
*SUPREME COURT OF THE STATE OF NEW YORK*

*APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT*

DECISIONS FILED

JUNE 30, 2017

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

**1213/16**

**CAF 15-00549**

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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IN THE MATTER OF JOSEPH M. SPRING, JR.,
PETITIONER-RESPONDENT,

V ORDER

HEATHER K. MOSHER, RESPONDENT-APPELLANT.

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JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO (HEIDI W. FEINBERG OF COUNSEL), FOR RESPONDENT-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (GARY MULDOON OF COUNSEL), ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered February 13, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted in part the petition to modify visitation.

Now, upon reading and filing the stipulation of discontinuance signed by the attorney for respondent and the Attorney for the Child on May 18 and 22, 2017, with attached affidavit to withdraw sworn to by respondent on June 6, 2017,

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

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**206**

**CA 16-00324**

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

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ERIE INSURANCE EXCHANGE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

J.M. PEREIRA & SONS, INC., RPC, INC., ALSO KNOWN AS RUBBER POLYMER CORPORATION, RICARDO VEGA AND ROBERT MARCHESE, AS ADMINISTRATOR OF THE ESTATES OF ANTONIO TAPIA, DECEASED, AND GILBERTO VEGA-SANCHEZ, DECEASED, DEFENDANTS-RESPONDENTS.

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

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR DEFENDANT-RESPONDENT J.M. PEREIRA & SONS, INC.

FOX ROTHSCHILD LLP, NEW YORK CITY (MATTHEW J. SCHENKER OF COUNSEL), FOR DEFENDANT-RESPONDENT RPC, INC., ALSO KNOWN AS RUBBER POLYMER CORPORATION.

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Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered November 12, 2015. The order, insofar as appealed from, denied plaintiff's motion for summary judgment.

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

Memorandum: Plaintiff, Erie Insurance Exchange, commenced this action seeking a declaration that it is not obligated to defend or indemnify defendant J.M. Pereira & Sons, Inc. (JMP) in an underlying personal injury action. We conclude that Supreme Court properly denied plaintiff's motion for summary judgment.

In 2006, several employees of JMP, a Pennsylvania corporation, were either injured or killed while working for JMP in New York State. At the time of the accident, the employees were allegedly working with waterproofing products produced by defendant RPC, Inc., also known as Rubber Polymer Corporation (RPC). The injured employee and the estates of the two employees killed in the accident commenced actions against various parties, including RPC, which in turn commenced third-party actions against JMP. At the time of the accident, JMP was insured by several insurance policies, two of which had been issued by plaintiff. One policy, the "Ultraflex Policy," provided insurance for

property damage, but it has been exhausted and is not at issue on this appeal. The second policy, known as the "Business Catastrophe Liability Policy" (BCL policy), provided commercial liability umbrella coverage.

RPC tendered its defense and indemnification to JMP, and both JMP and RPC tendered their defense and indemnification to plaintiff. Plaintiff denied the tender, contending that there was no contract or written agreement between RPC and JMP that would require defense and indemnification for the underlying claims and that RPC was not an additional insured under the BCL policy. With respect to JMP, plaintiff reserved its rights to disclaim coverage based on a policy exclusion that excluded coverage for bodily injury to JMP's employees if such injury arose out of their employment or during the course of performing their duties related to JMP's business.

JMP was also insured by the State Workers' Insurance Fund of Pennsylvania (SWIF), which had issued a single policy containing "WORKERS COMPENSATION INSURANCE" and "EMPLOYERS LIABILITY INSURANCE." The employers liability insurance "applied to work in the State of Pennsylvania," or employment that was "necessary or incidental to [JMP's] work" in Pennsylvania. Based on the applicability of several policy exclusions, including the geographic limitations of the policy, the SWIF denied coverage.

Plaintiff thereafter commenced an action in Pennsylvania against JMP, RPC, the injured employee, and the estates of the two killed employees, seeking a declaration that it had no duty to defend and indemnify JMP in the underlying actions. That Pennsylvania action was dismissed "without prejudice to refile with joinder of all indispensable parties." Following that dismissal, plaintiff commenced the instant action in New York, seeking a declaration that it has no obligation to defend JMP in the underlying actions and no obligation to indemnify JMP against any obligation it may incur in those underlying actions.

Before any depositions or any exchange of discovery between JMP and RPC, plaintiff moved for summary judgment, contending that Pennsylvania law governed interpretation of the BCL policy and that Exclusion G of that policy precluded coverage. All of the defendants opposed the motion.

Contrary to plaintiff's contention, we need not apply Pennsylvania law in order to interpret the provisions of the various insurance policies. "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz–New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223). "There is no need to engage in conflicts of laws analysis absent a conflict between the laws of New York and Pennsylvania with respect to the applicability of basic tenets of contract interpretation" (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570). Here, there is no such conflict (*compare Matter of Viking Pump, Inc.*, 27 NY3d 244,

257; *Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307; *Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383; *with Babcock & Wilcox Co. v American Nuclear Insurers*, 131 A3d 445, 456; *Mutual Benefit Ins. Co. v Politsopoulos*, 631 Pa 628, 640, 115 A3d 844, 852 n 6; *Penn-America Ins. Co. v Peccadillos, Inc.*, 27 A3d 259, 264-265, *appeal denied* 613 Pa 669, 34 A3d 832).

Exclusion G of the BCL policy provides that coverage is excluded for bodily injuries to JMP employees "arising out of and in the course of . . . [e]mployment by [JMP]; or . . . [p]erforming duties related to the conduct of [JMP's] business." There are three exceptions to Exclusion G, two of which are relevant to this appeal. The first provides that Exclusion G "does not apply to liability assumed by the insured under an 'insured contract.' " Insofar as relevant to this appeal, the BCL policy defines an "insured contract" as "[t]hat part of any other contract or agreement pertaining to [JMP's] business . . . under which [JMP] assume[s] the tort liability of another part [*sic*] to pay for 'bodily injury' or 'property damage' to a third person or organization. Tort liability means a liability that would be imposed by law in absence of any contract or agreement."

The second exception provides that Exclusion G "does not apply to the extent that valid 'underlying insurance' for the employer's liability risks . . . exists or would have existed but for the exhaustion of the underlying limits for 'bodily injury'. Coverage provided will follow the provisions, exclusions and limitations of the 'underlying insurance' *unless otherwise directed by [the BCL] insurance*" (emphasis added).

We conclude that plaintiff established, as a matter of law, that the first exception to Exclusion G does not apply, and neither JMP nor RPC raised a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Specifically, plaintiff established that JMP did not assume the tort liability of RPC under any contract or agreement between JMP and RPC. Although JMP and RPC submitted evidence that there was a contract or agreement between them that would require JMP to name RPC as an additional insured on JMP's insurance policies, an agreement to name a party as an additional insured is not an agreement to assume liability in tort for that party (*see American Ins. Co. v Schnall*, 134 AD3d 746, 748-749; *Nuzzo v Griffin Tech.*, 222 AD2d 184, 188, *lv dismissed* 89 NY2d 981, *lv denied* 91 NY2d 812; *Hailey v New York State Elec. & Gas Corp.*, 214 AD2d 986, 986; *cf. Tremco, Inc. v Pennsylvania Mfrs. Assn. Ins. Co.*, 832 A2d 1120, 1121-1122; *see also Brooks v Colton*, 760 A2d 393, 395-396).

We nevertheless conclude that the court properly denied plaintiff's motion inasmuch as plaintiff failed to establish, as a matter of law, that the second exception to Exclusion G does not apply. The second exception contains a standard "follow the form" provision. Such a provision generally means that the umbrella policy incorporates the provisions of a valid underlying policy, and "is designed to match the coverage provided by the underlying policy" (*Highrise Hoisting & Scaffolding, Inc. v Liberty Ins. Underwriters,*

*Inc.*, 116 AD3d 647, 648, *lv denied* 24 NY3d 908; *see Viking Pump, Inc.*, 27 NY3d at 252; *Federal Ins. Co. v International Bus. Machs. Corp.*, 18 NY3d 642, 646; *see also Kropa v Gateway Ford*, 974 A2d 502, 505, *appeal denied* 605 Pa 701). Nevertheless, the BCL policy also provides that it will follow the form of the valid underlying insurance "unless otherwise directed" by the BCL policy, and "we must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract[, leaving] no provision without force and effect" (*Viking Pump, Inc.*, 27 NY3d at 257 [internal quotation marks omitted]).

The dissent adopts plaintiff's position that the geographic limitation of the underlying SWIF policy, i.e., limiting coverage to work in Pennsylvania, precludes coverage for the accident that occurred in New York. According to the dissent, the underlying SWIF policy was not "*valid* 'underlying insurance' " because it limited coverage to work in Pennsylvania (emphasis added). We respectfully disagree with that position. The dissent is interpreting the word "valid" to mean "applicable." In our view, the geographic limits of that policy do not affect the policy's *validity* but, rather, affects its *applicability*. Otherwise there would never be a situation where the "unless otherwise directed" language would have meaning. That phrase has meaning only if the underlying insurance has exclusions not found in the BCL policy. Inasmuch as we must "construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect," we cannot adopt the position of the dissent (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222 [internal quotation marks omitted]). In any event, the fact that we and our dissenting colleague interpret the policy differently establishes, at the very least, that the policy is ambiguous and that plaintiff failed to satisfy its burden of establishing as a matter of law that there is "no other reasonable interpretation" of the exception to the exclusion (*Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 [internal quotation marks omitted]).

Based on our interpretation of the second exception, there would be coverage. The BCL policy applied "anywhere in the world," with the exception of areas subject to trade or economic sanctions or embargoes. Inasmuch as the second exception follows the form of the underlying insurance "unless otherwise directed" by the BCL policy, and the BCL policy otherwise directs coverage beyond Pennsylvania, we conclude that the geographic limitation of the SWIF policy does not preclude coverage under the BCL policy for an accident that occurred in New York State.

Contrary to plaintiff's further contention, the BCL policy, by its clear and unambiguous terms, does not require exhaustion of the underlying SWIF policy before the BCL policy coverage is triggered. Under the second exception to Exclusion G, coverage is provided if valid underlying insurance exists "or" would have existed but for exhaustion of the underlying limits. That exception does not require exhaustion of the underlying policy. Under the coverages section of the policy, plaintiff agreed to pay JMP "the 'ultimate net loss' in

excess of the 'retained limit' because of 'bodily injury' or 'property damage' to which [the BCL] insurance applies." The ultimate net loss is "the total sum, after reduction for recoveries or salvages collectible, that the insured becomes legally obligated to pay by reason of settlement or judgments" or other alternative dispute resolution, and the "retained limit" is the policy limit of the underlying insurance. Those provisions establish that plaintiff may deduct from any amount it pays to JMP the policy limit of the underlying insurance. It does not, however, require exhaustion of the underlying policy coverage.

JMP, as a nonmoving, nonappealing party, contends that we should exercise our power to search the record and award it summary judgment (*see* CPLR 3212 [b]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-111). We decline to do so. The mere fact that plaintiff did not establish as a matter of law that Exclusion G precludes coverage does not, in our view, establish as a matter of law that the BCL policy provides such coverage.

Based on our resolution, we do not address JMP's remaining contentions in response to plaintiff's appeal.

All concur except PERADOTTO, J.P., who dissents and votes to reverse the order insofar as appealed from in the following memorandum: I respectfully dissent because I disagree with the majority that plaintiff failed to establish, as a matter of law, that the second exception to Exclusion G in the "Business Catastrophe Liability Policy" (BCL policy) issued to defendant J.M. Pereira & Sons, Inc. (JMP) does not apply. In my view, plaintiff established that Exclusion G precludes coverage, and therefore the order insofar as appealed from should be reversed and judgment should be granted to plaintiff declaring that it is not required to provide a defense or indemnity in the underlying actions or third-party actions.

Under the BCL policy, which provides commercial liability umbrella coverage, plaintiff agreed to "pay on behalf of the insured the 'ultimate net loss' in excess of the 'retained limit' because of 'bodily injury' . . . to which th[e] insurance applies." Unless certain exceptions are applicable, however, Exclusion G to the BCL policy excludes employer's liability coverage for bodily injuries to JMP employees "arising out of and in the course of . . . [e]mployment by [JMP]; or . . . [p]erforming duties related to the conduct of [JMP's] business." The second exception provides that Exclusion G "does not apply to the extent that valid 'underlying insurance' for the employer's liability risks described above exists or would have existed but for the exhaustion of the underlying limits for 'bodily injury'. Coverage provided will follow the provisions, exclusions and limitations of the 'underlying insurance' unless otherwise directed by this insurance." The term "underlying insurance" is defined as "any policies of insurance listed in the declarations" in the applicable schedule, which includes, as relevant here, employer's liability coverage under a policy issued to JMP by the State Workers' Insurance Fund of Pennsylvania (SWIF). The employer's liability part of the

SWIF policy applies only "to work in the State of Pennsylvania," or employment that is "necessary or incidental to [JMP's] work" in Pennsylvania.

The only reasonable interpretation of the plain and unambiguous language is that the BCL policy would provide JMP with employer's liability coverage (i.e., the exclusion would not apply) only to the extent that such coverage existed under the SWIF policy. Inasmuch as the SWIF policy does not provide employer's liability coverage for JMP's work outside of Pennsylvania, I agree with plaintiff that no "valid 'underlying insurance' for [JMP's] liability risks" exists for bodily injuries to its employees insofar as such injuries arise out of or in the course of their employment by JMP or their performance of duties related to the conduct of JMP's business.

Contrary to the majority's determination, the "follow form" provision contained in the second sentence of the second exception to Exclusion G is relevant when, and only when, valid underlying insurance for the employer's liability risks exists pursuant to the first sentence of that exception. In that instance, the BCL policy would "conform[] to the terms" of the underlying SWIF policy (*Federal Ins. Co. v International Bus. Machs. Corp.*, 18 NY3d 642, 646) by "follow[ing its] provisions, exclusions and limitations," i.e., the BCL policy would "match the coverage provided" by the SWIF policy (*Highrise Hoisting & Scaffolding, Inc. v Liberty Ins. Underwriters, Inc.*, 116 AD3d 647, 648, *lv denied* 24 NY3d 908), "unless otherwise directed by [the BCL policy]." Here, however, there is no "[c]overage provided" by the SWIF policy for the BCL policy to match or "follow form."

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**542**

**KA 14-01074**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT S. LONG, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered February 13, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). In appeal No. 2, defendant appeals from a judgment convicting him upon his *Alford* plea of criminal possession of a controlled substance in the third degree (§ 220.16 [1]) and, in appeal No. 3, he appeals from a judgment convicting him upon his *Alford* plea of bribing a witness (§ 215.00).

In appeal No. 1, defendant failed to preserve for our review his contention that the guilty plea was not knowingly, intelligently, and voluntarily entered inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Zulian*, 68 AD3d 1731, 1732, *lv denied* 14 NY3d 894) and, contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666). In any event, the record establishes that defendant's contention is without merit. Defendant's further contention that he was denied the opportunity to withdraw his plea is belied by the record and patently without merit.

With respect to the pleas in all three appeals, it is well settled that the only claims of ineffective assistance of counsel that

survive a guilty plea are those where the plea was infected by the alleged ineffective assistance (*see People v Collins*, 129 AD3d 1676, 1676-1677, *lv denied* 26 NY3d 1038). To the extent that defendant contends that alleged ineffective assistance infected the pleas, we conclude that the contention is without merit, inasmuch as it is belied by his statements during the plea colloquies (*see People v Garner*, 86 AD3d 955, 956), or it involves matters that are outside the record and is not reviewable on direct appeal (*see generally People v Davis*, 119 AD3d 1383, 1384, *lv denied* 24 NY3d 960). We further note that, as part of the combined plea agreement, defendant waived any claim he had to specific performance of an alleged off-the-record plea agreement and that he allegedly complied with the conditions thereof in order to receive an allegedly more lenient sentence promise with respect to all three convictions at issue herein (*see generally People v Pena*, 7 AD3d 259, 260, *lv denied* 3 NY3d 645).

We reject defendant's further contention that County Court erred in failing to correct an error in the presentence report. The record establishes that the court ordered the appropriate correction and thus no corrective action is required by this Court.

Finally, the sentence is not unduly harsh or severe.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**543**

**KA 14-01075**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT S. LONG, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered February 13, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Long* ([appeal No. 1] ___ AD3d ___ [June 30, 2017]).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**544**

**KA 14-01076**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT S. LONG, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered February 13, 2014. The judgment convicted defendant, upon his plea of guilty, of bribing a witness.

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

Same memorandum as in *People v Long* ([appeal No. 1] ___ AD3d ___ [June 30, 2017]).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**552**

**CA 16-02063**

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

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TRACIE R. STRONG, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

ST. THOMAS CHURCH OF IRONDEQUOIT, ALSO KNOWN AS ST. THOMAS THE APOSTLE CHURCH, AND KATERI TEKAWITHA ROMAN CATHOLIC PARISH, DEFENDANTS.

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ST. THOMAS CHURCH OF IRONDEQUOIT, ALSO KNOWN AS ST. THOMAS THE APOSTLE CHURCH, AND KATERI TEKAWITHA ROMAN CATHOLIC PARISH, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

STEPPING STONES LEARNING CENTER, THIRD-PARTY DEFENDANT-APPELLANT.

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GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

CHARLES A. HALL, ROCHESTER, FOR DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered February 11, 2016. The order, among other things, denied in part the motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

Memorandum: Third-party defendant, Stepping Stones Learning Center (Stepping Stones), appeals from an order that denied in part its motion seeking summary judgment dismissing, inter alia, the third-party complaint and, instead, granted summary judgment to nonmoving defendants-third-party plaintiffs (hereafter, Church defendants) on the breach of contract claims. Although we agree with Stepping Stones that Supreme Court erred in granting summary judgment to the Church defendants on those claims, we conclude that the court properly denied in part Stepping Stones's motion.

Stepping Stones leased certain premises from the Church

defendants and, pursuant to the lease agreement between the parties, Stepping Stones was required to obtain liability insurance naming defendant-third-party plaintiff St. Thomas Church of Irondequoit, also known as St. Thomas the Apostle Church (Church), as an additional insured. The lease further required that the insurance policy obtained by Stepping Stones would "insur[e] [the Church] and [Stepping Stones] against liability for injury to persons or property occurring in or about the Premises or arising out of ownership, maintenance, use, or occupancy of [the] Premises." It is undisputed that Stepping Stones obtained an insurance policy that named the Church as an additional insured. The lease also obligated Stepping Stones to indemnify the Church for any damages arising out of any personal injury sustained by anyone "in or about" the leased premises unless such injury was caused by the negligence of the Church or any of its agents.

While the lease was in effect, Tracie R. Strong (plaintiff), an employee of Stepping Stones, was allegedly injured after she slipped and fell on snow and ice in the Church's parking lot. Plaintiffs thereafter commenced a personal injury action against the Church defendants. The Church sought coverage under the policy obtained by Stepping Stones naming the Church as an additional insured, but the insurance carrier disclaimed coverage, prompting the Church defendants to commence a third-party action against Stepping Stones. The third-party complaint sought contractual indemnification and alleged that Stepping Stones breached the lease by failing to obtain the requisite liability insurance.

Following discovery, Stepping Stones moved for summary judgment dismissing the third-party complaint and all claims and cross-claims asserted against it, contending only that, because the Church was obligated under the lease to plow and salt the parking lot where plaintiff allegedly fell, the Church itself was negligent and is therefore not entitled to contractual indemnification from Stepping Stones. The motion made no mention of the breach of contract claims, and Stepping Stones failed to submit a copy of the insurance policy in support of its motion. In opposition to the motion, the Church defendants addressed only the breach of contract claims, contending that, inasmuch as the insurance carrier disclaimed coverage, Stepping Stones breached the lease by failing to obtain the requisite insurance coverage. The Church defendants also failed to submit a copy of the insurance policy with their opposing papers. In reply, Stepping Stones submitted only portions of the insurance policy.

In denying Stepping Stones's motion in part and sua sponte granting summary judgment to the Church defendants on the breach of contract claims, the court reasoned that the Church defendants were entitled to judgment on the ground that, "[i]f the insurance carrier provided by Stepping Stones fails to cover the broad coverage demanded by the Lease, then Stepping Stones has breached the Lease agreement."

On appeal, Stepping Stones addresses only the court's determination with respect to the breach of contract claims. We agree with Stepping Stones that the court erred in granting summary judgment

to the Church defendants on those claims, and we therefore modify the order accordingly. The mere fact that the insurance carrier disclaimed coverage for the accident does not establish as a matter of law that Stepping Stones failed to obtain the necessary coverage. It is possible that the insurance carrier's disclaimer was improper, and that possibility may be explored by way of a declaratory judgment action (*see e.g. Bowker v NVR, Inc.*, 39 AD3d 1162, 1164; *Rohlin v Nationwide Mut. Ins. Co.*, 26 AD3d 749, 750).

We further conclude, however, that Stepping Stones is not entitled to summary judgment with respect to the breach of contract claims. As noted above, Stepping Stones's motion was directed at the contractual indemnification claim only, and no proof was offered in support of the motion with respect to the breach of contract claims. Stepping Stones "did not establish its prima facie entitlement to judgment as a matter of law dismissing the . . . claims alleging breach of contract for the failure to procure insurance, as it did not submit any evidence demonstrating that it procured an insurance policy as required by the lease" (*Simmons v Berkshire Equity, LLC*, 149 AD3d 1119, 1121). Thus, the burden never shifted to the Church defendants to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**575**

**CA 15-01603**

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

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IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF WILLIAM J., CONSECUTIVE NO. 270172, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO
MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF
MENTAL HEALTH AND NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

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EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (BENJAMIN D. AGATA OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered September 2, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that petitioner is a sex offender requiring civil management under a regimen of strict and intensive supervision and treatment.

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

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**576**

**CA 16-00794**

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

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

V MEMORANDUM AND ORDER

WILLIAM J., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (BENJAMIN D. AGATA OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered April 6, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to the custody of the Commissioner of the New York State Office of Mental Health for confinement in a secure treatment facility.

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

Memorandum: Respondent appeals from an order revoking his regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and committing him to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*). We affirm.

At the revocation hearing, respondent stipulated that he violated his SIST conditions and that he suffers from a "mental abnormality" (Mental Hygiene Law § 10.03 [i]). Respondent contends that the evidence is legally insufficient to support a determination that he has "such an inability to control behavior" that he "is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.07 [f]). Specifically, respondent relies on the absence of any evidence that his SIST violations involved any sexually inappropriate conduct, and contends that, in light of the conflicting expert testimony regarding the level of danger that respondent poses to himself and the community, petitioner failed to meet its burden of establishing by clear and convincing evidence that respondent is a dangerous sex offender requiring confinement (*see id.*; § 10.11 [d] [4]). We reject that contention.

We note at the outset that Supreme Court "was not limited to considering only the facts of the SIST violations" that prompted this revocation proceeding but, rather, it was entitled to "rely on all the relevant facts and circumstances tending to establish that respondent was a dangerous sex offender," such as his underlying offenses and past SIST violations (*Matter of State of New York v Motzer*, 79 AD3d 1687, 1688; *see Matter of State of New York v DeCapua*, 121 AD3d 1599, 1600, *lv denied* 24 NY3d 913). We further note that, although respondent's SIST violations were not sexual in nature, they "remain highly relevant regarding the level of danger that respondent poses to the community with respect to his risk of recidivism" (*Matter of State of New York v Donald N.*, 63 AD3d 1391, 1394; *see Matter of State of New York v Smith*, 145 AD3d 1445, 1445-1446; *Matter of State of New York v Jason H.*, 82 AD3d 778, 780).

