SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 15, 2012

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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CA 11-01531

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

ERIN C. DAVISON, PLAINTIFF-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT-APPELLANT,
AND JOHN CARNEY, DEFENDANT-APPELLANT-RESPONDENT.

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

DAVID RODRIGUEZ, ACTING CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (BRIAN C. MAHONEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered April 27, 2011 in a personal injury action. The order, among other things, denied defendant John Carney's motion for summary judgment dismissing the complaint against him, denied defendant City of Buffalo's motion for summary judgment dismissing the complaint and the cross claims against it, and granted defendant City of Buffalo and plaintiff summary judgment against defendant John Carney on the issues of negligence and proximate cause.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion of defendant City of Buffalo and dismissing the complaint and all cross claims against it and by vacating both that part of the order granting summary judgment to plaintiff and defendant City of Buffalo against defendant John Carney on the issues of negligence and proximate cause as well as the final ordering paragraph and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she fell on an uneven sidewalk in front of the residence of John Carney (defendant). Contrary to defendant's contention, we conclude that Supreme Court properly denied his motion for summary judgment dismissing the complaint against him.

"Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (*Hausser v Giunta*, 88 NY2d 449, 452-453).

That general rule is inapplicable, however, "where[, inter alia,] a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty" (*id.* at 453; *see Guadagno v City of Niagara Falls*, 38 AD3d 1310, 1311). Here, the version of section 413-50 (A) of the Code of defendant City of Buffalo (Code) applicable to this case provided that the owner of lands fronting or abutting on any street shall "make, maintain and repair the sidewalk adjoining his [or her] lands," and that such owner "shall be liable for any injury . . . by reason of omission, failure or negligence to make, maintain or repair such sidewalk" (former Code § 413-50 [A]). We conclude that the plain language of former section 413-50 (A) of the Code imposes liability upon defendant for plaintiff's injuries (*see Smalley v Bemben*, 12 NY3d 751, 752, *affg* 50 AD3d 1470). To the extent that our holding is inconsistent with our prior holding in *Montes v City of Buffalo* (295 AD2d 896, 897, *lv denied* 99 NY2d 504), that case is no longer to be followed in light of the decision of the Court of Appeals in *Smalley*. Although, as noted by the Court of Appeals in *Smalley*, the legislative history of the 1997 amendment to section 413-50 (A) "may also be read as indicating that the amendment was intended to impose liability on landowners for failing to remove snow and ice from city sidewalks abutting their property" (*Smalley*, 12 NY3d at 752, citing *Montes*, 295 AD2d at 897), that section nevertheless unambiguously "only imposes liability" on abutting landowners for negligently maintaining or failing to repair sidewalks (*id.*; *see Montes*, 295 AD2d at 898 [Lawton, J., dissenting in part]). "[A] court's role is not to correct erroneous legislation" (*Montes*, 295 AD2d at 898 [Lawton, J., dissenting]). We agree with defendant, however, that the court erred in sua sponte granting summary judgment to plaintiff and defendant City of Buffalo (City) on the issues of negligence and proximate cause inasmuch as there are issues of fact whether defendant was negligent in maintaining the sidewalk and whether such negligence was a proximate cause of plaintiff's injuries (*see generally Atkins v United Ref. Holdings, Inc.*, 71 AD3d 1459, 1460). We therefore modify the order accordingly.

We further agree with the City that the court erred in denying its motion for summary judgment dismissing the complaint and all cross claims against it. The City met its initial burden by establishing that it did not receive the requisite written notice of the allegedly defective sidewalk condition as required by section 21-2 of the City Charter (*see Robinson v City of Buffalo*, 303 AD2d 1048, 1048-1049), and plaintiff failed to raise "a triable issue of fact concerning the applicability of [an] exception to the prior written notice requirement, i.e., whether the City created the allegedly dangerous condition 'through an affirmative act of negligence' " (*Smith v City of Syracuse*, 298 AD2d 842, 842-843, quoting *Amabile v City of Buffalo*, 93 NY2d 471, 474). Although the City may have been negligent in failing to replace the temporary cold patch with a permanent repair, the resulting allegedly dangerous condition developed over nearly 10 years and did not "immediately result" from the City's work, and thus the affirmative act of negligence exception would not apply in any event (*Yarborough v City of New York*, 10 NY3d 726, 728; *see Horan v*

Town of Tonawanda, 83 AD3d 1565, 1567; *Gold v County of Westchester*, 15 AD3d 439, 440). We therefore further modify the order accordingly.

All concur except GORSKI, J., who is not participating.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01370

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM J. HAMILTON, DEFENDANT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR DEFENDANT-APPELLANT.

ADAM J. HAMILTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered May 24, 2010. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree (two counts), attempted murder in the second degree and aggravated criminal contempt.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]) and one count each of attempted murder in the second degree (§§ 110.00, 125.25 [1]) and aggravated criminal contempt (§ 215.52 [1]). Defendant contends that County Court erred in denying his request to charge the jury on attempted murder in the second degree as a lesser included offense of one of the counts of attempted murder in the first degree. We conclude that defendant waived his contention by withdrawing his request for that charge (*see People v Gomez*, 297 AD2d 388; *People v Hernandez*, 297 AD2d 389).

Defendant further contends that the court erred in allowing a police investigator, whom we note had extensive training regarding crime scene reconstruction, to testify with respect to possible bullet trajectories because he was not qualified and usurped the jury's fact-finding function. That contention is unpreserved for our review inasmuch as defendant failed to object to the investigator's testimony on those grounds (*see generally People v Osuna*, 65 NY2d 822, 824; *People v Smith*, 24 AD3d 1253, *lv denied* 6 NY3d 818). In any event, "[i]t is well established that the admissibility and scope of expert testimony is committed to the sound discretion of the trial court" (*People v Fish*, 235 AD2d 578, 579, *lv denied* 89 NY2d 1092; *see People*

v Cronin, 60 NY2d 430, 433). Where a police investigator has sufficient "practical experience . . ., his [or her] lack of formal education in ballistics and trajectories" may not disqualify the investigator from testifying with respect thereto (*People v Brockenshire*, 245 AD2d 1065, 1065-1066, *lv denied* 91 NY2d 940). We further conclude that the court properly admitted in evidence the testimony of the People's expert reconstruction witness, inasmuch as it was based on his specialized knowledge and was helpful in aiding the jury to reach its verdict (*see People v Brown*, 97 NY2d 500, 505; *Cronin*, 60 NY2d at 432-433).

We reject defendant's contention that the treating physician of one of the victims should not have been permitted to testify that a projectile from a shotgun caused the victim's injuries. The physician testified that he has been employed as a trauma surgeon since 1991, is board certified in critical care and general surgery and has seen and treated several hundred patients with gunshot wounds. Consequently, we conclude that the court properly determined that the physician had "the requisite skill, training, education, knowledge or experience" to provide a reliable opinion (*Matott v Ward*, 48 NY2d 455, 459; *see People v Geraci*, 254 AD2d 522, 524). We reject defendant's further contention in his main and pro se supplemental briefs that the court erred in ordering that the sentences imposed for attempted murder in the first degree run consecutively to each other. "[W]here, as here, separate acts are committed against different victims during the same criminal transaction, the court may properly impose consecutive sentences in the exercise of its discretion" (*People v Jones*, 79 AD3d 1773, 1774, *lv denied* 16 NY3d 832). The sentence is not unduly harsh or severe.

Defendant's remaining contentions are raised in his pro se supplemental brief. We reject his contention that the court erred in refusing to charge assault in the second degree (Penal Law § 120.05 [2]) as a lesser included offense of attempted murder in the second degree (*see People v Hymes*, 70 AD3d 1371, 1372-1373, *lv denied* 15 NY3d 774; *see generally People v Green*, 56 NY2d 427, 430-432, *rearg denied* 57 NY2d 775). The majority of instances cited by defendant in support of his further contention that he was denied effective assistance of counsel involve matters outside the record and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Russell*, 83 AD3d 1463, 1465, *lv denied* 17 NY3d 800), and we conclude that defendant otherwise received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant's remaining contentions are unpreserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

All concur except GORSKI, J., who is not participating.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 11-00148

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARNELL CARTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered June 17, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), robbery in the first degree (two counts), criminal use of a firearm in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is modified on the law by directing that all sentences imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that the evidence is legally insufficient to establish his guilt either as a principal or as an accomplice. We reject that contention. "Accessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime, intentionally aid another in the conduct constituting the offense" (*People v Chapman*, 30 AD3d 1000, 1001, *lv denied* 7 NY3d 811 [internal quotation marks omitted]; *see* § 20.00). Here, the People presented video evidence that defendant and others met in a mini-mart, where defendant pantomimed the firing of a handgun. Other video evidence establishes that, shortly thereafter, defendant and a group of young men exited the mini-mart, and defendant pulled his scarf over his face and walked quickly in the direction of the victim. The People also presented witnesses who testified that the group of men, with defendant in the lead and firing a handgun, chased the victim down the street. The victim's body was found the next morning, but his jewelry was missing and his pockets were turned out. The Medical Examiner testified that he died from a gunshot wound. Two of defendant's accomplices sold the jewelry at a pawn shop. In addition, defendant

told a Niagara Falls Police Captain that he knew the other men planned to rob the victim and that he accompanied them in the event that a fight would occur. Consequently, there was evidence from which the jury could have reasonably inferred that defendant and his accomplices shared "a common purpose and a collective objective" (*People v Cabey*, 85 NY2d 417, 422), and that "defendant either shot the victim or shared in the intention of the [accomplices] to do so" (*People v Morris*, 229 AD2d 451, *lv denied* 88 NY2d 990). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

In addition, defendant contends that County Court erred in permitting the People to impeach their own witness. Even assuming, arguendo, that the court erred in permitting the impeachment, we conclude that any error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). The evidence of guilt is overwhelming, and there is no significant probability that defendant otherwise would have been acquitted (*see People v Saez*, 69 NY2d 802, 804; *People v Cartledge*, 50 AD3d 1555, *lv denied* 10 NY3d 957; *People v Rodriquez*, 24 AD3d 1321, *lv denied* 6 NY3d 817). Defendant's contention regarding the court's refusal to suppress evidence seized from his house pursuant to a search warrant is moot because the People did not seek to introduce any such evidence at trial (*see generally People v Wegman*, 2 AD3d 1333, 1335, *lv denied* 2 NY3d 747; *People v Burnett*, 306 AD2d 947, 948; *People v Falcon*, 281 AD2d 368, 368-369, *lv denied* 96 NY2d 901).

We conclude, however, that the sentence is illegal insofar as the court directed that the sentence imposed for criminal possession of a weapon in the second degree shall run consecutively to the concurrent sentences imposed for the two counts of murder in the second degree (*see People v Ramsey*, 59 AD3d 1046, 1048, *lv denied* 12 NY3d 858; *People v Fuentes*, 52 AD3d 1297, 1300-1301, *lv denied* 11 NY3d 736). We therefore modify the judgment accordingly. " 'Although this issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180, *lv denied* 8 NY3d 983). As relevant here, the sentence is illegal because, "[p]ursuant to Penal Law § 70.25 (2), '[w]hen more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, . . .' the sentences, with an exception not relevant here, must run concurrently. Based on the evidence presented at trial, . . . 'the court has no discretion; concurrent sentences are mandated' " (*People v Roundtree*, 75 AD3d 1136, 1138, *lv denied* 15 NY3d 855, quoting *People v Hamilton*, 4 NY3d 654, 658; *see People v Cromwell*, 71 AD3d 414, 415, *lv denied* 15 NY3d 803; *People v Mercer*, 66 AD3d 1368, 1370, *lv denied* 13 NY3d 940). Here, "[t]here was no evidence of intended use of the weapon against another apart from its use in the killing of the murder victim" (*People v Boyer*, 31 AD3d 1136, 1139, *lv denied* 7 NY3d 865, *amended on other grounds* 87 AD3d 1413; *see People v Wright*, ___ NY3d ___, ___ [June 5, 2012]). As modified, the sentence is not unduly harsh or

severe.

We have considered defendant's remaining contention and conclude that it is without merit.

All concur except GORSKI, J., who is not participating.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 06-00060

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS E. LEE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR. OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered October 5, 2005. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the plea is vacated, that part of the motion seeking to suppress statements made by defendant is granted, and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]). In appeal No. 2, he appeals from a judgment convicting him, also upon his plea of guilty, of attempted burglary in the second degree in satisfaction of a separate indictment (§§ 110.00, 140.25 [2]).

The conviction in appeal No. 1 arises from defendant's theft of two bicycles in the Town of Irondequoit in the early morning hours of July 16, 2004. Defendant contends that County Court erred in refusing to suppress the statements that he made to the arresting officer because, inter alia, he was illegally detained in violation of his Fourth Amendment rights. We agree with defendant that his statements should have been suppressed on that ground. We note at the outset, however, that defendant's contention is confined solely to the judgment of conviction in appeal No. 1, and that he raises unrelated issues in appeal No. 2 that are unaffected by our determination in appeal No. 1.

With respect to appeal No. 1, at approximately 6:00 A.M. on the day in question, the Irondequoit Police Department received a report of a suspect who was "possibly" stealing bicycles. The report was

called in by a local Town Justice, who had found a bicycle in his driveway. In response to the report, a police officer drove to the residence of the Town Justice, who stated that his newspaper delivery woman had told him that she encountered a man riding one bicycle while simultaneously pulling the second bicycle that the Town Justice discovered was left in his driveway. The delivery woman had described the man to the Town Justice as a black male wearing a dark hooded sweatshirt and jeans.

Upon receiving that information, the officer left the Town Justice's residence in search of the suspect. After driving approximately one block, the officer observed defendant, a black male wearing a dark hooded sweatshirt and greenish-colored jeans, emerge from a nearby yard riding a bicycle. Defendant proceeded to ride the bicycle down the sidewalk, whereupon the officer pulled alongside him and called out for him to stop. Defendant initially did not comply, but when the officer yelled a second time for him to stop, defendant complied. The officer then exited his vehicle and approached defendant. When asked at the suppression hearing what he initially said to defendant, the officer responded, "I told him that we had a report of a suspicious male possibly stealing bikes and that the description of the male was a male black wearing a darker . . . hooded sweatshirt and jeans, and as you can see you fit the description, so I just have to make an inquiry and you'll be on your way if everything's okay." The officer testified similarly on cross-examination, explaining that, upon stopping defendant and explaining the reason therefor, the officer advised defendant that "after everything checks [out], you'll be on your way." The stop occurred at 6:21 A.M.

The officer proceeded to ask defendant a series of questions, including his identity, where he lived and what he was doing in the area. Defendant answered the officer's questions. When the officer asked where he had gotten the bike, defendant said that he purchased it a week earlier from "some dude" for $45. At some point during the questioning, another police officer arrived at the scene, and that second officer remained on the sidewalk with defendant while the first officer at the scene commenced an investigation. The first officer went to several residences on the street and questioned homeowners to determine whether their homes or garages had been burglarized. At 6.45 A.M., approximately 24 minutes after defendant was initially stopped by the police, the newspaper delivery woman, acting on her own volition, arrived at the scene and identified defendant as the person she had observed earlier in the morning with two bicycles. Fifteen minutes later, a third officer arrived with a civilian who identified the bicycle that defendant was riding as his. Defendant was then placed under arrest, administered *Miranda* warnings, and interrogated by the police. He was ultimately indicted for two counts of burglary in the second degree, one count of burglary in the third degree, and three counts of petit larceny. While released on those charges, defendant committed another burglary, which is the subject of the indictment in appeal No. 2.

In its decision denying defendant's suppression motion, the court concluded that, before encountering defendant, the information

possessed by the first officer at the scene was sufficient to support a founded suspicion that criminal activity was afoot, justifying the "limited intrusion upon defendant's freedom of movement" until the newspaper delivery woman arrived and identified defendant as the individual she had seen pulling the second bicycle. At that point, the court determined that the first officer at the scene had reasonable suspicion to believe that defendant had committed a crime, justifying defendant's temporary detention. When the second civilian arrived and identified the bicycle that defendant had been riding as his, the officers had probable cause to arrest defendant.

We agree with defendant that his 24-minute detention following the stop by the first officer at the scene violated his Fourth Amendment rights. The court's determination that the officer had a "founded suspicion that criminal activity [was] afoot" justified a common-law inquiry (*People v Hollman*, 79 NY2d 181, 191), a level two intrusion under *People v De Bour* (40 NY2d 210, 223). Pursuant to that level two intrusion, the officer was "entitled to interfere with [defendant] to the extent necessary to gain explanatory information"; he could not, however, forcibly seize defendant (*id*.). An officer making a common-law inquiry may detain a suspect temporarily, but only "to the extent necessary to obtain explanatory information" (*People v Medina*, 107 AD2d 302, 304).

Here, the length of defendant's detention exceeded that allowed pursuant to a common-law inquiry when, after first being asked for identifying information, defendant was held for 24 minutes while the first officer at the scene went to residences in the neighborhood searching for evidence of a crime. Once the officer began that process, defendant's temporary seizure pursuant to a lawful common-law inquiry became an investigatory detention, a level three intrusion necessitating a reasonable suspicion that defendant had committed a crime (*see People v Bruce*, 306 AD2d 68, 69, *lv denied* 100 NY2d 618; *see generally People v Ryan*, 12 NY3d 28, 29-31). Significantly, the suppression court determined that such reasonable suspicion did not exist until the newspaper delivery woman arrived and identified defendant, which as noted was 24 minutes after the initial encounter. "The police are not at liberty to arrest and hold a suspect while they search for evidence sufficient to justify their action" (*People v Williams*, 191 AD2d 989, 990, *lv denied* 82 NY2d 729; *see People v Williams*, 79 AD3d 1653, 1654, *affd* 17 NY3d 834 ["The officers were not at liberty to detain defendant (for 15 to 20 minutes) while other officers attempted to determine whether a burglary had in fact been committed, i.e., 'until evidence establishing probable cause could be found' "]; *see also Ryan*, 12 NY3d at 30-31 [A detention of approximately 13 minutes was not authorized, even in the event that the police had reasonable suspicion warranting a level three investigatory detention]).

We would reach the same conclusion even if, as the dissent suggests, the police did not canvass the neighborhood until after the newspaper delivery woman arrived. The fact remains that defendant was detained for 24 minutes in the absence of reasonable suspicion. The court specifically found that 24 minutes separated defendant's stop

and the arrival of the newspaper delivery woman, and the People do not challenge that finding on appeal. In our view, the 24-minute detention was unlawful regardless of whether the police were going door-to-door in search of a crime during that time period.

We further conclude that a reasonable person in defendant's position would not have felt free to leave after the first officer at the scene told him that, "*after* everything checks [out]" he would be "on [his] way" and then handed defendant off to another uniformed officer while he canvassed the neighborhood in search of a crime ([emphasis added]; *see generally People v Hicks*, 68 NY2d 234, 239-240; *People v Smith*, 234 AD2d 946, 946, *lv denied* 89 NY2d 1041; *People v McFadden*, 179 AD2d 1003, 1004).

We disagree with the dissent's conclusion that defendant was not detained while the police officer conducted his investigation. First, the suppression court specifically found that there was a "temporary detention" of defendant while the officer conducted a "further investigation." Thus, "the hearing court did not deny suppression on that ground, and since the issue was not determined adversely to defendant, we may not reach it on appeal" (*People v Gerrard*, 94 AD3d 592, 593, citing *People v Concepcion*, 17 NY3d 192, 194-195).

In any event, none of the cases cited by the dissent supports the conclusion that defendant here was not detained. In neither *People v Anthony* (85 AD3d 1634, *lv denied* 17 NY3d 813) nor *People v Ocasio* (85 NY2d 982) were the defendants ordered to remain in their places while the police conducted their investigations. In *People v Smith* (234 AD2d 946, *lv denied* 89 NY2d 1041) and *People v Yukl* (25 NY2d 585, *cert denied* 400 US 851), the defendants voluntarily accompanied officers to police headquarters with no indication that they were not free to leave. Here, in contrast, the investigating officer twice "yell[ed]" at defendant to stop riding his bike, and defendant complied with that order. The officer then told defendant that he could leave only "after everything checks [out]," which is tantamount to telling defendant that he could not leave until things did check out. Again, defendant complied, at which point he was handed off to another officer while the first officer investigated further. At that point, defendant could not reasonably "disregard the police and go about his business" (*California v Hodari D.*, 499 US 621, 628).

The fact that defendant complied with the officer's requests does not mean that he was not detained. In fact, quite the opposite is true. A police encounter need not be forcible to constitute a seizure for Fourth Amendment purposes. " 'Whenever an individual is physically or constructively detained by virtue of a significant interruption of his liberty of movement as a result of police action, that individual has been seized within the meaning of the Fourth Amendment . . . This is true *whether a person submits to the authority of the badge* or whether he succumbs to force' " (*People v Howard*, 147 AD2d 177, 181, *lv dismissed* 74 NY2d 943 [emphasis added], quoting *People v Cantor*, 36 NY2d 106, 111). "Submission to authority is not consent nor is a failure to argue with the police officer" (*People v Dingman*, 48 AD2d 739, 740).

Here, because defendant was twice told to stop and remain at the scene with a uniformed officer while another officer conducted an investigation, we conclude that "a reasonable person would have believed that he was not free to leave" (*United States v Mendenhall*, 446 US 544, 554; *see generally People v Hicks*, 68 NY2d 234, 239-240; *People v Smith*, 234 AD2d 946, 946, *lv denied* 89 NY2d 1041; *People v McFadden*, 179 AD2d 1003, 1004). Thus, we reverse the judgment in appeal No. 1, vacate the plea, grant that part of the omnibus motion of defendant seeking to suppress his statements, and remit the matter to County Court for further proceedings on the indictment.

With respect to appeal No. 2, "[t]he knowing, intelligent and voluntary waiver by defendant of the right to appeal encompasses his contention that County Court abused its discretion in denying his request for an adjournment to retain new counsel" (*People v Morgan*, 275 AD2d 970, *lv denied* 96 NY2d 761; *see People v La Bar*, 16 AD3d 1084, 1084-1085, *lv denied* 5 NY3d 764). In addition, "[b]y failing to object to the imposition of restitution at sentencing, which was not a part of the plea agreement, defendant failed to preserve for our review his contention that County Court erred in enhancing the sentence by imposing restitution at sentencing without affording him the opportunity to withdraw the plea" (*People v Rhodes*, 91 AD3d 1280, 1281; *see People v Lewis*, 89 AD3d 1485, 1486; *People v Lovett*, 8 AD3d 1007, 1007-1008, *lv denied* 3 NY3d 673, 677). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*cf. Rhodes*, 91 AD3d at 1281).

All concur except PERADOTTO, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent in part because I disagree with the majority that defendant was illegally detained in violation of his Fourth Amendment rights. I would therefore affirm the judgment in appeal No. 1 convicting defendant, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]) but, like the majority, I would affirm the judgment in appeal No. 2.

In the early morning hours of July 16, 2004, the Irondequoit Police Department received a telephone call from a local Town Justice who reported a suspicious male "[p]ossibly stealing bikes." In response to the report, a police officer drove to the residence of the Town Justice, who showed the responding officer a bicycle in his driveway and told the officer that his newspaper carrier had stopped a man who was pulling that bicycle while riding another bicycle. The newspaper carrier suspected that the man, whom she described as a black male wearing a dark hooded sweatshirt and jeans, might be stealing bicycles in the area. The officer returned to his patrol car and began checking the area for the suspect.

Shortly thereafter, at approximately 6:21 A.M., the officer observed defendant, a black male wearing a dark hooded sweatshirt and greenish-colored jeans, emerging from a backyard on a bicycle. The officer sent a dispatch that he saw a person matching the description of the possible bicycle thief, and he drove toward defendant. Defendant, who had been riding in the street, steered his bicycle onto the sidewalk. The officer pulled up alongside defendant and asked him

to stop. Defendant did not comply, possibly because he did not hear the officer. When the officer repeated his request, defendant complied. The officer stopped and then exited his patrol car, and walked over to where defendant was standing on the sidewalk.

Defendant testified at the suppression hearing that the officer told him that he "wanted to ask [defendant] a few questions, a couple questions." The officer testified that he approached defendant and "told him that we had a report of a suspicious male possibly stealing bikes and that the description of the male was a male black wearing a darker . . . hooded sweatshirt and jeans, and as you can see you fit the description, so I just have to make an inquiry and you'll be on your way if everything's okay." On cross-examination, the officer similarly testified that, when he initially stopped defendant, "I told him why I stopped him . . . [J]ust to keep him at ease. I told him after everything checks [out], you'll be on your way."

The officer then asked defendant a number of questions, including his name, whether he owned another bike, where he had been, what he was doing in the neighborhood, whether he lived in the neighborhood, and why he had emerged from a backyard. Defendant denied having a second bicycle. As the officer was questioning defendant on the sidewalk, the newspaper carrier arrived at the scene and identified defendant as the person she had observed earlier in the morning with the two bicycles. The officer testified that the newspaper carrier arrived "[w]ithin a short time" after he stopped defendant.

At the suppression hearing, defense counsel extensively questioned the officer about the timing of the newspaper carrier's arrival, noting that a supporting deposition taken by another officer from the newspaper carrier placed her arrival at 6:45 A.M. Defense counsel asked the officer whether the supporting deposition would "refresh [his] memory as to what time [the newspaper carrier] happened on the scene of the stop," and the officer replied, "I already told you it was during the conversation shortly after I stopped him that she arrived." When asked whether he had a "specific independent recollection of the time," the officer replied, "I do have a very good recollection that it was shortly after I stopped him . . . While I was talking to him while I was making my inquiry as to who he is, where he's coming from, does he live here, why [did] you come from somebody's yard and what's going on." The officer's testimony that the newspaper carrier arrived shortly after he stopped defendant and while he was making his initial inquiries of defendant is supported by defendant's own testimony at the suppression hearing. Defendant estimated that "approximately three minutes" elapsed from the time he was stopped until the time the newspaper carrier arrived.

After the newspaper carrier identified defendant, the officer asked defendant why he had lied about having a second bicycle. The officer then left defendant on the sidewalk with a second officer while he "check[ed] the houses that [defendant] emerged from, the yards," for evidence of a break-in. The first officer testified that he checked the exterior of three houses and woke up the occupants to ask if they were okay, a process that he testified took a "short

time." Within approximately 15 minutes, a third officer arrived with a civilian who identified the bicycle that defendant was riding as his own. At that point, the police placed defendant under arrest and issued *Miranda* warnings. During subsequent interrogation, defendant admitted that he stole the two bicycles in his possession that morning.

Contrary to the conclusion of the majority, I conclude that the court properly refused to suppress the statements defendant made to the arresting officer. It is well established that "[g]reat deference is afforded the findings of the suppression court" (*People v Davis*, 48 AD3d 1120, 1122, *lv denied* 10 NY3d 957; *see People v Prochilo*, 41 NY2d 759, 761), and that "[t]he suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof . . . will not be disturbed unless unsupported by the record" (*People v Esquerdo*, 71 AD3d 1424, 1424, *lv denied* 14 NY3d 887 [internal quotation marks omitted]; *see People v Sanders*, 74 AD3d 1896; *People v Youngblood*, 294 AD2d 954, 955, *lv denied* 98 NY2d 704).

In evaluating police conduct, we "must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858). Here, the suppression court determined that, when the officer first encountered defendant on the bicycle, the report from the Town Justice coupled with the officer's observations provided a founded suspicion that criminal activity was afoot and thus justified the second level of intrusion under *People v De Bour* (40 NY2d 210), i.e., the common-law right of inquiry (*see People v Moore*, 6 NY3d 496, 498-499; *De Bour*, 40 NY2d at 223). I agree. The officer observed defendant, who fit the description of the reported possible bicycle thief, emerging from a residential backyard on a bicycle during the early morning hours, shortly after the report and approximately one block away from the location of the second bicycle. The officer was thus permitted to effect "a detention short of a forcible seizure to obtain explanatory information" (*People v White*, 35 AD3d 1263, 1264, *lv denied* 8 NY3d 947, 951; *see Moore*, 6 NY3d at 500; *De Bour*, 40 NY2d at 223). The officer therefore was justified in approaching defendant, asking him to stop, requesting his name, and asking him various questions about his conduct and the bicycle he was riding.

I likewise agree with the suppression court's further determination that, when the newspaper carrier arrived and identified defendant as the individual she had seen pulling the second bicycle, the officer had reasonable suspicion to believe that defendant had committed a crime so as to "support the temporary detention of the defendant for further investigation." The majority does not take issue with that determination of the suppression court, but concludes that defendant was illegally "detained" for 24 minutes following the stop by the first officer on the scene. I disagree.

In my view, the facts do not support the majority's determination that, "after first being asked for identifying information, defendant

was held for 24 minutes while the first officer at the scene went to residences in the neighborhood searching for evidence of a crime." Although the testimony at the suppression hearing is not entirely clear on this point, it appears that the first officer checked the surrounding houses for signs of a break-in *after* the newspaper carrier identified defendant, i.e., in the 15 minutes between the newspaper carrier's arrival on the scene and the civilian's identification of the bicycle defendant had been riding. When defense counsel asked the first officer "[w]hat was the purpose of staying for another 15 minutes or more after [the newspaper carrier] had said that's the guy that I took the bike from," the first officer replied that he was "not done with [his] check of the yards" or his inquiry as to why defendant had lied about possessing a second bicycle.

Notably, defendant stated in support of his suppression motion that, "*[a]fter [the newspaper carrier] identified the defendant as the person she had seen earlier*, the Irondequoit Police Department conducted a house-to-house canvass of the neighborhood to determine if anyone had been the victim of a theft" (emphasis added). Moreover, the suppression court specifically found that the newspaper carrier arrived during the officer's initial questioning of defendant. In its decision, the court stated that, "[w]hile the [first] officer was obtaining information from the defendant, . . . the newspaper carrier . . . arrived and identified the defendant as the person she observed earlier pulling the bike left in [the Town Justice]'s driveway." Thus, according due deference to the suppression court's findings (*see Prochilo*, 41 NY2d at 761; *Davis*, 48 AD3d at 1122), I submit that the record does not support the majority's conclusion that the police "held" defendant while the first officer canvassed the neighborhood for evidence of a crime.

In any event, even assuming, arguendo, that the first officer searched nearby houses prior to the arrival of the newspaper carrier, I conclude that defendant was not thereby subjected to a level three forcible detention (*see Moore*, 6 NY3d at 498-499). The Court of Appeals has defined "a seizure of the person for constitutional purposes to be a significant interruption with an individual's liberty of movement" (*De Bour*, 40 NY2d at 216). In *People v Ocasio* (85 NY2d 982, 984), the Court explained that the determination whether a seizure occurred "requires the fact finder to apply a settled standard: whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom . . . ." Such a determination "involves consideration of all the facts—for example, was there a chase; were lights, sirens or a loudspeaker used; was the officer's gun drawn, was the individual prevented from moving; how many verbal commands were given; what was the content and tone of the commands; how many officers were involved; [and] where did the encounter take place" (*id.*).

The record reflects that the entire encounter, which did not exceed 24 minutes, took place on a public sidewalk, and that defendant was not handcuffed or restrained in any manner (*see People v Anthony*, 85 AD3d 1634, 1635, *lv denied* 17 NY3d 813; *cf. People v Evans*, 294

AD2d 918, 918-919, *lv dismissed* 98 NY2d 768). No officer displayed a weapon, the police did not act in an abusive or threatening manner, and there was no evidence that the police physically blocked defendant or otherwise interfered with his freedom of movement (*see Ocasio*, 85 NY2d at 984; *cf. People v Layou*, 71 AD3d 1382, 1383). While defendant was standing on the sidewalk, he consumed a soda and snacks that he had with him (*see People v Smith*, 234 AD2d 946, *lv denied* 89 NY2d 1041). The first officer testified that defendant never asked to leave or complained that he was treated with disrespect. Concerning the issue whether defendant was free to leave, the first officer testified that, "[i]f [defendant] said I'm leaving unless you're going to handcuff me . . . [, h]e would have been walking. I already knew his name." "Although it may be possible that [defendant] felt obliged to cooperate with the police in order to maintain his facade of innocence, this subjective view by the defendant does not require that we find him to have been in custody" (*People v Yukl*, 25 NY2d 585, 591-592, *cert denied* 400 US 851).

Finally, I disagree with the majority that a reasonable person in defendant's position would not have felt free to leave after the first officer told defendant that he "just ha[d] to make an inquiry and you'll be on your way if everything's okay" or "after everything checks [out], you'll be on your way." The officer testified that he made a statement to that effect upon first approaching defendant "just to keep him at ease" and to explain why he had stopped defendant. Defendant did not testify concerning any such statement by the first officer, recalling only that the first officer approached and told him that he "wanted to ask [defendant] a few questions, a couple questions." In my view, the first officer's statement, unaccompanied by any showing of force or other facts suggesting that defendant was not free to leave, did not elevate the level two encounter to a level three forcible detention (*see People v Lopez*, 71 AD3d 1518, 1518-1519, *lv denied* 15 NY3d 753; *People v Bent*, 206 AD2d 926, 926, *lv denied* 84 NY2d 906).

I would therefore affirm the judgments in appeal Nos. 1 and 2.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 06-00061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS E. LEE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR. OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered October 5, 2005. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Same Memorandum as in *People v Lee* ([appeal No. 1] ___ AD3d ___ [June 15, 2012]).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 11-02001

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES RIVERSO, DEFENDANT-APPELLANT.

ZIMMER LAW OFFICE, PLLC, SYRACUSE (KIMBERLY M. ZIMMER OF COUNSEL), AND MCGRAW LAW OFFICE, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered January 5, 2011. 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 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 was convicted of three counts of disseminating indecent material to minors in the first degree (Penal Law § 235.22), in connection with sexually explicit text messages that he transmitted to three 16-year-old girls who played on a soccer team that he coached. We reject defendant's contention that Supreme Court erred in assessing 20 points against him under risk factor 7, for his relationship with the victims. Pursuant to the Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, 20 points are assessed "if the offender's crime[s] . . . arose in the context of a professional or avocational relationship between the offender and the victim[s] and was an abuse of such relationship[s]. Each of [those] situations is one in which there is a heightened concern for public safety and need for community notification" (Risk Assessment Guidelines and Commentary, at 12 [2006]). "[A]vocational relationship" (*id.*) "is not defined in the risk assessment guidelines, but 'avocation' customarily refers to a hobby or occupation pursued outside of a person's regular work" (*People v Carlton*, 78 AD3d 1654, 1657 [Martoche and Centra, JJ., dissenting], *lv denied* 16 NY3d 782), and we conclude that a soccer league coach falls within the risk assessment guidelines. Although we note that defendant was employed as a college soccer coach, his criminal acts were not related to his employment. In any event, reducing defendant's score on the risk

assessment instrument (RAI) by the 20 points assessed against defendant under risk factor 7 does not alter his presumptive risk level.

We conclude that the court properly determined that the People proved by clear and convincing evidence that defendant has a moderate, rather than a low, risk of reoffending (*see* Correction Law § 168-*l* [6] [b]; § 168-n [3]). We further conclude that the court did not improvidently exercise its discretion in denying defendant's request for a downward departure to a level one risk based upon expert testimony that he "successfully" completed a course of sex offender treatment and that his risk of reoffending is "low." It is well established that "the [risk] level suggested by the RAI is merely presumptive and a SORA court possesses the discretion to impose a lower or higher risk level if it concludes that the factors in the RAI do not result in an appropriate designation" (*People v Mingo*, 12 NY3d 563, 568 n 2). We reject defendant's contention that his successful completion of a treatment program is a mitigating factor not otherwise taken into account by the RAI, inasmuch as the RAI considers whether a defendant has accepted responsibility for his or her sexual misconduct by assessing points for the failure to participate in treatment and, here, defendant has received the benefit of zero points for that factor (*see People v Douglas*, 18 AD3d 967, 968, *lv denied* 5 NY3d 710). In any event, the evidence presented at the SORA hearing established that defendant transmitted sexually explicit text messages to at least three girls whom he coached on the soccer team; that he had sexual contact with two of those girls in his vehicle; and that he attempted to engage in sexual activity with two of those girls at a hotel while attending out-of-town tournaments. Furthermore, we note that, although defendant's expert testified that his risk of reoffending was reduced by up to 40% because defendant successfully completed sex offender treatment, defendant nevertheless has a significant risk of reoffending. We therefore conclude that a downward departure is not warranted (*cf. People v Brewer*, 63 AD3d 1604, 1605; *People v Weatherley*, 41 AD3d 1238, 1238-1239; *People v Smith*, 30 AD3d 1070, 1071).

