however, the jury must have found that the People proved beyond a reasonable doubt all of the elements of manslaughter in the first degree, plus the added element that defendant selected the victim due to his sexual orientation. It therefore follows

that the verdict is inconsistent.

Significantly, the People do not dispute that the verdict is inconsistent based on the elements of the offenses as charged to the jury. Instead, the People contend that the inconsistent verdict should be allowed to stand because the court's remaining instructions may reasonably have been interpreted by the jurors as giving them a choice of convicting defendant of manslaughter in the first degree as a hate crime *or* manslaughter in the first degree. We reject that contention. As a preliminary matter, we note that the jury foreperson, in her affidavit submitted by the People in opposition to defendant's posttrial motion, did not state that the jurors interpreted the court's instructions in the manner suggested by the People, and there is no other evidence in the record to support the People's theory. In any event, even assuming, arguendo, that the court suggested to the jurors in its instructions that they could convict defendant of only one of the manslaughter in the first degree charges, we conclude that such a "suggestion" would be immaterial inasmuch as the Court of Appeals has made clear that we may "look[] to the record *only* to review the jury charge so as to ascertain what essential elements were described by the trial court" (*Tucker*, 55 NY2d at 7 [emphasis added]; *see generally Muhammad*, 17 NY3d at 539).

Relying on *People v Mason* (101 AD3d 1659, *revd on other grounds* ___ NY3d ___ [June 11, 2013]), the People further contend that the "split verdict" is not inconsistent or repugnant because it may have been the result of mistake, compromise or an exercise of mercy by the jury. We reject that contention as well. In *Mason*, the jury's verdict was apparently illogical but not, as here, legally or theoretically impossible based on the elements of the offenses charged to the jury. A verdict that is legally or theoretically impossible cannot be upheld on the ground that the verdict was the result of mistake, compromise or mercy (*see Muhammad*, 17 NY3d at 539-540; *Tucker*, 55 NY2d at 8-9).

We respectfully disagree with our dissenting colleague that ordinary or plain manslaughter in the first degree is a lesser included offense of manslaughter in the first degree as a hate crime. Indeed, both offenses are class B violent felonies, and it thus cannot be said that one is the lesser of the other. We therefore disagree with the dissent that the court should have instructed the jury that, if it found defendant guilty of manslaughter in the first degree as a hate crime, it should not consider the second count, charging manslaughter in the first degree. The court's "instructions to the jury will be examined only to determine whether the jury, as instructed, must have reached an inherently self-contradictory verdict" (*Tucker,* 55 NY2d at 8) and here, upon examining the court's instructions, we conclude that they did not necessitate an inconsistent verdict (*see generally People v Johnson,* 87 NY2d 357, 360). In any event, even crediting the theory of the dissent that ordinary or plain manslaughter in the first degree is a lesser included offense of manslaughter in the first degree as a hate crime, the verdict is nevertheless inconsistent because the jury found defendant not guilty of ordinary or plain manslaughter in the first degree, and thus "the jury . . . necessarily decided that one of the

essential elements [of ordinary or plain manslaughter in the first degree] was not proven beyond a reasonable doubt" (*Muhammad,* 17 NY3d at 539).

Although it is true, as the dissent points out, that the jurors may have complied with the "letter and spirit of the law" and that jurors, as lay persons, are not legal experts, in our view, both of those points are immaterial. The role of the court, as a legal expert, is to instruct the jurors on the law and where, as here, an attorney timely objects to a verdict as inconsistent, it is incumbent upon the court to inform the jurors of the defect in their verdict and to direct them to resume deliberations so as to render a proper verdict (*see* CPL 310.50 [2]; *People v Robinson*, 45 NY2d 448, 452). The court's failure to do so in this case constitutes reversible error. Whether the verdict is "reasonable and logical," as the dissent concludes, is of no moment inasmuch as the verdict is "inherently repugnant on the law" (*Muhammad,* 17 NY3d at 538).

In sum, based on our review of the elements of the offenses as charged to the jury, we conclude that the verdict is inconsistent, i.e., "legally impossible" (*id.* at 539), insofar as it finds defendant guilty of manslaughter in the first degree as a hate crime but not guilty of manslaughter in the first degree. We therefore modify the judgment accordingly (*see generally People v Hampton*, 61 NY2d 963, 964).

We have reviewed defendant's remaining contentions in both his main and supplemental pro se briefs and conclude that they lack merit.

All concur except PERADOTTO, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent because I disagree with the majority that the verdict is inconsistent insofar as the jury convicted defendant of manslaughter in the first degree as a hate crime (Penal Law §§ 125.20 [1]; 485.05 [1] [a]) but acquitted him of ordinary manslaughter in the first degree (§ 125.20 [1]). In my view, the jury's verdict is reasonable and logical based upon the elements of the crimes as charged to the jury and, therefore, should not be disturbed.

On November 14, 2008, the victim was the front-seat passenger in a vehicle driven by his brother. Their friend was sitting in the back seat of the vehicle. The victim was homosexual, regularly dressed in women's clothing, and preferred to be known as a female. According to more than one witness, the victim's sexual orientation, clothing preferences and gender identity were common knowledge in the community. The victim's brother pulled up in front of a house where a number of people were congregating, and the occupants of the vehicle proceeded to converse with some friends. Meanwhile, witnesses overheard several members of a different group of people on the street, which included defendant, making derogatory remarks about homosexuals. Defendant then went into the house, retrieved a rifle, and walked over to the victim's vehicle. As defendant approached the vehicle, a witness overheard him say, "We don't play that faggot shit." Defendant then pointed the rifle into the open window of the vehicle and fired a single shot. Another witness testified that, immediately prior to the shooting, defendant

made comments to the effect that he was "not done with this faggot[] . . . [He]'s not done with this faggot shit, and they needed to get out of there." A third witness heard defendant say, "Get you faggots, get out of here . . . Get the f*** out of here." The bullet grazed the victim's brother and struck the victim, who died shortly thereafter as a result of extensive internal bleeding.

Defendant was subsequently charged in a three-count indictment with murder in the second degree as a hate crime, murder in the second degree, and criminal possession of a weapon in the third degree. Without objection from defendant or the People, County Court also submitted several lesser included offenses to the jury. Specifically, the court charged manslaughter in the first degree as a hate crime and manslaughter in the second degree as a hate crime as lesser included offenses of murder in the second degree as a hate crime, and manslaughter in the first and second degrees as lesser included offenses of murder in the second degree. In its charge to the jury, the court emphasized that there were two sets of charged offenses: (1) murder in the second degree as a hate crime and the lesser included offenses of manslaughter in the first and second degrees as hate crimes as charged in the first count of the indictment; and (2) murder in the second degree and the lesser included offenses of manslaughter in the first and second degrees, i.e., simple or ordinary (hereafter, non-hate) murder or manslaughter as charged in the second count of the indictment. After explaining the elements of the hate crime offenses, the court told the jury that, "[i]rrespective of your verdicts regarding the crime of murder in the second degree as a hate crime, and the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree as a hate crime, whether it be guilty or not guilty, you must next go on to consider the second count of the indictment, murder in the second degree, and the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree." The court further stated that "[t]he Second Count of the indictment *charges the same murder as alleged in the First Count but not as a hate crime*" (emphasis added).

In response to a jury note, the court further instructed the jury as follows: "The best way I can define the difference between Count One, which is murder in the second degree as a hate crime, and the lesser-included offenses of manslaughter in the first degree and manslaughter in the second degree as a hate crime, and Count Two, which is just murder in the second degree, and then the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree, is one element. One element separates each of the charges. That element is when that person intentionally selects the person against whom the offense is committed . . . in whole or in substantial part because of a belief or perception regarding the sexual orientation of a person, regardless of whether the belief or perception is correct. That element is not included in murder in the second degree, manslaughter in the first degree, or manslaughter in the second degree. It is only included in murder in the second degree as a hate crime, manslaughter in the first degree as a hate crime, and manslaughter in the second degree as a hate crime. There lies the difference between the two. That element." The court continued: "With

regard to the Second Count, murder in the second degree [and the lesser includeds], they are exactly the same as the hate crimes without the added element that the accused selected the person against whom the offense was committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the sexual orientation of a person."

The jury returned the following verdict:

Count One

Murder in the second degree as a hate crime **NOT GUILTY**

Manslaughter in the first degree as a hate crime **GUILTY**

Manslaughter in the second degree as a hate crime **NOT REACHED**

Count Two

Murder in the second degree **NOT GUILTY**

Manslaughter in the first degree **NOT GUILTY**

Manslaughter in the second degree **NOT GUILTY**

Count Three

Criminal possession of a weapon 3d degree **GUILTY**

As the majority notes, defendant preserved for our review his contention that the verdict is inconsistent because the jury convicted him of manslaughter in the first degree as a hate crime but acquitted him of ordinary manslaughter in the first degree, inasmuch as he objected to the alleged inconsistency before the jury was discharged (*cf. People v Sharp*, 104 AD3d 1325, 1326). Contrary to the conclusion of the majority, however, I reject defendant's contention and conclude that the jury verdict should stand.

It is well settled that " 'a verdict as to a particular count shall be set aside' as repugnant 'only when it is inherently inconsistent *when viewed in light of the elements of each crime as charged to the jury*' . . . without regard to the accuracy of those instructions" (*People v Muhammad*, 17 NY3d 532, 539, quoting *People v Tucker*, 55 NY2d 1, 4, *rearg denied* 55 NY2d 1039 [emphasis added]; *see People v Hampton*, 61 NY2d 963, 964 ["The determination as to the repugnancy of the verdict is made solely on the basis of the trial court's charge and not on the correctness of those instructions"]). Thus, the critical determination is "whether the jury, *as instructed*, must have reached an inherently self-contradictory verdict" (*Tucker*, 55 NY2d at 8 [emphasis added]). The concern underlying the repugnancy rule is that "a defendant should not be convicted of a crime when the jury has found that he [or she] did not commit one or more of its essential elements" (*People v Loughlin*, 76 NY2d 804, 806).

In my view, the jury charge, coupled with the structure and order of the verdict sheet, conveyed to the jury that defendant was charged with hate and non-hate crimes based upon the same act, i.e., the fatal shooting of the victim. The jury's verdict and, indeed, the notes it sent to the court, reflect the jury's determination that the shooting at issue was a hate crime, i.e., that defendant intentionally selected the victim because of his sexual orientation (*see* Penal Law § 485.05 [1] [a]). During deliberations, the jury sent out a note requesting "the definition of manslaughter murder, *hate crime*" (emphasis added). The court, apparently misunderstanding the jury's request, proceeded to discuss the difference between count one, the hate crimes, and count two, the "non-hate" crimes. The jury then sent out a second note requesting an explanation of "the difference . . . between manslaughter 1 and manslaughter 2, *as a hate crime only*" (emphasis added). The above notes indicate that the jury was convinced, as amply supported by the record, that the fatal shooting of the victim constituted a hate crime, but that the jury was grappling with whether to convict defendant of the hate crime of murder in the second degree, manslaughter in the first degree, or manslaughter in the second degree. After the jury determined that defendant was guilty of manslaughter in the first degree as a hate crime, it proceeded to the second count of the indictment, as the court instructed it to do, and found defendant not guilty of ordinary murder in the second degree and the lesser included offenses thereof.

If, as the majority states, it is "legally impossible" to commit manslaughter in the first degree as a hate crime without thereby committing ordinary manslaughter in the first degree because "all of the elements of manslaughter in the first degree are elements of manslaughter in the first degree as a hate crime," then ordinary or plain manslaughter in the first degree is a lesser included offense of manslaughter in the first degree as a hate crime (*see* CPL 1.20 [37]; *People v Glover*, 57 NY2d 61, 63), and the jury should have been instructed accordingly. Although the majority states that both offenses are class B violent felony offenses and "it thus cannot be said that one is the lesser of the other," the statute imposes an enhanced sentence on a defendant convicted of manslaughter in the first degree as a hate crime in comparison to plain or ordinary manslaughter in the first degree (*see* Penal Law § 485.10; *People v Assi*, 14 NY3d 335, 338). The court therefore should have instructed the jury that, if its verdict on the first count was guilty, it should not consider the second count (*see* CJI2d[NY] Lesser Included Offense; *see generally People v Johnson,* 81 AD3d 1428, 1429, *lv denied* 16 NY3d 896). Indeed, the court provided that instruction relative to manslaughter in the first and second degrees as a hate crime, which the jury followed by not reaching the lesser charge of manslaughter in the second degree once it found defendant guilty of the greater charge of manslaughter in the first degree. Here, however, the court specifically instructed the jury that, "*[i]rrespective of your verdicts regarding the crime of murder in the second degree as a hate crime*, and the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree as a hate crime, *whether it be guilty or not guilty*, you must next go on to consider the second count of the indictment, murder in the second degree, and the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree" (emphasis added). Thus,

once the jury determined that defendant was guilty of a hate crime as charged in the first count of the indictment, that is, that defendant acted with the enhanced intent of targeting the victim based upon his sexual orientation, it was entirely reasonable for the jury to determine relative to the second count of the indictment that defendant was not guilty of "murder . . . *not as a hate crime*" or "*just* murder," as the court characterized it (emphases added).

Indeed, an affidavit of the jury foreperson, sworn to exactly one week after the verdict, states that, after concluding that defendant was the shooter, the jury proceeded to "deliberate on whether the case was a hate crime as defined by the judge. We determined that [defendant]'s motive and actions did meet the criteria as defined by the judge for a hate crime. We came to that decision relatively quickly." According to the foreperson, the jury then "discussed the other charges . . . that were not hate crimes, *but did not find him guilty of those charges once we had determined that this was a hate crime*" (emphasis added). In my view, that analysis makes perfect sense in light of the court's instructions and the distinct, "particularly heinous nature of criminal acts that are committed against individuals because of prejudice" (NY Bill Jacket, 2000 AB 30002, ch 107, Mem of Atty Gen). In enacting the Hate Crimes Act of 2000, the legislature "found" and "determined" in Penal Law § 485.00 that "[h]ate crimes do more than threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. Crimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs. Hate crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes." According to the legislature, the then-current law did "not adequately recognize the harm to public order and individual safety that hate crimes cause. Therefore, our laws must be strengthened *to provide clear recognition of the gravity of hate crimes and the compelling importance of preventing their recurrence*" (*id.* [emphasis added]; *see Assi*, 14 NY3d at 338). As New York's Attorney General stated in support of the hate crime legislation, "[b]y employing this new law to the fullest, our government will send a powerful message to victims and others like them that, regardless of personal characteristics or lifestyle, they are valued members of the community, and will make clear to victimizers that *this state does not tolerate hatred founded upon bias and prejudice*" (NY Bill Jacket, 2000 AB 30002, ch 107, Mem of Atty Gen [emphasis added]). In my view, the jury complied with both the letter and spirit of the law by concluding, based upon the overwhelming evidence before it, that the fatal shooting of the victim was a hate crime, not a "non-hate" or "ordinary" criminal act. It cannot be said that the jury, as instructed, "must have reached an inherently self-contradictory verdict" (*Tucker*, 55 NY2d at 8).

In sum, I conclude that we should not set aside the jury's verdict and modify the judgment herein based upon a result that the court's instructions permitted or even invited (*see generally Muhammad*, 17 NY3d at 539; *Tucker*, 55 NY2d at 8). The jury determined that defendant shot the victim because of his sexual orientation and thus that defendant was

guilty of manslaughter in the first degree as a hate crime. Defendant did not simply shoot the victim for some other "non-hate" reason or no reason at all, and thus the jury determined that defendant was not guilty of "ordinary" manslaughter in the first degree. In my view, this is in accord with "the fundamental principle that the jury should be permitted to render a verdict that fully reflects defendant's culpability" (*People v Johnson*, 87 NY2d 357, 360-361). Jurors are not legal experts and, given the instructions that were provided in this case, I cannot conclude that the jury's verdict was inconsistent, illogical, or contradictory. I otherwise agree with the majority that defendant's remaining contentions in his main and pro se supplemental briefs lack merit, and I would therefore affirm the judgment.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

575

CAF 12-01060

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

IN THE MATTER OF CAYDEN L.R.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MELISSA R., RESPONDENT-APPELLANT.

EMILY KARR-COOK, ELMIRA, FOR RESPONDENT-APPELLANT.

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

SETH BUCHMAN, ATTORNEY FOR THE CHILD, THREE MILE BAY.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered June 1, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother improperly appeals from the fact-finding order rather than the subsequent order of disposition. Nevertheless, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as properly taken from the order of disposition (*see* CPLR 5520 [c]; *Matter of Anthony M.*, 56 AD3d 1124, 1124, *lv denied* 12 NY3d 702).

Contrary to the contention of the mother, Family Court properly determined that petitioner made diligent efforts to reunite her with the child (*see* Social Services Law § 384-b [7] [a], [f]). Among other things, petitioner arranged for a psychological assessment of the mother, arranged for therapy sessions for the mother and various services for the child, and provided the mother with parenting, budgeting, and nutrition education training. Petitioner also provided the mother with supervised and unsupervised visits with the child. Most significantly, petitioner arranged for a child psychologist to meet with the mother on several occasions in her home to provide parenting training, and we agree with the court's assessment that this was "truly a diligent effort" by petitioner to encourage and strengthen the parent-child relationship.

Contrary to the further contention of the mother, the court properly determined that she failed to plan for the future of the child (*see* Social Services Law § 384-b [7] [a]). " '[T]o plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (§ 384-b [7] [c]). "At a minimum, parents must 'take steps to correct the conditions that led to the removal of the child from their home' " (*Matter of Nathaniel T.*, 67 NY2d 838, 840). Here, while the mother participated in the services offered by petitioner and had visitation with the child, the evidence established that she was unable to provide an adequate, stable home for the child and parental care for the child (*see Matter of Abraham C.*, 55 AD3d 1442, 1442-1443, *lv denied* 12 NY3d 701). While the child psychologist noted that the mother was consistently calm and patient with the child and was able to care for the child for short periods of time, she was unable to provide long-term care for the child. His testimony was supported by the testimony of the child's teachers and speech therapist, each of whom noted a marked negative change in the child's behavior based on the increased frequency of unsupervised overnight periods that he spent with the mother. In addition, the evidence established that the mother failed to address the problems that led to the removal of the child from her home (*see Matter of Ja-Nathan F.*, 309 AD2d 1152, 1152).

Finally, petitioner's contention that we should vacate that part of the order granting posttermination visitation is not properly before us inasmuch as petitioner did not cross-appeal from the order (*see Matter of Alexander M.*, 106 AD3d 1524, 1525; *see generally Matter of Carl G. v Oneida County Dept. of Social Servs.*, 24 AD3d 1274, 1276).

All concur except LINDLEY, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent. I note at the outset that I agree with the majority that we should exercise our discretion to treat the notice of appeal as valid and deem the appeal as properly taken from the order of disposition rather than the fact-finding order (*see* CPLR 5520 [c]; *Matter of Anthony M.*, 56 AD3d 1124, 1124, *lv denied* 12 NY3d 702). In my view, however, Family Court erred in terminating respondent mother's parental rights based on permanent neglect. Initially, given that it is undisputed that petitioner misdiagnosed both the mother and the child, I conclude that petitioner failed to prove by "clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the mother's relationship with the child" (*Matter of Serenity G. [Orena G.]*, 101 AD3d 1639, 1639-1640; *see* Social Services Law § 384-b [7] [a]). With respect to the mother, petitioner arranged for a psychological evaluation of her by a psychologist who determined that the mother is mildly mentally retarded. As it turns out, the mother has a verbal IQ of 77, which, according to the psychiatrist appointed by the court, takes her out of the mildly retarded range of intellectual functioning. This may explain why petitioner withdrew its initial petition, which sought to terminate the mother's parental rights based on mental retardation. The withdrawal of that petition appears to be a tacit admission that the mother is not in fact mentally retarded.

Far more important is the fact that the psychologist who examined the mother at petitioner's request failed to diagnose her with bipolar 2. The mother's bipolar condition was not diagnosed until late September 2011, after the mother, on her own volition and initiative, checked herself into the Samaritan Hospital Medical Center, where she was finally seen by a psychiatrist, Dr. Khaled Mohamed. Dr. Mohamed testified at the hearing that, upon evaluating the mother, it was "clear" that she had bipolar disorder. The mother had never previously been diagnosed or treated for bipolar disorder, and she had never before been prescribed a mood stabilizer. Instead, the mother had been treated for depression and was given antidepressants that, according to Dr. Mohamed, have a counterproductive effect on individuals who suffer from bipolar 2. Dr. Mohamed explained at trial that bipolar 2 "[a]ffects everything in life – affects emotion, concentration, sleep, appetite — everything," including the ability to learn.

As the Court of Appeals has stated, to satisfy its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family, the agency petitioning to terminate parental rights "must always determine the particular problems facing a parent with respect to the return of his or her child and make affirmative, repeated, and meaningful efforts to assist the parent in overcoming these handicaps" (*Matter of Sheila G.*, 61 NY2d 368, 385). That is to say, "[t]he agency should mold its diligent efforts to fit the individual circumstances so as to allow the parent to provide for the child's future" (*Matter of Patricia C.*, 63 AD3d 1710, 1711 [internal quotation marks omitted]; *see Matter of Colinia D. [Thomas F.]*, 84 AD3d 1755, 1756).

Here, the mother was not diagnosed with bipolar 2 until five years after the child had been removed from her care, and more than five months after the instant petition had been filed seeking to terminate her parental rights. Thus, during the diligent efforts period from January 2010 to February 2011, the mother was not being properly treated for her mental illness. Under the circumstances, it cannot be said that the services provided by petitioner to the mother were specifically tailored to assist her in overcoming her primary handicap. In fact, the antidepressant treatment provided to the mother actually made her bipolar condition worse.

It is true, as petitioner points out, that petitioner arranged for a child psychologist to provide parental training in the mother's home, which is highly unusual. But that service, like many others provided by petitioner to the mother, was premised on the belief, apparently erroneous, that the mother was mentally retarded, while her real condition remained undiagnosed and untreated. The services provided by petitioner should instead have been tailored to address the mother's mental illness. It may be true, as petitioner points out, that bipolar 2 is often misdiagnosed as depression, but that does not alter the fact that the services provided to the mother by petitioner were inadequate to effectuate a change in the mother's parenting skills.

Petitioner also misdiagnosed the child. Dr. Rubenzahl performed a psychological assessment of the child in February 2010, and diagnosed him with pervasive development disorder, not otherwise specified (PPD-NOS), "which is essentially a mild autistic condition." As a result of that diagnosis, petitioner determined that it should move slowly with respect to providing services to the mother. Dr. Rubenzahl acknowledged at trial, however, that his diagnosis of PPD-NOS was incorrect. Like the misdiagnosis of the mother, the misdiagnosis of the child affected the services provided by petitioner. I thus conclude that petitioner failed to prove by clear and convincing evidence that it made diligent efforts to strengthen the parent-child relationship and to reunite the family, and that the petition should have been dismissed on that basis alone.

In any event, even assuming, arguendo, that petitioner met its burden of proof with respect to diligent efforts, I conclude that it failed to prove by clear and convincing evidence that the mother failed to plan for the child's future. As petitioner acknowledges, the mother availed herself of all the services provided to her and, in fact, even went beyond those services and obtained mental health services on her own. In addition, it cannot be said that the mother failed to correct the problems that led to the child being removed from her care (*see generally Matter of Nathaniel T.*, 67 NY2d 838, 840). According to petitioner, the child was removed because the mother left him with an inappropriate caretaker, namely, the child's father, who was mentally retarded. Since then, the mother has not left the child with anyone, let alone anyone who is an inappropriate caretaker.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

599

KA 10-01043

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHAN BAXTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered July 29, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and resisting arrest (§ 205.30). Defendant failed to preserve for our review his contention that County Court "did not follow the requisite three-step analysis when he raised a *Batson* challenge" (*People v Collins*, 63 AD3d 1609, 1610, *lv denied* 13 NY3d 795; *see People v Robinson*, 1 AD3d 985, 985-986, *lv denied* 1 NY3d 633, *reconsideration denied* 2 NY3d 805).