Here, petitioner's expert testified that respondent suffers from antisocial personality disorder, substance abuse disorder, and severe cocaine and alcohol use disorder. Respondent's instant SIST violations included the use of cocaine on at least two occasions within one month of release to the community. Respondent has violated the conditions of SIST release on two prior occasions, and those violations also involved cocaine use. Petitioner's expert described respondent's cocaine use upon his most recent release to be of an "escalating" nature, and opined that respondent is unable to curb his craving for cocaine and has demonstrated a lack of cooperation with, and resentment toward, substance abuse and sex offender treatment. Petitioner's expert further opined that respondent's sex offending behavior is "linked" with his cocaine usage and his sexual arousal has become conditioned to his cocaine usage. Moreover, every examiner who has evaluated respondent has concluded that his sex offending behavior is linked to his substance abuse, and the hearing record contains numerous admissions by respondent that his sex offending behavior is linked to his cocaine use. Petitioner's expert testified that, based on his Static-99 scores, respondent was at a moderate to high risk of recidivism, and respondent's score on the Acute-2007 placed him in the high range risk of recidivism. Although respondent's expert testified that respondent had "put some distance" between his cocaine use and his sex offending behavior, respondent's expert also agreed that "[t]here's no doubt that one could lead to the other." We thus conclude that petitioner established by the requisite clear and convincing evidence that respondent's substance abuse was linked to his sex offending behavior and that respondent is a dangerous sex offender requiring confinement (*see* Mental Hygiene Law §§ 10.07 [f]; 10.11 [d] [4]; *Jason H.*, 82 AD3d at 779-780; *Donald N.*, 63 AD3d at 1391).

All concur except CURRAN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully disagree with the majority that the evidence was sufficient to show, by clear and convincing evidence (*see* Mental Hygiene Law §§ 10.07 [f]; 10.11 [d] [4]), that respondent's inability to control sexual misconduct required confinement pursuant to Mental Hygiene Law article 10. Therefore, I dissent.

The Mental Hygiene Law defines a " '[d]angerous sex offender requiring confinement' " as "a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, *and such an inability to control behavior*, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e] [emphasis added]).

Recently, in *Matter of State of New York v Michael M*. (24 NY3d 649), the Court of Appeals held that, in order to revoke a respondent's regimen of strict and intensive supervision and treatment (SIST) and impose civil confinement, the State must demonstrate that the respondent has an "inability to control *sexual misconduct*" (*id*. at 659 [emphasis added]). In other words, to be a dangerous sex offender requiring confinement, the State has to demonstrate that the respondent has "such an *inability* to control behavior that the person is likely to be a danger to others and to commit sex offenses if not confined" (*id.* at 660 [emphasis added]). The Court reasoned that the statute "clearly envisages a distinction between sex offenders who have difficulty controlling their sexual conduct and those who are unable to control it. The former are to be supervised and treated as 'outpatients' and only the latter may be confined" (*id*. at 659).

The Court in *Michael M.* found it significant that the record in that case "reveal[ed] nothing relevant to the issue of respondent's sexual control that occurred" from the time that the court imposed SIST rather than civil confinement to the time that the respondent was ordered to be confined (*id*.). Further, the Court commented that Mental Hygiene Law article 10 "implicitly contains its own 'least restrictive alternative doctrine' " (*id.* at 658). The legislative findings for Mental Hygiene Law article 10 limit confinement "by civil process" to "extreme cases" involving "the most dangerous offenders" (Mental Hygiene Law § 10.01 [b]), and the Court referred to SIST as "the least restrictive option" for a sex offender suffering from a mental abnormality (*Michael M.*, 24 NY3d at 658).

In *Matter of State of New York v Husted* (145 AD3d 1637), this Court followed the rule set forth in *Michael M.* and determined that the evidence established that the respondent violated the terms and conditions of his SIST regimen by using alcohol and marihuana, and by being discharged from sex offender treatment (*see id*. at 1638). We reversed the order determining that the respondent required confinement, however, stating that it was "undisputed that the alleged violations of respondent's SIST conditions related solely to his use of alcohol and marihuana, and not to any alleged sexual conduct" (*id.*).

Similarly, in this case, there is no evidence, clear and convincing or otherwise, linking the substance abuse underlying respondent's SIST violations to any sexual misconduct while on SIST. Petitioner relies on expert testimony that respondent's substance abuse is linked with his sexual behaviors. While that evidence established that respondent had *difficulty in controlling* his sexual conduct while using controlled substances and that respondent has a

mental abnormality, it did not establish an *inability to control* his behavior, i.e., sexual conduct, while on SIST, which is necessary to establish that confinement is required. Rather, the undisputed evidence in this case establishes that, despite engaging in high risk substance abuse behavior while on SIST, respondent had not committed a sexual offense during the past thirteen years. Respondent's SIST violations have all been related to substance abuse and curfew violations. These violations are similar to "[t]he vast majority of SIST violations[, which are] technical in nature and involved such acts as violating curfew, GPS infractions, and using alcohol or other substances" (New York State Office of Mental Health, 2015 Annual Report on the Implementation of Mental Hygiene Law Article 10 at 10). In other words, respondent's substance abuse SIST violations are the norm confronting our courts and *Michael M.* makes clear that civil confinement is not the default remedy for such nonsexual violations of SIST orders.

In cases such as this one, upon an alleged SIST violation, the court is confronted with a choice between continuing and/or modifying SIST, or civil confinement, and the latter is appropriate only upon a determination of "an inability to control behavior" which, in my view, must be related to sexual offenses or at least violations of a sexual nature. Otherwise, courts would be confining individuals such as respondent, who has completed his criminal sentence, without a sufficient statutory foundation inasmuch as the statute limits confinement to "extreme cases" involving "the most dangerous [sex] offenders" (Mental Hygiene Law § 10.01 [b]). While courts are understandably frustrated at repeated noncompliance with the supervision and treatment requirements provided in a SIST order, *Michael M.*, in my view, compels courts to choose the least restrictive option of SIST, except when the situation is so extreme that confinement is required by clear and convincing evidence. Indeed, in this case, the court noted in its decision that less restrictive SIST options were available for respondent, including placement in a residential treatment or inpatient treatment facility, but the court declined to consider those options. Rather, the court stated that such alternative options were not properly before it, and that the sole issue was to decide whether respondent is a dangerous sex offender requiring confinement. That reasoning, however, highlights that confinement is often the default option chosen by courts when making a determination in cases like this one. In my view, *Michael M.* requires courts to consider less restrictive options for these types of respondents, rather than simply imposing civil confinement, particularly where, as here, the case involves nonsexual SIST violations.

For these reasons, I would reverse the order, deny the petition, and remit the matter to Supreme Court for further proceedings.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**668**

**CA 16-01733**

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

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LARRY D. GARDNER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM P. CHESTER AND KEVIN P. CHESTER,
DEFENDANTS-APPELLANTS.

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HAGELIN SPENCER LLC, BUFFALO (MATTHEW D. PFALZER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 18, 2016. The order, insofar as appealed from, granted that part of the motion of plaintiff seeking summary judgment on the issue of defendants' negligence.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when the vehicle he was driving was struck from behind by a pickup truck operated by Kevin P. Chester (defendant) and owned by defendant William P. Chester. On appeal, defendants contend that Supreme Court erred in granting that part of plaintiff's motion for partial summary judgment on the issue of defendants' negligence. We agree.

"A rear-end collision with a vehicle that is stopped or is in the process of stopping 'creates a prima facie case of liability with respect to the [driver] of the rearmost vehicle, thereby requiring that [driver] to rebut the inference of negligence by providing a nonnegligent explanation for the collision' " (*Rosario v Swiatkowski*, 101 AD3d 1609, 1609). " 'One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle' . . . , and such an explanation '[may be] sufficient to overcome the inference of negligence and preclude an award of summary judgment' " (*Brooks v High St. Professional Bldg., Inc.*, 34 AD3d 1265, 1266; *see Tate v Brown*, 125 AD3d 1397, 1398-1399; *Danner v Campbell*, 302 AD2d 859, 859-860).

Here, in support of his motion, plaintiff submitted his deposition testimony in which he stated that he was traveling along a

three-lane highway at slightly below the speed limit in moderate rush hour traffic. According to plaintiff, traffic was "flowing" until he moved beyond a certain exit, at which point the left and middle lanes were moving slowly, so plaintiff changed lanes into the right lane, came to a gradual and full stop, and was stopped for 5 to 10 seconds before being rear-ended by the truck operated by defendant. Plaintiff, however, also submitted the deposition testimony of defendant, who stated that he did not see plaintiff's vehicle until immediately before the accident, when plaintiff moved from the middle lane to the right lane and slammed on his brakes in an instant or quickly, i.e., plaintiff's action was not a slow and cautious movement to which defendant could react (*cf. Herdendorf v Polino*, 43 AD3d 1429, 1430; *Newton v Perugini*, 16 AD3d 1087, 1089; *Shulga v Ashcroft*, 11 AD3d 893, 894). Defendant explained that he had not seen plaintiff's vehicle before the collision because he had been paying attention to the road in front of him and, when plaintiff engaged in his maneuver, defendant slammed on his brakes and tried to steer into the shoulder to avoid the accident, which caused the back end of the trailer that was attached to the truck to swing out, and the left corner of the truck struck plaintiff's vehicle. Based on the foregoing, we conclude that plaintiff "failed to meet his initial burden of establishing his entitlement to judgment as a matter of law inasmuch as he submitted the deposition testimony in which [defendant] provided a nonnegligent explanation for the collision," namely, that plaintiff caused the collision when he suddenly changed lanes in response to slowing traffic in the middle and left lanes of the highway and abruptly stopped in the right lane in front of defendant (*Brooks*, 34 AD3d at 1267; *see Tate*, 125 AD3d at 1398-1399; *Rosario*, 101 AD3d at 1609-1610).

Finally, we reject plaintiff's contention that he established defendant's negligence as a matter of law by submitting evidence of defendant's guilty plea of following too closely (Vehicle and Traffic Law § 1129 [a]). "It is well settled that 'the fact that [the] driver entered a plea of guilty to a Vehicle and Traffic Law offense is only some evidence of negligence and does not establish his negligence per se' " (*Shaw v Rosha Enters., Inc.*, 129 AD3d 1574, 1576). "Rather, it is the '*unexcused* violation of the Vehicle and Traffic Law [that] constitutes negligence per se' " (*id.*; *see Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392). Here, upon defendant's explanation, the trier of fact could excuse the violation on the ground that plaintiff cut in front of defendant and immediately stopped, thereby failing to provide defendant with adequate time to create the "reasonable and prudent" distance between the vehicles that is required by the statute (§ 1129 [a]).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**694**

**CA 16-01498**

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

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PETER HAMMOND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRUCE W. SMITH, DEFENDANT-RESPONDENT.

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HARRIS BEACH PLLC, PITTSFORD (DOUGLAS A. FOSS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 27, 2016. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, damages for breach of an alleged oral partnership between the parties to develop and market a new lithographic tool. Plaintiff appeals from an order that granted defendant's motion for summary judgment dismissing the complaint on the ground that no partnership existed between the parties. We affirm.

We conclude that defendant met his initial burden of establishing that no partnership existed (*see Fasolo v Scarafile*, 120 AD3d 929, 930, *lv dismissed* 24 NY3d 992; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "A partnership is an association of two or more persons to carry on as co-owners a business for profit" (Partnership Law § 10 [1]). Where, as here, there is no written partnership agreement between the parties, a court looks to the parties' conduct, intent, and relationship to determine whether a partnership existed in fact (*see Fasolo*, 120 AD3d at 929-930). The relevant factors are (1) the parties' intent, whether express or implied; (2) whether there was joint control and management of the business; (3) whether the parties shared both profits and losses; and (4) whether the parties combined their property, skill, or knowledge (*see Griffith Energy, Inc. v Evans*, 85 AD3d 1564, 1565; *Kyle v Ford*, 184 AD2d 1036, 1036-1037). No single factor is determinative; a court considers the parties' relationship as a whole (*see Fasolo*, 120 AD3d at 930; *Griffith Energy, Inc.*, 85 AD3d at 1565).

With respect to the first factor, we must consider whether the parties expressly or implicitly intended to become partners (*see generally Fasolo*, 120 AD3d at 930). Evidence concerning the parties' preliminary negotiations bears directly on their intent (*see Boyarsky v Froccaro*, 131 AD2d 710, 713). In support of his motion, defendant submitted, inter alia, the deposition testimony of plaintiff, the affidavit of defendant, invoices, a lease, and the parties' correspondence documenting their contract negotiations. That evidence establishes that the parties never shared the intent to become partners. In June 2004, defendant wrote an email to plaintiff suggesting that they discuss "how [they] might be able to work together." Plaintiff responded that a partnership "might work" and expressed hope that the parties could come to a "workable agreement." Thereafter, the parties met in person and plaintiff explained that he wanted a 50% share in a partnership. Plaintiff later testified at his deposition that, upon hearing that proposal, defendant had "a look on his face like maybe he wasn't expecting that," and did not respond.

Although plaintiff testified that he interpreted defendant's silence as an agreement to an equal partnership, the documentary evidence undermines any such assumption. In late September 2004, prior to meeting with defendant's attorney, plaintiff wrote an email to defendant stating: "I think we need to nail down the key terms of our agreement . . . Our attorney[s] and advisors should be able to help us come to a fair and equitable agreement." Defendant responded: "We should also keep open other ways to structure things. We initially discussed that your company might contract to build tools for my company. This could also be an option. Others may also exist." According to plaintiff's deposition testimony, the resulting meeting with defendant's attorney in October 2004 did not further the parties' business negotiations, and plaintiff left that meeting discouraged. Thereafter, plaintiff approached defendant and offered to take a reduced, 20% share in a partnership agreement, ostensibly to be a "good partner," further undermining any suggestion that the parties already had agreed to enter into an equal partnership. When plaintiff later testified about defendant's response to that proposal, plaintiff did not testify that defendant agreed to a partnership under the proposed terms; rather, he testified only that defendant appeared "happy" with plaintiff's change of heart. In May 2005, plaintiff wrote one last email to defendant asking to "finalize [their] business deal," but the parties ended their business relationship in or around August 2005 without having reduced it to writing. Thus, the evidence demonstrates that the parties never shared the intent to enter into a partnership, although they initially had explored the possibility of one.

We respectfully disagree with our dissenting colleague's view that plaintiff's deposition testimony raised triable issues of fact whether a partnership existed. Although plaintiff referred to the parties' business relationship as a partnership and testified that defendant acquiesced in plaintiff's initial proposal, it is well settled that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to create a material issue of fact (*Zuckerman*, 49 NY2d at 562).

With respect to the second factor, we must consider whether there was joint control and management, e.g., shared supervision of business operations and shared responsibility for handling financial affairs (*see Griffith Energy, Inc.*, 85 AD3d at 1566; *Kyle*, 184 AD2d at 1037). In his affidavit, defendant averred that he hired nine engineers, a technical writer, and a bookkeeper, contracted with a payroll company and an accounting firm, paid bills, established relationships with vendors, developed management protocols, and directed all assembly and engineering decisions, and plaintiff's deposition testimony raised no issues of fact in that regard. In contrast, plaintiff contributed the services of one engineer whom he employed and paid, and defendant reimbursed plaintiff for that employee's services. Furthermore, plaintiff testified at his deposition that financial transactions were handled through a bank account belonging to defendant's corporation, and that defendant alone had the authority to write checks on that account. Thus, the evidence overwhelmingly demonstrates that defendant had sole control and management of the business.

With respect to the third factor, we must consider whether the parties shared profits and losses (*see Fasolo*, 120 AD3d at 930; *Ramirez v Goldberg*, 82 AD2d 850, 852). Although a person's receipt of a share of profits is prima facie evidence that he or she is a partner (*see* Partnership Law § 11 [4]), there is no allegation or evidence that plaintiff received a share of profits.

It is well established that shared losses are an " 'essential element' " of any partnership agreement (*Prince v O'Brien*, 256 AD2d 208, 212; *see Fasolo*, 120 AD3d at 930). Where there is "undisputed evidence that [a party] never made a capital contribution to the business[, such evidence] strongly suggests that no partnership existed" (*Kyle*, 184 AD2d at 1037; *see Fasolo*, 120 AD3d at 930). The documentary evidence and plaintiff's own deposition testimony establish that plaintiff made no capital contributions and did not share in the business venture's losses. At his deposition, plaintiff testified that he made no capital contributions to the venture, and contributed only "time, effort, good will, [and] expertise as the investment." Throughout the course of their business relationship, plaintiff sent defendant numerous invoices to recoup tens of thousands of dollars of his expenses, and there is no dispute that defendant reimbursed plaintiff for those expenses. When the parties were seeking office space to lease, plaintiff sent an email to defendant indicating that he did not wish to be liable under the lease, and, indeed, defendant alone signed the resulting lease and accepted all obligations thereunder. Defendant averred that he used his own personal credit, and there is no dispute that defendant alone was liable to creditors.

Plaintiff contends, based on *Ramirez*, that he shared in losses because he offered his own services for a share of net profits and "risk[ed] losing the value of those services" (82 AD2d at 852). We reject that contention. Although plaintiff's testimony supports an inference that he offered services to the venture for which he was never compensated, such services alone do not establish that a person shared in losses sufficient to raise an issue of fact concerning the

existence of a partnership where, as here, that person invested no capital and was not liable to creditors (*see id.*).

With respect to the fourth factor, we must consider whether the parties combined their property, skill, and knowledge. Although plaintiff testified to instances in which he contributed his skill and knowledge related to design and marketing in the engineering industry, that factor is not dispositive (*see generally Fasolo*, 120 AD3d at 930). Upon our review of the foregoing factors and the parties' business relationship as a whole (*see generally id.*; *Griffith Energy, Inc.*, 85 AD3d at 1565), we conclude that defendant met his initial burden of establishing that no partnership existed (*see Fasolo*, 120 AD3d at 930). The burden thus shifted to plaintiff to raise an issue of fact by submitting evidence in admissible form (*see generally Zuckerman*, 49 NY2d at 562).

We further conclude that plaintiff failed to raise an issue of fact whether a partnership existed between the parties (*see Fasolo*, 120 AD3d at 931; *see generally Zuckerman*, 49 NY2d at 562). In opposition to the motion, plaintiff submitted, inter alia, the affidavit of plaintiff and documents that included a business proposal and a cover letter in which the word "partnership" is used to refer to the parties' business relationship. As Supreme Court properly reasoned, however, " 'calling an organization a partnership does not make it one' " (*Kyle*, 184 AD2d at 1037; *see UrbanAmerica, L.P. II v Carl Williams Group, L.L.C.*, 95 AD3d 642, 644). In light of the documentary evidence detailed above that the parties never shared the intent to become partners, those two references to a partnership in documents prepared by lay persons do not raise an issue of fact whether the parties in fact entered into a legal partnership. Finally, plaintiff's affidavit was insufficient to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. In my view, plaintiff's deposition testimony raised triable issues of fact with respect to the existence of a partnership between the parties. Because that testimony was among defendant's own submissions in support of his motion for summary judgment, I conclude that defendant failed to meet his initial burden on the motion, and that Supreme Court erred in granting it (*see Prince v O'Brien*, 234 AD2d 12, 12; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Bianchi v Midtown Reporting Serv., Inc.*, 103 AD3d 1261, 1261-1262).

At his deposition, plaintiff testified that he and defendant reached an oral agreement to be partners in their business venture at some point prior to an October 2004 meeting with defendant's attorney, and that defendant acquiesced in his request for a 50% share of the partnership (*see generally Don v Singer*, 92 AD3d 576, 577). Plaintiff further testified that he thereafter voluntarily reduced his share to 20% in recognition of defendant's greater contributions to the business, and that the two of them later agreed to bring a third person into the partnership, with plaintiff retaining his 20% share and the third person assuming a 10% share. In addition, plaintiff

testified that defendant sought to end their business relationship by telling plaintiff that he "didn't want to be partners anymore," which suggests that defendant believed that they had been partners up to that point. Although the court characterized the evidence of an absence of mutual intent to be partners as "overwhelming," and the majority points to evidence that it views as "undermin[ing]" plaintiff's testimony, I conclude that plaintiff's testimony supports a reasonable inference that the parties shared the intent to form a partnership (*see A.G. Interiors Unlimited v DiMaggio*, 224 AD2d 466, 466; *Boyarsky v Froccaro*, 131 AD2d 710, 712-713; *see generally Don*, 92 AD3d at 577), and that the existence of contrary evidence merely raises an issue of credibility inappropriate for resolution on a motion for summary judgment (*see generally Ferrante v American Lung Assn.*, 90 NY2d 623, 631; *Harrington Group, Inc. v B/G Sales Assoc., Inc.*, 41 AD3d 1161, 1162; *Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226). Even assuming, arguendo, that the majority is correct that certain factors tending to establish the existence of a partnership are lacking in this case (*see generally Fasolo v Scarafile*, 120 AD3d 929, 929-930, *lv dismissed* 24 NY3d 992), I conclude that those factors are not determinative (*see id.* at 930), and that the competing inferences regarding the intent of the parties should be resolved by the trier of fact (*see Cavezza v Gardner*, 176 AD2d 911, 911-912).

In any event, I conclude that defendant submitted conflicting evidence concerning whether the parties shared profits and losses and whether the parties combined their property, skill, and knowledge (*see Kyle v Ford*, 184 AD2d 1036, 1036-1037). With respect to the latter factor, plaintiff testified that his contributions to the business included goodwill, design and engineering expertise, and access to vendors and suppliers. With respect to sharing of profits and losses, although it is undisputed that defendant paid plaintiff for some of his services, plaintiff testified that he contributed a significant amount of unpaid services to the business, and that he did so "as an investment," i.e., in anticipation of a share of future profits. In my view, that testimony is sufficient to establish that plaintiff may have been exposed to a risk of losses (*see Ramirez v Goldberg*, 82 AD2d 850, 852; *see generally Don*, 92 AD3d at 577). Contrary to defendant's contention, the absence of other evidence corroborating that plaintiff in fact performed unpaid services affects only the evidentiary weight of plaintiff's testimony and does not warrant disregarding that testimony for purposes of defendant's motion (*see generally Alvarez*, 295 AD2d at 226).

In sum, I agree with plaintiff that the court improperly resolved issues of fact in granting defendant's motion (*see Patel v Patel*, 192 AD2d 357, 357-358), and I would therefore reverse the order and deny the motion.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**721**

**CA 16-02220**

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

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PETRI BAKING PRODUCTS, INC.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

HATCH LEONARD NAPLES, INC., NOW KNOWN AS
FIRST NIAGARA RISK MANAGEMENT, INC., AND
FIRST NIAGARA RISK MANAGEMENT, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

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LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (THOMAS J. GAFFNEY OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (RYAN K. CUMMINGS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

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Appeal and cross appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered June 3, 2016. The order denied the cross motion of plaintiff for summary judgment and granted in part and denied in part the motion of defendants for summary judgment.