All concur except SCONIERS, J., who dissents and votes to modify in accordance with the following Memorandum: I respectfully dissent because I conclude that Supreme Court improvidently exercised its discretion in determining that defendant is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). In my view, we should " 'substitute [our] own discretion even in the absence of an abuse' " of discretion by the court, and I therefore would modify the order by granting defendant's request for a downward reduction from a level two risk to a level one risk under SORA (*People v Goossens*, 75 AD3d 1171, 1171; *see People v Santiago*, 20 AD3d 885, 885-886). While defendant's presumptive risk level under the risk assessment instrument was properly determined to be a level two risk, I conclude "based on the record before [this Court] that there are . . . mitigating factor[s] of a kind or to a degree[] not otherwise adequately taken into account" by the Risk Assessment Guidelines and Commentary (*Santiago*, 20 AD3d at 886 [internal quotation marks omitted]; *see People v Kearns*, 68 AD3d 1713, 1714; Sex

Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]).

The evidence at the SORA hearing included expert testimony from a clinical psychologist who had provided numerous sessions of sex offender treatment to defendant and who had administered multiple psychological tests in evaluating defendant. Based on the expert's extensive treatment and evaluation of defendant, she opined within a reasonable degree of psychological certainty that defendant posed a low risk of reoffending. Another psychologist provided expert testimony regarding his meetings with defendant for the purpose of conducting a clinical interview and sexual assessment of defendant. Based on that assessment, he opined that defendant represented a low risk to reoffend. Moreover, "[t]here was no allegation or evidence of forcible compulsion" by defendant (*People v Brewer*, 63 AD3d 1604, 1605). Considering the foregoing and the record in its entirety, it is apparent that "defendant's response to [sex offender] treatment was exceptional" (*People v Martinez*, 92 AD3d 930, 931) and that, as a discretionary matter, he was entitled to a downward departure from his presumptive risk level.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01225

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

IN THE MATTER OF THE ARBITRATION BETWEEN
BOARD OF EDUCATION OF DUNDEE CENTRAL SCHOOL
DISTRICT, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

DOUGLAS COLEMAN, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

RICHARD E. CASAGRANDE, LATHAM (PAUL D. CLAYTON OF COUNSEL), FOR RESPONDENT-APPELLANT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (ERIC J. WILSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR NEW YORK STATE ASSOCIATION OF MANAGEMENT ADVOCATES FOR SCHOOL LABOR AFFAIRS, AMICUS CURIAE.

TIMOTHY G. KREMER, EXECUTIVE DIRECTOR, LATHAM (JAY WORONA OF COUNSEL), FOR NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC., AMICUS CURIAE.

Appeal from a judgment of the Supreme Court, Yates County (W. Patrick Falvey, A.J.), dated October 1, 2010. The judgment granted in part the petition to vacate portions of the Hearing Officer's award.

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

Memorandum: Pursuant to Education Law § 3020-a, petitioner filed two disciplinary charges with 16 specifications against respondent, a tenured Social Studies teacher employed by petitioner. Respondent moved to dismiss six specifications on the ground that the conduct encompassed by those specifications had been the subject of counseling memoranda placed in respondent's personnel file. The memoranda warned respondent "of the serious consequences of any future incident[s] . . . ." It is undisputed that the specific conduct addressed in the memoranda did not recur before the disciplinary charges were filed. The Hearing Officer granted respondent's motion, concluding that "it would be both improper and unfair under the just cause protocol to permit and entertain formal charges, identical in nature to those at issue in the foregoing counseling memoranda, [because], by all accounts, the matters have not repeated." We note that two of the dismissed specifications concerned respondent's drawing of a cartoon of two "aliens" on the test of a student with a disability and writing

the names of the student and her special education teacher next to the "aliens." Respondent was also accused of writing sexually inappropriate terms on a final exam in which he asked the students to define various vocabulary terms.

During the hearing, two specifications were withdrawn, and the Hearing Officer sustained six of the remaining specifications related to four incidents in which respondent threatened to kill a student; physically demonstrated a torture technique on a female student lying on respondent's desk; gave inappropriate and, in some instances, derogatory nicknames to students, despite previous warnings to refrain from such conduct; and ignored fair and consistent grading practices while exhibiting favoritism in grading practices. The Hearing Officer imposed a penalty of a six-month suspension without pay "but with continued medical insurance benefits."

Petitioner commenced this proceeding pursuant to Education Law § 3020-a (5) and CPLR 7511 challenging the penalty, the continuation of health benefits and the dismissal of the six specifications. Petitioner contended, inter alia, that the penalty of a six-month suspension was "excessively lenient"; that the Hearing Officer exceeded his authority under Education Law § 3020-a in ordering petitioner to continue to pay for respondent's health insurance during the period of suspension; and that the Hearing Officer's decision to dismiss the six specifications was irrational.

In appeal No. 1, respondent appeals from a judgment granting the petition in part (*Matter of Board of Educ. of the Dundee Cent. School Dist. v Coleman*, 29 Misc 3d 1204[A], 2010 NY Slip Op 51684[U], *4-*5). Supreme Court concluded, inter alia, that the Hearing Officer erred in dismissing the six specifications and lacked statutory authority to direct petitioner to pay for respondent's health insurance during the period of suspension (*id.* at *3-*4). The court therefore ordered respondent to reimburse petitioner for any such costs that had been previously paid by petitioner and remitted the matter for further consideration on the reinstated six specifications (*id.* at *4-*5). Inasmuch as the court was remitting the matter with respect to those specifications, it determined that it would be premature to address the issue of the appropriate penalty (*id.* at *4).

Upon remittal, the Hearing Officer sustained, in whole or in part, three of the six specifications, but he reimposed the same penalty, finding that respondent had previously been disciplined for the conduct at issue in those specifications through the counseling memoranda. Thus, the Hearing Officer concluded that "[i]t would be inherently unfair and totally contrary to the just cause protocol to issue *further* discipline to the [r]espondent for actions that were never repeated" (emphasis added).

Petitioner commenced a second proceeding pursuant to Education Law § 3020-a and CPLR 7511 to vacate the Hearing Officer's decision to the extent that the Hearing Officer determined that the penalty of a six-month suspension was appropriate and failed to comply with the prior judgment. Petitioner contended, inter alia, that the penalty

imposed was "excessively lenient" and that the refusal to impose any additional penalty was irrational. In appeal No. 2, respondent appeals from a judgment granting the petition and determining that the Hearing Officer's decision regarding the penalty lacked a rational basis "due to his improper reliance on the premise that [petitioner] had to prove [respondent] repeated the misconduct that gave rise to the counseling memoranda before [the Hearing Officer] would consider [petitioner's] request for a penalty" (*Board of Educ. of the Dundee Cent. School Dist. v Coleman*, 32 Misc 3d 334, 340). The court vacated the penalty and remitted the matter to a different hearing officer regarding only the issue of the penalty (*id.*).

We affirm the judgment in each appeal.

Education Law § 3020-a (5) permits judicial review of a hearing officer's decision, expressly providing that "[t]he court's review shall be limited to the grounds set forth in" CPLR 7511. Pursuant to CPLR 7511 (b), an award may be vacated only upon very limited grounds, one of which is that the arbitrator or person making the award "exceeded his [or her] power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511 [b] [1] [iii]). The Court of Appeals has concluded that "[a]n arbitration award may not be vacated unless it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37; *see Matter of Mohawk Val. Community Coll. [Mohawk Val. Community Coll. Professional Assn.]*, 28 AD3d 1140, 1141). "Where, as here, parties are subject to compulsory arbitration, the award must satisfy an additional layer of judicial scrutiny-it 'must have evidentiary support and cannot be arbitrary and capricious' " (*City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919, quoting *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223; *see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-568).

In appeal No. 1, we conclude that the Hearing Officer's decision to grant the motion of respondent to dismiss six of the specifications was arbitrary and capricious. It is well settled that counseling memoranda such as those placed in respondent's personnel file are not considered disciplinary actions (*see Holt v Board of Educ. of Webutuck Cent. School Dist.*, 52 NY2d 625, 631-632). Rather, such memoranda "amount to nothing more than administrative evaluations which the supervisory personnel of the school district have the right and the duty to make as an adjunct to their responsibility to supervise the faculty of the schools" (*id.* at 631). In *Holt*, the Court of Appeals specifically stated that such memoranda may "be used to support a formal charge of misconduct within three years of the occurrence which the evaluation addresses" (*id.* at 634 n 2; *see Matter of Heslop v Board of Educ., Newfield Cent. School Dist.*, 191 AD2d 875, 877; *see also Matter of Lory v County of Washington*, 77 AD3d 1265, 1266). As even the dissent recognizes, *Holt* and its progeny establish that counseling memoranda do not constitute professional discipline. Under

the clear language of *Holt*, *Lory* and *Heslop*, conduct addressed in a nondisciplinary counseling memorandum may be used to support formal disciplinary charges at a later date not to exceed three years. Thus, the court properly determined that it was irrational, arbitrary and capricious for the Hearing Officer to dismiss the six specifications on the *sole* ground that the conduct encompassed by those specifications had been addressed in counseling memoranda.

We further conclude in appeal No. 1 that the court properly determined that the Hearing Officer exceeded his statutory authority in directing petitioner to pay for respondent's health insurance benefits during the period of suspension. "In recommending a penalty under [section] 3020-a of the Education Law, a hearing [officer] is limited to one of the penalties set forth in that section, i.e., 'a reprimand, a fine, suspension for a fixed time without pay or dismissal' " (33 Ed Dept Rep [Decision No. 13201]; *see Matter of Adrian v Board of Educ. of E. Ramapo Cent. School Dist.*, 60 AD2d 840, 840; 33 Ed Dept Rep [Decision No. 13137]; 33 Ed Dept Rep [Decision No. 13135]). Inasmuch as a contribution toward an employee's health insurance is a form of compensation (*see Matter of Police Assn. of City of Mount Vernon v New York State Pub. Empl. Relations Bd.*, 126 AD2d 824, 825; *Matter of Town of Haverstraw v Newman*, 75 AD2d 874, 874-875), the Hearing Officer improperly imposed what amounted to "a penalty of suspension at reduced pay" (33 Ed Dept Rep [Decision No. 13201]). We therefore conclude that the court properly reinstated the six specifications and ordered respondent to reimburse petitioner for any payments that it made toward respondent's health insurance benefits during the suspension period.

In appeal No. 2, we conclude that the court properly determined that the Hearing Officer's decision on remittal to impose the same penalty was arbitrary and capricious inasmuch as the Hearing Officer based his decision on an erroneous interpretation of the law. The Hearing Officer refused to impose any additional penalty after sustaining some of the remitted six specifications based on his continuing belief that the counseling memoranda constituted a form of discipline. Inasmuch as it is well established that counseling memoranda are not disciplinary measures under Education Law § 3020-a (*see Holt*, 52 NY2d at 632-634; *Matter of Ferguson v Traficanti*, 295 AD2d 786, 788), the Hearing Officer's conclusion that respondent had previously been disciplined for the conduct encompassed by those specifications is arbitrary and capricious. We therefore conclude that the court properly vacated the penalty imposed by the Hearing Officer and remitted the matter to a different hearing officer for imposition of a penalty.

All concur except SCONIERS, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part in appeal No. 1 because I conclude that, with the exception of vacating the directive requiring petitioner to pay for respondent's health insurance during the period of suspension, Supreme Court exceeded its limited scope of review in vacating the Hearing Officer's decision and award with respect to the teacher disciplinary charges that petitioner brought pursuant to Education Law § 3020-a

(*Matter of Board of Educ. of the Dundee Cent. School Dist. v Coleman*, 29 Misc 3d 1204[A], 2010 NY Slip Op 51684[U]). As the majority correctly notes, "[a]n arbitration award may not be vacated unless it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37; *see Matter of Mohawk Val. Community Coll. [Mohawk Val. Community Coll. Professional Assn.]*, 28 AD3d 1140, 1141-1142). Moreover, as the Court of Appeals has made clear, these are "three narrow grounds" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79; *see Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 123). In addition, in cases such as this, in which the parties have engaged in compulsory arbitration, "the award must satisfy an additional layer of judicial scrutiny-it 'must have evidentiary support and cannot be arbitrary and capricious' " (*City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919, quoting *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223). Ordinarily, arbitrators are "not bound by principles of substantive law or by rules of evidence" (*Matter of Town of Webb Union Free School Dist. [Atlantic Energy Servs., Inc.]*, 81 AD3d 1454, 1454 [internal quotation marks omitted]; *see Matter of Silverman [Benmore Coats]*, 61 NY2d 299, 308; *Matter of Mays-Carr [State Farm Ins. Co.]*, 43 AD3d 1439, 1440).

Contrary to the decision of the majority, *Holt v Board of Educ. of Webutuck Cent. School Dist.* (52 NY2d 625) does not support its conclusion that the Hearing Officer's dismissal of those disciplinary charges on which the counseling memoranda had been issued was arbitrary and capricious. Rather, in a footnote, the Court merely noted that "critical evaluations *can only be used* to support a formal charge of misconduct within three years of the occurrence" addressed by the evaluation, citing Education Law § 3020-a (1), and that, "[t]hereafter, such evaluations can only be used to show that the teacher was given notice of the school district's dissatisfaction with his [or her] performance" (*id*. at 634 n 2 [emphasis added]). *Holt* simply held that counseling memoranda did not constitute professional discipline. *Holt* neither authorized a school district to bring formal disciplinary charges based on occurrences that had been the subject of counseling memoranda nor limited a hearing officer's authority to dismiss such disciplinary charges.

Moreover, the two remaining cases upon which the majority relies, i.e., *Matter of Heslop v Board of Educ., Newfield Cent. School Dist.* (191 AD2d 875, 877) and *Matter of Lory v County of Washington* (77 AD3d 1265, 1266), do not support the majority's position. Indeed, given the limits on our scope of review in proceedings such as this, upholding the Hearing Officer's dismissal of disciplinary charges herein would be wholly consistent with *Heslop* and *Lory*. While those cases both confirmed the determinations of hearing officers upholding disciplinary charges based on occurrences that had been the subject of counseling memoranda, nothing in those cases suggests or implies that the hearing officers were without authority to reach the contrary

result.

Given the lack of express legal precedent or strong public policy affording school districts the unfettered right and authority to bring disciplinary charges based on occurrences that had been the subject of counseling memoranda, it cannot be said that the Hearing Officer's dismissal of those charges against respondent was arbitrary and capricious, irrational or against public policy. Moreover, the counseling memoranda issued to respondent gave no indication that future charges based on those underlying incidents could be brought unless the same conduct was repeated. Indeed, the fact that the same conduct was not repeated provides a further basis for determining that the Hearing Officer's dismissal of the six disciplinary charges concerning conduct addressed in prior counseling memoranda was not arbitrary and capricious or irrational.

I agree with the majority in appeal No. 1, however, that the court properly determined that the Hearing Officer exceeded his statutory authority under Education Law § 3020-a in ordering petitioner to pay the cost of respondent's health insurance during the period in which respondent was suspended and thus properly ordered respondent to reimburse petitioner for any such payments. If the majority agreed with my view of appeal No. 1, we would necessarily have to dismiss as moot the appeal from the judgment in appeal No. 2. However, in light of the majority's determination in appeal No. 1, I am compelled to address the issues presented in appeal No. 2. Underlying appeal No. 2 is the decision and award of the Hearing Officer on remittal, finding respondent guilty on some of the reinstated disciplinary charges but determining that a greater penalty than was first imposed was not warranted (*Board of Educ. of the Dundee Cent. School Dist. v Coleman*, 32 Misc 3d 334). Given the lack of any strong public policy or principle of law compelling him to impose an enhanced penalty, it cannot be said that the Hearing Officer's refusal to impose a more severe sanction upon remittal was arbitrary and capricious or irrational. Simply because the Hearing Officer's rationale for reaching that result was faulty does not render the award irrational, and thus vacating the penalty and remitting the matter a second time, and to a different hearing officer, on the issue of the penalty to be imposed on respondent was beyond the court's scope of review in this CPLR article 75 proceeding.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

242

CA 11-01226

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

IN THE MATTER OF THE ARBITRATION BETWEEN
BOARD OF EDUCATION OF DUNDEE CENTRAL SCHOOL
DISTRICT, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

DOUGLAS COLEMAN, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

RICHARD E. CASAGRANDE, LATHAM (PAUL D. CLAYTON OF COUNSEL), FOR RESPONDENT-APPELLANT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (ERIC J. WILSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR NEW YORK STATE ASSOCIATION OF MANAGEMENT ADVOCATES FOR SCHOOL LABOR AFFAIRS, AMICUS CURIAE.

TIMOTHY G. KREMER, EXECUTIVE DIRECTOR, LATHAM (JAY WORONA OF COUNSEL), FOR NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC., AMICUS CURIAE.

Appeal from a judgment of the Supreme Court, Yates County (W. Patrick Falvey, A.J.), dated April 29, 2011. The judgment granted the petition to vacate that part of the Hearing Officer's award imposing a penalty of a suspension of six months and remitted the matter to a different hearing officer for the determination of an appropriate penalty.

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

Same Memorandum as in *Matter of Board of Educ. of Dundee Cent. School Dist. [Coleman]* ([appeal No. 1] ___ AD3d ___ [June 15, 2012]).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

320

CA 11-02133

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

DEBORAH VOSS, PROP-CO, LLC, CLASSI PEOPLE, INC., DOING BUSINESS AS SERTINO'S CAFÉ AND DREAM PEOPLE, INC., DOING BUSINESS AS SHIVER MODEL, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

THE NETHERLANDS INSURANCE COMPANY, ET AL., DEFENDANTS, AND CH INSURANCE BROKERAGE SERVICES, CO., INC., DEFENDANT-RESPONDENT.

DIRK J. OUDEMOOL, SYRACUSE, FOR PLAINTIFFS-APPELLANTS.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, ALBANY (ELIZABETH GROGAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 11, 2011. The order granted the motion of defendant CH Insurance Brokerage Services, Co., Inc. for summary judgment dismissing the amended complaint against it.

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

Memorandum: Plaintiffs commenced this action alleging, inter alia, negligence and breach of contract in connection with business interruption coverage that CH Insurance Brokerage Services, Co., Inc. (defendant) obtained for plaintiffs from former defendant, Peerless Insurance Company, for which defendant The Netherlands Insurance Company was substituted by stipulation of the parties after the action was commenced. We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the amended complaint against it, but our reasoning differs from that of the court. Contrary to the court's determination, we agree with plaintiffs that defendant failed to establish its entitlement to judgment dismissing the amended complaint on the ground that no special relationship existed between defendant and plaintiffs (*see generally Murphy v Kuhn*, 90 NY2d 266, 271). In support of its motion, defendant submitted the deposition testimony of Deborah Voss (plaintiff), the sole shareholder and principal of the corporate plaintiffs, stating that defendant's representative reviewed, inter alia, the types of businesses to be insured as well as sales figures, and that he thereafter presented her with a proposal for insurance coverage, which included $75,000 per incident for business

interruption insurance. When plaintiff questioned whether the amount was sufficient, defendant's representative assured her that it was and that defendant would review the coverage annually and recommend adjustments as the businesses grew. Thus, we conclude that defendant's own submission supports the contention that plaintiff relied upon defendant's expertise and assurance regarding the appropriate level of insurance to protect the corporate plaintiffs in the event of a loss (*cf. Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 157-158).

As noted, however, we nevertheless conclude that the court properly granted defendant's motion. The commercial building that housed the corporate plaintiffs, as well as a corporate tenant, was damaged on three separate occasions in connection with water leaking from the roof, which caused a portion of the roof to collapse on two of those occasions. The first two incidents occurred while the limit for business interruption coverage was $75,000, and the third incident occurred after the policy was renewed and the coverage for business interruption had been reduced to $30,000. Plaintiffs alleged in their amended complaint and supplemental bill of particulars that defendant failed to provide adequate coverage and was negligent in reducing the coverage. However, the renewed policy was in effect for approximately nine months at the time of the third loss, and "[p]laintiff[s are] charged with conclusive presumptive knowledge of the terms and limits of [the policy]" (*Hoffend & Sons, Inc.*, 19 AD3d 1056, 1057, *affd on other grounds* 7 NY3d 152 [internal quotation marks omitted]). Thus, the cause of action against defendant for negligence and breach of contract with respect to the reduced policy limit is defeated as a matter of law (*see id.* at 1057-1058). Indeed, plaintiff admitted that she knew that the policy limit had been reduced from $75,000 to $30,000 and that, although she had contacted defendant to question the reduction, she did not hear back from defendant's representative and did not again contact defendant's representatives.

We note that plaintiff testified at her deposition that plaintiffs received only $3,197 on the claim for business interruption for the first incident and $30,000 for the second incident, and that no funds were paid on the claim for business interruption for the third incident. Plaintiff testified that, if the policy limit of $75,000 had been paid in a timely manner for each of the first two incidents, the plaintiff corporations would have remained operational. We therefore conclude that, even in the event that defendant negligently failed to obtain sufficient business interruption coverage for plaintiffs, any such negligence is not a proximate cause of plaintiffs' damages as a matter of law (*see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784, 829).

All concur except CARNI, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent and would deny the motion of CH Insurance Brokerage Services, Co., Inc. (defendant) for summary judgment dismissing the amended complaint against it. At the outset, I note that I concur with my colleagues that "defendant's own submission supports the contention that [Deborah Voss (plaintiff)] relied upon defendant's expertise and assurance

regarding the appropriate level of insurance to protect the corporate plaintiffs in the event of a loss." Thus, I further concur with my colleagues that defendant failed to establish its entitlement to judgment dismissing the amended complaint on the ground that no special relationship existed between defendant and plaintiffs (*see generally Murphy v Kuhn*, 90 NY2d 266, 271). However, it is at this juncture that the majority and I part ways.

Given my agreement with the majority that plaintiffs' assertion of a "special relationship" with defendant remains viable, it thus follows that plaintiffs may be found to have relied upon defendant's expertise and assurance regarding the appropriate level of insurance to protect the corporate plaintiffs in the event of a loss. It is therefore incongruous to conclude, simultaneously, as does the majority, that the cause of action against defendant for negligence and breach of contract is defeated as a matter of law because the renewed policy was in effect for approximately nine months at the time of the third loss, and "[p]laintiff[s are] charged with conclusive presumptive knowledge of the terms and limits of [the policy]" (*Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 19 AD3d 1056, 1057, *affd on other grounds* 7 NY3d 152 [internal quotation marks omitted]). Rather, if plaintiffs in fact relied upon defendant's expertise and assurance regarding the appropriate level of insurance coverage, "it is no answer for the broker to argue, as an insurer might, that the insured has an obligation to read the policy" (*Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73, 82; *see Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 645). Indeed, the doctrine that an insured is presumed to know the terms and limits of the policy has its genesis in actions against *insurers* - not agents with whom a special relationship with the insured has been alleged or established (*see Metzger v Aetna Ins. Co.*, 227 NY 411, 414-417).

I also respectfully disagree with the majority's conclusion concerning the dispositive effect of the testimony of plaintiff that, if the $75,000 policy limits had been paid in a timely manner after the first two incidents, the plaintiff corporations would have remained operational. The policy at issue provided "BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE." Under the policy, the insured's "Business Income loss" is determined by the net income of the business before the direct physical loss or damage occurred. The policy covers business income loss sustained due to the necessary suspension of "operations" during the "period of restoration" caused by the physical loss to the business property.

However, the policy clearly contemplates the possibility that the insured might not resume "operations" after the loss. Specifically, the policy provides, "If you do not resume 'operations,' or do not resume 'operations' as quickly as possible, we will pay based on the length of time it would have taken to resume 'operations' as quickly as possible." Thus, neither the policy nor the benefits paid thereunder guarantee or insure that the insured business will once again become operational, profitable or sustainable. Instead, the policy insures against losing net business income and incurring extra expenses during the period when "operations" are suspended or during a

reasonable time in which to "resume operations" (*see generally Buffalo El. Co. v Prussian Natl. Ins. Co.*, 64 App Div 182, 185-187, *affd* 171 NY 25). If and when the business resumes operations, the insurer's obligation to pay net income benefits terminates (*see Royal Indem. Co. v Retail Brand Alliance, Inc.*, 33 AD3d 392, 393, *lv denied* 8 NY3d 813, 11 NY3d 705). However, if the business does not resume operations, the insured is entitled to business interruption coverage for the period of time it would have reasonably taken to resume operations (*see Children's Place Retail Stores, Inc. v Federal Ins. Co.*, 37 AD3d 243), and the duration of that time period ordinarily constitutes an issue of fact (*see Maple Leaf Motor Lodge v Allstate Ins. Co.*, 53 AD2d 1045, 1046). Thus, an insured may receive payment of policy benefits for business interruption coverage and never resume operations without violating the terms and conditions of the policy (*see DiLeo v United States Fid. & Guar. Co.*, 109 Ill App 2d 28, 42-43, 248 NE2d 669, 676; *see also National Union Fire Ins. Co. v Scandia of Hialeah, Inc.*, 414 So 2d 533, 535). There is no requirement in the policy that the insured must resume operations in order to recover business interruption losses (*see B A Props., Inc. v Aetna Cas. & Sur. Co.*, 273 F Supp 2d 673, 685). Indeed, the claims analyst for the insurer testified at his deposition that business income loss payments made to an insured could be spent "on anything."

Plaintiffs' action against defendant arises from the failure to procure business interruption coverage limits in an amount consistent with the nature of the business, and its revenue, expense and net income performance history. Whether defendant was negligent in failing to do so is measured not by whether plaintiffs would have resumed operations if timely paid the full but allegedly insufficient limits after each of the first two incidents. Instead, it is measured by the amount of plaintiffs' business income losses when compared to the policy limits determined and procured by defendant. Thus, I conclude that whether plaintiffs actually resumed operations is irrelevant to the proximate cause analysis. As the movant seeking summary judgment dismissing the amended complaint, defendant had to establish that the policy limits were sufficient to cover the amount of plaintiffs' business income losses during the relevant policy periods (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendant did not meet that burden and thus is not entitled to summary judgment.

Moreover, in my view the record is confusing and inconclusive with respect to the amount of plaintiffs' business interruption losses for each incident. However, the record does reflect that, with respect to the second incident, plaintiffs' claimed business income loss was the sum of $449,724. Obviously, the disparity between that loss and the $75,000 policy limit would provide the necessary proximate cause for an award of damages with respect to the second incident in the event that plaintiffs were successful in convincing the trier of fact that the aforementioned "special relationship"

existed and that defendant was negligent.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

395

CA 11-00949

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

ROBERT K. MONETTE AND SHARON M. MONETTE,
PLAINTIFFS-RESPONDENTS,

V ORDER

CHRISTINA L. TRUMMER, DAVID LEEDERMAN, JESSE L. BALL, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

BROWN & KELLY, LLP, BUFFALO (DONALD EPPERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DWYER, BLACK & LYLE, LLP, OLEAN (JEFFREY A. BLACK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered December 13, 2010 in a personal injury action. The order granted that part of the motion of plaintiffs for partial summary judgment on the issue of serious injury.

It is hereby ORDERED that said appeal is unanimously dismissed without costs. (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

396

CA 11-00950

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

ROBERT K. MONETTE AND SHARON M. MONETTE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CHRISTINA L. TRUMMER, DAVID LEEDERMAN, JESSE L. BALL, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

BROWN & KELLY, LLP, BUFFALO (DONALD EPPERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DWYER, BLACK & LYLE, LLP, OLEAN (JEFFREY A. BLACK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a resettled order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered March 30, 2011 in a personal injury action. The resettled order granted that part of the motion of plaintiffs for partial summary judgment on the issue of serious injury.

It is hereby ORDERED that the resettled order so appealed from is unanimously reversed on the law without costs and the motion is denied insofar as plaintiffs sought summary judgment on the issue whether plaintiff Robert K. Monette sustained a serious injury under the significant limitation of use category within the meaning of Insurance Law § 5102 (d).

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Robert K. Monette (plaintiff) when a parked vehicle in which he was sitting was rear-ended by a vehicle that the owner, Jesse L. Ball, had permitted David Leederman to operate, and which was operated during the subject accident by Christina L. Trummer (collectively, defendants). Plaintiffs moved for, inter alia, partial summary judgment on the issues of "liability" and serious injury. We note at the outset, however, that this Court has determined that the issue of liability "includes the issue of 'serious injury' " (*Ruzycki v Baker*, 301 AD2d 48, 52). Although Supreme Court in an earlier order, from which no appeal was taken, purported to grant the motion insofar as it sought partial summary judgment on the issue of "liability" with respect to Trummer and Jesse Ball but reserved decision on the issue whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d), the court actually granted the motion only insofar as it sought partial summary judgment

on the issue of negligence rather than liability (*see id.*). Defendants now appeal from a resettled order granting that part of the motion for partial summary judgment on the issue of serious injury. We further note at the outset that, although plaintiffs alleged several categories of serious injury in their bill of particulars, their appellate brief alleges only that plaintiff sustained a significant limitation of use of his cervical spine. Plaintiffs therefore are deemed to have abandoned their contentions with respect to the remaining categories of serious injury (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

In support of that part of their motion on the issue of serious injury, plaintiffs relied solely upon reports in which their medical expert noted certain limitations in plaintiff's range of cervical motion, and opined that plaintiff sustained only a moderate orthopedic disability and was able to perform his activities of daily living without limitations. Thus, plaintiffs failed to meet their initial burden on the issue of serious injury (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff's "own [physician] concluded that [he] had only a minor limitation of movement in [his] neck and back[,] and . . . a 'minor, mild or slight limitation of use [is] classified as insignificant within the meaning of the [no-fault] statute' " (*Gaddy v Eyler*, 79 NY2d 955, 957; *see Ray v Ficchi*, 178 AD2d 988, 989, *lv denied* 80 NY2d 958; *see generally Travis v Batchi*, 18 NY3d 208, 219-220). Inasmuch as plaintiffs' expert made "no meaningful comparison so as to differentiate serious injuries from mild or moderate ones, [his affidavit] was thus insufficient to establish a significant limitation of use" (*Peterson v Cellery*, 93 AD3d 911, 913).

In any event, even assuming, arguendo, that plaintiffs met their burden on the issue of serious injury, we conclude that "defendants raised an issue of fact . . . by submitting the report of the physician who examined plaintiff on their behalf, wherein he concluded that plaintiff's 'complaints' resulted from a preexisting condition and were not causally related to the accident" (*Covert v Samuel*, 53 AD3d 1147, 1149; *see Schwartz v Vukson*, 67 AD3d 1398, 1400; *see generally Carrasco v Mendez*, 4 NY3d 566, 579).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

445

CAF 11-01173

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

IN THE MATTER OF HALEY M.T.,
RESPONDENT-APPELLANT.
---------- MEMORANDUM AND ORDER
PENN YAN CENTRAL SCHOOL DISTRICT,
PETITIONER-RESPONDENT.

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS, FOR RESPONDENT-APPELLANT.

DIANNE S. LOVEJOY, PENN YAN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered March 15, 2011 in a proceeding pursuant to Family Court Act article 7. The order, among other things, adjudged that respondent is a person in need of supervision.

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

Memorandum: On appeal from an order adjudicating her a person in need of supervision (PINS) and placing her in the custody of the Commissioner of Social Services for a period of one year, respondent contends that Family Court failed to advise her of her right to remain silent at the dispositional hearing (*see* Family Ct Act § 741 [a]), that the order of fact-finding and disposition fails to comply with section 754 (2), and that placement is not an appropriate disposition. Those contentions are moot because the placement order expired on March 7, 2012 (*see Matter of Todd B.*, 4 AD3d 650; *Matter of Shannon R.*, 278 AD2d 939), "and this matter does not fall within the exception[] to the mootness doctrine" (*Shannon R.*, 278 AD2d 939). Despite the expiration of respondent's placement, however, her challenge to the underlying PINS adjudication is not moot (*see Matter of Sonya LL.*, 53 AD3d 727, 728).

Respondent further contends that the order should be reversed and the petition dismissed because the court failed to comply with Family Court Act § 742 (b), which "require[s] the Court to review the pre-petition services" at the initial appearance (Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, at 107; *see also* § 735). That contention is raised for the first time on appeal, and thus respondent failed to preserve it for our review (*see generally Matter of Alexander C.*, 83 AD3d 1058, 1059; *Matter of Vanessa S.*, 20 AD3d 924). In any event, respondent's contention lacks merit. The petition and documents attached thereto establish that petitioner

complied with the substantive statutory requirements of Family Court Act §§ 732 and 735 (*see Matter of Mercedes M.M.*, 52 AD3d 1210, 1211; *cf. Matter of Nicholas R.Y.*, 91 AD3d 1321, 1322; *Matter of James L.* [appeal No. 2], 74 AD3d 1775, 1775-1776; *Matter of Rajan M.*, 35 AD3d 863, 864-865), and the court's comments at the initial appearance demonstrate that the court had reviewed petitioner's efforts to divert this case pursuant to section 735. Contrary to respondent's further contention, she received meaningful representation (*see Matter of Elijah D.*, 74 AD3d 1846, 1847; *Matter of Grabiel V.*, 59 AD3d 1132, 1133, *lv denied* 12 NY3d 711).

Respondent failed to take an appeal from the order settling the record, and her contentions with respect to that order therefore are not properly before us (*see Oubre v Carpenter*, 241 AD2d 964, 965).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

467

CA 11-02251

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

LINDA LEE SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RONALD B. REEVES, JR., NOLA M. REEVES, PHARMALOGIC SYRACUSE, LLC, AND WENDY LADUE, DEFENDANTS-APPELLANTS.

MACKENZIE HUGHES LLP, SYRACUSE (JONATHAN H. BARD OF COUNSEL), FOR DEFENDANTS-APPELLANTS RONALD B. REEVES, JR. AND NOLA M. REEVES.

LAW OFFICE OF SUSAN B. OWENS, WHITE PLAINS (PAUL J. CATONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS PHARMALOGIC SYRACUSE, LLC AND WENDY LADUE.

GREENE & REID, PLLC, SYRACUSE (JEFFREY G. POMEROY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered June 20, 2011. The order denied the motion of defendants Ronald B. Reeves, Jr. and Nola M. Reeves and the cross motion of defendants Pharmalogic Syracuse, LLC and Wendy Ladue for summary judgment dismissing the complaints.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle in which she was a passenger, owned by defendant Nola M. Reeves and operated by defendant Ronald B. Reeves, Jr., collided at an intersection with a vehicle owned by defendant Pharmalogic Syracuse, LLC and operated by defendant Wendy Ladue. Defendants moved and cross-moved for summary judgment dismissing the respective complaints against them on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and Supreme Court denied the motion and cross motion. On appeal, plaintiff's brief limits the categories under which she claims a serious injury to the permanent consequential limitation of use and significant limitation of use categories of serious injury, and we therefore deem abandoned her prior claims that she sustained a serious injury under other categories as well (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We reverse.

Plaintiff alleges that she sustained a traumatic brain injury in

the accident that has resulted in symptoms of postconcussion syndrome and a "chorea-like" movement disorder of her distal extremities. We note that we have long recognized the subjective nature of complaints associated with a claim of postconcussion syndrome (*see Costa v Billingsley*, 127 AD2d 990, 991). Defendants contend that the fact that plaintiff did not seek or receive any medical treatment for 10 months following the accident renders any finding on the issue of causation speculative. We agree (*cf. Perl v Meher*, 18 NY3d 208, 217-218). We reject plaintiff's characterization of that void in medical treatment, with which the court agreed, as a "gap in treatment" (*see generally Pommells v Perez*, 4 NY3d 566, 574). Indeed, rather than a "gap in treatment," plaintiff received no treatment contemporaneous with the accident and the injuries she claims to have sustained therein (*cf. Perl*, 18 NY3d at 217-218). Further, the record establishes that none of the objective imaging tests and scans performed on plaintiff's head and brain has revealed a medically determined injury (*see Alcombrack v Swarts*, 49 AD3d 1170, 1172-1173). Defendants submitted the affirmation and report of the physician who examined plaintiff at defendants' request, who stated that the only objective test for delayed diagnosis of postconcussion syndrome is a Cerebral SPECT scan. It is undisputed that plaintiff's SPECT scan was within "normal limits." The physician further opined that, based upon the lack of medical treatment for 10 months following the accident, the negative SPECT scan and the lack of objective findings, plaintiff's neurological symptoms, including those described by some providers in the medical records as "post concussional Chorea," were not caused by the accident. In addition, defendants submitted the affirmation of another physician who examined plaintiff and concluded that, based upon the normal findings in the SPECT and MRI scans, "a post traumatic brain injury has been ruled out." Thus, defendants met their initial burden on the motion and cross motion by establishing the "absence of admissible [objective] evidence that plaintiff suffered a serious injury . . . when the accident occurred" (*Perez v Rodriguez*, 25 AD3d 506, 509).