In any event, that contention is without merit, as is defendant's further contention that the court erred in denying his *Batson* challenge. The law is well settled that, "[u]nder *Batson* and its progeny, the party claiming discriminatory use of peremptories must first make out a prima facie case of purposeful discrimination by showing that the facts and circumstances of the voir dire raise an inference that the other party excused one or more jurors for an impermissible reason . . . Once a prima facie showing of discrimination is made, the nonmovant must come forward with a race-neutral explanation for each challenged peremptory--step two . . . The third step of the *Batson* inquiry requires the trial court to make an ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented" (*People v Smocum*, 99 NY2d 418, 421-422; *see People v James*, 99 NY2d 264, 270-271). Defendant's contention regarding the first prong of the test is

not at issue because where, as here, the prosecution "has placed its race-neutral reasons [for exercising a challenge] on the record . . . , the sufficiency of the prima facie showing becomes 'moot' " (*People v Hecker*, 15 NY3d 625, 652; *see People v Payne*, 99 NY2d 264, 270). Furthermore, we conclude that the prosecutor "met [her] burden under step two of the analysis and that the court properly 'denied [defendant's *Batson*] challenge, thereby implicitly determining that [the prosecutor's] reasons [for exercising the peremptory challenge] were not pretextual' under step three" (*People v Scott*, 31 AD3d 1165, 1165, *lv denied* 7 NY3d 851; *see Robinson*, 1 AD3d at 986).

Defendant failed to preserve for our review his further contention that the court erred in questioning him during the trial and thereby deprived him of a fair trial (*see People v Charleston*, 56 NY2d 886, 887; *People v Valle*, 70 AD3d 1386, 1387, *lv denied* 15 NY3d 758; *People v Smalls*, 293 AD2d 500, 500-501, *lv denied* 98 NY2d 681). In any event, we reject that contention. "Although some of the court's comments and interventions were inappropriate, they were not so egregious as to deprive defendant of a fair trial" (*People v Rios-Davilla*, 64 AD3d 482, 483, *lv denied* 13 NY3d 838; *cf. People v Arnold*, 98 NY2d 63, 67-69), particularly in view of the fact that they concerned only a tangential issue regarding the precise location of a potential witness at the time of the crime.

Defendant failed to preserve for our review his contention that the testimony of a detective at the suppression hearing "was patently tailored to nullify constitutional objections and was incredible as a matter of law" (*People v Watson*, 90 AD3d 1666, 1667, *lv denied* 19 NY3d 868; *see People v Inge*, 90 AD3d 675, 676, *lv denied* 18 NY3d 958; *People v Barnwell*, 40 AD3d 774, 775, *lv denied* 9 NY3d 920). In any event, that contention is without merit inasmuch as the detective's testimony that he could observe a weapon in defendant's lap through a partly open window in broad daylight is not patently unbelievable. Defendant's remaining contentions with respect to the detective are outside the record on appeal and thus are properly the subject of a motion pursuant to CPL article 440 (*see generally People v Stachnik*, 101 AD3d 1590, 1591, *lv denied* 20 NY3d 1104).

Defendant's contention that he was denied his constitutional right to present a defense is not preserved for our review (*see People v Lane*, 7 NY3d 888, 889; *People v Lee*, 96 NY2d 157, 163). We nevertheless review defendant's related evidentiary challenge to the court's denial of his request for an order to produce a proposed inmate witness at trial inasmuch as that contention is properly before us, and we conclude that such contention requires reversal. CPL 630.10 provides for the attendance of an inmate witness in a criminal action or proceeding upon a demonstration of "reasonable cause to believe that such person possesses information material" to such proceeding. Here, defendant made the requisite showing under that statute, and the court abused its discretion in refusing to order the production of the subject inmate witness whose testimony defendant sought to present at trial (*see People v Prentice*, 208 AD2d 1064, 1064-1065, *lv dismissed* 84 NY2d 1037; *see generally People v Aska*, 91

NY2d 979, 980-981). There is no dispute that the proposed inmate witness spoke to the driver of the vehicle in which defendant was a passenger just before defendant's arrest. The proposed witness was at a distance of between 20 feet and 20 yards from the vehicle at the time of defendant's arrest. Moreover, we note that there was no fingerprint evidence in this case, which involved a top count of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), and the issue of defendant's guilt turned largely on the testimony of two police detectives. We cannot countenance the court's refusal to allow defendant to present the testimony of a witness who might have supported defendant's version of events.

Moreover, in refusing to order the production of the proposed inmate witness, the court relied largely on the contents of a letter defendant had written to the proposed inmate witness regarding that witness's anticipated testimony at trial. It is undisputed, however, that the proposed inmate witness never received the letter and knew nothing of that correspondence, and the court's focus on such letter in denying defendant's request to produce that witness reflects a misunderstanding of defendant's request. Indeed, we note that, on the record before us and in the absence of a jury evaluation of the testimony of the proposed inmate witness (*see generally People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942), we are unable to ascertain whether the letter was an attempt to suborn perjury or was instead an inartful but truthful reflection of defendant's own version of events and an indication to the proposed inmate witness of what that version was. We therefore reverse the judgment and grant defendant a new trial. In view of our determination, we do not address defendant's remaining contentions.

All concur except SMITH, J.P., and VALENTINO, J., who dissent and vote to affirm in the following Memorandum: We respectfully disagree with the majority that County Court erred in denying defendant's request for an order to produce an incarcerated witness at trial, and we therefore dissent. Initially, we agree with the majority that defendant failed to preserve for our review his constitutional challenge to the denial of his request (*see People v Lane*, 7 NY3d 888, 889; *People v Little*, 24 AD3d 1244, 1245, *lv denied* 6 NY3d 835). We further agree that defendant requested an order directing the production of the incarcerated witness and thus preserved for our review his contention that the court erred in denying that request. We conclude, however, that defendant failed to meet his burden with respect to his request, and thus the court properly denied it.

A trial court may issue an order directing the production of "a person confined in an institution within this state . . . , upon application of a party to a criminal action or proceeding, demonstrating reasonable cause to believe that such person possesses information material thereto" (CPL 630.10). In his request for such an order, therefore, defendant was required to provide the court "with some assurance that the witness will be able to give competent material evidence on a matter at issue in the proceeding" (Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 630.10 at 29). Under similar circumstances, when seeking an

adjournment to call a witness, a defendant must make an offer of proof establishing that the testimony of the witness "would be material and favorable to the defense" (*Matter of Anthony M.*, 63 NY2d 270, 284; *see People v Softic*, 17 AD3d 1075, 1076, *lv denied* 5 NY3d 794; *People v Doud*, 280 AD2d 955, 955-956, *lv denied* 96 NY2d 799). We conclude that defendant must make a similar showing in the situation before us.

Here, defendant did not make an offer of proof regarding the substance of the proposed testimony of the incarcerated witness. To the contrary, defendant merely intimated that the witness might provide character testimony and might also have unspecified information regarding the facts, without stating the nature or source of that information. Furthermore, during the oral request for the order at issue, defense counsel indicated that he had never spoken with the witness or had any indirect communication regarding the substance of his possible testimony. Although we agree with the majority that other evidence at trial established that this witness was present at the scene, that fact alone did not establish that he had material information to provide with respect to the charges. Indeed, defendant testified that the witness was some distance from the vehicle when the officers approached it, which is when the officers testified that they observed the weapon in defendant's lap. Consequently, the court properly denied defendant's request because "the defense failed to show that [the] witness[ ] possessed material information" regarding the issues at trial (*People v Thomas*, 148 AD2d 883, 885, *lv denied* 74 NY2d 748; *see People v Wright*, 176 AD2d 1131, 1131, *lv denied* 79 NY2d 866).

Because we agree with the majority regarding defendant's remaining contentions, we would affirm the conviction.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

602

CA 12-02058

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

KELLEY BUTTERFIELD AND DOUGLAS BUTTERFIELD, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JAMES R. CAPUTO, M.D., JAMES R. CAPUTO, M.D., P.C., DEFENDANTS-APPELLANTS-RESPONDENTS, AND CROUSE HOSPITAL, DEFENDANT-RESPONDENT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHAEL PAUL RINGWOOD OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

DEFRANCISCO & FALGIATANO LAW FIRM, SYRACUSE (CHARLES L. FALGIATANO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 24, 2012. The order, inter alia, granted those parts of the motions of plaintiffs and defendant Crouse Hospital to set aside the verdict with respect to defendants James R. Caputo, M.D., and James R. Caputo, M.D., P.C.

It is hereby ORDERED that the order so appealed from is modified on the law by denying those parts of the posttrial motions of plaintiffs and defendant Crouse Hospital to set aside the verdict as to defendants James R. Caputo, M.D. and James R. Caputo, M.D., P.C., and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for, inter alia, injuries sustained by Kelley Butterfield (plaintiff) as the result of the alleged negligence of defendants James R. Caputo, M.D., and James R. Caputo, M.D., P.C. (collectively, Dr. Caputo) in performing laparoscopic surgery on plaintiff at defendant Crouse Hospital (Crouse) and the alleged negligence of defendants in providing her with postoperative care. After a trial, a jury found that defendants were negligent, and that the negligence of Crouse was a substantial factor in causing plaintiff’s injuries, but that the negligence of Dr. Caputo was not. The jury awarded damages to plaintiff’s husband for past loss of consortium and to plaintiff for past and future pain and suffering, as well as future medical costs.

We agree with Dr. Caputo that Supreme Court erred in granting

those parts of the posttrial motions of plaintiffs and Crouse seeking to set aside the verdict with respect to him. We therefore modify the order accordingly. "A verdict finding that a defendant was negligent but that such negligence was not a proximate cause of the [plaintiff's injuries] is against the weight of the evidence only when [those] issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Santillo v Thompson*, 71 AD3d 1587, 1588-1589 [internal quotation marks omitted]). "Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Schreiber v University of Rochester Med. Ctr.*, 88 AD3d 1262, 1263 [internal quotation marks omitted]). Here, plaintiffs alleged four different theories of negligence against Dr. Caputo, and we conclude that there is a reasonable view of the evidence to support a finding that Dr. Caputo was negligent in failing to provide Crouse's resident staff with adequate information concerning the operative procedure and plaintiff's postoperative care, but that such failures were not the proximate cause of plaintiff's injuries (*see generally id.*).

Contrary to Crouse's contention, however, the court properly granted plaintiffs' "supplemental motion" to correct the verdict with respect to the award of damages for plaintiff's future pain and suffering. In support of the "supplemental motion," plaintiffs submitted affidavits from all six jurors, who averred that they understood and agreed that plaintiff would receive $60,000 per year for a period of 30 years, not a total of $60,000 over the course of that period (*see Smith v Field*, 302 AD2d 585, 586-587; *Rose v Thau*, 45 AD2d 182, 184-185). We acknowledge that "public policy concerns disfavor the use of juror affidavits for posttrial impeachment of a verdict" (*Wylder v Viccari*, 138 AD2d 482, 484). Here, however, "[t]he information afforded by the affidavits of the jurors is not to impeach, but to support the verdict really given by them" (*Wirt v Reid*, 138 App Div 760, 766; *see Dalrymple v Williams*, 63 NY 361, 364), and "where[, as here,] there has been an honest mistake which, if not corrected, would prevent the findings of the jury as it actually was from being carried out, the correction of the verdict by the court [is] not an impeachment of the verdict by the jurors" (*Rose*, 45 AD2d at 184; *see Smith*, 302 AD2d at 586-587). Contrary to Crouse's further contention, the court also properly concluded that the corrected award of damages for plaintiff's future pain and suffering does not deviate materially from what would be reasonable compensation (*see generally* CPLR 5501 [c]).

Finally, we conclude that the court properly denied Crouse's motion for a new trial based upon alleged juror misconduct inasmuch as the motion was supported only by hearsay (*see Putchlawski v Diaz*, 192 AD2d 444, 445, *lv denied* 82 NY2d 654).

All concur except FAHEY, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part. I agree with the majority that Supreme Court erred in granting those parts of the posttrial motions of plaintiffs and defendant Crouse Hospital (Crouse) seeking to set aside the verdict

with respect to defendants James R. Caputo, M.D., and James R. Caputo, M.D., P.C. (collectively, Dr. Caputo). I cannot agree with the majority, however, that the court properly granted plaintiffs' "supplemental motion" to correct the verdict with respect to the award of damages for the future pain and suffering of Kelley Butterfield (plaintiff). Instead, I would grant Crouse's "supplemental motion" to the extent that it seeks a new trial on the issue of damages for plaintiff's future pain and suffering.

The trial of this medical malpractice action commenced on January 9, 2012 and, on January 20, 2012, the jury returned a verdict that, inter alia, awarded damages to plaintiff in the amount of $60,000 for future pain and suffering over a period of 30 years. The court subsequently issued a scheduling order requiring posttrial motions to be filed by February 21, 2012, and plaintiffs and Crouse filed their motions by that deadline.

On March 3, 2012, while the posttrial motions were pending, plaintiffs' attorney attended a college basketball game at the Carrier Dome in Syracuse and, while there, was approached by the jury foreperson. An affidavit submitted by plaintiffs' attorney establishes that he and the foreperson spoke briefly, and that the two decided to discuss the foreperson's experience on the jury in greater detail at a more appropriate time and location.

Plaintiffs' attorney averred that the two eventually spoke via telephone on March 8, 2012. During that telephone conversation, plaintiffs' attorney and the foreperson discussed, inter alia, the jury's award for plaintiff's future pain and suffering. The foreperson expressed surprise at plaintiffs' apparent disappointment with that award, and plaintiffs' attorney explained that plaintiff was disappointed that the jury had awarded her those future damages in the sum of only $60,000 to be paid over 30 years. According to plaintiffs' attorney, the foreperson indicated that it was the intent of the jury to award plaintiff future damages for pain and suffering of $60,000 *per year* for 30 years, thus yielding a total of $1,800,000 for that component of the jury award. Plaintiffs' attorney further averred that the foreperson explicitly told him that the jury understood that it was "to record the amount awarded per year and then the number of years it was to cover; [the jury] did not understand [that it was] to put the total amount of the award for the entire 30 year period."

Plaintiffs' attorney subsequently contacted the court and was granted leave to submit "supplemental motion" papers, which include an affidavit from each juror stating that the jury intended to award plaintiff $1.8 million in damages for future pain and suffering, i.e., an award of damages of $60,000 per year for a period of 30 years, rather than a total of $60,000 to be paid over a period of 30 years. Crouse opposed the "supplemental motion" on the ground that juror affidavits may not be used to impeach the verdict but added by way of its own "supplemental motion" that, in light of the issues raised by plaintiffs' submissions, the interests of justice and fairness required the court to grant a new trial on all issues. In my view,

the court erred in granting plaintiffs' "supplemental motion" and in denying Crouse's "supplemental motion" in its entirety.

As an initial matter, I reject Crouse's contention that plaintiffs waived their instant challenge to the verdict. "Waiver is an *intentional relinquishment* of a known right" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [emphasis added]) and, here, there is no evidence that plaintiffs' attorney intentionally relinquished his right to challenge the manner in which the court instructed the jury with respect to the award of damages for plaintiff's future pain and suffering, or the manner in which the jury calculated, recorded, or reported that award.

On the merits, I note that " '[a]bsent exceptional circumstances, juror affidavits may not be used to attack a jury verdict' " (*Herbst v Marshall*, 89 AD3d 1403, 1404; *see Phelinger v Krawczyk* [appeal No. 1], 37 AD3d 1153, 1153-1154). *Moisakis v Allied Bldg. Prods. Corp.* (265 AD2d 457, *lv denied* 95 NY2d 752) sets forth the following exceptions to the general rule that, unless they have been subjected to outside influence, jurors may not impeach their own verdict: "First, juror testimony may be used in certain rare instances to correct a ministerial error in reporting the verdict (*see*[] *Grant v Endy*, 167 AD2d 807; *Russo v Jess R. Rifkin, D.D.S., P. C.*, 113 AD2d 570), such as when the foreperson, through an honest mistake, enters the percentages of fault on the wrong lines (*see*[] *Rose v Thau*, 45 AD2d 182). However, 'this exception to the general rule is not intended to encompass jury error in reaching a verdict' (*Wylder v Viccari*, 138 AD2d 482, 484, citing *Pache v Boehm*, 60 AD2d 867). Second, where there are ' "inherent defects, confusion or ambiguity in the verdict[,]" ' the trial court may order a new trial (*McStocker v Kolment*, 160 AD2d 980, 981, quoting *Wingate v Long Is. R. R.*, 92 AD2d 797, 798). The confusion must be apparent from the trial record (*see*[] *Wylder v Viccari, supra*, at 484; *Cortes v Edoo*, 228 AD2d 463, 466)" (*Moisakis*, 265 AD2d at 458; *cf. Porter v Milhorat*, 26 AD3d 424, 424).

I cannot conclude that the first *Moisakis* exception applies here. Where "the thought process of the jurors must be examined in order to determine their true intent, the error . . . is not ministerial in nature" (*McStocker*, 160 AD2d at 981), and courts have frequently concluded that a jury's mistaken impression that its damages award is a net, rather than gross, calculation is not a ministerial error (*see Lustyik v Manaher*, 246 AD2d 887, 889-890; *Alkinburgh v Glessing*, 240 AD2d 904, 904-905; *Walden v Otis El. Co.*, 178 AD2d 878, 880, *lv denied* 79 NY2d 758; *Grant v Endy*, 167 AD2d 807, 807-808; *McStocker*, 160 AD2d at 980-981; *Labov v City of New York*, 154 AD2d 348, 348-349; *see also Laylon v Shaver*, 187 AD2d 983, 984-985). In this appeal, as in each of the above-cited cases, the jury essentially made a substantive error with respect to its calculation of a gross award of damages. Inasmuch as the error in this case was identified through examination of the jury's thought process, I conclude that it was not ministerial in nature.

Plaintiffs address the ministerial exception by relying on, inter alia, *Rose v Thau* (45 AD2d 182) and *Smith v Field* (302 AD2d 585), two cases on which the majority also relies. In *Rose*, the Third Department affirmed the trial court's correction of a verdict erroneously reported by the jury inasmuch as the jury had inverted its apportionment of fault between two defendants. Specifically, the jury members had apportioned 90% of the fault to the decedent, Richard J. Thau, and 10% of the fault to defendant Winifred D. Lucy, but subsequently signed affidavits agreeing that they had erred in reporting the verdict, averring that they intended to apportion 90% of the fault to Lucy, and 10% of the fault to the decedent (*id.* at 183-184). In my view, the error in *Rose* was obviously clerical in nature and distinguishable from the facts of this case. In any event, were the facts in *Rose* analogous to the facts here, I would nevertheless question the continuing precedential value of *Rose*'s holding given that the Third Department arguably resolved subsequent similar cases, i.e., *Lustyik* (246 AD2d 887) and *Grant* (167 AD2d 807), to the contrary.

The facts in *Smith v Field* (302 AD2d 585), the other case on which plaintiffs and the majority rely, are more analogous to those in this case. In *Smith*, the Second Department concluded that the jury erred "in reporting and recording the actual verdict" and affirmed the trial court's correction of the record of the proceedings to reflect the actual verdict (*id*. at 587). There, similar to this case, "[t]he verdict sheet regarding damages for future pain and suffering asked for the 'total amount of damages, if any' and 'the period of years for such award.' The jury stated that the amount awarded was $5,000 for a period of 20 years" (*id.* at 585-586). Before the jury left the courtroom, the plaintiffs' attorney sought to clarify whether the jury intended to award a total of $5,000 to be paid over a 20-year period, or a total of $5,000 each year for a 20-year period (*see id.* at 586). The trial court denied the plaintiffs' application for clarification, and the plaintiffs subsequently moved "to correct the verdict based upon the unanimous statement in writing of all six jurors, made immediately after the jurors were discharged, that they 'intended to award plaintiff $5,000 per year for 20 years for a total of $100,000 for future pain and suffering' " (*id.*). The trial court granted plaintiffs' motion and resettled the judgment and, on appeal, the Second Department affirmed the resettled judgment.

In my view, the *Smith* case is factually distinguishable from this case. In *Smith* (302 AD2d at 586), the jury members clarified, in a unanimous writing, the part of the verdict at issue "immediately" after they were discharged, i.e., ostensibly within minutes. In this case, however, the jury members did not make their written averments concerning their award of damages until several weeks after they rendered their verdict.

Even more important, however, is the fact that the *Smith* case appears to be an outlier in the jurisprudence of jury verdict impeachment. Notably, it has never been cited for its holding, except in *DeCrescenzo v Gonzalez* (46 AD3d 607, 609), which cited it as contrasting authority. Moreover, approximately seven years after

Smith was decided, the First Department considered a similar issue in *Breen-Burns v Scarsdale Woods Homeowners' Assn. Inc.* (73 AD3d 661, *lv dismissed* 15 NY3d 837, *lv denied* 16 NY3d 704). There, the Court addressed an alleged clerical error of the jury in reporting awards of future damages, noting that "juror affidavits alleged that the jury intended its future damages awards to be paid 'per year,' notwithstanding that the verdict sheet's special interrogatories had not provided for such interpretation or award basis" (*id.* at 662). The Court reversed an order granting the plaintiff's motion to set aside the verdict on grounds including the alleged clerical error by the jury in reporting its verdict, holding that, because "the alleged error in reporting the future damages awards involved an examination into how the jury determined [those] awards, . . . the alleged error was not ministerial in nature" (*id.*). Given the anomalous holding of *Smith* in comparison with the body of law surveyed above, I conclude that we should apply the logic of *Breen-Burns* to the facts herein and hold that the jury's error in reporting and recording its verdict was not ministerial in nature.

I further conclude, however, that the second *Moisakis* exception applies to the facts of the instant case. Under that exception, a new trial may be granted upon a finding by the trial court of "inherent defects, confusion or ambiguity in the verdict" (*Moisakis*, 265 AD2d at 458 [internal quotation marks omitted]). Typically, "[t]he confusion must be apparent from the *trial* record" (*id.* [emphasis added]; *cf. Porter*, 26 AD3d at 425). Although this Court's review is constrained by the limited parts of the trial record before us, I conclude that this case is obviously one in which the jury was confused, at least in part, with respect to the manner in which to record and report its verdict. Thus, I agree with Crouse that a new trial is warranted on the ground of juror confusion, but only with respect to damages for plaintiff's future pain and suffering. Like the majority, I therefore would modify the order by denying those parts of the posttrial motions to set aside the verdict with respect to Dr. Caputo, but I would further grant Crouse's "supplemental motion" to the extent that it seeks a new trial on the issue of damages for plaintiff's future pain and suffering.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

611

KA 10-01873

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAYVON UNDERDUE, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered January 25, 2010. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

623

CA 12-02242

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

THOMAS V. CASE, PLAINTIFF,

V MEMORANDUM AND ORDER

ANTONE R. CASE, ET AL., DEFENDANTS.

DAVID A. SHULTS AND BARBARA L.S. FINCH,
RESPONDENTS;

DIBBLE & MILLER, P.C., APPELLANT.

DIBBLE & MILLER, P.C., ROCHESTER (GERARD F. NORTON OF COUNSEL), FOR APPELLANT.

