SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 11, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

JoAnn M. Wahl, CLERK

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1255

KA 06-02312

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON M. KOLUPA, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ESTHER COHEN LEE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered March 30, 2006. The judgment convicted defendant, upon a jury verdict, of attempted rape in the first degree, sexual abuse in the first degree, criminal sexual act in the first degree, attempted sexual abuse in the first degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice by directing that the sentences imposed on counts one through four of the indictment shall run concurrently with respect to each other and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, criminal sexual act in the first degree (Penal Law § 130.50 [3]) and attempted rape in the first degree (§§ 110.00, 130.35 [3]). Contrary to defendant's contention, the unsworn testimony of the seven-year-old victim was sufficiently corroborated by evidence of defendant's opportunity, the testimony concerning defendant's statements to the police and the testimony of other witnesses (*see generally People v Groff*, 71 NY2d 101, 109-110). "Strict corroboration of every material element of the charged crime is not required, as the purpose of corroboration is to ensure the trustworthiness of the unsworn testimony rather than [to] prove the charge itself" (*People v Petrie*, 3 AD3d 665, 667; *see Groff*, 71 NY2d at 108-110).

Contrary to the further contention of defendant, County Court properly determined that a police officer's alleged promise to charge defendant with a misdemeanor, issue him an appearance ticket and release him did not render his statements to the police inadmissible pursuant to CPL 60.45 (2) (b) (i). Inasmuch as some of defendant's

inculpatory statements were made before the alleged promise was given, we conclude that there is no risk that the promise caused defendant to incriminate himself falsely (*see generally People v Carrillo*, 257 AD2d 780, 782-783, *lv denied* 93 NY2d 967). In any event, considering the totality of the circumstances in this case (*see People v Anderson*, 42 NY2d 35, 38), we conclude that the alleged promise that defendant would be charged with a misdemeanor, issued an appearance ticket and released is not one that created a substantial risk of false incrimination during the course of the two-hour interview with the police (*see People v Williamson*, 245 AD2d 966, 967-968, *lv denied* 91 NY2d 946; *People v Hamelinck*, 222 AD2d 1024, *lv denied* 87 NY2d 921; *see also People v Alexander*, 51 AD3d 1380, 1381-1382, *lv denied* 11 NY3d 733).

Finally, we reject defendant's contention that the sentences imposed on the counts of attempted rape in the first degree and sexual abuse in the first degree must run concurrently as a matter of law (*see generally People v Rosas*, 8 NY3d 493, 496-497; *People v Laureano*, 87 NY2d 640, 643). We conclude, however, that the imposition of consecutive sentences with respect to counts one through four of the indictment renders the sentence unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences imposed on those counts shall run concurrently with respect to each other (*see* CPL 470.15 [6] [b]).

All concur except MARTOCHE, J.P., and CENTRA, J., who dissent in part in accordance with the following Memorandum: We respectfully dissent in part. In our view, the evidence is legally insufficient to support the conviction of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [3]), sexual abuse in the first degree (§ 130.65 [3]) and criminal sexual act in the first degree (§ 130.50 [3]). We disagree with the majority that the unsworn testimony of the seven-year-old victim was sufficiently corroborated by testimony concerning defendant's statements to the police and the testimony of other witnesses.

"The corroboration standard . . . requires proof of circumstances tending to prove the material facts of the crime and tending to connect the defendant to that crime" (*People v Guerra*, 178 AD2d 434, 434-435; *see generally People v Groff*, 71 NY2d 101, 109). Here, however, the two physicians who examined the victim testified that they found nothing of significance in their examination of the victim's genitals. Although the testimony concerning defendant's statements to the police established that defendant admitted that he exposed himself to the victim, there was no evidence that defendant admitted that he committed any other physical acts with respect to the victim. We thus conclude that defendant's testimony tended to prove only the material facts of the lesser crimes of which defendant was convicted, attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]), but failed to prove the material facts of the remaining crimes (*see Guerra*, 178 AD2d at 435). We therefore would modify the judgment by reversing those parts convicting defendant of attempted rape in the first degree, sexual abuse in the first degree and criminal sexual act

in the first degree and dismissing counts one through three of the indictment.