The affirmation of plaintiff's treating physician, who examined plaintiff 10 months after the accident, is insufficient to raise an issue of fact because it fails to address the absence of objective findings on the CT, SPECT and MRI scans, relies upon subjective complaints of tenderness and headaches (*see Alcombrack*, 49 AD3d at 1171-1172), and does not contain an adequate assessment of how the alleged "chorea-like" injuries were related to the accident—particularly in light of the complete absence of any contemporaneous or objective findings on the various scans of plaintiff's brain (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351; *Smith v Besanceney*, 61 AD3d 1336, 1337-1338; *Fitzmaurice v Chase*, 288 AD2d 651, 653-654; *Kristel v Mitchell*, 270 AD2d 598, 599). Thus, the opinion of plaintiff's treating physician that her neurologic condition is causally related to the accident is speculative and conclusory and therefore inadequate to raise an issue of fact (*see Franchini v Palmieri*, 307 AD2d 1056, 1058, *affd* 1 NY3d 536; *Clark v Basco*, 83 AD3d 1136, 1138-1139). Similarly, the affirmation of another physician submitted by plaintiff fails to address the absence of objective findings on the SPECT, CT and MRI

scans and does not contain an adequate assessment of how the alleged "chorea-like" injuries were related to the accident and is therefore insufficient to raise an issue of fact.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

486

KA 10-02035

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JABARI H. SPENCER, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 24, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that County Court erred in admitting in evidence the recording of the 911 call made by one of the victims following the robbery. We agree. The 911 recording constitutes hearsay (*see People v Buie*, 86 NY2d 501, 505), and none of the exceptions to the rule against hearsay apply herein. The 911 recording is not admissible under the present sense impression exception because there is nothing in the record establishing that the victim's "statement describes or explains an event or condition and was 'made while the [victim] was perceiving the event or condition, *or immediately thereafter*' " (*People v Vasquez*, 88 NY2d 561, 575, quoting *People v Brown*, 80 NY2d 729, 732). Specifically, it is not clear when the 911 call was made relative to when the robbery ended. Moreover, the victim's statements on the 911 recording also included references to other events, i.e., one that occurred at least one day before the robbery and another that occurred a week prior to the robbery. Thus, those statements clearly do not reflect a present sense impression (*see id.*).

Further, the 911 recording is not admissible as an excited utterance because the victim's statements clearly indicate that he had time to reflect on what had occurred prior to describing the robbery and who had committed the robbery. "Excited utterances 'are the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative[,]' preventing the opportunity for deliberation and fabrication" (*People v Carroll*, 95 NY2d 375, 385,

quoting *Vasquez*, 88 NY2d at 574; *see People v Edwards*, 47 NY2d 493, 496-497). Given that the 911 recording constituted hearsay, it was error to admit it in evidence and such admission constituted improper bolstering of the testimony of the victim who made the 911 call (*see generally Buie*, 86 NY2d at 510; *People v McDaniel*, 81 NY2d 10, 18).

Nevertheless, we conclude that the court's error in admitting in evidence the 911 recording is harmless because the "proof of [defendant's] guilt was overwhelming . . . and . . . there was no significant probability that the jury would have acquitted [him] had the proscribed evidence not been introduced" (*People v Kello*, 96 NY2d 740, 744; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Two of the three victims of the robbery were acquainted with defendant, and they both recognized him almost immediately as the perpetrator, despite the fact that his face was covered. Moreover, those witnesses were consistent in their respective versions of the facts regarding the robbery and were unequivocal in their identification of defendant as the perpetrator.

The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that none requires reversal.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

491

CAF 11-01921

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

IN THE MATTER OF KELLY A. FENDICK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS J. FENDICK, RESPONDENT-APPELLANT.

BOUVIER PARTNERSHIP, LLP, EAST AURORA (ROGER T. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

REID A. WHITING, LEROY, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wyoming County (Eric R. Adams, A.J.), entered November 22, 2010 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the objections in part and vacating that part of the order of the Support Magistrate providing that respondent's pro rata share of the basic child support obligation is $410.69 per week and the first ordering paragraph thereof providing that respondent shall pay to petitioner $374.06 per week for the basic child support payment, exclusive of health care expenses, and substituting therefor a provision that respondent's pro rata share of the basic child support obligation is $357.26 per week and a provision that respondent shall pay to petitioner $320.63 per week for the basic child support payment, exclusive of health care expenses, and vacating the fifth ordering paragraph of the order of the Support Magistrate providing that respondent shall pay to petitioner past child support in the amount of $10,853.95, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Wyoming County, for further proceedings in accordance with the following Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent father appeals from an order denying his objections to the order of the Support Magistrate that, inter alia, determined that each party receives $1,600 per month, i.e., $19,200 per year, in rental income and that petitioner mother receives $17,400 per year in investment income. Although "[g]reat deference should be given to the determination of the Support Magistrate" (*Matter of Yamonaco v Fey*, 91 AD3d 1322, 1323; *see Matter of Manocchio v Manocchio*, 16 AD3d 1126, 1128), we nevertheless agree with the father that the Support Magistrate erred in determining the amounts of rental and investment income and that Family Court therefore should have granted the father's objections with respect to those parts of the Support

Magistrate's order.

In their testimony at the hearing before the Support Magistrate, the parties agreed that they split monthly rental income in the amount of $1,600, such that each party receives $800 per month. Thus, the Support Magistrate plainly misconstrued the testimony in finding that the parties each receive rental income in the amount of $1,600 per month, and the calculations of the parties' adjusted gross income should be amended to reflect that each party in fact receives $800 per month, i.e., $9,600 per year, in rental income.

We further conclude that the Support Magistrate erred in finding that the mother receives investment income in the amount of $17,400 per year. That finding was based on the fact that the mother receives monthly loan payments of principal and interest from two individuals to whom she made personal loans. Contrary to the Support Magistrate's finding, however, only the interest portion of those monthly payments, rather than the entire payments of principal plus interest, should have been considered "income" for purposes of calculating child support, inasmuch as the principal amounts of those loans were "sums expended in connection with such investment" (Family Ct Act § 413 [1] [b] [5] [ii]; *cf. Matter of Mitchell v Mitchell*, 264 AD2d 535, 539, *lv denied* 94 NY2d 754). The mother's interest income on those two loans, as reflected in her tax return, was $2,779 per year, and thus the calculations of the parties' adjusted gross income should be amended to reflect that amount.

Based on the revised calculations of the parties' adjusted gross income in light of those errors, we conclude that the father's pro rata share of the child support obligation is 62%. We therefore modify the order by granting the objections in part and vacating that part of the order of the Support Magistrate providing that the father's pro rata share of the basic child support obligation is $410.69 per week and the first ordering paragraph thereof providing that the father shall pay to the mother $374.06 per week for the basic child support payment, exclusive of health care expenses, and substituting therefor a provision that the father's pro rata share of the basic child support obligation is $357.26 per week and a provision that the father shall pay to the mother $320.63 per week for the basic child support payment, exclusive of health care expenses. We further modify the order by vacating the fifth ordering paragraph of the order of the Support Magistrate providing that the father shall pay to the mother past child support in the amount of $10,853.95, and we remit the matter to Family Court for further proceedings to recalculate the amount of past child support. Finally, we reject the mother's contention that there are alternative grounds for sustaining the father's support obligation calculated by the Support Magistrate (*see generally Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

501

CA 11-01602

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

IN THE MATTER OF THE INTERIM ACCOUNTING OF LAMISE KADAH CARANO, AS EXECUTOR, AND THE FINAL ACCOUNTING OF WARREN W. BADER, PUBLIC ADMINISTRATOR, AS ADMINISTRATOR C.T.A. OF THE ESTATE OF ANN M. KADAH, ALSO KNOWN AS ANN KADAH, DECEASED. MEMORANDUM AND ORDER

LAMISE KADAH CARANO, PETITIONER-APPELLANT;

RONALD B. KADAH, OBJECTANT-RESPONDENT.

WHITTEMORE LAW FIRM, RENO, NEVADA (F. HARVEY WHITTEMORE, OF THE NEVADA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE, FOR PETITIONER-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR OBJECTANT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Onondaga County (John J. Elliott, S.), entered April 12, 2011. The order, inter alia, granted the motion of objectant for summary judgment on various objections made with respect to petitioner's intermediate accountings, imposed surcharges on petitioner, and ordered petitioner to reimburse objectant $35,000 for counsel fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying objectant's motion for summary judgment with respect to objections 13, 14, 15, 17, 18, 26, 30, 31, and 32 and supplemental objections 5, 14, 15, 16, 29 and 39, and vacating the sixth ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: Petitioner, the former executor of decedent's estate, appeals from an order that, inter alia, granted the motion of objectant for summary judgment on various objections made with respect to petitioner's intermediate accountings, surcharged petitioner based on those objections, ordered petitioner to reimburse objectant $35,000 for counsel fees incurred by him, and imposed statutory interest on the surcharges. At the outset, we reject petitioner's request to take judicial notice of the documents attached as an appendix to her appellate brief. Although those documents are from prior proceedings relating to this estate, they were not submitted to Surrogate's Court in connection with the order on appeal (*see* 22 NYCRR 1000.4 [a] [2]), nor are they part of the stipulated record on appeal (*see* 22 NYCRR 1000.4 [a] [1]).

As limited by her brief, petitioner contends that the Surrogate erred in granting objectant's motion for summary judgment with respect to specified objections and supplemental objections. We reject petitioner's contention that the Surrogate erred in ordering her to pay objectant $35,000 for counsel fees incurred by him. We otherwise agree with petitioner's contentions on appeal, however, and we therefore modify the order accordingly.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case . . . [, and the f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). With respect to that part of objectant's motion asserting that petitioner incurred excess counsel fees in the amount of $72,994.28, we conclude that objectant failed to meet his initial burden of establishing that any of those fees were excessive or otherwise unwarranted. In support of the motion, objectant merely listed the total legal fees paid or expected to be paid to each law firm that provided services in this estate proceeding, including those fees incurred or expected to be incurred after petitioner was replaced as executor. Objectant then summarily suggested a lower total amount for such fees, and requested that all fees in excess of that amount be surcharged to petitioner. We conclude that objectant thereby failed to establish his entitlement to judgment on his objections and supplemental objections asserting that petitioner had incurred excessive legal fees, i.e., objections 13 through 15 and 30 through 32, as well as supplemental objections 14 through 16 and 39.

We further agree with petitioner that the Surrogate erred in granting objectant's motion with respect to objection 26 and supplemental objection 29 and surcharging petitioner for estate tax penalties and interest incurred by the estate arising from the late filing of estate tax returns and the late payment of estate taxes. While objectant met his initial burden with respect thereto, petitioner raised an issue of fact by, inter alia, presenting evidence that she relied on the advice of counsel with respect to estate tax matters and that objectant refused to consent to a business plan intended to reduce the estate's tax liability (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Petitioner also raised an issue of fact whether certain paintings at Daedalus Drive in Cicero are the property of the estate, and thus the Surrogate erred in granting objectant's motion with respect to supplemental objection 5, concluding instead that those paintings are the property of a specified corporation. In addition, the Surrogate erred in granting objectant's motion with respect to objections 17 and 18, inasmuch as petitioner raised an issue of fact whether the expenses for a printer and office supplies that she incurred while she served as executor were warranted.

Finally, although we reject petitioner's contention that the Surrogate imposed a double penalty by ordering her to pay a portion of

the counsel fees incurred by objectant in the fifth ordering paragraph, we agree with her that the Surrogate's award of statutory interest on the surcharges constituted an unfair penalty (*see Matter of Acker*, 128 AD2d 867, 867-868). We therefore vacate the sixth ordering paragraph.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

548

CA 11-02378

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

PENNY BOYEA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES J. BENZ, III, FEDEX GROUND PACKAGE SYSTEM, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

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

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

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 2, 2011 in a personal injury action. The order denied in part the motion of defendants James J. Benz, III and FedEx Ground Package System, Inc. to compel plaintiff to provide authorizations for the release of certain records.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking all records relating to plaintiff's pre-accident applications for Social Security Disability benefits and directing plaintiff to submit those records to Supreme Court, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle in which she was a passenger was struck by a vehicle operated by defendant James J. Benz, III and leased by defendant FedEx Ground Package System, Inc. (FedEx). Plaintiff alleged that, as a result of the accident, she sustained permanent injuries to, inter alia, her neck, back, shoulders, arms, legs, buttocks and chest. In her bill of particulars, plaintiff further alleged that her injuries included headaches, dizziness, lightheadedness, heart palpitations, chest pain, anxiety, lack of concentration, vivid nightmares, excessive nervousness while in a motor vehicle, "emotional upset and shock to the nerves and nervous system," emotional anguish and suffering, limited ability to perform normal daily functions and social activities, "inability and limited ability to engage in life's enjoyments and loss of employment and career." Plaintiff sought damages for, inter alia, "her inability to lead a normal life, permanency, pain and suffering[and] future lost earnings."

Plaintiff provided authorizations for defendants to obtain her medical records, but those authorizations were limited to post-accident treatment of her neck and back. Benz and FedEx (collectively, defendants) moved to compel plaintiff to provide authorizations for post-accident medical records relating to other treatment, as well as pre-accident medical records. In response to defendants' motion, plaintiff agreed to provide defendants with authorizations permitting them to obtain her pre-accident medical records "for the body parts at issue," i.e., her "neck, back, shoulders, arms, legs, buttocks, headaches and chest." During the course of discovery, it became apparent that plaintiff suffered from a preexisting mental illness. In particular, a psychotherapist's notes from approximately two years prior to the accident indicate that plaintiff had not worked in two years and that she was applying for Social Security Disability (SSD) benefits. Defendants thus sought plaintiff's authorization for records from the Social Security Administration concerning any prior applications for SSD benefits.

At oral argument of the motion, plaintiff withdrew her claim for emotional distress as a result of the accident. Supreme Court granted the motion in part. The court, inter alia, ordered plaintiff to authorize the release of all pre-accident medical records relating to her "neck, back, shoulders, arms, legs, buttocks, headaches and chest," but it denied that part of defendants' motion seeking to compel plaintiff to authorize the release of records relating to any pre-accident applications for SSD benefits. The court, however, ordered plaintiff to provide defendants with the administrative determinations of all pre-accident applications for SSD benefits, and it ordered that all records relating to plaintiff's post-accident applications for SSD benefits be submitted to the court for in camera review.

We agree with defendants that the court abused its discretion in denying that part of their motion seeking to compel the disclosure of all records relating to plaintiff's pre-accident applications for SSD benefits. "The determinative factor is whether the records sought to be discovered are material and necessary in defense of the action" (*Bozek v Derkatz*, 55 AD3d 1311, 1312 [internal quotation marks omitted]; *see* CPLR 3101 [a]). Although plaintiff is no longer asserting a separate claim for emotional distress as a result of the accident, many of her broad allegations of injury, including her alleged limited ability to perform normal daily functions and social activities, as well as her alleged "inability and limited ability to engage in life's enjoyments and loss of employment and career," could have resulted from physical injuries sustained in the accident, her preexisting mental condition or some combination thereof (*see Tirado v Koritz*, 77 AD3d 1368, 1370; *see generally Geraci v National Fuel Gas Distrib. Corp.*, 255 AD2d 945, 946; *Kenyon v Caruso Dev. Co.*, 167 AD2d 966, 966-967). Further, plaintiff's previous allegation that she was unable to work may be relevant to her current claim of "loss of employment and career" (*see generally Kenyon*, 167 AD2d at 967). Finally, plaintiff's preexisting mental condition may be relevant insofar as she seeks damages for, inter alia, "her inability to lead a normal life, permanency, pain and suffering[and] future lost

earnings" (*see Vanalst v City of New York*, 276 AD2d 789; *Geraci*, 255 AD2d at 946).

We therefore modify the order by granting that part of defendants' motion seeking all records relating to plaintiff's pre-accident applications for SSD benefits and directing plaintiff to submit those records to the court, and we remit the matter to Supreme Court for an in camera review of those records to determine whether they are material and related to any physical or mental condition placed in issue by plaintiff (*see Goetchius v Spavento*, 84 AD3d 1712, 1713; *Tirado*, 77 AD3d at 1370; *Tabone v Lee*, 59 AD3d 1021, 1022-1023).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

587

CA 11-02517

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

HUGO RAFAEL RAMIREZ GABRIEL, ALSO KNOWN AS CESAR MENDEZ, ET AL., PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

JOHNSTON'S L.P. GAS SERVICE, INC., DEFENDANT-RESPONDENT-APPELLANT, ET AL., DEFENDANTS. (ACTION NO. 1.)

HUGO RAFAEL RAMIREZ GABRIEL, ALSO KNOWN AS CESAR MENDEZ, ET AL., PLAINTIFFS-APPELLANTS,

V

ANTHONY A. DEMARCO, ANTHONY W. DEMARCO, ANTHONY DEMARCO & SONS, INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (ACTION NO. 2.)

HUGO RAFAEL RAMIREZ GABRIEL, ALSO KNOWN AS CESAR MENDEZ, ET AL., PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

RAYTHEON COMPANY, DEFENDANT-RESPONDENT-APPELLANT. (ACTION NO. 3.)

OPINION AND ORDER

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

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT JOHNSTON'S L.P. GAS SERVICE, INC.

LAW OFFICE OF FRANCIS E. MALONEY, JR., SYRACUSE (FRANCIS E. MALONEY, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT ANTHONY A. DEMARCO.

BOND, SCHOENECK & KING, PLLC, OSWEGO (SCOTT J. DELCONTE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT RAYTHEON COMPANY.

DAVIDSON & O'MARA, P.C., ELMIRA (THOMAS F. O'MARA OF COUNSEL), FOR DEFENDANT-RESPONDENT ANTHONY DEMARCO & SONS, INC.

Appeal and cross appeals from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered August 5, 2011 in a personal injury action. The order, inter alia, denied those parts of plaintiffs' motion for a protective order relating to the taking of certain depositions and trial testimony via video and denied, without prejudice, the cross motions of defendants Raytheon Company and Johnston's L.P. Gas Service, Inc. for dismissal of the claims of the majority of plaintiffs against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the third ordering paragraph concerning the depositions of plaintiffs and granting those parts of plaintiffs' motion for a protective order permitting the undeposed plaintiffs who have returned to Guatemala to be deposed in Guatemala via video conference and permitting the plaintiffs who have returned to Mexico and Guatemala to testify at trial by video and as modified the order is affirmed without costs.

Opinion by FAHEY, J.:

I

The primary issue on this appeal is whether Supreme Court erred in denying those parts of plaintiffs' motion for a protective order permitting certain plaintiffs who have not been deposed and have left the United States for Guatemala to be deposed in Guatemala via video conference and allowing those plaintiffs who have left the United States for either Mexico or Guatemala to testify at trial by video. We conclude that the court abused its discretion in denying those parts of plaintiffs' motion with respect to both the depositions and the trial testimony.

II

These consolidated actions had their genesis in an October 6, 2005 propane gas explosion at a farm camp in Schroeppel, New York that killed one migrant worker and injured nine others. Plaintiffs are the nine injured workers, six of whom are citizens of Guatemala and three of whom are citizens of Mexico. All plaintiffs were in the United States as illegal, undocumented farm workers at the time of the explosion, and they were employed by defendant Anthony DeMarco & Sons, Inc. (DeMarco, Inc.). Defendants Anthony A. DeMarco, Anthony W. DeMarco and DeMarco, Inc. (collectively, DeMarco defendants) provided living quarters for plaintiffs and owned the building where the explosion occurred. Defendant Raytheon Company (Raytheon) allegedly manufactured a stove involved in the explosion, and defendant Johnston's L.P. Gas Service, Inc. (Johnston) allegedly filled some propane tanks at the explosion site.

After the explosion, plaintiffs commenced these actions seeking

damages for injuries they sustained in that accident, and the matter proceeded to the point that seven of the nine plaintiffs had been deposed by all defendants. Plaintiff Hugo Rafael Ramirez Gabriel, also known as Cesar Mendez (Mendez), had been deposed only by Johnston, and plaintiff Lucio Jimenez Gabriel, also known as Marco Antonio Jimenez (Gabriel), remained undeposed.

The foregoing depositions followed a round of discovery motion practice undertaken by plaintiffs and designed to compel completion of the depositions and medical examinations of plaintiffs by November 2008. The impetus for that motion practice was obvious: plaintiffs sought to go on record before leaving the United States, either voluntarily or otherwise. By order entered August 8, 2008, the court directed that the depositions of the seven plaintiffs who then remained in the United States were to take place during the first two weeks of November 2008, and that any medical examinations of those plaintiffs undertaken on behalf of defendants were to occur by November 30, 2008, with the caveat that the examination of plaintiff Ledis Vasquez Lopez (Lopez) was to occur by November 17, 2008. At that time, Mendez and Gabriel had returned to Guatemala, and Lopez had been granted a voluntary departure by the United States Immigration Court that required him to leave the country by November 19, 2008.

III

By February 2011, only three of the nine plaintiffs remained in the United States. Five of the plaintiffs, i.e., Gabriel, Mendez, Lopez, Ernesto Diaz Vasquez (Vasquez) and Alvaro Reynoso Jimenez, also known as Rolando Perez (Jimenez), had returned to Guatemala, and one plaintiff, Vidal Zacarias Angel, also known as Jose Manuel Perez (Angel), had returned to Mexico. The remaining three plaintiffs, Eusemo Bravo Lopez, also known as Hugo Roblero (Eusemo), Benai Salas Mejias, also known as Rogelio Gonzalez (Mejias), and Ediberto Ramirez Perez (Perez) remained in the United States. Eusemo and Mejias, however, expected to leave the United States shortly, and only Perez planned to stay in the country indefinitely.

On February 15, 2011, plaintiffs moved, inter alia, for a protective order permitting those plaintiffs who had returned to Guatemala and had not been deposed by all defendants to be deposed via video conference. Plaintiffs also sought a protective order permitting those plaintiffs who had returned to Mexico and Guatemala to have their trial testimony taken by video conference. In support of the motion, plaintiffs' attorney in these actions explained the immigration status of each plaintiff, noted that plaintiffs would assume the cost of video conferencing and indicated that video conferencing was feasible in both Guatemala and Mexico. Moreover, plaintiffs' immigration attorney submitted an affidavit in which she described her unsuccessful attempts to obtain visas for Gabriel and Mendez and explained that such applications were expensive—each application came with a $140 fee and resulted in $500 in transportation expenses—and arduous in view of the 16-hour round trip from the village in which those plaintiffs reside to the United States Embassy in Guatemala City. The letters denying the visa applications

for Gabriel and Mendez submitted with the affidavit of plaintiffs' immigration attorney establish that the subject applications were denied because those plaintiffs were "foreigners who . . . remained illegally in the United States for one year and then [sought] re-admittance within the following 10 years from the date they left the United States" and who had "[e]nter[ed] or [tried] to enter the United States illegally after having been illegally present for a period of more than one year." Plaintiffs' immigration attorney further noted that any visa applications made by the other plaintiffs would be denied for the same reasons.

Raytheon responded by cross-moving for an order dismissing the complaint with respect to Gabriel and Mendez in the event that they did not appear in New York for depositions. Raytheon also sought an order dismissing the complaint with respect to those plaintiffs who had left the country by that time, i.e., Gabriel, Mendez, Lopez, Vasquez, Jimenez and Angel, in the event that "they will not be present for the trial." In support of its cross motion, Raytheon contended that the taking of deposition testimony by video conference was inappropriate because plaintiffs had not demonstrated that appearing for depositions in New York would cause an undue hardship, and because any hardship was self-imposed by virtue of plaintiffs' illegal entry into the United States. Raytheon alleged that it would suffer prejudice from the taking of depositions by video and that such prejudice included potential problems with technology, its ability to evaluate witness credibility, language barriers, potential perjury, witness identification and assessment of injuries. Likewise, Raytheon alleged that it would suffer prejudice from the use of videotaped testimony at trial, contending that such evidence would impair the jury's assessment of witness credibility and plaintiffs' injuries, and would preclude defendants from calling plaintiffs as rebuttal witnesses.

Similar to Raytheon, Johnston cross-moved for, inter alia, an order compelling Gabriel and Mendez to appear for depositions and providing that "any plaintiff . . . not present to testify . . . [at] trial shall have [his] complaint dismissed." In support of its cross motion, Johnston contended that plaintiffs' inability to attend the depositions and trial was a "consequence of their illegal activity" and that defendants would be prejudiced by the taking of depositions through video conference inasmuch as they would be deprived of "an opportunity to conduct . . . in-person deposition[s]" of Gabriel and Mendez. With respect to the issue whether to permit the use of video testimony at trial, Johnston contended that it would be a "logistical nightmare" to orchestrate such testimony and that such testimony could impede Johnston's ability to establish "grave" injuries, a required element of Johnston's claims against plaintiffs' employer, DeMarco, Inc. (*see generally* Workers' Compensation Law § 11).

The DeMarco defendants opposed plaintiffs' motion by way of an affidavit in which their attorney contended that plaintiffs should not be permitted to testify at trial by video conference because such practice is unauthorized by case law and because of the difficulty of locating an interpreter and enforcing the witness oaths. On the issue

whether depositions should be conducted by video conference, the attorney for the DeMarco defendants contended that plaintiffs "failed to show that hardship exists," and he suggested that plaintiffs' absence was "largely self-imposed" and related to plaintiffs' conduct.

In reply, plaintiffs' attorney attempted to explain the circumstances giving rise to the decision of most of the plaintiffs to return to Central America. In sum and substance, plaintiffs have on average a third-grade education, speak very little English and generally left the United States as a direct result of the medical and financial hardships imposed by the accident. By the time plaintiffs tendered their reply, Eusemo was subject to a fate similar to that of Lopez inasmuch as Eusemo had been ordered by the United States Immigration Court to leave the United States by August 31, 2011.

The exhibits attached to the reply affirmation of plaintiffs' attorney consist in part of excerpts from the depositions of those plaintiffs who were deposed, which establish that those plaintiffs are ill-educated, illegal migrant workers from Central America and have families there. The subject exhibits also included the affidavits of Jimenez, Vasquez and Angel establishing that each of those plaintiffs had been severely injured in the accident, expected to receive workers' compensation settlements and sought to return to families that they had not seen in several years given their uninterrupted presence in the United States.

An affidavit of Lopez also annexed to the reply affidavit of plaintiffs' attorney established that Lopez, too, was seriously injured and separated from his family for many years given his continued presence in this country, but unlike the other affiants, he had been ordered to leave the United States by November 2008. In his affidavit, Mejias averred that he intended to return to Mexico to live more frugally on his workers' compensation settlement, and that he could neither work nor qualify for public assistance in the United States. Mejias, who was rendered a paraplegic as a result of the explosion, also indicated that he would be cared for by his family in Mexico and that he thought it unlikely that he would be granted a visa to re-enter the United States for trial given his uninterrupted presence here since at least the date of the accident. Plaintiffs' immigration attorney did not consider Mejias's case in the affidavit she offered in reply to the cross motions, but she noted therein that her requests for visa waivers for Gabriel and Mendez had been denied by the United States Embassy in Guatemala.

After receiving reply papers from Johnston and Raytheon reiterating their contentions that plaintiffs' hardship was of their own making and that those defendants would be prejudiced to the extent that the court permitted plaintiffs to testify by video, the court issued an order characterizing this matter as one "in which each of the plaintiffs for whom the protective order is sought entered the United States illegally and left the United States voluntarily, and who are presumptively unable to return to the United States as a result of their illegal initial entry." "Balancing the equities presented," the court set a trial date and, in the third ordering

paragraph, directed "[t]hat plaintiffs must return to the United States for depositions and independent medical examinations, if requested by defendants . . . [60] days prior to trial." The court also denied the cross motions without prejudice. Plaintiffs appeal, and Raytheon and Johnston cross-appeal.

IV

We begin with plaintiffs' appeal and note at the outset that plaintiffs have abandoned any contention with respect to the issue whether those plaintiffs who have left the United States must return to this country for medical examinations within 60 days of trial (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We also note what we perceive to be the nature of plaintiffs' contentions on appeal. At this point, only two plaintiffs—Gabriel and Mendez—have yet to be fully deposed. In our view, plaintiffs contend on appeal that the court should have permitted video depositions of all plaintiffs, i.e., initial depositions of Gabriel and Mendez and second video depositions of all plaintiffs to be used at trial.

A

We now turn to the merits and consider first the question whether the court should have permitted plaintiffs to give deposition testimony from Mexico and Guatemala. "As a general rule, a non-resident plaintiff who has invoked the jurisdiction of New York State by bringing suit in its courts must stand ready to be deposed in New York unless it is shown that undue hardship would result" (*Farrakhan v N.Y.P. Holdings*, 226 AD2d 133, 135-136; *see Gartner v Unified Windows, Doors & Siding, Inc.*, 68 AD3d 815, 815; *Rodriguez v Infinity Ins. Co.*, 283 AD2d 969, 970). Nevertheless,

> "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]).

Put differently, upon a showing of undue hardship, a court has the authority to issue a protective order requiring that a party's deposition be conducted outside of the country where the action was commenced (*see Doherty v City of New York*, 24 AD3d 275, 275-276; *Rogovin v Rogovin*, 3 AD3d 352, 353), and it may direct that a deposition must be conducted in a foreign country (*see Gartner*, 68 AD3d at 815-816; *Hoffman v Kraus*, 260 AD2d 435, 437).

We conclude that the court abused its discretion in denying that part of plaintiffs' motion for a protective order pursuant to CPLR 3103 (a) directing that the depositions of Gabriel and Mendez be

conducted by video conference (*see Yu Hui Chen v Chen Li Zhi*, 81 AD3d 818, 819; *Gartner*, 68 AD3d at 815-816; *Rogovin*, 3 AD3d at 353; *see generally Wygocki v Milford Plaza Hotel*, 38 AD3d 237, 237-238; *Hoffman*, 260 AD2d at 437). *Yu Hui Chen* is instructive. There, the Second Department reversed that part of an order denying the plaintiff's cross motion for a protective order pursuant to CPLR 3103 (a) directing that his deposition be conducted by remote electronic means. The Court stated that, "[w]hile depositions of parties to an action are generally held in the county where the action is pending . . ., if a party demonstrates that conducting his or her deposition in that county would cause undue hardship, the Supreme Court can order the deposition to be held elsewhere" (*Yu Hui Chen*, 81 AD3d at 818). The Court also concluded that the plaintiff therein "demonstrated that traveling from China to the United States for his deposition would cause undue hardship" (*id.* at 819).

Johnston minimizes the relevance of *Yu Hui Chen* in its respondent's brief by noting that "[n]o facts are provided" in the memorandum determining that case. Our review of the record in *Yu Hui Chen*, however, reveals that the plaintiff was injured in a workplace accident in April 2007 and commenced a Labor Law and common-law negligence action in July 2007 seeking damages for injuries he sustained in that accident. In approximately February 2008, the plaintiff was arrested by United States Immigration and Customs Enforcement officers and, from the time of his arrest, was detained at a government facility and precluded from testifying at either his Workers' Compensation Board hearing or at a deposition.

Without the knowledge of his attorney, the plaintiff in *Yu Hui Chen* was subsequently deported, apparently to China. After research and consultation with attorneys who practiced immigration law in both New York and China, the plaintiff's attorney reached the conclusion that to have the plaintiff return to the United States in the near future would be overly burdensome and at great financial cost, if not almost impossible. The plaintiff's attorney also noted that the deportation of plaintiff would preclude him from obtaining a visa to enter the United States until after 10 years from his date of departure. Moreover, the plaintiff submitted an affidavit confirming his deportation and indicating that he attempted to secure another visa to enter the United States to participate in a deposition but was told by attorneys in China that he could not do so. The plaintiff added that he could not anticipate when he would be able to return, but he knew that it would be difficult and beyond his financial means at that time.

The financial and legal impediments that the plaintiffs who are abroad in this case face in returning to this country are strikingly similar to those at issue in *Yu Hui Chen*. Plaintiffs are all impoverished laborers and, except for Perez and potentially Eusemo and Mejias, are either absolutely or likely without means of obtaining a visa to re-enter the country. Here, many plaintiffs left the United States for practical reasons, i.e., the desire to preserve the workers' compensation settlements that supported their existence and to visit family they had not seen in years. Such departures, however,

are hardly voluntary, and there is no indication that any plaintiff left to avoid examination before or at trial.

The cases on which defendants primarily rely, i.e., *Rodriguez v Infinity Ins. Co.* and *Bristol-Myers Squibb Co. v Yen-Shang B. Chen* ([appeal No. 2] 186 AD2d 999), do not compel a different result. In *Rodriguez* (283 AD2d at 970), the plaintiffs were seasonal farm workers from Mexico, and we determined that the "conclusory allegations of hardship" contained in an attorney affidavit failed to establish that the plaintiffs would suffer an undue hardship in coming to New York for depositions. Here, by contrast, the explanation of plaintiffs' hardship in returning to the United States was comprehensive. *Bristol-Myers Squibb Co.* ([appeal No. 2] 186 AD2d 999) involved a Taiwanese national who unsuccessfully sought to avoid appearing in Syracuse for a deposition on the ground that the 12,000-mile journey from Taiwan to Syracuse was unnecessary, inconvenient and expensive. We concluded that the defendant's burden was self-imposed because the defendant *chose* to travel back to Taiwan from Canada after receiving a deposition notice (*id.*), and *Bristol-Myers Squibb Co.* is distinguishable inasmuch as the plaintiffs in this matter neither had the financial means to remain in this country nor have the ability to return.

B

We next turn to the issue whether the testimony given at the depositions of plaintiffs taken abroad may be used at trial. Our review of that question begins with CPLR 3117 (a) (3), which provides in relevant part that

> "the deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules, provided the court finds:
>
> . . .
>
> (iv) that the party offering the deposition has been unable to procure the attendance of the witness by diligent efforts; or
>
> (v) upon motion or notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court . . . ."

The determination whether to permit a party to introduce his or her own deposition into evidence at trial rests within the discretion of the court and "is reviewable only for 'clear abuse' " (*Dailey v Keith*, 306 AD2d 815, 815, *affd* 1 NY3d 586, quoting *Feldsberg v Nitschke*, 49 NY2d 636, 643, *rearg denied* 50 NY2d 1059; *see American Bank Note Corp. v Daniele*, 81 AD3d 500, 501). Taking into account

" 'the law's preference for oral testimony in open court' " (*Dailey*, 306 AD2d at 815, quoting Siegel, NY Prac § 358, at 587 [3d ed]), as well as all of the relevant facts and circumstances, we conclude that there was such an abuse of discretion here.

We further conclude that plaintiffs met the criteria set forth in CPLR 3117 (a) (3) (iv), i.e., that plaintiffs appear unable to attend the trial despite diligent efforts. Although only Gabriel and Mendez, i.e., the two plaintiffs who have not been fully deposed, sought and failed to obtain visas to enter the United States, the reasons underpinning the denial of the visa applications of those plaintiffs are equally germane to what would be the futile visa applications of the other plaintiffs who have left the United States. Vasquez, Jimenez, Lopez, Angel and Mejias have indicated that they have been in the United States illegally for several years. Eusemo, although not explicit about the length of his illegal stay, established that he had been ordered to leave the United States. In view of that evidence, it is extraordinarily unlikely that those plaintiffs will obtain visas, and there is little sense in those impoverished plaintiffs engaging in a futile and, by their standards, onerously expensive visa application process (*see generally Yu Hui Chen*, 81 AD3d at 818-819).

We also conclude that plaintiffs met the criteria set forth in CPLR 3117 (a) (3) (v), i.e., that exceptional circumstances exist that make the use of plaintiffs' depositions in their case-in-chief at trial desirable. Plaintiffs are all impoverished migrant workers who were severely injured in the accident. Except for Perez, and potentially Eusemo and Mejias, each plaintiff has left the country with no reasonable hope of returning for trial. On the face of this record, the absence of plaintiffs has nothing to do with evading confrontation by defendants. Rather, Lopez was expelled from the country, and the remaining plaintiffs, except for Perez and potentially Eusemo and Mejias, left to preserve their workers' compensation settlements and reunite with the families they had not seen in years.

Moreover, the equities with respect to this issue weigh in plaintiffs' favor. Under these circumstances, to deprive plaintiffs of the opportunity to testify at trial via video would be tantamount to depriving them of their day in court. To the extent that plaintiffs such as those in this case are precluded from testifying, it could inhibit their ability to pursue legitimate personal injury claims in cases such as this one.

Additionally, the use of videotaped testimony at trial is not unheard of. To the extent that plaintiffs engage in a second round of videotaped depositions, defendants' concerns regarding their right to confront the witnesses against them and their ability to effectively cross-examine those witnesses would be rendered moot. Moreover, contrary to the contention of the DeMarco defendants, plaintiffs' videotaped testimony will not provide the only means of addressing the grave injury issue in this case. With the exception of Mejias, whose paraplegia constitutes a grave injury pursuant to Workers' Compensation Law § 11, the issue whether any of the remaining

plaintiffs sustained a grave injury appears to turn on the question whether the facial scarring those plaintiffs sustained is "severe" within the meaning of that statute. The standard for determining whether a facial disfigurement is "severe" is whether "a reasonable person viewing the plaintiff's face in its altered state would regard the condition as abhorrently distressing, highly objectionable, shocking or extremely unsightly" (*Fleming v Graham*, 10 NY3d 296, 301), and there is no reason why defendants cannot address that issue through the photographic evidence appearing in the record.