THE WOLFORD LAW FIRM LLP, ROCHESTER (SARAH SNYDER MERKEL OF COUNSEL), FOR RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Matthew A. Rosenbaum, J.), entered September 7, 2012. The order, among other things, granted the motion of David A. Shults and Barbara L.S. Finch for an order directing that funds held by the Livingston County Clerk in this matter to be paid over to them.

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

Memorandum: Plaintiff commenced this action against his brother, Antone R. Case, among other defendants, seeking dissolution of the brothers' partnership, which operated a potato farm. The complaint also asserted causes of action for an accounting and partition of real property owned by the partnership. Plaintiff was initially represented by Phillips, Lytle, Hitchcock, Blaine & Huber LLP (Phillips Lytle). While Phillips Lytle was representing plaintiff, Supreme Court (Alonzo, A.J.) appointed a receiver who took custody of the partnership's funds, among other property, and held the funds in escrow pending resolution of the action. Approximately five months later, David A. Shults and Barbara L.S. Finch (Shults Creditors) loaned plaintiff $260,000 to fund a new business that he operated with his wife. As security for the loan, plaintiff later assigned to the Shults Creditors all rights, title and interest he had to the proceeds from the partnership dissolution action, including the funds held by the receiver. Shortly after the Shults Creditors filed the assignment with the Livingston County Clerk, Phillips Lytle moved to withdraw as plaintiff's attorney on the grounds that it was owed a substantial

amount for unpaid legal fees and plaintiff had assigned to the Shults Creditors his interest in the partnership's funds, from which Phillips Lytle expected ultimately to be paid. Supreme Court (Donofrio, A.J.) granted the motion and gave plaintiff 15 days in which to "secure new counsel." Plaintiff thereafter retained appellant Dibble & Miller, P.C. (Dibble & Miller) to represent him in this action. Dibble & Miller had previously served as special tax counsel for plaintiff.

The partnership dissolution action eventually proceeded to trial, during which the brothers reached a settlement that resolved all claims between them. Pursuant to the settlement, plaintiff was entitled to $232,255.10 of the funds held in escrow by the receiver, while his brother was entitled to the remaining $382,255.10. A dispute then arose between Dibble & Miller and the Shults Creditors over which party was entitled to plaintiff's share of the settlement proceeds. Although Dibble & Miller had been paid an initial retainer of $20,000, plaintiff owed the firm more than $230,000 for legal services rendered in this action. At the same time, plaintiff owed the Shults Creditors for the $260,000 loan that was secured by plaintiff's interest in the funds held by the receiver. According to Dibble & Miller, its charging lien pursuant to Judiciary Law § 475 took precedence over the Shults Creditors' perfected security interest in the settlement proceeds.

Supreme Court (Fisher, J.) ordered, in sum and substance, that the Shults Creditors were entitled to plaintiff's share of the settlement proceeds. Dibble & Miller took an appeal from that order, but we dismissed the appeal because, at the time, the parties were in federal court on a related matter and the funds previously held by the receiver had been transferred to the clerk in federal court (*Case v Case*, 78 AD3d 1610, 1610-1611). The parties subsequently stipulated that the dispute between them in federal court no longer involved a federal issue, and they thus agreed to have the matter resolved in state court. The funds were then transferred to the Livingston County Clerk. The Shults Creditors moved for an order directing that the funds in question be paid to them. Dibble & Miller cross-moved for partial vacatur of Justice Fisher's order, as well as for an order determining the priority of the liens. Supreme Court (Rosenbaum, J.), inter alia, granted the motion of the Shults Creditors and distributed the funds to the Shults Creditors. We affirm.

The priority of conflicting perfected security interests is determined by the date of filing or perfection (*see* UCC § 9-322 [a] [1]). Relying on Judiciary Law § 475, which provides that an attorney's charging lien attaches by operation of law upon the "commencement" of an action or proceeding (*see LMWT Realty Corp. v Davis Agency*, 85 NY2d 462, 467), Dibble & Miller contends that its charging lien arose before the Shults Creditors perfected their security interest. In support of that contention, Dibble & Miller notes that its notice of appearance in this action was filed on April 14, 2004, whereas the Shults Creditors' assignment was filed almost two years later, on February 2, 2006. The record is clear, however, that Dibble & Miller's representation of plaintiff in April 2004 was limited to providing tax advice. Dibble & Miller did not become

attorney of record for plaintiff in this action until after May 3, 2006, when the court granted Phillips Lytle's motion to withdraw as plaintiff's counsel. Indeed, if Dibble & Miller were co-counsel with Phillips Lytle, as Dibble & Miller suggests, there would have been no need for Judge Donofrio to state in her order that plaintiff had 15 days in which to secure new counsel. There would have also been no need for Judge Donofrio to hold the case in "abeyance" for "an additional period of 30 days after Plaintiff or his new counsel have received from Phillips Lytle the documents specified in paragraph 4 [of the instant order]."

In fact, as the Shults Creditors point out, Dibble & Miller's own billing records show that it was not plaintiff's attorney of record until after the court allowed Phillips Lytle to withdraw as plaintiff's counsel. In addition, in a sworn statement given in federal court, Gerald Dibble, Esq., of Dibble & Miller, stated that his firm "succeeded the firm of Phillips Lytle in representing [plaintiff], having first been engaged by [plaintiff] on or about March 10, 2004 as special tax counsel for [plaintiff] in connection with claims of the IRS relating to income taxes . . . Thereafter, on or about March 15, 2006, [plaintiff] asked this firm to represent him in the State Action because Phillips Lytle moved to withdraw as [plaintiff's] counsel."

Based on the above, we conclude that Dibble & Miller's reliance on its April 2004 notice of appearance is misplaced. That notice of appearance was limited to Dibble & Miller's role as special tax counsel for plaintiff. Dibble & Miller was not then the attorney of record for plaintiff in this action, and it is well settled that "[o]nly the attorney of record . . . is entitled to an attorney's . . . charging lien" (*Matter of Barnum v Srogi*, 96 AD2d 723, 724; *see Rodriguez v City of New York*, 66 NY2d 825, 827-828).

Dibble & Miller further contends that its charging lien arose first because it relates back to the date of commencement of the action, notwithstanding that Dibble & Miller did not become plaintiff's attorney of record until more than three years after such date. According to Dibble & Miller, its charging lien relates back to the date of commencement of the action because Judge Donofrio's order gave its charging lien priority over Phillips Lytle's charging lien. We reject that contention, for which Dibble & Miller cites no authority. The order signed by Judge Donofrio simply gave priority to Dibble & Miller's charging lien over that of Phillips Lytle; she did not order that Dibble & Miller's charging lien relates back to the date of commencement of the action, which would have the effect of giving Dibble & Miller's lien priority over the Shults Creditors' perfected security interest. The Shults Creditors were not given an opportunity to be heard before Judge Donofrio's order was entered, and we will not presume that Judge Donofrio implicitly intended to give preference to Dibble & Miller over the Shults Creditors.

In sum, we conclude that the Shults Creditors' perfected security interest in the partnership funds was filed before Dibble & Miller's charging lien arose by operation of law under Judiciary Law § 475.

The law is clear that "a claim may . . . supersede an attorney's lien if the claim is both prior in time and a charge against the specific fund upon which the attorney's lien attaches, not merely general indebtedness asserted against the client" (*LMWT Realty Corp.*, 85 NY2d at 468).

We reject Dibble & Miller's further contention that its efforts on plaintiff's behalf in this action "created" the funds at issue (*id.*). Notably, the partnership funds were in the receiver's hands before Dibble & Miller became attorney of record for plaintiff. The receiver was appointed on January 20, 2005, and the funds were in his account no later than February 6, 2006, when the Shults Creditors filed their UCC financing statement. Phillips Lytle did not move to withdraw as plaintiff's counsel until March 3, 2006, and plaintiff later retained Dibble & Miller. Under the circumstances, it cannot be said that the funds held by the receiver were created as a result of Dibble & Miller's legal services rendered to plaintiff, notwithstanding the fact that Dibble & Miller's efforts led to the settlement that established plaintiff's *rights* to the funds in question. As one observer has noted, "[i]f the collateral or its proceeds exist independent of the attorney's efforts . . . , equitable considerations cannot avoid the priority of a security interest created before the involvement of the attorney" (James N. Blair, Wolman Blair PLLC, Practice Insights, NY CLS, Book 36, UCC § 9-322, 2013 Cum Supp at 230).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

625

CA 13-00036

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

JOHN W. GRACE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL R. LAW, PHILLIPS LYTLE, LLP, ROBERT L. BRENNA, JR., AND BRENNA, BRENNA & BOYCE, PLLC, DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE, LLP, BUFFALO (KEVIN J. ENGLISH OF COUNSEL), FOR DEFENDANTS-APPELLANTS MICHAEL R. LAW AND PHILLIPS LYTLE, LLP.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (GREGORY D. ERIKSEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS ROBERT L. BRENNA, JR. AND BRENNA, BRENNA & BOYCE, PLLC.

LOTEMPIO & BROWN, P.C., BUFFALO (BRIAN J. BOGNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie Court (Shirley Troutman, J.), entered October 3, 2012. The order, insofar as appealed from, denied the motion of defendants Robert L. Brenna, Jr., and Brenna, Brenna & Boyce, PLLC for summary judgment and denied that part of the cross motion of defendants Michael R. Law and Phillips Lytle, LLP seeking summary judgment.

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

Memorandum: Plaintiff commenced this legal malpractice action seeking damages for the alleged negligence of defendants in their representation of him in a medical malpractice action arising from his treatment for an eye condition at the Veterans Administration Outpatient Clinic in Rochester. In August 2006, defendants Robert L. Brenna, Jr. and Brenna, Brenna & Boyce, PLLC (hereafter, Brenna defendants) commenced an administrative tort claim against the United States on plaintiff's behalf by filing an SF-95 form with the Veterans Administration (hereafter, VA). After six months elapsed without a response from the government, Brenna recommended that plaintiff retain defendants Michael R. Law and Phillips Lytle, LLP (hereafter, Law defendants) to pursue a medical malpractice claim in federal court. Plaintiff retained the Law defendants in or about July 2007 and, on January 3, 2008, the Law defendants filed a complaint in the United States District Court for the Western District of New York against the United States and the VA (collectively, government) under the Federal

Tort Claims Act ([FTCA] 28 USC § 2671 *et seq.*). The complaint alleged, inter alia, that the VA failed to monitor and/or treat plaintiff's eye condition in a proper and timely manner, thereby resulting in the loss of vision in plaintiff's right eye.

While preparing for the deposition of Dr. Shobha Boghani, the physician who primarily treated plaintiff at the VA, the government apparently discovered that Dr. Boghani was employed by the University of Rochester (hereafter, U of R). As a result, in October 2008, the government sought and was granted leave to file a third-party action against Dr. Boghani and the U of R. The addition of the U of R created a conflict for the Law defendants and, as a result, the Brenna defendants assumed sole responsibility for the medical malpractice action in December 2008. On May 22, 2009, Brenna filed an amended complaint in federal court naming the U of R and Dr. Boghani as defendants and asserting state-law claims for medical malpractice. By order dated November 3, 2010, District Court granted the motion of the U of R and Dr. Boghani for summary judgment dismissing the amended complaint against them as time-barred. The court also granted the government's motion for summary judgment dismissing the FTCA claims against it insofar as based upon the alleged negligence of the U of R and Dr. Boghani, concluding that Dr. Boghani was an independent contractor and not an employee of the VA. The only remaining claim in the amended complaint was that the VA was negligent in failing to reschedule an ophthalmology appointment after a July 2003 appointment was cancelled.

Shortly thereafter, plaintiff directed the Brenna defendants to discontinue the federal action and, on December 16, 2011, a stipulation of discontinuance was entered in federal court. Plaintiff then commenced this legal malpractice action alleging, inter alia, that defendants were negligent in failing to name Dr. Boghani and the U of R in the initial complaint in federal court. The Brenna defendants subsequently moved for summary judgment dismissing the complaint against them, and the Law defendants cross-moved for leave to amend their answer to add a statute of limitations defense and for summary judgment dismissing the complaint against them. Supreme Court denied the Brenna defendants' motion, granted that part of the Law defendants' cross motion seeking leave to amend their answer, and denied that part of their cross motion for summary judgment dismissing the complaint against them. We affirm.

"To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove that the defendant attorney failed to exercise 'the ordinary reasonable skill and knowledge commonly possessed by a member of the legal community, and that the attorney's breach of [that] duty proximately caused plaintiff to sustain actual and ascertainable damages' " (*Velie v Ellis Law, P.C.*, 48 AD3d 674, 675). "To obtain summary judgment dismissing a complaint in an action to recover damages for legal malpractice, a defendant must demonstrate that the plaintiff is unable to prove at least one of the essential elements of [his or her] legal malpractice cause of action" (*Boglia v Greenberg*, 63 AD3d 973, 974; *see Pignataro v Welsh*, 38 AD3d 1320, 1320, *lv denied* 9 NY3d 849).

Initially, we reject defendants' contention that plaintiff waived or abandoned his legal malpractice claim by voluntarily discontinuing what remained of his medical malpractice action and failing to take an appeal from District Court's November 2010 order dismissing the bulk of his claims. In support of that contention, defendants primarily rely upon this Court's decision in *Rupert v Gates & Adams, P.C.* (83 AD3d 1393, 1396), in which we concluded that the plaintiff waived his right to raise certain allegations of legal malpractice in the context of a matrimonial action based upon his execution of a settlement agreement. Specifically, we concluded that, although certain allegations of legal malpractice had merit, Supreme Court in that case "did not err in granting defendants' motion concerning those alleged errors because they could have been corrected on an appeal from the final judgment in the matrimonial action, *and plaintiff consented to the dismissal on the merits of any appeal in the matrimonial action as part of the global settlement resolving a bankruptcy proceeding in which he was involved*. In so doing, plaintiff precluded pursuit of the very means by which defendants' representation of plaintiff in the matrimonial action could have been vindicated . . . We therefore conclude that plaintiff, *by virtue of his global settlement*, waived the right to raise those shortcomings in this legal malpractice action" (*id.* [emphasis added]).

Here, unlike in *Rupert*, plaintiff did not, as part of a settlement agreement or otherwise, waive his right to raise the claim that defendants committed malpractice in the underlying action by failing to sue the appropriate parties before the expiration of the applicable statute of limitations. Rather, plaintiff discontinued his federal medical malpractice action, which the court had reduced to the claim that employees of the VA were negligent in failing to reschedule a cancelled ophthalmology appointment, and commenced this legal malpractice action in state court. We reject defendants' invitation to extend the ruling in *Rupert* to a per se rule that a party who voluntarily discontinues an underlying action and forgoes an appeal thereby abandons his or her right to pursue a claim for legal malpractice. Indeed, we noted in *Rupert* that, in determining that the court erred in granting the defendants' cross motion for summary judgment dismissing the complaint in the context of a prior appeal (*Rupert v Gates & Adams, P.C.*, 48 AD3d 1221), we "necessarily rejected the very premise upon which the court denied the instant motion for summary judgment," i.e., that "this legal malpractice action is barred by [the] plaintiff's failure to perfect an appeal from the judgment in the matrimonial action" (*id.* at 1395).

Although the precise question presented herein appears to be an issue of first impression in New York, we note that several of our sister states have rejected the per se rule advanced by defendants herein (*see e.g. MB Indus., LLC v CNA Ins. Co.*, 74 So 3d 1173, 1176; *Hewitt v Allen*, 118 Nev 216, 217-218, 43 P3d 345, 345-346; *Eastman v Flor-Ohio, Ltd.*, 744 So 2d 499, 502-504; *Segall v Segall*, 632 So 2d 76, 78). As has been noted, such a rule would force parties to prosecute potentially meritless appeals to their judicial conclusion in order to preserve their right to commence a malpractice action, thereby increasing the costs of litigation and overburdening the court

system (*see Eastman*, 744 So 2d at 504). The additional time spent to pursue an unlikely appellate remedy could also result in expiration of the statute of limitations on the legal malpractice claim (*see MB Indus.*, 74 So 3d at 1181). Further, requiring parties to exhaust the appellate process prior to commencing a legal malpractice action would discourage settlements and potentially conflict with an injured party's duty to mitigate damages (*see Crestwood Cove Apts. Bus. Trust v Turner*, 164 P3d 1247, 1254; *Eastman*, 744 So 2d at 504).

Here, we conclude that defendants failed to establish as a matter of law that any alleged negligence on their part was not a proximate cause of plaintiff's damages (*see Wilk v Lewis & Lewis, P.C.*, 75 AD3d 1063, 1066; *New Kayak Pool Corp. v Kavinoky Cook, LLP*, 74 AD3d 1852, 1853; *Andzel v Cosgrove*, 56 AD3d 1226, 1227). Specifically, defendants failed to establish that plaintiff was likely to succeed on an appeal from the November 2010 order and, therefore, that their alleged negligence was not a proximate cause of his damages (*see Crestwood Cove Apts. Bus. Trust*, 164 P3d at 1252; *Hewitt*, 118 Nev at 222, 43 P3d at 348; *see also Technical Packaging, Inc. v Hanchett*, 992 So 2d 309, 316, *review denied* 6 So 3d 52; *cf. Bradley v Davis*, 777 So 2d 1189, 1190, *dismissed* 805 So 2d 804, *cert denied* 535 US 926). Notably, the record before us does not include the full record from the underlying action, i.e., the record that would have been before the Second Circuit on an appeal (*see Technical Packaging, Inc.*, 922 So 2d at 315). Thus, while defendants "may be able to show that [their] representation of [plaintiff] did not preclude [him] from prevailing in the [underlying] lawsuit [or upon appeal], [they have] not done so at this time" (*Lenahan v Russell L. Forkey, P.A.*, 702 So 2d 610, 612).

The Law defendants also contended in support of that part of their cross motion for summary judgment dismissing the complaint against them that the action was time-barred. Even assuming, arguendo, that they met their initial burden on the cross motion in that respect, we conclude that plaintiff raised a triable issue of fact whether the continuous representation doctrine applied to toll the statute of limitations (*see Sobel v Ansanelli*, 98 AD3d 1020, 1023; *International Electron Devices [USA] LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512, 1512-1513).

All concur except WHALEN, J., who dissents and votes to reverse the order insofar as appealed from in accordance with the following Memorandum: I respectfully dissent because, in my view, plaintiff is precluded as a matter of law from bringing this legal malpractice action based upon his voluntary discontinuance of the underlying federal action and failure to pursue a nonfrivolous appeal. It is important to note that, if plaintiff had been successful in his appeal in the underlying federal action, we would not have a subsequent legal malpractice case.

In the underlying federal medical malpractice case, defendants failed to name a certain physician as a defendant, which is the basis of the subsequent legal malpractice claim. Defendants' contention is that the physician was a government employee and thus was not required to be named individually as a defendant because the government was

already a party. The federal trial court determined that the physician was an independent contractor, not a government employee. I conclude that defendants would have had a meritorious argument had plaintiff taken an appeal from the federal order based upon case law supporting defendants' position that the physician was a government employee as opposed to an independent contractor. Federal courts have employed the "control test" to determine if an individual or other entity equitably should be considered an "employee" of the federal government for purposes of the Federal Tort Claims Act ([FTCA] 28 USC § 2671 *et seq.*) because the FTCA waives sovereign immunity for the torts of employees of the government but not for those of its independent contractors (*see United States v Orleans*, 425 US 807, 813-814). "[I]t is well settled that the question whether one is an employee of the United States is to be determined by federal law" (*Lurch v United States*, 719 F2d 333, 337 [10th Cir 1983], *cert denied* 466 US 927). Courts look to factors such as which entity determined the amount of the individual's salary, who actually paid that sum, whether the government exercised day-to-day control over the individual, what entity determined the individual's work hours and provided for vacation leave, whether the government had the authority to review the individual's performance and any other factors relating to the government's exercise of control over the individual's work (*see Leone v United States*, 910 F2d 46, 50 [2d Cir 1990], *cert denied* 499 US 905; *see also Tivoli v United States*, 1996 WL 1056005, *3-5 [SD NY], *affd* 164 F3d 619 [2d Cir 1998]; *Lurch*, 719 F2d at 336-337 [reciting test and determining that the individual was an independent contractor based on the contract itself]).

In *Tivoli*, physicians employed by Georgetown University (Georgetown) worked full-time at the National Institutes of Health (NIH) (*id.* at *3). The contract specified the names of the physicians who would serve as "key personnel," and the government had to approve those key personnel so that it could ensure quality physicians (*id.*). Georgetown had no supervision over any of the physician's day-to-day activities (*id.*). The NIH set forth by contract the hours that the physicians worked and provided all medical equipment and facilities necessary for the physicians to complete their work (*id.*). In fact, the only factor demonstrating that the physicians were Georgetown employees was that they received their salaries from Georgetown (*id.* at *4). The District Court found, based on the various factors, that the physicians were under the control, direction and supervision of the government and thus were employees of the government despite language to the contrary in the contract. In the case before us now, the physician was mentioned by name in the contract but it is unclear whether this was because the Veterans Administration (VA) requested her specifically or because the University of Rochester designated her as an available physician for the VA. Had the VA specifically designated the physician, that would be evidence of its having exercised control and could weigh in favor of a finding that she was an employee of the VA.

In *Williams v United States* (2007 WL 951382 [SD NY 2007]), the District Court initially noted that, although the contract declared that the physician was not to be considered a government employee for

any reason, the court was not bound by the language of the contract in determining whether the physician was a government employee for purposes of the FTCA (*see id.* at *10). The court found that the physician, by contract, was to " 'be *under the direction of the Chief* [of Bronx VA]' " and was required to provide his services " 'in accordance with VA policies and procedures,' " and that " 'personnel assignments [by the contracting entity] were subject to the approval of the Bronx VA Chief of Staff' " (*id.* at *11). Finally, the court noted that the government "controlled not only [the physician's] work hours and vacation time . . . , but where he worked, who he saw, and what he did during those hours" (*id.* at *12). In denying the government's motion for summary judgment dismissing the complaint, the court determined that "a reasonable factfinder could conclude that [the physician] qualifie[d] under the FTCA as an 'employee' of the Bronx VA" (*id.*). In the case now before us, the physician was required to work at the VA Outpatient Clinic six days per month. Additionally, other physicians could only be substituted for the named physician in the event that she became permanently or temporarily unavailable due to vacation, illness, emergencies or termination of employment. That is additional evidence weighing in favor of classifying the physician as an employee of the VA.

The federal court in the underlying medical malpractice action herein found that, "[w]hile the fact that the VA provided the place of work, as well as the tools, for the most part, weighs in favor of finding that [the physician] was the VA's agent," consideration of all of the other factors favored a finding that the physician was an independent contractor. An appellate court could disagree with the District Court's weighing of the various factors regarding whether the physician was a government employee. Inasmuch as plaintiff's theoretical appeal to the Second Circuit would have been before a panel for de novo review of whether there was a "genuine factual dispute" for resolution by a jury, plaintiff may have succeeded on appeal in at least a reversal of defendants' respective motions for summary judgment (*Vermont Teddy Bear Co., Inc. v 1-800 Beargram Co.*, 373 F3d 241, 244). Thus, plaintiff's decision to direct defendants to discontinue the federal action precluded defendants from being vindicated should the appeal have resulted in reversal.

We have held that a plaintiff in a legal malpractice action waived his right to raise certain allegations of malpractice in the context of a matrimonial action based upon his execution of a settlement agreement (*Rupert v Gates & Adams, P.C.*, 83 AD3d 1393). We concluded there that Supreme Court "did not err in granting defendants' motion concerning those alleged errors because they could have been corrected on an appeal from the final judgment in the matrimonial action, and plaintiff consented to the dismissal on the merits of any appeal in the matrimonial action as part of the global settlement resolving a bankruptcy proceeding in which he was involved. In doing so, plaintiff precluded pursuit of the very means by which defendants' representation of plaintiff in the matrimonial action could have been vindicated" (*id.* at 1396).