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

Memorandum: Plaintiff, a commercial food baking and production business, commenced this action asserting causes of action for breach of contract, fraud, and negligence/negligent misrepresentation premised upon the alleged failure of defendants (hereafter, First Niagara) to procure flood insurance coverage prior to the flood that damaged its business operations. In September 2003, Brian Conlogue, an insurance broker employed by First Niagara, summarized the coverage specifications for plaintiff's projected insurance policy, which was provided to him by plaintiff's existing insurance provider. His written summary indicated that plaintiff carried flood insurance. Unbeknownst to Conlogue, and apparently to plaintiff, plaintiff did not in fact carry flood insurance coverage, and the specifications were erroneous in that regard. The error was neither brought to plaintiff's attention by Conlogue nor discovered by plaintiff.

Plaintiff hired First Niagara in September 2003 as its insurance broker, and it authorized First Niagara to procure its business insurance for several years. Each annual policy contained a flood insurance exclusion provision. On September 18, 2006, Walter

McFarlane, the brother of plaintiff's chief financial officer at the time, called Conlogue to discuss the flood insurance provisions in the existing policy. McFarlane expressed some confusion and asked, " 'We have flood insurance, right? Because we want it.' " Conlogue indicated that he would "get back to him," but there is no evidence that he did so. On August 10, 2009, a flood event caused damage to plaintiff's business operations. After making a claim, plaintiff was informed that flood coverage was excluded from its policy.

First Niagara moved for summary judgment to dismiss the complaint or, in the alternative, to dismiss plaintiff's claim for lost profit damages. Plaintiff cross-moved for partial summary judgment on its causes of action for breach of contract and negligence/negligent misrepresentation. Supreme Court granted First Niagara's motion in part insofar as it dismissed plaintiff's fraud cause of action, and it determined that no "special relationship" existed between the parties. The court denied the motion in all other respects and denied plaintiff's cross motion. Plaintiff appeals, and First Niagara cross-appeals, from the order.

On its appeal, plaintiff challenges only those parts of the order that granted First Niagara's motion with respect to the issue whether a "special relationship" existed and that denied its cross motion. We therefore deem abandoned any contention by plaintiff with respect to the order insofar as it granted that part of First Niagara's motion for summary judgment seeking dismissal of the fraud cause of action against it (*see Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 94 AD3d 1466, 1467; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We conclude that the court properly granted First Niagara's motion insofar as it asserted that no special relationship existed between the parties. "As a general principle, insurance brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so" (*Nicotera v Allstate Ins. Co.*, 147 AD3d 1474, 1476, *lv denied* 29 NY3d 907 [internal quotation marks omitted]; *see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734). "Absent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide[ ] or direct a client to obtain additional coverage" (*5 Awnings Plus, Inc. v Moses Ins. Group, Inc.*, 108 AD3d 1198, 1200 [internal quotation marks omitted]; *see American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 735). "[A] special relationship may arise where '(1) the agent receives compensation for consultation apart from payment of the premiums . . . (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent . . . ; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on' " (*Sawyer v Rutecki*, 92 AD3d 1237, 1237-1238, *lv denied* 19 NY3d 804, quoting *Murphy v Kuhn*, 90 NY2d 266, 272).

Here, First Niagara met its initial burden of establishing that

no special relationship existed, and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Specifically, First Niagara submitted evidence that it received no compensation from plaintiff over and above the commissions it received for the insurance policies it had procured, that plaintiff did not use First Niagara as its exclusive agent, and that plaintiff retained final decision-making authority over what coverage to obtain (*see Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 158; *Sawyer*, 92 AD3d at 1238). Thus, even accepting plaintiff's allegations as true, we conclude that "the record in the instant case presents only the standard consumer-agent insurance placement relationship" (*Murphy*, 90 NY2d at 271; *see Hoffend & Sons, Inc.*, 7 NY3d at 158).

We further conclude, however, that First Niagara failed to tender "sufficient evidence to eliminate any material issues of fact from the case" relating to plaintiff's specific request for flood insurance coverage (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853). Although "[a] general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage" (*Hoffend & Sons, Inc.*, 7 NY3d at 158), McFarlane testified that he specifically requested Conlogue to clarify whether plaintiff carried flood insurance coverage, "[b]ecause we want it." Notably, the First Niagara employee in charge of "obtain[ing] flood insurance certificates for client[] properties" retrieved plaintiff's certificate the very next day, upon Conlogue's request. We conclude that there are triable issues of fact concerning whether plaintiff made a specific request for flood insurance coverage prior to the flood event (*cf. 5 Awnings Plus, Inc.*, 108 AD3d at 1201; *Catalanotto v Commercial Mut. Ins. Co.*, 285 AD2d 788, 790, *lv denied* 97 NY2d 604; *see generally Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 644-645).

We have considered First Niagara's remaining contention regarding plaintiff's claim for lost profit damages, and we conclude that it is without merit.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**736**

**KA 15-01453**

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAVON ELLISON, SR., DEFENDANT-APPELLANT.

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ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered August 27, 2015. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault 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 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]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to defendant's contention, upon viewing the evidence in the light most favorable to the People, we conclude that the evidence is legally sufficient to establish that he possessed a loaded firearm outside of his home or place of business (*see generally People v Danielson*, 9 NY3d 342, 349; *People v Bleakley*, 69 NY2d 490, 495). Although no weapon was recovered, the victim's girlfriend testified that she observed the victim standing next to the driver's side of a vehicle that was occupied only by the driver when she heard three or four gun shots and saw the victim holding his abdomen. The victim's girlfriend identified defendant by name twice in the 911 call she made while driving the victim to the hospital, and the recording of that call was admitted in evidence. Furthermore, another witness testified that, while he and defendant were housed at the same correctional facility, defendant admitted to him that he shot the victim in the abdomen at the location where the victim's girlfriend testified the shooting had occurred. We therefore conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that defendant possessed a loaded firearm outside of his home or place of business (*see generally Bleakley*, 69 NY2d at 495). We reject defendant's further contention that County Court erred in

directing that the sentence on that count run consecutively to the concurrent terms of imprisonment imposed on the attempted murder and assault counts. The evidence established that defendant's possession of a loaded firearm outside of his home or place of business was a separate act for sentencing purposes (*see People v Brown*, 21 NY3d 739, 744-745; *see also* Penal Law § 70.25 [2]).

Contrary to defendant's further contention, the court properly allowed the People to impeach the credibility of the victim's girlfriend when she testified that she did not see the driver of the vehicle who shot the victim, which contradicted her grand jury testimony and her sworn statement identifying defendant as the shooter. It is well established that "[e]vidence of a prior contradictory statement may be received for the limited purpose of impeaching the witness's credibility with respect to his or her testimony . . . [where, as here], the testimony on a 'material fact' . . . 'tend[s] to disprove the party's position or affirmatively damage[s] the party's case' " (*People v Berry*, 27 NY3d 10, 17, *rearg dismissed* 28 NY3d 1060; *see* CPL 60.35 [1]). We conclude that the testimony of the witness denying that she saw the driver related to a material fact, the identity of the shooter, and affirmatively damaged the People's case (*see Berry*, 27 NY3d at 17-18), particularly because the victim did not testify.

Defendant did not object to the court's failure to give a limiting instruction when the prosecutor impeached the credibility of the witness and thus did not preserve for our review his contention that the court's failure to give a limiting instruction constitutes reversible error (*see* CPL 470.05 [2]). In any event, we conclude that the contention is without merit. CPL 60.35 (2) provides that evidence concerning prior contradictory statements may be used only for the purpose of impeaching the credibility of the witness and does not constitute evidence-in-chief, and it further provides that, "[u]pon receiving such evidence at a jury trial, the court must so instruct the jury." The court properly charged the jury that the witness's contradictory statements did not constitute evidence-in-chief and that the jury could consider those statements only for the purpose of assessing her credibility, and thus we conclude that the failure to give a limiting instruction at the time her testimony was impeached does not warrant reversal (*see People v Davis*, 112 AD2d 722, 724, *lv denied* 66 NY2d 918).

Finally, the sentence is not unduly harsh or severe.

WHALEN, P.J., and DEJOSEPH, J., concur in the following memorandum: We concur in the result reached by the majority but respectfully disagree with the conclusion that County Court properly allowed the People to impeach the credibility of their own witness, the victim's girlfriend, using her grand jury testimony and her statement to police. In our view, the witness's testimony at trial that she glanced at the vehicle involved in the shooting but did not see the driver or know who was driving was "merely neutral or unhelpful," rather than affirmatively damaging, to the People's case (*People v Hampton*, 73 AD3d 442, 443, *lv denied* 16 NY3d 895; *see People v Ayala*,

121 AD3d 1124, 1125, *lv denied* 25 NY3d 987; *People v Griffiths*, 247 AD2d 550, 552, *lv denied* 92 NY2d 852; *see generally* CPL 60.35 [1]; *People v Fitzpatrick*, 40 NY2d 44, 51-52). "Trial testimony that the witness has no knowledge of or cannot recall a particular event [or fact], whether truthful or not, does not affirmatively damage the People's case" (*People v Lawrence*, 227 AD2d 893, 894). *People v Berry* (27 NY3d 10, *rearg dismissed* 28 NY3d 1060), relied upon by the majority, is distinguishable because the witness therein affirmatively damaged the People's case by testifying that he did not see defendant at the scene of a shooting when it occurred, which was tantamount to an assertion that defendant was not present inasmuch as the witness had allegedly been standing with defendant immediately prior to the shooting (*see id.* at 13-15, 18). Here, in contrast, the witness's claimed inability to identify the driver at trial failed to corroborate, but did not *contradict*, the People's theory that the driver was defendant (*see Fitzpatrick*, 40 NY2d at 52; *Ayala*, 121 AD3d at 1125; *see generally People v Saez*, 69 NY2d 802, 803-804; *People v James*, 137 AD3d 1587, 1589).

Nevertheless, we conclude that the court's error in permitting the People to impeach the victim's girlfriend is harmless. As noted by the majority, the People's evidence included a recorded 911 call in which the victim's girlfriend identified defendant as the shooter and the testimony of an inmate witness that defendant admitted to the shooting. In addition, the inmate witness testified that defendant admitted that his brother had "paid off" the victim, and the People introduced recordings of telephone calls from jail tending to establish that defendant was trying to prevent the victim and the victim's girlfriend from testifying. We therefore conclude that the evidence of guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see People v Cartledge*, 50 AD3d 1555, 1555-1556, *lv denied* 10 NY3d 957; *see also Saez*, 69 NY2d at 804; *People v Comer*, 146 AD2d 794, 795, *lv denied* 73 NY2d 976). We note that the jury would have been aware from the 911 call that the victim's girlfriend had previously identified defendant even if the People had not been permitted to impeach her with her grand jury testimony and police statement.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**747**

**CA 16-02258**

PRESENT: SMITH, J.P., DEJOSEPH, TROUTMAN, AND SCUDDER, JJ.

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WILLIAM C. SAGER, SR., INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF WILLIAM C. SAGER, JR., DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS, NHJB, INC., DOING BUSINESS AS MOLLY'S PUB, INDIVIDUALLY, AND AS A PRIVATE ACTOR JOINTLY ENGAGED WITH GOVERNMENT OFFICIALS IN PROHIBITED ACTION, NORMAN HABIB, INDIVIDUALLY, AND AS A PRIVATE ACTOR JOINTLY ENGAGED WITH GOVERNMENT OFFICIALS IN PROHIBITED ACTION AND MICHAEL MIRANDA, INDIVIDUALLY, AND AS A PRIVATE ACTOR JOINTLY ENGAGED WITH GOVERNMENT OFFICIALS IN PROHIBITED ACTION, DEFENDANTS-APPELLANTS.

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LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR DEFENDANTS-APPELLANTS NHJB, INC., DOING BUSINESS AS MOLLY'S PUB, INDIVIDUALLY, AND AS A PRIVATE ACTOR JOINTLY ENGAGED WITH GOVERNMENT OFFICIALS IN PROHIBITED ACTION, AND NORMAN HABIB, INDIVIDUALLY, AND AS A PRIVATE ACTOR JOINTLY ENGAGED WITH GOVERNMENT OFFICIALS IN PROHIBITED ACTION.

GOLDBERG SEGALLA LLP, BUFFALO (DANIEL T. HUNTER OF COUNSEL), FOR DEFENDANT-APPELLANT MICHAEL MIRANDA, INDIVIDUALLY, AND AS A PRIVATE ACTOR JOINTLY ENGAGED WITH GOVERNMENT OFFICIALS IN PROHIBITED ACTION.

LAW OFFICE OF FRANCIS LETRO, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeals from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered August 15, 2016. The order, among other things, denied the motions of defendants-appellants seeking to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion of defendant Michael Miranda and dismissing the complaint against him and as modified the order is affirmed without costs.

Memorandum: Plaintiff, individually and as administrator of decedent's estate, commenced this action seeking damages arising from fatal injuries sustained by decedent while he was a patron at Molly's

Pub. Defendant Norman Habib is the sole shareholder of defendant NHJB, Inc., doing business as Molly's Pub (NHJB), which operated Molly's Pub. NHJB entered into a two-year agreement with defendant Michael Miranda to lease the premises, and it is undisputed that decedent was injured during the period of the lease. Plaintiff alleged that an employee of NHJB assaulted decedent, who was then removed from the establishment by bouncers, off-duty police officers for defendant City of Buffalo (City), who allegedly did not timely seek medical assistance for decedent. With respect to defendants NHJB, Habib and Miranda, plaintiff alleged that each was liable for damages pursuant to 42 USC § 1983 for conspiracy to deprive decedent of his civil rights and for wrongful death. Plaintiff also alleged that each of those defendants was liable for negligent hiring and retention, violation of the Dram Shop Act, negligence based upon a defective or dangerous condition of the premises, and wrongful death.

NHJB and Habib (collectively, NHJB defendants) moved to dismiss the complaint against Habib, a Florida domiciliary, for lack of personal jurisdiction pursuant to CPLR 3211 (a) (8), and to dismiss the complaint against them both for failure to state a cause of action (*see* CPLR 3211 [a] [7]). We conclude that Supreme Court properly determined that plaintiff made a prima facie showing of personal jurisdiction pursuant to CPLR 302 (a) (1) (*see Fischbarg v Doucet*, 9 NY3d 375, 381 n 5). Habib is the named principal on the liquor license and, in opposition to the motion, plaintiff provided the transcript of the testimony of a witness at the criminal trial of NHJB's employee in connection with decedent's death, who stated that Habib was regularly at Molly's Pub and was present at Molly's Pub on the night decedent was injured, although not at the time the injuries were inflicted. Thus, upon consideration of the totality of the circumstances, we conclude that Habib " 'has engaged in sufficient purposeful activity to confer jurisdiction in New York' " (*Grimaldi v Guinn*, 72 AD3d 37, 44-45; *see generally Fischbarg*, 9 NY3d at 380). We further conclude that Habib's "conduct in relation to New York was such that [he] 'should [have] reasonably anticipate[d] being haled into court' " in this state, and thus the exercise of jurisdiction does not violate due process (*Matter of Chautauqua County Dept. of Social Servs. v Rita M.S.*, 94 AD3d 1509, 1514, quoting *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 287).

We further conclude that the court properly denied the NHJB defendants' motion based on the failure to state a cause of action. It is axiomatic that we " 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63). We conclude with respect to each cause of action that plaintiff stated a cause of action against the NHJB defendants.

We agree with Miranda, however, that the court erred in denying his motion to dismiss the complaint against him pursuant to CPLR 3211 (a) (7), and we therefore modify the order accordingly. The

conclusory allegations in the complaint alleging liability on the same grounds as those alleged against the NHJB defendants based upon the alleged ownership or partnership interest in the operation of Molly's Pub are insufficient to state a cause of action against him. In support of that part of his motion to dismiss the complaint insofar as it alleged that he was liable for negligent hiring or retention of NHJB employees, a violation of the Dram Shop Act and negligence based upon an alleged dangerous condition, Miranda submitted the lease, which provides that he shall not be liable for injury to persons or for any defects in the building. He also submitted an affidavit in which he stated that he has no ownership interest in Molly's Pub, that did he not exercise any control over the operation of Molly's Pub or the personnel of NHJB, that he had no actual or constructive notice of a dangerous or defective condition on the premises and that he was "merely an out-of-possession landlord." In support of that part of his motion to dismiss the complaint insofar as it alleged that he engaged in a conspiracy with state actors, Miranda averred that he had never been part of any agreement with the City or its police department to act in concert with any state actor for any purpose, and he had never been issued a liquor license for a bar on the premises based upon the alleged ownership or partnership interest in the operation of Molly's Pub.

"[W]hile it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support . . . Indeed, a cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations" (*Miller v Allstate Indem. Co.*, 132 AD3d 1306, 1307 [internal quotation marks omitted]). Here, plaintiff failed to allege any facts to support his allegation that Miranda had an ownership or partnership interest in the operation of Molly's Pub. Exhibits attached to the affirmation of plaintiff's attorney submitted in opposition to the motion, including a "Notice to Landlord," i.e., Miranda, advising that proceedings had been commenced to revoke the liquor license issued to Habib, and a hyperlink to a video on the New York State Liquor Authority's website that states that Miranda, as landlord, was present at the revocation hearing but did not participate were not sufficient to remedy the defects in the complaint alleging that Miranda had an ownership interest in NHJB or was an operating partner of Molly's Pub (*see generally Leon v Martinez*, 84 NY2d 83, 88).

All concur except DEJOSEPH, J., who dissents in part and votes to affirm in the following memorandum: I respectfully dissent in part. I agree with the majority that Supreme Court properly denied the motion of defendants Norman Habib and NHJB, Inc., doing business as Molly's Pub (NHJB defendants), to dismiss the complaint against them. I do not agree with the majority, however, that the court erred in denying the motion of defendant Michael Miranda to dismiss the complaint against him. I therefore would affirm the order.

It is well settled that, on a CPLR 3211 (a) (7) motion to dismiss, "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer*

*v Ginzburg*, 43 NY2d 268, 275; *see Barski v Town of Aurelius*, 147 AD3d 1483, 1483). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88). As this Court recognized in *Liberty Affordable Hous., Inc. v Maple Ct. Apts.* (125 AD3d 85, 89), "evidentiary submissions may only be considered for a limited purpose in assessing the facial sufficiency of a civil complaint . . . This limited purpose . . . is twofold. On the one hand, affidavits submitted by the defendant [as movant] will seldom if ever warrant the relief sought under CPLR 3211 (a) (7) *unless too* the affidavits establish *conclusively* that plaintiff has no cause of action . . . On the other hand, the nonmoving party may freely submit evidentiary materials to preserve inartfully pleaded, but potentially meritorious, claims" (internal quotation marks omitted).

The complaint, liberally construed, alleges that Miranda was the owner of the subject premises located at 3199 Main Street, Buffalo, New York, commonly known as Molly's Pub. It further alleges that Miranda is an owner, principal, director, operating partner, and/or silent partner with the NHJB defendants and Molly's Pub. Despite the fact that the complaint alleges the same facts and causes of action as to the NHJB defendants and Miranda, the majority concludes that plaintiff stated a cause of action against the NHJB defendants, but failed to do so as to Miranda. The majority relies on, inter alia, Miranda's submission of the lease and an affidavit that indicated that he was "merely an out-of- possession landlord." In my view, the language contained in the lease is not dispositive and, accepting the allegations in the complaint as true, I conclude that plaintiff is entitled to discovery on the issue whether Miranda "actually was an out-of-possession landlord [who] had relinquished control [of the premises]" (*Kane v Port Auth. of N.Y. & N.J.*, 49 AD3d 503, 504).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**764**

**CA 16-01449**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, NEMOYER, AND CURRAN, JJ.

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PATRICK J. CARNEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JUN W. CARNEY, DEFENDANT-RESPONDENT.
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PAUL B. WATKINS, ESQ., ATTORNEY FOR THE CHILDREN, APPELLANT.

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

PAUL B. WATKINS, ATTORNEY FOR THE CHILDREN, FAIRPORT, APPELLANT PRO SE.

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered January 5, 2016. The order dismissed the application of plaintiff to modify a prior stipulated order.

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

Memorandum: Plaintiff father and the Attorney for the Children (AFC) appeal from an order granting defendant mother's motion to dismiss the father's post-divorce application seeking to modify a prior stipulated order by, as limited by his request below, changing his visitation from supervised to unsupervised. The father and the AFC contend that Supreme Court erred in granting the mother's motion to dismiss the application without a hearing. We reject that contention. It is well established that "[a] hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order" (*Matter of Esposito v Magill*, 140 AD3d 1772, 1773, *lv denied* 28 NY3d 904 [internal quotation marks omitted]). Here, upon "giv[ing] the pleading a liberal construction, accept[ing] the facts alleged therein as true, [and] accord[ing] the nonmoving party the benefit of every favorable inference" (*Matter of Machado v Tanoury*, 142 AD3d 1322, 1323), we conclude that the father's allegations regarding the unavailability of supervisors and the mother's conduct " 'do not set forth a change in circumstances which would warrant the relief sought,' " i.e., unsupervised visitation (*Matter of Ragin v Dorsey* [appeal No. 1], 101 AD3d 1758, 1758; *see Matter of Varricchio v Varricchio*, 68 AD3d 774, 775; *Matter of Jason*

*DD. v Maryann EE.*, 4 AD3d 687, 688). We further conclude that the father otherwise "failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing" (*Esposito*, 140 AD3d at 1773 [internal quotation marks omitted]; *see Matter of Hall v Hall*, 61 AD3d 1284, 1285; *Matter of Sitzer v Fay*, 27 AD3d 566, 567). Finally, we have reviewed the remaining contentions of the father and the AFC and conclude that they lack merit.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**773**

**KA 15-00005**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL J. WATKINS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 20, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and criminal possession of marihuana in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of criminal possession of marihuana in the third degree (§ 221.20). Defendant contends that Supreme Court should have suppressed tangible evidence, i.e., a firearm and marihuana, that was seized from a parked vehicle occupied by defendant and an acquaintance on the ground that the police conducted an unlawful seizure by blocking the vehicle without the requisite reasonable suspicion of criminal behavior. Defendant's contention is not preserved for our review inasmuch as he failed to raise that specific contention in his motion papers or at the suppression hearing as a ground for suppressing the tangible evidence (*see People v Witt*, 129 AD3d 1449, 1449, *lv denied* 26 NY3d 937), nor did the court expressly decide the question raised on appeal (*see* CPL 470.05 [2]; *People v Graham*, 25 NY3d 994, 997; *People v Turriago*, 90 NY2d 77, 83-84, *rearg denied* 90 NY2d 936). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that defense counsel was ineffective for failing to seek suppression of the tangible evidence on the ground that the ostensible blocking of the vehicle constituted a seizure requiring reasonable suspicion. We reject that contention. It is

well established that "a showing that [defense] counsel failed to make a particular pretrial motion generally does not, by itself, establish ineffective assistance of counsel" (*People v Rivera*, 71 NY2d 705, 709). "To prevail on his claim, defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's failure to pursue colorable claims," and "[o]nly in the rare case will it be possible, based on the trial record alone, to deem counsel ineffective for failure to pursue a suppression motion" (*People v Carver*, 27 NY3d 418, 420 [internal quotation marks omitted]; *see Rivera*, 71 NY2d at 709). Here, defendant failed to demonstrate the absence of legitimate explanations for defense counsel's decision not to pursue suppression on the ground advanced by defendant on appeal (*see generally Rivera*, 71 NY2d at 709). We have reviewed defendant's remaining claims of ineffective assistance of defense counsel during trial and conclude that they lack merit (*see generally Carver*, 27 NY3d at 422; *People v Baldi*, 54 NY2d 137, 147).