C

Contrary to the contention of Johnston and Raytheon, our determination is consistent with sound public policy. "An alien unauthorized for employment in the United States is not barred from seeking to recover . . . in a personal injury action" (*Piedrahita v RGF Dev. Corp.*, 38 AD3d 741), and *Balbuena v IDR Realty LLC* (6 NY3d 338) is instructive on this point. In *Balbuena* (6 NY3d at 359, quoting *Rosa v Partners in Progress, Inc.*, 152 NH 6, 13, 868 A2d 994, 1000), the Court of Appeals noted that, "in order to further the laudable purposes of [the federal Immigration Reform and Control Act of 1986 (8 USC § 1324a *et seq*.)] and [the state] Labor Law, 'tort deterrence principles provide a compelling reason to allow an award of such damages against a person responsible for an illegal alien's employment when that person knew or should have known of that illegal alien's status . . . .' " The Court in *Balbuena* further noted that a different conclusion would have "diminish[ed] the protections afforded by the Labor Law [and] improvidently reward[ed] employers who knowingly disregard the employment verification system in defiance of the primary purposes of federal immigration laws" (*id.*). Moreover, the *Balbuena* Court recognized the plaintiffs' unauthorized presence in this country, but it found such "transgression . . . insufficient to justify denying [them] a portion of the damages to which they [were] otherwise entitled" (*id.* at 361).

Applying the principles of *Balbuena* here, we conclude that, as a general matter, allowing plaintiffs to testify from Mexico and Guatemala via video is generally consistent with sound public policy. To hold otherwise would undercut tort deterrence principles and *encourage* the employment of aliens not lawfully present in the United States. In so concluding, however, we note that defendants did not raise the issue whether the use of "fake" documents by Lopez and a false social security number by Mendez to obtain work in this country precludes recovery by those plaintiffs (*see generally Hoffman Plastic Compounds, Inc. v National Labor Relations Bd.*, 535 US 137, 148-151; *Balbuena*, 6 NY3d at 354-355). Our inquiry is limited to whether the public interest is served by allowing illegal aliens who voluntarily left the country and who are or appear to be precluded from returning may testify at a deposition or at a trial from a foreign country via video.

V

We now turn to the cross appeals of Raytheon and Johnston, which raise the issue whether the court erred in denying their respective cross motions seeking, inter alia, dismissal of the claims of the majority of the plaintiffs in the actions against them. Pursuant to 22 NYCRR 202.27 (b), a court has the discretion to dismiss the complaint in the event of a plaintiff's failure to appear (*see Harris v Bliss*, 60 AD3d 437, 438), but here the issue is academic in view of our determination that the court abused its discretion in denying those parts of plaintiffs' motion for a protective order relating to the taking of certain depositions and trial testimony via video. In any event, dismissal of the claims of those plaintiffs not presently in the United States is unwarranted at this juncture. Those plaintiffs have yet to default, and the issue thus is not ripe for our review (*see generally Murad v Russo*, 74 AD3d 1823, 1824, *lv dismissed* 16 NY3d 732).

VI

Accordingly, we conclude that the order should be modified by vacating that part of the third ordering paragraph concerning the depositions of plaintiffs and granting those parts of plaintiffs' motion for a protective order permitting the undeposed plaintiffs who have returned to Guatemala, i.e., Gabriel and Mendez, to be deposed in Guatemala via video conference and permitting those plaintiffs who have returned to Mexico and Guatemala to testify at trial by video.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

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CA 11-01865

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

IN THE MATTER OF THE ESTATE OF KATHERINE M. DESSAUER, DECEASED.

ANTONIA GREENLEE, SHARI L. MEYER, DEBORAH A. ALAIMO, PETITIONERS-RESPONDENTS,

MEMORANDUM AND ORDER

V

THOMAS DESSAUER, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF KATHERINE M. DESSAUER, DECEASED, RESPONDENT-APPELLANT.

MELVIN BRESSLER, ROCHESTER, FOR RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a decree of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered November 3, 2010. The decree, among other things, ordered respondent to pay the attorneys' fees and disbursements incurred by petitioners in commencing this proceeding.

It is hereby ORDERED that the decree so appealed from is unanimously modified on the law by reducing the award of attorneys' fees and disbursements in the sum of $6,048.77 to $3,071.27 and as modified the decree is affirmed without costs.

Memorandum: Respondent, individually and as executor of the estate of Katherine M. Dessauer (decedent), appeals from a decree that ordered him to pay attorneys' fees and disbursements incurred by petitioners in commencing this proceeding to compel production of decedent's will pursuant to SCPA 1401. Respondent contends for the first time on appeal that petitioners lacked standing to commence the proceeding, and that contention therefore is not properly before us (*see Matter of Jared*, 225 AD2d 1049; *see generally Matter of Grawe*, 32 AD3d 1309, 1310). We further conclude, however, that Surrogate's Court abused its discretion in determining that petitioners are entitled to attorneys' fees in the amount of $5,955 for legal services rendered in instituting this proceeding. We reject the contention of petitioners that respondent failed to contend either that the award of attorneys' fees was an abuse of discretion or that the amount of the award was unreasonable (*cf. Oakes v Patel*, 87 AD3d 816, 819). " 'In evaluating what constitutes a reasonable attorney's fee, factors to be considered include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems

presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained' " (*Matter of Talbot*, 84 AD3d 967, 967-968; *see Pelc v Berg*, 68 AD3d 1672, 1673). Applying those factors here, we conclude that petitioners are entitled to the sum of $2,977.50 for legal services rendered in instituting this proceeding, together with the sum of $93.77 that was awarded for disbursements with respect to the petition, and we thus modify the decree accordingly.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

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KA 09-00589

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT BROWN, DEFENDANT-APPELLANT.

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

ROBERT BROWN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered January 29, 2009. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of sexual abuse in the first degree (Penal Law § 130.65 [1]), defendant challenges the legal sufficiency of the evidence to support the conviction. Defendant failed to preserve his challenge for our review, however, inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' at" the same alleged shortcoming in the evidence raised on appeal (*People v Gray*, 86 NY2d 10, 19). In any event, defendant's contention lacks merit, inasmuch as there is a "valid line of reasoning and permissible inferences" to lead reasonable persons to the conclusion reached by the jury based on the evidence presented at trial (*People v Bleakley*, 69 NY2d 490, 495). Because we conclude that the evidence at trial is legally sufficient to support the conviction, defendant's further contention that the evidence presented to the grand jury was legally insufficient is not reviewable on appeal (*see* CPL 210.30 [6]; *People v Prior*, 23 AD3d 1076, 1076-1077, *lv denied* 6 NY3d 817). Furthermore, we reject defendant's contention that his trial counsel was ineffective for failing to preserve his legal sufficiency challenge for our review. "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922).

Defendant further contends that the verdict is against the weight of the evidence and factually inconsistent because the jury acquitted him of rape in the first degree under Penal Law § 130.35 (1) and found him guilty of sexual abuse in the first degree. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject that contention (*see generally Bleakley*, 69 NY2d at 495). Specifically, the jury was entitled to infer from the evidence at trial that defendant forcibly committed an act of penis-to-vagina contact that qualified as sexual contact (*see* § 130.00 [3]), but that stopped short of sexual intercourse, i.e., "penetration," required for rape (§ 130.00 [1]; *see* § 130.35). We thus conclude that defendant mistakenly relies on *People v Boykin* (127 AD2d 1004, 1004, *lv denied* 69 NY2d 1001) and *People v Vicaretti* (54 AD2d 236), in which there was no evidence at trial from which such an inference could be drawn.

Defendant failed to preserve for our review several of his contentions concerning alleged acts of prosecutorial misconduct and, in any event, " 'any alleged [prosecutorial] misconduct was not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Szyzskowski*, 89 AD3d 1501, 1503). Contrary to defendant's further contention, County Court did not err in permitting a witness to testify that he and other men reported to the police that defendant had "raped a female." The testimony regarding that out-of-court statement was not hearsay because it "was not received for its truth, but [instead was received] for the legitimate, nonhearsay purpose of completing the narrative of events and explaining police actions" in subsequently tracking down defendant and the victim (*People v Perez*, 47 AD3d 409, 411, *lv denied* 10 NY3d 843). Defendant objected to the admission of only a portion of the testimony and photographic evidence related to his alleged assault of the victim's boyfriend. Thus, his contention that the testimony and evidence were irrelevant inasmuch as charges pertaining to that assault had been dismissed prior to trial is preserved for our review only in part (*see* CPL 470.05 [2]). To the extent that defendant's contention is preserved for our review, we agree with him that the court abused its discretion in admitting that testimony and evidence at trial (*see generally People v Carroll*, 95 NY2d 375, 385-387). Nevertheless, we conclude that any error in the admission of the testimony and evidence is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). Defendant failed to preserve for our review his challenge to the testimony of two police officers regarding out-of-court showup identifications made by the victim and several other witnesses (*see* CPL 470.05 [2]), and we decline to exercise our power to address that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant failed to preserve for our review his contention that the order of protection issued by the court does not comport with CPL 530.13 (*see People v Nieves*, 2 NY3d 310, 315-317), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention in his pro se supplemental

brief, the court had subject matter jurisdiction over the charge of sexual abuse in the first degree contained in the indictment. Although the felony complaint, which preceded the indictment, did not contain such a charge, the grand jury had the authority to consider offenses other than "those designated in the felony complaint" (*People v Simmons*, 178 AD2d 972, 972, *lv denied* 79 NY2d 1007). Defendant failed to preserve for our review his further contention, raised in his pro se supplemental brief, that the charge of sexual abuse in the first degree set forth in the indictment was not adequately specific (*see People v Adams*, 59 AD3d 928, 929, *lv denied* 12 NY3d 813; *see also People v Soto*, 44 NY2d 683, 684). In any event, that contention lacks merit. The indictment properly provided defendant with "fair notice of the nature of the charge[] against him, and of the manner, time and place of the conduct underlying the accusations, so as to enable him to answer to the charge[] and to prepare an adequate defense" (*People v Keindl*, 68 NY2d 410, 416, *rearg denied* 69 NY2d 823). Defendant also failed to preserve for our review his additional contention in his pro se supplemental brief that the counts charging him with rape in the first degree and sexual abuse in the first degree were duplicitous because they were premised upon the same facts and evidence (*see People v Becoats*, 17 NY3d 643, 650, *cert denied* ___ US ___ [Apr. 23, 2012]). We note in any event that defendant's contention is moot in light of his acquittal of rape in the first degree (*see People v Haberer*, 24 AD3d 1283, 1283, *lv denied* 7 NY3d 756, 848), and that it also is without merit (*see People v Scott*, 12 AD3d 1144, 1145, *lv denied* 4 NY3d 767).

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

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

614

CA 11-00631

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

PAUL M. ALOI AND CHERYL R. ALOI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ARLEE ELLIS AND ALICE M. ELLIS,
DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered March 15, 2011. The order sanctioned counsel for defendants with a fine of $10,000 for frivolous conduct.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the award of sanctions is vacated.

Memorandum: In this personal injury action arising out of a motor vehicle accident, defendants appeal from an order that imposed a $10,000 sanction against the law firm of the attorney who represented defendants at a bifurcated trial on liability. According to Supreme Court, defendants' attorney engaged in frivolous conduct within the meaning of 22 NYCRR 130-1.1 by failing to concede liability at trial and by pursuing a meritless affirmative defense of comparative negligence. As a preliminary matter, we note that, although defendants' notice of appeal recites that defendants are appealing from the order, they in fact are not aggrieved by the imposition of sanctions against their attorney's law firm (*see Moore v Federated Dept. Stores, Inc.*, 94 AD3d 638, 639). Nevertheless, the notice of appeal may be deemed to have been filed on behalf of the nonparty law firm (*see* CPLR 2001; *Matter of Tagliaferri v Weiler*, 1 NY3d 605, 606; *Joan 2000, Ltd. v Deco Constr. Corp.*, 66 AD3d 841, 842). In addition, although no appeal as of right lies from an order such as this, which was entered after a hearing ordered sua sponte by the trial court (*see* CPLR 5701 [a] [2]; *Sholes v Meagher*, 100 NY2d 333, 334), we nevertheless treat the notice of appeal as an application for leave to appeal, and we grant the application in the interest of justice (*see Matter of Walker v Bowman*, 70 AD3d 1323, 1323-1324).

With respect to the merits, we conclude that the court abused its discretion in imposing sanctions against the law firm of defendants' attorney. Although the circumstances of the accident established that defendant Arlee Ellis was the more culpable party, "there can be more

than one proximate cause of an accident, and . . . the fact that [a driver] failed to stop at [a] stop sign is not dispositive of the issue [of the comparative negligence of the other driver]" (*Deshaies v Prudential Rochester Realty*, 302 AD2d 999, 1000; *see Cox v Nunez*, 23 AD3d 427, 427). Even where, as here, a driver negligently fails to yield the right-of-way, an oncoming driver may be guilty of some degree of comparative negligence where, e.g., he or she had time to take evasive action but failed to do so (*see e.g. Dorr v Farnham*, 57 AD3d 1404, 1405-1406; *Cooley v Urban*, 1 AD3d 900, 901). We thus conclude that the pursuit of the defense by defendants' attorney was not frivolous, and we note in particular that plaintiffs did not move for summary judgment seeking dismissal of it.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

618

CA 11-02559

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

MICHELLE GALETTA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GARY GALETTA, DEFENDANT-RESPONDENT.

BARNEY & AFFRONTI, LLP, ROCHESTER (FRANCIS C. AFFRONTI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

STEPHEN M. LEONARDO, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John M. Owens, J.), entered September 28, 2011. The order, among other things, denied plaintiff's motion for summary judgment.

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

Memorandum: After plaintiff commenced this divorce action, she moved for, inter alia, summary judgment determining that the parties' prenuptial agreement is invalid because it was not properly acknowledged. Contrary to plaintiff's contention, Supreme Court properly denied that part of her motion. Pursuant to Domestic Relations Law § 236 (B) (3), "[a]n agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." In order to satisfy the acknowledgment requirement, "there must be an oral acknowledgment before an authorized officer, and a written certificate of acknowledgment must be attached to the agreement" (*Filkins v Filkins* [appeal No. 3], 303 AD2d 934, 934; *see Matisoff v Dobi*, 90 NY2d 127, 137-138; *see generally* Real Property Law §§ 291, 306).

We agree with plaintiff that the written certificate of acknowledgment is insufficient because it does not contain the information required by Real Property Law § 303, i.e., that the person taking the acknowledgment "knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument." Contrary to defendant's contention, the certificate was not in "substantial compliance" with the statute, and thus the court's reliance on *Weinstein v Weinstein* (36 AD3d 797, 798) for that proposition was misplaced. In *Weinstein*, the language in the certificate failed to conform to the "precise language" of the Real

Property Law (*id.*). Here, however, the certificate fails to "stat[e] all the matters required to be done, known, or proved on the taking of such acknowledgment or proof" (§ 306). Inasmuch as the certificate is devoid of information required by the Real Property Law, we conclude that it is insufficient on its face and does not establish that the prenuptial agreement was properly acknowledged (*see generally Fryer v Rockefeller*, 63 NY 268, 272-273; *Garguilio v Garguilio*, 122 AD2d 105, 106; *Gross v Rowley*, 147 App Div 529, 531-532).

We agree with defendant that a subsequently-filed affidavit from the notary who took defendant's acknowledgment raises a triable issue of fact whether the prenuptial agreement was properly acknowledged. Although the dissent correctly notes that defendant does not specifically contend in his brief on appeal that the affidavit cured the defect, we conclude that such a contention is implicit in defendant's submission of the notary's affidavit, the only purpose of which was to cure the defect, i.e., to supply the information missing from the contemporaneously-executed acknowledgment. In addition, defendant's attorney raised that contention at oral argument of this appeal. The issue squarely before us is thus whether defects in such an acknowledgment are subject to cure. We conclude that they are.

In *Matisoff* (90 NY2d at 137), the Court of Appeals specifically declined to resolve the issue "whether and under what circumstances the absence of acknowledgment can be cured," and noted that other courts have been divided on the issue. It is well settled that defects in an acknowledgment required by EPTL 5–1.1–A (e) (2) (*see* EPTL 5–1.1 [f] [2]), concerning waivers of the spousal right of election, may be cured (*see Matisoff*, 90 NY2d at 137; *Matter of Maul*, 176 Misc 170, 174, *affd* 262 App Div 941, *affd* 287 NY 694; *Matter of Saperstein*, 254 AD2d 88, 88-89; *see generally Rogers v Pell*, 154 NY 518, 530-531). Inasmuch as the language of the EPTL contains the same "restrictive acknowledgment language as the Domestic Relations Law under discussion in the *Matisoff* case" (*D'Agrosa v Coniglio*, 12 Misc 3d 1179[A], 2006 NY Slip Op 51305[U], at *3), we conclude that the same reasoning should apply to Domestic Relations Law § 236 (B) (3) and that defects in the acknowledgment required by that section may be cured.

We recognize that there is a split of authority on the issue whether such defects may be cured, and this Court has yet to take a position. In *Arizin v Covello* (175 Misc 2d 453, 457), the court held that "an unacknowledged nuptial agreement which is acknowledged on a subsequent date is enforceable in a matrimonial action as long as the subsequent acknowledgment complies with the statutory requirements of Domestic Relations Law § 236 (B) (3)" (*see also Hurley v Johnson*, 4 Misc 3d 616, 620). We cited to *Arizin* in our decision in *Filkins* (303 AD2d at 934). In *Filkins*, however, there was no written certificate of acknowledgment attached to the parties' prenuptial agreement, and we held that "plaintiff's attempt to cure the defect by having the agreement notarized and filed after commencement of [the] divorce action fail[ed] because the agreement was never reacknowledged in compliance with Domestic Relations Law § 236 (B) (3)" (*id.* at 934-935). By citing to *Arizin*, we implicitly endorsed the possibility

that a defect in a technically improper acknowledgment accompanying a nuptial agreement could be cured (*see id.* at 935).

We recognize that the Second Department in *D'Elia v D'Elia* (14 AD3d 477, 478) held that the defendant's "attempt to cure the acknowledgment defect by submitting a duly-executed certificate of acknowledgment at trial was not sufficient," but it is not clear from that decision whether there was a contemporaneous acknowledgment that was technically improper. We also recognize that the First Department in *Anonymous v Anonymous* (253 AD2d 696, 697, *lv dismissed* 93 NY2d 888) "would not permit [the] defendant to cure [the] defect in the [prenuptial] agreement by an alleged acknowledgment in affidavit form which was executed and which surfaced some 12 years after the fact in the midst of a contested matrimonial action in light of the required formalities of Domestic Relations Law § 236 (B) (3)." Inasmuch as the preamble to the decision in *Anonymous* refers to "the absence of an acknowledgment" (*id.*), our decision herein is not inconsistent with that of the Second Department. Here, defendant is not attempting to cure the complete absence of a contemporaneous acknowledgment. Rather, he is attempting to submit evidence that there was, in fact, a proper and contemporaneous acknowledgment at the time the prenuptial agreement was executed. In our view, the affidavit from the notary who took defendant's acknowledgment is sufficient to raise a triable issue of fact whether "the parties . . . contemporaneously demonstrated the deliberate nature of their agreement" (*Schoeman, Marsh & Updike v Dobi*, 264 AD2d 572, 573, *lv dismissed* 94 NY2d 944, 97 NY2d 721, *lv denied* 100 NY2d 508; *cf. Leighton v Leighton*, 46 AD3d 264, 265, *appeal dismissed* 10 NY3d 739). The statements of the notary, i.e., that it was his usual and customary practice to ask and confirm that the person signing the document was the same person named in the document and that he or she was signing said document, "constitute competent and admissible evidence concerning routine professional practice sufficient to raise a triable issue of fact" (*Gier v CGF Health Sys.*, 307 AD2d 729, 730; *see generally Halloran v Virginia Chems.*, 41 NY2d 386, 389). We thus conclude that the court properly denied that part of plaintiff's motion for summary judgment seeking a determination as a matter of law that the parties' prenuptial agreement is invalid.

All concur except CENTRA and CARNI, JJ., who dissent and vote to modify in accordance with the following Memorandum: We respectfully dissent and would modify the order by granting plaintiff's motion to the extent that it seeks summary judgment determining that the parties' prenuptial agreement is invalid and unenforceable. We agree with the majority that the prenuptial agreement was not properly acknowledged because the certificate of acknowledgment of defendant's signature on the prenuptial agreement does not contain the information required by Real Property Law § 303, i.e., that the person taking the acknowledgment "knows or has satisfactory evidence[] that the person making it is the person described in and who executed such instrument." We disagree with the majority, however, that defendant raised a triable issue of fact sufficient to defeat the motion. In opposition to the motion, defendant submitted the affidavit of the notary who took defendant's acknowledgment of the prenuptial

agreement. On appeal, defendant contends that the notary's affidavit "reaffirmed" that the acknowledgment was valid. We reject that contention because, as explained above, the certificate of acknowledgment was defective on its face and thus was not valid in the first instance. Defendant does not contend in the alternative that, if the acknowledgment was defective, the notary's affidavit cured the defect. Thus, unlike the majority, we would not reach that issue because it is not before us.

In any event, we write to note our disagreement with the majority that a defect in an acknowledgment may be cured (*see D'Elia v D'Elia*, 14 AD3d 477, 478; *see generally Filkins v Filkins* [appeal No. 3], 303 AD2d 934, 934-935). Furthermore, "[e]ven assuming . . . that the requisite acknowledgment could be supplied" at a later time and is not required to be made contemporaneous with the signing of the prenuptial agreement, we conclude that the notary's affidavit does not establish the proper acknowledgment or even raise a triable issue of fact (*Matisoff v Dobi*, 90 NY2d 127, 137). The notary averred that "[i]t was then, and has always been, my custom and practice when taking an acknowledgment to ask and confirm that the person signing the document was the same person named in the document and that he or she was signing said document. I am confident I followed the same procedure when I took [defendant's] acknowledgment on" the prenuptial agreement. That affidavit is insufficient to raise an issue of fact whether the notary "*kn[ew] or ha[d] satisfactory evidence*[] that the person making [the acknowledgment] is the person described in and who executed" the prenuptial agreement (Real Property Law § 303 [emphasis added]). Stated differently, there was no "identity of the person making the acknowledgment with the person described in the instrument and the person who executed the same" (*Gross v Rowley*, 147 App Div 529, 531).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

619

CA 11-02456

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

MARY ANN WERNER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DEFENDANT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (KEVIN VASQUEZ HUTCHESON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (SCOTT M. SCHWARTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 14, 2011 in a personal injury action. The order denied defendant's motion for summary judgment dismissing 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: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she tripped and fell while walking down a corridor in Buffalo General Hospital, which was owned and operated by defendant. Following discovery, defendant moved for summary judgment dismissing the complaint on the grounds that the alleged defect was not a dangerous condition as a matter of law, and that defendant did not create the condition or have actual or constructive notice of it. We agree with defendant that Supreme Court erred in denying the motion. In support of the motion, defendant submitted evidence establishing that the allegedly dangerous condition was no more than a "nickel size" indentation in the linoleum-tiled corridor, and that plaintiff was wearing sandals with no backing and one- or two-inch heels.

As plaintiff correctly notes, "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [internal quotation marks omitted]). Nevertheless, where an alleged defect is shown to be "trivial as a matter of law," summary judgment is appropriate (*Sokolovskaya v Zemnovitsch*, 89 AD3d 918, 918; *see generally Trincere*, 90 NY2d at 977-978). Here, defendant's submissions established that, in light of "the width, depth, elevation, irregularity and appearance of the

defect along with the 'time, place and circumstance' of the injury" (*Trincere*, 90 NY2d at 978), the defect was trivial as a matter of law, and in response plaintiff failed to raise a triable issue of fact to defeat the motion *(see generally Zuckerman v City of New York*, 49 NY2d 557). In light of our decision, we need not address defendant's contentions that it did not create the dangerous condition and lacked constructive notice of its existence.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

630

KA 09-01478

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRAE BOX, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 5, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid because the minimal inquiry made by County Court was "insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

639

CA 12-00184

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

STATE FARM FIRE & CASUALTY COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MATTHEW RICCI, RAYMOND PINK AND MICHELLE PINK,
DEFENDANTS-RESPONDENTS.

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONWAY & KIRBY, LLP, LATHAM (ANDREW W. KIRBY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RAYMOND PINK AND MICHELLE PINK.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered October 12, 2011 in a declaratory judgment action. The order, insofar as appealed from, denied in part the motion of plaintiff seeking partial summary judgment dismissing the second, third, and fourth counterclaims of defendant Matthew Ricci.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion for partial summary judgment dismissing the second counterclaim of defendant Matthew Ricci to the extent that it alleges bad faith and improper conduct by plaintiff and as modified the order is affirmed without costs.

Memorandum: Defendant Raymond Pink was a spectator at a youth hockey game when a fight broke out among other spectators in the stands. Defendant Matthew Ricci was one of those spectators, and Raymond Pink was injured during the fight. Raymond Pink and his wife, defendant Michelle Pink, subsequently commenced a personal injury action (hereafter, underlying action) against, inter alia, Ricci, seeking damages for the injuries that Raymond Pink sustained. Plaintiff, State Farm Fire & Casualty Company (State Farm), insured Ricci pursuant to a policy of homeowner's insurance (policy) and reserved its right to deny and disclaim coverage in the underlying action in a letter sent to Ricci five days after State Farm received its first notice of the underlying action. Four days after reserving its right to deny coverage, State Farm advised Ricci that, based on the question of coverage, Ricci had the right to select attorneys of his choice to defend him at State Farm's expense in the underlying action. Ricci did not select independent counsel to defend him in that action.

Approximately two years later, State Farm commenced this action seeking, inter alia, a declaration of the rights of the parties under the policy. Ricci joined issue by submitting an answer in which he asserted four counterclaims, the second of which alleged that Ricci "is entitled to have his attorney[s'] fees paid by [State Farm] with reference to the cost of defending [the underlying] action, particularly in view of the bad faith and improper conduct engaged in by [State Farm] and its representatives and agents." The Pinks submitted an answer that did not allege that State Farm had acted in bad faith.

State Farm subsequently moved for partial summary judgment dismissing Ricci's second through fourth counterclaims. Supreme Court granted only those parts of the motion with respect to the third and fourth counterclaims. We modify the order by granting that part of the motion with respect to Ricci's second counterclaim to the extent that it alleges bad faith and improper conduct by State Farm.

"[I]n order to establish a prima facie case of bad faith [based on a disclaimer of coverage], [a party] must establish that the insurer's conduct constituted a gross disregard of the insured's interests . . . In other words, [the party] must establish that the . . . insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the interests of the insured" (*Bennion v Allstate Ins. Co.*, 284 AD2d 924, 926 [internal quotation marks omitted]; *see Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453-454, *rearg denied* 83 NY2d 779).

Here, State Farm met its initial burden on that part of the motion with respect to its alleged bad faith and improper conduct (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Within days of receiving the complaint in the underlying action, State Farm reserved its right to deny and disclaim coverage (*see Progressive Northeastern Ins. Co. v Farmers New Century Ins. Co.*, 83 AD3d 1519, 1520) and, shortly thereafter, it afforded Ricci the opportunity to select attorneys of his choice to represent him in the underlying action at State Farm's expense (*see Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392, 401; *Hall v McNeil*, 125 AD2d 943). State Farm's reservation of rights is based on the complaint and, after reserving its right to deny and disclaim coverage, State Farm maintained its defense of Ricci in the underlying action. By commencing this declaratory judgment action, State Farm seeks merely to clarify its obligations under the policy, and such an approach is not only permissible but advisable (*see Lang v Hanover Ins. Co.*, 3 NY3d 350, 356).

With respect to the issue of State Farm's alleged bad faith and improper conduct, defendants failed to raise a triable issue of fact sufficient to defeat the motion. Ricci has not submitted a brief in this appeal, and we assume for the sake of argument that the Pinks have standing to oppose it. Contrary to the contention of the Pinks, State Farm's failure to disclaim coverage in a timely manner is insufficient to establish bad faith. To the extent that State Farm

failed to notify the Pinks in a timely manner that it disclaimed coverage based on a policy exclusion, the untimely disclaimer would be ineffective with respect to the Pinks (*see Arida v Essex Ins. Co.*, 299 AD2d 902, 903; *cf. HBE Corp. v Sirius Am. Ins. Co.*, 63 AD3d 1509, 1510). Moreover, the declaratory judgment action is premised upon the theory that the claim is not covered by the policy in the first instance, and no disclaimer is required where a claim falls outside the scope of coverage afforded by the policy (*see Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648).

Contrary to the Pinks' further contention, Insurance Law § 3420 (former [d]) considers the time in which an insurer must disclaim coverage, not the time in which an insurer may bring a declaratory judgment action seeking a determination of its policy obligations. We reject the contention of the Pinks that State Farm's delay of approximately two years between the time it reserved its right to disclaim or deny coverage and its commencement of this action evinces bad faith. In addition, there is no merit to the Pinks' contention that State Farm improperly relied on sealed records from the criminal proceedings against Ricci in determining whether to deny coverage for Ricci in the underlying action. There is no merit to the Pinks' contention that the subject records were unsealed only with respect to the underlying action (*Pink v Ricci*, 74 AD3d 1773). In fact, in the underlying action, the Pinks moved for an order "directing that all court and police records, statements, investigation and transcripts involving the criminal proceeding against [Ricci] in the City of Rome Court regarding the November 26, 2006 incident for which [he] plead[ed] to assault in the third degree . . . [be] unsealed," and that relief was granted. We concluded in the appeal in the underlying action that Ricci waived his statutory privilege of confidentiality with respect to those records by asserting cross claims alleging that he had been harmed by Raymond Pink and others acting in concert with him (*id.* at 1774). Here, the Pinks contend that the cross claims were asserted approximately one week after State Farm first learned of the underlying action and several months before the records at issue were first disclosed in the underlying action by the Pinks, who had obtained them through a Freedom of Information Law request. Put differently, nothing in the record suggests that State Farm obtained the records at issue while they were sealed. We have considered the Pinks' remaining contentions with respect to State Farm's alleged bad faith and improper conduct, and we conclude that none has merit.

We next turn to the issue whether the court erred in denying without prejudice pursuant to CPLR 3212 (f) that part of the motion with respect to Ricci's second counterclaim to the extent that it alleges bad faith and improper conduct by State Farm. "Although a motion for summary judgment may be opposed on the ground 'that facts essential to justify opposition may exist but cannot then be stated' . . ., 'the opposing party must make an evidentiary showing supporting [that] conclusion, mere speculation or conjecture being insufficient' " (*Preferred Capital v PBK, Inc.*, 309 AD2d 1168, 1169; *see Newman v Regent Contr. Corp.*, 31 AD3d 1133, 1134-1135). Here, for the foregoing reasons, the Pinks' contention that State Farm acted in

bad faith is merely speculative, and the court thus abused its discretion in denying that part of the motion without prejudice and with leave to renew following further discovery (*see Welch Foods v Wilson*, 277 AD2d 882, 883; *cf. Rincon v Finger Lakes Racing Assn., Inc.*, 11 AD3d 950).

Finally, we conclude that the court properly denied that part of the motion with respect to Ricci's second counterclaim to the extent that it seeks attorneys' fees, inasmuch as " 'an insured who prevails in an action brought by an insurance company seeking a declaratory judgment that it has no duty to defend or indemnify the insured may recover attorneys' fees regardless of whether the insurer provided a defense to the insured' " (*RLI Ins. Co. v Smiedala*, 77 AD3d 1293, 1295, quoting *U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 598).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

640

CA 12-00058

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

HICHAM KHALLAD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHELENA BLANC, DEFENDANT-RESPONDENT.

SANTOSH K. PAWAR, PITTSFORD, FOR PLAINTIFF-APPELLANT.

Appeal from a judgment of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered July 25, 2011. The judgment, among other things, declared that a Florida judgment of divorce is valid.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that a judgment of divorce obtained by defendant in Florida is invalid. In 2002, defendant traveled to Morocco and conceived a child with plaintiff, a Moroccan native. The parties' child was born in Florida in July 2003 and, in March 2005, plaintiff and defendant were married in Florida. Thereafter, the parties resided together in Florida for one or two months before plaintiff moved to New York City. In January 2006, defendant filed a petition for dissolution of marriage in the Circuit Court for the Ninth Judicial Circuit, in and for Orange County, Florida (hereafter, Florida court), asserting that the marriage was "irretrievably broken" and that she and plaintiff had no children in common. Defendant submitted an "affidavit of diligent search and inquiry," in which she averred that plaintiff's current residence was unknown to her and that she had made a diligent search and inquiry to discover it. Defendant then served the petition upon plaintiff by publication in a local Florida newspaper. Plaintiff did not respond to the petition or appear in court, and a default judgment was entered against him. In April 2006, the Florida court granted a final judgment of dissolution of marriage (hereafter, divorce judgment).

According to plaintiff, he first learned of the divorce judgment in or about June 2010, when deportation proceedings were commenced against him. On July 29, 2010, plaintiff moved to set aside the default judgment in the Florida court, asserting that he failed to appear in the divorce action because he did not receive a summons or petition. Plaintiff further alleged that defendant fraudulently obtained the divorce judgment inasmuch as she falsely stated that she did not know where plaintiff lived and that the parties did not have any children in common. After a hearing, the Florida court denied

plaintiff's motion on the ground that it had been filed more than one year after entry of the divorce judgment (*see* Fla Rules Civ Pro rule 1.540 [b]).

Plaintiff thereafter commenced this action seeking a declaration that the divorce judgment is "invalid and of no force and effect" because it was fraudulently obtained. By the judgment on appeal, Supreme Court, inter alia, determined that the divorce judgment should be granted full faith and credit, and thus declared that the judgment was valid. We affirm.

"A divorce judgment of a sister state made in an action in which both parties were subject to the personal jurisdiction of the court is entitled to full faith and credit by the courts of this state" (*Matter of Sannuto v Palma-Sannuto*, 32 AD3d 443, 443; *see Erhart v Erhart*, 226 AD2d 26, 27). Absent a jurisdictional challenge, a judgment entered upon a party's default is entitled to full faith and credit (*see Steven M. Garber & Assoc. v Zuber*, 87 AD3d 1295, 1296, *lv denied* 18 NY3d 802; *Vertex Std. USA, Inc. v Reichert*, 16 AD3d 1163, 1163; *GNOC Corp. v Cappelletti*, 208 AD2d 498). "The application of full faith and credit to the judgment of a sister State is the functional equivalent of interstate res judicata" (*DiCaprio v DiCaprio*, 219 AD2d 819, 819, *appeal dismissed* 87 NY2d 967, *lv denied* 88 NY2d 802, *rearg denied* 89 NY2d 861; *see* Siegel, NY Prac § 471, at 797 [4th ed]). "As a matter of full faith and credit, review by the courts of this State is limited to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations . . . Thus, inquiry into the merits of the underlying dispute is foreclosed; the facts have bearing only in the limited context of our jurisdictional review" (*Fiore v Oakwood Plaza Shopping Ctr.*, 78 NY2d 572, 577, *rearg denied* 79 NY2d 916, *cert denied* 506 US 823; *see Mortgage Money Unlimited v Schaffer*, 1 AD3d 773, 774). In determining whether the Florida court had jurisdiction over plaintiff, we must "ascertain whether [Florida's] long arm statute has been complied with, and whether that court's exercise of jurisdiction comports with Federal constitutional principles of due process" (*Mortgage Money Unlimited*, 1 AD3d at 774 [internal quotation marks omitted]).

Here, plaintiff does not contend that he lacked the requisite minimum contacts with Florida such that allowing the divorce action to proceed in that state deprived him of due process (*see generally Steven M. Garber & Assoc.*, 87 AD3d at 1296). Indeed, it is undisputed that the parties were married and thereafter lived together in Florida, and that their child was born in Florida (*cf. Matter of Herrmann v Herrmann*, 198 AD2d 761). Rather, plaintiff contends that the Florida court lacked personal jurisdiction because defendant failed to serve him personally with the summons and petition in the divorce action in accordance with Florida law (*see generally Vertex Std. USA, Inc.*, 16 AD3d at 1164). We reject that contention.

Under Florida law, the summons and petition in a divorce action "shall be served upon the other party to the marriage in the same manner as service of papers in civil actions generally" (Fla Stat Ann,

tit 6, § 61.043 [1]). As a general rule, service of process is made by delivering a copy of the summons and petition to the person to be served (*see* Fla Stat Ann, tit 6, § 48.031 [1] [a]). "[S]ervice of process on persons outside of th[e] state shall be made in the same manner as service within th[e] state . . . No order of court is required" (Fla Stat Ann, tit 6, § 48.194 [1]). As relevant here, section 49.011 provides that "[s]ervice of process by publication may be made in any court on any party identified in [section] 49.021 in any action or proceeding . . . [f]or dissolution or annulment of marriage," and section 49.021 (1) in turn provides that "[s]ervice of process by publication may be had upon . . . [a]ny known or unknown natural person."