Our decision in *Rupert* was based upon sound policy and should be

applied here for various reasons, the first being judicial economy. The majority is concerned that forcing a party to pursue a potentially meritless appeal will result in increased costs of litigation and overburdening the court system. As stated previously, I do not view the appeal as meritless here. I believe that allowing a plaintiff to discontinue his or her underlying case in order to pursue a legal malpractice action will result in the increased litigation costs and overburdening of the court system that the majority seeks to avoid. A legal malpractice case requires commencing a separate action that not only involves litigating the legal malpractice action but also involves litigating the underlying action. This may result in additional expert witnesses being called and a more lengthy discovery process because the parties are beginning the litigation of essentially two separate cases in state court as opposed to one in federal court. Importantly, the parties will have to litigate the very issue that would have been decided on appeal in the underlying action in order to resolve the legal malpractice case. This will obviously result in additional costs, attorney fees and use of court resources. However, should a litigant have to pursue an appeal that may correct a potentially erroneous trial court decision in the underlying litigation, a subsequent legal malpractice case may be avoided, thus saving costs and the use of court resources.

Additionally, allowing a litigant to choose to forego the appeal process and commence a legal malpractice action against his or her attorney allows the litigant to select a new defendant that he or she may feel is an easier target before a jury than a physician or hospital would be. I cannot see the merit in allowing a litigant, who does not give his or her attorney an opportunity to pursue a potentially meritorious appeal, to abandon his or her underlying case as a strategic decision in order to pursue a legal malpractice claim against his or her attorney. The appellate review of disputed issues is an integral part of our judicial system, allowing for review, contemplation and determination of cases by a panel of justices or judges as opposed to a single one. Requiring the litigant to seek final determination of the disputed issue through the appellate process should not be looked upon as onerous, as argued by plaintiff.

I also disagree with the majority that the additional time spent pursuing an appeal could result in the expiration of the statute of limitations on a legal malpractice claim. That issue is easily remedied. Nothing prevents plaintiff from commencing a separate malpractice action that may be stayed until the resolution of the underlying action, which includes resolution of any issues on appeal. Second, plaintiff may also obtain a waiver of the statute of limitations from defendants so that a subsequent legal malpractice action would not be time-barred.

I also disagree with the majority that requiring plaintiff to exhaust his appellate remedies interferes with settlement and potentially conflicts with an injured party’s duty to mitigate damages. It is speculative to assume that a certain litigation posture will interfere with settlement over another litigation posture. Who is to say that a case is more difficult to settle when

there are outstanding appellate issues that may result in the reversal of the trial court's decision versus when there is a legal malpractice case that must resolve both legal malpractice issues and medical malpractice issues, as well as appellate issues. One may easily conclude that the latter interferes more with settlement than the former. I also disagree with the majority that plaintiff's pursuit of an appeal here conflicts with his duty to mitigate damages. The proper way to mitigate damages in this case would have been for plaintiff to pursue his appeal and also to continue to litigate his remaining cause of action, which may have resulted in an award of some or all of his damages. In the event that he recovered all of his damages, a subsequent legal malpractice case would be unnecessary. In the event that he recovered partial damages, the issues and damages recoverable in a subsequent legal malpractice case would be limited. Plaintiff violated his duty to mitigate by discontinuing his remaining cause of action and foregoing his appeal in the underlying action.

I therefore would reverse the order insofar as appealed from and grant defendants' motion and cross motion for summary judgment seeking dismissal of the complaint.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

632

CA 12-01853

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

CANANDAIGUA EMERGENCY SQUAD, INC., PENFIELD VOLUNTEER EMERGENCY AMBULANCE SERVICE, INC., NORTHEAST QUADRANT ADVANCED LIFE SUPPORT, INC., CHILI VOLUNTEER AMBULANCE SERVICE, INC., AND VILLAGE OF MACEDON, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROCHESTER AREA HEALTH MAINTENANCE ORGANIZATION, INC., DOING BUSINESS AS PREFERRED CARE AND MVP HEALTH CARE, INC., DEFENDANTS-RESPONDENTS.

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

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (LAURIE A. GIORDANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 4, 2012. The order, among other things, denied plaintiffs' motion for partial summary judgment and granted defendants' cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of defendants' cross motion for summary judgment dismissing the sixth and seventh causes of action against defendant Rochester Area Health Maintenance Organization, Inc., doing business as Preferred Care, and for summary judgment on the counterclaims and as modified the order is affirmed without costs.

Memorandum: Plaintiffs are various entities that provide emergency ambulance services to persons in and around Monroe County. Rochester Area Health Maintenance Organization, Inc., doing business as Preferred Care (defendant), served as a Medicare Advantage Organization under Medicare Part C. For purposes of this appeal, it is not disputed that defendant MVP Health Care, Inc. was entitled to summary judgment dismissing the complaint and that only defendant has a basis for asserting counterclaims. During the relevant time period, defendant remitted payments to plaintiffs for services provided to patients enrolled in the Medicare Advantage Plan administered by defendant. Plaintiffs commenced this action in response to defendant's subsequent reduction of payments made in order to recoup alleged overpayments made by defendant for services provided by

plaintiffs during the years 2007 and 2008. Plaintiffs appeal from an order that denied their motion for partial summary judgment on liability and granted, as relevant to this appeal, that part of defendants' cross motion for summary judgment dismissing the complaint against defendant and for summary judgment on the counterclaims. We conclude that Supreme Court erred in granting those parts of defendants' cross motion for summary judgment dismissing the sixth and seventh causes of action against defendant and for judgment on the counterclaims. We therefore modify the order accordingly.

Addressing first the sixth cause of action, challenging defendant's right to recoup alleged overpayments, and the counterclaims for recoupment, we conclude that there are issues of fact whether defendant is entitled to recoup alleged overpayments made to plaintiffs for services provided to patients covered by the Medicare Advantage plan administered by defendant. We agree with plaintiffs that the applicable Medicare fee schedule set a minimum payment, but not a maximum payment, for the services that plaintiffs provided (*see* 42 USC § 1395w-22 [a] [2] [A]). On the one hand, if defendant had paid plaintiffs the minimum fees required by the applicable Medicare fee schedule, then plaintiffs would not be entitled to object to those payments as being insufficient (*see* 42 CFR 422.214 [a] [1]). On the other hand, however, while defendant paid plaintiffs more than the minimum amount required by the fee schedule for a period of time, defendants have failed to establish that defendant is entitled as a matter of law to recoup any or all of those funds from plaintiffs. Although the common law right of a governmental agency to recoup erroneously distributed public funds is well established (*see e.g. Matter of Leirer v Caputo*, 81 NY2d 455, 459-460; *Matter of Westledge Nursing Home v Axelrod*, 68 NY2d 862, 864-865), that right does not necessarily extend to defendant, a private entity managing public funds (*see generally Leirer*, 81 NY2d at 459-460). Moreover, defendants have failed, on this record, to establish that defendant has a legal basis or right to recoup alleged overpayments made to plaintiffs. The court therefore erred in granting those parts of defendants' cross motion for summary judgment dismissing the sixth cause of action against defendant and for summary judgment on the counterclaims for recoupment.

We also agree with plaintiffs that the court erred in granting that part of defendants' cross motion with respect to the seventh cause of action against defendant, for unjust enrichment. " 'A cause of action for unjust enrichment requires a showing that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff' " (*Hayward Baker, Inc. v C.O. Falter Constr. Corp.*, 104 AD3d 1253, 1255; *see Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421, *remittitur amended* 31 NY2d 678, *rearg denied* 31 NY2d 709, *cert denied* 414 US 829). " 'The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another' " (*Hayward Baker, Inc.*, 104 AD3d at 1255). There are issues of fact with respect to whether defendant's recoupment of funds previously paid to plaintiffs constitutes unjust enrichment.

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

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

634

CA 12-01577

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

GRANT MEABON, PLAINTIFF,

V MEMORANDUM AND ORDER

TOWN OF POLAND, DEFENDANT.

TOWN OF POLAND, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

SHERWOOD A. CHAPMAN, DOING BUSINESS
AS CADILLAC CARPENTRY, THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KENNEY SHELTON LIPTAK & NOWAK, LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

BENDER & BENDER, LLP, BUFFALO (THOMAS W. BENDER OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered May 14, 2012. The order, insofar as appealed from, granted that part of the motion of third-party plaintiff for partial summary judgment on the first cause of action in the third-party complaint and denied the cross motion of third-party defendant 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-third-party plaintiff insofar as it sought partial summary judgment on the first cause of action in the third-party complaint is denied and the cross motion of third-party defendant for summary judgment dismissing the third-party complaint is granted.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries that he allegedly sustained while constructing a pole barn for defendant-third-party plaintiff, Town of Poland (Town). Plaintiff, an employee of third-party defendant, Sherwood A. Chapman, doing business as Cadillac Carpentry (Cadillac), was injured when he slipped and fell from the roof of the structure. In appeal No. 1, Cadillac, as limited by its brief, appeals from an order granting that part of the Town’s motion

for partial summary judgment on the first cause of action in the third-party complaint, for contractual indemnification from Cadillac, and denying its cross motion for summary judgment dismissing the third-party complaint. In appeal No. 2, Cadillac appeals from an order denying its motion for leave to renew its cross motion pursuant to CPLR 2221.

We agree with Cadillac that Supreme Court erred in granting that part of the Town's motion with respect to contractual indemnification from Cadillac, and in denying its cross motion for summary judgment dismissing the third-party complaint. "Workers' Compensation Law § 11 prohibits a third-party action against an employer unless the plaintiff sustained a grave injury or there is 'a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution or indemnification of the [third-party plaintiff]' " (*Rodriguez v Seven Seventeen HB Buffalo Corp.*, 56 AD3d 1280, 1281, quoting *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 367, *rearg denied* 5 NY3d 746; *see also Johnson v UniFirst Corp.*, 67 AD3d 1442, 1443). The Town concedes that plaintiff did not suffer a "grave injury," and that it is entitled to indemnification only if it can demonstrate the existence of a written contract.

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491). We note, however, that "a clause in a [contract] executed *after* a plaintiff's accident may nevertheless be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work was made as of [a pre-accident date], and that the parties intended that it apply as of that date" (*Nephew v Klewin Bldg. Co., Inc.*, 21 AD3d 1419, 1421-1422). Here, Cadillac met its initial burden on its cross motion by establishing as a matter of law that, although there was a contract between the parties, it was executed nearly a week after plaintiff's accident. Although the contract is not dated, i.e., the parties left blank a space to be filled in with the date on which the contract was "made," we conclude that other language in the contract makes clear that it became effective on the date on which the parties entered into the contract. Thus, Cadillac established that the parties did not intend that the contract be applied retroactively (*cf. Pena v Chateau Woodmere Corp.*, 304 AD2d 442, 444, *appeal dismissed* 2 AD3d 1488), and the Town failed to raise a triable issue of fact whether the contract should be applied retroactively to the time of plaintiff's accident (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We also agree with Cadillac that the Town failed to meet its initial burden on its motion, or to raise a triable issue of fact in response to Cadillac's cross motion, whether a "course of conduct" between the parties gave rise to a contract for indemnification. Although the Town initially argued such "course of conduct" based on the fact that Cadillac was to provide it with a certificate of insurance or to name it as an insured on an insurance policy (*cf.*

Kinney v Lisk Co., 76 NY2d 215, 218; *Rodriguez*, 56 AD3d at 1281), the Town has conceded on appeal that Cadillac was not required to provide it with insurance coverage.

Furthermore, inasmuch as the Town's concession constitutes an abandonment of its remaining cause of action in the third-party complaint, we conclude that the court erred in denying Cadillac's cross motion for summary judgment dismissing the third-party complaint. In light of our determination, we dismiss as moot the appeal from the order in appeal No. 2 concerning Cadillac's motion for leave to renew its cross motion (*see generally Elinski v Niagara Falls Coach Lines, Inc.*, 101 AD3d 1722, 1723).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

635.1

CA 12-02035

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

POLYFUSION ELECTRONICS, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

PROMARK ELECTRONICS, INC. AND ROBERT
GATHERCOLE, DEFENDANTS-APPELLANTS-RESPONDENTS.

WOODS OVIATT GILMAN, LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

LAWRENCE C. BROWN, CHEEKTOWAGA, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered December 22, 2011. The judgment dismissed the complaint and awarded defendant Promark Electronics, Inc., money damages on the fourth counterclaim.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the award of damages under the fourth counterclaim and awarding instead the same amount of damages to defendant Promark Electronics, Inc. under the second counterclaim, awarding damages to defendant Promark Electronics, Inc. on the first counterclaim in the amount of $47,589.15 along with reasonable attorney's fees, and granting defendant Promark Electronics, Inc. interest on the judgment at the rate of 9% rather than 3% per annum, and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, to determine the amount of reasonable attorney's fees to be awarded pursuant to Labor Law § 191-c (3) and to recalculate the amount of interest to be awarded pursuant to CPLR 5004 in accordance with the following Memorandum: Defendants appeal and plaintiff cross-appeals from a judgment entered following a nonjury trial that dismissed the complaint and awarded defendant Promark Electronics, Inc. (Promark) judgment on the fourth counterclaim, for quantum meruit, plus interest. Plaintiff, a contract electronics manufacturer, hired defendants to generate new business orders and, in 2002, plaintiff signed an agreement providing that plaintiff would pay defendants a five-percent commission on new customers resulting from defendants' efforts. The agreement also contained a 30-day termination clause available to both plaintiff and defendants. It is undisputed that plaintiff restructured the commission schedule in 2005 and that defendants accepted the restructured schedule. Due to financial difficulties, plaintiff was deficient in paying various commissions

owed to defendants and, in 2008, plaintiff terminated its relationship with defendants. Plaintiff commenced this action seeking commissions it alleges were wrongly paid to defendants, and defendants asserted counterclaims for the unpaid commissions.

We agree with defendants on their appeal that Supreme Court should have awarded Promark judgment on the second counterclaim, breach of contract, rather than on the fourth counterclaim, for quantum meruit. We therefore modify the judgment accordingly. The agreement between the parties was an enforceable unilateral contract (*see Petterson v Pattberg*, 248 NY 86, 88), and the existence of an enforceable written contract between the parties precludes recovery in quantum meruit (*see Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607). Plaintiff's contention on its cross appeal that there were additional unwritten requirements that defendants failed to fulfill and thus that defendants were not entitled to judgment in their favor is without merit; parole evidence is not admissible here because there is no ambiguity in the contract between plaintiff and defendants (*see Schron v Troutman Sanders LLP*, 20 NY3d 430, 436; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162).

We further agree with defendants that Promark is entitled to judgment on the first counterclaim, alleging the violation of Labor Law § 191-c. Labor Law § 191-c (1) provides that, "[w]hen a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated." Labor Law § 191-c (3) provides that "[a] principal who fails to comply with the provisions of this section concerning timely payment of all earned commissions shall be liable to the sales representative in a civil action for double damages. The prevailing party in any such action shall be entitled to an award of reasonable attorney's fees, court costs, and disbursements." It is undisputed that plaintiff failed to pay defendants commissions within five business days after they became due, and the record establishes that plaintiff was a "principal" and defendants were "sales representative[s]" for purposes of the statute. We therefore further modify the judgment by awarding Promark damages in the amount of $47,589.15 on the first counterclaim, representing double damages of the amount awarded on the breach of contract claim, and we remit the matter to Supreme Court for a calculation of reasonable attorney's fees (*see Zeman v Falconer Elecs., Inc.*, 55 AD3d 1240, 1241-1242). We note that the judgment includes an award of costs to defendants.

Finally, we conclude that the court lacked discretion to vary the statutorily-prescribed interest rate of 9% per annum (*see* CPLR 5004). As this Court has previously recognized, interest at the rate of 9% per annum is mandatory for "sum[s] awarded because of a breach of performance of a contract" (CPLR 5001 [a]; *see Urban v B.R. Guest, Inc.*, 45 AD3d 1418, 1418). We therefore further modify the judgment accordingly.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

635

CA 12-01578

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

GRANT MEABON, PLAINTIFF,

V MEMORANDUM AND ORDER

TOWN OF POLAND, DEFENDANT.

TOWN OF POLAND, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

SHERWOOD A. CHAPMAN, DOING BUSINESS
AS CADILLAC CARPENTRY, THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KENNEY SHELTON LIPTAK & NOWAK, LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

BENDER & BENDER, LLP, BUFFALO (THOMAS W. BENDER OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered June 21, 2012. The order denied the motion of third-party defendant for leave to renew and to stay the trial.

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

Same Memorandum as in *Meabon v Town of Poland* ([appeal No. 1] ___ AD3d ___ [July 19, 2013]).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

652

CA 12-02244

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

SCOTT J. PIATT, PA, INDIVIDUALLY, AND SCOTT J. PIATT, DOING BUSINESS AS AESTHETIC SOLUTIONS AND SUMMIT HEALTHCARE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROSS A. HORSLEY, M.D., DEFENDANT, AND PAUL B. KIRSCH, M.D., DEFENDANT-APPELLANT.

SHANE & REISNER, LLP, ALLEGANY (JEFFREY P. REISNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

AMIGONE SANCHEZ & MATTREY, LLP, BUFFALO (JACK M. SANCHEZ OF COUNSEL), AND JAMES F. ALLEN, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered February 10, 2012. The order, insofar as appealed from, denied that part of the motion of defendant Paul B. Kirsch, M.D., to vacate a default judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed in the exercise of discretion without costs and that part of the motion seeking vacatur of the judgment entered August 6, 2010 is granted upon condition that defendant Paul B. Kirsch, M.D. shall serve an answer within 20 days of service of a copy of the order of this Court with notice of entry.

Memorandum: Paul B. Kirsch, M.D. (defendant), as limited by his brief, appeals from an order denying that part of his motion seeking to vacate the default judgment entered against him. At the outset, we note that Supreme Court's failure to rule on that part of the motion seeking dismissal of the complaint against defendant is deemed a denial thereof (*see Matijiw v New York Cent. Mut. Fire Ins. Co.*, 15 AD3d 875, 876; *Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864). As noted, however, defendant's brief is limited to that part of his motion seeking to vacate the default judgment. On the merits, we agree with plaintiff that defendant failed to establish that he did not receive actual notice of the summons and complaint as required by CPLR 317, and that defendant failed to establish a reasonable excuse for his default under CPLR 5015 (a) (1). Nevertheless, under the circumstances of this case, we exercise our broad discretionary power to vacate the default judgment (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68; *Matter of County of Ontario [Middlebrook]*, 59 AD3d 1065, 1065). The court granted a default judgment on the first,

fourth and fifth causes of action sounding in, respectively, conspiracy and conversion, breach of an employment agreement, and fraud and defamation. The court also awarded damages of $250,000, $953,011.44 and $1,000,000, respectively, on those causes of action. First, with respect to the first cause of action, we note that "New York does not recognize civil conspiracy to commit a tort as an independent cause of action" (*Matter of Hoge [Select Fabricators, Inc.]*, 96 AD3d 1398, 1400 [internal quotation marks omitted]). Second, we question the reasonableness of the court's award of damages, particularly in light of the fact that the record does not reflect how the court determined those awards. Third, given the lack of detail in the complaint (*see generally* CPLR 3016 [a], [b]), we also question plaintiff's entitlement to judgment with respect to the alleged fraud and defamation. We therefore exercise our "inherent authority to vacate the default judgment 'for sufficient reason and in the interests of substantial justice' " (*Middlebrook*, 59 AD3d at 1065, quoting *Woodson*, 100 NY2d at 68), and we grant that part of defendant's motion seeking to vacate the default judgment entered against him upon condition that he shall serve an answer within 20 days of service of a copy of the order of this Court with notice of entry.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

655

CA 12-01323

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

CHRISTOPHER A. MILCZARSKI, AS ADMINISTRATOR
OF THE ESTATE OF MARK A. MILCZARSKI, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

MICHAEL K. WALASZEK, K.W. AUTO & SALES INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (DONNA L. BURDEN OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered October 26, 2011. The order, insofar as appealed from, denied the motion of defendants Michael K. Walaszek and K.W. Auto & Sales Inc., for summary judgment.

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

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

656

CA 12-02134

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

CHRISTOPHER A. MILCZARSKI, AS ADMINISTRATOR
OF THE ESTATE OF MARK A. MILCZARSKI, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL K. WALASZEK, K.W. AUTO & SALES INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (DONNA L. BURDEN OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 15, 2012. The order granted the motion of defendants Michael K. Walaszek and K.W. Auto & Sales Inc., for leave to renew, and upon renewal, denied their motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendants Michael K. Walaszek and K.W. Auto & Sales Inc. for partial summary judgment and dismissing the complaint against those defendants insofar as it seeks damages for plaintiff's pecuniary loss beyond reimbursement of funeral expenses and for any pecuniary loss sustained by distributee Cynthia Craft and as modified the order is affirmed without costs.

Memorandum: In this wrongful death action, Michael K. Walaszek and K.W. Auto & Sales Inc. (defendants) appeal from an order that granted their motion for leave to renew their motion for partial summary judgment seeking, inter alia, dismissal of the complaint insofar as it sought damages for decedent's family members for the pecuniary loss of support, guidance and companionship of decedent, but that, upon renewal, adhered to its prior determination denying the motion. We reject defendants' contention that there are no issues of fact with respect to whether any of decedent's family members suffered pecuniary damages. Damages in a wrongful death action are limited to "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought" (EPTL 5-4.3 [a]). "Pecuniary loss" is defined as "the economic value of the decedent to each distributee at the time decedent died" (*Huthmacher v Dunlop Tire Corp.*, 309 AD2d 1175, 1176),

and includes loss of income and financial support, loss of household services, loss of parental guidance, as well as funeral expenses and medical expenses incidental to death (*see Gonzalez v New York City Hous. Auth.*, 77 NY2d 663, 667-669; *DeLong v County of Erie*, 60 NY2d 296, 306-308). Generally, because it is difficult to provide direct evidence of wrongful death damages, the calculation of pecuniary loss "is a matter resting squarely within the province of the jury" (*Parilis v Feinstein*, 49 NY2d 984, 985; *see Altmajer v Morley*, 274 AD2d 364, 365). On this record, we conclude that there are issues of fact with respect to whether plaintiff, as decedent's brother, suffered pecuniary loss in the form of funeral expenses and whether decedent's brother Matthew suffered pecuniary loss given the evidence of their longstanding close and interdependent relationship. We agree with defendants, however, that they are entitled to summary judgment dismissing the complaint insofar as it seeks damages for plaintiff's pecuniary loss beyond reimbursement for funeral expenses and for any pecuniary loss sustained by decedent's sister, Cynthia Craft. We therefore modify the order accordingly.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

659

CA 12-02391

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

CHRISTOPHER RAWLINS, BY AND THROUGH HIS LEGAL CUSTODIAN, ANGELA RAWLINS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ST. JOSEPH'S HOSPITAL HEALTH CENTER, ST. JOSEPH'S MATERNAL CHILD HEALTH CENTER, MATERNAL CHILD HEALTH CENTER PEDIATRICS, MATERNAL CHILD HEALTH CENTER OB/GYN, STEPHEN M. BROWN, M.D., JASON E. BERNAD, M.D., KATHERINE M. WALKER, M.D., AND STEPHANIE A. DIPERNA, M.D., DEFENDANTS-RESPONDENTS.