We reject defendant's contention that the verdict is against the weight of the evidence with respect to the two counts of criminal possession of a weapon in the second degree. Viewing the evidence presented at trial in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349; *see generally People v Santiago*, 134 AD3d 472, 473, *lv denied* 27 NY3d 1006), we conclude that, although a different result would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, " 'the verdict, based on the applicability of the automobile presumption . . . , is not against the weight of the evidence' " (*People v Smith*, 134 AD3d 1568, 1569; *see People v Blocker*, 132 AD3d 1287, 1288, *lv denied* 27 NY3d 992). In addition, given that defendant was the driver of the vehicle, was sufficiently close to his acquaintance and the firearm to exercise joint dominion and control over the firearm, and was found in possession of a valuable quantity of marihuana, the jury was also entitled to find defendant guilty pursuant to a theory of constructive possession on the basis that he jointly possessed the firearm with his acquaintance as part of the same criminal operation (*see People v Dunbar*, 129 AD3d 419, 419-420, *lv denied* 26 NY3d 1008; *People v Caba*, 23 AD3d 291, 292, *lv denied* 6 NY3d 810).

Although defendant failed to preserve for our review his further contention that the evidence is not legally sufficient to support the conviction because the People failed to adduce adequate evidence at trial that the firearm at issue was loaded with live ammunition, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298, *lv denied* 19 NY3d 968; *see Danielson*, 9 NY3d at 349-350). Contrary to defendant's contention, we conclude that the jury was entitled to find from the credible evidence, including the testimony of the firearm examiner who test-fired the ammunition submitted with the subject firearm, that defendant possessed an operable firearm loaded with live ammunition (*see* Penal Law § 265.00 [15]; *cf. People v*

*Grice*, 84 AD3d 1419, 1420, *lv denied* 17 NY3d 806; *People v Johnson*, 56 AD3d 1191, 1192).

To the extent that defendant contends that the court erred in charging the jury with other theories of possession because the evidence did not support such charges, he failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Kendricks*, 23 AD3d 1119, 1119), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**776**

**KA 15-01399**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN COLON, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered December 9, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (six counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of six counts of burglary in the second degree (Penal Law § 140.25 [2]). The charges arose in part from home burglaries in Elma and Grand Island. The grand jury charged defendant by indictment with six counts of burglary in the second degree. Thereafter, defendant made an omnibus motion requesting, inter alia, that County Court dismiss the indictment on the ground that the evidence presented to the grand jury was insufficient. Defendant also sought to suppress physical evidence seized upon an allegedly unlawful search and his statements to the police, which he alleged were made involuntarily. After reviewing the grand jury minutes in camera, the court issued a decision and order concluding that the evidence before the grand jury was legally sufficient and denying that part of the motion seeking dismissal of the indictment. With respect to that part of the motion seeking suppression, the court convened a *Huntley/Mapp* hearing, heard testimony from, inter alia, three Erie County Sheriff's deputies, and ultimately denied that part of the motion.

We reject defendant's contention that the court erred in refusing to suppress physical evidence and statements on the ground that the police lacked probable cause to arrest him for the Elma burglary. Contrary to defendant's contention, the court properly concluded that

the deputies had probable cause for his arrest on October 3, 2012. In determining whether there was probable cause for an arrest, "the basis for such a belief must not only be reasonable, but it must appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator" (*People v Carrasquillo*, 54 NY2d 248, 254; *see People v Hightower*, 39 AD3d 1247, 1248, *lv denied* 9 NY3d 845).

The testimony of the deputies established that an eyewitness spotted a suspicious, red vehicle with a particular license plate number in the vicinity of the Elma burglary. The description of the driver of that vehicle matched defendant, and the vehicle's license plate number was traced to a relative of defendant's girlfriend, who told the deputies that she rented the vehicle for defendant's use. In addition, defendant's girlfriend told the deputies that defendant was not home at the time of the Elma burglary. When the deputies attempted to speak to defendant later that night, he fled. Shortly thereafter, they observed Eric Rivera driving a dark van away from defendant's apartment complex, with a man in the passenger seat. Within days, an eyewitness observed an identical van in the vicinity of the Grand Island burglary. That eyewitness spoke to a man near the van and positively identified the man as defendant. The telephone in the victim's home was used to place multiple calls to telephone numbers linked to defendant and to Rivera. Based on that testimony, the court properly concluded that it was "more probable than not" that defendant had perpetrated the Elma burglary (*Carrasquillo*, 54 NY2d at 254).

Defendant further contends that the prosecutor failed in his duty to correct allegedly false testimony given by a witness. In particular, defendant contends that one of the deputies testified that he developed defendant as a suspect in the Elma burglary based on a statement made by Rivera, but that the deputy's testimony was contradicted by a police report establishing that Rivera could not have given such a statement before defendant's October 3, 2012 arrest. We reject that contention. The deputy testified that he developed defendant as a suspect in the Grand Island burglary—not the Elma burglary—based in part on Rivera's statement. Moreover, neither the deputy's testimony nor the police report indicate the date on which Rivera gave his statement, and thus defendant failed to establish that the testimony and the police report contradict each other. Although the court improperly noted Rivera's statement among the evidence that provided the police with probable cause to arrest defendant for the Elma burglary, the record does not support the allegation that the deputy gave false testimony, and thus the prosecutor had no duty to correct him (*cf. People v Colon*, 13 NY3d 343, 349, *rearg denied* 14 NY3d 750).

Contrary to defendant's next contention, the court properly concluded that the deputies had the requisite consent to enter his apartment to arrest him on October 3, 2012. " 'Where a person with ostensible authority consents to police presence on the premises, either explicitly or tacitly, the right to be secure against warrantless arrests in private premises as expressed in *Payton v New*

*York* (445 US 573 [1980]) is not violated' " (*People v Bunce*, 141 AD3d 536, 537, *lv denied* 28 NY3d 969). Inasmuch as consent may be established by conduct (*see People v Huff*, 133 AD3d 1223, 1223, *lv denied* 27 NY3d 999; *People v Sinzheimer*, 15 AD3d 732, 734, *lv denied* 5 NY3d 794), we conclude that defendant's girlfriend's "conduct in stepping aside from the door to admit the [deputies] is enough to establish consent" (*People v Davis*, 120 AD2d 606, 607, *lv denied* 68 NY2d 769). Moreover, defendant's girlfriend had actual authority to consent to the deputies' entry because she was residing in the apartment at the time (*see generally People v Frankline*, 87 AD3d 831, 833, *lv denied* 19 NY3d 973).

Defendant further contends that, on September 10, 2012, the deputies exceeded the scope of their consent to enter the apartment where defendant lived with his father by proceeding past the entryway and into defendant's bedroom. We reject that contention. During the suppression hearing, two deputies testified that they knocked on the door of the apartment and that defendant's father answered the door. When the deputies asked for defendant, his father called his name, left the door open, and led the deputies to defendant's bedroom. The deputies observed defendant's girlfriend standing in the hallway outside the open bedroom door. Through the open door, the deputies saw defendant leave the bedroom through a back door leading onto a patio. Notably, one deputy smelled an odor of marihuana as soon as he entered the apartment, and he observed marihuana in plain view in the bedroom. Rather than pursue defendant through the bedroom, the deputies turned around, left the apartment through the front door, and went outside to look for him. We thus conclude that the record establishes that defendant's father freely and voluntarily consented to the deputies' entry into the apartment, and that the deputies did not exceed the scope of that consent (*see People v Swain*, 109 AD3d 1090, 1091-1092, *lv denied* 23 NY3d 968; *People v Kelley*, 220 AD2d 456, 456, *lv denied* 87 NY2d 922).

Contrary to defendant's further contention, the court properly concluded that the deputies had valid consent to conduct a warrantless search of his bedroom on September 10, 2012. "It is well established that the police need not procure a warrant in order to conduct a lawful search when they have obtained the voluntary consent of a party possessing the requisite authority or control over the premises or property to be inspected" (*People v Adams*, 53 NY2d 1, 8, *rearg denied* 54 NY2d 832, *cert denied* 454 US 854). The deputies' testimony established that defendant's father, who was the sole lessee of the apartment, read the form containing the consent to search the premises, indicated that he understood it, and signed it. We thus conclude that the People "met their burden of establishing that defendant's father voluntarily consented to the search of the apartment, including defendant's bedroom where the [marihuana and cell phones were] found in plain view . . . , and that he had the authority to consent to that search" (*People v Adams*, 244 AD2d 897, 898, *lv denied* 91 NY2d 887; *see also Swain*, 109 AD3d at 1091-1092).

We agree with defendant, however, that the court erred in denying his motion to withdraw his plea of guilty. "A trial court is

constitutionally required to ensure that a defendant, before entering a guilty plea, has a full understanding of what the plea entails and its consequences" (*People v Belliard*, 20 NY3d 381, 385; *see People v Streber*, 145 AD3d 1531, 1532). It is nevertheless well established that a guilty plea is not invalid merely because the court "failed to specifically enumerate all the rights to which the defendant was entitled and to elicit from him or her a list of detailed waivers before accepting the guilty plea" (*People v Harris*, 61 NY2d 9, 16; *see People v Tyrell*, 22 NY3d 359, 365). Where the record establishes, however, that the court incorrectly advised the defendant of the consequences of his guilty plea, the resulting plea "must be vacated because it was not knowingly, intelligently and voluntarily entered" (*People v Jordan*, 67 AD3d 1406, 1407).

Here, the court incorrectly advised defendant with respect to the rights that defendant was forfeiting in pleading guilty. It is well established that a defendant who pleads guilty may not challenge on appeal the sufficiency or the admissibility of the evidence before the grand jury (*see People v Hansen*, 95 NY2d 227, 233). The record establishes, however, that defendant asked to be assured that he could raise those issues on appeal from a judgment entered upon his plea of guilty, and the court assured him that he could do so. Given those assurances, which ended up being false, defendant accepted the plea deal, and entered a guilty plea. When defendant learned that he would not be able to raise on appeal the above grand jury issues, he made a motion to withdraw his plea, which the court denied. Under the circumstances, that was error. We therefore conclude that the plea must be vacated and the matter remitted to County Court for further proceedings on the indictment.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**778**

**CAF 15-01624**

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

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IN THE MATTER OF LAHNI THOMAS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GEOFFREY THOMAS, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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CHAFFEE & LINDER, PLLC, BATH (RUTH A. CHAFFEE OF COUNSEL), FOR PETITIONER-APPELLANT.

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

JOAN MERRY, ATTORNEY FOR THE CHILDREN, HORNELL.

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Appeal from an order of the Family Court, Steuben County (J.C. Argetsinger, J.H.O.), entered August 27, 2015 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Memorandum: In appeal No. 1, petitioner-respondent mother appeals from an order that dismissed her petition brought pursuant to Family Court Act article 8 alleging that respondent-petitioner father violated an order of protection. We reject the mother's contention that Family Court erred in dismissing the petition. According the requisite deference to the court's credibility determinations with respect to the parties' witnesses at the hearing (*see Matter of Schoenl v Schoenl*, 136 AD3d 1361, 1362), we conclude that the court properly determined that the mother failed to establish by clear and convincing evidence that the father violated the terms of the order of protection (*see Matter of Lanzafame v Jones*, 121 AD3d 1598, 1598, *lv denied* 24 NY3d 913).

In appeal No. 2, the mother appeals from an order that, among other things, denied her petition seeking permission to relocate with the parties' children from Hornell to Buffalo. While these consolidated appeals were pending, the parties filed additional modification petitions and, after a hearing, the court issued an order that newly resolved the custody and visitation issues with respect to the children. We conclude that the superseding order renders appeal No. 2 moot, and the exception to the mootness doctrine does not apply

(*see Matter of Pugh v Richardson*, 138 AD3d 1423, 1423-1424; *Matter of Trombley v Payne*, 133 AD3d 1252, 1252).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**779**

**CAF 15-01625**

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

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IN THE MATTER OF GEOFFREY THOMAS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LAHNI THOMAS, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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CHAFFEE & LINDER, PLLC, BATH (RUTH A. CHAFFEE OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

JOAN MERRY, ATTORNEY FOR THE CHILDREN, HORNELL.

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Appeal from an order of the Family Court, Steuben County (J.C. Argetsinger, J.H.O.), entered September 17, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied respondent's request to relocate to Buffalo, New York with the children.

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

Same memorandum as in *Matter of Thomas v Thomas* ([appeal No. 1] ___ AD3d ___ [June 30, 2017]).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**785**

**CA 17-00002**

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

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DAVID M. AHLERS, ET AL., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ECOVATION, INC., ET AL., DEFENDANTS,
W. JEROME FRAUTSCHI, W. JEROME FRAUTSCHI LIVING TRUST, PLEASANT T. ROWLAND, PLEASANT T. ROWLAND REVOCABLE TRUST, THE PLEASANT T. ROWLAND FOUNDATION, INC., THE OVERTURE FOUNDATION, INC., DIANE C. CREEL, GEORGE SLOCUM, DAVID CALL, DAVID PATCHEN, CREIGHTON K. (KIM) EARLY, RICHARD KOLLAUF, RITA OBERLE, ROBERT SHEH AND PHILIP STRAWBRIDGE, DEFENDANTS-RESPONDENTS.

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TROUTMAN SANDERS LLP, NEW YORK CITY (JONATHAN D. FORSTOT OF COUNSEL), DENTONS US LLP, WOODS OVIATT GILMAN LLP, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS W. JEROME FRAUTSCHI, W. JEROME FRAUTSCHI LIVING TRUST, PLEASANT T. ROWLAND, PLEASANT T. ROWLAND REVOCABLE TRUST, THE PLEASANT T. ROWLAND FOUNDATION, INC., AND THE OVERTURE FOUNDATION, INC.

PEPPER HAMILTON LLP, PHILADELPHIA, PENNSYLVANIA (ELI SEGAL, OF THE PENNSYLVANIA AND NEW JERSEY BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND THE WOLFORD LAW FIRM LLP, ROCHESTER, FOR DEFENDANTS-RESPONDENTS DIANE C. CREEL, GEORGE SLOCUM, DAVID CALL, DAVID PATCHEN, CREIGHTON K. (KIM) EARLY, RICHARD KOLLAUF, RITA OBERLE, ROBERT SHEH AND PHILIP STRAWBRIDGE.

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Appeal from an order of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered October 3, 2016. The order granted the motions of defendants W. Jerome Frautschi, W. Jerome Frautschi Living Trust, Pleasant T. Rowland Revocable Trust, The Pleasant T. Rowland Foundation, Inc., and the Overture Foundation, Inc. and defendants David Call, Diane C. Creel, Creighton Early, Richard Kollauf, Rita Oberle, David Patchen, Robert Sheh, Philip Strawbridge, and George Slocum for summary judgment dismissing plaintiffs' third amended complaint against them.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We write only to note that, with respect to plaintiffs' cause of action for unjust enrichment, although "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388; *see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572), where, as here, the plaintiffs are not parties to the subject agreements, an unjust enrichment cause of action is not foreclosed (*see Ahlers v Ecovation, Inc.*, 74 AD3d 1889, 1890; *Marc Contr., Inc. v 39 Winfield Assoc., LLC*, 63 AD3d 693, 695). We nonetheless conclude that the court properly granted those parts of defendants-respondents' respective motions for summary judgment seeking dismissal of that cause of action. It is well settled that "[t]he essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421). Here, we conclude that defendants-respondents met their initial burden of establishing that there was no unjust enrichment on their part, and plaintiffs failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562; *Harrison v Harrison*, 57 AD3d 1406, 1408).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**790**

**KA 14-00190**

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EARL F. SPRAGUE, III, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 22, 2014. The appeal was held by this Court by order entered June 17, 2016, decision was reserved and the matter was remitted to Genesee County Court for further proceedings (140 AD3d 1784). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing those parts convicting defendant of sexual abuse in the first degree under counts 2, 5, 13 through 17, and 25 through 28 of indictment No. 5548 and dismissing those counts of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of 28 counts of sexual abuse in the first degree (Penal Law § 130.65 [3]) and three counts of criminal contempt in the second degree (§ 215.50 [3]). The charges arose from allegations that defendant sexually abused two female victims less than 11 years old. We previously remitted this matter to County Court for a ruling on defendant's motion for a trial order of dismissal (*People v Sprague*, 140 AD3d 1784). Upon remittal, the court denied the motion.

With respect to the facts of this case, we note that the grand jury charged defendant by indictment No. 5548 with 28 counts of sexual abuse in the first degree. A bill of particulars provided that counts 1, 3, 4, 6 through 12, and 18 through 24 were based on allegations that defendant touched a victim's vagina, and counts 2, 5, 13 through 17, and 25 through 28 were based on allegations that defendant had a victim touch his penis. Before trial, the court consolidated indictment No. 5548 with two other indictments charging defendant with additional crimes. Both victims testified at trial. One victim testified that, on two separate occasions, defendant touched her

vagina, and that, on one of those occasions, he had her touch his penis. The other victim testified that, on 15 separate occasions, defendant touched her vagina, and that, on 10 of those occasions, he had her touch his penis.

We agree with defendant that the indictment is multiplicitous because it included separate counts of sexual abuse in the first degree for incidents in which defendant allegedly touched the victim's vagina while he had the victim simultaneously touch his penis. Although defendant did not challenge the indictment on that ground and thus failed to preserve his contention for our review (*see People v Fulton*, 133 AD3d 1194, 1194-1195, *lv denied* 26 NY3d 1109, *reconsideration denied* 27 NY3d 997), we exercise our discretion to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

An indictment is multiplicitous "when a single offense is charged in more than one count" (*People v Alonzo*, 16 NY3d 267, 269; *see People v Casiano*, 117 AD3d 1507, 1509). A person commits the criminal offense of sexual abuse in the first degree when he or she subjects a person under 11 years old to sexual contact (*see* Penal Law § 130.65 [3]). Nevertheless, a defendant may not be charged with separate counts of sexual abuse in the first degree for each instance of unlawful sexual contact where the instances of sexual contact constitute "a single, uninterrupted criminal act" (*Alonzo*, 16 NY3d at 270; *see People v Kelly*, 148 AD3d 585, 585). Here, for each instance of defendant touching a victim's vagina, defendant was properly charged with a single and distinct count. By contrast, for each instance of defendant compelling a victim to touch his penis while defendant was simultaneously touching that victim's vagina, defendant was charged with two separate counts. Charging two separate counts under those facts was improper inasmuch as the actions alleged in each pair of counts constituted a single, uninterrupted criminal act. We thus conclude that the indictment was multiplicitous, and we therefore dismiss counts 2, 5, 13 through 17, and 25 through 28 of indictment No. 5548.

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 the convictions on the remaining counts (*see People v Bleakley*, 69 NY2d 490, 495). We further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Insofar as defendant contends that he was denied effective assistance of counsel, we reject that contention (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention that the court did not provide him with an opportunity to propose a response to a jury note (*see People v Nealon*, 26 NY3d 152, 158). We reject defendant's contention that preservation is not required because the court's handling of the note constituted a mode of proceedings error (*see generally People v O'Rama*, 78 NY2d 270, 279).

"Where, as here, counsel has meaningful notice of a substantive jury note because the court has read the precise content of the note into the record in the presence of counsel, defendant, and the jury, the court's failure to discuss the note with counsel before recalling the jury is not a mode of proceedings error. Counsel is required to object to the court's procedure to preserve any such error for appellate review" (*Nealon*, 26 NY3d at 161-162). The record establishes that defendant had meaningful notice of the jury note. Indeed, the jury note was merely a clarification of prior jury notes and there is no dispute that defendant had meaningful notice of, and an opportunity to propose a response to, the prior jury notes. Moreover, the court read the subject jury note into the record in the presence of defense counsel, defendant, and the jury (*see id.*; *People v Dame*, 144 AD3d 1625, 1625, *lv denied* 29 NY3d 948).

We reject defendant's contention that the court's *Molineux* ruling constituted an abuse of discretion. The victims' testimony that defendant assaulted their mother was admissible to explain the victims' delay in reporting the sexual abuse (*see People v Nicholson*, 26 NY3d 813, 829-830; *People v Hill*, 121 AD3d 469, 469, *lv denied* 25 NY3d 1165; *see generally People v Molineux*, 168 NY 264, 291-294). Moreover, the court's detailed written *Molineux* ruling precluded testimony about events that the victims did not observe, as well as testimony about defendant's drug use and his encouraging one of the victims to sell drugs, thus demonstrating that the court weighed the probative value of all of the proposed evidence against its potential for prejudice (*see People v Rivers*, 82 AD3d 1623, 1623, *lv denied* 17 NY3d 904).

Finally, the sentence is not unduly harsh or severe.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**825**

**CAF 16-01574**

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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IN THE MATTER OF WILLIAM BRAGA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JODI ANN BELL, RESPONDENT-RESPONDENT.

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LISA M. FAHEY, EAST SYRACUSE, FOR PETITIONER-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

ANDREW S. GREENBERG, ATTORNEY FOR THE CHILD, SYRACUSE.

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Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered March 31, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted primary physical custody of the parties' child to respondent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by awarding petitioner primary physical custody of the parties' child and vacating the 2nd through 12th ordering paragraphs and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that, inter alia, granted respondent mother primary physical custody of the subject child, who was eight years old at the time of the hearing. The mother had primary physical custody of the child pursuant to an informal arrangement between the parties. There was no prior court order determining custody.

Although the custody determination of Family Court ordinarily is entitled to great deference, such deference is unwarranted where that determination lacks a sound and substantial basis in the record (*see Fox v Fox*, 177 AD2d 209, 211-212; *see also Matter of Amrane v Belkhir*, 141 AD3d 1074, 1075). Indeed, "[o]ur authority in determinations of custody is as broad as that of Family Court" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450; *see Matter of Cole v Nofri*, 107 AD3d 1510, 1511-1512, *appeal dismissed and lv denied* 22 NY3d 1083). It is well settled that, in determining the child's best interests, a court should consider "(1) the continuity and stability of the existing custodial arrangement, including the relative fitness of the parents and the length of time the present custodial arrangement has

continued; (2) [the] quality of the child's home environment and that of the parent seeking custody; (3) the ability of each parent to provide for the child's emotional and intellectual development; (4) the financial status and ability of each parent to provide for the child; (5) the individual needs and expressed desires of the child; and (6) the need of the child to live with siblings" (*Fox*, 177 AD2d at 210; *see Matter of Chilbert v Soler*, 77 AD3d 1405, 1406, *lv denied* 16 NY3d 701). Additionally, a preexisting custody arrangement established by agreement is " 'a weighty factor,' " but is not absolute (*Eschbach v Eschbach*, 56 NY2d 167, 171; *see Fox*, 177 AD2d at 210-211).

We agree with the father that, upon a review of the relevant factors (*see Fox*, 177 AD2d at 210-211), awarding him primary physical custody of the child is in the child's best interests. With respect to the first factor, although the mother has been the child's primary caretaker since birth, her living arrangements were unstable. The mother and the child had lived in seven different residences over the three years preceding the hearing, which resulted in the child changing schools every year. As the court recognized in its decision, the father is the more stable parent.