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1492

CA 08-00705

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

DAVID CHRISTA CONSTRUCTION, INC., AND HOWARD MILLS, AS SUPERINTENDENT OF INSURANCE OF STATE OF NEW YORK AND ANCILLARY RECEIVER OF RELIANCE INSURANCE COMPANY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

AMERICAN HOME ASSURANCE COMPANY, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO (FRANK G. GODSON OF COUNSEL), FOR PLAINTIFF-APPELLANT DAVID CHRISTA CONSTRUCTION, INC.

CRAMER, SMITH & LEACH, P.C., SYRACUSE (RALPH S. ALEXANDER OF COUNSEL), FOR PLAINTIFF-APPELLANT HOWARD MILLS, AS SUPERINTENDENT OF INSURANCE OF STATE OF NEW YORK AND ANCILLARY RECEIVER OF RELIANCE INSURANCE COMPANY.

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

Appeals from an order of the Supreme Court, Wayne County (Stephen R. Sirkin, A.J.), entered October 31, 2007 in a declaratory judgment action. The order denied the motions of plaintiffs insofar as they sought summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, those parts of the motions seeking summary judgment are granted, and judgment is granted in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that defendant American Home Assurance Company is obligated to provide primary coverage for the defense and indemnification of plaintiff David Christa Construction, Inc. in the underlying action and that plaintiff Howard Mills, as Superintendent of Insurance of State of New York and ancillary receiver of Reliance Insurance Company, is obligated to provide excess coverage to plaintiff David Christa Construction, Inc. in the underlying action.

Memorandum: Daniel Roosa, an employee of Spring Lake Excavating, Inc. (Spring Lake), was injured while working on a construction

project at Cornell University (project). Plaintiff David Christa Construction, Inc. (Christa) was the general contractor on the project and held a commercial general liability insurance policy from United Pacific Insurance Company, a subsidiary of Reliance Insurance Company (collectively, United). In its subcontract with Christa, Spring Lake agreed to procure liability insurance naming Christa as an additional insured. Spring Lake obtained a comprehensive liability insurance policy from American Home Assurance Company (defendant) that included as an "[a]dditional [a]ssured[]" (hereafter, additional insured) any organization to which Spring Lake "agreed, by written contract, to provide coverage, but only with respect to operations performed by or on behalf of" Spring Lake. Roosa and his wife commenced a Labor Law and common-law negligence action against, inter alia, Christa, and Christa subsequently commenced a third-party action against Spring Lake.

Before us on this appeal are consolidated actions. The first is an action commenced by Christa seeking, inter alia, a declaration that it is covered under defendant's policy and that defendant is obligated to defend and indemnify Christa in the underlying action. The second is an action commenced by plaintiff Superintendent of Insurance of State of New York and ancillary receiver of Reliance Insurance Company (plaintiff Superintendent), seeking, inter alia, a declaration that defendant's obligation to defend and indemnify Christa in the underlying action is primary with respect to any obligations of plaintiff Superintendent and any funds available under the receivership. In a prior appeal, we concluded that "Supreme Court properly denied defendant's motion insofar as it sought a declaration concerning the priority of coverage among the applicable insurance policies," i.e., defendant's policy and two other policies, based on defendant's failure to join one of those insurers as a necessary party (*David Christa Constr., Inc. v American Home Assur. Co.*, 41 AD3d 1211, 1211).

In this action, Christa moved, inter alia, for summary judgment declaring that defendant is obligated to provide primary coverage for the defense and indemnification of Christa in the underlying action and that "the obligations on the part of [United] and [plaintiff Superintendent] as Ancillary Receiver are purely excess and secondary in nature." Plaintiff Superintendent also moved, inter alia, for summary judgment declaring that defendant is obligated to provide primary coverage for the defense and indemnification of Christa and that any obligations of plaintiff Superintendent are excess. Plaintiffs appeal from an order denying both motions insofar as they sought summary judgment, based on the court's determination that "there is a question of fact requiring certain discovery before the matter of the priorities of insurance coverage can be finally determined . . . ." While this appeal was pending, the jury rendered a verdict against Christa and in favor of Spring Lake in the trial of Christa's third-party action against Spring Lake in the underlying action, and the court dismissed the third-party complaint.