SIDNEY P. COMINSKY TRIAL LAWYERS, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ST. JOSEPH'S HOSPITAL HEALTH CENTER, ST. JOSEPH'S MATERNAL CHILD HEALTH CENTER, MATERNAL CHILD HEALTH CENTER PEDIATRICS, MATERNAL CHILD HEALTH CENTER OB/GYN, JASON E. BERNAD, M.D., KATHERINE M. WALKER, M.D. AND STEPHANIE A. DIPERNA, M.D.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 16, 2012. The order denied in part plaintiff's motion to compel certain discovery responses.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion for discovery of certain materials sought in items 12, 14, 15, 16, 21, 24 and 29, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Onondaga County, for a hearing with respect to certain materials sought in items 12, 15, 16, 21 and 53 in accordance with the following Memorandum: Plaintiff's legal guardian commenced this medical malpractice action seeking damages for injuries allegedly sustained by the infant plaintiff during his birth at defendant St. Joseph's Hospital Health Center (hospital). Plaintiff appeals from an order that denied in part his motion to compel certain discovery responses from the hospital and the remaining defendants with the exception of Stephen M. Brown, M.D. (collectively, defendants). On this appeal, plaintiff challenges Supreme Court's rulings with respect to 37 of his 56 discovery requests. As a preliminary matter, we reject plaintiff's contention that we should conduct a de novo review of his discovery demands (*see e.g. Giles v Yi*, 105 AD3d 1313, 1315-1316; *Finnegan v Peter, Sr. &*

Mary L. Liberatore Family Ltd. Partnership, 90 AD3d 1676, 1677; *see also Radder v CSX Transp., Inc.*, 68 AD3d 1743, 1745).

On the merits, we note that CPLR 3101 requires "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). The phrase " 'material and necessary should be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason' " (*Matter of Wendy's Rests., LLC v Assessor, Town of Henrietta*, 74 AD3d 1916, 1917; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407). "Entitlement to discovery of matter satisfying the threshold requirement is, however, tempered by the trial court's authority to impose, in its discretion, appropriate restrictions on demands which are unduly burdensome . . . and to prevent abuse by issuing a protective order where the discovery request may cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (*Kooper v Kooper*, 74 AD3d 6, 10 [internal quotation marks omitted]; *see* CPLR 3103 [a]). In opposing a motion to compel discovery, a party must "establish that the requests for information are unduly burdensome, or that they may cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (*Kimball v Normandeau*, 83 AD3d 1522, 1523 [internal quotation marks omitted]; *see generally* CPLR 3103 [a]).

Applying those rules here, we conclude that the court erred in denying plaintiff's motion with respect to items 12, 14-16, 21, 24, 29, and 53, and otherwise properly denied the motion. We therefore modify the order accordingly. With respect to those parts of the motion properly denied by the court, we note that the court did not abuse its discretion in defining "the period of time at issue" as the period from January 1, 2001 to December 31, 2002. " 'The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice, and evidence that such deviation or departure was a proximate cause of injury or damage' " (*James v Wormuth* [appeal No. 2], 93 AD3d 1290, 1291, *affd* ___ NY3d ___ [June 27, 2013]). The "standards of practice" element logically applies to the time at which the alleged deviation occurred (*see Vera v Soohoo*, 41 AD3d 586, 588; *Nicholas v Reason*, 84 AD2d 915, 915) and, here, the court's "period of time at issue" includes August 27, 2002, the date of plaintiff's birth. The court's "period of time" also should apply to those parts of the order concerning the discovery requests that we conclude should have been granted herein, to the extent that the materials sought by plaintiff in those requests existed during that period.

With respect to items 12 and 21, plaintiff sought discovery of certain national standards published by various organizations for fetal monitoring and pediatric advancement of life support. Upon our review of plaintiff's "statements of facts and claims," we conclude that plaintiff sought discovery of those standards in order to aid him in establishing the alleged negligence of defendant Stephen M. Brown, M.D. in failing to identify evidence of fetal distress, and the

hospital's alleged negligence in allowing and engaging in improper neonatal resuscitation. We further conclude that those documents are "material and necessary" to the prosecution of those claims in this action (CPLR 3101 [a]) and, thus, that the court abused its discretion in denying those parts of plaintiff's motion with respect to them (*see Boyea v Benz*, 96 AD3d 1558, 1559). Contrary to defendants' contention, the alleged public availability of those documents fails to meet the standards for "[p]revention of abuse" set forth in CPLR 3103 (a) (*see Kimball*, 83 AD3d at 1523). Moreover, the fact that "the documents sought may be available in public records does not, in itself, preclude production of those records from a party" (*Alfaro v Schwartz*, 233 AD2d 281, 282; *see Long v State of New York*, 33 AD2d 621, 621; *cf. Matter of Beryl*, 118 AD2d 705, 707). In any event, defendants concede that there is some doubt whether the documents plaintiff seeks in item 12 are available to the public. Inasmuch as defendants contend for the first time on appeal that there should be no disclosure with respect to item 12 because they are not in possession of the documents sought in items 12 and 21, we remit the matter to Supreme Court for a hearing to determine whether defendants possess the documents covered by those items (*see generally Matter of Niagara County Water Dist. v Board of Assessors of City of Lockport*, 31 AD2d 1004, 1005).

We agree with plaintiff that the court abused its discretion in denying that part of his motion seeking discovery of a protocol entitled "Circulating Vaginal Delivery" (CVD), pursuant to item 14 (*see Boyea*, 96 AD3d at 1559; *see also Alfaro*, 233 AD2d at 282). We conclude that the CVD protocol is "material and necessary" to the prosecution of plaintiff's action (CPLR 3101 [a]). Defendants' purported lack of knowledge with respect to the CVD protocol does not preclude disclosure of that document (*see generally Kimball*, 83 AD3d at 1523). Also under item 14, plaintiff sought discovery of documents with respect to the interpretation and management of fetal heart rate patterns, and we further conclude that such documents are "material and necessary" to the prosecution of this action (CPLR 3101 [a]). We reject defendants' contention that the request for those documents is unduly burdensome (*see Engel v Hagedorn*, 170 AD2d 301, 301; *see generally* CPLR 3103 [a]). We do not address defendants' final contention with respect to item 14, which is unpreserved for our review (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

With respect to item 15, we conclude that the court abused its discretion in denying plaintiff's motion to the extent that he sought discovery of materials concerning cesarean sections. We conclude that those materials are "material and necessary" to the prosecution of plaintiff's action (CPLR 3101 [a]), and we note that defendants' purported lack of knowledge with respect to those materials does not preclude disclosure of them (*see Kimball*, 83 AD3d at 1523). Nevertheless, we further remit the matter to Supreme Court to determine at the hearing whether defendants possess the materials requested by plaintiff in item 15.

With respect to item 16, we conclude that the court abused its

discretion in denying plaintiff's motion to the extent that he sought discovery of materials concerning intrapartum and antepartum suctioning, as well as certain guidelines of the Association of Women's Health, Obstetric, and Neonatal Nurses and the American Congress of Obstetricians and Gynecologists, on the ground that plaintiff was seeking public information (*see Boyea*, 96 AD3d at 1559). As we have noted above, the fact that materials "may be available in public records does not, in itself, preclude production" of those materials from a party (*Alfaro*, 233 AD2d at 282). Defendants' contention that they do not possess the materials likewise is raised for the first time on appeal, and we therefore further remit the matter to Supreme Court to determine at the hearing whether defendants possess those materials (*see generally Niagara County Water Dist.*, 31 AD2d at 1005).

We further conclude that the court abused its discretion in denying plaintiff's motion to the extent that he sought discovery under item 24, concerning materials containing criteria for determining whether neonatal encephalopathy has occurred and for designating asphyxia or hypoxia in a newborn (*see Boyea*, 96 AD3d at 1559). We conclude that the materials concerning the hospital's criteria for designating asphyxia or hypoxia, i.e., oxygen deprivation, in a newborn are "material and necessary" to the prosecution of this action (CPLR 3101 [a]), and defendants have not demonstrated that they would be unduly burdened by the production of those materials (*see Kimball*, 83 AD3d at 1523; *see generally* CPLR 3103 [a]).

The court likewise abused its discretion in denying plaintiff's motion insofar as plaintiff sought discovery under item 29, concerning materials containing referral protocols for infants, including exemplars of any forms used in the evaluation of children at risk for developmental delays (*see Boyea*, 96 AD3d at 1559). Those materials are "material and necessary" to the prosecution of plaintiff's action (CPLR 3101 [a]), and defendants have not met their burden of establishing that production of those materials would be unduly burdensome (*see Kimball*, 83 AD3d at 1523; *see generally* CPLR 3103 [a]).

Finally, with respect to item 53, plaintiff sought discovery of "[u]nredacted policies and procedures identified during the inspection permitted by" the court's initial discovery order. Defendants responded that the initial discovery "order acknowledged that information and materials requested [are] subject to privilege defenses that could not be fully evaluated due to scope of materials involved," and that the "[R]eferee's work is not complete" in that regard. The Referee indicated that his "recollection is that [the hospital's] response is accurate in part. It is not in the order but understood that privileged material [is] exempt." The court concluded that "[n]o production/response [was] required." The record before us does not indicate whether the Referee ever determined what information in the materials were covered by privilege, and we therefore cannot review whether any discovery with respect to item 53 is required. Consequently, we further remit the matter to Supreme Court so that

defendants may produce for an in camera review "all the procedures and protocols" that plaintiff was permitted to review following the initial discovery order, to enable the court to determine what information therein, if any, is privileged (*see Nichter v Erie County Med. Ctr. Corp.*, 93 AD3d 1337, 1338).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

660

CA 12-02218

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

THE ONEIDA INDIAN NATION, A SOVEREIGN NATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HUNT CONSTRUCTION GROUP, INC.,
DEFENDANT-RESPONDENT.

WILLIAMS & CONNOLLY LLP, WASHINGTON, D.C. (DENNIS M. BLACK, OF THE WASHINGTON, D.C. AND MARYLAND BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND MACKENZIE HUGHES LLP, SYRACUSE, FOR PLAINTIFF-APPELLANT.

PILLSBURY WINTHROP SHAW PITTMAN LLP, WASHINGTON, D.C., HANCOCK ESTABROOK LLP, SYRACUSE (JOHN G. POWERS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 11, 2012. The order granted the motion of defendant seeking leave to amend its first amended answer.

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

Memorandum: Plaintiff appeals from an order that granted the motion of defendant seeking leave to amend its first amended answer to assert an affirmative defense and a counterclaim, for recoupment. We agree with plaintiff that Supreme Court erred in granting the motion inasmuch as it is well settled that such leave "should not be granted where, as here, the proposed amendment lacks merit" (*Hodgson, Russ, Andrews, Woods & Goodyear v Isolatek Intl. Corp.*, 300 AD2d 1047, 1048; *see Handville v MJP Contrs., Inc.*, 77 AD3d 1471, 1473). In order for a claim of equitable recoupment to survive, a party must have a "legally subsisting cause of action [or counterclaim] upon which it could maintain an independent claim" (*Telmark, Inc. v C & R Farms* [appeal No. 2], 115 AD2d 966, 967; *see generally Eber-NDC, LLC v Star Indus., Inc.*, 42 AD3d 873, 876). Here, defendant's recoupment affirmative defense and counterclaim are based upon extra-contractual claims that were dismissed on a prior appeal when asserted as independent causes of action (*Oneida Indian Nation v Hunt Constr. Group, Inc.*, 88 AD3d 1264, 1265). Inasmuch as defendant no longer has a cause of action against plaintiff for extra-contractual claims, it cannot now assert a counterclaim or affirmative defense for recoupment

based upon the facts and circumstances underlying those claims (*see generally Telmark, Inc*., 115 AD2d at 966-967).

In light of our determination, we do not reach plaintiff's remaining contentions.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

663

TP 12-02248

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF MARK DONVITO, VOLUNTARY ADMINISTRATOR OF THE ESTATE OF NICHOLAS J. DONVITO, DECEASED, PETITIONER,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, ELIZABETH R. BERLIN, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, AND DAVID SUTKOWY, COMMISSIONER, ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

MANNION & COPANI, SYRACUSE (ANTHONY F. COPANI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, AND ELIZABETH R. BERLIN, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Deborah H. Karalunas, J.], entered December 4, 2012) to review a determination of respondents. The determination denied the application of petitioner's decedent for certain Medicaid benefits.

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

Memorandum: Petitioner, as administrator of his father's estate, commenced this CPLR article 78 proceeding challenging the determination that a seven-month delay on decedent's eligibility for Medicaid coverage was properly imposed as a penalty for transferring resources in order to qualify for Medicaid coverage and that decedent's net available monthly income (NAMI) was properly deemed to include payments he received from his civil service pension. We confirm the determination.

Decedent entered an assisted living facility in March 2003 when he was 83 years old. In October 2008, having suffered a stroke

several months earlier, decedent was admitted into a nursing home. Less than two years later, in June 2010, petitioner filed a Medicaid application on behalf of decedent, having been given power of attorney. Onondaga County Department of Social Services (DSS) denied the application, determining that decedent was ineligible for medical assistance for a seven-month period because he gave $54,162.05 to petitioner and members of petitioner's family from June 12, 2007 to August 14, 2008, which was within the five-year look-back period. The last of the six transfers — to petitioner in the amount of $6,500 — was made approximately one month after decedent suffered his stroke. In January 2011, at the end of the seven-month penalty period, decedent became eligible for Medicaid. DSS also determined that decedent's NAMI included the sum of $1,756.90, which he had been receiving on a monthly basis from his civil service pension.

At the fair hearing conducted on the administrative appeal filed by petitioner, petitioner testified that the $6,500 payment he received from decedent was not a gift, but instead constituted reimbursement for expenses he incurred on behalf of decedent. Although petitioner acknowledged that the other five transfers of funds to him and his family members were gifts, he contended that decedent had a history of giving money to him and that, in making the most recent gifts, decedent was not motivated by a desire to become eligible for Medicaid. With respect to the determination of decedent's NAMI, petitioner testified that, although decedent had been receiving his monthly payments from his civil service pension, for unknown reasons decedent stopped receiving the payments in September 2011. Petitioner thus contended that the pension payments should not be included in decedent's NAMI. The determination of DSS was affirmed on the administrative appeal, and we now confirm the determination following the fair hearing inasmuch as it is supported by the requisite substantial evidence (*see generally Matter of Mallery v Shah*, 93 AD3d 936, 937).

"In determining the medical assistance eligibility of an institutionalized individual, any transfer of an asset by the individual . . . for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services" for a certain penalty period (Social Services Law § 366 [5] [d] [3]). The look-back period is the "sixty-month period[] immediately preceding the date that an [applicant] is both institutionalized and has applied for medical assistance" (§ 366 [5] [d] [1] [vi]). Where an applicant has transferred assets for less than fair market value, the burden of proof is on the applicant to "rebut the presumption that the transfer of funds was motivated, in part if not in whole, by . . . anticipation of future need to qualify for medical assistance" (*Mallery*, 93 AD3d at 937 [internal quotation marks omitted]; *see generally* § 366; 18 NYCRR 360-4.4).

Here, petitioner failed to meet his burden of proof at the fair hearing with respect to the transfer of resources during the look-back period. Petitioner offered no receipts or other documentary evidence, such as credit card bills or cancelled checks, to support his assertion that he purchased on decedent's behalf, inter alia,

furniture and clothing in the amount of $6,500. Indeed, petitioner did not specify where he purchased the items or the cost of each item. We also note that the $6,500 transfer was made to petitioner shortly after decedent suffered a stroke, at which time decedent's need for nursing home services could easily have been anticipated (*see Matter of Javeline v Whalen*, 291 AD2d 497, 497). With respect to the other transfers, which petitioner concedes were gifts, petitioner did not establish that decedent was not motivated, at least in part, by a desire to qualify for Medicaid. Contrary to petitioner's contention, decedent did not have a consistent history of giving money to relatives; before the transfers in question, decedent's most recent gift was seven years earlier.

Finally, petitioner failed to establish that decedent's civil service pension was improperly included in his NAMI. Decedent's bank records showed that the pension payments were made directly into his account on a monthly basis until September 2011, and petitioner offered no explanation for why decedent was no longer receiving those pension benefits, which presumably were payable for life. It is undisputed that "available income" includes pension benefits (*see* 18 NYCRR 360-4.3 [b] [3]), and DSS did not have the burden at the fair hearing of proving that decedent was still receiving those payments.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

678

CA 12-02300

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND VALENTINO, JJ.

---

5 AWNINGS PLUS, INC., FORMERLY KNOWN AS PORTAGE HOUSE MOTEL, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MOSES INSURANCE GROUP, INC., DEFENDANT-APPELLANT.

KEIDEL, WELDON & CUNNINGHAM, LLP, SYRACUSE (DARREN P. RENNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (JAMES C. ROSCETTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Catherine Nugent Panepinto, J.), entered February 17, 2012. The order denied the motion of defendant to dismiss the complaint.

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

Memorandum: Defendant, who was the insurance agent for nonparty Awnings Plus, Inc. (API), procured workers' compensation insurance for API through the New York State Insurance Fund (NYSIF). After plaintiff purchased some of the assets of API, API ceased doing business and defendant offered to procure workers' compensation insurance for plaintiff. According to plaintiff, defendant advised plaintiff to execute an assignment of interest agreement transferring the NYSIF workers' compensation policy from API to plaintiff. Unbeknownst to plaintiff, API owed premiums on the NYSIF policy in the amount of $12,000 and, in July 2009, NYSIF commenced an action against plaintiff seeking to collect the monies due from API. Plaintiff ultimately paid $11,061.24 to NYSIF. Plaintiff thereafter commenced this breach of contract and negligence action in November 2011 seeking to recover from defendant the monies it paid to NYSIF. Plaintiff asserted that defendant prepared the assignment of API's insurance policy, that defendant knew or should have known at that time that API owed premiums on the assigned policy, and that defendant should have "advise[d] plaintiff of the implications of the assignment." Defendant moved to dismiss the complaint, and Supreme Court denied the motion.

We agree with defendant that the court erred in denying that part of the motion to dismiss the negligence cause of action on statute of

limitations grounds. It is well settled that a cause of action accrues "when all [of] the facts necessary to the cause of action have occurred and an injured party can obtain relief in court" (*Ackerman v Price Waterhouse*, 84 NY2d 535, 541). "In most cases, this accrual time is measured from the day an actionable injury occurs, 'even if the aggrieved party is then ignorant of the wrong or injury' " (*McCoy v Feinman*, 99 NY2d 295, 301, quoting *Ackerman*, 84 NY2d at 541; *see Brooks v AXA Advisors, LLC* [appeal No. 2], 104 AD3d 1178, 1180, *lv denied* ___ NY3d ___ [June 25, 2013]). Here, the injury to plaintiff, i.e., plaintiff's financial responsibility for API's debt, occurred on April 3, 2007, which is the date that it executed the assignment. As plaintiff acknowledges in the complaint, API "owed money on th[e] policy *at the time the assignment was executed*" (emphasis added). The assignment provides that, "upon the acceptance of th[e] agreement," i.e., April 3, 2007, the "assignee agrees to . . . assume all obligations [in the policy] . . . , including liability and responsibility for the payment of any premiums or additional premiums." Thus, by signing the assignment, plaintiff became responsible for monies API owed on the policy and therefore sustained an actionable injury on the date it executed the assignment (*see generally McCoy*, 99 NY2d at 305). In other words, upon the execution of the assignment, which shifted liability for arrears in policy premiums from API to plaintiff, plaintiff's damages were "sufficiently calculable to permit plaintiff to obtain prompt judicial redress of that injury" and plaintiff therefore had a "complete cause of action" (*id.*).

The fact that plaintiff may not have learned of the amount owed until July 2009, i.e., the date on which NYSIF commenced the action against it, does not alter the analysis for statute of limitations purposes (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94; *see also One Beacon Ins. v Terra Firma Constr. Mgt. & Gen. Contr., LLC*, 2004 WL 369273, at *3). Thus, plaintiff's negligence cause of action is barred by the three-year statute of limitations set forth in CPLR 214, and the court erred in denying that part of the motion to dismiss that cause of action (*see generally Cappelli v Berkshire Life Ins. Co.*, 276 AD2d 458, 459).

We further agree with defendant that the court erred in denying that part of its motion to dismiss the breach of contract cause of action because plaintiff failed to state a claim upon which relief may be granted. " '[A]n insurance agent's duty to its customer is generally defined by the nature of the customer's request for coverage' " (*Obomsawin v Bailey, Haskell & LaLonde Agency, Inc.*, 85 AD3d 1566, 1567, *lv denied* 17 NY3d 710). " 'Absent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide[ ] or direct a client to obtain additional coverage' " (*id.*; *see Murphy v Kuhn*, 90 NY2d 266, 270). "To set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy" (*American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 735, *rearg denied* 20 NY3d 1044). "A general request for coverage

will not satisfy the requirement of a specific request for a certain type of coverage" (*Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 158; *see Radford v Peerless Ins. Co.*, 93 AD3d 1354, 1355; *Catalanotto v Commercial Mut. Ins. Co.*, 285 AD2d 788, 790, *lv denied* 97 NY2d 604; *M & E Mfg. Co. v Frank H. Reis, Inc.*, 258 AD2d 9, 12; *Empire Indus. Corp. v Insurance Cos. of N. Am.*, 226 AD2d 580, 581).

Here, plaintiff requested only that defendant procure the "best policy value" for plaintiff's workers' compensation coverage. This is "the very kind of request that has been repeatedly held to be insufficient" to trigger a special duty requiring defendant to advise plaintiff concerning its insurance coverage (*Catalanotto*, 285 AD2d at 790). Defendant procured workers' compensation coverage for plaintiff through the assignment of API's policy. As noted above, the assignment itself indicated that plaintiff would be responsible "for the payment of any premiums or additional premiums . . . which may become due on account of this policy up to the effective date of this assignment of interest agreement." Plaintiff has thus failed to state a breach of contract cause of action because there was no specific request for coverage that defendant failed to meet (*see generally American Bldg. Supply Corp.*, 19 NY3d at 735).

We therefore reverse the order, grant defendant's motion, and dismiss the complaint.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

679

CA 12-00806

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND VALENTINO, JJ.

DEIRDRE LOY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS L. LOY, DEFENDANT-APPELLANT.

CHAMBERLAIN, D'AMANDA, OPPENHEIMER & GREENFIELD, LLP, ROCHESTER (JOHN A. SCHUPPENHAUER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ZIMMERMAN & TYO, ATTORNEYS, SHORTSVILLE (JOHN E. TYO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered January 25, 2012. The order, among other things, distributed defendant's pension benefits.

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

Memorandum: In this postjudgment matrimonial proceeding, defendant appeals from a qualified domestic relations order (QDRO) that directed the New York State and Local Retirement System (retirement system) to pay his ex-wife her marital share of defendant's pension pursuant to the *Majauskas* formula (*see Majauskas v Majauskas*, 61 NY2d 481, 489-491). Although no appeal lies as of right from a QDRO (*see Andress v Andress*, 97 AD3d 1151, 1152; *Cuda v Cuda* [appeal No. 2], 19 AD3d 1114, 1114), we nevertheless treat the notice of appeal as an application for leave to appeal and grant the application (*see Cuda*, 19 AD3d at 1114).

With respect to the merits, defendant contends that Supreme Court should have ordered the retirement system to calculate his "retirement allowance" as being the "hypothetical" benefit he would have received based on his years of service as of the date on which the divorce action was commenced, rather than as being the actual benefit he later received upon retirement. According to defendant, the QDRO entered by the court improperly awards plaintiff a portion of his separate property, i.e., the increases in his "retirement allowance" attributable to step increases and promotional increases in his pay that occurred after the date of commencement of the divorce action. We reject that contention. As the Court of Appeals stated in *Majauskas*, where the pension participant made a similar argument, the fact that a participant's three highest years of earnings may occur after divorce does affect the alternate payee's marital share of the

pension benefits, "for as the Delaware Supreme Court held in *Jerry L.C. v Lucille H.C.* [448 A2d 223, 226], '[s]ince each employment year is counted for pension purposes each contributes to the high salary years' " (*id.* at 492). The cases relied upon by defendant are distinguishable because they involve defined contribution retirement plans (*see Wegman v Wegman*, 123 AD2d 220; *Kammerer v Kammerer,* 2001 NY Slip Op 40218[U]), whereas here defendant has a defined benefit plan.