Concerning the quality of the home environment, the father and his wife own a home where the child has his own room, his own bed, and age-appropriate toys. In contrast, the mother's chaotic living arrangements have put the child in regular contact with a half-sister who abuses drugs and have resulted in the child living in a home that was infested with fleas. Concerning the child's emotional and intellectual development, the father ensures that the child attends school regularly and completes his homework. The record established that, since the father began playing a larger role in the child's life, the child's attendance and performance in school has improved dramatically. Also, the father facilitates the child's participation in activities such as karate and swimming, encourages him to read for 20 minutes a day, and has adjusted his diet to address his medical needs. In contrast, the mother has shown a lack of concern for the child's attendance and performance in school, shields him from experiences and foods that he finds unpleasant, and prefers that he play video games and eat fast food. Concerning the parents' relative financial status, the father's household income is significantly higher and his job is stable. In contrast, although the mother had difficulty affording her expenses and was evicted from prior residences, she continued to bounce from one part-time job to another and testified that she sees no need to work more than 28 hours a week.

Concerning the child's wishes, the child told the Attorney for the Child (AFC) that he wished to remain with the mother. In our view, however, the child's wishes are entitled to little weight, particularly given his young age and the mother's overly permissive parenting philosophy (*see generally Matter of Shaw v Bice*, 117 AD3d 1576, 1577, *lv denied* 24 NY3d 902). We note that the parties waived a *Lincoln* hearing due in part to the child's age. Moreover, despite the child's expressed desires, the AFC declined to take a position at the hearing with respect to his best interests. Concerning the child's

need to live with siblings, the hearing testimony established that the child often plays with two other half-sisters who live with or near the mother, and that the child has a close relationship with them. Nevertheless, based on the relative fitness of the parents, the quality of their home environments, their ability to provide for the child's emotional and intellectual development, and their relative financial status, we conclude that awarding the father primary physical custody is in the child's best interests (*see generally Fox*, 177 AD2d at 210). We therefore modify the order accordingly, and we remit the matter to Family Court to fashion an appropriate visitation schedule with the mother.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**831**

**CA 17-00205**

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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THE BANK OF NEW YORK MELLON, AS TRUSTEE
FOR CIT MORTGAGE LOAN TRUST 2007-1,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT ANDERSON, ALSO KNOWN AS ROBERT K.
ANDERSON, MICHELE ANDERSON,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

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THE LAW OFFICE OF CHARLES WALLSHEIN, MELVILLE (CHARLES WALLSHEIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DAVIDSON FINK LLP, ROCHESTER (LARRY T. POWELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an amended order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered February 22, 2016. The amended order, insofar as appealed from, granted plaintiff's motion for summary judgment.

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

Memorandum: In this residential foreclosure action, defendants-appellants (defendants) appeal from an amended order insofar as it granted plaintiff's motion for summary judgment and an order of reference. Plaintiff commenced this action by summons and verified complaint to which plaintiff attached, inter alia, a copy of the note endorsed in blank and a copy of the mortgage. In their answer, defendants asserted general denials and affirmative defenses including a defense that plaintiff lacked standing to commence the action. Plaintiff thereafter moved for summary judgment and submitted, inter alia, the affidavit of an authorized signatory of Caliber Home Loans, Inc. (Caliber), plaintiff's loan servicer.

We conclude that Supreme Court erred in granting plaintiff's motion because plaintiff failed to establish standing. It is well settled that a plaintiff moving for summary judgment in a mortgage foreclosure action establishes its prima facie case by submitting a copy of the mortgage, the unpaid note and evidence of default (*see Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 684; *HSBC Bank*

*USA, N.A. v Spitzer*, 131 AD3d 1206, 1206-1207). Where the defendant has asserted lack of standing as an affirmative defense, the plaintiff also must establish standing as an additional requirement of its prima facie case (*see Deutsche Bank Natl. Trust Co.*, 142 AD3d at 684; *HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 773, 774). Where the note is endorsed in blank, the plaintiff may establish standing by demonstrating that it had physical possession of the original note at the time the action was commenced (*see Deutsche Bank Natl. Trust Co.*, 142 AD3d at 684-685; *see generally Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361). The plaintiff may do so through an affidavit of an individual swearing to such possession following a review of admissible business records (*see Aurora Loan Servs.*, 25 NY3d at 359-361; *JPMorgan Chase Bank, N.A. v Weinberger*, 142 AD3d 643, 644-645; *see generally* CPLR 4518 [a]).

We agree with defendants that the affidavit submitted by plaintiff in support of its motion was insufficient to establish standing. The Caliber employee who authored the affidavit stated that Caliber maintains plaintiff's books and records pertaining to the mortgage account; plaintiff had physical possession of the original note before the action was commenced and remained in physical possession of the original note as of the date of the motion; and he was personally familiar with Caliber's record-keeping practices. However, plaintiff failed to demonstrate that its records pertaining to defendants' account were admissible as business records (*see* CPLR 4518 [a]), inasmuch as the affiant did not swear that he was personally familiar with plaintiff's record-keeping practices and procedures (*see Aurora Loan Servs., LLC v Baritz*, 144 AD3d 618, 619-620; *Deutsche Bank Natl. Trust Co.*, 142 AD3d at 685).

Contrary to plaintiff's contention, the mere attachment of a copy of the note to the verified complaint does not demonstrate that plaintiff had physical possession of the original note when the action was commenced (*see generally Deutsche Bank Natl. Trust Co.*, 142 AD3d at 684-685), and thus is insufficient to establish standing.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**835**

**CA 16-02216**

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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IN THE MATTER OF PHILIP L. GURNSEY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

J. DAVID SAMPSON, EXECUTIVE DEPUTY COMMISSIONER,
NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
DEBORAH V. DUGAN, CHAIRMAN, NEW YORK STATE
DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD, AND
NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES
ADMINISTRATIVE APPEALS BOARD,
RESPONDENTS-RESPONDENTS.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered January 22, 2016 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding against, inter alia, the New York State Department of Motor Vehicles (respondent) seeking to annul the determination denying petitioner's application for a new driver's license. Before his license was revoked in 2000, petitioner had accumulated five alcohol-related driving convictions, and there was also one incident in which he refused to submit to a chemical test. In 2014, petitioner applied for a new license. The application was denied on the ground that petitioner had "five or more alcohol- or drug-related driving convictions or incidents in any combination," and thus was subject to lifetime revocation (15 NYCRR 136.5 [b] [1]). In 2015, petitioner pursued an administrative appeal and sought an exception based on a showing of "unusual, extenuating and compelling circumstances" (15 NYCRR 136.5 [d]), and that also was denied.

We reject petitioner's contention that the exception contained in 15 NYCRR 136.5 (d) is unconstitutionally vague. The

void-for-vagueness doctrine employs a "rough idea of fairness" (*Colten v Kentucky*, 407 US 104, 110; *see Matter of Turner v Municipal Code Violations Bur. of City of Rochester*, 122 AD3d 1376, 1377), and applies to regulations as well as to statutes (*see Matter of Slocum v Berman*, 81 AD2d 1014, 1015, *lv denied* 54 NY2d 602, *appeal dismissed* 54 NY2d 752). Due process of law requires that a statute or regulation be sufficiently definite such that persons of common intelligence need not guess at its meaning (*see Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 256; *Turner*, 122 AD3d at 1377-1378). The doctrine "serves not only to assure that citizens can conform their conduct to the dictates of law but, equally important, to guide those who must administer the law" (*People v Illardo*, 48 NY2d 408, 413; *see Bakery Salvage Corp. v City of Buffalo*, 175 AD2d 608, 609). On the other hand, the doctrine "does not require impossible standards of specificity which would unduly weaken and inhibit a regulating authority . . . [,] especially in a field where flexibility and adaptation of the legislative policy to varying conditions is the essence of the program" (*Slocum*, 81 AD2d at 1015).

Respondent's Commissioner (Commissioner) promulgated 15 NYCRR 136.5 pursuant to her authority to exercise discretion in determining whether to reissue a driver's license following a mandatory revocation (*see Matter of Acevedo v New York State Dept. of Motor Vehs.*, ___ NY3d ___, ___ [May 9, 2017]; *see generally* Vehicle and Traffic Law §§ 508 [4]; 510 [6] [a]). Contrary to petitioner's contention, the regulation does not give respondent "unfettered discretion" to deny an application. Section 136.5 formalized the manner in which the Commissioner would exercise her discretion by "ensur[ing] that her discretion is exercised consistently and uniformly, such that similarly-situated applicants are treated equally" (*Acevedo*, ___ NY3d at ___). Additionally, the regulation puts the public on notice of respondent's general policy with respect to relicensing a person whose driver's license has been revoked for multiple alcohol- or drug-related transgressions (*see id.* at ___). In petitioner's case, he faces a lifetime ban because he has at least five such convictions or incidents, as defined in the regulation (*see* 15 NYCRR 136.5 [b] [1]). Nevertheless, the Commissioner reserved the discretion to deviate from her general policy in "unusual, extenuating and compelling circumstances" (15 NYCRR 136.5 [d]). That exception ensures that respondent has the flexibility to grant an application for relicensing where extraordinary circumstances render the application of the general policy inappropriate or unfair (*see Acevedo*, ___ NY3d at ___; *see generally Slocum*, 81 AD2d at 1015). Thus, reading the language of the challenged exception within the context of the regulation as a whole, we conclude that 15 NYCRR 136.5 (d) is not unconstitutionally vague.

Petitioner further contends that respondent's determination that he had not demonstrated entitlement to such an exception was arbitrary and capricious and an abuse of discretion (*see* CPLR 7803 [3]). We also reject that contention. In seeking an exception under 15 NYCRR 136.5 (d), petitioner submitted an affidavit in which he averred that he had been sober for the past seven years, had completed alcohol treatment programs successfully, had not been convicted of an alcohol-

related driving offense since 1995, and would benefit from being able to drive approximately 17 miles to his place of employment. Petitioner's contention is not preserved for our review insofar as he relies on his daily commute because he did not raise that ground in his CPLR article 78 petition (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Furthermore, petitioner did not submit with his application any documentation supporting his purported successful completion of alcohol treatment. We thus conclude that the denial of his application was not arbitrary and capricious or an abuse of discretion (*see Matter of Nicholson v Appeals Bd. of Admin. Adjudication Bur.*, 135 AD3d 1224, 1225).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**852**

**CA 17-00162**

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

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JACQUELINE ABATE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF DONALD ABATE, DECEASED, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

COUNTY OF ERIE, ERIE COUNTY SHERIFF'S OFFICE, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

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MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (ANTHONY B. TARGIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FITZGERALD & ROLLER, P.C., BUFFALO (DEREK J. ROLLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered May 4, 2016. The order granted the motion of plaintiff to compel disclosure and denied the cross motion of defendants County of Erie and Erie County Sheriff's Office for a protective order.

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

Opinion by NEMOYER, J.:

We hold that County Law § 308 (4) poses no obstacle to the court-ordered discovery of 911 records in a civil lawsuit.

FACTS

An unusually intense winter storm stranded plaintiff's decedent inside his vehicle during the early morning hours of November 18, 2014, in the Town of Alden, Erie County. The decedent called 911 at 3:50 a.m. to report his predicament. The dispatcher instructed the decedent to remain in his vehicle, and assured him that help would be forthcoming. Help did not arrive, however, until 1:37 a.m. on the following day (November 19, 2014). By that point, it was too late – the decedent had tragically died, still stranded inside his vehicle.

Plaintiff thereafter commenced this action against, inter alia, the County of Erie and the Erie County Sheriff's Office (collectively,

defendants). In her complaint, plaintiff alleged that the decedent's death resulted from defendants' negligent failure to rescue him during the storm. According to plaintiff, defendants breached a special duty to the decedent that attached as a result of his communications with defendants' 911 service.

In the course of discovery, plaintiff sought disclosure pursuant to CPLR article 31 of 911 records concerning the decedent and his plight on November 18-19, 2014. Plaintiff also sought disclosure of 911 records pertaining to other stranded persons at eight specified locations in the decedent's vicinity. Defendants voluntarily disclosed the decedent's 911 records, but they refused to disclose any 911 records pertaining to other stranded persons. Plaintiff moved to compel production. Defendants opposed the motion, arguing principally that the 911 records of non-parties were categorically exempt from disclosure by County Law § 308 (4). Supreme Court disagreed and granted plaintiff's motion to compel. Defendants now appeal, and we conclude that the order should be affirmed.

DISCUSSION

County Law § 308 (4) provides, in full:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

Defendants say that this language is conclusive and absolute: 911 records "shall not" be disclosed to any person other than certain specific law enforcement and public safety entities not involved here. When the statute is divorced from its surrounding context, defendants' interpretation of section 308 (4) has some superficial allure. "Statutory phrases should not, however, be read in isolation" (*Matter of Guido v New York State Teachers' Retirement Sys.*, 94 NY2d 64, 69). As the Court of Appeals has often instructed, the "primary goal of the court in interpreting a statute is to determine and implement the Legislature's intent" (*Matter of Tompkins County Support Collection Unit v Chamberlin*, 99 NY2d 328, 335; *see People v Litto*, 8 NY3d 692, 697), and "[a]lthough the plain language of the statute provides the best evidence of legislative intent, the legislative history of an enactment may also be relevant and is not to be ignored, even if words be clear" (*Kimmel v State of New York*, ___ NY3d ___, ___ [May 9, 2017] [internal quotation marks omitted]; *see Chamberlin*, 99 NY2d at 335; *Riley v County of Broome*, 95 NY2d 455, 463). In that same vein, "inquiry must [also] be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision" (*Matter of Sutka v Conners*, 73 NY2d 395, 403; *see Guido*, 94 NY2d at 69). Put simply, the New York courts have a "long

tradition of using all available interpretive tools to ascertain the meaning of a statute" (*Riley*, 95 NY2d at 464).

Here, the context and legislative history of section 308 (4) paint a different picture than defendants' de-contextualized analysis suggests. Section 308 was enacted as part of article 6 of the County Law, which contains 59 discrete provisions related almost exclusively to the *financing* of a uniform, statewide telephonic emergency response system. The first of those 59 provisions, County Law § 300, sets forth the Legislature's intent in enacting article 6:

> "The legislature . . . finds that a major obstacle to the establishment of an E911 system in the various counties within the state is the cost of the telecommunication equipment and services which are necessary to provide such system . . . [B]y the enactment of the provisions of this article, it is the intent of the legislature to fulfill its obligation to provide for the health, safety and welfare of the people of this state by providing counties with a *funding mechanism* to assist in the payment of the costs associated with establishing and maintaining an E911 system and thereby considerably increase the potential for providing all citizens of this state with the valuable services inherent in an E911 system" (emphasis added).

Notably, these findings do not reflect any legislative desire to preclude civil litigants from accessing 911 records under CPLR article 31. To the contrary, County Law § 300 reveals unmistakably that the Legislature was motivated to adopt County Law article 6 in order to update the emergency response system across the State and to mitigate the financial burden of that endeavor for local governments. It is hardly surprising, then, that section 308 (4) lacks the hallmark language of other statutory provisions which specifically cut off a civil litigant's access to certain classes of evidentiary materials for reasons of public policy (*see e.g.* Civil Rights Law § 79-h [b], [c] [shielding journalists from contempt for withholding certain information in judicial proceedings, "(n)otwithstanding the provisions of any general or specific law to the contrary"]; Public Health Law § 2805-m [2] [barring article 31 discovery of certain information related to medical malpractice, "(n)otwithstanding any other provisions of law"]).

The relevant legislative history lends further support to our conclusion that the Legislature did not enact section 308 (4) in order to exempt 911 records from the scope of discovery authorized by CPLR article 31. Specifically, the sponsoring memorandum for what would become County Law article 6 referenced only the budgetary implications of enhanced 911 services for local government (*see* Sponsor's Mem, Bill Jacket, L 1989, ch 756), and a later-introduced bill sought to repeal section 308 (4) on the ground that it unjustifiably shielded 911 records from requests under the Freedom of Information Law (FOIL) (*see*

Sponsor's Mem, 2015 NY Senate Bill S1175). Tellingly, the sponsor of S1175 did not identify any need to repeal section 308 (4) in order to make 911 records discoverable under article 31, and for good reason – section 308 (4) had never exempted 911 records from such disclosure in the first place.

Nor can we ignore the implications of defendants' argument on established discovery practices in criminal matters. As the Second Department noted in *Anderson v State of New York* (134 AD3d 1061), discovery of 911 records occurs with great regularity in criminal cases (*see id.* at 1063; *see e.g. People v Boyd*, 254 AD2d 740, 741, *lv denied* 92 NY2d 1047), and defendants' preferred construction of section 308 (4) would, at the very minimum, call that longstanding and salutary practice into considerable question. We decline to construe section 308 (4) in a manner that could effectively eliminate a criminal defendant's access to potentially critical, and even exculpatory, evidentiary materials.

Finally, defendants' broad view of section 308 (4) would render superfluous the statute's own express prohibition on using 911 records "for any commercial purpose other than the provision of emergency services." After all, if 911 records were categorically exempt from disclosure in the first instance, then the Legislature would not have needed to explicitly ban the commercial exploitation of such records. We decline to endorse such a cardinal sin of statutory construction (*see generally Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 587).

In light of the foregoing, we are persuaded that section 308 (4) operates not as a restriction on discovery pursuant to CPLR article 31 – whose scope must be liberally construed – but rather as a narrow carve out that exempts 911 records from requests under the Freedom of Information Law and similar sunshine regimes. We thus join our colleagues in the Second Department in concluding that County Law § 308 (4) "is not intended to prohibit the disclosure of matter that is material and relevant in a civil litigation, accessible by a so-ordered subpoena or directed by a court to be disclosed in a discovery order" (*Anderson*, 134 AD3d at 1062).[1]

Defendants' remaining points do not require extended discussion. Contrary to their contention, Supreme Court properly determined that 911 records concerning other motorists stranded in the decedent's vicinity are "material and necessary in the prosecution . . . of [plaintiff's] action" (CPLR 3101 [a]), particularly because those records might bear upon the special duty that defendants allegedly

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[1] We reject defendants' alternative invitation to construe County Law § 308 (4) to permit disclosure of 911 records that directly involve the decedent, but not 911 records that involve other persons stranded during the storm. Such an outcome finds no support in the statutory text or legislative history, and adopting defendants' alternative construction would effectively rewrite section 308 (4) in the guise of construing it.

owed the decedent (*see Cuffy v City of New York*, 69 NY2d 255, 260; *see generally Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407). Indeed, accepting defendants' materiality argument would effectively obligate a plaintiff to prove his or her case in order to access the very evidence necessary to proving his or her case. Contrary to defendants' further contention, plaintiff's entitlement to discovery under CPLR article 31 is in no way constrained by the FOIL exemption for records whose disclosure would inflict an "unwarranted invasion of personal privacy" (Public Officers Law § 87 [2] [b]). The discovery provisions of CPLR article 31 operate independently of the Freedom of Information Law, and a litigant's entitlement to any particular evidentiary item under article 31 is not affected by the disclosability of that item under FOIL (*see Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 80-82). Lastly, defendants' claim that plaintiff's discovery demand is unduly burdensome is improperly raised for the first time in the reply brief (*see Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143, 1144), and, in any event, is without merit.

Accordingly, the order appealed from should be affirmed.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**856**

**CA 16-01554**

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ.

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IN THE MATTER OF MELODY L. DARRIN AND BRADLEY DARRIN, CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF CATTARAUGUS, RESPONDENT-RESPONDENT.

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CHRISTOPHER A. SPENCE, OLEAN, FOR CLAIMANTS-APPELLANTS.

BRADY & SWENSON, P.C., SALAMANCA (ERIN M. BRADY SWENSON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered November 4, 2015. The order, insofar as appealed from, denied that part of the application of claimants for leave to file and serve a late notice of claim for claimant Bradley Darrin.

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

Memorandum: Claimants appeal from an order that, inter alia, denied that part of their application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5) for the derivative claims of claimant Bradley Darrin (husband). We agree with claimants that Supreme Court abused its discretion in denying that part of the application. " 'It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining a defense on the merits' " (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248). " 'While the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the [municipality] received actual knowledge of the facts constituting the claim in a timely manner' " (*id.*). With respect to actual knowledge, "[i]t is well established that '[k]nowledge of the injuries or damages claimed . . . , rather than mere notice of the underlying occurrence, is necessary to establish actual knowledge of the essential facts of the claim' " (*id.*).

Here, respondent contends that it did not receive actual knowledge of the facts constituting the husband's claim because it did not receive knowledge of the injuries or damages claimed by the husband. We reject that contention. "[C]ourts have granted leave to serve a supplemental or amended notice of claim to add a derivative cause of action for loss of consortium . . . where such claim 'results from the same facts as were alleged in a timely and otherwise admittedly valid notice of claim for personal injuries' " (*Betette v County of Monroe*, 82 AD3d 1708, 1710; *see Dodd v Warren*, 110 AD2d 807, 808). Indeed, courts have generally recognized that derivative causes of action "[are] predicated upon exactly the same facts" as the injured party's claims (*Matter of Cody v Village of Lake George*, 158 AD2d 888, 889). As a result, where it has been determined that the respondent received timely notice of the injured claimant's claims, "there can be no claim of prejudice to respondent" resulting from a late notice of a derivative claim (*id.*).

Although we recognize that claimants did not file a timely notice of claim for the injuries sustained by claimant Melody L. Darrin (wife), the court's determination to grant the application with respect to her suggests that the court determined that respondent had actual knowledge of the facts underlying her claim. Inasmuch as the husband's derivative claim is "predicated upon exactly the same facts" as the wife's claims (*id.*), we discern no rational basis upon which the court could have granted the application with respect to the wife but not the husband (*see Centelles v New York City Health & Hosps. Corp.*, 84 AD2d 826, 827; *cf. Hayden v Incorporated Vil. of Hempstead*, 103 AD2d 765, 766; *Matter of Holland v New York City Health & Hosps. Corp.*, 81 AD2d 638, 639).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**872**

**CA 17-00094**

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, WINSLOW, AND SCUDDER, JJ.

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VINCENT C. STEVENSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAWN CRAMER, DEFENDANT,
VILLAGE OF EAST SYRACUSE, EAST SYRACUSE FIRE DEPARTMENT AND EAST SYRACUSE FIRE DEPARTMENT, INC., DEFENDANTS-RESPONDENTS.

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HOFFMANN, HUBERT & HOFFMANN, LLP, SYRACUSE (TERRANCE J. HOFFMANN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TADDEO & SHAHAN, LLP, SYRACUSE (COREY J. VINCENT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 28, 2016. The order, insofar as appealed from, granted that part of the motion of defendants for summary judgment with respect to the first cause of action as against defendants-respondents.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the first cause of action is reinstated against defendants-respondents.

Memorandum: Plaintiff commenced this defamation action alleging that defendant Dawn Cramer made defamatory remarks in the course of her employment as an administrative assistant for defendants Village of East Syracuse (Village), East Syracuse Fire Department, and East Syracuse Fire Department, Inc. (collectively, Fire Department), i.e., that plaintiff was a “child molester” and that she had “tapes” to prove it. Plaintiff further alleged that the Village and the Fire Department are vicariously liable for Cramer’s actions. Cramer, the Village, and the Fire Department moved for summary judgment dismissing the complaint against them. Supreme Court denied the motion with respect to Cramer, but granted the motion with respect to the Village and the Fire Department (hereafter, defendants).