We conclude that the court erred in denying plaintiffs' respective motions insofar as they sought summary judgment declaring

the priority of insurance coverage. We agree with plaintiffs that the policies of United and defendant, when read together, unambiguously provide that the coverage provided by defendant is primary and that the coverage provided by United, and thus plaintiff Superintendent by virtue of the receivership, is excess. The scope of insurance coverage obtained by a general contractor and subcontractor "must be determined by the terms of the policies, not the terms of the subcontract" (*United States Fid. & Guar. Co. v CNA Ins. Cos.*, 208 AD2d 1163, 1165). Here, the additional insured provision of defendant's policy was triggered when Spring Lake agreed in the subcontract agreement to obtain liability insurance and to list Christa as an additional insured. The well-settled definition of the term "additional insured" is "an entity enjoying the same protection as the named insured" (*Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [internal quotation marks omitted]). Under defendant's policy, the coverage afforded to Spring Lake was to be excess over any other insurance available to it "other than [i]nsurance that is excess" to defendant's policy. Inasmuch as Christa was an additional insured, defendant likewise was obligated to provide Christa with excess coverage unless other insurance available to Christa provided only excess, rather than primary, coverage. United's policy unambiguously provided that it was to be excess over any other insurance covering Christa and on which it was not the named insured, which would include defendant's policy. Thus, United's policy provided Christa with excess coverage over defendant's policy.

We also agree with plaintiffs that defendant is required to defend and indemnify Christa in the underlying action, regardless of the dismissal of the third-party complaint against Spring Lake. The language of defendant's additional insured provision "focuses not upon the precise cause of the accident, as defendant[] urge[s], but upon the general nature of the operation in the course of which the injury was sustained" (*Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83, 83). The parties do not dispute that Roosa was employed by Spring Lake and injured while performing construction work for Spring Lake. Consequently, we conclude that Roosa was injured while acting "with respect to operations performed by or on behalf of" Spring Lake and that defendant is obligated to provide coverage to Christa as an additional insured pursuant to its policy. The fact that Roosa's injury may have been caused by Christa's negligence is immaterial with respect to the issue whether Christa is covered under defendant's policy (*see Tishman Constr. Corp. of N.Y. v American Mfrs. Mut. Ins. Co.*, 303 AD2d 323, 324; *Turner Constr. Co. v Pace Plumbing Corp.*, 298 AD2d 146, 147; *Consolidated Edison Co. of N.Y. v United States Fid. & Guar. Co.*, 266 AD2d 9; *Lim v Atlas-Gem Erectors Co.*, 225 AD2d 304, 305-306).

We thus conclude that defendant is obligated to provide primary coverage for the defense and indemnification of Christa in the underlying action and that plaintiff Superintendent is obligated to provide excess coverage pursuant to United's policy.

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1533

CA 08-01451

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

GERTRUDE KASH, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

JEWISH HOME AND INFIRMARY OF ROCHESTER, N.Y., INC., JEWISH HEALTH CARE SYSTEM OF ROCHESTER, INC., AND LARS-GORAN LARSSON, M.D., DEFENDANTS-RESPONDENTS.

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

THE SOMERSET FIRM, LLC, CANANDAIGUA (MARGARET E. SOMERSET OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JEWISH HOME AND INFIRMARY OF ROCHESTER, N.Y., INC. AND JEWISH HEALTH CARE SYSTEM OF ROCHESTER, INC.

HIRSCH & TUBIOLO, P.C., ROCHESTER (CHRISTOPHER S. NOONE OF COUNSEL), FOR DEFENDANT-RESPONDENT LARS-GORAN LARSSON, M.D.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered November 26, 2007 in a medical malpractice action. The order denied the motion of plaintiff for leave to amend the complaint by adding a cause of action under Public Health Law § 2801-d.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the motion is granted upon condition that plaintiff shall serve the proposed amended complaint within 20 days of service of the order of this Court with notice of entry.

Opinion by PINE, J.:

I

Plaintiff commenced this action seeking damages for injuries she sustained as the result of defendants' alleged medical malpractice. Several months after commencing the action, plaintiff moved for leave to amend the complaint by adding a separate cause of action under Public Health Law § 2801-d. For the reasons that follow, we conclude that Supreme Court erred in denying the motion.

II

Public Health Law § 2801-d was enacted in 1975 and provides in

pertinent part:

> "Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation, except as hereinafter provided. For purposes of this section a 'right or benefit' of a patient of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation . . . The remedies provided in this section are *in addition to and cumulative with any other remedies available to a patient, at law or in equity or by administrative proceedings*" (emphasis added).