As a condition precedent to service by publication, the plaintiff must file a sworn statement (*see* Fla Stat Ann, tit 6, § 49.031 [1]), asserting therein, inter alia, "[t]hat diligent search and inquiry have been made to discover the name and residence of such person," and "that the residence of such person is . . . [u]nknown to the affiant" (Fla Stat Ann, tit 6, § 49.041 [1], [3] [a]). The notice must be published once per week for four consecutive weeks in a newspaper published in the county where the court is located (*see* Fla Stat Ann, tit 6, § 49.10 [1] [a]), and proof of publication must be made by affidavit of an officer or employee, among others, of the newspaper (*see* Fla Stat Ann, tit 6, § 49.10 [2]).

Here, defendant signed an "Affidavit of Diligent Search and Inquiry" (Fla Family Law Rules of Pro form 12.913 [b]), swearing that she "ha[d] made [a] diligent search and inquiry to discover the name and current residence of" plaintiff. Defendant further averred therein that plaintiff's "current residence [wa]s unknown to [her]," and she signed the affidavit under penalty of perjury. A publisher's affidavit of publication confirms that the notice was published for four consecutive weeks in a newspaper in Orange County, Florida, the situs of the Florida court. Thus, defendant established that she constructively served plaintiff by publication in accordance with Florida law (*see* Fla Stat Ann, tit 6, § 49.021 [1]; § 49.031 [1]; §§ 49.041, 49.10 [1] [a]; [2]).

Plaintiff contends, however, that defendant committed fraud in procuring service of process by publication because defendant knew where plaintiff lived and how to contact him. Plaintiff's contention may have merit in light of the undisputed fact that defendant visited plaintiff in New York and stayed at his apartment several months before she commenced the divorce action. Once it has been determined, however, that a sister state properly exercised jurisdiction over a party, our review of the foreign judgment ends and we must accord full faith and credit to that judgment (*see JDC Fin. Co. I v Patton*, 284 AD2d 164, 166; *see generally Mortgage Money Unlimited*, 1 AD3d at 774; Siegel, NY Prac § 471, at 797-798).

Plaintiff's further contention that the Florida court deprived him of his parental rights by failing to determine issues of custody, visitation and a parenting plan before dissolving the marriage is beyond our scope of review. This Court's inquiry is limited to

whether the Florida court that rendered the divorce judgment had jurisdiction (*see Fiore*, 78 NY2d at 577), and the merits of the divorce action, including issues of custody, visitation and support, are not properly before us (*see generally Mortgage Money Unlimited*, 1 AD3d at 774; *JDC Fin. Co. I*, 284 AD2d at 166). In any event, we conclude that those issues should be addressed in Florida, not New York. The parties were married and lived together in Florida, and there is a valid judgment of divorce in Florida. In addition, defendant and the parties' child continue to reside in Florida. Florida law permits plaintiff to commence an independent action challenging the validity of the divorce judgment on the ground of fraud upon the court more than one year after entry of that judgment (*see* Fla Rules Civ Pro rule 1.540 [b]; *Lefler v Lefler*, 776 So 2d 319, 321 [Fla]). Thus, plaintiff remains free to commence such an action in Florida to challenge the validity of the divorce judgment and to assert his rights to custody and visitation.

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

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

657

KA 09-01933

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES FIDA, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered September 2, 2009 pursuant to the 2004 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 1989 conviction of criminal sale of a controlled substance in the first degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for further proceedings.

Memorandum: Defendant appeals from an order denying his application for resentencing under the 2004 Drug Law Reform Act ([DLRA-1] L 2004, ch 738, § 23). We agree with defendant that County Court erred in determining that he was ineligible for resentencing because he had previously been released on parole and was incarcerated for a parole violation at the time of his application (*see People v Caban*, 84 AD3d 828, 828). As the Court of Appeals has noted with respect to the 2009 Drug Law Reform Act (*see* CPL 440.46), although "many parole violators have shown by their conduct that they do not deserve relief from their sentences[,] . . . courts can deny their resentencing applications . . . if 'substantial justice dictates that the application should be denied' " (*People v Paulin*, 17 NY3d 238, 244, quoting L 2004, ch 738, § 23; *see Caban*, 84 AD3d 828). We therefore reverse the order and remit the matter to County Court for further proceedings on defendant's application for resentencing pursuant to DLRA-1.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

658

KA 10-01241

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSIE J. BARNES, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (JOHN E. TYO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered May 26, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree (two counts), grand larceny in the third degree (two counts), grand larceny in the fourth degree (two counts) and criminal mischief 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: Defendant appeals from a judgment convicting him following a jury trial of two counts each of burglary in the second degree (Penal Law § 140.25 [2]), grand larceny in the third degree (§ 155.35 [1]), grand larceny in the fourth degree (§ 155.30 [7]), and criminal mischief in the third degree (§ 145.05 [2]). The convictions arise from two residential burglaries committed by defendant in the Town of Victor on the same day. We agree with defendant that County Court erred in ordering him to wear a stun belt and then shackles at trial without first making "findings on the record" concerning the necessity for such restraints (*People v Buchanan*, 13 NY3d 1, 4; *see People v Cruz*, 17 NY3d 941, 944-945; *see generally Deck v Missouri*, 544 US 622, 624). Although the court set forth a reasonable explanation for its use of restraints in response to a post-trial motion by defendant challenging, inter alia, the propriety of the use of the restraints, the court's post hoc explanation does not suffice inasmuch as the court was required to have considered the relevant factors and made a sufficient inquiry "*before*" making a finding that restraints were necessary (*Buchanan*, 13 NY3d at 4 [emphasis added]).

We reject the People's contention that reversal is not required because the error is harmless. Even assuming, arguendo, that the error is harmless with respect to the use of the shackles (*see People v Clyde*, 18 NY3d 145, 153-154), we note that the Court of Appeals did

not apply harmless error analysis in *Buchanan* to the improper use of a stun belt, and *Cruz* (17 NY3d at 945 n) makes clear that the improper use of a stun belt is not subject to harmless error analysis.

We reject defendant's further contentions that the court erred in denying his pretrial motion to dismiss the indictment based on the prosecutor's allegedly improper impeachment of him before the grand jury regarding his criminal record (*see People v Burton*, 191 AD2d 451, *lv denied* 81 NY2d 1011), and that the court erred in denying his motion for a trial order of dismissal based on legally insufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We need not address defendant's remaining contentions in light of our decision to grant defendant a new trial.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

659

CAF 11-01859

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

IN THE MATTER OF DANIEL TARRANT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON OSTROWSKI, RESPONDENT-APPELLANT.

DOMINIC PAUL CANDINO, BUFFALO, FOR RESPONDENT-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR PETITIONER-RESPONDENT.

MINDY L. MARRANCA, ATTORNEY FOR THE CHILDREN, BUFFALO, FOR OLIVIA T. AND DOMINIC T.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered August 29, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole custody of the parties' children.

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

Memorandum: Respondent mother appeals from an order modifying the parties' existing custody arrangement by transferring physical custody of the parties' two children to petitioner father and granting the father sole custody of the children. The parties have had joint custody of the children with primary physical custody with the mother since February 24, 2010, pursuant to an order incorporating the parties' January 5, 2010 written custody agreement. In addition, Family Court adjudicated the mother to have violated prior court orders.

We reject the mother's contention that the court erred in determining that she willfully violated one or more prior court orders. Deferring as we must to the court's findings of fact, which are supported by a "sound and substantial basis in the record" (*Matter of Alice A. v Joshua B.*, 232 AD2d 777, 779), as well as its resolution of issues of credibility, we conclude that there was the requisite clear and convincing evidence to support the finding that the mother willfully violated a prior court order by preventing the father from receiving custodial access to the children in April 2010 (*see generally Matter of Seacord v Seacord*, 81 AD3d 1101, 1103). That custodial access was set forth in the parties' January 5, 2010 custody agreement, which in turn was incorporated in the court's order of

February 24, 2010.

We also reject the mother's contention that the court erred in considering testimony regarding matters that predated the aforementioned custody agreement and order. In custody cases, "Family Court is afforded broad discretion in establishing the parameters of the proof at trial and, if necessary, may extend it to all relevant matters" (*Matter of Gardner v Gardner*, 69 AD3d 1243, 1244). Here, the court explained that background information regarding the nature of the parties' relationship prior to the custody order and the circumstances surrounding their separation was required, to enable the court to understand the reluctance of the older child to spend time with the father and to make a more informed decision on the father's instant modification petition. Because the testimony in question provided the court with a baseline from which to assess whether there was a change in circumstances and permitted the court to conduct a more complete assessment of the best interests of the children, we conclude that the court did not abuse its discretion in considering such testimony. Contrary to the mother's further contention, such testimony was not barred by res judicata or collateral estoppel.

Turning to the merits of the mother's challenge to the transfer of custody, we note that "alteration of an established custody arrangement will be ordered only upon a showing of a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child[ren]" (*Matter of Irwin v Neyland*, 213 AD2d 773, 773). Here, the evidence at the hearing indicated that, prior to the establishment of the previous custody arrangement, the parties had no issues carrying out the father's custodial access, the father had successful visits with the children, and both children were loving in their interactions with the father and the paternal grandparents. The evidence further indicated that, after the prior custody arrangement was established, the father was denied access to the children on at least three occasions and the behavior of the older child toward the father and the paternal grandparents deteriorated drastically. Specifically, the older child began to exhibit a newfound hostility toward the father and paternal grandparents, showed an unwillingness to enjoy time spent with them, suddenly became unwilling to speak to the father on the telephone and, indeed, began acting in a violent manner toward the father. In light of that evidence, the court properly determined that a sufficient change of circumstances existed to warrant a review of the custody arrangement.

The remaining issue is whether the court erred in determining that the change of custody to the father was in the children's best interests. The court's determination is "entitled to great deference" and will not be disturbed if "the record establishes that it is the product of 'careful weighing of [the] appropriate factors' . . . and it has a sound and substantial basis in the record" (*Matter of McLeod v McLeod*, 59 AD3d 1011, 1011). Although "defiance of a court order is but one factor to be considered when determining the relative fitness of the parties and what custody arrangement is in the child[ren]'s best interest[s]" (*Wodka v Wodka*, 168 AD2d 1000, 1001), we conclude that the court properly weighed and considered all of the relevant

factors, some of which favored the father while others favored the mother. Giving due deference to the court's "superior ability to evaluate the character and credibility of the witnesses" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625), we perceive no basis to disturb its award of custody to the father.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

663

CA 11-02385

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

W. JAMES CAMPERLINO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAN E. BARGABOS AND KENWOOD HOMES, INC., DOING BUSINESS AS HERITAGE HOMES, DEFENDANTS-APPELLANTS.

D'ARRIGO & COTE, LIVERPOOL (MARIO D'ARRIGO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GREENE, HERSHDORFER & SHARPE, SYRACUSE (LORRAINE RANN MERTELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered July 27, 2011 in a breach of contract action. The order, among other things, denied defendants' motion to dismiss the complaint.

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

Memorandum: In this breach of contract action, defendants appeal from an order that, inter alia, denied their pre-answer motion to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5) and (7), and directed them to serve an answer. We reject defendants' contention that, pursuant to a plain reading of paragraph 10 of the parties' purchase contract, plaintiff is not entitled to reimbursement for development costs because defendants never developed the lots within Section III of the Waterford Wood subdivision. As Supreme Court noted in its bench decision, paragraph 10 does not distinguish between developed and undeveloped lots. Instead, it provides that "[t]he costs incurred by the Seller [plaintiff] for said development shall be reimbursed to the Seller from the proceeds of sales of lots by the Purchaser [defendants] within said Section III." Defendants' interpretation of paragraph 10 requires the insertion of the term "developed" therein, such that the paragraph would specify that the reimbursement applies to the proceeds from sales of "developed lots." It is well settled, however, that "courts may not by construction add . . . terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [internal quotation marks omitted]; *see Bailey v Fish & Neave*, 8 NY3d 523, 528).

We also reject defendants' related contention that the reimbursement requirement of paragraph 10 does not apply because they sold the entirety of Section III to a third party, rather than lots "within" Section III. The sale of all the lots comprising Section III to one buyer necessarily constituted the sale of the lots within Section III, and plaintiff's entitlement to reimbursement for development costs pursuant to the purchase contract was not made contingent upon the sale of individual lots by defendants. Particularly "in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length . . . courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Vermont Teddy Bear Co.*, 1 NY3d at 475 [internal quotation marks omitted]). At the very least, paragraph 10 is ambiguous in this regard, rendering dismissal of plaintiff's reimbursement claim pursuant to CPLR 3211 (a) inappropriate.

Defendants further contend that this action is barred by the general releases signed by plaintiff in a prior action between the parties. We conclude that the court properly denied defendants' motion to dismiss on that ground. Pursuant to the general releases, defendants are released from "all actions, causes of action, . . . covenants, contracts, . . . [and] agreements" that plaintiff "ever had, now has or hereafter can, shall or may have" against defendants "from the beginning of the world to the day of the date hereof, including without limitation all matters related to, and all claims asserted" in a specified prior action. Where, as here, " '[a] release . . . contain[s] specific recitals as to the claims being released, and yet conclude[s] with an omnibus clause to the effect that the releasor releases and discharges all claims and demands whatsoever which he [or she] . . . may have against the releasee . . ., the courts have often applied the rule of ejusdem generis, and held that the general words of a release are limited by the recital of a particular claim' " (*Green v Lake Placid 1980 Olympic Games*, 147 AD2d 860, 862). In our view, the reference to the prior action in the releases creates an ambiguity concerning their intended scope (*see e.g. Bugel v WPS Niagara Props., Inc.*, 19 AD3d 1081, 1082-1083), and that ambiguity cannot properly be resolved in the context of a pre-answer motion to dismiss (*see generally Hambrecht & Quist Guar. Fin., LLC v El Coronado Holdings, LLC*, 27 AD3d 204).

Finally, for reasons stated by the court in its bench decision, we conclude that this action is not barred by the statute of limitations and that plaintiff did not waive his right to reimbursement under paragraph 10 by consenting to the sale of Section III by defendants to a third party.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

669

CA 11-02273

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

IN THE MATTER OF THE PETITION OF DOROTHY E. GRAY TO DETERMINE THE VALIDITY OF ELECTION AGAINST THE LAST WILL AND TESTAMENT OF DONALD J. GRAY, DECEASED. MEMORANDUM AND ORDER

DOROTHY E. GRAY, PETITIONER-RESPONDENT;

ELSIE GARNSEY, RESPONDENT-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (KEVIN M. HAYDEN OF COUNSEL), FOR RESPONDENT-APPELLANT.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (PETER L. WALTON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Jefferson County (Peter A. Schwerzmann, S.), entered June 14, 2011. The decree granted the petition and deemed valid the notice of election executed by petitioner.

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

Memorandum: Petitioner, the estranged wife of decedent, commenced this proceeding, inter alia, to determine the validity of her notice of election. Petitioner and decedent separated in the 1980s, and decedent thereafter began living with respondent, his girlfriend, until his death in February 2008. In his will decedent left the residuary estate to respondent, bequeathing to petitioner only real property that he owned jointly with her. In June 2008, approximately four months after decedent died but before letters of administration were issued, petitioner's attorney filed a notice of election in Surrogate's Court and served the notice upon Key Bank, the executor named in decedent's will. Key Bank, however, renounced its appointment as executor and returned the notice to petitioner's attorney. The Surrogate's Court Clerk also returned the notice of election to petitioner's attorney, explaining that an estate for decedent had not yet been filed.

In March 2009, letters of administration were issued to the son of petitioner and decedent, and, according to petitioner, her son agreed to serve as executor provided that there was no dispute concerning the distribution of assets. Petitioner failed to re-file her notice of election with the Surrogate or to serve it upon the executor, nor did she seek an extension of time within which to do so.

The attorney representing the estate also represented respondent, at least initially, and there is no dispute that respondent and her attorney had actual knowledge since June 2008 that petitioner sought to exercise her right of election and had filed a premature notice of election. In fact, respondent's attorney engaged in detailed and prolonged negotiations with the attorney for petitioner with respect to the amount of her elective share. They eventually agreed upon a specific amount, i.e., $398,970.62, and the attorney for respondent informed petitioner's attorney that respondent and the executor were "getting the money together." Despite assurances that the payment would be forthcoming, petitioner never received her agreed-upon elective share.

In May 2010, respondent retained a new attorney and opposed petitioner's right to an elective share on the ground that petitioner failed to file a notice of election within six months of the issuance of letters of administration and no later than two years after the date of decedent's death, as required by EPTL 5-1.1-A (d) (1). Petitioner thereafter commenced this proceeding seeking a decree determining that her notice of election was valid. In support of her petition, she submitted a detailed affidavit from her attorney, who recounted all of the dealings with respondent's former attorney, along with letters from her attorney to respondent's former attorney corroborating the assertions in his affidavit. The attorney for petitioner attributed his failure to re-file the notice of election to the "numerous and oft-repeated representations and assurances" of respondent's former attorney that payment of the agreed-upon amount of petitioner's elective share was imminent.

In opposition to the petition, respondent submitted an affidavit from her subsequently retained attorney, who lacked personal knowledge of the relevant facts. The parties thereafter agreed that the Surrogate would base his decision solely on the papers submitted, thereby waiving their right to an evidentiary hearing. The Surrogate granted the petition, concluding that respondent was equitably estopped from challenging the notice of election on timeliness grounds. We affirm.

We conclude that, although petitioner did not substantially comply with the procedural requirements of EPTL 5-1.1-A inasmuch as she failed to file her notice of election "within six months from the date of the issuance of letters . . . of administration . . . but in no event [no] later than two years after the date of decedent's death" (EPTL 5-1.1-A [d] [1]), the Surrogate properly applied the doctrine of equitable estoppel to enable petitioner to assert her right to an elective share. Petitioner submitted ample evidence demonstrating that, as a result of numerous representations from the attorney representing the estate and respondent that her elective share rights would be honored, she was "lulled . . . into sleeping on [her] rights" (*Enright v Nationwide Ins.* [appeal No. 2], 295 AD2d 980, 981). Contrary to respondent's contention, petitioner also established that the attorney with whom her attorney was negotiating represented respondent as well as the estate. Notably, respondent offered no evidence to rebut the allegations in the petition. She did not submit

an affidavit from herself or the attorney whom petitioner asserts represented her during the relevant time period, nor did she dispute any of the allegations set forth in the affidavit of petitioner's attorney.

We agree with respondent that the Surrogate erred in determining that, for the doctrine of equitable estoppel to apply, petitioner was not required to establish that respondent *intended* to lull her into inactivity (*see generally Zumpano v Quinn*, 6 NY3d 666, 674; *Philip F. v Roman Catholic Diocese of Las Vegas*, 70 AD3d 765, 766; *Murphy v Wegman's Food Mkts.*, 140 AD2d 973, 974, *lv denied* 72 NY2d 808). Nevertheless, we conclude that the record supports a finding of the requisite intent on the part of respondent. Such a finding may be inferred from the sworn allegations of petitioner's attorney, which as noted are not disputed by respondent. If respondent had not intended to lull petitioner into inactivity, she could have set that forth in an affidavit. We thus conclude that the Surrogate properly granted the petition.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

673

KA 10-01095

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered March 23, 2010. The appeal was held by this Court by order entered October 7, 2011, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (88 AD3d 1293). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision and remitted the matter to Supreme Court "to determine, following a hearing if necessary, whether defense counsel consented to the annotated verdict sheet" (*People v Johnson*, 88 AD3d 1293, 1295). We determined in our prior decision that defendant's remaining contentions lacked merit (*id.*). Upon remittal, the court determined following a reconstruction hearing that defense counsel impliedly consented to the annotated verdict sheet, which included the language "an armed felony" with respect to robbery in the first degree, the only crime charged in the indictment. We reject defendant's present contention that the determination of implied consent is not supported by the record.

Although generally "the lack of an objection to the annotated verdict sheet by defense counsel cannot be transmuted into consent" (*People v Damiano*, 87 NY2d 477, 484), it is well settled that consent to the submission of an annotated verdict sheet may be implied where defense counsel "fail[s] to object to the verdict sheet after having an opportunity to review it" (*People v Knight*, 280 AD2d 937, 940, *lv denied* 96 NY2d 864; *see People v Washington*, 9 AD3d 499, 500-501, *lv denied* 3 NY3d 675, 680, 682; *People v Highsmith*, 248 AD2d 961, 962, *lv denied* 91 NY2d 1005, 1008). Here, the court's confidential law clerk testified at the reconstruction hearing that he provided defense

counsel and the prosecutor with a copy of the annotated verdict sheet at the close of proof and instructed the attorneys to let him know if they had any objections. The law clerk further testified that neither defense counsel nor the prosecutor thereafter objected to the verdict sheet, which was submitted to the jury the following day. The law clerk's testimony was corroborated by the prosecutor, who recalled having received a copy of the annotated verdict sheet from the law clerk during a conference with defense counsel at the close of proof. The law clerk's testimony was also corroborated by the fact that defense counsel had a copy of the charge list and annotated verdict sheet in his case file. The mere fact that defense counsel did not recall having received the annotated verdict sheet or having discussed it with the law clerk does not directly contradict the law clerk's testimony, which the court apparently credited.

Because defense counsel had an "opportunity to review" the annotated verdict sheet well before it was submitted to the jury and did not object to it, we conclude that the court properly determined that defendant impliedly consented to its submission to the jury (*Knight*, 280 AD2d at 940; *see Highsmith*, 248 AD2d at 962; *cf. People v Gerstner*, 270 AD2d 837).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

677

KA 10-01857

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEAN PIERRE VILLAFANE, 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 (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered July 6, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]), 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 the challenge to the severity of the sentence because Supreme Court failed to advise defendant of the potential periods of incarceration or the potential maximum term of incarceration (*see People v Newman*, 21 AD3d 1343; *People v McLean*, 302 AD2d 934; *cf. People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737), and there was no specific sentence promise at the time of the waiver (*cf. People v Semple,* 23 AD3d 1058, 1059, *lv denied* 6 NY3d 852). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

682

KA 10-02355

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUIL L. ADAMS, DEFENDANT-APPELLANT.

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

MARQUIL L. ADAMS, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 29, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law §160.15 [4]) and robbery in the second degree (§160.10 [1]). Contrary to defendant's contention, we conclude that the evidence, when viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish his identity as one of the perpetrators of the robbery (*see People v Brown*, 92 AD3d 1216-1217, *lv denied* ___ NY3d ___ [Apr. 30, 2012]). We further conclude that the verdict is not against the weight of the evidence on the issue of identification (*see People v Young*, 74 AD3d 1471, 1472, *lv denied* 15 NY3d 811*; see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant also contends that the pretrial identification by the robbery victim from a photo array should have been suppressed as the fruit of an illegal arrest (*see generally People v Hill*, 53 AD3d 1151, 1151; *People v Robinson*, 282 AD2d 75, 79-82). In its ruling on defendant's suppression motion, Supreme Court concluded that the photo array procedure was not unduly suggestive, but failed to address the legality of defendant's detention or arrest. "CPL 470.15 (1) precludes [this Court] from reviewing an issue that was either decided in an appellant's favor or was not decided by the trial court" (*People*

v Ingram, 18 NY3d 948, 949; *see People v LaFontaine*, 92 NY2d 470, 474, *rearg denied* 93 NY2d 849). Thus, we may not resolve defendant's contention regarding a theory not addressed by the court. We therefore hold the case, reserve decision and remit the matter to Supreme Court to determine whether the identification testimony should be suppressed as the fruit of an illegal detention or arrest (*see generally People v Chattley*, 89 AD3d 1557, 1558).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

687

CA 11-01153

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

KENNETH M. SCHLAU, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
AND FREY ELECTRIC CONSTRUCTION CO., INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (KIMBERLY A. GEORGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 17, 2011 in a personal injury action. The order and judgment, among other things, granted the motion of defendant Frey Electric Construction Co., Inc. for summary judgment dismissing the amended complaint and cross claims against it.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion of Frey Electric Construction Co., Inc. without prejudice and reinstating the amended complaint and cross claims against it and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff, an employee of a concessionaire at defendant HSBC Arena (Arena), commenced this action seeking damages for injuries he sustained after receiving an electrical shock from the handle of an electronically secured door at the Arena. We conclude that Supreme Court erred in granting the motion of defendant Frey Electric Construction Co., Inc. (Frey) seeking summary judgment dismissing the amended complaint and cross claims against it. Frey's "motion is premature because discovery has not been completed, including depositions concerning the respective roles, if any, of the parties involved in the accident" (*Syracuse Univ. v Games 2002, LLC*, 71 AD3d 1531, 1531-1532). We therefore modify the order and judgment by denying Frey's motion without prejudice and reinstating the amended complaint and cross claims against it (*see Coniber v Center Point Transfer Sta., Inc.*, 82 AD3d 1629; *Hobbs v Enprotech Corp.*, 12 AD3d

1063, 1064).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

688

CA 11-02430

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

KENNETH M. SCHLAU, JR., PLAINTIFF-APPELLANT,

V ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
AND FREY ELECTRIC CONSTRUCTION CO., INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (KIMBERLY A. GEORGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 7, 2011 in a personal injury action. The order, among other things, denied plaintiff's motion for leave to reargue his opposition to the summary judgment motion of defendant Frey Electric Construction Co., Inc.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

689

CA 11-02462

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

KENNETH M. SCHLAU, JR., PLAINTIFF-APPELLANT,

V ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
AND FREY ELECTRIC CONSTRUCTION CO., INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (KIMBERLY A. GEORGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 7, 2011 in a personal injury action. The order denied plaintiff's motion for leave to renew and reargue his opposition to the summary judgment motion of defendant Frey Electric Construction Co., Inc.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Braitman v Minicucci & Grenga* [appeal No. 1], 272 AD2d 875).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

696

CA 12-00130

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

PEGGY D. LAPP, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MINNESOTA MINING & MANUFACTURING COMPANY, INC.,
DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD J. LIPPES & ASSOCIATES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered October 25, 2011 in a personal injury action. The order denied defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained as a result of her alleged exposure to toxins while working with a machine that was manufactured by defendant. Plaintiff filed a note of issue on September 1, 2010 and, in May 2011, defendant moved for summary judgment dismissing the complaint. Supreme Court properly denied the motion on the grounds that it was untimely (*see* CPLR 3212 [a]), and that defendant did not meet its burden of demonstrating good cause for its delay in bringing the motion (*see Brill v City of New York*, 2 NY3d 648, 652; *Jones v Town of Le Ray*, 28 AD3d 1177, 1178). In light of our conclusion that the court properly denied defendant's motion, we do not address the remaining issues raised by defendant.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

709

CAF 12-00202

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

IN THE MATTER OF CHRISTOPHER W.,
RESPONDENT-RESPONDENT. MEMORANDUM AND ORDER

ERIE COUNTY ATTORNEY, PETITIONER-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (MICHAEL J. LISZEWSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered April 5, 2011 in a proceeding pursuant to Family Court Act article 3. The order dismissed the petition.

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

Memorandum: In this juvenile delinquency proceeding pursuant to Family Court Act article 3, petitioner appeals from an order granting respondent's motion to dismiss the petition. We agree with petitioner that Family Court erred in granting respondent's motion to dismiss the petition as facially insufficient based on the court's finding that the alleged victim, an infant, was unable to give sworn testimony (*see* § 343.1 [2]). A delinquency petition is facially sufficient provided that the nonhearsay allegations "of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof" (§ 311.2 [3]; *see Matter of Nelson R.*, 90 NY2d 359, 362).

Here, the nonhearsay allegations in the victim's supporting deposition, if true, establish that respondent subjected her to sexual contact by touching her vagina when she was three years old. The petition is therefore facially sufficient to allege that respondent committed acts that, if committed by an adult, constitute the crime of sexual abuse in the first degree (*see* Penal Law § 130.65 [3]). The fact that the alleged victim is unable to give sworn testimony is a latent defect that does not affect the facial sufficiency of the petition (*see Nelson R.*, 90 NY2d at 361; *Matter of Edward B.*, 80 NY2d 458, 464; *Matter of Jermaine G.*, 38 AD3d 105, 109-110). Contrary to the further contention of respondent, the court's determination that the alleged victim "cannot understand the nature of the oath and therefore cannot provide the Court with sworn testimony" does not

amount to an implicit determination that she does not have “sufficient intelligence and capacity” to provide unsworn testimony (Family Ct Act § 343.1 [2]).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

714

CA 12-00243

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

CHESTER LISS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARY FORTE AND CARL FORTE,
DEFENDANTS-RESPONDENTS.

LAW OFFICES OF MARK DAVID BLUM, MANLIUS (MARK DAVID BLUM OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (MANUEL P. KARAM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered December 7, 2011. The order granted the motion of defendants for partial summary judgment dismissing plaintiff's abuse of process cause of action.

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

Memorandum: Plaintiff appeals from an order granting defendants' motion for partial summary judgment dismissing the cause of action for abuse of process. By that cause of action, plaintiff alleged that Mary Forte (defendant) maliciously filed a false criminal complaint against him with the police in which she alleged that plaintiff, her neighbor, trespassed into her backyard to pick up waste from his dog. The police arrested plaintiff on a trespass charge and issued an appearance ticket to him. After the trespass charge was adjourned in contemplation of dismissal, plaintiff commenced this action seeking monetary damages for the emotional distress he allegedly suffered as a result of his arrest.

We conclude that Supreme Court properly granted defendants' motion. A plaintiff asserting a cause of action for abuse of process must plead and prove that there was "(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116, citing *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 403). In addition, the plaintiff must plead and prove actual or special damages (*see Silberman v Flaum*, 225 AD2d 985, 986; *City Sts. Realty Corp. v Resner*, 174 AD2d 408), although we note that legal fees incurred in defending against false criminal charges are sufficient

(*see Parkin v Cornell Univ.*, 78 NY2d 523, 530).

Here, defendants established that defendant did not use process "in a perverted manner to obtain a collateral objective" (*Curiano*, 63 NY2d at 116), which generally requires "the improper use of process after it is issued" (*id*. at 117 [internal quotation marks omitted]; *see Selinger v Selinger*, 210 AD2d 309; *Ronaldson v Countryside Manor Condominium Bd. of Mgrs.*, 189 AD2d 808, 809, *lv dismissed* 82 NY2d 706). Plaintiff in response failed to raise an issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although plaintiff submitted evidence indicating that defendant may have filed a false criminal complaint against him out of spite, "[a] malicious motive alone . . . does not give rise to a cause of action for abuse of process" (*Curiano*, 63 NY2d at 117). As defendants contend, plaintiff failed to demonstrate that defendant otherwise "utilized the process in a manner inconsistent with the purpose for which it was designed" (*Minasian v Lubow*, 49 AD3d 1033, 1036). The remedy for a party against whom a false criminal complaint is filed lies in the tort of malicious prosecution, and plaintiff is unable to pursue that tort because the charge against him resulted in an adjournment in contemplation of dismissal (*see Malanga v Sears, Roebuck & Co.*, 109 AD2d 1054, 1054-1055, *affd* 65 NY2d 1009).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

719

CA 12-00053

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

JAKE K. HILL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SENECA NATION OF INDIANS, ET AL., DEFENDANTS,
AND SENECA CONCRETE AND PAVING CO., LLC,
DEFENDANT-RESPONDENT.

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JOHANNA M. HEALY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered April 6, 2011 in a personal injury action. The order, insofar as appealed from, granted that part of the motion of defendant Seneca Concrete and Paving Co., LLC seeking dismissal of plaintiff's second and third causes of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant-respondent is denied in part and the second and third causes of action against it are reinstated.

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained while working on a construction project on property owned by defendant Seneca Nation of Indians (Seneca Nation). The injury occurred when a trench in which plaintiff was working collapsed on him. Plaintiff was employed by a contractor hired by the general contractor, defendant-respondent (defendant), a New York corporation. Supreme Court granted defendant's pre-answer motion to dismiss the complaint against it insofar as it asserted causes of action for breach of contract and the violation of Labor Law §§ 200, 240 (1) and § 241 (6), i.e., the first through third and fifth causes of action. Plaintiff conceded that his section 240 (1) cause of action should be dismissed and, as limited by his brief, he contends on appeal only that the court erred in granting the motion with respect to the causes of action under sections 200 and 241 (6), thus abandoning the breach of contract cause of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). Plaintiff contends that defendant, a non-Indian entity, "cannot avoid [its] obligations under New York law by hiding behind tribal sovereignty," while defendant contends that tribal law rather than New York law applies because the accident occurred on the Seneca Nation's sovereign land, and tribal

law does not provide for vicarious liability for property owners and general contractors. We agree with plaintiff.

This appeal is governed by our decisions in *Karcz v Klewin Bldg. Co., Inc.* (85 AD3d 1649) and *John v Klewin Bldg. Co., Inc*. (94 AD3d 1502), both of which were issued after the court granted defendant's motion. In *Karcz*, we rejected the defendants' contention that tribal law rather than New York law applied to a Labor Law action arising from a construction accident that occurred on land owned by the Seneca Nation. We held that, because "the locus of the alleged [malfeasance] is the Seneca Nation's sole connection to this action," that connection was "merely tangential," and thus Supreme Court "did not violate the Seneca Nation's right to self-government by exercising jurisdiction over th[e] dispute" (*id.* at 1650).

Defendant contends on appeal that *Karcz* is distinguishable because, unlike in this case, the injured plaintiff was not a Native American. In *John*, however, the plaintiff was in fact a member of the Seneca Nation, and we held that *Karcz* applied, thereby establishing that the plaintiff's status as a Native American is not dispositive of the issue before us. None of defendant's remaining contentions leads us to conclude that tribal law, rather than New York law, should apply to this case.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

724

KA 11-00863

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY R. KIMS, II, DEFENDANT-APPELLANT.

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

STANLEY R. KIMS, II, DEFENDANT-APPELLANT PRO SE.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 28, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree, criminal possession of marihuana in the second degree and criminally using drug paraphernalia in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is modified on the law by reversing those parts convicting defendant of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree and as modified the judgment is affirmed, and a new trial is granted on counts one and two of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We agree with defendant that County Court erred in charging the jury with respect to the presumption contained in Penal Law § 220.25 (2). That presumption, known as the "room presumption," provides that the presence of, inter alia, a "narcotic drug . . . in open view in a room," under circumstances evincing an intent to sell the drug, "is presumptive evidence of knowing possession thereof by each and every person *in close proximity to such controlled substance at the time such controlled substance was found*" (*id.* [emphasis added]). Thus, "[w]hen narcotics are found in open view in a room on private premises, every person 'in close proximity' to the drugs at the time of discovery is presumed by statute to have knowingly possessed them" (*People v Daniels*, 37 NY2d 624, 630-631; *see People v*

Coleman, 26 AD3d 773, 775, *lv denied* 7 NY3d 754).

Our inquiry with respect to Penal Law § 220.25 (2) on this appeal turns on the interpretation of the "close proximity" language of the statute. "Penal statutes 'must be construed according to the fair import of their terms to promote justice and effect the objects of the law' " (*People v Fraser*, 264 AD2d 105, 110, *affd* 96 NY2d 318, *cert denied* 533 US 951, quoting § 5.00; *see People v Miller*, 70 NY2d 903, 906), and it is fundamental that in interpreting a statute we should attempt to effectuate the intent of the Legislature (*see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583). The "room presumption" was added to the Penal Law in 1971 (*see* L 1971, ch 1044) and, according to its drafters, was intended to address situations in which the police execute a search warrant at a suspected " 'drug factory' " only to find drugs and drug paraphernalia scattered about the room. "The occupants of such 'factories,' who moments before were diluting or packaging the drugs, usually proclaim[ed] their innocence and disclaim[ed] ownership of, or any connection with, the materials spread before them," thus often leaving the police "uncertain as to whom to arrest" (Mem of St Commn of Investigation, Bill Jacket, L 1971, ch 1044, at 4). Moreover, a letter from the chairperson of the State Commission of Investigation, which drafted this statutory provision, further explains that the phrase "in close proximity" was included "to remedy a fairly common situation wherein police execute a search warrant on premises suspected of being a 'drug factory' and find narcotics in open view in the room," and that "[i]t is also intended to include persons who might, upon the sudden appearance of the police, hide in closets, bathrooms or other convenient recesses" (Letter from St Commn of Investigation, Dec. 1, 1971, Bill Jacket, L 1971, ch 1044, at 6-7).