As limited by his brief, plaintiff contends that the court erred in granting that part of the motion seeking to dismiss the first cause of action alleging defamation against defendants. It is well established that, although “[s]lander as a rule is not actionable unless the plaintiff suffers special damage,” where, as here, a

statement charges plaintiff with a serious crime, the statement constitutes " 'slander per se' " and special damage is not required (*Liberman v Gelstein*, 80 NY2d 429, 434-435; *see Accadia Site Contr., Inc. v Skurka*, 129 AD3d 1453, 1453). Nevertheless, "[a] qualified privilege arises when a person makes a good[]faith, bona fide communication upon a subject in which he or she has an interest, or a legal, moral or societal interest to speak, and the communication is made to a person with a corresponding interest" (*Fiore v Town of Whitestown*, 125 AD3d 1527, 1529, *lv denied* 25 NY3d 910 [internal quotation marks omitted]; *see Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365). Here, Cramer is alleged to have made the statement to the assistant fire chief in connection with plaintiff's application for membership in the Fire Department in December 2012 and at a Fire Department meeting in January 2013 during a discussion of his application for membership.

We conclude that defendants met their initial burden of establishing that any alleged statements are protected by a qualified privilege inasmuch as they were made between members of the organization in connection with plaintiff's application for membership, and thus "the burden shifted to plaintiff[] to raise a triable issue of fact 'whether the statements were motivated solely by malice' " (*Tattoos by Design, Inc. v Kowalski*, 136 AD3d 1406, 1408, *amended on rearg* 138 AD3d 1515). "If [Cramer's] statements were made to further the interest protected by the privilege, it matters not that [she] *also* despised plaintiff. Thus, a triable issue is raised only if a jury could reasonably conclude that 'malice was the one and only cause for the publication' " (*Liberman*, 80 NY2d at 439). Plaintiff provided the deposition testimony of the assistant fire chief, who testified that Cramer told him to "go tell [plaintiff] for me that if he continues with this application I'm going to pull out tapes that I have that shows he's a child molester and that it's going to ruin his life." Plaintiff also provided the deposition testimony of a woman who was at the Fire Department in January or February 2012 and heard Cramer call plaintiff a "child molester"; that same witness heard Cramer call plaintiff a pedophile in 2011. A Fire Department employee testified in his deposition that he heard Cramer say to her husband that she had proof that plaintiff was a "child molester." In light of that evidence, we therefore conclude that plaintiff raised an issue of fact whether Cramer's statements were motivated solely by malice and thus are not protected by a qualified privilege.

"An employer may be held vicariously liable for an allegedly slanderous statement made by an employee only if the employee was acting within the scope of his or her employment at the time that the statement was made" (*Seymour v New York State Elec. & Gas Corp.*, 215 AD2d 971, 973). We further conclude that defendants failed to establish their entitlement to judgment as a matter of law that Cramer was not acting within the scope of her employment when she allegedly made the statements to the assistant fire chief and/or at the meeting (*see Buck v Zwelling*, 272 AD2d 895, 896; *Majtan v Johnson Co.*, 168 AD2d 912, 912; *see generally Riviello v Waldron*, 47 NY2d 297, 302-

303).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**874**

**CA 16-01826**

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, WINSLOW, AND SCUDDER, JJ.

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IN THE MATTER OF JEWISH HOME OF ROCHESTER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID DWORKIN, RESPONDENT-APPELLANT.

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JASON S. DIPONZIO, ROCHESTER, FOR RESPONDENT-APPELLANT.

HINMAN STRAUB, P.C., ALBANY (DAVID T. LUNTZ OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered January 7, 2016. The order denied the motion of respondent to dismiss the petition.

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

Memorandum: Pursuant to powers of attorney executed in New Jersey, respondent obtained admission for his parents to petitioner's facility. Thereafter, petitioner commenced this special proceeding pursuant to General Obligations Law § 5-1510 to compel respondent to provide an accounting and to remove respondent as the agent for his parents inasmuch as respondent had allegedly withheld available resources to pay for the care of his parents. Respondent moved to dismiss the petition on the ground that the General Obligations Law does not apply and that petitioner lacks standing to commence this special proceeding. Supreme Court denied the motion. We affirm.

Section 5-1510 (3) of the General Obligations Law provides that "[a] special proceeding may be commenced . . . [by] the agent, the spouse, child or parent of the principal, the principal's successor in interest, *or any third party who may be required to accept a power of attorney*" (emphasis added). Furthermore, General Obligations Law § 5-1512 provides, inter alia, that "a power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid in this state, regardless of whether the principal is a domiciliary of this state." Consequently, we conclude that the above two statutory provisions confer standing on petitioner to commence this special proceeding. Contrary to respondent's contention, General Obligations Law § 5-1501C (11) does not alter our conclusion.

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

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**876**

**CA 16-02124**

PRESENT: CARNI, J.P., CURRAN, TROUTMAN, WINSLOW, AND SCUDDER, JJ.

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ICM CONTROLS CORP., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BENJAMIN V. MORROW, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

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HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 20, 2016. The order, insofar as appealed from, denied plaintiff's motion insofar as it sought to compel discovery from defendant Benjamin V. Morrow with respect to damages.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and that part of the motion seeking to compel discovery from defendant Benjamin V. Morrow with respect to damages only is granted.

Memorandum: Plaintiff commenced this action against its former vice president of engineering, defendant Benjamin V. Morrow, and defendant Morben, LLC, seeking, inter alia, to recover damages resulting from the alleged breach of noncompete and confidentiality provisions contained in an employment agreement. After issue was joined, plaintiff served defendants with a notice to take Morrow's deposition and a request for various documents, including personal and business tax returns; documents related to the sale of plaintiff's products, drawings, or designs; invoices and receipts; and communications between defendants and plaintiff's clients. Despite plaintiff's repeated requests, a scheduling order, and an order compelling defendants' compliance with discovery, defendants refused to comply.

Plaintiff eventually moved for, inter alia, an order striking defendants' answer, granting default judgment on liability, scheduling an inquest on the issue of damages, and compelling discovery. With respect to damages, in particular, plaintiff sought leave to serve defendants with a revised discovery request for documents limited to damages, giving defendants 20 days to respond thereto, and an order requiring Morrow to appear for a deposition within 20 days of plaintiff's receipt of defendants' document production. Supreme Court granted plaintiff's motion in part, struck defendants' answer, granted

plaintiff a default judgment on the issue of liability, and ordered an inquest on damages. The court otherwise denied the motion, including that part seeking an order compelling discovery with respect to damages.

We agree with plaintiff that it is entitled to discovery in order to establish its damages (*see Kimmel v State of New York*, 302 AD2d 908, 908). A "defendant's obligation to afford [a] plaintiff the opportunity to pursue discovery [is not] terminated when the answer [is] stricken," inasmuch as a plaintiff should not be "handicapped in the proof of its damages by [a] defendant's prior defiance of orders, notices, or subpoenas calling for his production of records or the taking of a deposition" (*Reynolds Sec. v Underwriters Bank & Trust Co*., 44 NY2d 568, 573; *see Kimmel*, 302 AD2d at 908). Thus, a "plaintiff, if it chooses to do so, may press its right to discovery in advance of the inquest, whether for direct use as evidence in proving its damages or for the procurement of information that may lead to such evidence" (*Reynolds Sec*., 44 NY2d at 574). Here, plaintiff is entitled to an order compelling Morrow's compliance with the discovery demands insofar as those demands are "material and necessary" to establish plaintiff's damages (CPLR 3101 [a]). We therefore reverse the order insofar as appealed from and grant that part of the motion seeking an order to compel discovery from Morrow with respect to damages only.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**878**

**KA 15-01401**

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL MANNING, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (EMMANUEL O. ULUBIYO OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered July 30, 2015. The judgment convicted defendant, upon a jury verdict, of kidnapping in the second degree and attempted kidnapping 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 kidnapping in the second degree (Penal Law § 135.20) and attempted kidnapping in the second degree (§§ 110.00, 135.20). Defendant and his codefendant (defendants) were at a costume party, and the codefendant was dressed as an FBI agent. Defendants left together in an SUV and, upon encountering a woman (hereafter, first victim) on the street, defendants got out of the SUV, announced themselves as FBI agents, and tried to pull the first victim's arms behind her back. When two men approached to see what was going on, defendants got back into the SUV and drove away, and the first victim flagged down a police vehicle. Defendants then encountered another woman (hereafter, second victim) and again got out of the SUV and acted as if they were FBI agents. One of them put the second victim in handcuffs, defendant "hoisted" her into the SUV, and defendants began questioning her about a supposed murder investigation. An officer interviewing the first victim happened to see the SUV driving a few blocks away, and the police pursued it. The codefendant, who was driving, stopped the vehicle and fled, and the officers found defendant and the handcuffed second victim in the back seat. Both victims worked as prostitutes, but each victim testified that she did not approach the SUV for that purpose, and further testified that it did not seem like defendants were joking.

We reject defendant's contention that the evidence is legally

insufficient to establish an attempted abduction of the first victim and an abduction of the second victim (*see* Penal Law §§ 135.00 [2] [a]; 135.20). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), supports a reasonable inference that defendants intended to move the first victim into the SUV (*see generally People v Denson*, 26 NY3d 179, 189; *People v Brown*, 187 AD2d 664, 665, *lv denied* 81 NY2d 968), and it is legally sufficient to establish that the SUV, once in motion, was "a place where [the victims were] not likely to be found" (§ 135.00 [2] [a]; *see People v Grohoske*, 148 AD3d 97, 103, *lv denied* 28 NY3d 1184; *People v Cole*, 140 AD3d 1183, 1183-1184, *lv denied* 28 NY3d 970; *People v Carter*, 263 AD2d 958, 959, *lv denied* 94 NY2d 820). The evidence is also sufficient to establish that defendants restrained the second victim "with intent to prevent [her] liberation" (§ 135.00 [2] [a]; *see People v Linderberry*, 222 AD2d 731, 734, *lv denied* 87 NY2d 975; *cf. People v Brinson*, 55 AD2d 844, 844-845), even though she was restrained in the SUV for a relatively short time (*see People v Hinton*, 258 AD2d 874, 874, *lv denied* 93 NY2d 1019; *People v Balcom*, 171 AD2d 1028, 1028-1029, *lv denied* 78 NY2d 920; *see also People v Burkhardt*, 81 AD3d 970, 971, *lv denied* 17 NY3d 793). In particular, the second victim testified that she asked to be released and was told to shut up, that defendant pulled on her clothing and tried to take pictures of her with his phone, that defendants gave no indication that she would be released, and that the codefendant stopped the SUV only in response to the police pursuit. Defendant's further contention that the evidence is insufficient to establish his accessorial liability for the crimes is unpreserved for our review (*see People v Gray*, 86 NY2d 10, 19; *People v Hales*, 272 AD2d 984, 984, *lv denied* 95 NY2d 935), and it is without merit in any event (*see People v Allah*, 71 NY2d 830, 832; *People v Chambers*, 184 AD2d 568, 569, *lv denied* 80 NY2d 928).

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 contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to reject the defense theory that defendants intended only to play a joke or prank on the victims (*see People v Hunter*, 142 AD3d 1381, 1381; *Matter of Rashaun S.*, 46 AD3d 412, 412), as well as defendant's assertions in a police interview that the second victim was "with it" and got into the SUV willingly (*see People v Valero*, 134 AD2d 635, 635-636, *lv denied* 70 NY2d 1011; *see generally People v Frankline*, 87 AD3d 831, 832, *lv denied* 19 NY3d 973). The challenges that defendant raises on appeal to the credibility of the victims " 'were matters for the jury to determine, and we see no reason to disturb its verdict' " (*People v Thompson*, 147 AD3d 1298, 1300; *see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that he was denied effective assistance of counsel in connection with his decision to reject a pretrial plea offer and proceed to trial (*see generally Lafler v Cooper*, 566 US 156, 162-163). That contention involves strategic discussions between defendant and his attorney outside the record on

appeal, and it must therefore be raised by way of a motion pursuant to CPL 440.10 (*see People v Mangiarella*, 128 AD3d 1418, 1418; *People v Rosario*, 43 AD3d 765, 765, *lv denied* 9 NY3d 1009). On the record before us, defendant has not established that his rejection of the plea offer was attributable to ineffective assistance of counsel (*see People v Nicelli*, 121 AD3d 1129, 1130, *lv denied* 24 NY3d 1220; *People v Bennett*, 277 AD2d 1008, 1008, *lv denied* 96 NY2d 780; *see also People v Rodriguez*, 133 AD3d 619, 620, *lv denied* 27 NY3d 968). Finally, we reject defendant's contention that his sentence — a determinate term of imprisonment of 10 years plus a period of postrelease supervision for the class B violent felony offense of kidnapping in the second degree, and a lesser concurrent term for the class C violent felony offense of attempted kidnapping in the second degree (*see* Penal Law § 70.02 [1] [a], [b]) — is unduly harsh and severe (*see generally People v Lemery*, 107 AD3d 1593, 1595, *lv denied* 22 NY3d 956).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**879**

**KA 14-01379**

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK S. SNYDER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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CHARLES J. GREENBERG, AMHERST, FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

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Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered September 16, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (§ 220.39 [1]). The two pleas were entered in a single plea proceeding.

We reject defendant's contention in each appeal that he did not knowingly, intelligently and voluntarily waive his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). The record establishes that County Court " 'engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' . . . , and informed him that the waiver was a condition of the plea agreement" (*People v Krouth*, 115 AD3d 1354, 1354-1355, *lv denied* 23 NY3d 1064; *see Lopez*, 6 NY3d at 257; *People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794). Defendant's challenge in each appeal to the factual sufficiency of the plea allocution is foreclosed by his valid waiver of the right to appeal (*see People v Northrup*, 23 AD3d 1102, 1102, *lv denied* 6 NY3d 757). Contrary to defendant's contention in appeal No. 1, his waiver encompasses his challenge to the court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342; *People v Kemp*, 94 NY2d 831, 833). Finally, although defendant's waiver of his right "to appeal the propriety of [his] conviction to a higher [c]ourt" does not foreclose

his "right to invoke the [this Court's] interest-of-justice jurisdiction to reduce the sentence" (*Lopez*, 6 NY3d at 255; *see People v Maracle*, 19 NY3d 925, 927-928), we decline in each appeal to reduce defendant's bargained-for sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**880**

**KA 14-01380**

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK S. SNYDER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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CHARLES J. GREENBERG, AMHERST, FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

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Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered September 16, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Same memorandum as in *People v Snyder* ([appeal No. 1] ___ AD3d ___ [June 30, 2017]).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**885**

**KA 16-02079**

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK L. MORRISON, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), dated August 12, 2015. The order affirmed an order of the Town Court of the Town of Elba.

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

Memorandum: Defendant appeals from an order of Genesee County Court that affirmed an order of Elba Town Court determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Preliminarily, we note that "[a]n appeal may be taken to the appellate division as of right from an order of a county court . . . which determines an appeal from a judgment of a lower court" (CPLR 5703 [b]), and here County Court determined the appeal from an order of Town Court, not a judgment. Nonetheless, we conclude that this appeal from an "order" rather than a "judgment" is properly before us as of right pursuant to CPLR 5703 (b) inasmuch as " 'the rights of the parties are for all practical purposes finally determined' " (*People v Willis*, 130 AD3d 1470, 1471; *see Highlands Ins. Co. v Maddena Constr. Co.*, 109 AD2d 1071, 1072).

With respect to the merits, we reject defendant's contention that the People failed to present clear and convincing evidence to support the assessment of 15 points under risk factor 11 for defendant's history of alcohol and drug abuse (*see* Correction Law § 168-n [3]). That assessment is sufficiently supported by reliable hearsay evidence inasmuch as the presentence report (PSR) shows that defendant was convicted in Florida in 2004 for driving under the influence (*see* Fla Stat § 316.193 [1]), and was shortly thereafter arrested again for the same offense; defendant's then-13-year-old daughter reported in a supporting deposition that defendant smoked marihuana with her on multiple occasions approximately two months before he sexually abused

the daughter's friend; and the daughter's mother reported in a statement attached to the PSR that defendant had a history of daily drug use (*see People v Leeson*, 148 AD3d 1677, 1678, *lv denied* ___ NY3d ___ [June 8, 2017]; *People v Regan*, 46 AD3d 1434, 1434-1435; *People v Lewis*, 37 AD3d 689, 689-690, *lv denied* 8 NY3d 814; *see generally People v Ramos*, 41 AD3d 1250, 1250, *lv denied* 9 NY3d 809).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**888**

**CA 17-00149**

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

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JESSICA M. PERKINS AND RODNEY A. PERKINS, JR.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND ROBERT L. DANNER, III,
DEFENDANTS-APPELLANTS.

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TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered September 23, 2016. The order, insofar as appealed from, denied the cross motion of defendants for summary judgment and granted in part the motion of plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' motion in its entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Jessica M. Perkins (plaintiff) when her vehicle collided with a police vehicle operated by defendant Robert L. Danner, III, a police officer employed by defendant City of Buffalo. At the time of the accident, Danner was responding to an emergency call without his emergency lights or siren activated, and he ran a red light at an intersection. As plaintiff entered the intersection with a green light, her vehicle struck the rear end of Danner's vehicle.

Plaintiffs moved for summary judgment on the issues of, inter alia, negligence and proximate cause, and defendants cross-moved for summary judgment dismissing the complaint because, among other things, Danner did not act with reckless disregard for the safety of others. Supreme Court determined that ordinary negligence principles were applicable to this case, granted those parts of plaintiffs' motion seeking summary judgment on the issues of negligence and proximate cause, and denied defendants' cross motion.

We agree with defendants that the court should have applied the reckless disregard standard of care to the facts of this case. At the

time of the collision, Danner was operating an authorized emergency vehicle while involved in an emergency operation (*see* Vehicle and Traffic Law §§ 101, 1104 [a]), and his police vehicle was exempt from the requirement that emergency lights or siren be activated (*see* § 1104 [c]). Thus, the court erred in failing to apply "a reckless disregard standard of care 'for determining . . . civil liability for damages resulting from the privileged operation of an emergency vehicle' " (*Kabir v County of Monroe*, 16 NY3d 217, 230; *see* § 1104 [e]). Contrary to plaintiffs' contention, the evidence establishing that Danner did not slow down prior to entering the intersection does not render Danner's conduct "unprivileged as a matter of law, but rather presents an issue of fact whether he acted with reckless disregard for the safety of others" (*Rice v City of Buffalo*, 145 AD3d 1503, 1505; *see Connelly v City of Syracuse*, 103 AD3d 1242, 1242-1243). We therefore conclude that the court erred in granting plaintiffs' motion in part inasmuch as it erroneously applied an ordinary negligence standard (*see generally Campbell v City of Elmira*, 84 NY2d 505, 507-508), and we modify the order accordingly.

Contrary to defendants' further contention, however, the court properly denied their cross motion. Even assuming, arguendo, that defendants met their initial burden, we conclude that plaintiffs raised a triable issue of fact whether Danner acted with reckless disregard for the safety of others by " 'intentionally [performing an] act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and [doing] so with conscious indifference to the outcome" (*Saarinen v Kerr*, 84 NY2d 494, 501; *see generally Rice*, 145 AD3d at 1505).

In light of our determination, we need not reach defendants' remaining contention.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**889**

**CA 16-02219**

PRESENT: PERADOTTO, J.P., DEJOSEPH, CURRAN, AND WINSLOW, JJ.

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DONALD HALL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
NHJB, INC., DOING BUSINESS AS MOLLY'S PUB,
AND NORMAN HABIB, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS A SHAREHOLDER OF
NHJB, INC., DEFENDANTS-APPELLANTS.

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LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GOMEZ & BECKER, LLP, BUFFALO (RAFAEL O. GOMEZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered August 15, 2016. The order, among other things, denied the motion of defendants NHJB, Inc., doing business as Molly's Pub, and Norman Habib, individually and in his official capacity as a shareholder of NHJB, Inc., to dismiss the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for, inter alia, false arrest, assault and battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. He alleges that he was with his friend William Sager at a bar operated by defendant NHJB, Inc., doing business as Molly's Pub (NHJB), when an employee of the bar pushed Sager down a flight of stairs, causing injuries that ultimately resulted in Sager's death (*see Sager v City of Buffalo*, ___ AD3d ___ [June 30, 2017]); that he went to check on Sager and was told to leave the premises by defendant Robert Eloff, an off-duty police officer who was providing security at the bar; that he moved onto a public sidewalk, but Eloff nonetheless arrested him and made false statements to other officers that led to plaintiff being charged with criminal trespass in the third degree; and that he was taken back into the bar in handcuffs and placed next to Sager, who was unconscious and bleeding. Defendant Norman Habib, a resident of Florida at the time of the incident, was the sole shareholder of NHJB. NHJB and Habib (hereafter, defendants) moved to dismiss the complaint against them in part pursuant to CPLR 3211 (a) (7) and (8), contending that the court lacked personal

jurisdiction over Habib, and that the complaint failed to state a cause of action against them except insofar as it alleged assault and battery against NHJB. Supreme Court denied the motion, and defendants appeal.

Contrary to defendants' contention, we conclude that plaintiff made " 'a prima facie showing' " that the court has personal jurisdiction over Habib (*Halas v Dick's Sporting Goods*, 105 AD3d 1411, 1412; *see Sager*, ___ AD3d at ___). As the principal and sole shareholder of NHJB, which operated a bar in New York, Habib transacted business in New York within the meaning of CPLR 302 (a) (1) (*see People v Frisco Mktg. of NY LLC*, 93 AD3d 1352, 1353-1354; *CIBC Mellon Trust Co. v HSBC Guyerzeller Bank AG*, 56 AD3d 307, 308-309; *see generally Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467-472), and we conclude that there is a substantial relationship between plaintiff's claims and Habib's activities in New York (*see generally Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 339; *Fischbarg v Doucet*, 9 NY3d 375, 384). In addition, we conclude that the exercise of personal jurisdiction over Habib comports with due process (*see Fischbarg*, 9 NY3d at 384-385; *Sager*, ___ AD3d at ___; *see generally LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216).

We reject defendants' contention that the complaint fails to state a cause of action against them for false arrest in violation of 42 USC § 1983. Although defendants are not state actors, the complaint alleges that they engaged in a conspiracy with police officers to have plaintiff arrested without probable cause in order to suppress evidence of what had happened to Sager (*see generally Payne v County of Sullivan*, 12 AD3d 807, 809-810; *Freedman v Coppola*, 206 AD2d 893, 893-894), and we reject defendants' contention that plaintiff's allegations of conspiracy are merely conclusory (*cf. Williams v Maddi*, 306 AD2d 852, 853, *lv denied* 100 NY2d 516, *cert denied* 541 US 960; *Ford v Snashall*, 285 AD2d 881, 882).

We also reject defendants' contention that the complaint fails to set forth a basis for holding Habib liable in his individual capacity for assault and battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. Accepting plaintiff's allegations as true and affording him the benefit of every possible favorable inference on defendants' motion to dismiss (*see Leon v Martinez*, 84 NY2d 83, 87-88), we conclude that the complaint sufficiently alleges that Habib was Eloff's employer and therefore potentially subject to vicarious liability for Eloff's actions (*see Nerey v Greenpoint Mtge. Funding, Inc.*, 116 AD3d 1015, 1016; *Young v Nationwide Mut. Ins. Co.*, 21 AD3d 1099, 1101; *see generally Riviello v Waldron*, 47 NY2d 297, 302-304; *Bilias v Gaslight, Inc.*, 100 AD3d 533, 533-534).

Contrary to defendants' further contention, we conclude that plaintiff's cause of action for negligent infliction of emotional distress, which is premised on his alleged placement in handcuffs next to the grievously injured Sager, sufficiently alleges that the conduct at issue was negligent (*cf. Santana v Leith*, 117 AD3d 711, 712).