Defendant further contends, seemingly in the alternative, that the QDRO is inconsistent with the parties' stipulation, which he interprets as giving plaintiff a share of his pension as if he retired on the date of commencement of the divorce action. That contention is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, defendant's contention lacks merit. The stipulation makes no reference to a hypothetical retirement date; instead, it simply provides that plaintiff's share of the pension will be determined pursuant to the *Majauskas* formula, and that is what the QDRO accomplishes.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

687

KA 12-01691

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRYL NOYES, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Kenneth F. Case, J.), entered March 23, 2012. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). We reject defendant's contention that County Court erred in assessing points against him under risk factors 3 (number of victims), 7 (relationship between offender and victim), and 12 (acceptance of responsibility—expelled from or refused treatment). With respect to risk factor 12, the case summary establishes that defendant was expelled from his sex offender treatment program for exhibiting "hostility and a poor attitude" and for continuing to deny responsibility for the underlying sex offense. Thus, the court properly assessed defendant 15 points under risk factor 12 (*see People v Lewis*, 37 AD3d 689, 690, *lv denied* 8 NY3d 814; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15-16 [2006]). Notably, according to the case summary, defendant's denial of responsibility was made despite his guilty plea, and any danger of self-incrimination was therefore eliminated inasmuch as "defendant has already been prosecuted for the offense" that he would be required to admit in treatment (*People v Paladino*, 46 AD3d 864, 865-866, *lv denied* 10 NY3d 704). With respect to the 30 points assessed under risk factor 3 and the 20 points assessed under risk factor 7, we note that the underlying conviction was a federal offense to which defendant pleaded guilty to receiving child pornography (18 USC 2252 [a] [2]). Although the Court of Appeals has stated that "[i]t does not seem that factor 7 was written with possessors of child pornography in mind" (*People v Johnson*, 11 NY3d 416, 420), the Court

of Appeals determined that points were properly assessed under risk factor 7 in a case where the defendant was convicted of possessing child pornography (*see id.*; *see also People v Poole*, 90 AD3d 1550, 1550-1551). Consequently, we conclude that the court here properly assessed points under risk factor 7. We further conclude that the court properly assessed points under risk factor 3 because there were more than three victims (*see Poole*, 90 AD3d at 1550).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

695

OP 12-02197

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

IN THE MATTER OF JAAN AARISMAA, IV,
PETITIONER,

V MEMORANDUM AND ORDER

HON. DENNIS F. BENDER, SURROGATE COURT JUDGE,
JANE LAWSON, CHIEF COURT CLERK, CRISTINA L. LOTZ,
SENECA COUNTY CLERK, FRANK R. FISHER, SENECA
COUNTY ATTORNEY, JOHN L. WAGNER, AS EXECUTOR, AND
MARK B. WHEELER, ATTORNEY, RESPONDENTS.

JAAN AARISMAA, IV, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS HON. DENNIS F. BENDER, SURROGATE COURT JUDGE AND JANE LAWSON, CHIEF COURT CLERK.

HARRIS BEACH PLLC, ITHACA (MARK B. WHEELER OF COUNSEL), FOR RESPONDENTS JOHN L. WAGNER, AS EXECUTOR AND MARK B. WHEELER, ATTORNEY.

FRANK R. FISHER, COUNTY ATTORNEY, WATERLOO, RESPONDENT PRO SE, AND FOR CRISTINA L. LOTZ, SENECA COUNTY CLERK.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to compel respondent Hon. Dennis F. Bender to issue a default judgment in the Matter of the Estate of Stanley A. Wagner, deceased, and for other relief.

It is hereby ORDERED that said petition is unanimously dismissed with costs.

Memorandum: Petitioner commenced this original proceeding pursuant to CPLR article 78 seeking, inter alia, to compel respondent Honorable Dennis F. Bender to issue him a default judgment in an estate matter in Surrogate's Court, Seneca County. We agree with respondents that the petition should be dismissed in its entirety. It is well settled that "[a] CPLR article 78 proceeding may not be used to seek review of issues that could have been raised on direct appeal" (*Matter of Estate of Rappaport v Riordan*, 66 AD3d 1018, 1018; *see Matter of Tyler v Forma*, 231 AD2d 891, 891; *Matter of Venture Mag. v White*, 103 AD2d 450, 451). Petitioner's contentions in this proceeding all involve challenges to an October 2011 judgment and decree that, inter alia, granted the motion of respondent John L.

Wagner, who is the executor of the estate of decedent, for summary judgment dismissing the petition in the estate matter, and to a November 2011 decision and decree imposing sanctions upon petitioner for frivolous and abusive litigation conduct. Those challenges could and should have been raised on direct appeal from the decrees at issue and are not properly the subject of a CPLR article 78 petition (*see Estate of Rappaport*, 66 AD3d at 1018; *Matter of Wong v Chetta*, 271 AD2d 451, 451; *Hodge v LoRusso*, 181 AD2d 1009, 1009). Although petitioner filed notices of appeal with respect to the relevant decrees, he failed to perfect the appeals in a timely manner (*see* 22 NYCRR 1000.12).

Petitioner's contention that respondents prevented him from preparing a record on appeal is likewise not properly before us and, in any event, that contention is without merit. Petitioner neither submitted a proposed record to Wagner for his stipulation nor moved to settle the record in Surrogate's Court.

With respect to petitioner's claim for relief in the nature of mandamus compelling Surrogate's Court and respondent Cristina L. Lotz, Seneca County Clerk, to enter a default judgment pursuant to CPLR 3215 (a), we conclude that "the extraordinary remedy of mandamus does not lie . . . because petitioner has failed to establish a clear legal right to the relief sought or that the relief sought involves the performance of a purely ministerial act" (*Matter of Platten v Dadd*, 38 AD3d 1216, 1217, *lv denied* 9 NY3d 802; *see Matter of Tefft v Hutchinson*, 93 AD3d 1332, 1333; *Matter of Neal v White*, 46 AD3d 156, 161). CPLR 3215 (a) provides that, "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305, plus costs and interest . . . Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment." Here, Wagner did not fail to appear in the estate matter; rather, he filed an answer with counterclaims and moved for summary judgment dismissing the petition. Thus, CPLR 3215 (a) does not apply, and Lotz properly rejected petitioner's attempt to file a default judgment against Wagner.

With respect to petitioner's claims against Wagner and respondent Mark B. Wheeler, who was the attorney for Wagner in the estate matter, we agree with their contention that they are not "bod[ies] or officer[s]" against whom relief may be sought pursuant to CPLR article 78 (CPLR 7802 [a]). In any event, petitioner's claims against Wagner and Wheeler, all of which arise from the assertion that their summary judgment motion was premature pursuant to CPLR 3212 (a), are without merit. We further agree with respondents that many, if not all, of petitioner's claims are barred by the four-month statute of limitations applicable to CPLR article 78 proceedings (*see* CPLR 217

[1]; *Wong*, 271 AD2d at 452) and that petitioner's claims for money damages against several of the respondents are barred by judicial immunity and quasi-judicial immunity (*see Welch v State of New York*, 203 AD2d 80, 81; *see generally Mosher-Simons v County of Allegany*, 99 NY2d 214, 219-220). Petitioner's remaining claims for relief are unavailable in a CPLR article 78 proceeding and/or are wholly without merit (*see generally Matter of Parry v County of Onondaga*, 51 AD3d 1385, 1386-1387).

Finally, in light of the frivolous nature of this proceeding and petitioner's continued abuse of the judicial system, we conclude that imposition of costs is appropriate (*see generally Matter of Young v Costantino*, 281 AD2d 988, 988).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

720

CA 12-02394

PRESENT: SMITH, J.P., CARNI, VALENTINO, AND WHALEN, JJ.

MISERENDINO, SEEGERT & ESTOFF, P.C., FORMERLY KNOWN AS MISERENDINO, CELNIKER, SEEGERT & ESTOFF, P.C., FORMERLY KNOWN AS MISERENDINO, KRULL & FOLEY, P.C., FORMERLY KNOWN AS MISERENDINO, KRULL & FOLEY, PLAINTIFF-APPELLANT,

V ORDER

PHILIP CELNIKER, JONATHAN D. ESTOFF, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (ACTION NO. 1.)

THE MISERENDINO LAW FIRM, P.C., FORMERLY KNOWN AS MISERENDINO, SEEGERT & ESTOFF, P.C., FORMERLY KNOWN AS MISERENDINO, CELNIKER, SEEGERT & ESTOFF, P.C., FORMERLY KNOWN AS MISERENDINO, KRULL & FOLEY, P.C., FORMERLY KNOWN AS KRULL & FOLEY, PLAINTIFF-APPELLANT,

V

WALTER P. SEEGERT, DEFENDANT-RESPONDENT. (ACTION NO. 2.)

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

CONNORS & VILARDO, LLP, BUFFALO (RANDALL D. WHITE OF COUNSEL), FOR DEFENDANT-RESPONDENT PHILIP CELNIKER.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR DEFENDANT-RESPONDENT JONATHAN D. ESTOFF.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (LAWRENCE J. MATTAR OF COUNSEL), FOR DEFENDANT-RESPONDENT WALTER P. SEEGERT.

PERSONIUS MELBER LLP, BUFFALO (RODNEY O. PERSONIUS OF COUNSEL), FOR DEFENDANTS, ON THE COUNTERCLAIMS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered December 3, 2012. The order, insofar as appealed from, denied the motion of plaintiff to compel defendants

Philip Celniker, Jonathan D. Estoff and Walter P. Seegert to produce certain portions of their respective federal and state income tax returns and to compel the forensic examination of certain computers.

Now, upon the stipulations of discontinuance signed by the attorneys for the parties on June 18, 2013, and filed in the Erie County Clerk's Office on July 12, 2013,

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

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

736

KA 11-02035

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMITRIA S. JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 8, 2011. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting her after a nonjury trial of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that County Court erred in denying the motion to suppress her written statement as the fruit of unlawful pre-*Miranda* questioning. Contrary to defendant's contention, the court properly refused to suppress statements that she made to the police inasmuch as "defendant was not in custody when [s]he made those statements and thus . . . the fact that [s]he had not been [administered *Miranda* warnings] when [s]he made the statements does not require their suppression" (*People v Semrau*, 77 AD3d 1436, 1437, *lv denied* 16 NY3d 746).

Contrary to defendant's further contention, the identification procedure was not unduly suggestive. "[T]he subjects depicted in the photo array are sufficiently similar in appearance so that the viewer's attention is not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection" (*People v Quinones*, 5 AD3d 1093, 1093, *lv denied* 3 NY3d 646), and the photographs used in the array did not "create a substantial likelihood that the defendant would be singled out for identification" (*People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833; *see People v Egan*, 6 AD3d 1203, 1204, *lv denied* 3 NY3d 639).

Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we

further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Additionally, " '[h]aving considered the facts and circumstances of this case,' " we reject defendant's contention that the court abused its discretion in denying her youthful offender status (*People v Guppy*, 92 AD3d 1243, 1243, *lv denied* 19 NY3d 961; *see People v Potter*, 13 AD3d 1191, 1191, *lv denied* 4 NY3d 889; *see generally* CPL 720.20 [1] [a]). We decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see generally People v Shrubsall*, 167 AD2d 929, 930-931).

Finally, defendant's contention that the court erred in ordering her to pay restitution without conducting a hearing is unpreserved for our review inasmuch as defendant did not "request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of restitution order[ed] during the sentencing proceeding" (*People v Butler*, 70 AD3d 1509, 1510, *lv denied* 14 NY3d 886 [internal quotation marks omitted]; *see People v Horne*, 97 NY2d 404, 414 n 3). 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]).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

740

CAF 12-00935

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

IN THE MATTER OF CHRISTY S.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PHONESAVANH S., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

SCOTT T. GODKIN, UTICA, FOR RESPONDENT-APPELLANT.

PAUL SKAVINA, ROME, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered March 27, 2012 in a proceeding pursuant to, inter alia, Family Court Act article 6. The order determined that the mother should have sole custody of the subject child.

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

Memorandum: Pursuant to a 2008 stipulated joint custody order, respondent father had primary physical custody of the child who is the subject of these proceedings. In April 2011, petitioner in appeal No. 2, Oneida County Department of Social Services (DSS), commenced a neglect proceeding pursuant to Family Court Act article 10 against the father. The child was removed from the home and placed in foster care, and thereafter DSS placed the child with petitioner in appeal No. 1, the mother of the child. The mother filed a petition pursuant to Family Court Act article 6 seeking to modify the 2008 joint custody order by awarding her sole custody of the child. A hearing was held on the neglect petition, and Family Court determined that the father had neglected the child. A trial was then held on the modification petition, and the court granted sole custody of the child to the mother. In appeal No. 1, the father appeals from the order granting the mother sole custody on the modification petition and, in appeal No. 2, he appeals from the dispositional order on the neglect petition.

Addressing first appeal No. 2, we conclude that, contrary to the father's contention, DSS established by a preponderance of the evidence that the child is a neglected child (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). The evidence established that the

child's emotional condition has been impaired as a result of the father's "bizarre and paranoid behavior," which resulted in the child being frightened and depressed (*Matter of Faith J.*, 47 AD3d 630, 630; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 371-372). The child's out-of-court statements were adequately corroborated by the father's statements to the DSS caseworker (*see Matter of Karl L.*, 224 AD2d 841, 842-843) and the child's testimony (*see generally Matter of Christina F.*, 74 NY2d 532, 536-537).

With respect to appeal No. 1, the adjudication of neglect constituted a change in circumstances that warranted a determination whether a modification of the custody arrangement set forth in the 2008 joint custody order was in the best interests of the child (*see Matter of Mark RR. v Billie RR.*, 95 AD3d 1602, 1602-1603; *Matter of Jeremy J.A. v Carley A.*, 48 AD3d 1035, 1036), and we conclude that the court properly determined that it was in the child's best interests for the mother to have sole custody.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

741

CAF 12-00936

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

IN THE MATTER OF MANELIN S.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

PHONESAVANH S., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

SCOTT T. GODKIN, UTICA, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered April 25, 2012 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected the subject child.

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

Same Memorandum as in *Matter of Christy S. v Phonesavanh S.* (___ AD3d ___ [July 19, 2013]).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

746

CA 13-00059

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

BRANDYWINE PAVERS, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PAT J. BOMBARD, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

ROMEO & ROMEO, P.C., SYRACUSE (ROBERT A. ROMEO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (THOMAS W. CUSIMANO, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered November 15, 2012 in a foreclosure action. The amended judgment, inter alia, directed the Referee to sell the subject real property as one parcel.

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

Memorandum: Plaintiff commenced this action to foreclose on a mortgage that was secured by property owned by Pat J. Bombard (defendant). Supreme Court properly granted plaintiff's motion to amend the judgment of foreclosure to permit the sale of all of the premises described in plaintiff's summons and complaint and directed the Referee to sell the premises as one parcel. Contrary to defendant's contention, plaintiff's motion was not one seeking leave to renew its motion for summary judgment on the complaint, but rather was a motion to amend or modify the judgment (*see* CPLR 2221 [a], [e]). To the extent that defendant challenges the propriety of the court's prior order granting plaintiff's motion for summary judgment, defendant is precluded from raising those challenges because his appeal from that prior order was dismissed for want of prosecution (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 754-756; *Bray v Cox*, 38 NY2d 350, 355).

In any event, even if we were to consider plaintiff's challenges in the exercise of our discretion (*see Knauer v Anderson*, 2 AD3d 1314, 1314-1315, *affd sub nom. Rubeis v Aqua Club, Inc.*, 3 NY3d 408), we would conclude that they are without merit. Plaintiff met its initial burden on the summary judgment motion by submitting the note and mortgage together with an affidavit of nonpayment (*see Manufacturers & Traders Trust Co. v True-Tone Sound* [appeal No. 1], 288 AD2d 951, 951;

I.P.L. Corp. v Industrial Power & Light. Corp., 202 AD2d 1029, 1029). "The burden then shifted to defendant[] to attempt to defeat summary judgment by production of evidentiary material in admissible form demonstrating a triable issue of fact with respect to some defense to plaintiff's recovery on the note[] and [mortgage]" (*I.P.L. Corp.*, 202 AD2d at 1029). In opposition to the motion, defendant claimed that he intended to mortgage only a portion of the property described in the mortgage. "Under long accepted principles[, however,] one who signs a document is, absent fraud or other wrongful act of the other contracting party, bound by its contents" (*Da Silva v Musso*, 53 NY2d 543, 550; *see M&T Bank v HR Staffing Solutions, Inc.* [appeal No. 2], 106 AD3d 1498, 1499). " '[A] party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents' " (*Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785, 788; *see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 11). Whether defendant intended to mortgage only part of his property is irrelevant where the writing is unambiguous that it included all the property (*see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162).

Defendant further contends that the court erred in issuing the amended judgment because there is a question of fact whether the two parcels described in the mortgage can be sold as one parcel. We reject that contention. Plaintiff submitted evidence that the Referee determined that selling only one of the parcels would create an illegal subdivision. In opposition to plaintiff's motion to amend the judgment of foreclosure, defendant failed to submit any evidence that his property was ever subdivided and thus could be sold separately.

Finally, defendant's contention that the court erred in not granting him a settlement conference pursuant to CPLR 3408 is improperly raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, his contention is without merit. CPLR 3408 provides for mandatory settlement conferences in residential foreclosure actions and applies to "any residential foreclosure action involving a home loan . . . in which the defendant is a resident of the property subject to foreclosure" (CPLR 3408 [a]). CPLR 3408 does not apply to defendant because he was not a resident of the property. Defendant further contends that CPLR 3408 applies to defendant Erma C. Jerva, but defendant lacks standing to raise arguments on her behalf (*see generally* CPLR 5511; *People v Park Ave. Plastic Surgery, P.C.*, 48 AD3d 367, 367; *Raven El. Corp. v City of New York*, 291 AD2d 355, 355; *Matter of Nesrine E.*, 287 AD2d 565, 565).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

756

KA 12-00108

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD J. LARKINS, DEFENDANT-APPELLANT.

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

RONALD J. LARKINS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered December 23, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (three counts), criminal use of a firearm in the first degree (two counts), criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon 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 following a jury trial of, inter alia, three counts of robbery in the first degree (Penal Law § 160.15 [2], [3], [4]), defendant contends that County Court's *Molineux* ruling constitutes reversible error. We agree.

Prior to trial, the court granted the People's motion to present *Molineux* evidence for the limited purpose of proving defendant's identity (*see People v Molineux*, 168 NY 264, 293-294). Pursuant to the court's ruling, the People presented evidence on their direct case that defendant was the perpetrator of an attempted robbery of a hotel clerk in Syracuse, Onondaga County, shortly before the crime at issue herein, i.e., the robbery of a hotel clerk in Weedsport, Cayuga County. At the time of the instant trial, defendant had been charged with criminal conduct in Onondaga County including attempted robbery, but not tried or convicted on any of the charges there. Nevertheless, during the instant trial, the People presented the testimony of five witnesses who referred to defendant's alleged involvement in criminal conduct in Onondaga County and offered in evidence a video recording purportedly depicting defendant committing the attempted gunpoint robbery there. The *Molineux* evidence therefore pervaded the trial.

Inasmuch as the court rejected other grounds for admission of the *Molineux* evidence and limited its ruling to evidence establishing defendant's identity, our review is limited to that ground (*see People v Concepcion*, 17 NY3d 192, 194-195). "Before admitting evidence of other crimes to establish identity, the Trial Judge must find that both *modus operandi* and defendant's identity as the perpetrator of the other crimes are established by clear and convincing evidence" (Prince, Richardson on Evidence § 4–514 [Farrell 11th ed]; *see People v Robinson*, 68 NY2d 541, 548). Here, the record establishes that the court ruled that the evidence of defendant's identity with respect to the attempted robbery would be admissible as a matter of law, but did not determine the relevancy of the identification evidence of the attempted robbery, nor did it properly balance its prejudicial effect as against its probative value (*see People v Chaney*, 298 AD2d 617, 618-619, *lv dismissed in part and denied in part* 100 NY2d 537; *see generally People v Alvino*, 71 NY2d 233, 242). Additionally, there is no indication in the record that the court found that the *modus operandi* and defendant's identity as the perpetrator of the attempted robbery were established by clear and convincing evidence. We thus conclude that the case before the jury became a prohibited "trial within a trial" (*Robinson*, 68 NY2d at 550; *see People v Drake*, 94 AD3d 1506, 1508, *lv denied* 20 NY3d 1010). We further conclude that the evidence of the attempted robbery was "sufficiently prejudicial so as to deprive defendant of a fair trial" (*People v Ortiz*, 156 AD2d 77, 79, *lv denied* 76 NY2d 793; *see generally People v Lewis*, 69 NY2d 321, 328). We therefore conclude that defendant is entitled to a new trial.

Contrary to defendant's further contentions in his main brief, the evidence presented at trial, without the inadmissible identification evidence, is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the properly admitted 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). In view of our determination to grant a new trial, we do not address defendant's remaining contentions in his main and pro se supplemental briefs.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

781

KA 12-00993

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHEYENNE J. KOONS, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (AMANDA M. CHAFEE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Steuben County Court (Marianne Furfure, A.J.), entered March 12, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk under the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that he was deprived of due process by the People's failure to provide him with notice that they would seek a departure from the recommendation of the Board of Examiners of Sex Offenders. Defendant failed to preserve that contention for our review by a timely objection before County Court (*see People v Charache*, 9 NY3d 829, 830; *see generally People v Neuer*, 86 AD3d 926, 926, *lv denied* 17 NY3d 716).

Defendant further contends that the court erred in assessing 20 points against him under risk factor 4 (duration of offense conduct with victim) and 10 points under risk factor 10 (recency of prior felony or sex crime). We reject those contentions. With respect to risk factor 4, the People had the burden of proving that "defendant engaged in two acts of sexual intercourse with the victim and that such 'acts [were] separated in time by at least 24 hours' " (*People v Wood*, 60 AD3d 1350, 1351, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]; *see generally* Correction Law § 168-n [3]; *People v Johnson*, 104 AD3d 1321, 1321). The reliable hearsay evidence presented by the People established that defendant and one victim engaged in sexual intercourse between early June 2009 and early August 2009 in at least two different towns. Defendant admitted to at least eight such sexual encounters, and the victim alleged that she and defendant may have had as many as 15

sexual encounters. The People therefore demonstrated by clear and convincing evidence a continuing course of conduct and thus the court's assessment of 20 points under risk factor 4 was proper. With respect to risk factor 10, we note that defendant conceded at the hearing that 30 points were properly assessed under risk factor 9 (number and nature of prior crimes) based upon his prior youthful offender adjudication for endangering the welfare of a child. Inasmuch as the presentence investigation report and case summary demonstrated that the underlying acts of and resulting guilty plea to endangering the welfare of a child occurred within three years of the present sexual offenses, the court correctly assessed 10 additional points under risk factor 10 (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 14; *see generally People v Rotterman*, 96 AD3d 1467, 1468, *lv denied* 19 NY3d 813).