Here, unlike the scenario envisioned by the Legislature, defendant walked out the "front" of his apartment, entered his nearby vehicle and was apprehended almost immediately by parole officers who were investigating whether he resided at that location. Several minutes later, parole officers and police detectives entered defendant's apartment to conduct a warrantless protective search. The officers found another person present in the apartment and discovered a significant amount of cocaine in the rear area of the apartment, and that cocaine was seized in a subsequent search conducted pursuant to a search warrant.

Consequently, based on the facts of this case, we conclude that "defendant was not in 'close proximity to such controlled substance at the time such controlled substance was found' " (*People v Edwards*, 23 AD3d 1140, 1141, quoting Penal Law § 220.25 [2]). We further conclude that the court's error in charging the presumption cannot be considered harmless inasmuch as there is no way to discern whether the jury's verdict convicting defendant of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree, i.e., the only counts with respect to which the presumption was charged, " 'was predicated on the illegally charged presumption or on a finding of constructive possession irrespective of the presumption' " (*id.* at 1142, quoting

People v Martinez, 83 NY2d 26, 35, *cert denied* 511 US 1137). We therefore modify the judgment by reversing those parts convicting defendant of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree, and we grant a new trial on those counts of the indictment (*see People v Rodriguez*, 104 AD2d 832, 834).

We respectfully disagree with our dissenting colleague that we should apply the reasoning of the First Department in *People v Alvarez* (8 AD3d 58, 59, *lv denied* 3 NY3d 670) to the facts of this case. In *Alvarez*, the First Department concluded that the trial court properly charged the jury with respect to the room presumption where the defendant was not apprehended in the apartment in question and the police did not see him fleeing therefrom. The trial evidence in *Alvarez*, however, "clearly warranted" the conclusion that the defendant jumped out of the window of the apartment in which the drugs were found, inasmuch as the defendant was discovered injured in the backyard area below the window, and was attempting to flee by climbing a fence (*id.*).

Put differently, the defendant in *Alvarez*, who appears to have been the only occupant of the apartment in which the drugs were located, was found in flight and physically close to a makeshift exit from that apartment. Here, in contrast to the facts in *Alvarez*, defendant was not in flight from the police; he was apprehended in the driveway outside the apartment several minutes after leaving the apartment in which the drugs were found; and the apartment was occupied by another person. Given the distance in time and space present here but absent from *Alvarez*, we respectfully disagree with our dissenting colleague that *Alvarez* applies here.

We now turn to defendant's remaining contentions. Contrary to defendant's contention, the court's pretrial *Molineux* ruling does not constitute an abuse of discretion. The evidence of defendant's prior drug sales and association with drug dealers was probative of "legally relevant and material issue[s] before the [jury]" (*People v Alvino*, 71 NY2d 233, 242; *see People v Satiro*, 72 NY2d 821, 822; *People v Ray*, 63 AD3d 1705, 1706, *lv denied* 13 NY3d 838; Prince, Richardson on Evidence § 4-510 [Farrell 11th ed]). In addition, " '[t]he limited probative force of . . . evidence [with respect to defendant's escape from custody] is no reason for its exclusion' " (*People v Roman*, 60 AD3d 1416, 1418, *lv denied* 12 NY3d 928, quoting *People v Yazum*, 13 NY2d 302, 304, *rearg denied* 15 NY2d 679) and, here, the court gave a jury instruction that conveyed the "weakness [of that evidence] as an indication of guilt of the crime[s] charged" (*Yazum*, 13 NY2d at 304). In any event, any error with respect to the *Molineux* ruling is harmless (*see People v Baker*, 21 AD3d 1435, 1436, *lv denied* 6 NY3d 773; *see generally People v Crimmins*, 36 NY2d 230, 241-242). We further conclude that " 'any alleged [prosecutorial] misconduct was not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Szyzskowski*, 89 AD3d 1501, 1503; *see People v Pruchnicki*, 74 AD3d 1820, 1822, *lv denied* 15 NY3d 855). Contrary to defendant's contention, the court properly refused to suppress

evidence seized from his apartment subsequent to a warrantless protective search (*see People v Lasso-Reina*, 305 AD2d 121, 122, *lv denied* 100 NY2d 595; *see generally People v Bost*, 264 AD2d 425, 426).

Defendant contends in his pro se supplemental brief that the evidence seized from his vehicle and apartment should be suppressed because the parole officers who stopped him in his vehicle acted as conduits for, or agents of, the police. Defendant sets forth a similar contention with respect to the evidence seized from his apartment in his main brief. Even assuming, arguendo, that defendant initially preserved those contentions for our review (*see generally People v Mendoza*, 82 NY2d 415, 428), we conclude that he thereafter abandoned them (*see People v Adams*, 90 AD3d 1508, 1509, *lv denied* 18 NY3d 954; *People v Anderson*, 52 AD3d 1320, 1320-1321, *lv denied* 11 NY3d 733). Defendant's further contention in his pro se supplemental brief that he was denied his right of confrontation with respect to the testimony of a police detective is unpreserved for our review (*see People v Davis*, 87 AD3d 1332, 1334-1335, *lv denied* 18 NY3d 858, 956). In any event, that contention lacks merit. The detective testified that he learned from a confidential informant that defendant's residence might be used as a "stash house," i.e., a place to keep drugs and money and to package drugs for sale. We conclude that such testimony was properly admitted in evidence for the purpose of explaining the actions of the police and the sequence of events leading to defendant's arrest (*see People v Davis*, 23 AD3d 833, 835, *lv denied* 6 NY3d 811; *see also People v Tosca*, 98 NY2d 660, 661). Finally, we conclude that the court properly admitted in evidence the drugs at issue despite the alleged gaps in the chain of custody with respect thereto. "The police provided sufficient assurances of the identity and unchanged condition of the evidence . . ., and thus any alleged gaps in the chain of custody went to the weight of the evidence, not its admissibility" (*People v Kennedy*, 78 AD3d 1477, 1478, *lv denied* 16 NY3d 798; *see People v Hawkins*, 11 NY3d 484, 494).

All concur except SCUDDER, P.J., who dissents in part and votes to affirm in the following Memorandum: I respectfully dissent in part. I disagree with the majority that County Court erred in charging the jury with respect to the presumption set forth in Penal Law § 220.25 (2), and I would therefore affirm the judgment in its entirety.

The record establishes that cocaine and drug packaging paraphernalia were located in plain view in the kitchen of the apartment rented by defendant. The kitchen was in the rear of the apartment, and the police discovered the contraband approximately five minutes after parole officers observed defendant and another person exit the front door of the apartment, which was located in the living room. Defendant's companion admitted that he had purchased drugs from defendant immediately before the two left the apartment together. A third person was in the apartment with defendant and his companion, and that person, i.e., "Chino," appeared to be asleep on the couch in the living room when the police entered the apartment. While he was detained by police in the driveway, defendant yelled to bystanders, "call Chino, call Chino." The record also establishes that the address of defendant's approved residence for parole purposes was

different from the address where the subject contraband was located, and that there were no beds in the two-bedroom apartment where the contraband was located. In my view, these facts support a determination that the apartment defendant rented was used as a "drug factory operation" (*People v Martinez*, 83 NY2d 26, 29, *cert denied* 511 US 1137), and thus that the court properly instructed the jury that it was permitted to consider whether defendant was in knowing possession of the cocaine at the time it was found.

The court charged the jury that "the presence of a narcotic drug . . . in open view in a room under circumstances evincing an intent . . . to prepare that substance for sale is presumptive evidence of knowing possession of that substance by each and every person *in close proximity to it at the time the substance was found . . .* The People must prove beyond a reasonable doubt that the cocaine was in open view in a room *and that the circumstances were such as to evince an intent . . . to prepare the cocaine for sale* [. If you so find . . .], then you may, but you are not required to, infer from that fact that each and every person in close proximity to the cocaine at the time it was found was in knowing possession of it" (emphasis added).

In *People v Alvarez* (8 AD3d 58, 59, *lv denied* 3 NY3d 670), the First Department concluded that the trial court properly charged the jury on the presumption contained in Penal Law § 220.25 (2) where the defendant was found outside of the apartment in which the drugs were located and the police deduced that he had jumped out of a window. In my view, we should apply the reasoning of the *Alvarez* Court to this case. The cocaine was "in open view in a room . . . under circumstances evincing an intent to unlawfully . . . package or otherwise prepare [it] for sale" (§ 220.25 [2]; *cf. Martinez*, 83 NY2d at 34 n 3). Further, approximately five minutes before the cocaine was found by the police, defendant was observed leaving the apartment that he rented but may not have used as his residence, and he was in the company of a person who admitted that he had purchased cocaine from defendant. Thus, the court properly determined that the jury could find that defendant was in close proximity to the cocaine when he was apprehended in his car in the driveway (*see Alvarez*, 8 AD3d at 59).

The majority's reliance on *People v Edwards* (23 AD3d 1140, 1141) is misplaced. In *Edwards*, the bag of cocaine was not found in a room of the subject apartment but instead was found on the bottom step of a stairway leading to the apartment, and defendant was found in the rear of the apartment. We concluded that "the controlled substance was not 'in open view in a room' and that, in any event, defendant was not in 'close proximity to such controlled substance at the time such controlled substance was found' " (*id.* at 1141). If defendant herein had not been observed leaving the apartment less than five minutes before the cocaine was found, I would agree with the majority that *Edwards* is analogous. However, in my view, the facts presented here support the determination that defendant was in close proximity to the controlled substance at the time it was found and thus that the court properly instructed the jury that it was entitled to infer that

defendant was in knowing possession of the cocaine.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

725

KA 11-00449

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS JACOBS, 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 (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered November 4, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [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 the challenge to the severity of the sentence because Supreme Court failed to advise defendant of the potential periods of incarceration or the potential maximum term of incarceration (*see People v Newman*, 21 AD3d 1343; *People v McLean*, 302 AD2d 934; *cf. People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737), and there was no specific sentence promise at the time of the waiver (*cf. People v Semple*, 23 AD3d 1058, 1059, *lv denied* 6 NY3d 852). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe in light of the severity of the offense and the favorable nature of the plea agreement.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

729

KA 11-00493

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY D. FINEOUT, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered February 14, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of marihuana in the second degree, criminally using drug paraphernalia in the second degree (two counts) and perjury in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of marihuana in the second degree (§ 221.25). At the outset, we note our concern with defendant's contention that the People withheld disclosure of a cooperation agreement of one of their witnesses and subsequently countenanced the perjury of that witness with respect to the existence of the cooperation agreement. That contention, however, involves "matters outside the record on appeal and thus may properly be raised by way of a motion pursuant to CPL article 440" (*People v Johnson*, 88 AD3d 1293, 1294; *see People v Ellis*, 73 AD3d 1433, 1434, *lv denied* 15 NY3d 851).

Defendant failed to preserve for our review his contention that County Court erred in admitting certain testimony of several police detectives with respect to their investigation of this case. Defendant failed to object to parts of that testimony he now challenges (*see* CPL 470.05 [2]), and otherwise made only a general objection (*see People v Mobley*, 49 AD3d 1343, 1344, *lv denied* 11 NY3d 791) or premised his objection on a theory not advanced on appeal (*see generally People v Coapman*, 90 AD3d 1681, 1683, *lv denied* 18 NY3d 956; *People v Smith*, 24 AD3d 1253, 1253, *lv denied* 6 NY3d 818). In any event, that contention lacks merit inasmuch as the admission of the testimony did not violate an exclusionary rule (*see People v Alvino*,

71 NY2d 233, 241).

The further contention of defendant that the court erred in failing to submit to the jury the issue whether a certain witness was an accomplice as a matter of law is not preserved for our review (*see People v Blume*, 92 AD3d 1025, 1027; *People v Freeman*, 78 AD3d 1505, 1506, *lv denied* 15 NY3d 952), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, we reject the contention of defendant that he was denied a fair trial based on cumulative error and "the inattention of defense counsel to those errors." Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

735

CA 11-02383

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

JOHN CHRISTODOULIDES, M.D.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FIRST UNUM LIFE INSURANCE COMPANY,
DEFENDANT-APPELLANT,
AND LIFE INSURANCE COMPANY OF BOSTON AND
NEW YORK, DEFENDANT.
(APPEAL NO. 1.)

PHILLIPS LYTLE LLP, BUFFALO (PAUL K. STECKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (HUGH C. CARLIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 17, 2011. The judgment awarded plaintiff money damages against defendant First Unum Life Insurance Company.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered November 1, 2011 is modified on the law by denying that part of plaintiff's cross motion against defendant First Unum Life Insurance Company, and by vacating the declaration and the award of damages against that defendant, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that he is entitled to lifetime benefits under three disability insurance policies issued to him by defendants. Defendant First Unum Life Insurance Company (First Unum) issued one of the disability insurance policies, and defendant Life Insurance Company of Boston and New York (BNY) issued the remaining two policies. The First Unum policy insures against "(1) loss or disability resulting directly and independently of all other causes from accidental bodily injury occurring during any term of this policy, being hereinafter referred to as 'such injury' or (2) loss or disability commencing during any term of this policy, resulting from sickness, hereinafter referred to as 'such sickness.' " Where the loss or disability results from an accident, the insured is entitled to lifetime benefits. Where the loss or disability results from sickness, however, the maximum benefit period is to age 65.

Under the BNY policies, the maximum benefit period similarly depends upon whether the disability is caused by "injury" or "sickness." Where, as here, the insured is between the ages of 63 and 64 at the onset of disability, the maximum benefit period is "lifetime" for disability caused by injury and 24 months for disability caused by sickness. The BNY policies define "injury" as "accidental bodily injury that . . . results directly and independently of all other causes in loss or disability." "Sickness" is defined as "a sickness or disease first diagnosed or treated while the Policy is in force and resulting in a loss or disability commencing while the Policy is in force."

In September 2006, plaintiff experienced pain in his right shoulder while lifting five-pound weights in his home as part of his regular exercise routine. A February 2007 MRI revealed a rotator cuff tear in plaintiff's right shoulder. As a result of the pain in his shoulder, plaintiff was unable to perform his duties as a physician, and he ceased working as a urologist in June 2007. Thereafter, plaintiff applied for benefits under the three disability policies issued by defendants. Defendants determined that plaintiff was totally disabled and paid him disability benefits under the policies for a period of 24 months. At that point, defendants ceased paying benefits on the ground that plaintiff's disability was the result of "sickness" as opposed to "injury" within the meaning of the policies. Defendants moved for summary judgment dismissing the complaint, and plaintiff cross-moved for summary judgment declaring that he is entitled to lifetime benefits under the three policies and awarding him damages in the amount of the benefits allegedly owed under the policies. Supreme Court denied defendants' motion, granted plaintiff's cross motion, and awarded judgment against First Unum in the amount of $18,172.50 (appeal No. 1) and against BNY in the amount of $174,670 (appeal No. 2). In both appeals, defendants contend that the court erred in denying their motion for summary judgment because plaintiff's alleged disability did not result from an "accidental bodily injury" resulting "directly and independently of all other causes," as required by the subject insurance policies.

Contrary to defendants' contention, we conclude that plaintiff established as a matter of law that his shoulder injury constitutes an "accidental bodily injury" within the meaning of the subject policies. "As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . ., and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267; *see Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177). "Unless otherwise defined by the policy, words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense" (*Hartford Ins. Co. of Midwest v Halt*, 223 AD2d 204, 212, *lv denied* 89 NY2d 813; *see Rocon Mfg. v Ferraro*, 199 AD2d 999, 999). Thus, "[t]he meaning of the language used in the policy must be found in the common sense and common speech of the average person" (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 32-33, *affd* 49 NY2d 924; *see Canfield v Peerless Ins. Co.*, 262 AD2d 934, 934, *lv denied* 94 NY2d 757). Of course, "[i]f the terms of

a policy are ambiguous, . . . any ambiguity must be construed in favor of the insured and against the insurer" (*White*, 9 NY3d at 267; *see United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232; *Salimbene v Merchants Mut. Ins. Co.*, 217 AD2d 991, 992).

The subject insurance policies do not define the terms "accident" or "accidental." "When interpreting the multifaceted term accident in an insurance policy, we must construe the word accident as would the ordinary [person] on the street or ordinary person when he [or she] purchases and pays for insurance . . . The term is not given a narrow, technical definition by the law. It is construed, rather, in accordance with its understanding by the average [person] . . . who, of course, relates it to the factual context in which it is used" (*Michaels v City of Buffalo*, 85 NY2d 754, 757 [internal quotation marks and emphasis omitted]; *see Arthur A. Johnson Corp. v Indemnity Ins. Co. of N. Am.*, 7 NY2d 222, 227). Black's Law Dictionary defines "accident" as, inter alia, "[a]n unintended and unforeseen injurious occurrence" (*id.* at 16 [9th ed 2009]). In New York, unlike other jurisdictions, there is no distinction made between "accidental means and accidental results" (*Burr v Commercial Travelers Mut. Acc. Assn. of Am.*, 295 NY 294, 302; *see Miller v Continental Ins. Co.*, 40 NY2d 675, 678). Thus, the term "accident" in an insurance policy may "pertain not only to an unintentional or unexpected event which, if it occurs, will foreseeably bring on [injury], but [may pertain] equally to an intentional or expected event which unintentionally or unexpectedly has that result" (*Miller*, 40 NY2d at 678; *see Salimbene*, 217 AD2d at 993-994).

Here, there is no question that, although plaintiff was intentionally engaged in the exercise of lifting weights at the time of his injury, the resulting rotator cuff tear was unintended, unexpected, and unforeseen (*see* Black's Law Dictionary, accident; *Miller*, 40 NY2d at 677-678; *see also Lachter v Insurance Co. of N. Am.*, 145 AD2d 540, 541). Defendants, however, contend that plaintiff's rotator cuff tear does not qualify as an accidental bodily injury because it occurred during the course of his "ordinary physical activity," i.e., his usual workout routine. We reject that contention. Defendants rely on *Valente v Equitable Life Assur. Socy. of U. S.* (120 AD2d 934, 935, *lv denied* 68 NY2d 608), in which this Court concluded that a heart attack suffered as a consequence of ordinary physical exertion does not constitute an accident within the meaning of the accidental death provision of an insurance policy on the life of the plaintiff's decedent. That reliance is misplaced, however. The decedent, a 41-year-old man with no history of heart disease, had a heart attack and died shortly after lifting and moving large cartons of coffee as part of his routine duties at the supermarket where he worked (*id*. at 934). The insurance policy in *Valente*, unlike in this case, specifically excluded coverage for "[l]osses resulting from, or caused directly or indirectly" by a "bodily . . . infirmity" (*id*. at 935). Although this Court noted that "the sudden heart attack suffered by plaintiff's decedent was neither expected nor foreseen by him," we reasoned that "the problem with that definition of accidental death is that it would include, *contrary to*

the clear intent of the policy, any sudden death resulting from natural causes" (*id.* [emphasis added]).

We agree with defendants, however, that the court erred in granting plaintiff's cross motion for summary judgment because there is an issue of fact whether plaintiff's disability resulted from the September 2006 accident, "directly and independently of all other causes" (*see Arbour v Commercial Life Ins. Co.*, 240 AD2d 1001, 1001-1003; *see generally Lachter*, 145 AD2d at 541). Defendants submitted, inter alia, plaintiff's deposition testimony in which he testified that he first experienced pain in his right shoulder in 2001, approximately five years before the subject accident. An X ray report of plaintiff's right shoulder from April 2001 found "[i]nferior spurring from the acromion," and an April 2001 MRI report noted a "[s]mall 5 or 6 mm anterior rotator cuff tear" in the same shoulder. The February 2007 MRI of plaintiff's right shoulder revealed a "[r]ight side supraspinatus tendon rotator cuff insertion tear about 1.5 cm gap present," and the report states that "[t]his is a changing pattern of progression compared to the 2001 baseline exam." Defendants also submitted a March 2007 report from an orthopedic surgeon who noted that plaintiff reported a "similar episode back in 2001," and that the 2001 MRI "revealed a partial-thickness tear of the rotator cuff." The orthopedic surgeon concluded that the April 2001 MRI films of plaintiff's right shoulder showed "some evidence of rotator cuff tendinosis." In addition, defendants submitted a 2007 BNY claim form, in which plaintiff described the onset of his symptoms as "years ago." Defendants further submitted the affirmation of another orthopedic surgeon who, upon reviewing plaintiff's medical records, opined that the rotator cuff tear diagnosed in 2007 "was the result of normal and expected progression of the smaller tear with which he was diagnosed in 2001, as a result [of] an ongoing degenerative process in the right shoulder." That orthopedic surgeon further opined that plaintiff's September 2006 onset of shoulder pain was "not associated with any specific acute new trauma or injury," but rather was caused by his "underlying degenerative condition of his right shoulder."

Defendants also submitted, however, plaintiff's deposition testimony to the effect that his 2001 right shoulder pain was gone in about 10 days or two weeks, that the pain was "not significant," and that it did not interfere with his ability to practice medicine. Plaintiff further testified that he experienced "[n]o symptoms" between 2001 and September 2006. The statement of the attending physician accompanying plaintiff's 2007 claim for benefits from BNY indicates that plaintiff's symptoms first occurred in September 2006, and that plaintiff had never had the same or similar condition. Finally, in opposition to defendants' motion and in support of his cross motion, plaintiff submitted an affidavit in which he averred that his 2001 shoulder episode resolved in 10 to 14 days, that he did not lose any time from work as a result of that episode, and that he had "no further discomfort or limitation with [his] right shoulder until September, 2006."

We therefore vacate the judgment in each appeal and modify the

single order underlying the judgments by denying plaintiff's cross motion for summary judgment, and by vacating the declarations and the award of damages against each defendant.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

736

CA 11-02384

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

JOHN CHRISTODOULIDES, M.D.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FIRST UNUM LIFE INSURANCE COMPANY,
DEFENDANT,
AND LIFE INSURANCE COMPANY OF BOSTON AND
NEW YORK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (PAUL K. STECKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (HUGH C. CARLIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 17, 2011. The judgment awarded plaintiff money damages against defendant Life Insurance Company of Boston and New York.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the same order as in *Christodoulides v First Unum Life Ins. Co.* ([appeal No. 1] ___ AD3d ___ [June 15, 2012]) is further modified on the law by denying that part of plaintiff's cross motion against defendant Life Insurance Company of Boston and New York, and by vacating the declaration and the award of damages against that defendant, and as further modified the order is affirmed without costs.

Same Memorandum as in *Christodoulides v First Unum Life Ins. Co.* ([appeal No. 1] ___ AD3d ___ [June 15, 2012]).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

737

CA 11-01970

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

STEPHEN NICHOLS, PLAINTIFF-APPELLANT,

V ORDER

MARIE HACK, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

NIRA T. KERMISCH, SUDBURY, MASSACHUSETTS, FOR PLAINTIFF-APPELLANT.

LITTLER MENDELSON, P.C., ROCHESTER (PAMELA S.C. REYNOLDS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Monroe County (David Michael Barry, J.), entered May 12, 2011. The amended judgment dismissed the complaint upon a jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

738

CA 11-01971

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

STEPHEN NICHOLS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARIE HACK, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

NIRA T. KERMISCH, SUDBURY, MASSACHUSETTS, FOR PLAINTIFF-APPELLANT.

LITTLER MENDELSON, P.C., ROCHESTER (PAMELA S.C. REYNOLDS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a second amended judgment of the Supreme Court, Monroe County (David Michael Barry, J.), entered June 24, 2011. The second amended judgment dismissed the complaint upon a jury verdict.

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

Memorandum: On appeal from a second amended judgment that dismissed his complaint for malicious prosecution after the jury returned a verdict in favor of defendant, plaintiff contends, inter alia, that Supreme Court erred in admitting testimony that defendant consulted with an attorney prior to filing a harassment charge against plaintiff and in giving a jury charge addressing reliance on the advice of counsel in the context of a malicious prosecution action. We reject plaintiff's contentions. Whether a defendant in a malicious prosecution action is required to plead reliance on the advice of counsel "as an affirmative defense turns on the particular circumstances of each case and is a matter within the sound discretion of the [trial] court" (*Edwards v New York City Tr. Auth.*, 37 AD3d 157, 158). Here, the court properly exercised its discretion in admitting testimony regarding defendant's consultation with an attorney. Moreover, it is apparent on this record that plaintiff knew that defendant had conferred with an attorney prior to filing a harassment charge against him and, thus, there was no chance that the failure to plead reliance on the advice of counsel took plaintiff "by surprise" (CPLR 3018 [b]). In addition, the testimony of defendant and the attorney with whom she consulted prior to filing a harassment charge was sufficient to support the court's decision to instruct the jury regarding defendant's assertion that she had relied on the advice of counsel (*see* PJI 3:50.3). We have considered plaintiff's remaining

contentions and conclude that they are without merit.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

740

CA 11-02079

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

DARLENE DONALD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DEVAN E. AHERN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTEN M. BENSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 8, 2011 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant to compel plaintiff to complete HIPAA compliant authorizations and to submit to a second deposition and granted the cross motion of plaintiff for a protective order.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted to the extent that plaintiff is directed to submit to Supreme Court a certified complete copy of her medical records from mental health providers since 2000 and to submit to a second deposition, the cross motion is denied, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle driven by defendant rear-ended the vehicle driven by plaintiff. After deposing plaintiff, defendant moved to compel plaintiff to provide defendant with Health Insurance Portability and Accountability Act ([HIPAA] 42 USC § 1320d *et seq.*) compliant authorizations allowing defendant to obtain plaintiff's medical records from psychologists, psychiatrists, counselors, and therapists from whom plaintiff received treatment, and to compel plaintiff to submit to a second deposition on her psychological conditions, treatment, and related medications, and the effect thereof on her quality of life. Plaintiff cross-moved for a protective order to strike defendant's request for disclosure of the records and to strike her deposition testimony concerning her mental health treatment. In appeal No. 1, defendant appeals from an order denying those parts of his motion to compel plaintiff to produce HIPAA compliant authorizations and to compel plaintiff to submit to a second deposition with respect to any "psychological treatment," while permitting defendant's attorney to continue to depose plaintiff

concerning "any other issues" consistent with Supreme Court's decision inasmuch as defendant's attorney indicated that she had discontinued the deposition when plaintiff became "extremely upset." By the order in appeal No. 1, the court also granted plaintiff's cross motion for a protective order. After defendant filed a notice of appeal from the order in appeal No. 1, plaintiff filed a note of issue and certificate of readiness. Defendant moved to strike the note of issue and certificate of readiness because, inter alia, pretrial discovery had not been completed. In appeal No. 2, defendant appeals from an order denying his motion.

With respect to appeal No. 1, we agree with defendant that the court erred in denying defendant's motion insofar as it sought to compel plaintiff to complete the HIPAA authorizations and erred in granting plaintiff's cross motion, but only to the extent that the resulting records are to be submitted to the court for an in camera review and appropriate redaction, as explained herein, before defendant may receive them. "[A]lthough a plaintiff who commences a personal injury action has waived the physician-patient privilege to the extent that his [or her] physical or mental condition is affirmatively placed in controversy . . ., the waiver of that privilege does not permit discovery of information involving unrelated illnesses and treatments" (*Bozek v Derkatz*, 55 AD3d 1311, 1312 [internal quotation marks omitted]; *see Tirado v Koritz*, 77 AD3d 1368, 1369; *Tabone v Lee*, 59 AD3d 1021, 1022). "The determinative factor is whether the records sought to be discovered are material and necessary in defense of the action . . ., or whether the records may contain information reasonably calculated to lead to relevant evidence" (*Bozek*, 55 AD3d at 1312 [internal quotation marks omitted]; *see Nichter v Erie County Med. Ctr. Corp.*, 93 AD3d 1337, 1338).

Here, plaintiff affirmatively placed various aspects of her physical condition in controversy, including pain in her upper extremities and headaches of increasing intensity and frequency, thus waiving any physician-patient privilege concerning records related to those physical conditions (*see Tirado*, 77 AD3d at 1369; *Tabone*, 59 AD3d at 1022). Based on plaintiff's deposition testimony, plaintiff's depression is related to those physical conditions inasmuch as plaintiff agreed that her depression causes her stress, which in turn increases her pain. Further, defendant is entitled to plaintiff's mental health records because plaintiff alleged that she has suffered an impaired and diminished quality of life and, given plaintiff's preexisting depression, her impaired quality of life and inability to enjoy the activities she enjoyed before the accident could result from physical injuries sustained in the accident, her preexisting mental condition or aggravation of that condition, or some combination thereof. Therefore, because plaintiff's depression is not an unrelated ailment, plaintiff waived her physician-patient privilege concerning her mental health records, and the records sought to be discovered are material and necessary in defense of the action.

We acknowledge, however, that there may be information in plaintiff's mental health records that is irrelevant to the current action, and that there are legitimate concerns with respect to "the

unfettered disclosure" of a plaintiff's mental health records (*see Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 460). We thus conclude that plaintiff must submit her mental health records from 2000 to the present to Supreme Court for an in camera review and the redaction of any irrelevant information (*see Nichter*, 93 AD3d at 1338; *see generally Tirado*, 77 AD3d at 1369; *Tabone*, 59 AD3d at 1022).

We further agree with defendant that the court erred in denying that part of the motion to compel a second deposition of plaintiff regarding her mental health issues. Plaintiff's mental health records are a proper part of disclosure in this case, the deposition of plaintiff on the issue of her mental health is material and necessary to the defense, and defendant's attorney specifically requested an opportunity to depose plaintiff a second time on issues related to her mental health (*see* CPLR 3101 [a]; *Gromoll v Bertolino*, 4 AD3d 759, 759-760).

In light of our conclusion in appeal No. 1, we agree with defendant in appeal No. 2 that the court erred in denying his motion to strike the note of issue and certificate of readiness. A court may strike a note of issue and certificate of readiness on motion where, inter alia, "it appears that a material fact in the certificate of readiness is incorrect" (22 NYCRR 202.21 [e]). Here, the certificate of readiness stated that discovery was complete. Because we agree with defendant that discovery was incomplete when the note of issue and certificate of readiness were filed, " 'a material fact in the certificate of readiness [was] incorrect' " (*Suphankomut v Chi-The Yu*, 66 AD3d 1360, 1360, quoting 22 NYCRR 202.21 [e]).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

741

CA 11-02080

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

DARLENE DONALD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DEVAN E. AHERN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTEN M. BENSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered September 22, 2011 in a personal injury action. The order denied the motion of defendant to strike plaintiff's note of issue and certificate of readiness.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the note of issue and certificate of readiness are vacated.

Same Memorandum as in *Donald v Ahern* ([appeal No. 1] ___ AD3d ___ [June 15, 2012]).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

742

CA 11-01872

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

ROSCOE BEASON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID KLEINE, DEFENDANT-APPELLANT.

MATTHEW D. NAFUS, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

HARRIS, CHESWORTH, O'BRIEN, JOHNSTONE & WELCH, LLP, ROCHESTER (CHRISTOPHER T. PUSATERI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered November 30, 2010. The judgment imposed a constructive trust on certain real property and directed defendant to execute a deed transferring the property to plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by dismissing the cause of action for fraud and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to impose a constructive trust on certain real property that he transferred to defendant, his stepson, by quitclaim deed dated August 16, 2001. Plaintiff purchased the subject property with his late wife, defendant's mother, in 1966, and they resided there together until her death in July 2001. Shortly after his mother's death, defendant introduced plaintiff to James Dys, an attorney. Dys prepared a revised will for plaintiff, which devised plaintiff's real and personal property to his stepchildren, i.e., defendant and his sister. Dys also prepared a quitclaim deed, which transferred the subject property to defendant, with a life estate in plaintiff's favor. Plaintiff signed both documents.

In support of the cause of action for a constructive trust, plaintiff alleged that he was never advised that the quitclaim deed transferred ownership of the subject property to defendant such that plaintiff would thereafter be unable to divide that property between both of his stepchildren. Plaintiff further alleged that, based on his close and confidential relationship with defendant, he relied upon defendant's assurances that the purpose of the transaction was to protect the property in the event that he required nursing home care and that, upon his death, the property would be divided between his stepchildren. Plaintiff subsequently amended his complaint to add a cause of action for fraud. Following a nonjury trial, Supreme Court

found in favor of plaintiff on both causes of action. Defendant appeals from a judgment imposing a constructive trust on the subject property and directing defendant to execute a deed transferring the property to plaintiff.

We note at the outset that defendant's contention that the court should have recused itself because it allegedly filed an attorney disciplinary grievance against Dys, a witness for the defense, is unpreserved for our review (*see Matter of Rath v Melens*, 15 AD3d 837, 837; *Matter of Nunnery v Nunnery*, 275 AD2d 986, 987). With respect to his remaining contentions on the issue of recusal, defendant " 'failed to allege any basis for mandatory disqualification or recusal [pursuant to Judiciary Law § 14], and we conclude that the court did not abuse its discretion in refusing to recuse itself' " (*Caplash v Rochester Oral & Maxillofacial Surgery Assoc., LLC*, 63 AD3d 1683, 1686). In our view, defendant's allegations of bias by the court against Dys are "too speculative to warrant the conclusion that the court abused its discretion in refusing to recuse itself here" (*Matter of Rumsey v Niebel*, 286 AD2d 564, 565).

Turning to the merits, we note that Black's Law Dictionary defines a constructive trust as "[a]n equitable remedy that a court imposes against one who has obtained property by wrongdoing" (Black's Law Dictionary 1649 [9th ed 2009]). "[I]t is well settled that '[a] constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest' . . . 'In order to invoke the court's equity powers, plaintiff[] must show a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, a breach of the promise, and defendant's unjust enrichment' " (*Delzer v Rozbicki*, 85 AD3d 1722, 1722-1723; *see Sharp v Kosmalski*, 40 NY2d 119, 121). Inasmuch as a constructive trust is an equitable remedy, however, "courts do not rigidly apply the elements but use them as flexible guidelines" (*Moak v Raynor*, 28 AD3d 900, 902; *see Simonds v Simonds*, 45 NY2d 233, 241). "In this flexible spirit, the promise need not be express, but may be implied based on the circumstances of the relationship and the nature of the transaction" (*Moak*, 28 AD3d at 902; *see Sharp*, 40 NY2d at 122).

Viewing the evidence in the light most favorable to plaintiff, we conclude that a fair interpretation of the evidence supports the court's determination to impose a constructive trust under the circumstances of this case (*see generally Home Insulation & Supply, Inc. v Buchheit*, 59 AD3d 1078, 1079; *Treat v Wegmans Food Mkts., Inc.*, 46 AD3d 1403, 1404-1405). We reject defendant's contention that plaintiff failed to establish the promissory element of a constructive trust. Plaintiff testified at trial that, prior to his wife's death, they discussed their intention that, upon their deaths, the subject property should pass to defendant and his sister. Plaintiff communicated that intention to defendant, who promised to help "make that happen." In our view, that statement by defendant "could be viewed as an indefinite express promise" (*Moak*, 28 AD3d at 902; *see also Cinquemani v Lazio*, 37 AD3d 882, 883). Although the testimony of

defendant and Dys contradicted plaintiff's testimony regarding the promise, the court "had the advantage of observing the witnesses and assessing their credibility" (*Treat*, 46 AD3d at 1404), and we see no reason to disturb the court's credibility determination.

Even assuming, arguendo, that the evidence does not support the existence of an express promise, we conclude that a promise may be inferred in this case "based on the circumstances of the relationship and the nature of the transaction" (*Moak*, 28 AD3d at 902; *see Sharp*, 40 NY2d at 122). The evidence established that the parties enjoyed the close, confidential relationship of father and son during the relevant period, and plaintiff relied upon defendant in the management of his affairs. Shortly after his mother's death, defendant introduced plaintiff to Dys and, proceeding on Dys's advice, plaintiff signed the will and the quitclaim deed. Although the will devised plaintiff's real and personal property to his stepchildren, the quitclaim deed transferred the future interest in the subject real property to defendant alone. Plaintiff, who lacks proficiency in reading and writing, testified that the will and deed were not read or explained to him. He signed the documents because he "trusted [defendant] to do the right thing" and he believed that he was protecting the property in the event that he required nursing home care. After signing the documents, plaintiff continued to believe that, upon his death, the property would be divided between his stepchildren in accordance with the wishes of plaintiff and his late wife. Plaintiff did not learn about the consequences of the transaction until nearly seven years later, and he testified at trial that he would not have signed the deed had he known its effect.

We therefore conclude that plaintiff's transfer of the subject property to defendant was made in reliance upon defendant's implicit promise to plaintiff to uphold the testamentary plan of plaintiff and his late wife and in an effort to protect the property in the event that plaintiff required nursing home care. Thus, the imposition of a constructive trust was proper (*see Johnson v Lih*, 216 AD2d 821, 823; *Tordai v Tordai*, 109 AD2d 996, 997; *see generally Sharp*, 40 NY2d at 122).