While the same conduct is characterized as intentional elsewhere in the complaint, plaintiff is entitled to plead inconsistent theories of liability (*see* CPLR 3014; *Mitchell v New York Hosp.*, 61 NY2d 208, 218).

Defendants' remaining contentions are not properly before us inasmuch as they were raised for the first time either in defendants' reply papers (*see Nick's Garage, Inc. v Liberty Mut. Fire Ins. Co.*, 120 AD3d 967, 968), or on appeal (*see Matter of Small Smiles Litig.*, 125 AD3d 1531, 1532).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**895**

**CA 16-02173**

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

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JOSEPH M. ROZEWSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL T. TRAUTMANN, DEFENDANT-RESPONDENT.

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ARTHUR J. RUMIZEN, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JEFFREY SENDZIAK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 16, 2016. The order granted the motion of defendant for leave to serve an amended answer and struck all claims of a left wrist injury from plaintiff's bill of particulars and supplemental bill of particulars.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries that he allegedly sustained in a motor vehicle accident. Plaintiff appeals from an order that granted defendant's motion for leave to serve an amended answer asserting collateral estoppel as an affirmative defense and that, on the basis of that defense, struck all claims of a left wrist injury from the complaint, as supplemented by the initial and supplemental bills of particulars. Supreme Court determined that plaintiff is collaterally estopped from establishing that such an injury was causally related to the subject motor vehicle accident because of a no-fault arbitration award that determined otherwise. We reject plaintiff's contention that collateral estoppel should not apply because he was not afforded a full and fair opportunity to litigate that issue in the arbitration proceeding.

Under the doctrine of collateral estoppel, or issue preclusion, a party may not "relitigat[e] in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500). Collateral estoppel applies only if "(1) the issue sought to be precluded is identical to a material issue necessarily decided by the [prior tribunal] in a prior proceeding; and (2) there was a full and fair opportunity to contest the issue in [that] tribunal"

(*Jeffreys v Griffin*, 1 NY3d 34, 39; *see Ryan*, 62 NY2d at 500-501). In determining whether a party was given a full and fair opportunity to litigate the issue in a prior proceeding, the court should consider " 'the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the difference in the applicable law and the foreseeability of future litigation' " (*Clemens v Apple*, 65 NY2d 746, 748, quoting *Ryan*, 62 NY2d at 501). The doctrine of collateral estoppel may be invoked based upon an arbitration award (*see Matter of American Ins. Co. [Messinger–Aetna Cas. & Sur. Co.]*, 43 NY2d 184, 189-190; *see generally Rembrandt Indus. v Hodges Intl.*, 38 NY2d 502, 504), including the arbitration of a no-fault claim (*see Clemens*, 65 NY2d at 748-749; *Barnett v Ives*, 265 AD2d 865, 866).

Here, we conclude that plaintiff had a full and fair opportunity to litigate the question whether his left wrist injury was causally related to the automobile accident because he "freely elected to proceed to arbitration with the assistance of counsel . . . despite the availability of an alternate judicial forum . . . , and had the *opportunity* to employ procedures substantially similar to those utilized in a court of law" (*Clemens*, 65 NY2d at 749). Moreover, "in view of the fact that the arbitration was sought *subsequent* to the commencement of this negligence action against defendant to recover for personal injuries, plaintiff, proceeding with the aid of counsel, should have been aware of the possibility that the result of the arbitration would affect a pending court proceeding addressing, in part, the identical issue presented at the arbitration," i.e., whether plaintiff's left wrist injury was causally related to the accident (*id.*).

We have considered plaintiff's remaining contentions and conclude that they have no merit.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**896**

**KA 15-01189**

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICOLE E. HARGIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered February 2, 2015. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (two counts), criminal sexual act in the second degree (35 counts), criminal sexual act in the third degree (three counts), rape in the second degree (two counts), rape in the third degree (four counts) and endangering the welfare of a child (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts 1, 3 through 16, 18 through 50, and 52 of the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her upon a jury verdict of various sex crimes committed against three victims, including two counts of predatory sexual assault against a child (Penal Law § 130.96). In appeal No. 2, she appeals from a judgment convicting her upon the same jury verdict of rape in the second degree (§ 130.30 [1]) committed against a fourth victim. The appeals arise from separate indictments that were joined for trial. In both appeals, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence *(see generally People v Bleakley*, 69 NY2d 490, 495). We reject defendant's contention that the testimony of the victims was incredible as a matter of law (*see People v St. Ives*, 145 AD3d 1185, 1187-1188; *People v Nilsen*, 79 AD3d 1759, 1760, *lv denied* 16 NY3d 862; *People v Baker*, 30 AD3d 1102, 1102-1103, *lv denied* 7 NY3d 846).

We agree with defendant, however, that County Court erred in denying her challenge for cause to a prospective juror whose statements during voir dire cast serious doubt on her ability to be

impartial (*see generally* CPL 270.20 [1] [b]; *People v Arnold*, 96 NY2d 358, 362-363). Upon being asked by defense counsel whether she thought that she "would have to hear from [defendant] in order to determine what the verdict should be," the prospective juror responded, in relevant part, that she "would like to hear from everyone involved." Defense counsel later asked the prospective juror, by way of confirmation, whether she had said that she would "like to hear from [defendant]," and the prospective juror reiterated that she "would like to hear from everyone." We conclude that the prospective juror's responses suggested that defendant had an obligation to testify, thereby casting serious doubt on her ability to render an impartial verdict (*see People v Bludson*, 97 NY2d 644, 645-646; *People v Casillas*, 134 AD3d 1394, 1395-1396; *People v Jackson*, 125 AD3d 485, 485-486; *People v Givans*, 45 AD3d 1460, 1461; *People v Russell*, 16 AD3d 776, 777-778, *lv denied* 5 NY3d 809). We further conclude that the prospective juror's silence when the court subsequently asked the entire panel whether anyone "needs to hear from the defendant or must hear from the defendant before he or she renders a verdict" did not constitute an unequivocal assurance of impartiality that would warrant denial of defendant's challenge for cause (*see Arnold*, 96 NY2d at 363-364; *Casillas*, 134 AD3d at 1396; *People v Strassner*, 126 AD3d 1395, 1396; *cf. People v Taylor*, 134 AD3d 1165, 1169, *lv denied* 26 NY3d 1150). Inasmuch as defendant exercised a peremptory challenge with respect to the prospective juror and exhausted all of her peremptory challenges before the completion of jury selection, the denial of her challenge for cause constitutes reversible error (*see* CPL 270.20 [2]; *Strassner*, 126 AD3d at 1396). We therefore reverse the judgment in each appeal and grant a new trial on the counts of which defendant was convicted.

In view of our determination, we do not address defendant's remaining contentions, including her contention that the court erred in denying her challenge for cause to another prospective juror.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**897**

**KA 15-01190**

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICOLE E. HARGIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered February 2, 2015. The judgment convicted defendant, upon a jury verdict, of rape in the second degree.

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

Same memorandum as in *People v Hargis* ([appeal No. 1] ___ AD3d ___ [June 30, 2017]).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**899**

**KA 16-00004**

PRESENT: WHALEN, P.J., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL L. CRANDALL, DEFENDANT-APPELLANT.

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ADAM H. VANBUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered October 27, 2015. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [9]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**900**

**KA 14-02302**

PRESENT: WHALEN, P.J., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN HOMER, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN J. GILSENAN, OF THE PENNSYLVANIA AND MICHIGAN BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 4, 2014. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [9]). 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 Carroll*, 148 AD3d 1546, 1546 [internal quotation marks omitted]; *see People v Harris*, 148 AD3d 1694, 1694, *lv denied* ___ NY3d ___ [May 26, 2017]; *cf. People v Massey*, 149 AD3d 1524, 1525). Moreover, the colloquy concerning the waiver of the right to appeal, which was immediately preceded by a colloquy concerning the rights automatically forfeited by a guilty plea, conflated the right to appeal with the rights forfeited by a guilty plea (*cf. Massey*, 149 AD3d at 1525). "[T]he written waiver of the right to appeal, which was not signed until sentencing, does not serve to validate the otherwise inadequate oral waiver where, as here, 'there is no indication that [the court] obtained a knowing and voluntary waiver of that right at the time of the plea' " (*Carroll*, 148 AD3d at 1546-1547). Nevertheless, considering defendant's criminal record, which includes two prior felony convictions, we perceive no basis upon which to modify the sentence as a matter of

discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**901**

**KA 13-00499**

PRESENT: WHALEN, P.J., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER J. POMPEO, DEFENDANT-APPELLANT.

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered January 2, 2013. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from a judgment revoking his sentence of probation imposed upon his conviction, following his plea of guilty, of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), and sentencing him to a term of incarceration. Defendant's sole contention is that the sentence is unduly harsh and severe. Because defendant has completed serving that sentence, his appeal is moot (*see People v Mackey*, 79 AD3d 1680, 1681, *lv denied* 16 NY3d 860).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**902**

**KA 15-01177**

PRESENT: WHALEN, P.J., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMIAN JOHNSON, DEFENDANT-APPELLANT.

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CATHERINE H. JOSH, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), entered May 20, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). As the People correctly concede, Supreme Court erred in calculating the three-year period under risk factor 10, recency of prior felony or sex crime, from the date of sentencing rather than the date of the plea (*see People v Wood*, 60 AD3d 1350, 1350). Thus, the risk assessment score must be reduced from 115 to 105, rendering defendant a presumptive level two risk. We therefore modify the order accordingly.

Contrary to the People's contention that the court failed to rule on their request to assess 20 points under risk factor seven, relationship with the victim, the record establishes that the court denied their request.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**903**

**KA 16-00866**

PRESENT: WHALEN, P.J., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE EATON, ALSO KNOWN AS LAWRENCE STYLES,
DEFENDANT-APPELLANT.

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DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered April 28, 2015. The judgment convicted defendant, upon his plea of guilty, of gang assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of gang assault in the first degree (Penal Law § 120.07). We reject defendant's contention that he did not validly waive his right to appeal any issue concerning the severity of the sentence. Defendant's oral waiver of the right to appeal was accompanied by a written waiver stating that defendant was waiving his right to appeal "issues relating to [his] sentence and conviction" (*see People v Ramos*, 7 NY3d 737, 738; *People v McArthur*, 149 AD3d 1568, 1568-1569), and County Court obtained defendant's assurances at the plea proceeding that he had read and understood the written waiver (*see People v Lewis*, 143 AD3d 1183, 1185). The court's statements at the plea colloquy and the terms of the written waiver also "adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Sampson*, 149 AD3d 1486, 1487 [internal quotation marks omitted]). Thus, defendant may not challenge the severity of the sentence on this appeal.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**904**

**KA 16-01270**

PRESENT: WHALEN, P.J., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIKA BROWN, DEFENDANT-APPELLANT.

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KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered June 15, 2016. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and one count of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). At the outset, we conclude that defendant knowingly, voluntarily and intelligently waived her right to appeal, and that waiver encompasses her challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256). The further contention of defendant that the sentence is illegal, however, survives her waiver of the right to appeal (*see People v Seaberg*, 74 NY2d 1, 9; *People v Bussom*, 125 AD3d 1331, 1331). Nevertheless, contrary to defendant's contention, we conclude that County Court imposed a legal sentence.

To the extent that defendant contends that the plea was not knowing, voluntary and intelligent because the court failed to conduct a sufficient inquiry to determine whether she understood the consequences of the plea, that contention also survives her valid waiver of the right to appeal (*see People v Green*, 122 AD3d 1342, 1343; *People v Povoski*, 78 AD3d 1533, 1533, *lv denied* 16 NY3d 799). Defendant's contention, however, is not preserved for our review because she did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Hough*, 148 AD3d 1671, 1671; *People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965). We conclude in any event that defendant's contention is "belied

by [her] statements during the plea colloquy" (*People v Rickard*, 262 AD2d 1073, 1073, *lv denied* 94 NY2d 828; *see People v Hampton*, 142 AD3d 1305, 1306-1307, *lv denied* 28 NY3d 1124; *People v Caldwell*, 78 AD3d 1562, 1563, *lv denied* 16 NY3d 796). The record reveals that an interpreter was present throughout the plea proceeding, and defendant "acknowledged, through the interpreter, that [she] understood the terms of the plea bargain and that [she] willingly accepted them" (*People v Mercedes*, 171 AD2d 1044, 1044, *lv denied* 77 NY2d 998; *see People v Martes*, 154 AD2d 946, 946, *lv denied* 75 NY2d 870; *People v Quezada*, 145 AD2d 950, 951).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**905**

**CA 15-00544**

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, AND SCUDDER, JJ.

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IN THE MATTER OF JANE F. NIETHE, AS PARENT AND NATURAL GUARDIAN FOR LEAVE TO CHANGE MINORS' NAMES TO DOMINIC ROBERT MCCARTHY AND DILLAN LEONARD MCCARTHY, PETITIONER-RESPONDENT;

DANIEL W. DEPERNO, RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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DANIEL W. DEPERNO, RESPONDENT-APPELLANT PRO SE.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ERIN E. MCCAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered March 3, 2015. The order, inter alia, granted the petition to change names.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding seeking an order permitting her two sons to change their surname from respondent's surname to her maiden surname. In 2001, respondent, who is the sons' father, pleaded guilty to three felony sex offenses in satisfaction of, among other things, a 31-count indictment (*People v DePerno*, 92 AD3d 1089). The incident garnered significant media attention because respondent was, at the time, a tenured college professor and the victim of the sexual abuse was only 14 years old when the abuse began. Petitioner feared that her sons, who are now old enough to understand the nature of respondent's crimes, would be "humiliated, stigmatized and ridiculed" as a result of respondent's background. Petitioner further contended that the sons "have strongly negative feelings" about respondent and no longer wish to bear his surname. Respondent opposed the petition, challenging many of the contentions made by petitioner concerning his past conduct and his relationship with his sons. We conclude that Supreme Court erred in summarily granting the petition.

"Civil Rights Law § 63 authorizes an infant's name change if there is no reasonable objection to the proposed name, and the interests of the infant will be substantially promoted by the change" (*Matter of Eberhardt*, 83 AD3d 116, 121). With respect to infants, the statute provides in relevant part, that, if the court is "satisfied . . . that the petition is true, . . . that there is no reasonable objection to the change of name proposed, and . . . that the interests

of the infant will be substantially promoted by the change," the court may grant the petition (§ 63). With respect to the interests of the infant, "the issue is not whether it is in the infant's best interests to have the surname of the mother or father, but whether the interests of the infant will be promoted substantially by changing his [or her] surname" (*Swank v Petkovsek*, 216 AD2d 920, 920). Such a determination "requires a court to consider the totality of the circumstances" (*Eberhardt*, 83 AD3d at 123).

Contrary to petitioner's contention, respondent raised reasonable objections to the petition (*cf. id.* at 121-122). Petitioner is seeking to change the sons' names to a surname that is not used by either parent or the sons' half-sibling (*cf. id.* at 117). While "neither parent has a superior right to determine the surname of the child," we have stated that "a father has a recognized interest in having his child bear his surname" (*Matter of Cohan v Cunningham*, 104 AD2d 716, 716). Respondent also contends that an order granting the petition will have a deleterious effect on his relationship with his sons (*see generally Eberhardt*, 83 AD3d at 123-124). Although petitioner contends that the sons desire the name change, that contention is based on hearsay, and respondent challenges that contention. Inasmuch as the court did not conduct an in camera interview with them, we cannot resolve that disputed issue on this record. In any event, the sons are now of sufficient age and maturity to express their preference for a particular surname, and they have a right to be heard (*see generally id.*).

Because the record is insufficient to enable us to determine whether the requested change would substantially promote the sons' interests (*see* Civil Rights Law § 63; *Swank*, 216 AD2d at 920), we reverse the order and remit the matter to Supreme Court for a hearing on the petition (*see Matter of Altheim*, 12 AD3d 993, 994; *Matter of John Phillip M.-P.*, 307 AD2d 318, 318-319; *Matter of Kyle Michael M.*, 281 AD2d 954, 954-955).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**906**

**CA 16-00935**

PRESENT: WHALEN, P.J., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

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IN THE MATTER OF WILLIAM HOLMES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 6, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking to annul the determination of the Parole Board (Board) denying him parole release. "It is well settled that parole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements enumerated in Executive Law § 259-i" (*Matter of Gssime v New York State Div. of Parole*, 84 AD3d 1630, 1631, *lv dismissed* 17 NY3d 847; *see Matter of Johnson v New York State Div. of Parole*, 65 AD3d 838, 839). Contrary to petitioner's contention, we conclude that the Board did not rely on incorrect information in making its determination, specifically that petitioner had not completed the alcohol and substance abuse program (ASAT). Petitioner admitted that ASAT had been recommended to him, and his statement that his counselor did not think he needed ASAT because he had already taken it previously does not make that information erroneous. We reject petitioner's further contentions that the Board looked exclusively to past-focused factors and failed to consider all of the factors in a fair manner. The record establishes that the Board appropriately considered the relevant factors in denying petitioner's application for release, including, inter alia, the underlying offense, petitioner's criminal history and prior violations of parole, his institutional adjustment, and his plans upon release (*see Matter*

*of Kenefick v Sticht*, 139 AD3d 1380, 1381, *lv denied* 28 NY3d 902).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**907**

**CA 16-00996**

PRESENT: WHALEN, P.J., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ.

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IN THE MATTER OF VINCENTE REYNOSO,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 6, 2016 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.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**908**

**KA 15-01532**

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENISE HADDAD SMITH, DEFENDANT-APPELLANT.

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

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

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Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Oneida County Court (Michael L. Dwyer, J.), dated July 27, 2015. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10. The appeal was held by this Court by order entered October 7, 2016, decision was reserved, and the matter was remitted to Oneida County Court for further proceedings (143 AD3d 1236). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision and remitted the matter to County Court for a hearing on defendant's CPL 440.10 motion to vacate the judgment convicting her following a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the second degree (§ 120.05 [2]) (*People v Smith*, 143 AD3d 1236). As we noted in our earlier decision, at trial the People presented evidence that defendant sliced her estranged husband's neck with a kitchen knife while he was lying on a bed at his parents' residence, but he was able to flee and call for assistance. The police thereafter found defendant inside the residence with allegedly self-inflicted stab wounds, including an abdominal stab wound that required removal of her spleen. Two medical witnesses testified at trial that a wound located below and behind defendant's left armpit (hereafter, back wound) was caused by one of the two medical witnesses when he inserted a chest tube during a medical procedure. Defendant testified in her own defense at trial and asserted that her estranged husband attacked her with the knife, and that his neck was cut in the ensuing struggle over the knife.

In her CPL 440.10 motion, defendant contended that the back wound

was actually a puncture wound that was caused by her estranged husband. She thus contended that she was denied effective assistance of counsel because trial counsel failed to show the back wound to the jury, failed to engage a medical expert to testify about that wound, and failed to examine the clothing she was wearing at the time of the stabbing, which consisted of a camisole shirt and a sweatshirt. Defendant contended that an examination of the clothing would have revealed that there were holes in the clothing that aligned with the back wound, thus establishing that the wound was caused by her estranged husband inasmuch as that wound could not have been self-inflicted. The court denied the motion without a hearing and without examining the garments.

We concluded that, if there were holes in the shirts matching the back wound, then, in the absence of a strategic explanation, "the failure of defendant's trial attorney to examine that clothing, coupled with his failure to call a medical expert to discuss the wound and to show the wound to the jury, would have been so ' "egregious and prejudicial" ' as to deprive defendant of a fair trial" (*id.* at 1238, quoting *People v Turner*, 5 NY3d 476, 480). We directed the court on remittal to conduct "a limited hearing on the issue relating to the location of the holes in the shirts" (*id.*).

At the hearing on remittal, defense counsel waived defendant's presence, and the court examined the two shirts while they were placed both on a table and then on two different sized mannequins. No testimony was taken. The court thereafter found that each garment had only one hole, and that the holes did not align with the back wound. Rather, they more closely aligned with the wound to defendant's abdomen. We conclude that the court properly denied defendant's motion.

Contrary to defendant's contention, the court did not err in limiting the scope of the hearing on remittal. It is well settled that a trial court has broad discretion to limit the scope of a hearing (*see People v Duran*, 6 AD3d 809, 810, *lv denied* 3 NY3d 639; *see generally People v Sorge*, 301 NY 198, 201-202), and this is not a situation in which defendant was "denied the opportunity for a full inquiry" (*People v Bryce*, 246 AD2d 75, 79, *appeal dismissed* 92 NY2d 1024; *see People v Days*, 150 AD3d 1622, 1623-1624).

Contrary to defendant's further contention, the evidence at the hearing on remittal supported the court's determination. We have reviewed photographs of the shirts both on the table and on the mannequins, and we conclude that the single hole in each shirt does not align in any way with the back wound. Indeed, we agree with the court's conclusion that, "had defense counsel drawn the jury's attention to the relationship between the 'holes in the shirts' and the wounds in defendant's torso, he would have *undermined* [defendant's] claim that [the victim] stabbed her in the back while simultaneously *supporting* the People's argument that the injury to her abdomen was self-inflicted" (emphasis in original). Moreover, we further agree with the court that, inasmuch as defense counsel was "faced with sworn testimony from an expert medical witness that the

expert witness was personally responsible for the [back wound],” any attempt to impeach that testimony by arguing that the wound was caused by the victim and not the medical expert “would have had an extremely adverse effect on defense counsel’s credibility and that of [defendant] in the eyes of the jury.” We thus conclude that defendant failed to establish that defense counsel was ineffective in failing to address the back wound inasmuch as “[t]here can be no denial of effective assistance of trial counsel arising from counsel’s failure to ‘make a motion or argument that has little or no chance of success’ ” (*People v Caban*, 5 NY3d 143, 152).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**909**

**TP 17-00167**

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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IN THE MATTER OF SHAWN WILLIAMS, PETITIONER,

V ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT.

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SHAWN K. WILLIAMS, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered January 18, 2017) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**911**

**KA 15-02162**

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARRY L. MALLARD, JR., ALSO KNOWN AS LIL LARRY,
DEFENDANT-APPELLANT.

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LARRY L. MALLARD, JR., DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered October 2, 2013. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We agree with defendant that his " 'waiver of his right to appeal was invalid because [County Court] conflated the appeal waiver with the rights automatically waived by the guilty plea' " (*People v Hawkins*, 94 AD3d 1439, 1439, *lv denied* 19 NY3d 974; *see People v Howington*, 144 AD3d 1651, 1652). Thus, defendant's remaining challenges are not encompassed by that waiver. Contrary to the remaining contention of defendant in his main brief, the sentence is not unduly harsh and severe.