The statute further provides that any damages recovered by a patient "shall be exempt for purposes of determining initial or continuing eligibility for [Medicaid]" (§ 2801-d [5]). Such significant relief is not available in a traditional tort cause of action. Furthermore, both punitive damages and attorneys' fees may be awarded in a section 2801-d cause of action (*see* § 2801-d [2], [6]).

III

This Court first addressed Public Health Law § 2801-d in 1995 in *Goldberg v Plaza Nursing Home Comp*. (222 AD2d 1082), a case in which the plaintiff asserted traditional tort causes of action including wrongful death, as well as a cause of action under section 2801-d. Relying exclusively on the legislative history of the statute, we concluded that "it is unlikely that the Legislature envisioned extension of the principle of strict liability to residential health care facilities for injuries and damages that are traditionally the subject of tort liability" (*id.* at 1084; *see also Begandy v Richardson*, 134 Misc 2d 357, 360-361). We further stated that "the purpose [of the statute] was not to create a new personal injury cause of action based on negligence when that remedy already existed" (*Goldberg*, 222 AD2d at 1084). Thus, because the plaintiff "possessed the right to bring a[n] . . . action predicated upon [the] defendant's negligence" (*id.*), we granted the defendant nursing home's motion seeking summary judgment dismissing the section 2801-d cause of action (*see id.* at 1083-1084).

We next addressed Public Health Law § 2801-d in 2002, when we "decline[d] to apply the reasoning set forth in *Goldberg*" (*Doe v Westfall Health Care Ctr.*, 303 AD2d 102, 109). We permitted the plaintiff to assert a section 2801-d cause of action despite the fact that the plaintiff also asserted traditional tort causes of action (*see id.* at 109-112). In *Doe*, the plaintiff's decedent had been raped by an employee of the defendant nursing home (*see id.* at 104). As a

result of the rape, she became pregnant and gave birth to a baby boy (*see id.*). The decedent later died from unrelated causes, and her mother, individually and as administratrix of her estate, commenced the action asserting, inter alia, traditional tort causes of action and a cause of action under section 2801-d (*see id.* at 104-105). Relying on the clear language of section 2801-d (4), we concluded that the plaintiff in *Doe* was entitled to assert both the section 2801-d cause of action and the traditional tort causes of action because "the Legislature ha[d] explicitly expressed its intent to add to the available tort remedies" (*id.* at 112). We noted, however, that the rape of the decedent was "precisely the sort of conduct that [section 2801-d] was designed to target[] but [that] recovery for such conduct [was] often barred for plaintiffs who sue at common law" (*id.* at 110). Thus, our determination was based in part on the fact that, although the tort causes of action asserted by the plaintiff had survived a motion to dismiss, they "ultimately [might] not survive a motion for summary judgment" (*id.* at 112).

As our dissenting colleagues note, there is no difficulty with the sufficiency of plaintiff's evidence in this action and no bar to recovery if negligence is found. Thus, we are not faced with the same concerns as in *Doe*. We nevertheless conclude that, pursuant to the express terms of the statute, plaintiff is entitled to assert a cause of action under Public Health Law § 2801-d, regardless of the possible merit of the medical malpractice cause of action.

IV

"As a general rule of statutory interpretation, application of a statute's clear language should not be ignored in favor of more equivocal evidence of legislative intent . . .[, and] the most direct way to effectuate the will of the Legislature is to give meaning and force to the words of its statutes" (*Desiderio v Ochs*, 100 NY2d 159, 169). Thus, " 'where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning' " (*Pultz v Economakis*, 10 NY3d 542, 547). The Court of Appeals has stated that,

> "[a]bsent ambiguity[,] the courts may not resort to rules of construction to broaden the scope and application of a statute[] because no rule of construction gives the court discretion to declare the intent of the law *when the words are unequivocal* . . . Lastly, [t]he courts are not free to legislate and if any unsought consequences result, *the Legislature is best suited to evaluate and resolve them*" (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 107 [internal quotation marks omitted]).

Because we conclude that the language of Public Health Law § 2801-d is clear and unambiguous, we are required to give effect to its plain meaning. The remedies set forth in section 2801-d "are *in addition to and cumulative with* any other remedies available to a

patient, at law or in equity or by administrative proceedings" (§ 2801-d [4] [emphasis added]). Therefore, although "plaintiff possessed the right to bring a[n] . . . action predicated upon defendant[s'] negligence" (*Goldberg*, 222 AD2d at 1084), we conclude that she is not precluded from asserting a separate cause of action under section 2801-d.