Finally, we reject defendant's contention that he was denied effective assistance of counsel (*see Rotterman*, 96 AD3d at 1468; *People v Bowles*, 89 AD3d 171, 181, *lv denied* 18 NY3d 807).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

782

KA 12-00586

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES L. JONES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 12, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]), defendant contends that he did not knowingly, voluntarily and intelligently waive his right to appeal. We reject that contention. Defendant waived his right to appeal both orally and in writing, and we conclude that " '[d]efendant's responses to County Court's questions unequivocally established that defendant understood the proceedings and was voluntarily waiving the right to appeal' " (*People v Buryta*, 85 AD3d 1621, 1622; *see People v Lyons*, 86 AD3d 930, 930, *lv denied* 17 NY3d 954). Defendant's valid waiver of the right to appeal encompasses his contention that the court abused its discretion in denying his request for youthful offender status (*see People v Jones*, 96 AD3d 1637, 1637, *lv denied* 19 NY3d 1103; *People v Rush*, 94 AD3d 1449, 1449-1450, *lv denied* 19 NY3d 967), as well as his contention concerning the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255; *Jones*, 96 AD3d at 1637).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

785

KA 12-01052

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TEARA FATICO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered February 2, 2012. The judgment convicted defendant, upon her plea of guilty, of attempted burglary in the first degree.

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

Memorandum: On appeal from a judgment convicting her, upon her plea of guilty, of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]), defendant contends that her waiver of the right to appeal is unenforceable and that her sentence is unduly harsh and severe. Contrary to defendant's contention, County Court, during the plea colloquy, did not conflate the waiver of the right to appeal with those rights automatically forfeited by the plea (*see People v Richards*, 93 AD3d 1240, 1240, *lv denied* 20 NY3d 1014), and we conclude that her waiver of the right to appeal was otherwise knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Pratt*, 77 AD3d 1337, 1337, *lv denied* 15 NY3d 955). Defendant's valid waiver of the right to appeal encompasses her challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *People v Strickland*, 103 AD3d 1178, 1178).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

786

KA 12-01017

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TREVON A. LUGG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 28, 2009. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]), defendant contends that his waiver of indictment was invalid because the subsequent guilty plea was to a crime not charged in the superior court information (SCI) or contained within the waiver of indictment. We reject that contention. The SCI charged defendant with grand larceny in the third degree for cashing forged checks at a bank in Utica in an amount exceeding $5,700, and the waiver of indictment in fact specified that grand larceny in the third degree was included therein (*see* CPL 195.20). To the extent that defendant is challenging the sufficiency of the factual allocution, his contention is unpreserved for our review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665). We note in any event that, upon further inquiry by County Court, defendant admitted to cashing the checks in Utica (*see generally id.* at 666). Defendant further contends that he was denied effective assistance of counsel. To the extent that his contention survives his plea of guilty (*see People v Nieves*, 299 AD2d 888, 889, *lv denied* 99 NY2d 631), we conclude that it is lacking in merit (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

787

KA 12-01762

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN SMITH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JESSAMINE I. JACKSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Erie County Court (Kenneth F. Case, J.), entered August 14, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk under the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that he was denied due process because he did not receive timely notification that "his . . . case [was] under review and that he . . . [was] permitted to submit to the [Board of Examiners of Sex Offenders (Board)] any information relevant to the review" (§ 168-n [3]). We reject that contention. Although the People did not timely notify defendant that his case was under review, County Court "offered defendant an adjournment and thus afforded defendant a meaningful opportunity" to prepare and submit mitigating evidence (*People v Jordan*, 31 AD3d 1196, 1196, *lv denied* 7 NY3d 714; *see People v Myers*, 87 AD3d 1286, 1287, *lv denied* 18 NY3d 802). Contrary to defendant's further contention, the court properly assessed 15 points for his history of drug or alcohol abuse as recommended in the risk assessment instrument. The court's determination to accept that recommendation is supported by the requisite clear and convincing evidence (*see generally* § 168-n [3]).

Also contrary to defendant's contention, he "failed to present clear and convincing evidence of special circumstances justifying a downward departure" (*People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703). Defendant's "significant educational and rehabilitative efforts while confined, which he claims have reduced his likelihood of reoffending[,] . . . already were taken into account by the guidelines, as evidenced by the scoring on the risk assessment

instrument for . . . conduct while confined (risk factor 13)" (*People v Kotzen*, 100 AD3d 1162, 1163, *lv denied* 20 NY3d 860). Defendant also contends that his age and health are mitigating factors warranting a downward departure, but we conclude that he failed to establish that he has "physical conditions that minimize [the] risk of re-offense" (Correction Law § 168-*l* [5] [d]; *see People v Curthoys*, 77 AD3d 1215, 1217).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

789

KA 10-00056

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BLAIR CHATTLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 27, 2009. The appeal was held by this Court by order entered November 18, 2011, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (89 AD3d 1557). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [5]) and reckless endangerment in the first degree (§ 120.25). We previously held this case, reserved decision and remitted the matter to Supreme Court to rule on defendant's motion to withdraw his guilty plea (*People v Chattley*, 89 AD3d 1557). Upon remittal, the court denied the motion, and we now affirm.

Although defendant contends that the court erred in denying his pro se motion to withdraw his plea, the motion papers are not included in the record on appeal, and thus defendant failed to meet his burden of providing us with a complete record (*see generally People v Kinchen*, 60 NY2d 772, 774; *People v Taylor*, 231 AD2d 945, 946, *lv denied* 89 NY2d 930). In any event, based on the record before us, we perceive no reason to conclude that the court erred in denying the motion.

Defendant's further contention that he was deprived of effective assistance of counsel does not survive his waiver of the right to appeal, the validity of which he does not challenge, inasmuch as defendant " 'failed to demonstrate that the plea bargaining process

was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance' " (*People v Lucieer*, ___ AD3d ___, ___ [June 14, 2013]). Here, defendant does not assert that his motion to withdraw his plea was based on grounds of ineffective assistance of counsel, nor does he suggest that, but for defense counsel's errors or omissions, he would not have pleaded guilty. Indeed, the alleged failings of defense counsel, who, according to defendant, took a position adverse to his interests, occurred after defendant entered his plea.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

791

TP 13-00268

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

IN THE MATTER OF ANTOINE FREEMAN, PETITIONER,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered February 4, 2013) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 107.20 (7 NYCRR 270.2 [B] [8] [iii]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated inmate rules 107.20 (7 NYCRR 270.2 [B] [8] [iii] [false statement or information]) and 109.12 (7 NYCRR 270.2 [B] [10] [iii] [movement regulation violation]). Respondent correctly concedes that the determination that petitioner violated inmate rule 107.20 is not supported by substantial evidence (*see generally Matter of Rodriguez v Fischer*, 96 AD3d 1374, 1374-1375). We therefore modify the determination and grant the petition in part by annulling that part of the determination finding that petitioner violated inmate rule 107.20, and we direct respondent to expunge from petitioner's institutional record all references to the violation of that inmate rule (*see id.* at 1375). Inasmuch as the record demonstrates that petitioner has served his administrative penalty, the appropriate remedy is expungement of all references to the violation of that rule

from his institutional record (*see id.*). Moreover, inasmuch as petitioner has served that penalty and there was no recommended loss of good time, there is no need to remit the matter to respondent for further consideration of the penalty (*see id.*; *Matter of Maybanks v Goord*, 306 AD2d 839, 840). Contrary to petitioner's contention, the determination that he violated inmate rule 109.12 is supported by substantial evidence (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966; *People ex rel. Vega v Smith*, 66 NY2d 130, 139).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

796

KA 11-02182

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMONT HINES, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered August 23, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass his challenge to the severity of the sentence because the record establishes that defendant waived his right to appeal before Supreme Court advised him of the potential periods of imprisonment that could be imposed (*see People v Mingo*, 38 AD3d 1270, 1271; *see generally People v Lococo*, 92 NY2d 825, 827). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

797

KA 10-02074

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES GREENE, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered September 14, 2010. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

798

KA 12-01344

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD J. STAUDER, DEFENDANT-APPELLANT.

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

GERALD J. STAUDER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered May 1, 2012. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

We have considered defendant's contentions in his pro se supplemental brief and conclude that they are without merit.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

799

KA 12-00047

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONTE LEE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 19, 2010. The judgment convicted defendant, upon his plea of guilty, of gang assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of gang assault in the second degree (Penal Law § 120.06), defendant contends that Supreme Court failed to engage in an adequate colloquy to ensure that his waiver of the right to appeal was knowing and voluntary and that the court erred in denying his request for youthful offender status. "Even assuming, arguendo, that the waiver by defendant of the right to appeal is invalid and thus does not encompass his challenge to the court's refusal to adjudicate him a youthful offender, we nevertheless reject that challenge" (*People v McClellan*, 49 AD3d 1201, 1202; *see People v Davis*, 84 AD3d 1710, 1710, *lv denied* 17 NY3d 815). With regard to defendant's alternative contention that his sentence is unduly harsh and severe, the People correctly concede that defendant's purported waiver of the right to appeal would not encompass that contention in any event, inasmuch as defendant waived the right to appeal before the court advised him of the maximum possible sentence he could receive (*see People v Allen*, 93 AD3d 1340, 1341, *lv denied* 19 NY3d 956; *People v Farrell*, 71 AD3d 1507, 1507, *lv denied* 15 NY3d 804). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

800

KA 11-00358

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL L. SCHROCK, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Cattaraugus County Court (Michael L. Nenno, J.), entered January 4, 2011. The appeal was held by this Court by order entered October 5, 2012, decision was reserved and the matter was remitted to Cattaraugus County Court for further proceedings (99 AD3d 1196). The proceedings were held and completed.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.10 to vacate a judgment convicting him following a jury trial of two counts of attempted murder in the first degree, among other felonies. We previously held the case, reserved decision and remitted the matter to County Court to consider other possible grounds for denying the motion (*People v Schrock*, 99 AD3d 1196, 1197). This case is now before us following remittal, and we affirm.

The offenses were committed on May 3, 2006, when a deputy sheriff was transporting defendant in a patrol car back to jail after a court appearance on an unrelated charge. While he was sitting in the back seat, defendant managed to free one hand from his handcuffs and attack the deputy. Despite being choked and struck with the handcuffs by defendant, the deputy stopped the car and exited the vehicle, whereupon he was overpowered by defendant. During the ensuing struggle, defendant grabbed the deputy's firearm and twice attempted to shoot him, but the gun jammed and would not discharge. Defendant then entered the patrol car and attempted to run over the deputy, who had to dive out of the way to avoid being crushed. Defendant was later apprehended by the police after a high-speed chase. At trial, defendant did not deny that he engaged in the above conduct; instead, he asserted that he was not responsible for his actions by reason of mental disease or defect (*see* Penal Law § 40.15). The jury convicted

defendant of all counts of the indictment.

On direct appeal, defendant contended, inter alia, that he was improperly restrained at trial by a stun belt, the use of which he did not object to at trial. The record was silent, however, on the issue of whether defendant actually wore a stun belt at trial. In affirming the judgment, we stated in relevant part that defendant's stun belt contention was unpreserved for our review and that, in any event, the contention "involves matters outside the record on appeal, and it therefore must be raised by way of a motion pursuant to CPL 440.10" (*People v Schrock*, 73 AD3d 1429, 1431, *lv denied* 15 NY3d 855; *see* CPL 440.10 [1] [f]). Defendant thereafter filed the instant CPL 440.10 motion, contending again that he was improperly required to wear a stun belt at trial. Defendant further contended that he was denied effective assistance of counsel by his trial attorney. The court conducted a hearing on the motion, and the testimony at the hearing established that defendant was required by the Sheriff to wear a stun belt on the last day of trial during the rebuttal testimony of the People's expert witness and that, inasmuch as the stun belt was not visible under defendant's clothing, the trial judge did not know that defendant was wearing it. There was no evidence at the hearing that defendant wore the stun belt for any other portion of the trial. Defense counsel testified at the hearing on remittal that defendant advised him that he was wearing the stun belt, but that he did not complain about it and defense counsel did not raise the issue with the court or otherwise object to its use.

Following the hearing, the court denied the motion, stating that, although the use of the stun belt was improper inasmuch as the trial court did not make particularized findings that the restraint was necessary (*see People v Buchanan*, 13 NY3d 1, 3), the error was harmless beyond a reasonable doubt. The court also rejected defendant's contention concerning ineffective assistance of counsel. On defendant's appeal from the order denying the motion, we agreed with the court's ruling that defendant was not deprived of effective assistance of counsel. Relying on *People v Barnes* (96 AD3d 1579, 1579-1580; *see People v Cruz*, 17 NY3d 941, 945 n), however, we determined that harmless error analysis did not apply to the improper use of a stun belt (*Schrock*, 99 AD3d at 1197), and that the court could not deny defendant's motion on that ground. We noted that, although there may be grounds to justify denial of the motion, we could not affirm the order based on those grounds because they were not relied upon by the motion court (*id.*). We therefore remitted the matter to County Court to consider other possible grounds for denying the motion.

Upon remittal, the court again denied the motion, this time relying on the " 'plain error' " doctrine, which, as codified in Federal Rules of Criminal Procedure rule 52 (b), allows consideration on appeal of unpreserved issues that affect the appellant's " 'substantial rights' " (*Henderson v United States*, ___ US ___, ___, 133 S Ct 1121, 1122). In denying the motion, the court wrote: "The United States Supreme Court has said that a verdict of a jury will not ordinarily be set aside for error not brought to the attention of the

court and the parties or to the public interest where an opportunity has been presented to advance all issues of law and fact in the case [citation omitted]. Certainly, there can be exceptional circumstances in criminal cases where appellate courts find errors to which no objection was made, if the errors are obvious or [a]ffect the fairness, integrity or reputation of a public proceeding [citations omitted]. This does not appear to be the case in this instance . . . The 'plain error' doctrine requires the Court to find that the error not only [a]ffected substantial rights but that it had an unfair prejudicial effect on the jury deliberations [citation omitted]. There is no evidence before this court that such error existed in this case." We interpret the court's determination to be a denial of the motion on the ground that any error does not constitute a mode of proceedings error requiring reversal as a matter of law and that defendant failed to preserve for our review his contention that he was improperly required to wear a stun belt on the last day of the trial. We now affirm.

As a preliminary matter, we note that defendant's motion was brought pursuant to CPL 440.10 (1) (g) and (h), neither of which applies to the facts of this case as it relates to the stun belt contention. CPL 440.10 (1) (g) is inapplicable because the motion is not based upon newly discovered evidence, and CPL 440.10 (1) (h) is inapplicable because the Court of Appeals explicitly stated in *Buchanan* that its holding concerning the use of the stun belt was not based on constitutional grounds. The court thus could have denied the motion on that basis alone. Because the court did not do so, however, we cannot rely on that rationale to affirm the order (*see People v Concepcion*, 17 NY3d 192, 194-195). The only subdivision that seemingly applies to defendant's stun belt contention is CPL 440.10 (1) (f), and we will thus address the issue as if it were raised thereunder.

CPL 440.10 (1) (f) provides that, "[a]t any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . [i]mproper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have *required a reversal* of the judgment upon an appeal therefrom" (emphasis added). Here, as the court stated in its decision issued upon remittal, defendant failed to object to the stun belt and, thus, we could have reversed the judgment on appeal on that ground only in the interest of justice, and not as a matter of law. That is to say, reversal would not have been *required*. It therefore follows that County Court could not have granted defendant's motion under CPL 440.10 (1) (f) unless the unauthorized use of the stun belt at trial constitutes a mode of proceedings error, in which case reversal would have been required on direct appeal if the use of the stun belt had been disclosed on the record (*see generally People v Tabb*, 13 NY3d 852, 853).

We respectfully disagree with our dissenting colleague that the improper use of the stun belt, i.e., at the direction of the Sheriff rather than the court, constitutes a mode of proceedings error.

Indeed, we note that a mode of proceedings error occurs "[w]here the procedure *adopted by the court* . . . is at a basic variance with the mandate of law" (*People v Patterson*, 39 NY2d 288, 296 [emphasis added]), and that is not the case here. We further note that in *Buchanan* the court deferred to the Sheriff, indeed delegated to the Sheriff, the determination whether defendant should wear the stun belt after the court acknowledged that defendant had done nothing to merit it (*see Buchanan*, 13 NY3d at 3), but the Court of Appeals did not find the error to be a mode of proceedings error. Instead, the Court of Appeals simply ruled that the court failed to exercise its discretion (*see id.* at 4).

Neither the Court of Appeals nor, indeed, any other court in New York has held that the improper use of a stun belt at trial constitutes a mode of proceedings error, and we do not do so here. As the Court of Appeals has stated, the term "mode of proceedings error . . . is reserved for the most fundamental flaws" (*People v Becoats*, 17 NY3d 643, 651, *cert denied* ___ US ___, 132 S Ct 1970), i.e., wherein " 'the entire trial is irreparably tainted' " (*id.*). Here, the court did not know that defendant was wearing the stun belt and, while our dissenting colleague characterizes the situation as the usurpation of the court's authority by the Sheriff, it nevertheless results in the failure, albeit unwittingly, of the court to exercise its discretion. We note that there is no evidence that defendant wore the stun belt at trial other than during the rebuttal testimony of the People's expert, and it is undisputed that the stun belt was not visible to the jury. Moreover, there is no indication in the record that the stun belt caused defendant discomfort (*cf. Buchanan*, 13 NY3d at 1) or inhibited communication between defendant and his attorney (*cf. Buchanan*, 56 AD3d 46, 48-49, *revd* 13 NY3d at 3).

It is well established that "[a] defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings proscribed by the law" (*Patterson*, 39 NY2d at 296). It therefore follows that because the court has *discretion* whether to require the use of a stun belt (*see Buchanan*, 13 NY3d at 4), neither the failure to exercise that discretion nor the improper use of a stun belt constitutes a "fundamental flaw[]" (*Becoats*, 17 NY3d at 651), or a "procedure adopted by the court[, which] is at basic variance with the mandate of law" (*Patterson*, 39 NY2d at 296). As noted, it was the court's failure to exercise its discretion in *Buchanan* that resulted in reversal of the judgment of conviction (*see Buchanan*, 13 NY3d at 4). "To expand the definition of 'mode of proceedings' error too freely would create many . . . anomalous results" (*Becoats*, 17 NY3d at 651).

We recognize that the issue here is not the use of the stun belt per se; but rather that the proper procedures for the use of the stun belt were not followed. Given the nature of the charged offenses — defendant escaped from custody and repeatedly attempted to kill a deputy sheriff before leading the police on a high-speed chase — the use of a stun belt at trial may well have been justified if the proper procedures had been followed (*see Buchanan*, 13 NY3d at 4). In

addition, we note that *Buchanan* was decided two years after defendant's trial, at a time when the procedures regarding the use of stun belts were unsettled. In our view, it is not the case that the Sheriff, who may have had legitimate security concerns regarding defendant, intentionally usurped the court's authority with respect to restraining defendant.

Under the circumstances, we cannot agree with our dissenting colleague that the limited use of the stun belt in this case, at the direction of the Sheriff and not the court, irreparably tainted defendant's entire trial and therefore constituted a mode of proceedings error. Thus, although we agree with defendant that *Buchanan* applies here because defendant's direct appeal was pending when it was decided (*see generally People v Pepper*, 53 NY2d 213, 219-220, *cert denied* 454 US 967), we nevertheless conclude that the failure of the court to exercise its discretion with respect to the use of the stun belt does not constitute a mode of proceedings error. Because defendant was required to preserve for our review his contention that he was improperly restrained at trial by a stun belt, reversal of the judgment therefore is not required (*see* CPL 440.10 [1] [f]). We thus conclude that the court properly denied defendant's motion to vacate the judgment of conviction.

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 denying defendant's CPL 440.10 motion, grant that motion, vacate the judgment and grant a new trial. In my view, the usurpation by the Sheriff of County Court's authority, which here is embodied in the Sheriff's unilateral decision to require defendant to wear a stun belt during trial without the knowledge of the court, is a mode of proceedings error, and the court thus should have granted defendant's motion.

I generally share the majority's view of the facts. However, I note my view that the hearing on the motion establishes that defense counsel learned during the rebuttal testimony of the People's expert witness that defendant was wearing a stun belt, and further leaves open the possibility that defendant wore the stun belt during parts of the trial conducted prior to the rebuttal testimony of that witness.

In any event, I further agree with the majority's treatment of defendant's motion as one made pursuant to CPL 440.10 (1) (f), and will apply that analysis herein. I also agree with the majority that CPL 440.10 (1) (f) permits reversal here only to the extent that the unauthorized use of the stun belt at trial was a mode of proceedings error. To my mind, the unilateral application of that device by the Sheriff without the knowledge of the court, i.e., the Sheriff's unauthorized assumption of the power of the court in determining whether a stun belt is necessary (*cf. People v Buchanan*, 13 NY3d 1, 4), is such an error.

In *People v Patterson* (39 NY2d 288, 295, *affd* 432 US 197), the Court of Appeals stated that "[a] defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of

the court or the mode of proceedings pr[e]scribed by law." The Court further noted that "the purpose of this narrow, historical exception is to ensure that criminal trials are conducted in accordance with the mode of procedure mandated by Constitution and statute. Where the procedure adopted by the court below is at a basic variance with the mandate of law, the entire trial is irreparably tainted" (*id.* at 295-296).

The Court of Appeals in *People v Hanley* (20 NY3d 601, 604-605) recently added that such "exception encompasses only 'the most fundamental flaws' . . . that implicate 'jurisdictional matters . . . or rights of a constitutional dimension that go to the very heart of the process' " (*id.* at 604-605). *Hanley* also afforded the Court the opportunity to note that examples of mode of proceedings errors include: "jurisdictional issues (*see e.g. People v Correa*, 15 NY3d 213, 222 [2010]; *People v Pierce*, 14 NY3d 564, 570 n 2 [2010]; *People v Kalin*, 12 NY3d 225, 229 [2009]; *People v Carvajal*, 6 NY3d 305, 312 [2005]); double jeopardy (*see People v Williams*, 14 NY3d 198, 220-221 [2010], *cert denied* 562 US ___, 131 S Ct 125 [2010]); constitutional speedy trial (*see People v Blakley*, 34 NY2d 311, 315 [1974]); shifting the People's burden of proof to the defense (*see People v Patterson*, 39 NY2d at 296); delegation of a judicial function (*see People v Ahmed*, 66 NY2d 307, 310-311 [1985], [*rearg denied* 67 NY2d 647 (1986)]); prohibiting the defense from meaningful participation in the criminal proceeding (*see People v O'Rama*, 78 NY2d 270, 279 [1991]); and the imposition of an illegal sentence (*see People v Samms*, 95 NY2d 52, 56 [2000])" (*id.* at 607 n 2).