We further conclude that, viewing the evidence in the light most favorable to plaintiff, there is no fair interpretation of the evidence to support the court's determination in favor of plaintiff on the fraud cause of action (*see generally Home Insulation & Supply, Inc.*, 59 AD3d at 1079; *Treat*, 46 AD3d at 1404-1405). It is well settled that, "[t]o establish a cause of action for fraud, plaintiff must demonstrate that defendant[] knowingly misrepresented a material fact upon which plaintiff justifiably relied and which caused plaintiff to sustain damages" (*Klafehn v Morrison*, 75 AD3d 808, 810). We agree with defendant that no evidence was adduced at trial to establish that he misrepresented any material fact to plaintiff. Although plaintiff testified that defendant promised to help him effectuate his plan to divide the subject property between his stepchildren, "representations . . . that are not statements of existing fact but are merely expressions of future expectations or that are promissory in nature at the time made and relate to future

actions or conduct are insufficient to support a cause of action . . . for fraud" (*Transit Mgt., LLC v Watson Indus., Inc.*, 23 AD3d 1152, 1155; *see Cerabono v Price*, 7 AD3d 479, 480, *lv dismissed* 3 NY3d 737, *lv denied* 4 NY3d 704). Indeed, no evidence was adduced that defendant misrepresented to plaintiff the contents of the quitclaim deed or its effect. We therefore modify the judgment by dismissing the cause of action for fraud.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

748.1
KA 05-00172

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CYRIL WINEBRENNER, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered March 30, 2005. The judgment convicted defendant, upon his plea of guilty, of murder in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of murder in the first degree (Penal Law § 125.27 [1] [a] [vi]; [b]), defendant contends that County Court abused its discretion in failing, sua sponte, to order a competency examination pursuant to CPL 730.30 (1). In support of his contention, defendant relies on evidence contained in the presentence report and his sentencing memorandum, both of which were received by the court after defendant entered his plea. Before addressing the merits of defendant's contention, we note "that the issue of competency to stand trial may be raised on appeal despite the absence of any objection to the . . . court's failure to cause the defendant to be examined" (*People v Armlin*, 37 NY2d 167, 172; *see People v Bennefield*, 306 AD2d 911, 912; *People v Moore*, 203 AD2d 900, 900, *lv denied* 84 NY2d 830; *People v Meurer*, 184 AD2d 1067, 1068, *lv dismissed* 80 NY2d 835, *lv denied* 80 NY2d 907; *see also People v Keebler*, 15 AD3d 724, 726, *lv denied* 4 NY3d 854; *People v Frazier*, 114 AD2d 1038, 1039, *lv denied* 67 NY2d 883). To the extent that our decision in *People v Bryant* (87 AD3d 1270, 1271, *lv denied* 18 NY3d 881) stated that preservation of such a contention was required, we disavow that statement.

With respect to the merits of defendant's contention, "[i]t is fundamental that the trial of a criminal defendant while he is mentally incompetent violates due process" (*People v Arnold*, 113 AD2d 101, 102). The test for competency "is whether the defendant has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding—and whether he [or she]

has a rational as well as factual understanding of the proceedings against him [or her]" (*id.* [internal quotation marks omitted]), and a court may sua sponte order a competency examination at any time before a final judgment is entered (*see People v Smyth*, 3 NY2d 184, 187, *rearg denied* 3 NY2d 942; *see also Armlin*, 37 NY2d at 171). "In determining whether a . . . court should have invoked the procedures of CPL article 730 and directed an examination and hearing on defendant's competency, the focus is on what the . . . court did in light of what it knew or should have known of the defendant at any time before final judgment . . . The test to be applied has been formulated as follows: 'Did the . . . judge receive information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted [the judge] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his [or her] attorney in [the] defense' " (*Arnold*, 113 AD2d at 102-103).

We agree with the People that, before the court received the presentence report and sentencing memorandum, there is nothing in this record that would have alerted the court to any issue concerning defendant's competency. " '[T]here is no indication in the record that defendant was unable to understand the proceedings or that he was mentally incompetent at the time he entered his guilty plea' " (*People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869). Thus, any contention that the court should have sua sponte ordered a competency examination *before* accepting defendant's plea lacks merit.

We further conclude that the evidence contained in the presentence report and sentencing memorandum did not raise any doubt about defendant's competency at the time of the plea or at the time of sentencing. Those documents established that, 10 months before the crime and 2½ years before the plea, defendant had a 24-hour hospitalization that was allegedly caused by a conversion disorder. At the time of the plea and at sentencing, defendant spoke coherently about his role in the crime and his remorse for his actions. He indicated that he understood that he was entering a plea of guilty, and he responded appropriately to the court's questions (*see People v Majors*, 73 AD3d 1382, 1382-1383, *lv denied* 15 NY3d 775; *People v Brown*, 9 AD3d 884, 885, *lv denied* 3 NY3d 671; *People v Murray*, 255 AD2d 997, *lv denied* 93 NY2d 975; *cf. Arnold*, 113 AD2d at 103-104; *People v Cartagena*, 92 AD2d 901, 901-902). The court was able to observe defendant and to interact with him (*see People v Yu-Jen Chang*, 92 AD3d 1132, 1134-1135; *People v Chicherchia*, 86 AD3d 953, 954, *lv denied* 17 NY3d 952), and "defense counsel, who was in the best position to assess defendant's capacity, did not raise the issue of defendant's fitness to proceed or request an examination pursuant to CPL 730.30 (2)" (*Brown*, 9 AD3d at 885 [internal quotation marks omitted]; *see Chicherchia*, 86 AD3d at 954).

Defendant further contends that he was denied effective assistance of counsel because defense counsel allowed defendant to plead guilty without an adequate inquiry into his mental state. We reject that contention. Defendant has "failed to 'demonstrate the absence of strategic or other legitimate explanations' . . . for the

absence of a psychiatric . . . defense" (*People v Leiva*, 59 AD3d 161, 162, *lv denied* 12 NY3d 818, quoting *People v Rivera*, 71 NY2d 705, 709; *see People v Williams*, 41 AD3d 1252, 1254; *People v Alexander*, 266 AD2d 906, *lv denied* 94 NY2d 916), and the record on appeal establishes that defense counsel attempted to obtain the records related to defendant's hospital admission but had no success. In any event, as the People correctly noted at oral argument of this appeal, defendant's challenge to defense counsel's investigative efforts "involves matter[s] which [are] dehors the record and is not properly presented on direct appeal" (*People v Miller*, 81 AD3d 854, 855, *lv denied* 16 NY3d 861).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

760

CAF 11-00899

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

IN THE MATTER OF BONNIE L. MINEO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS A. MINEO, RESPONDENT-RESPONDENT.

DENIS A. KITCHEN, WILLIAMSVILLE, FOR PETITIONER-APPELLANT.

PATRICIA M. MCGRATH, ATTORNEY FOR THE CHILD, LOCKPORT, FOR THOMAS M., V.

Appeal from an order of the Family Court, Erie County (Tracey A. Kassman, R.), entered April 12, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Family Court erred in granting the motion of respondent father, made at the close of petitioner mother's proof, seeking dismissal of the petition in which the mother sought an order permitting her to change the school district in which the parties' child was enrolled, from the Grand Island School District to the Kenmore-Tonawanda School District. Under the terms of their separation agreement, which was incorporated but not merged into the judgment of divorce, the parties agreed, inter alia, that "the child [would] not be removed from the Grand Island [S]chool [D]istrict without the expressed written consent of the [father]." " 'While that provision in the [separation] agreement is a relevant factor to consider in determining the child's best interests, it is not dispositive' " (*Petroski v Petroski*, 24 AD3d 1295, 1296-1297; *see Matter of Tropea v Tropea*, 87 NY2d 727, 741 n 2; *Carlson v Carlson*, 248 AD2d 1026, 1028). "Considering the facts in the light most favorable to [the mother], accepting her proof as true and affording her every favorable inference that reasonably could be drawn therefrom" (*Matter of Stone v Wyant*, 8 AD3d 1046, 1047; *see Matter of Zito v Pfohl*, 302 AD2d 918), we conclude that the mother met her initial burden on the petition (*see Stone*, 8 AD3d at 1047; *see also Matter of Bobroff v Farwell*, 57 AD3d 1284, 1286; *Carlson*, 248 AD2d at 1027-1028; *cf. Petroski*, 24 AD3d at 1296-1297; *see generally Tropea*, 87 NY2d at 738-742). Thus, the court erred in granting the father's motion to dismiss the petition at the close of the mother's proof.

In view of the statement of the father's attorney made on the record that he would not have presented evidence at trial had the court denied his motion, we turn to the issue whether the mother established by the requisite preponderance of the evidence that the proposed relocation was in the child's best interests (*see Tropea*, 87 NY2d at 741; *Rauch v Keller*, 77 AD3d 1409, 1410). Although the court did not engage in that analysis, the record is sufficient for this Court to do so (*see Matter of Brian C.*, 32 AD3d 1224, 1225, *lv denied* 7 NY3d 717). "In the exercise of our independent power of factual review" (*id.*), we conclude that the mother established as a matter of law that the best interests of the parties' child would be served by granting the petition (*see Tropea*, 87 NY2d at 741). Here, the record strongly suggests that the relocation would enhance the lives of the mother and the child financially inasmuch as it would alleviate the mother's burden of transporting the child to and from Grand Island Schools or, in the alternative, finding new housing on Grand Island, and would enable the mother to increase her efforts to obtain employment (*see Matter of Scialdo v Cook*, 53 AD3d 1090, 1092; *cf. Matter of Seyler v Hasfurter*, 61 AD3d 1437). Moreover, there is no indication that the quality of the education provided by the Kenmore-Tonawanda School District is inferior to that of the Grand Island School District (*see Bobroff*, 57 AD3d at 1286; *Carlson*, 248 AD2d at 1028), nor is there evidence that the father's access to the child would be affected by the change in school districts (*cf. Tropea*, 87 NY2d at 742). Indeed, the primary issue in this case is whether the child may be educated in the Kenmore-Tonawanda School District rather than the Grand Island School District, and by granting the petition at this juncture the child will be able to enroll in the Kenmore-Tonawanda School District at the beginning of the 2012-2013 school year.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

774

KA 11-00357

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN T. WOODARD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered May 14, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) and attempted robbery in the first degree (§§ 110.00, 160.15 [2]) in connection with the shooting death of the victim by one or both of the codefendants. Defendant contends that Supreme Court erred in refusing to instruct the jury on the affirmative defense to felony murder (§ 125.25 [3]), on the ground that there was no evidence to support a determination that defendant knew that the codefendants' guns were loaded. We reject that contention (*see People v Cox*, 21 AD3d 1361, 1363, *lv denied* 6 NY3d 753). The evidence established that defendant willingly drove the codefendants from Elmira to Rochester for the express purpose of robbing the victim and that defendant knew that the codefendants had guns with them for that purpose. Thus, when viewing the evidence in the light most favorable to defendant (*see People v White*, 79 NY2d 900, 903), we conclude that the evidence does not support the affirmative defense (*see People v Samuel*, 88 AD3d 1020, 1021, *lv denied* 18 NY3d 861; *cf. People v Cable*, 96 AD2d 251, 260-261, *revd on other grounds sub nom. Matter of Anthony M.*, 63 NY2d 270).

Defendant failed to preserve for our review his contention that the court erred in refusing to permit defense counsel to pursue questioning at the suppression hearing with respect to whether defendant's arrest was based upon probable cause, because defendant did not move to suppress evidence on that ground (*see People v Mobley*, 49 AD3d 1343, 1343-1344, *lv denied* 11 NY3d 791). Defendant also

failed to preserve for our review his contention that the court abused its discretion and denied defendant his constitutional rights by denying his motion pursuant to CPL 710.40 (4) to reopen the suppression hearing on the issue whether the arrest was based upon probable cause. Instead, defendant sought to reopen the hearing based upon his contention that he invoked his right to counsel when he was arrested in Elmira, before being transported to meet with police officers from the Rochester Police Department (*see Mobley*, 49 AD3d at 1343-1344). "Because defendant had knowledge of the facts surrounding his arrest, those facts may not be considered additional pertinent facts . . . discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion" (*People v Simon*, 222 AD2d 1117, 1117, *lv denied* 87 NY2d 977, *rearg denied* 88 NY2d 854 [internal quotation marks omitted]; *see* CPL 710.40 [4]). In any event, inasmuch as evidence at the suppression hearing established that defendant had been identified in a photo array as a participant in the crimes prior to his arrest, we conclude that the arrest was based upon probable cause (*see People v Dumbleton*, 67 AD3d 1451, 1452, *lv denied* 14 NY3d 770).

Defendant also failed to preserve for our review his contention that the court erred in permitting the People to use his grand jury testimony in their direct case, in contravention of a cooperation agreement defendant had signed (*see* CPL 470.05 [2]). In any event, we conclude that any error is harmless inasmuch as the evidence is overwhelming and there is not a significant probability that he would have been acquitted if the alleged error had not occurred (*see People v Crimmins*, 36 NY2d 230, 241-242). Defendant's statement to the police, which was consistent with his grand jury testimony, was also admitted in evidence, and it was corroborated by the testimony of an eyewitness and by physical evidence (*see generally People v Faust*, 73 NY2d 828, 829, *rearg denied* 73 NY2d 995).

We reject defendant's contention that he was deprived of effective assistance of counsel. The failure to provide a specific basis for a trial order of dismissal that had no chance of success does not constitute ineffective assistance of counsel (*see People v Horton*, 79 AD3d 1614, 1616, *lv denied* 16 NY3d 859). Indeed, defendant does not contend on appeal that the evidence is legally insufficient to support the conviction (*see id.*). Further, defendant has failed to demonstrate that a motion to suppress his statement based on the lack of probable cause for his arrest, if made, would have been successful, and thus he has failed to establish that defense counsel was ineffective for failing to make the motion (*see People v Borcyk*, 60 AD3d 1489, 1490, *lv denied* 12 NY3d 923). Defendant's remaining contentions with respect to defense counsel's performance either are outside the record and thus not reviewable on direct appeal (*see People v Slater*, 61 AD3d 1328, 1329, *lv denied* 13 NY3d 749), or they are without merit (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, in light of his willing participation in the plan to rob the victim and his knowledge that the codefendants both had guns, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

776

KA 11-00058

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN LOPEZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 7, 2010. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). With respect to the issue of intent, we note that " '[i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime' " (*People v Badger*, 90 AD3d 1531, 1532, *lv denied* 18 NY3d 991; *see People v Cobb*, 72 AD3d 1565, 1565, *lv denied* 15 NY3d 803). Here, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to establish defendant's intent to kill. The People presented evidence that defendant and the victim quarreled immediately before the shooting (*see People v Lucas*, 94 AD3d 1441, 1441; *People v Vigliotti*, 270 AD2d 904, 904-905, *lv denied* 95 NY2d 839, *rearg denied* 95 NY2d 970; *People v Henning*, 267 AD2d 1092, *lv denied* 94 NY2d 903), and that defendant was only a few feet away from the victim when defendant pointed a gun at him and then fired that weapon (*see Lucas*, 94 AD3d at 1441; *Cobb*, 72 AD3d at 1565; *Vigliotti*, 270 AD2d at 904-905). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury"

(*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]).

Contrary to defendant's further contention, we conclude that Supreme Court properly denied his request for a missing witness charge with respect to the victim's cousin and friend, respectively. " 'The request, made after the close of the proof, was untimely' " (*People v Garrido-Valdez*, 299 AD2d 858, 859, *lv denied* 99 NY2d 614; *see People v Garner*, 52 AD3d 1329, 1330, *lv denied* 11 NY3d 788). Defendant failed to preserve for our review his contention that he was deprived of a fair trial based on prosecutorial misconduct during summation (*see People v McEathron*, 86 AD3d 915, 916; *People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954) and, in any event, that contention is without merit. To the extent that the prosecutor referred to the defense's failure to "contradict" the proof offered by the People and to the theories of the defense as a "distraction" and "nonsense," we conclude that such conduct, although improper, was not so egregious as to deprive defendant of a fair trial (*see People v Carr*, 59 AD3d 945, 946, *affd* 14 NY3d 808; *see also McEathron*, 86 AD3d at 916-917; *Lyon*, 77 AD3d at 1339). We reject defendant's contention that the People misstated the law on summation, and we note in any event that the court instructed the jury that it should accept the law as charged by the court (*see generally People v Barnes*, 80 NY2d 867, 868). The remaining instances of alleged prosecutorial misconduct on summation were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915; *see McEathron*, 86 AD3d at 916; *Lyon*, 77 AD3d at 1339).

We also reject defendant's contention that he was denied effective assistance of counsel. Defendant contends that he received ineffective assistance based on his trial counsel's consent to a mistrial after a jury was selected and sworn in the first trial. We agree with defendant that, by consenting to a mistrial at that stage of the proceedings, defense counsel waived any claim of double jeopardy and foreclosed any challenge to the necessity of declaring a mistrial (*see generally People v Catten*, 69 NY2d 547, 553-554; *People v Ferguson*, 67 NY2d 383, 387-388). Nevertheless, we reject defendant's contention that he was thereby denied effective assistance of counsel inasmuch as he failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's allegedly deficient conduct" (*People v Caban*, 5 NY3d 143, 152). We also reject defendant's contention that he was denied effective assistance of counsel based on the failure of defense counsel to object to the allegedly improper comments made by the prosecutor on summation. As previously noted herein, "defendant was not denied a fair trial by [the prosecutor's improper commentary on summation relating to the defense], and the remaining instances of alleged prosecutorial misconduct on summation did not in fact constitute prosecutorial misconduct" (*Lyon*, 77 AD3d at 1339; *see People v Hill*, 82 AD3d 1715, 1716, *lv denied* 17 NY3d 806; *see generally Caban*, 5 NY3d at 152).

Finally, the sentence is not unduly harsh or severe.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

777

KA 11-02173

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISIDORO MARRA, DEFENDANT-APPELLANT.

GIRVIN & FERLAZZO, P.C., ALBANY (SALVATORE D. FERLAZZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered May 5, 2011. The judgment convicted defendant, upon a jury verdict, of rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of 10 years and a period of postrelease supervision of 5 years and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of rape in the first degree (Penal Law § 130.35 [2]), defendant contends that the verdict is against the weight of the evidence because the People failed to prove the element of penetration beyond a reasonable doubt. We reject that contention. The victim testified at trial that she had fallen asleep on a couch at an inn owned by defendant, after consuming multiple glasses of wine with her dinner. She further testified that, when she awoke, defendant was on top of her and his penis was inside her vagina. The victim's testimony was corroborated by the fact that defendant's DNA was found on the area between her vagina and anus. We also note that the victim was crying and hysterical when examined by medical personnel at the hospital shortly after the rape was reported to the police. When defendant was questioned by the police, he said that he had been drinking alcohol that night and did not "remember anything" about what happened with the victim. Defendant further stated that he had "no idea" how the events had transpired such that he was in the room where the victim was sleeping when the rape occurred. Toward the end of his police interview, defendant asked, "What if I can prove that [the victim] came on to me first," thus suggesting that intercourse may have taken place as the victim had alleged. Finally, based on the evidence at trial, we discern no motive for the victim to make a false

accusation against defendant, with whom she was acquainted and had no apparent grudges.

As defendant correctly notes, swabs taken from the victim's vagina at the hospital tested negative for defendant's sperm. The absence of defendant's sperm, however, is not necessarily inconsistent with the victim's claim of penetration because the victim testified that defendant did not ejaculate. More troubling is the absence of defendant's DNA on the swabs taken from the victim's vagina, inasmuch as a forensic scientist testified for the People at trial that it is "possible" for there to be a skin to skin transfer of DNA. Nevertheless, the forensic scientist did not testify that there is *always* a transfer of DNA from skin to skin contact, and no evidence to that effect was presented to the jury.

This case turned largely upon the credibility of the victim, and the jury evidently believed the victim's testimony that defendant inserted his penis into her vagina without her consent while she was asleep. We are cognizant of our duty to conduct an independent assessment of all of the proof as well as our authority to "substitute [our] own credibility determinations for those made by the jury in an appropriate case" (*People v Delamota*, 18 NY3d 107, 116-117). In our view, however, this is not an appropriate case in which to substitute our own credibility determinations, given that the victim's testimony was not riddled with inconsistencies or otherwise substantially impeached. "Sitting as the thirteenth juror . . . [and] weigh[ing] the evidence in light of the elements of the crime as charged to the other jurors" (*People v Danielson*, 9 NY3d 342, 349), we conclude that, although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Bleakley*, 69 NY2d 490, 495; *People v Kalen*, 68 AD3d 1666, 1666-1667, *lv denied* 14 NY3d 842).

Defendant further contends that County Court improperly admitted in evidence photographs of the victim taken at the hospital. According to defendant, the People failed to lay an adequate foundation for their admission because the victim was not asked how she sustained the marks and bruises depicted therein and there was no evidence that the injuries depicted were caused by defendant. Defendant further contends that the potential for prejudice arising from the photographs outweighed their probative value. We conclude that defendant failed to preserve his present contentions for our review, because they differ from those raised before the trial court (*see* CPL 470.05 [2]; *People v Major*, 251 AD2d 999, 1000, *lv denied* 92 NY2d 927; *People v Hobbs*, 178 AD2d 1017, *lv denied* 79 NY2d 1002). In his motion in limine, defendant sought to preclude the photographs on the ground that they were not timely turned over to the defense, and at trial he objected to the admission of the photographs generally and on the ground that there would be "no medical testimony indicating the length of time that those bruises were there from the time that they were initially inflicted."

In any event, we conclude that the People did lay a proper foundation for admission in evidence of the photographs. "Properly

authenticated photographs are admissible whenever relevant to describe the physical characteristics of a person, place, or thing" (Prince, Richardson on Evidence § 4-213, at 148-149 [Farrell 11th ed]). Photographs are properly authenticated when "a competent witness possessing knowledge of the matter" identifies the subject depicted therein and verifies that the photographs accurately represent the subject depicted (*People v Byrnes*, 33 NY2d 343, 347; *see generally People v Austin*, 13 AD3d 1196, 1197, *lv denied* 5 NY3d 785). Here, contrary to defendant's contention, the People laid a proper foundation for the admission of the photographs, inasmuch as the nurse who took them testified that the photographs accurately represented the portions of the victim's body depicted therein.

Although the People laid a proper foundation for the photographs, however, it does not necessarily follow that the court properly admitted them in evidence. The photographs must also be relevant, i.e., they must "tend 'to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered' " (*People v Wood*, 79 NY2d 958, 960, quoting *People v Pobliner*, 32 NY2d 356, 369, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905), and we conclude that they were relevant. In addition, we conclude that their probative value outweighed their potential for prejudice (*see People v Acevedo*, 40 NY2d 701, 704-705). The nurse who took the photographs testified that some of the bruises and red marks depicted looked "fresh" while other injuries looked "older." The photographs of the "fresh" injuries were relevant to the issue of physical helplessness under the People's theory that, by undressing the victim and having sexual intercourse with her while she was sleeping, defendant caused bruising and red marks to the victim's body that would not normally result from consensual intercourse. Even assuming, arguendo, that the court erred in admitting photographs depicting "older" bruises that may have predated the rape, we conclude that any such error is harmless (*see People v Crimmins*, 36 NY2d 230, 240-241). The injuries in question were relatively minor in nature and thus not inflammatory, and, based on defense counsel's cross-examination of the nurse, the jury was well aware of the fact that the "older" bruises may have existed prior to the rape.

Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct during summation (*see People v Gonzalez*, 81 AD3d 1374, 1374; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849) and, in any event, we conclude that none of the prosecutor's comments was so egregious as to deny defendant a fair trial (*see People v Rivers*, 82 AD3d 1623, 1624, *lv denied* 17 NY3d 904; *People v Quinones*, 5 AD3d 1093, 1094, *lv denied* 3 NY3d 646). We reject defendant's further contention that he was denied effective assistance of counsel. The purported shortcomings of defense counsel did not demonstrate actual ineffectiveness and, viewing defense counsel's representation in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

We agree with defendant, however, that, in light of his age, his lack of a prior criminal record and other mitigating circumstances, the sentence of a determinate term of incarceration of 18 years followed by 15 years of postrelease supervision is unduly harsh and severe. As a matter of discretion in the interest of justice, we therefore modify the judgment by reducing the sentence to a determinate term of imprisonment of 10 years and a period of 5 years of postrelease supervision.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

781

CA 11-00264

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

GINA M. CHIAPPONE, INDIVIDUALLY AND AS NATURAL GUARDIAN AND GUARDIAN OF THE PROPERTY OF BRITTNEY A. CHIAPPONE, VINCENT M. CHIAPPONE, GIOVANNI J. CHIAPPONE, MARIANA M. CHIAPPONE AND MICHAEL T. CHIAPPONE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM PENN LIFE INSURANCE COMPANY OF NEW YORK, DEFENDANT-RESPONDENT, ET AL., DEFENDANT.

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

BLEAKLEY PLATT & SCHMIDT, LLP, WHITE PLAINS (ROBERT D. MEADE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 16, 2010. The order denied the motion of plaintiff for leave to reargue and renew.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Plaintiff appeals from an order that denied her motion for leave to reargue and renew her prior motion for summary judgment on the complaint and her opposition to the cross motion of William Penn Life Insurance Company of New York (defendant) for summary judgment dismissing the complaint. The appeal from the order insofar as it denied that branch of plaintiff's motion seeking leave to reargue must be dismissed because no appeal lies from an order denying leave to reargue (*see Hill v Milan*, 89 AD3d 1458). The appeal from the order insofar as it denied that branch of plaintiff's motion seeking leave to renew, however, is properly before us (*see Kirchmeyer v Subramanian*, 167 AD2d 851).

We conclude that Supreme Court did not abuse its discretion in denying plaintiff's motion for leave to renew. Plaintiff failed to establish that the purported new evidence was not in existence or not available at the time of the prior motion and cross motion (*see* CPLR 2221 [e] [2]; *Kirby v Suburban Elec. Engrs. Contrs., Inc.*, 83 AD3d 1380, 1381, *lv dismissed* 17 NY3d 783; *Patel v Exxon Corp.*, 11 AD3d 916, 917). Plaintiff further failed to set forth a "reasonable

justification for the failure to present such facts on the prior motion [and cross motion]" (CPLR 2221 [e] [3]; *see Patel*, 11 AD3d at 917; *Robinson v Consolidated Rail Corp*., 8 AD3d 1080). Even assuming, arguendo, that plaintiff offered new facts in support of her motion for leave to renew, we conclude that those "new facts not offered on the prior motion [and cross motion] . . . would [not] change the prior determination" (CPLR 2221 [e] [2]; *see Garcea v Battista*, 53 AD3d 1068, 1070; *Cole v North Am. Adm'rs, Inc.*, 11 AD3d 974, 975).

To the extent that plaintiff advances contentions relating to the prior order denying her motion for summary judgment and granting defendant's cross motion for summary judgment dismissing the complaint, we note that plaintiff's appeal from that order was deemed abandoned and dismissed pursuant to 22 NYCRR 1000.12 (b) for failure to perfect it. "[A] prior dismissal for want of prosecution acts as a bar to a subsequent appeal as to all questions that were presented on the earlier appeal" (*Bray v Cox*, 38 NY2d 350, 353; *see Alfieri v Empire Beef Co., Inc.*, 41 AD3d 1313), and we decline to exercise our discretion to review the merits of those contentions (*see Williams v Williams*, 52 AD3d 1271; *Alfieri*, 41 AD3d 1313; *see generally Faricelli v TSS Seedman's*, 94 NY2d 772, 774; *Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 756).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

786

CA 11-02107

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

DEREK PAYNE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BUFFALO GENERAL HOSPITAL, STANLEY H. KIM, M.D., VINOD R. PATEL, M.D., HEIDI NARINS SUFFOLETTO, M.D., MEI YIM WONG, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 1.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MARK SPITLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS BUFFALO GENERAL HOSPITAL, HEIDI NARINS SUFFOLETTO, M.D., AND MEI YIM WONG, M.D.

CONNORS & VILARDO, LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-APPELLANTS STANLEY H. KIM, M.D. AND VINOD R. PATEL, M.D.

VINAL & VINAL, BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 21, 2010 in a medical malpractice action. The order granted the oral application of plaintiff to compel defendants to accept his untimely medical expert affirmation.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries he sustained after suffering a stroke while under defendants' care. Defendants-appellants (defendants) moved for summary judgment dismissing the complaint against them, and plaintiff made an oral application to compel defendants to accept the untimely affirmation of his medical expert submitted in opposition to defendants' motions. In appeal No. 1, defendants appeal from an order granting plaintiff's application and, in appeal No. 2, they appeal from an order denying their motions for summary judgment dismissing the complaint against them.

With respect to appeal No. 1, we reject defendants' contention that Supreme Court erred in granting plaintiff's application and in thus considering plaintiff's untimely expert affirmation. "While a court can in its discretion accept late papers, CPLR 2214 and [CPLR] 2004 mandate that the delinquent party offer a valid excuse for the delay . . . Additional factors relevant when essentially extending the

return day by accepting late papers include, among others, the length of the delay and any prejudice" (*Mallards Dairy, LLC v E&M Engrs. & Surveyors, P.C.*, 71 AD3d 1415, 1416 [internal quotation marks omitted]; *see generally Foitl v G.A.F. Corp.*, 64 NY2d 911, 912-913). Plaintiff's attorney offered a valid excuse for the delay (*see Mallards Dairy, LLC*, 71 AD3d at 1416; *Associates First Capital v Crabill*, 51 AD3d 1186, 1188, *lv denied* 11 NY3d 702; *cf. Gagnon v St. Joseph's Hosp.*, 90 AD3d 1605, 1607), the delay of only several days was minimal (*see Associates First Capital*, 51 AD3d at 1188), and "any prejudice was alleviated when defendant[s were] permitted to submit . . . reply affidavit[s] in response to plaintiff's late submission" (*Mallards Dairy, LLC*, 71 AD3d at 1416).

With respect to appeal No. 2, we conclude that the court properly denied defendants' motions for summary judgment dismissing the complaint against them. At the outset, we reject the contention of defendants that plaintiff's expert failed to offer an adequate foundation for his qualifications in neurosurgery and emergency medicine. It is well recognized that a plaintiff's expert need not have practiced in the same speciality as the defendants (*see Diel v Bryan*, 57 AD3d 1493, 1494). The record includes the redacted affirmation of plaintiff's expert stating that the expert was a physician duly admitted to practice in New York, had been licensed and had practiced for over 20 years, had a specialty in neurology, and had practiced in emergency room settings in hospitals in Western New York. We conclude that the expert's affirmation was sufficient to demonstrate that the expert has "the requisite skill, training, education, knowledge or experience from which it can be assumed that [the expert's] opinion rendered [on the issues of negligence and proximate cause] is reliable" (*Bickom v Bierwagen*, 48 AD3d 1247, 1248 [internal quotation marks omitted]; *see Chipley v Stephenson*, 72 AD3d 1548, 1549; *cf. Behar v Coren*, 21 AD3d 1045, 1047, *lv denied* 6 NY3d 705).

Although we conclude that defendants Buffalo General Hospital, Heidi Narins Suffoletto, M.D. and Mei Yim Wong, M.D. met their initial burden on their motion of establishing their entitlement to judgment as a matter of law, we conclude that the affirmation of plaintiff's expert submitted in opposition to the motion of those defendants raised triable issues of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). With respect to the motion of defendants Stanley H. Kim, M.D. and Vinod R. Patel, M.D., we note that, as defendants in a medical malpractice case moving for summary judgment dismissing the complaint against them, they had " 'the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby' " (*Gagnon*, 90 AD3d at 1605). The expert affidavits submitted by those defendants in support of their motion " 'fail[ed] to address each of the specific factual claims of negligence raised in plaintiff's bill of particulars, [and thus] th[ose] affidavit[s are] insufficient to support a motion for summary judgment as a matter of law' " (*id.*; *see Humphrey v Gardner*, 81 AD3d

1257, 1258).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

787

CA 11-02109

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

DEREK PAYNE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BUFFALO GENERAL HOSPITAL, STANLEY H. KIM, M.D., VINOD R. PATEL, M.D., HEIDI NARINS SUFFOLETTO, M.D., MEI YIM WONG, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 2.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MARK SPITLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS BUFFALO GENERAL HOSPITAL, HEIDI NARINS SUFFOLETTO, M.D., AND MEI YIM WONG, M.D.

CONNORS & VILARDO, LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-APPELLANTS STANLEY H. KIM, M.D. AND VINOD R. PATEL, M.D.

VINAL & VINAL, BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 10, 2011 in a medical malpractice action. The order denied the motions of defendants-appellants for summary judgment.

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

Same Memorandum as in *Payne v Buffalo General Hospital* ([appeal No. 1] __ AD3d __ [June 15, 2012]).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

791.1

CA 12-00843

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

IN THE MATTER OF ACCADIA SITE CONTRACTING, INC.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY F. CARUANA, SUPERVISOR, TOWN OF TONAWANDA,
MEMBERS OF TOWN OF TONAWANDA BOARD, IN THEIR
OFFICIAL CAPACITIES, YARUSSI CONSTRUCTION, INC.,
AND CONCRETE APPLIED TECHNOLOGIES, INC.,
RESPONDENTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JEFFREY F. REINA OF COUNSEL), FOR PETITIONER-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (PATRICIA GILLEN OF COUNSEL), FOR RESPONDENT-RESPONDENT CONCRETE APPLIED TECHNOLOGIES, INC.

COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS ANTHONY F. CARUANA, SUPERVISOR, TOWN OF TONAWANDA, AND MEMBERS OF TOWN OF TONAWANDA BOARD, IN THEIR OFFICIAL CAPACITIES.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John F. O'Donnell, J.), entered April 23, 2012 in a proceeding pursuant to CPLR article 78. The judgment dismissed the proceeding and vacated a temporary restraining order.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to restrain the Town of Tonawanda respondents (collectively, Town) from proceeding on a contract with respondent Concrete Applied Technologies, Inc. (CATCO), the second lowest bidder for a public works project aimed at repairing and improving the Town's sanitary sewer system (project), and requiring the Town to re-bid the contract for the project. After granting petitioner a temporary restraining order (TRO) pending a hearing and later holding such a hearing, Supreme Court dismissed the proceeding and vacated the TRO. We granted a stay pending this expedited appeal by petitioner, and now affirm.

Pursuant to the terms of the "bid book" provided to prospective bidders, they were required to agree to all of the contractual

provisions, including a provision that requires the winning bidder to indemnify the Town for any claims "arising out of or incidental to" work on the project. Additionally, the bid book informed prospective bidders that the Town would not accept "[c]onditional bids."

Upon reviewing the specifications for the project, petitioner, a prospective bidder, became concerned about the property damage that could result from performing the "sheet piling" component of the project. In a letter dated January 11, 2012, a representative of petitioner informed a representative of the entity hired by the Town to oversee the project that, "should [petitioner] be the low bidder on the project, [petitioner] will not be held responsible for any damage" stemming from the sheet piling work. The letter also stated that petitioner "wishe[d] to go on record prior to the bid regarding this situation and will be held harmless should any damage claims [arise] from the piles being driven through the clay strata."

Petitioner thereafter submitted a compliant bid proposal in which it affirmed its understanding of the terms of the contract governing the project and neither referenced nor attached its pre-bid letter. When the Town publicly opened the seven bids it received for the project, petitioner's bid was the lowest and CATCO's bid was the second lowest. By a subsequent resolution, the Town determined that petitioner's bid was made conditional by its pre-bid letter and was therefore nonresponsive. The Town thus awarded the project to CATCO, the second lowest bidder.

A municipality that solicits bids for a public works project generally must award the contract for that project to the "lowest responsible bidder" (Town Law § 122; *see* General Municipal Law § 103 [1]; *Matter of AAA Carting & Rubbish Removal, Inc. v Town of Southeast*, 17 NY3d 136, 142). If a bid fails to comply with bid specifications, the municipality may waive such noncompliance "if the defect is a mere irregularity and it is in the best interests of the municipality to do so" (*Le Cesse Bros. Contr. v Town Bd. of Town of Williamson*, 62 AD2d 28, 32, *affd* 46 NY2d 960). If, however, "the variance between the bid and the specification is material or substantial, . . . the defect may not be waived and the municipality must reject the bid so that all bidders may be treated alike and so that the possibility of fraud, corruption or favoritism is avoided" (*id.*). The municipality "has the right to determine whether a variance from bid specifications is material" (*Matter of AT&T Communications v County of Nassau*, 214 AD2d 666, 667), and such a determination " 'must be upheld by the courts if supported by any rational basis' " (*Diamond D Constr. Corp. v County of Erie*, 209 AD2d 922, 923). A variance from bid specifications is material, and thus cannot be waived by a municipality, if the variance "affect[ed] the competitive character of the bidding" and gave the bidder "a substantial advantage or benefit not enjoyed by the other bidders" (*Le Cesse Bros. Contr.*, 62 AD2d at 32; *see Diamond D Constr. Corp.*, 209 AD2d at 922-923). In a CPLR article 78 proceeding challenging a municipality's handling of bids for a public works project, the municipality's "discretionary decision [to reject any bids] ought not to be disturbed by the courts unless [that decision is] irrational,

dishonest or otherwise unlawful" (*Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth.*, 66 NY2d 144, 149).