The dissenting opinion states that Public Health Law § 2801-d (4) "makes it clear that a plaintiff is not *limited* to a cause of action pursuant to that section," and thus he or she may elect whether to pursue traditional tort causes of action or a section 2801-d cause of action. In our view, the dissenters fail to consider the clear language of the statute that the remedies of section 2801-d "are in addition to and cumulative with any other" right or remedy (§ 2801-d [4]). A plaintiff need not choose between traditional tort causes of action and a section 2801-d cause of action but, rather, may pursue both.

V

In concluding that we should adhere to our decisions in *Goldberg* and *Doe*, the dissenters rely on "the doctrine of stare decisis, which recognizes that legal questions, once resolved, should not be reexamined every time they are presented" (*Dufel v Green*, 198 AD2d 640, 640, *affd* 84 NY2d 795). In our view, "[a]lthough due deference should be accorded the doctrine of stare decisis in order to promote consistency and stability in the decisional law, we should not blindly follow an earlier ruling [that] has been demonstrated to be unsound simply out of respect for that doctrine" (*Brennin v Perales*, 163 AD2d 560, 562). "[T]he doctrine of stare decisis, like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question" (*Rumsey v New York & New England R.R. Co.*, 133 NY 79, 85; *see Matter of Eckart*, 39 NY2d 493, 498-499). Contrary to the statement of our dissenting colleagues, we are not "easily" casting aside the reasoned decisions of former members of this Court. At the time *Goldberg* was decided, it was the first appellate decision to address Public Health Law § 2801-d and, in *Doe*, this Court modified *Goldberg* in order to address a particularly heinous set of facts. We have concluded after careful consideration that it is our duty to reexamine those decisions and follow clear statutory language.

In adhering to the decision in *Doe*, our dissenting colleagues state that they would limit Public Health Law § 2801-d causes of action "to those cases in which recovery under a common-law cause of action would prove difficult or inadequate." We conclude, however, that such a rule is "unworkable" (*People v Damiano*, 87 NY2d 477, 489 [Simons, J., concurring]). In order to adhere to *Doe*, a court would be required to determine preliminarily whether recovery on the traditional tort causes of action will "prove difficult or

inadequate." Neither this Court in *Doe* nor the dissenters in this case have provided any criteria for such a determination. For example, how likely must it be that the traditional tort causes of action will fail before a section 2801-d cause of action will be permitted to stand, in accordance with *Doe*? This Court in *Doe* and the dissenters in this case have created an ambiguity not present in *Goldberg* and, in our view, that ambiguity creates the likelihood of inconsistent rulings and unpredictable results.

Since our holding in *Goldberg*, the First and Third Departments have permitted plaintiffs to assert both a Public Health Law § 2801-d cause of action and traditional tort causes of action (*see e.g. Leclaire v Fort Hudson Nursing Home, Inc.*, 52 AD3d 1101, 1102; *Ward v Eastchester Health Care Ctr., LLC*, 34 AD3d 247; *Fleming v Barnwell Nursing Home & Health Facilities*, 309 AD2d 1132, 1132-1133; *Zeides v Hebrew Home for Aged at Riverdale*, 300 AD2d 178, 178-179). Thus, the "lessons of time" and the clear language of section 2801-d have led us to conclude that *Goldberg*, as modified by *Doe*, "creates more questions than it resolves, [and that the law is] ultimately . . . better served by a new rule" (*People v Taylor*, 9 NY3d 129, 149).

While the dissenting opinion notes that neither the First Department nor the Third Department has analyzed the legislative history of Public Health Law § 2801-d or determined whether such a cause of action is proper in cases where the plaintiff could successfully recover under a traditional tort cause of action, we conclude that the omission of such an analysis in the decisions of those Departments implicitly recognizes that none is necessary. Where, as here, the clear and unambiguous language of the statute provides that the section 2801-d rights and remedies "are in addition to and cumulative with any other" right or remedy available to a patient (§ 2801-d [4]), there is no reason to look to the legislative history of the statute (*see generally Desiderio*, 100 NY2d at 169).

VI

Plaintiff is entitled to assert both a cause of action under Public Health Law § 2801-d and traditional tort causes of action. Accordingly, we conclude that the order should be reversed and plaintiff's motion granted upon condition that plaintiff shall serve the proposed amended complaint within 20 days of service of the order of this Court with notice of entry.