In my view, the *usurpation* of the court's power to determine whether to require defendant to wear a stun belt is no different from the *delegation* of court powers found to have constituted mode of proceedings errors (*see Ahmed*, 66 NY2d at 309-310; *People v Weber* [appeal No. 2], 64 AD3d 1185, 1186; *People v Rogoski*, 194 AD2d 754, 755, *lv denied* 82 NY2d 759; *cf. People v Mays*, 20 NY3d 969, 971). Indeed, although defense counsel learned of the application of the stun belt during the rebuttal testimony of the People's expert witness and thus could have brought the issue to the court's attention, this is not a case in which the court had the last word and exercised full and proper control over the application of that device to defendant (*see People v Khalek*, 91 NY2d 838, 839-840; *cf. People v Kelly*, 5 NY3d 116, 120-121). The error here lies not in the fact that defendant had to wear a stun belt, but in the fact that the Sheriff usurped the power of the court to make a determination regarding the use of the stun belt to restrain defendant. We cannot allow court personnel or law enforcement officers to exercise powers reserved to the court, and I therefore conclude that the court erred in denying defendant's CPL 440.10 motion.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

808

TP 13-00271

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

IN THE MATTER OF CESAR ROSA, PETITIONER,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered February 4, 2013) to review a determination of respondent. The determination revoked petitioner's release to parole supervision.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the Administrative Law Judge (ALJ) revoking his release to parole supervision. " '[I]t is well settled that a determination to revoke parole will be confirmed if the procedural requirements were followed and there is evidence [that], if credited, would support such determination' " (*Matter of Wilson v Evans*, 104 AD3d 1190, 1190). We conclude that the ALJ's determination that petitioner violated the conditions of his parole by exposing his penis and masturbating in a public library is supported by substantial evidence (*see generally id.*). In making that determination, the ALJ was entitled to credit the testimony of respondent's witnesses and reject petitioner's version of the events (*see Matter of Mosley v Dennison*, 30 AD3d 975, 976, *lv denied* 7 NY3d 712). Contrary to petitioner's contention, we conclude that he received meaningful representation at the final parole revocation hearing (*see Matter of James v Chairman of N.Y. State Bd. of Parole*, 106 AD3d 1300, 1300). We reject petitioner's further contention that the 72-month time assessment imposed against him is excessive. "The Executive Law does not place an outer limit on the length of that assessment, and the [ALJ's] determination may not be modified upon judicial review 'in the

absence of impropriety' " (*Matter of Bell v Lemons*, 78 AD3d 1393, 1393-1394; *see Wilson*, 104 AD3d at 1191). Here, the ALJ considered the appropriate factors and, "given petitioner's violent criminal record and his recurrent disregard for the conditions of his parole, we perceive nothing improper in the assessment imposed" (*Bell*, 78 AD3d at 1394).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

809

TP 12-01670

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

IN THE MATTER OF JOHN FALBO, JR., PETITIONER,

V MEMORANDUM AND ORDER

BARBARA J. FIALO, NEW YORK STATE COMMISSIONER OF MOTOR VEHICLES, RESPONDENT.

JOHN FALBO, JR., PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Norman I. Siegel, A.J.], entered August 25, 2011) to review a determination of respondent. The determination suspended petitioner's inspection station license and imposed a civil penalty of $1,750.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he had violated Vehicle and Traffic Law § 303 (e) (3) and 15 NYCRR 79.8 (c) (3) in connection with his business as a certified vehicle inspector. We conclude that the determination was supported by substantial evidence that petitioner refused to conduct an inspection and made affirmative misrepresentations regarding the number of inspection certificates that he had available (*see generally Matter of Jennings v New York Off. of Mental Health*, 90 NY2d 227, 239). Petitioner did not preserve for our review his additional contentions regarding new evidence and further justifications for his actions inasmuch as he did not raise those contentions before the Administrative Law Judge (*see Matter of Gorman v New York State Dept. of Motor Vehs.*, 34 AD3d 1361, 1361).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

810

CA 12-00538

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

IN THE MATTER OF JOHN COLVIN, ACTING SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RONNIE COVINGTON, RESPONDENT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, 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, Seneca County (Dennis F. Bender, A.J.), entered February 17, 2012. The order, among other things, directed respondent to cooperate with the medical personnel of the Department of Corrections and Community Supervision.

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

Memorandum: Respondent appeals from an order that, inter alia, granted the petition seeking to require him to cooperate with the medical personnel of the Department of Corrections and Community Supervision and to cooperate in the methods of force feeding and necessary medical treatment. We conclude that this appeal is moot because the order by its own terms has expired, and the exception to the mootness doctrine does not apply herein (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). We add only that there is no merit to respondent's contention that the order does not " 'conform strictly to [Supreme Court's] decision' " (*Spier v Horowitz*, 16 AD3d 400, 401).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

811

CA 12-00391

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

IN THE MATTER OF CLIFFORD GRAHAM,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KEVIN WALSH, SHERIFF, ONONDAGA COUNTY AND
GORDON J. CUFFY, ONONDAGA COUNTY ATTORNEY,
RESPONDENTS-RESPONDENTS.

CLIFFORD GRAHAM, PETITIONER-APPELLANT PRO SE.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (KAREN A. BLESKOSKI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered February 7, 2012 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging a jail time credit amendment made by the Onondaga County Sheriff's Department (Department). Petitioner was released on parole in 2008 for a 2001 conviction; the sentence of incarceration imposed with respect to that conviction had a maximum expiration date of July 4, 2009. On August 22, 2008, petitioner was arrested on new charges, was held at a local jail on those charges and a parole warrant for approximately one month, and was returned to jail on January 26, 2009. No parole violation proceedings were commenced. Petitioner was convicted of the new charges and sentenced on October 2, 2009. The Department certified that petitioner was entitled to be credited with 288 days of jail time that was to be applied toward the sentence of incarceration imposed with respect to his 2009 conviction but, after receiving a letter from the New York State Department of Corrections and Community Supervision, it issued an amended certification with a jail time credit of 95 days.

Supreme Court properly dismissed the petition. Penal Law § 70.30 (3) "provides for a credit against [the term of a definite sentence, a determinate sentence, or] the maximum term of an indeterminate sentence for time that a person spends in jail prior to the commencement of the sentence, provided that the incarceration resulted from the charge culminating in the sentence" (*Matter of Blake v*

Dennison, 57 AD3d 1137, 1138, *lv denied* 12 NY3d 710). Such credit, however, "shall not include any time that is credited against the term or maximum term of any previously imposed sentence or period of post-release supervision to which the person is subject" (§ 70.70 [3]). Thus, a person is prohibited "from receiving jail time credit against a subsequent sentence when such credit has already been applied to time served on a previous sentence" (*Blake*, 57 AD3d at 1138).

Here, "[a]ny jail time served prior to the maximum expiration date of the [2001] sentence was properly credited toward that sentence until it expired on its own terms on [July 4, 2009]" (*Matter of Booker v Laffin*, 98 AD3d 1213, 1213; *see Matter of Murphy v Wells*, 95 AD3d 1575, 1576, *lv denied* 19 NY3d 811; *Matter of De Bois v Goord*, 271 AD2d 874, 875-876). "Thus, the [2009] sentence was properly credited only with jail time served after the expiration of the [2001] sentence" (*Booker*, 98 AD3d at 1213-1214). In other words, "petitioner is not entitled to jail time credit against the [2009] sentence for the jail time that was credited against the [2001] sentence" (*Matter of Ivy v Goord*, 31 AD3d 1204, 1204; *see Matter of Jeffrey v Ward*, 44 NY2d 812, 813-814).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

812

KA 12-00990

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY BETHUNE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered April 20, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Defendant was convicted upon his plea of guilty of, inter alia, aggravated sexual abuse in the first degree (Penal Law § 130.70), and he was thereafter adjudicated a level three risk. Contrary to defendant's contention, Supreme Court properly determined that he had previously been convicted of a felony sex crime and applied the corresponding override provision. The case summary stated that defendant had previously been convicted in the State of California of, inter alia, the crime of oral copulation. A conviction of such a crime may be a misdemeanor or a felony, depending upon the particulars of the conviction (*see generally People v Hofsheier*, 37 Cal 4th 1185, 1196 n 3). In addition to stating the name of the crime of which defendant was convicted in California, however, the case summary repeatedly indicated that defendant had previously been convicted of a "felony sex crime," the oral copulation conviction was defendant's only prior sex offense, and defendant did not deny having been convicted of that offense. "The case summary may constitute clear and convincing evidence of the facts alleged therein and, where, as here, the defendant does not dispute the facts contained in the case summary, the case summary alone is sufficient to support the court's determination" (*People v Guzman*, 96 AD3d 1441, 1441-1442, *lv denied* 19 NY3d 812; *see People v Beames*, 100 AD3d 1163, 1164; *People v Hubel*, 70 AD3d 1492, 1493). The court therefore properly determined

that the override provision applied.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

813

KA 12-01270

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUSSELL YOUNG, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Anthony F. Aloi, J.), entered April 16, 2012. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that he was ineligible to be designated a sexually violent offender (*see People v Windham*, 10 NY3d 801, 802; *People v Cullen*, 79 AD3d 1677, 1677-1678, *lv denied* 16 NY3d 709). Defendant did not present an adequate record to permit review of his contention that he was deprived of due process as a result of being denied access to documents relevant to his conviction of child molestation in the first degree in Washington State, on which County Court relied in its written decision and order determining defendant to be a level two risk (*see Palermo v Taccone*, 79 AD3d 1616, 1620; *de Vries v Metropolitan Tr. Auth.*, 11 AD3d 312, 312-313). In any event, we note that the court also relied on the case summary in determining defendant to be a level two risk. "The case summary may constitute clear and convincing evidence of the facts alleged therein and, where, as here, the defendant does not dispute the facts contained in the case summary, the case summary alone is sufficient to support the court's determination" (*People v Guzman*, 96 AD3d 1441, 1441-1442, *lv denied* 19 NY3d 812). Defendant's further contention that he was denied effective assistance of counsel lacks merit. Although "[a] sex offender facing risk level classification under SORA has a right to . . . effective assistance of counsel" (*People v Willingham*, 101 AD3d 979, 979), we conclude that, viewing the evidence, the law and the

circumstances of this case in totality and at the time of representation, defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant contends that reversal is required because the court failed to set forth its findings of fact and conclusions of law with respect to its determination that defendant is a level two risk, as required by Correction Law § 168-n (3). We reject that contention; rather, we conclude that the court's findings of fact rendered in conjunction with its oral decision " 'are clear, supported by the record and sufficiently detailed to permit intelligent appellate review' " (*People v Smith*, 75 AD3d 1112, 1112). Moreover, even if the court failed to set forth its findings of fact and conclusions of law, remittal is unnecessary where, as here, the record is sufficient to enable us to make our own findings of fact and conclusions of law (*see People v Urbanski*, 74 AD3d 1882, 1883, *lv denied* 15 NY3d 707). We also reject defendant's contention that the court erred in assessing him 20 points under risk factor 4 (*see People v Di John*, 48 AD3d 1302, 1303; *see generally People v Pettigrew*, 14 NY3d 406, 408-409). Here, the case summary indicates that defendant digitally penetrated the victim on three separate occasions between March 1992 and May 1992 (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]; *see also Di John*, 48 AD3d at 1303). Defendant did not preserve for our review his contention that the court erred in assessing 15 points under risk factor 12 (*see Cullen*, 79 AD3d at 1677) and, in any event, that contention lacks merit inasmuch as the case summary indicates that defendant denied molesting his victim and declined sex offender treatment (*see generally People v Hurlburt-Anderson*, 46 AD3d 1437, 1437). Defendant's further contention that the court erred in assessing 10 points under risk factor 13 is likewise without merit inasmuch as the case summary indicates that defendant was charged with a probation violation five days after his release from incarceration and was subsequently convicted of additional criminal activity (*cf. People v Neuer*, 86 AD3d 926, 927, *lv denied* 17 NY3d 716). Finally, we conclude that "defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" of his risk level (*People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

814

KA 12-00683

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW HAYHURST, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 16, 2012. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of 3½ years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and sentencing him to a determinate term of incarceration of seven years. Defendant failed to preserve for our review his contention that the sentence should be vacated because he was sentenced without a complete and accurate updated presentence investigation report (*see People v Gianni*, 94 AD3d 1477, 1478, *lv denied* 19 NY3d 973; *People v Carey*, 86 AD3d 925, 925, *lv denied* 17 NY3d 814; *People v Ruff*, 50 AD3d 1167, 1168). In any event, defendant's contention is without merit. We agree with defendant, however, that the sentence is unduly harsh and severe under the circumstances of this case, and we therefore modify the sentence as a matter of discretion in the interest of justice to a determinate term of imprisonment of 3½ years (*see generally* CPL 470.15 [6] [b]).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

815

KA 12-01646

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENNIE COGER, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Orleans County Court (James P. Punch, J.), entered June 28, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously 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 pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We agree with defendant that the People failed to prove by the requisite clear and convincing evidence that he had a history of alcohol and drug abuse, i.e., risk factor 11 on the risk assessment instrument (RAI) (*see generally* § 168-n [3]; *People v Mingo*, 12 NY3d 563, 571). In the case summary presented by the People at the SORA hearing, the Board of Examiners of Sex Offenders (Board) indicated that defendant was assessed with 15 points on the RAI for a history of alcohol and drug abuse because "Probation identified [defendant's] continued drug and alcohol use as problematic, and he refused to attend treatment for th[at] problem." The presentence investigation report, upon which the Board relied for the 15-point assessment, stated merely that "[i]ssues identified by Probation included continued drug and alcohol use" and that defendant refused substance abuse treatment. There is, however, no evidence that defendant was ever screened for substance abuse issues (*cf. People v Madera*, 100 AD3d 1111, 1112; *People v Faul*, 81 AD3d 1246, 1247), "only very limited information about his alleged prior history of drug and alcohol abuse" (*People v Mabee*, 69 AD3d 820, 820, *lv denied* 15 NY3d 703), and no information about what treatment was recommended or why treatment was recommended (*see Madera*, 100 AD3d at 1112; *Faul*, 81 AD3d at 1247). Under these circumstances, the case

summary alone is insufficient "to satisfy the People's burden of establishing that risk factor by clear and convincing evidence" (*Madera*, 100 AD3d at 1112; *see Faul*, 81 AD3d at 1247-1248; *Mabee*, 69 AD3d at 820; *see also People v Judson*, 50 AD3d 1242, 1243).

Further, defendant's prior convictions for criminal possession and sale of marihuana and criminal possession of a controlled substance in the seventh degree do not constitute clear and convincing evidence that defendant used drugs, let alone that he had a history of abusing them (*see Madera*, 100 AD3d at 1112; *People v Irizarry*, 36 AD3d 473, 473; *People v Collazo*, 7 AD3d 595, 596; *cf. People v Abrams*, 76 AD3d 1058, 1058-1059, *lv denied* 16 NY3d 703; *People v Vaughn*, 26 AD3d 776, 777). During the presentence investigation, defendant never admitted to using drugs or alcohol, and he denied abusing any substances at the SORA hearing (*cf. People v Zimmerman*, 101 AD3d 1677, 1678; *People v Mundo*, 98 AD3d 1292, 1293, *lv denied* 20 NY3d 855; *People v Urbanski*, 74 AD3d 1882, 1883, *lv denied* 15 NY3d 707). Defendant's admission that he was intoxicated during a previous incident, which led to a rape charge that was subsequently dismissed, is insufficient to establish that his sexual misconduct can "be characterized by repetitive and compulsive behavior[] associated with drugs or alcohol" (Correction Law § 168-l [5] [a] [ii]), especially because defendant does not have any other history of intoxication with respect to his sexual offenses, including the instant offenses (*see People v Palmer*, 20 NY3d 373, 378-379; *People v Vasquez*, 49 AD3d 1282, 1283). Consequently, as noted, the People failed to meet their burden of establishing by clear and convincing evidence that defendant had a history of alcohol or drug abuse (*see Palmer*, 20 NY3d at 378-380; *Faul*, 81 AD3d at 1247-1248). We thus conclude that County Court erred in assessing 15 points on the RAI for risk factor 11 and that defendant's score on the RAI must be reduced from 110 to 95, rendering him a presumptive level two risk. We therefore modify the order accordingly.

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

816

KA 11-02403

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL W. BROTZ, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (NEAL D. FUTERFAS OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (DAVID P. DYS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered October 23, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree (six counts) and identity theft in the third degree (six counts).

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 six counts each of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [2]) and identity theft in the third degree (§ 190.78 [1]), defendant contends that County Court violated CPL 380.50 (1) by not affording him an opportunity to speak at sentencing about the restitution portion of his sentence. Because defendant did not request an opportunity to be heard about restitution, the payment of which was contemplated by the plea agreement, and did not object to the order of restitution on that or indeed any other ground, his contention is unpreserved for our review (*see* CPL 470.05 [2]; *People v McGinn*, 96 AD3d 977, 978, *lv denied* 19 NY3d 998; *People v Sharp*, 56 AD3d 1230, 1231, *lv denied* 11 NY3d 900), 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 [3] [c]).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

817

KA 11-00140

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD WHITE, DEFENDANT-APPELLANT.

HERMAN KAUFMAN, RYE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered December 14, 2010. The appeal was held by this Court by order entered March 16, 2012, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (93 AD3d 1181). The proceedings were held and completed.

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 rape in the third degree (Penal Law § 130.25 [3]). In a prior determination with respect to this appeal, we rejected the majority of defendant's contentions, but concluded that the record was insufficient to permit us to determine whether he was denied effective assistance of counsel due to his attorney's failure to move to dismiss the indictment on due process grounds, to wit, that he was denied his constitutional right to a speedy trial (*People v White*, 93 AD3d 1181, 1182). Consequently, we held the case, reserved decision on that issue, and remitted the matter to Supreme Court for an evidentiary hearing "to determine whether the preindictment delay deprived defendant of his constitutional rights to a speedy trial and due process" (*id.*). Upon reviewing the record from that hearing, we conclude that defendant was not deprived of due process or his constitutional right to a speedy trial, and thus his attorney was not ineffective in failing to move to dismiss the indictment on those grounds.

Where a defendant contends that he or she was deprived of the right to due process by a delay in commencing a prosecution, the People bear the burden of establishing that there is good cause for the delay (*see People v Singer*, 44 NY2d 241, 254). In determining whether there has been an undue delay, a court must consider several factors, including " '(1) the extent of the delay; (2) the reason for

the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay' " (*People v Decker*, 13 NY3d 12, 15, quoting *People v Taranovich*, 37 NY2d 442, 445; *see People v Vernace*, 96 NY2d 886, 887).

Upon applying the *Taranovich* factors to the facts before us, we conclude that the delay did not deprive defendant of his right to due process. We agree with defendant that the rape in the first degree charge "can only be described as serious" (*People v Bradberry*, 68 AD3d 1688, 1690, *lv denied* 14 NY3d 838). Conversely, although the 40-month delay in commencing the prosecution was substantial, it was not per se unreasonable (*see Decker*, 13 NY3d at 15). Furthermore, defendant was not incarcerated for an extended period prior to the trial on these charges, and there is no evidence that defendant was prejudiced by the delay in commencing the prosecution. Finally, the reason for the delay in this case was the police detective's inability to fully identify and locate defendant. That excuse was not unreasonable inasmuch as the victim was unable to identify defendant from mug shots or otherwise ascertain which of the 32 men in the Buffalo Police Department's identification system with defendant's name was the perpetrator.

Therefore, inasmuch as a motion to dismiss based upon a violation of defendant's due process or constitutional speedy trial rights would not have been successful, defense counsel was not ineffective for failing to make such a motion (*see People v Alger*, 23 AD3d 706, 706-707, *lv denied* 6 NY3d 845; *see generally People v Caban*, 5 NY3d 143, 152).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court

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

818

CAF 12-02057, CAF 12-02084

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

IN THE MATTER OF JUAN C. LARA,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MICHELLE B. SULLIVAN,
RESPONDENT-RESPONDENT-APPELLANT.

HEIDI W. FEINBERG, ATTORNEY FOR THE
CHILD, APPELLANT.

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

HEIDI W. FEINBERG, ATTORNEY FOR THE CHILD, ROCHESTER, APPELLANT PRO SE.

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

Appeals and cross appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered October 9, 2012 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the petition seeking modification of a prior custody order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and the facts by granting the modification petition and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following Memorandum: Petitioner father and the Attorney for the Child (AFC) appeal from an order denying the father's petition seeking to modify a 2001 order granting respondent mother custody of the parties' daughter by granting custody of the 14-year-old child to him. On her cross appeal, the mother contends that Family Court erred in finding that she was in civil contempt for violating a 2001 order that prohibited her from removing the parties' daughter from the State of New York (*see* Judiciary Law § 753 [A] [3]), and that she was denied effective assistance of counsel with respect to the father's petition alleging that she violated the 2001 order.

Addressing first the cross appeal, we reject the mother's contention that the court erred in finding her in civil contempt of the court's order. It is undisputed that the order prohibited her

from moving out-of-state with the parties' child without the permission of either the father or the court, and that the mother moved to Maine in August 2011 without such permission. We reject the mother's further contention that she was denied effective assistance of counsel. The mother failed to appear for the three days on which the hearing was conducted, and we conclude that she failed to establish that she was denied meaningful representation and that the alleged deficiencies in counsel's representation resulted in actual prejudice (*see Matter of Alisa E. [Wendy F.]*, 98 AD3d 1296, 1296; *Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17 NY3d 704).

With respect to the father's appeal, we note that, in support of his modification petition, the father presented the testimony of the mother's parents, sister and long-term friend, as well as his own testimony and that of a school official. The undisputed testimony established that the child's unmarried parents separated approximately one year after her birth and that the father had only sporadic contact with the child and had not seen her for four years prior to filing the modification petition in August 2011. The father filed the modification petition after learning that the child had been hospitalized and that the mother intended to move with the child to Maine. Other undisputed evidence established that the mother and child lived with family members or a family friend for most of the child's life; that the mother's family members and long-term friend were actively involved in the care and support of the child; that the mother was verbally abusive to the child; that the child loved her mother but was afraid of her; that the mother refused to permit the father to visit the child; that the mother moved to Maine in violation of the custody order that required either the permission of the father or Family Court; and that, after relocating to Maine, the mother and the child lived in a cramped two-bedroom house with another family before relocating to a shelter in a neighboring community. The AFC advised the court that her client loved her mother but wanted to return to live with her father in Rochester because the mother was unpredictable, unstable and "scary."

"Generally, a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Stilson v Stilson*, 93 AD3d 1222, 1223 [internal quotation marks omitted]). Here, we conclude that the court's determination that it is in the best interests of the child to remain in the custody of the mother lacks a sound and substantial basis in the record. We therefore modify the order by granting the father's modification petition.

As a preliminary matter, we conclude that the court abused its discretion in failing to "draw the strongest inference that the opposing evidence permits" against the mother based upon her failure to appear for the hearing (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79), although we note that the court stated that it was doing so. Although the court properly determined that the father failed to take steps to enforce his right to visit

with the child, the court failed to credit the testimony of the mother's family that the mother interfered with the father's ability to visit the child; that the mother disparaged the father in the child's presence; that, despite the court's order granting telephone access to the child, the access lasted only two weeks; that the mother was verbally abusive to the child; that the child was afraid of her mother; and that the mother exhibited behaviors that support a determination that she failed to provide a proper home environment and parental guidance for the child (*see generally Eschbach v Eschbach*, 56 NY2d 167, 172). Further, the court failed to credit the evidence, including testimony and school records, that the mother failed to provide for the child's emotional development and that the child's intellectual and emotional development was supported by the mother's family members and long-term friend, rather than by the mother (*see generally Fox v Fox*, 177 AD2d 209, 210). We note that there is no evidence that the mother has the financial ability to provide for the child and that the evidence establishes that the father has a job, a home, and pays child support (*see id.*).

Although the court properly determined that the child "barely knows" the father, we conclude that the court erred in failing to give any weight to the 14-year-old child's preference to live with the father rather than the mother, where, as here, the record establishes that her age and maturity would make her input "particularly meaningful" (*Matter of VanDusen v Riggs*, 77 AD3d 1355, 1356 [internal quotation marks omitted]; *see Fox*, 177 AD2d at 210).

Finally, upon granting the modification petition, we remit the matter to Family Court to establish a visitation schedule with the mother. We note that, in connection with the motions of the father and the AFC to expedite this appeal, this Court was advised that there may be a court proceeding in Maine involving the mother and child. Family Court is therefore further directed upon remittal to coordinate this proceeding with any court proceeding in Maine insofar as necessary to effectuate the order of this Court (*see generally Matter of Michael B.*, 80 NY2d 299, 319).

Entered: July 19, 2013

Frances E. Cafarell
Clerk of the Court