Here, we conclude that the determination of the Town that petitioner's bid was conditional and nonresponsive, and thus constituted a material variance from the project's bid specifications, was rational, honest, and lawful (*see generally id.*). The unequivocal language of petitioner's pre-bid letter was such that it was reasonable for the Town to conclude that the term stated therein concerning the refusal to be held liable for any damage arising from the sheet piling work was intended to impose a condition on petitioner's subsequent bid proposal regardless of whether the pre-bid letter was attached to or otherwise incorporated into that proposal. Because petitioner indicated prior to submitting its bid that it did not intend to comply with the indemnification clause in the contract governing the project with respect to an apparently risky component of the project to which other bidders would be subject, we conclude that the Town had a " 'rational basis' " for determining that petitioner's bid materially deviated from the bid specifications (*Diamond D Constr. Corp.*, 209 AD2d at 923; *see generally Le Cesse Bros. Contr.*, 62 AD2d at 31-32). Thus, it was reasonable for the Town to determine that petitioner had "a substantial advantage or benefit not enjoyed by the other bidders" (*Le Cesse Bros. Contr.*, 62 AD2d at 32), because the Town reasonably could have believed that, if other bidders had known that they could shift liability to the Town for claims arising out of the sheet piling work, their bids would have been lower. Inasmuch as it was reasonable for the Town to deem petitioner's bid variance "material," it necessarily follows that it was reasonable for the Town to reject petitioner's bid and to accept the next lowest bid (*id.*).

Petitioner's contention that the parol evidence rule barred the Town from considering its pre-bid letter is without merit because petitioner's bid was a mere offer to contract (*see S.S.I. Invs. v Korea Tungsten Min. Co.*, 80 AD2d 155, 157-159, *affd* 55 NY2d 934; *Le Cesse Bros. Contr.*, 62 AD2d at 33), and because there was no written contract between the Town and petitioner (*see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 161-162). Moreover, contrary to petitioner's contention, it was not required to send its pre-bid letter pursuant to the terms of the "Information to Bidders" portion of the bid book. The section to which petitioner refers states that prospective bidders should notify the Town of "discrepancies[] in, or omissions from the Drawings or Contract Documents" and should inquire if they are "in doubt as to their meaning," but petitioner's letter did neither. Finally, although petitioner is correct that CATCO and several other bidders, like petitioner, estimated a cost of $0.01 per square foot for the sheet piling work, which may have been an indication that those bidders did not intend to carry out that part of the project, the fact remains that only petitioner expressly stated its intention to demand that the contract be altered to hold it harmless for that activity.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

791

CA 11-02201

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

IN THE MATTER OF CRAIG S. FEHLHABER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF UTICA CITY SCHOOL
DISTRICT, JAMES WILLIS, SUPERINTENDENT OF
SCHOOLS, MICHAEL FERRARO, RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENTS.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PETITIONER-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered April 6, 2011 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: Respondent Board of Education of Utica City School District (Board) employed petitioner as a tenured teacher until 1997, then as "Clerk of the Works," and most recently as Superintendent of Buildings and Grounds. In 2010, the Board eliminated the position of Superintendent of Buildings and Grounds. Petitioner sought to "bump" vertically into the position of Maintenance Foreman or, in the alternative, to resume a teaching position. When the Board denied both requests, petitioner commenced this CPLR article 78 proceeding seeking, among other things, to compel the Board to place him in one of those positions. He appeals from the judgment dismissing his petition.

With respect to the first basis for Supreme Court's dismissal of the petition, i.e., that petitioner failed to file a timely notice of claim, we agree with petitioner that no notice of claim was required. Although Education Law § 3813 (1) mandates that a notice of claim be filed when a claim is asserted against, inter alia, a board of education, "the notice of claim requirement is inapplicable to cases which seek to vindicate tenure rights which are legal rights guaranteed by State law and in the public interest" (*Matter of Cowan v Board of Educ. of Brentwood Union Free School Dist.*, 99 AD2d 831, 833;

see Matter of Moraitis v Board of Educ. Deer Park Union Free School Dist., 84 AD3d 1090, 1091; *Matter of Piaggone v Board of Educ., Floral Park-Bellrose Union Free School Dist.*, 92 AD2d 106, 108-109).

Nevertheless, we conclude that the court properly dismissed the petition on the merits. Petitioner contends that he is entitled to a vertical "bump" into the position of Maintenance Foreman pursuant to Civil Service Law § 80 (6). The record establishes, however, that the Utica Municipal Civil Service Commission (Commission) consulted with the New York State Civil Service Commission on that issue and confirmed that, "[i]n order for the rights of 'bumping' to exist, the Petitioner would have to demonstrate a legal entitlement to that 'bumping' right. Our commission has determined that no such 'bumping right' exists for the Petitioner." Furthermore, in a case concerning an employee's bumping rights under the Civil Service Law, the Court of Appeals has reiterated that "judicial review of [the Commission's] classification system and determinations are limited to whether there was a rational basis for the agency's conclusion . . . Unless the [Commission's] determinations were arbitrary or capricious, a court should not undermine its actions" (*Matter of Hughes v Doherty*, 5 NY3d 100, 105; *see Matter of Dillon v Nassau County Civ. Serv. Commn.*, 43 NY2d 574, 580). Here, petitioner failed to establish that the Commission's determination was arbitrary or capricious, or that there was no rational basis for its determination.

With respect to petitioner's alternative contention, that he is merely on a leave of absence from his tenured teaching position, we agree with the court that he voluntarily abandoned his teaching position and thereby relinquished his tenure rights, at the latest, upon leaving the position for which the leave of absence was approved. It is well settled that " '[t]he burden of proving abandonment is upon the [Board] and must be established by clear and convincing evidence that the petitioner, by a voluntary and deliberate act, intended to relinquish [his or] her teaching position and forfeit [his or] her tenure rights' " (*Ciccarelli v Board of Educ. of W. Seneca Cent. School Dist.*, 107 AD2d 1050, 1050). Here, the Board granted petitioner a leave of absence in 1997 "[t]o assume duties as Clerk of the Works." Petitioner left the Clerk of the Works position in 2002, when he received a permanent appointment to the position of Superintendent of Buildings and Grounds, and he failed to seek reinstatement as a teacher or an extension of his leave of absence (*see Matter of West v Board of Trustees of Eggertsville Common School Dist.*, 89 AD2d 796, 796; *Matter of Thomas v Board of Educ. of Oceanside Union Free School Dist., Town of Hempstead*, 58 AD2d 584, 585; *cf. Matter of Diggins v Honeoye Falls-Lima Cent. School Dist.*, 50 AD3d 1473, 1473-1474).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

792

KA 08-02238

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALDINE M. MOTZER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered September 5, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, robbery in the second degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of one count each of robbery in the first degree (Penal Law § 160.15 [3]) and robbery in the second degree (§ 160.10 [3]), and two counts of endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review her contention that, in sentencing her, County Court penalized her for exercising the right to a jury trial, "inasmuch as defendant failed to raise that contention at sentencing" (*People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862). In any event, that contention lacks merit. " '[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting h[er] right to trial . . ., and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial' " (*id.*).

Defendant further contends that she was improperly adjudicated a persistent felony offender because the court did not comply with CPL 400.20 (3) when it attached defendant's presentence report to its order as its "statement" setting forth, inter alia, the dates and places of the prior convictions that render her a persistent felony offender. In addition, she contends that her due process rights were thereby violated. We conclude that defendant waived her contentions (*see generally People v Ahmed*, 66 NY2d 307, 311, *rearg denied* 67 NY2d

647; *People v Perez*, 85 AD3d 1538, 1541). The record establishes that, during the persistent felony offender hearing, the court offered to adjourn the hearing in order to draft a separate statement pursuant to the statute. Defense counsel conferred with defendant and, after clarification from the court that it would attach "just those statements" upon which it was relying, defense counsel expressly declined the court's offer.

Defendant also contends that she was improperly adjudicated a persistent felony offender because the court did not specifically ask her whether she wished to present any evidence "on the question of [her] background and criminal conduct" (CPL 400.20 [7]). Defendant failed to preserve that contention for our review (*see People v Brown*, 306 AD2d 12, 13, *lv denied* 100 NY2d 592) and, in any event, it is without merit. Although the court did not use that specific phrase contained in CPL 400.20 (7), the court asked defense counsel whether he, inter alia, wanted to controvert any of the information in the presentence report, to call any witnesses, and to be heard on the application. Indeed, defense counsel controverted some of the information in the presentence report and argued that defendant should not be adjudicated a persistent felony offender. Thus, the court in essence asked defendant whether she wished to present any evidence and gave her an opportunity to do so.

Finally, the sentence is not unduly harsh or severe.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

793

KA 10-02305

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRELL M. 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 A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered November 15, 2010. 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: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]). We reject defendant's contention that he did not knowingly, voluntarily and intelligently waive his right to appeal. Contrary to defendant's contention, County Court "engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Wright*, 66 AD3d 1334, *lv denied* 13 NY3d 912 [internal quotation marks omitted]). Further, the record as a whole, including the written waiver of the right to appeal, establishes "that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *see People v Kulyeshie*, 71 AD3d 1478, 1478-1479, *lv denied* 14 NY3d 889).

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 Elshabazz*, 81 AD3d 1429, 1429, *lv denied* 16 NY3d 858; *People v Kearns*, 50 AD3d 1514, 1515, *lv denied* 11 NY3d 790), as well as his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 256).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

794

KA 11-00293

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS K. MARTIN, 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 Supreme Court, Erie County (M. William Boller, A.J.), rendered January 4, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant failed to preserve for our review his challenge to the authenticity of the recording of police radio transmissions inasmuch as he did not object to their admission in evidence at the suppression hearing that preceded the plea (*see* CPL 470.05 [2]; *People v Mack*, 89 AD3d 864, 866, *lv denied* 18 NY3d 959; *People v Alexander*, 48 AD3d 1225, 1226, *lv denied* 10 NY3d 859). In any event, defendant's contention that the recording is inauthentic because it may have been digitally "burned" is based upon mere speculation and is therefore without merit.

We reject defendant's further contention that Supreme Court erred in refusing to suppress the weapon found in his vehicle and his statements to the police, which he alleges were the fruit of an illegal stop and search of his vehicle. The police had reasonable suspicion to stop defendant's vehicle (*see People v Caponigro*, 76 AD3d 913, 913-914, *lv denied* 15 NY3d 952; *People v Velez*, 59 AD3d 572, 575, *lv denied* 12 NY3d 860), and the incremental series of investigative steps taken thereafter were lawful (*see generally People v Torres*, 74 NY2d 224, 231 n 4). Finally, to the extent that defendant's contention that he was denied effective assistance of counsel survives his plea of guilty (*see People v Hawkins*, 94 AD3d 1439, 1441), we conclude that it lacks merit (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

795

KA 10-00667

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID MCCALLUM, DEFENDANT-APPELLANT.

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

DAVID MCCALLUM, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered February 11, 2010. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends in his main and pro se supplemental briefs that the evidence is legally insufficient to support his conviction because the People failed to meet their burden of disproving his justification defense beyond a reasonable doubt. We reject that contention. The evidence at trial established that defendant administered a fatal beating to the victim without justification. Defendant's statement to the police that he struck the victim only once with his fist was contradicted by the Medical Examiner's testimony that the victim died as the result of "multiple" blunt force injuries. In addition, defendant admitted that the victim did not strike or harm him. Although defendant told the police that the victim threatened him with a hammer and screwdriver, no such tools were found at the crime scene and there is no evidence that the victim was otherwise armed. We also note that defendant, who was 6'3" tall and weighed approximately 200 pounds, was considerably larger than the victim. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support defendant's conviction insofar as it established "that a reasonable person in the same situation [as defendant] would not have perceived that deadly force was necessary" (*People v Umali*, 10 NY3d 417, 425, *rearg denied* 11 NY3d 744, *cert denied* ___ US ___, 129 S Ct 1595; *cf. People v McClellan*, 49

AD3d 1203, 1204, *lv denied* 11 NY3d 791). Contrary to defendant's further contention in his main brief, when viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the jury's rejection of the justification defense is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant's remaining contentions are raised in his main brief unless specified otherwise. Defendant's contention that County Court's justification charge was improper because it differed from the justification charge contained in the Criminal Jury Instructions lacks merit. The court's charge "accurately stated the applicable legal principles" and thus was not erroneous (*People v Horn*, 217 AD2d 406, 406, *lv denied* 86 NY2d 843; *see People v Coleman*, 70 NY2d 817, 819). In addition, the court properly refused to charge criminally negligent homicide as a lesser included offense. Although the court charged the lesser included offense of manslaughter in the second degree, the jury convicted defendant of manslaughter in the first degree. Thus, "defendant is foreclosed from challenging the court's denial of his request to charge the further lesser included offense[]" of criminally negligent homicide (*People v Williams*, 273 AD2d 824, 826, *lv denied* 95 NY2d 893; *see also People v Boettcher*, 69 NY2d 174, 180).

Defendant failed to preserve for our review his further contention that the court erroneously dismissed a prospective juror because he did not object to the prospective juror's dismissal (*see* CPL 470.05 [2]; *People v Hopkins*, 76 NY2d 872, 873), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that the court erred in allowing the People to present evidence of a prior altercation between defendant and the victim. Evidence regarding the altercation was "relevant . . . to provide background information concerning the prior relationship between defendant and the victim" and was relevant to the determination whether defendant's use of deadly force was justified (*People v Perez*, 67 AD3d 1324, 1325, *lv denied* 13 NY3d 941).

Contrary to defendant's further contention, the verdict sheet did not contain an improper annotation (*see generally People v Damiano*, 87 NY2d 477, 480). The notation on the verdict sheet that manslaughter in the second degree was being submitted as a "lesser included offense" of manslaughter in the first degree is neither "statutory text" nor an "element[] of the crimes charged" (*id.*). Rather, that language simply "distinguished" between manslaughter in the first degree and the lesser included offense of manslaughter in the second degree, which is permitted pursuant to CPL 310.20 (2) (*see People v Miller*, 73 AD3d 1435, 1435, *affd* 18 NY3d 704).

We further conclude that the sentence is not unduly harsh or severe. Contrary to defendant's related contention in his pro se supplemental brief, the fact that the court imposed a more severe sentence after trial than that offered during plea negotiations does not demonstrate that defendant was punished for exercising his right to a trial (*see People v Taplin*, 1 AD3d 1044, 1046, *lv denied* 1 NY3d

635).

We reject defendant's contention in his pro se supplemental brief that the court erred in denying his request for a jury charge regarding the justifiable use of physical force. Defendant's entitlement to such a charge "turn[s] on whether there [is] a reasonable view of the evidence, viewed most favorably to defendant, that he only used nondeadly force" (*People v Quinones*, 91 AD3d 445, 445, *lv denied* 198 NY3d 961). We conclude that, because of the severity of the victim's injuries, "there was no reasonable view [of the evidence] that defendant only used nondeadly physical force, and thus [there was] no jury issue . . . whether defendant used deadly physical force" (*id*. at 446).

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

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

797

KA 10-01088

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN MCNITT, DEFENDANT-APPELLANT.

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

JONATHAN MCNITT, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered February 18, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, resisting arrest and disorderly conduct.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [former (3)]), resisting arrest (§ 205.30), and disorderly conduct (§ 240.20 [3]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his request for new counsel (*see generally People v Rolfe*, 83 AD3d 1219, 1220, *lv denied* 17 NY3d 809). The record establishes that the court made a sufficient inquiry and determined that there was no good cause for substitution (*see generally People v Linares*, 2 NY3d 507, 510-511). Defendant failed to preserve for our review his contention that the court erred in admitting in evidence testimony regarding an uncharged crime (*see People v Thomas*, 85 AD3d 1572, 1572; *People v Kelly*, 71 AD3d 1520, 1520, *lv denied* 15 NY3d 775). In any event, his contention is without merit inasmuch as the testimony was relevant to establish defendant's motive and to provide relevant background information (*see Thomas*, 85 AD3d at 1572; *People v Monzon*, 289 AD2d 595, *lv denied* 98 NY2d 712). By failing to object to his appearance in prison garb at trial, defendant failed to preserve for our review his contention that he was thereby denied a fair trial (*see People v Walker*, 259 AD2d 1026, 1027, *lv denied* 93 NY2d 1029), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, upon our review of the evidence, the law, and the circumstances of this case, viewed in

totality and as of the time of the representation, we reject defendant's contention that he received ineffective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

798

KA 10-02081

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS GEROYIANIS, 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 (LIAM A. DWYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered October 8, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, grand larceny in the third degree and criminal possession of stolen property in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and as a matter of discretion in the interest of justice by reducing the sentence on the first count of the indictment to an indeterminate term of imprisonment of 16 years to life, and by reducing the conviction of grand larceny in the third degree (Penal Law § 155.35 [1]) to grand larceny in the fourth degree (§ 155.30 [1]) and reducing the conviction of criminal possession of stolen property in the third degree (§ 165.50) to criminal possession of stolen property in the fourth degree (§ 165.45 [1]) and vacating the sentence imposed on counts two and three of the indictment and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for sentencing on those counts.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), grand larceny in the third degree (§ 155.35 [1]), and criminal possession of stolen property in the third degree (§ 165.50). Contrary to defendant's contention, we conclude that the conviction of burglary in the second degree is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although there were no eyewitnesses and there was no direct evidence of defendant's guilt, "the element of identity was established by a compelling chain of circumstantial evidence that had no reasonable explanation except that defendant was . . . the perpetrator[]" (*People v Brown*, 92 AD3d 1216, 1217, *lv denied* ___ NY3d ___ [Apr. 30, 2012]). At the time of the burglary, defendant was the victim's next-door neighbor. The victim testified that he was out of his apartment from

8:30 A.M. until 2:30 P.M. on the date of the burglary and that, when he returned, a laptop computer to which a Harley Davidson sticker was affixed, various computer accessories, a DVD player, and approximately 150 to 160 DVDs were missing. A person acquainted with defendant testified that, in the early afternoon on the date of the burglary, defendant arrived at his house with a laptop computer and over 100 DVDs. Defendant told the acquaintance that the items were "hot," i.e., stolen. The acquaintance further testified that defendant peeled a Harley Davidson sticker from the laptop computer. The acquaintance later gave the sticker to the police, and the victim identified it as the same sticker that had been affixed to his laptop computer. In addition, the People's forensic serologist testified that defendant could not be excluded as a contributor to the DNA profiles found on the power strip into which the stolen laptop computer had been plugged in the victim's apartment. Viewing the evidence in light of the elements of the crime of burglary in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence with respect to that crime (*see generally Bleakley*, 69 NY2d at 495).

As defendant correctly concedes, he failed to preserve for our review his further contention that Supreme Court failed to respond to a jury note requesting to view an exhibit, i.e., a DNA analysis chart, before the jury announced its verdict, inasmuch as he did not object to the court's handling of that jury note (*see People v Starling*, 85 NY2d 509, 516; *People v Johnson*, 289 AD2d 1008, 1009, *lv denied* 97 NY2d 756; *People v Fuentes*, 246 AD2d 474, 475, *lv denied* 91 NY2d 941). Contrary to defendant's contention, the alleged failure of the court to respond to the jury's request to view the exhibit is not a mode of proceedings error for which preservation is not required (*see People v Kisoon*, 8 NY3d 129, 135). "[T]his is not a case where there was 'a failure to provide [defense] counsel with meaningful notice of the contents of the jury note or an opportunity to respond' . . ., and defendant therefore was required to preserve his contention for our review" (*People v Kalb*, 91 AD3d 1359, 1359). In accordance with the procedure set forth in *People v O'Rama* (78 NY2d 270, 277-278), the court marked the jury note as a court exhibit and, before recalling the jury, read the note verbatim into the record in the presence of counsel (*see People v Bonner*, 79 AD3d 1790, 1790-1791, *lv denied* 17 NY3d 792). The court then advised counsel that it had a second note indicating that the jury had reached a verdict and that it intended to return the jury to the courtroom to announce the jury's verdict. Defense counsel did not object to the court's intended course of conduct, and his "silence at a time when any error by the court could have been obviated by timely objection renders the [contention] unpreserved" for our review (*Starling*, 85 NY2d at 516). In any event, there is no merit to defendant's contention.

We agree with defendant, however, that the conviction of grand larceny in the third degree and criminal possession of stolen property in the third degree is not supported by legally sufficient evidence that the value of the stolen property exceeded $3,000. The value of stolen property is "the market value of the property at the time and

place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime" (Penal Law § 155.20 [1]). The People therefore were required to establish beyond a reasonable doubt that the value of the stolen property exceeded $3,000. "The Court of Appeals has unequivocally held that 'a victim must provide a basis of knowledge for his [or her] statement of value before it can be accepted as legally sufficient evidence of such value' " (*People v Gonzalez*, 221 AD2d 203, 204, quoting *People v Lopez*, 79 NY2d 402, 404). "Conclusory statements and rough estimates of value are not sufficient" (*People v Loomis*, 56 AD3d 1046, 1047; *see People v Selassie*, 166 AD2d 358, 359, *lv denied* 77 NY2d 911). Although a "victim is competent to supply evidence of original cost" (*People v Stein*, 172 AD2d 1060, 1060, *lv denied* 78 NY2d 975), "evidence of the original purchase price, without more, will not satisfy the People's burden" (*Gonzalez*, 221 AD2d at 204).

Here, the victim testified that the following items were stolen from his apartment: a laptop computer, a DVD player, a laptop computer cooling device, a wireless mouse, a wireless laptop computer air card, and approximately 150 to 160 DVDs. The record establishes that the victim purchased the laptop computer in October 2008 for $892.49, and that he purchased the DVD player in September 2007 for $115.49. Contrary to the contention of defendant, the victim's testimony and supporting bank statements are sufficient to establish the value of the laptop computer. The victim purchased the laptop computer only nine months before the burglary and it is therefore unlikely that its market value depreciated significantly by the time of the burglary (*see People v Monclova*, 89 AD3d 424, 425, *lv denied* 18 NY3d 861; *see also People v Alexander*, 41 AD3d 1200, 1201, *lv denied* 9 NY3d 920). As for the DVD player, given the lapse of time between the purchase and the theft as well as the absence of any testimony concerning the condition of the DVD player, we cannot conclude that there is legally sufficient evidence with respect to the value of the DVD player at the time of the burglary (*see Monclova*, 89 AD3d at 424-425; *cf. Alexander*, 41 AD3d at 1201). With respect to the remaining items of stolen property, there was no evidence presented concerning the purchase price or current value of the property. Although the victim testified that new DVDs cost "$19 apiece, $20 apiece depending," he did not testify concerning the age or condition of his DVDs, the market value of the DVDs at the time of the theft, or the cost of replacing his DVD collection (*see Gonzalez*, 221 AD2d at 205). As for the remaining stolen items, the victim provided only "rough estimates of value" (*Loomis*, 56 AD3d at 1047), without setting forth any basis for his estimates (*see Gonzalez*, 221 AD2d at 204-205; *see also People v Watkins*, 233 AD2d 904, 905), and thus the evidence also is legally insufficient to establish the value of those remaining items. "Consequently, we cannot on this record conclude 'that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold' of $[3],000" (*People v Brink*, 78 AD3d 1483, 1484, *lv denied* 16 NY3d 742, *rearg denied* 16 NY3d 828). The evidence is legally sufficient, however, to establish that defendant committed the lesser included offenses of grand larceny in the fourth degree (Penal Law § 155.30

[1]) and criminal possession of stolen property in the fourth degree (§ 165.45 [1]). We therefore modify the judgment accordingly, and we remit the matter to Supreme Court for sentencing on those convictions.

We further agree with defendant that the sentence imposed on the conviction of burglary in the second degree is unduly harsh and severe under the circumstances of this case, and we therefore further modify the judgment by reducing the sentence as a matter of discretion in the interest of justice to an indeterminate term of imprisonment of 16 years to life.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

800

KA 11-00103

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN M. MANTOR, DEFENDANT-APPELLANT.

DAVID M. GIGLIO, UTICA (ALYSSA O'NEIL 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 (Michael L. Dwyer, J.), rendered July 22, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, burglary in the second degree and arson in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of burglary in the first degree (Penal Law § 140.30 [3]), burglary in the second degree (§ 140.25 [2]) and arson in the third degree (§ 150.10 [1]). The evidence at trial established that defendant broke into his ex-girlfriend's residence and set fire to the premises, causing significant property damage. Defendant failed to preserve for our review his contention that County Court erred in admitting in evidence photographs depicting various relatives of his ex-girlfriend in her residence prior to the fire (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Given the innocuous nature of the photographs and the minimal prejudice suffered by defendant as a result of their admission in evidence, we conclude that defense counsel's failure to object to the photographs on relevancy grounds did not deprive defendant of meaningful representation (*see generally People v Benevento*, 91 NY2d 708, 712-713). We similarly conclude that defendant was not deprived of meaningful representation as a result of his attorney's failure to retain an expert to testify in support of his intoxication defense. " 'Defendant has not demonstrated that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence' " (*People v Jurgensen*, 288 AD2d 937, 938, *lv denied* 97 NY2d 684; *see People v Hunter*, 70 AD3d 1388, 1389, *lv denied* 15 NY3d 751).

Defendant further contends that statements he made to police officers investigating the fire should have been suppressed because he had invoked his right to counsel earlier that morning on an unrelated charge. We reject that contention. "Under New York's indelible right to counsel rule, a defendant in custody in connection with a criminal matter for which he is represented by counsel may not be interrogated in the absence of his attorney with respect to that matter or an unrelated matter unless he waives the right to counsel in the presence of his attorney" (*People v Lopez*, 16 NY3d 375, 377; *see People v Rogers*, 43 NY2d 167, 169-174). Here, defendant was not in custody on the unrelated charge for which he had previously invoked his right to counsel, and thus he did not have a derivative right to counsel with respect to the arson charge (*see People v Steward*, 88 NY2d 496, 500-502, *rearg denied* 88 NY2d 1018*; People v Osborne*, 88 AD3d 1284, 1286; *People v Scaccia*, 6 AD3d 1105, 1105-1106, *lv denied* 3 NY3d 681).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

802

CAF 11-01829

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

IN THE MATTER OF THOMAS DENOTO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SARAH DENOTO, RESPONDENT-APPELLANT.

WILLIAM J. SEDOR, ROCHESTER, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered January 24, 2011 in a proceeding pursuant to Family Court Act article 4. The order denied and dismissed respondent's objections to an order of the Support Magistrate.

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

Memorandum: Petitioner father commenced this proceeding alleging that respondent mother owed, inter alia, $30,000 in arrears for child support. The arrears had been established by an order dated October 8, 2003 entered upon the consent of the parties, and were "held in abeyance until further proceedings." The mother sought, inter alia, to vacate the $30,000 in arrears on the ground that, at the time of the agreement, she was addicted to crack cocaine and was not competent to consent to the arrears. Following a hearing, the Support Magistrate ordered that the hold on the $30,000 arrears balance was to be removed. The mother now appeals from an order of Family Court that "denied and dismissed" her objections to the Support Magistrate's order.

The mother contends that the Support Magistrate did not have jurisdiction under the Family Court Act or the parties' judgment of divorce to award arrears. Lack of jurisdiction is a ground upon which an order may be vacated (*see* CPLR 5015 [a] [4]), and " 'a court's lack of subject matter jurisdiction may not be waived and may, in fact, be raised at any time' " (*Guideone Specialty Mut. Ins. Co. v State Ins. Fund*, 94 AD3d 700, ___; *see Green v State of New York*, 90 AD3d 1577, 1578, *lv dismissed in part and denied in part* 18 NY3d 901; *Matter of Hyatt Legal Servs.*, 97 AD2d 983). Nevertheless, we cannot review the mother's contention because the record is insufficient to enable us to do so (*see Matter of Kraemer v Kalish*, 11 AD3d 898, 899).

The mother further contends that the award of arrears is invalid and unenforceable because, inter alia, the consent order does not comply with Family Court Act § 413 (1) (h). We conclude that her

contention is without merit because section 413 (1) (h) is not applicable here, inasmuch as the mother seeks to vacate only that part of the order establishing arrears and not child support. The mother's additional contentions as to why the October 2003 order is invalid, unenforceable, and unconscionable are not properly before us because she raises those contentions for the first time on appeal (*see generally* CPLR 5015; *Matter of Chomik v Sypniak*, 70 AD3d 1336, 1336-1337).

Finally, to the extent that the mother preserved for our review her contention that the court erred in giving deference to the order of the Support Magistrate, we conclude that her contention lacks merit. Indeed, " '[t]he greatest deference should be given to the decision of the [Support Magistrate,] who is in the best position to assess the credibility of the witnesses and the evidence proffered' " (*Matter of Niagara County Dept. of Social Servs. v Hueber*, 89 AD3d 1433, 1434, *lv denied* 18 NY3d 805). Here, the court properly deferred to the Support Magistrate's findings of fact and credibility determinations.

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

809

CA 12-00154

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

JAMES R. DALTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FREDERICK J. LUCAS AND TRANSITOWNE DODGE OF GREECE, DOING BUSINESS AS DOAN DODGE CHRYSLER, DEFENDANTS-RESPONDENTS.

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

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (DAVID MURPHY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered August 12, 2011 in a personal injury action. The order, insofar as appealed from, denied the motion of plaintiff for summary judgment on the issues of negligence and proximate cause.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when a vehicle operated by Frederick J. Lucas (defendant) and owned by defendant Transitowne Dodge of Greece, doing business as Doan Dodge Chrysler (Transitowne), collided with a vehicle operated by plaintiff. The collision occurred when plaintiff and defendant were driving in opposite directions on a two-lane bridge, and the vehicle driven by defendant entered plaintiff's lane of travel and collided head-on with plaintiff's vehicle. Contrary to plaintiff's contention, Supreme Court properly denied those parts of his motion with respect to the issues of negligence and proximate cause because defendants raised a triable issue of fact concerning the applicability of the emergency doctrine.

Under the emergency doctrine, " 'when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the [driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context' . . . provided the [driver] has not created the emergency" (*Caristo v Sanzone*, 96 NY2d 172, 174, quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, *rearg denied* 77 NY2d 990; *see Lifson v City of Syracuse*, 17 NY3d 492, 497). The existence of an

emergency and the reasonableness of a driver's response thereto generally constitute issues of fact (*see Patterson v Central N.Y. Regional Transp. Auth. [CNYRTA]*, 94 AD3d 1565, 1566; *Mitchell v City of New York*, 89 AD3d 1068, 1069; *Schlanger v Doe*, 53 AD3d 827, 828).

Here, plaintiff established a prima facie case of negligence by submitting evidence that defendant's vehicle crossed the center line of the roadway and struck plaintiff's vehicle head-on (*see Boorman v Bowhers*, 27 AD3d 1058, 1059; *Matte v Hall*, 20 AD3d 898, 899-900; *Stringari v Peerless Importers*, 304 AD2d 413, 413). Defendants, however, raised an issue of fact whether defendant was faced with a sudden and unexpected situation, i.e., the icy condition of the bridge, and whether he acted reasonably under the circumstances (*see Boorman*, 27 AD3d at 1059; *Brown v Bracht*, 132 AD2d 857, 859, *lv denied* 70 NY2d 615). In opposition to the motion, defendants submitted an affidavit in which defendant averred that the road was damp from intermittent precipitation on the day of the accident and that, from the time he left Transitowne until he reached the bridge, he did not observe or experience any slippery or icy road conditions. According to defendant, he experienced no loss of traction or control while approaching the bridge, and there was no visible accumulation of ice or snow on the road prior to reaching the inclined portion of the bridge. Defendant thus averred that the "icy condition on the hill was totally unanticipated." Defendants also submitted weather records reflecting that, on the date of the accident, temperatures in the area hovered near the freezing mark, with trace precipitation throughout the day and negligible snow accumulation (.08 inches) by the time of the accident. Plaintiff similarly testified at his deposition that, although it was "quite cold" on the date of the accident, he did not recall much precipitation that day and he did not have any difficulty maintaining traction during his drive home from work. Defendants thus raised an issue of fact whether defendant was "confronted with a sudden unanticipated and unforeseeable icing of the bridge surface which placed him in an emergency situation" (*Brown*, 132 AD2d at 859; *cf. Bellantone v Toddy Taxi*, 307 AD2d 979, 979-980; *Smith v Perfectaire Co.*, 270 AD2d 410).

Contrary to plaintiff's further contention, we conclude that there is an issue of fact concerning the reasonableness of defendant's actions when he was faced with the purported emergency, including his alleged failure to apply the brakes upon losing control of the vehicle (*see generally Heye v Smith*, 30 AD3d 991, 992; *Bixler v Buckeye Pipe Line Co.*, 309 AD2d 1285, 1286).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

826/11

KA 09-00930

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRAY GILLIAM, DEFENDANT-APPELLANT.

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

TYRAY GILLIAM, 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 May 28, 2008. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree. The judgment was affirmed by order of this Court entered July 1, 2011 (86 AD3d 923), and defendant on November 28, 2011 was granted leave to appeal to the Court of Appeals from the order of this Court (17 NY3d 953), and the Court of Appeals on May 8, 2012 reversed the order and remitted the case to this Court for clarification of the basis of this Court's decision (___ NY3d ___ [May 8, 2012]).

Now, upon remittitur from the Court of Appeals,

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

Memorandum: In a prior appeal (*People v Gilliam*, 86 AD3d 923, *revd* ___ NY3d ___ [May 8, 2012]), we summarily affirmed the judgment convicting defendant of rape in the second degree (Penal Law § 130.30 [1]). Defendant had contended that his sentence was unduly harsh and severe. In reversing our order, the Court of Appeals concluded that we may not summarily affirm a judgment "without indicating whether [we] relied on the waiver [of the right to appeal] or determined that the sentencing claim lacked merit" (*Gilliam*, ___ NY3d at ___). The Court remitted the matter to this Court "for clarification of the basis of [our] decision" (*id.* at ___).

Upon remittal, we conclude that defendant's unrestricted waiver of the right to appeal encompassed his right to challenge the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737). To the extent that defendant in his pro se supplemental brief challenges "the

denial of his CPL 190.80 motion for release on his own recognizance predicated on the alleged failure to indict him within 45 days of his arrest, we note that such a challenge became moot when the indictment was issued" (*People v Phillips*, 277 AD2d 816, 819, *lv denied* 96 NY2d 804). The remaining contention of defendant in his pro se supplemental brief, which concerns a matter raised in his omnibus motion, is not properly before us. That contention is also encompassed by defendant's unrestricted waiver of the right to appeal and, in any event, "[t]he record reflects that defendant withdrew his omnibus motion as part of the plea of guilty, thereby foreclosing our review of the issues raised therein" (*People v Thousand*, 41 AD3d 1272, 1273, *lv denied* 9 NY3d 927; *see People v Williams*, 55 AD3d 759; *People v Gully*, 17 AD3d 382, *lv denied* 5 NY3d 763).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court

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

923/11

KA 08-02581

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARNELL NORTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 6, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree. The judgment was affirmed by order of this Court entered September 30, 2011 (87 AD3d 1310), and defendant on December 16, 2011 was granted leave to appeal to the Court of Appeals from the order of this Court (18 NY3d 861), and the Court of Appeals on May 8, 2012 reversed the order and remitted the case to this Court for clarification of the basis of this Court's decision (___ NY3d ___ [May 8, 2012]).

Now, upon remittitur from the Court of Appeals,

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

Memorandum: In a prior appeal (*People v Norton*, 87 AD3d 1310, *revd* ___ NY3d ___ [May 8, 2012]), we summarily affirmed the judgment convicting defendant of robbery in the first degree (Penal Law § 160.15 [2]). Defendant had contended that his sentence was unduly harsh and severe. In reversing our order, the Court of Appeals concluded that this Court may not summarily affirm the judgment "without indicating whether [we] relied on the waiver [of the right to appeal] or determined that the sentencing claim lacked merit" (*Norton*, ___ NY3d at ___). The Court remitted the matter to this Court "for clarification of the basis of [our] decision" (*id.* at ___).

Upon remittal, we clarify that we previously reviewed the merits of defendant's contention, having determined that there was no valid waiver of the right to appeal, and we concluded that the sentence is not unduly harsh or severe. Although Supreme Court referred to a waiver of the right to appeal at the time of the plea, no oral waiver

was elicited from defendant. In addition, neither the written waiver of the right to appeal in the record nor the court's brief mention of that waiver during the plea proceeding distinguished the waiver of the right to appeal from those rights automatically forfeited upon a plea of guilty. Consequently, the record failed to "establish that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256).

Entered: June 15, 2012

Frances E. Cafarell
Clerk of the Court