FAHEY and GORSKI, JJ., concur with PINE, J.; CENTRA, J., dissents and votes to affirm in the following Opinion in which SCUDDER, P.J., concurs:

INTRODUCTION

We respectfully dissent and would affirm the order denying plaintiff's motion seeking leave to amend the complaint by adding a cause of action under Public Health Law § 2801-d. In our view, plaintiff may not rely upon that statute because she has stated a

cause of action for medical malpractice that will not be difficult to prove.

FACTS

In February 2006 plaintiff became a long-term care resident of defendant Jewish Home and Infirmary of Rochester, N.Y., Inc., which is owned and operated by defendant Jewish Health Care System of Rochester, Inc. (collectively, Jewish Home). According to plaintiff, she suffered from a bladder retention problem and thus required straight catheterization in order to void her bladder. On March 5, 2006, however, a member of the nursing staff failed to perform the procedure, and plaintiff was required to leave her bed later in the evening in order to use the bathroom. While in the process of leaving her bed, her bladder spontaneously emptied onto the floor, and she slipped and fell. Over the next few days, plaintiff underwent diagnostic evaluations but was encouraged by the medical staff to attempt to ambulate and to attend physical therapy sessions. One of those evaluations was performed by defendant Lars-Goran Larsson, M.D., who allegedly failed to perform a neurological exam or even to note plaintiff's fall in his documentation of the evaluation.

Plaintiff's condition eventually worsened, causing plaintiff to experience severe pain, and she fell again on March 12, 2006 while attempting to ambulate. On March 15, 2006, plaintiff underwent a CT scan that revealed "a compression fracture of T7 and a compression deformity of T11." Nevertheless, defendants did not hospitalize plaintiff and allegedly "failed to follow any spinal cord precautions to guard against spinal cord injury." On March 18, 2006, plaintiff was visited by her son-in-law, a physician, who performed a neurological examination and ordered that plaintiff be rushed to a hospital for emergency evaluation of a potential spinal cord injury. At the hospital, plaintiff "was diagnosed with compression fractures of her thoracic spine . . . [as well as] a permanent spinal cord injury resulting in paraplegia and loss of bladder and bowel function."

Plaintiff commenced this action asserting a cause of action for medical malpractice. Specifically, plaintiff alleged that defendants failed "to properly perform straight catheterization as ordered by the nursing staff . . .[, which] was a departure from the standard of care for a reasonably prudent nurse or nursing home . . . [and] resulted in plaintiff slipping and falling and suffering an injury to her back." Plaintiff further alleged that "[t]he failure of defendants to diagnose and treat [her] compression fractures and . . . to provide spinal precautions after her first fall was a departure from the [relevant] standard of care . . . and resulted in her permanent spinal cord injury."

Five months after commencing this action, plaintiff moved for leave to amend the complaint by adding a cause of action against the Jewish Home pursuant to Public Health Law § 2801-d. Supreme Court denied the motion, relying on two of this Court's prior decisions.

PUBLIC HEALTH LAW § 2801-d

The majority sets forth the relevant provisions of Public Health Law § 2801-d. Section 2801-d (2) allows for compensatory damages in an amount no "less than [25%] of the daily per-patient rate of payment established for the residential health care facility." As noted by the majority, a plaintiff may also recover punitive damages and attorneys' fees for a cause of action pursuant to section 2801-d (*see* § 2801-d [2], [6]), and any damages recovered by a plaintiff "shall be exempt for purposes of determining initial or continuing eligibility for [Medicaid]" (§ 2801-d [5]).

Public Health Law § 2803-c sets forth various rights of patients in nursing homes, any violation of which could support a section 2801-d cause of action against the facility. Included in those rights is "the right to receive adequate and appropriate medical care" (§ 2803-c [3] [e]), which plaintiff relies upon to support her section 2801-d cause of action. Plaintiff also relies on alleged violations of the regulations governing nursing homes (*see e.g.* 10 NYCRR 415.12 [h] [2] ["The facility shall ensure that . . . each resident receives adequate supervision and assistive devices to prevent accidents"]).