Defendant's challenge in his pro se supplemental brief to the factual sufficiency of the plea allocution is not preserved for our review (*see generally People v Lopez*, 71 NY2d 662, 665), and it is lacking in merit in any event. No factual basis for the plea is required where, as here, "a defendant enters a negotiated plea to a lesser crime than the one charged" (*People v Johnson*, 23 NY3d 973, 975; *see People v Gibson*, 140 AD3d 1786, 1787, *lv denied* 28 NY3d 1072). We further conclude, contrary to defendant's contention in his pro se supplemental brief, that he was afforded meaningful representation inasmuch as he "receive[d] an advantageous plea and

nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Norman*, 128 AD3d 1418, 1419, *lv denied* 27 NY3d 1003 [internal quotation marks omitted]). To the extent that defendant's contentions regarding the plea and effective assistance of counsel are based upon matters outside the record, those matters should be addressed by a motion pursuant to CPL 440.10 (*see Norman*, 128 AD3d at 1419).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**912**

**KA 15-00007**

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICCARDO GIULIANO, ALSO KNOWN AS GUILIANO,
DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered June 10, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of failure to register and/or verify as a sex offender as a class E felony (Correction Law §§ 168-f [4]; 168-t) and sentencing him to a term of incarceration based on his admission that he violated conditions of his probation. We agree with defendant that the waiver of the right to appeal, although it encompassed the sentence of probation, does not encompass his challenge to the severity of the sentence imposed following his violations of probation (*see People v Williams*, 140 AD3d 1749, 1750, *lv denied* 28 NY3d 975; *People v Johnson*, 77 AD3d 1441, 1442, *lv denied* 15 NY3d 953). We nonetheless conclude that, in light of defendant's numerous admitted violations of probation, the maximum term of incarceration of 1⅓ to 4 years imposed by County Court is not unduly harsh or severe.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**913**

**KA 14-01549**

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHARLES E. FELTEN, DEFENDANT-APPELLANT.

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WILLIAMS HEINL MOODY BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered July 31, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**914**

**KA 16-01616**

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRUCE W. BUTLER, DEFENDANT-APPELLANT.

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered June 8, 2016. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of grand larceny in the second degree (Penal Law § 155.40 [1]). Contrary to the contention of defendant, the oral waiver of the right to appeal and the waiver contained in the written plea agreement establish that he knowingly, intelligently, and voluntarily waived his right to appeal (*see People v McArthur*, 149 AD3d 1568, 1568-1569; *see generally People v Lopez*, 6 NY3d 248, 256). Defendant's valid waiver of the right to appeal, which specifically included a waiver of the right to challenge "the conviction, sentence, and any proceedings that may result from this prosecution," encompasses his contention that the sentence imposed is unduly harsh and severe (*see Lopez*, 6 NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Defendant's contention that County Court failed to conduct a sufficient inquiry before determining that he violated the conditions of his interim probation is not preserved for our review (*see People v Wissert*, 85 AD3d 1633, 1633-1634, *lv denied* 17 NY3d 956; *People v Saucier*, 69 AD3d 1125, 1125-1126). In any event, defendant's contention is without merit. "[T]he summary hearing conducted by the court was sufficient pursuant to CPL 400.10 (3) to enable the court to 'assure itself that the information upon which it bas[ed] the sentence [was] reliable and accurate' " (*People v Rollins*, 50 AD3d 1535, 1536, *lv denied* 10 NY3d 939, quoting *People v Outley*, 80 NY2d 702, 712; *see*

*Saucier*, 69 AD3d at 1126). "[T]he court's inquiry into the matter was of sufficient depth to enable the court to determine that defendant failed to comply with the terms and conditions of his interim probation" (*Wissert*, 85 AD3d at 1634 [internal quotation marks omitted]). Indeed, defendant did not dispute the People's allegation that he failed to comply with the condition that he pay restitution to the victim.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**915**

**CA 16-00995**

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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IN THE MATTER OF HERBERT FARRINGTON,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

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

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Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered April 29, 2016 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.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**916**

**CA 16-01932**

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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IN THE MATTER OF CHARLES PETERSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TINA STANFORD, CHAIRWOMAN, NEW YORK STATE
DIVISION OF PAROLE, ET AL.,
RESPONDENTS-RESPONDENTS.

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CHARLES PETERSON, PETITIONER-APPELLANT PRO SE.

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

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered September 23, 2016 in a proceeding pursuant to CPLR article 78. The judgment denied the relief sought in the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the New York State Board of Parole (Board) denying his release to parole supervision. Contrary to petitioner's contention, there is no indication in the record that the Board relied on incorrect information concerning his criminal history in denying his request for parole release (*see Matter of Boccadisi v Stanford*, 133 AD3d 1169, 1170-1171; *Matter of Rivers v Evans*, 119 AD3d 1188, 1188-1189). Contrary to petitioner's further contention, Supreme Court properly denied the petition inasmuch as the Board considered the required statutory factors and adequately set forth its reasons for denying petitioner's application (*see Matter of Siao-Pao v Dennison*, 11 NY3d 777, 778), and inasmuch as the Board's determination does not exhibit "irrationality bordering on impropriety" (*Matter of Kenefick v Sticht*, 139 AD3d 1380, 1381, *lv denied* 28 NY3d 902). Petitioner's additional contentions—that respondents lacked jurisdiction over him by virtue of improper procedures and that he was denied due process of law by the Board's failure to follow its statutory mandates—were not raised in his administrative appeal, and petitioner therefore has failed to exhaust his administrative remedies with respect to them (*see Matter of Karlin v Cully*, 104 AD3d 1285,

1286; *Matter of Secore v Mantello*, 176 AD2d 1244, 1244).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**917**

**CA 16-00905**

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

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IN THE MATTER OF LAO SIHATHEP,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 6, 2016 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.

Frances E. Cafarell

Entered: June 30, 2017

Clerk of the Court

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

**918**

**CA 16-00904**

PRESENT: CENTRA, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

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IN THE MATTER OF HILTON WEBB,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 6, 2016 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.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**920**

**KA 16-00889**

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS EDWARDS, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered January 28, 2013. The judgment convicted defendant, upon his plea of guilty, of kidnapping 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 kidnapping in the second degree (Penal Law § 135.20). 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 Hassett*, 119 AD3d 1443, 1443-1444, *lv denied* 24 NY3d 961 [internal quotation marks omitted]). In addition, "there is no basis upon which to conclude that the court ensured '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 Jones*, 107 AD3d 1589, 1590, *lv denied* 21 NY3d 1075, quoting *People v Lopez*, 6 NY3d 248, 256). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**921**

**KA 15-01203**

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBIN J. SMITH, DEFENDANT-APPELLANT.

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 4, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the third degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of criminal possession of stolen property in the third degree (Penal Law § 165.50). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). Defendant's waiver of the right to appeal was a "general unrestricted waiver" that encompasses his contention that the sentence imposed is unduly harsh and severe (*People v Hidalgo*, 91 NY2d 733, 737; *see Lopez*, 6 NY3d at 255-256; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**922**

**KA 16-00387**

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, NEMOYER, AND SCUDDER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN K. NWAJEI, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 13, 2015. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of criminal sexual act in the third degree (Penal Law § 130.40 [2]) and sentencing him to a determinate term of incarceration, followed by a period of postrelease supervision. We reject defendant's contention that he was deprived of his fundamental due process right to present a defense at the violation of probation hearing (*see generally Chambers v Mississippi*, 410 US 284, 302), inasmuch as County Court did not abuse its discretion in precluding the testimony of defendant's mother as irrelevant (*see generally People v Rodriguez*, 149 AD3d 464, 466). We further reject defendant's contention that the court "prematurely end[ed]" the violation of probation hearing. The record establishes that the court properly ended the hearing after defense counsel rested his case.

Defendant's contention that the court erred in denying defense counsel's request after the conclusion of the hearing to be relieved of his assignment is unpreserved for our review inasmuch as defendant did not join in defense counsel's request (*see People v Youngblood*, 294 AD2d 954, 955, *lv denied* 98 NY2d 704; *cf. People v Tineo*, 64 NY2d 531, 535-536). In any event, we conclude that the court did not abuse its discretion in denying defense counsel's request, given the timing of the request (*see generally People v O'Daniel*, 24 NY3d 134, 138; *People v Arroyave*, 49 NY2d 264, 271-272), and the fact that it was based on defense counsel's frustration with defendant's refusal to

accept counsel's recommendation with respect to a plea offer (*see People v Woodring*, 48 AD3d 1273, 1274, *lv denied* 10 NY3d 846). Finally, we reject defendant's contention that his sentence is unduly harsh and severe.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**925**

**KA 15-01966**

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENRY C. MARLING, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered November 9, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was knowing, intelligent and voluntary (*see People v Lopez*, 6 NY3d 248, 256), and we conclude that the valid waiver encompasses his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**926**

**KA 14-00728**

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY P. WEISBROD, DEFENDANT-APPELLANT.

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WILLIAMS HEINL MOODY BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ANDREW R. KELLY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered January 7, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument 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 forged instrument in the second degree (Penal Law § 170.25). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver constitutes a general unrestricted waiver that forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255-256; *People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**927**

**KA 15-00940**

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCELLUS J. PIERCE, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 16, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the third degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the third degree (Penal Law §§ 110.00, 160.05) and grand larceny in the fourth degree (§ 155.30 [8]). Contrary to defendant's contention, we conclude that "[t]he plea colloquy and the written waiver of the right to appeal signed [and acknowledged in County Court] by defendant demonstrate that [he] knowingly, intelligently and voluntarily waived the right to appeal," including the right to appeal the severity of the sentence (*People v Farrara*, 145 AD3d 1527, 1527 [internal quotation marks omitted]; *see People v Ramos*, 7 NY3d 737, 738). Defendant's valid waiver forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**928**

**KA 16-00047**

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL PUFF, DEFENDANT-APPELLANT.

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

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

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Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered November 23, 2015. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing 10 points under the risk factor based on the recency of a prior felony offense inasmuch as the prior felony conviction occurred more than three years before the instant offense. We reject that contention. Although the instant offense was committed on October 21, 1998, and defendant was convicted of a prior felony offense more than three years earlier, on March 23, 1995, the presentence report establishes that defendant was sentenced to two separate periods of incarceration during the period between the prior conviction and the date of the instant offense. We conclude that evidence of those two terms of incarceration, one for approximately one year and nine months, and the other for approximately 45 days, is sufficient to "establish[ ] by clear and convincing evidence that defendant was incarcerated for sufficient periods to reduce the time between the conviction for the prior offense and the date of the instant offense to within the requisite three-year period" (*People v Weathersby*, 61 AD3d 1382, 1382-1383, *lv denied* 13 NY3d 701).

Defendant failed to preserve for our review his contention that he was entitled to a downward departure to a level one risk inasmuch as he failed to request such a departure (*see People v Ratcliff*, 53 AD3d 1110, 1110, *lv denied* 11 NY3d 708). In any event, we conclude

that "defendant failed to establish his entitlement to a downward departure from his presumptive risk level inasmuch as he failed to establish the existence of a mitigating factor by the requisite preponderance of the evidence" (*People v Nilsen*, 148 AD3d 1688, 1689, *lv denied* ___ NY3d ___ [June 8, 2017]; *see generally People v Gillotti*, 23 NY3d 841, 861).

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

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

**929**

**KA 15-00237**

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER WEAKFALL, DEFENDANT-APPELLANT.

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THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered August 7, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal mischief 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 mischief in the second degree (Penal Law § 145.10). Defendant forfeited his challenge to the legal sufficiency of the evidence by pleading guilty (*see People v Feidner*, 109 AD3d 1086, 1086). Indeed, "it would be logically inconsistent to permit a defendant to enter a plea of guilty based on particular admitted facts, yet to allow that defendant contemporaneously to reserve the right to challenge on appeal the sufficiency of those facts to support a conviction, had there been a trial" (*People v Plunkett*, 19 NY3d 400, 405-406). Furthermore, the sentence is not unduly harsh or severe.

Entered: June 30, 2017

Frances E. Cafarell
Clerk of the Court

**MOTION NOS. (153-154/96) KA 05-01122. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 05-01123. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. (APPEAL NO. 2.)** -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, LINDLEY, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (114/10) KA 08-02140. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTONIO D. RUTLEDGE, DEFENDANT-APPELLANT. --** Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (1450/12) KA 11-00847. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM M. DEAN, DEFENDANT-APPELLANT. --** Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (1037/15) KA 13-02162. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERRANCE B. HINES, DEFENDANT-APPELLANT. --** Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NOS. (267-268/17) KA 14-00575. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN V. BYNG, DEFENDANT-APPELLANT. (APPEAL NO. 1.)**

**KA 14-00574. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN V. BYNG, DEFENDANT-APPELLANT. (APPEAL NO. 2.)** -- Motion for reargument denied. PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed June 30, 2017.)

**MOTION NO. (325/17) CA 16-00689. -- ANITA A. VITULLO, PLAINTIFF-RESPONDENT, V NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-APPELLANT. (APPEAL NO. 1.) --** Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (326/17) CA 16-00146. -- IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNT OF HSBC BANK USA, N.A., AS TRUSTEE OF THE TRUST UNDER AGREEMENT DATED JANUARY 21, 1957, SEYMOUR H. KNOX, GRANTOR, FOR THE BENEFIT OF THE ISSUE OF SEYMOUR H. KNOX, III, FOR THE PERIOD JANUARY 21, 1957 TO NOVEMBER 3, 2005. (PROCEEDING NO. 1.) IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF HSBC BANK USA, N.A., AS TRUSTEE OF THE TRUST UNDER AGREEMENT DATED JANUARY 21, 1957, SEYMOUR H. KNOX, GRANTOR, FOR THE BENEFIT OF THE ISSUE OF SEYMOUR H. KNOX, III, FOR THE PERIOD NOVEMBER 4, 2005 TO JUNE 25, 2012. (PROCEEDING NO. 2.) IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF W.A. READ KNOX, SUCCESSOR TRUSTEE, JEAN R. KNOX, AND HSBC BANK USA, N.A., AS TRUSTEES OF THE TRUST UNDER ARTICLE THIRD OF THE WILL OF SEYMOUR H. KNOX, III,**

**DECEASED, FOR THE PERIOD JULY 16, 1998 TO NOVEMBER 3, 2005. (PROCEEDING NO. 3.) IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF W.A. READ KNOX, SUCCESSOR TRUSTEE, JEAN R. KNOX, AND HSBC BANK USA, N.A., AS TRUSTEES OF THE TRUST UNDER ARTICLE THIRD OF THE WILL OF SEYMOUR H. KNOX, III, DECEASED, FOR THE PERIOD NOVEMBER 4, 2005 TO SEPTEMBER 4, 2012. (PROCEEDING NO. 4.) IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNT OF W.A. READ KNOX, SUCCESSOR TRUSTEE, JEAN R. KNOX AND HSBC BANK USA, N.A., AS TRUSTEES OF THE TRUST UNDER ARTICLE SEVENTH OF THE WILL OF SEYMOUR H. KNOX, III, DECEASED, FOR THE BENEFIT OF JEAN R. KNOX (MARITAL TRUST) FOR THE PERIOD JUNE 3, 1996 TO NOVEMBER 3, 2005. (PROCEEDING NO. 5.) IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF W.A. READ KNOX, SUCCESSOR TRUSTEE, JEAN R. KNOX AND HSBC BANK USA, N.A., AS TRUSTEES OF THE TRUST UNDER ARTICLE SEVENTH OF THE WILL OF SEYMOUR H. KNOX, III, DECEASED, FOR THE BENEFIT OF JEAN R. KNOX (MARITAL TRUST) FOR THE PERIOD NOVEMBER 4, 2005 TO JANUARY 31, 2013. (PROCEEDING NO. 6.) HSBC BANK USA, N.A., PETITIONER-APPELLANT; W.A. READ KNOX, SEYMOUR H. KNOX, IV, AVERY KNOX, HELEN KNOX KEILHOLTZ AND JEAN READ KNOX, OBJECTANTS-RESPONDENTS. (APPEAL NO. 1.) --** Motion for reargument denied. PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (330/17) CA 16-01568. -- ANITA A. VITULLO, PLAINTIFF-APPELLANT, V NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-RESPONDENT.**

**(APPEAL NO. 2.) --** Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (331/17) CA 16-01627. -- IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNTS OF HSBC BANK USA, N.A., AS TRUSTEE OF THE TRUST UNDER AGREEMENT DATED JANUARY 21, 1957, SEYMOUR H. KNOX, GRANTOR, FOR THE BENEFIT OF THE ISSUE OF SEYMOUR H. KNOX, III, FOR THE PERIOD JANUARY 21, 1957 TO NOVEMBER 3, 2005, AND NOVEMBER 4, 2005 TO JUNE 25, 2012. HSBC BANK USA N.A., PETITIONER-APPELLANT, V SEYMOUR H. KNOX, IV, W.A. READ KNOX, AVERY KNOX, HELEN KNOX KEILHOLTZ, OBJECTANTS-RESPONDENTS, AND AURORA KNOX, RESPONDENT. (APPEAL NO. 2.) --** Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CARNI, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (350/17) CA 15-02034. -- IN THE MATTER OF KAMALA D. HARRIS, ATTORNEY GENERAL OF STATE OF CALIFORNIA, PETITIONER-RESPONDENT, V SENECA PROMOTIONS, INC., RESPONDENT. NATIVE WHOLESALE SUPPLY COMPANY, APPELLANT. --** Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND NEMOYER, JJ. (Filed June 30, 2017.)

**MOTION NO. (403/17) KA 16-01415. -- THE PEOPLE OF THE STATE OF NEW YORK,**

**RESPONDENT, V JERRY MASSEY, DEFENDANT-APPELLANT. --** Motion for reargument, and for other relief, granted in part and, upon reargument, the memorandum and order entered April 28, 2017 (140 AD3d 1524) is amended by deleting the second sentence of the second paragraph of the memorandum and substituting the following sentences: "As a preliminary matter, that contention survives defendant's waiver of the right to appeal (*see id.*). Contrary to the People's contention, although defendant initially withdrew his motion to withdraw the guilty plea, defendant's contention is properly before us inasmuch as the record reflects that the court allowed defendant to reinstate his motion, and then the court expressly denied the motion (*cf. People v Harris*, 97 AD3d 1111, 1112, *lv denied* 19 NY3d 1026). Nevertheless, we reject that contention. Defendant's terse answers to the court's questions do not indicate that he failed to understand the nature and consequences of his plea (*see People v Dorrah*, 50 AD3d 1619, 1619, *lv denied* 11 NY3d 736). Moreover, it is well established that the denial of a motion to withdraw a guilty plea is not an abuse of discretion absent 'some evidence of innocence, fraud, or mistake in inducing the plea' (*People v Noce*, 145 AD3d 1456, 1457 [internal quotation marks omitted]; *see People v Ernst*, 144 AD3d 1605, 1606, *lv denied* 28 NY3d 1144), and there is no such evidence here. Although defendant alleges that the prosecutor promised him the opportunity to withdraw his guilty plea if he provided information concerning other crimes, the record establishes that defendant refused to cooperate with the prosecutor in that regard. Furthermore, the minutes of the plea colloquy belie defendant's belated assertions of innocence, and

thus we conclude that the court did not abuse its discretion in denying his motion without a hearing (*see Dale*, 142 AD3d at 1289; *People v Miles*, 138 AD3d 1350, 1351, *lv denied* 28 NY3d 934)." PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN AND TROUTMAN, JJ. (Filed June 30, 2017.)

**MOTION NO. (454/17) CA 15-00733. -- NNPL TRUST SERIES 2012-1, PLAINTIFF-RESPONDENT, V DIANNE L. LUNN, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 2.) --** Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (457/17) CA 16-01638. -- NICHOLAS DOMINICK AND LORRAINE J. DOMINICK, PLAINTIFFS-RESPONDENTS, V CHARLES MILLAR & SON CO., CHARLES MILLAR SUPPLY, INC., MILLAR SUPPLY, INC., PACEMAKER MILLAR STEEL & INDUSTRIAL SUPPLY COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO CHARLES MILLAR & SON SUPPLY, INC., PACEMAKER MILLAR STEEL & INDUSTRIAL SUPPLY OF BINGHAMTON, INC., PACEMAKER STEEL & ALUMINUM OF BINGHAMTON CORP., PACEMAKER STEEL AND PIPING CO., INC., INDIVIDUALLY AND AS SUCCESSOR TO CHARLES MILLAR, PACEMAKER STEEL WAREHOUSE INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 1.) --** Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (458/17) CA 16-02017. -- NICHOLAS DOMINICK AND LORRAINE J. DOMINICK, PLAINTIFFS-RESPONDENTS, V CHARLES MILLAR & SON CO., CHARLES MILLAR SUPPLY, INC., MILLAR SUPPLY, INC., PACEMAKER MILLAR STEEL & INDUSTRIAL SUPPLY COMPANY, INC., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO CHARLES MILLAR & SON SUPPLY, INC., PACEMAKER MILLAR STEEL & INDUSTRIAL SUPPLY OF BINGHAMTON, INC., PACEMAKER STEEL & ALUMINUM OF BINGHAMTON CORP., PACEMAKER STEEL AND PIPING CO., INC., INDIVIDUALLY AND AS SUCCESSOR TO CHARLES MILLAR, PACEMAKER STEEL WAREHOUSE INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 2.) --** Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (595/17) CA 16-02026. -- IN THE MATTER OF LAURENCE R. GOODYEAR, DECEASED. DANIEL M. GOODYEAR AND WENDY GRISWOLD, PETITIONERS-RESPONDENTS, V FREDERICK YOUNG, BEVERLY H. YOUNG, JOHN F. YOUNG, JAMES R. YOUNG, JEFFREY K. YOUNG, F.J. YOUNG COMPANY, JKLM ENERGY, LLC, AND SWEPI, LP, RESPONDENTS-APPELLANTS. --** Motion for reargument denied. PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (617/17) CA 16-02043. -- IN THE MATTER OF MARGARET WOOSTER, CLAYTON S. “JAY” BURNEY, JR., LYNDA K. STEPHENS AND JAMES E. CARR, PETITIONERS-APPELLANTS-RESPONDENTS, V QUEEN CITY LANDING, LLC, RESPONDENT-RESPONDENT-APPELLANT, CITY OF BUFFALO PLANNING BOARD AND CITY OF**

**BUFFALO COMMON COUNCIL, RESPONDENTS-RESPONDENTS. (PROCEEDING NO. 1.) IN THE MATTER OF BUFFALO NIAGARA RIVERKEEPERS, INC., PETITIONER-APPELLANT-RESPONDENT, V CITY OF BUFFALO, RESPONDENT-RESPONDENT, AND QUEEN CITY LANDING, LLC, RESPONDENT-RESPONDENT-APPELLANT. (PROCEEDING NO. 2.) (APPEAL NO. 1.) --** Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND SCUDDER, JJ. (Filed June 30, 2017.)

**MOTION NO. (619/17) CA 16-01958. -- LLOYD PICHE, PLAINTIFF-APPELLANT, V SYNERGY TOOLING SYSTEMS, INC., C.V.M. ELECTRIC, INC., DEFENDANTS-RESPONDENTS, AND N. CHOOPS PAINTING AND DECORATING, INC., DEFENDANT. SYNERGY TOOLING SYSTEMS, INC., THIRD-PARTY PLAINTIFF, V AMHERST ACOUSTICAL, INC., THIRD-PARTY DEFENDANT. --** Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND SCUDDER, JJ. (Filed June 30, 2017.)

**KA 14-01210 AND KA 14-01211. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM H. HOWELL, DEFENDANT-APPELLANT.** -- Judgments unanimously affirmed. Counsel’s motion to be relieved of assignments granted (*see People v Crawford*, 71 AD2d 38). (Appeals from Judgments of the Monroe County Court, Hon. John L. DeMarco, J. - Burglary, 3rd Degree). PRESENT: WHALEN, P.J., CARNI, LINDLEY, CURRAN, AND SCUDDER, JJ. (Filed June 30, 2017.)