PRECEDENT

We first examined Public Health Law § 2801-d in *Goldberg v Plaza Nursing Home Comp.* (222 AD2d 1082). In that case, the plaintiff alleged that the defendant nursing home's employees ignored the calls of her mother, the decedent, to release her from a restraint vest that she wore, and the decedent became agitated and was either strangled by the vest or suffered cardiac arrest (*see id.* at 1083). We concluded that Supreme Court should have granted the defendant's motion for summary judgment dismissing the section 2801-d cause of action (*see id.* at 1083-1084). Relying on the legislative history of the statute, as well as *Begandy v Richardson* (134 Misc 2d 357, 360-361), we concluded that the purpose of section 2801-d "was not to create a new personal injury cause of action based on negligence when that remedy already existed" (*Goldberg*, 222 AD2d at 1084). We noted that the plaintiff had the right to bring a wrongful death action predicated upon the defendant's negligence and that to allow the section 2801-d cause of action to stand "would authorize a cause of action under that section for every case based upon negligence and implicating a residential health care facility" (*id.*).

We examined Public Health Law § 2801-d again in *Doe v Westfall Health Care Ctr.* (303 AD2d 102, 104), a case in which the decedent was placed in a nursing home after she sustained a head injury in an automobile accident, leaving her in a chronic vegetative state. The decedent was raped by a male health aide at the facility and became pregnant, ultimately giving birth to a baby boy before dying the following year (*see id.* at 104). The plaintiff, decedent's mother, asserted causes of action for, inter alia, negligence and a violation of section 2801-d (*see id.*). We reexamined *Goldberg* and concluded "that the clear intent of section 2801-d was to expand the existing

remedies for conduct that, although constituting grievous and actionable violations of important rights, did not give rise to damages of sufficient monetary value to justify litigation" (*id.* at 109). We further concluded that the complained-of conduct in *Doe* "is precisely the sort of conduct that [section 2801-d] was designed to target, but recovery for such conduct is often barred for plaintiffs who sue at common law" (*id.* at 110). In that case, a negligence cause of action against the facility would have been difficult to establish "because of the [probable] absence of the requisite element of foreseeability, i.e., the facility's lack of prior knowledge of the [health aide's] criminal tendencies" (*id.* at 110). We concluded that "the Legislature could not have intended that [the] plaintiff be prevented from asserting a cause of action under [section 2801-d] merely because her simultaneously asserted common-law causes of action survived a motion to dismiss where, as here, those common[-]law causes of action ultimately may not survive a motion for summary judgment" (*id.* at 112). We therefore overruled our decision in *Goldberg* to the extent that "we determined therein that summary judgment dismissing the [section 2801-d] cause of action was appropriate despite doubt concerning the efficacy of the remaining common-law cause of action" (*id.*).

We also note that the First and Third Departments have allowed a Public Health Law § 2801-d cause of action to stand even when the plaintiff alleges a common-law cause of action (*see Leclaire v Fort Hudson Nursing Home, Inc.*, 52 AD3d 1101, 1102; *Ward v Eastchester Health Care Ctr., LLC*, 34 AD3d 247; *Fleming v Barnwell Nursing Home & Health Facilities,* 309 AD2d 1132, 1132-1133; *Zeides v Hebrew Home for Aged at Riverdale*, 300 AD2d 178, 178-179). Those cases, however, do not discuss the legislative history of the statute or analyze whether such a cause of action is proper when the plaintiff could successfully recover under a common-law cause of action.

ANALYSIS

The majority relies on the purportedly clear language of the statute and concludes that plaintiff is not precluded from asserting a cause of action under Public Health Law § 2801-d inasmuch as the remedies provided for in that section "are in addition to and cumulative with any other remedies available to a patient, at law or in equity or by administrative proceedings" (§ 2801-d [4]). The majority further concludes that our prior decisions should not be followed because they were unsound and contrary to reason. We disagree.

The doctrine of stare decisis "recognizes that legal questions, once resolved, should not be reexamined every time they are presented" (*Dufel v Green*, 198 AD2d 640, 640, *affd* 84 NY2d 795). " 'The doctrine . . . rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court changes' " (*People v Taylor*, 9 NY3d 129, 148). Stare decisis " 'is the preferred course because it promotes the evenhanded, predictable, and consistent

development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process' " (*id.*; *see People v Damiano*, 87 NY2d 477, 488-489 [Simons, J., concurring]; *Baden v Staples*, 45 NY2d 889, 892). We have examined the issue raised on this appeal not once, but twice. Certainly the learned jurists on this Court in the prior decisions were aware of the language of Public Health Law § 2801-d relied upon by the majority. The only changes to the body of law concerning that issue since our decision in *Doe* are the decisions of the First and Third Departments that, as noted above, did not provide any analysis with respect to whether a section 2801-d cause of action is appropriate when the plaintiff has a viable common-law cause of action. The lower court in this case explicitly relied on our decisions in *Goldberg* and *Doe* in denying the motion. We cannot agree with the majority's conclusion that our prior decisions should be so easily cast aside.

In our opinion, there are no compelling reasons "to overcome the sound demands of stare decisis" (*Hartford Ins. Co. of Midwest v Halt*, 223 AD2d 204, 212, *lv denied* 89 NY2d 813). The language of Public Health Law § 2801-d (4) makes it clear that a plaintiff is not *limited* to a cause of action pursuant to that section when he or she has other viable causes of action, such as one for negligence. In other words, a plaintiff may decide to assert a section 2801-d cause of action rather than one for negligence or medical malpractice. As we noted in *Doe*, the purpose of section 2801-d "was to expand the existing remedies for conduct that, although constituting grievous and actionable violations of important rights, did not give rise to damages of sufficient monetary value to justify litigation" (*id.* at 109). The Memorandum of the State Executive Department stated that the purpose of the statute was "[t]o provide patients in nursing homes, including facilities providing health-related services, with increased powers to enforce their rights to adequate treatment and care by providing them with a private right of action to sue for damages and other relief and enabling them to bring such suits as class actions" (Mem of State Exec Dept, 1975 McKinney's Session Laws of NY, at 1685). The Governor's Memorandum similarly stated that the statute would create "a patient's right of action against a facility [that] fails to meet required standards of care" (Governor's Mem approving L 1975, chs 648-660, 1975 McKinney's Session Laws of NY, at 1764). The State Executive Department further explained that the statute would increase the protection of nursing home patients by creating incentives to encourage private parties to help to protect their rights (*see* Mem of State Exec Dept, at 1685-1686). For example, the statute allows for class actions and fixes the minimum amount of damages, thus enabling the potential recovery to be large enough to encourage the private bar to commence actions on behalf of nursing home patients (*see id.* at 1686). In addition, the statute permits the award of attorneys' fees, which further encourages such representation (*see id.*).

In this case, rather than initially asserting a cause of action under Public Health Law § 2801-d, plaintiff elected to recover damages

by asserting a cause of action for medical malpractice. Plaintiff admits that she is now seeking damages under section 2801-d to ensure that she could "recover compensation for her injuries while retaining Medicaid eligibility to pay for her ongoing care," and "to keep at least a portion of her recovery safe from Medicaid recoupment." As we concluded in *Goldberg* and *Doe* and as the legislative history of section 2801-d demonstrates, however, that section was not meant to supplement *every* case asserting a common-law cause of action against a residential health care facility. The Legislature did not intend to allow a plaintiff to assert a section 2801-d cause of action in addition to common-law causes of action simply to allow the plaintiff to retain Medicaid eligibility or to render exempt from Medicaid recoupment any damages recovered by the plaintiff.

We conclude, as we did in *Doe*, that a Public Health Law § 2801-d cause of action should be limited to those cases in which recovery under a common-law cause of action would prove difficult or inadequate. Simply alleging a violation of a right enumerated in section 2803-c is not enough to allow a section 2801-d cause of action to stand. The provisions of section 2803-c, including the provision that a patient "shall have the right to receive adequate and appropriate medical care" (§ 2803-c [3] [e]), would encompass most negligence actions brought against a residential health care facility. In determining whether a section 2801-d cause of action is appropriate in a case where a residential health care facility allegedly deprived the plaintiff of some right or benefit, a court must examine the facts to determine the likelihood of success under the common-law causes of action asserted. In some cases, that determination cannot be made at the pleadings stage, in which event a motion for leave to amend the complaint to assert a cause of action under section 2801-d should be granted. Here, however, it is clear from the factual allegations of the complaint that this is a straightforward medical malpractice case against the facility, rather than a case envisioned by the Legislature as appropriate for a section 2801-d cause of action. This is not a case where an attorney would need the financial incentives of section 2801-d (2) and (6) in order to represent plaintiff. "There is no difficulty with the plaintiff['s] proof or any bar to recovery, if negligence is found, under standard common-law principles, nor any problem of damages" (*Bielewicz v Maplewood Nursing Home, Inc.*, 4 Misc 3d 475, 479).

Accordingly, we would affirm the order.

Entered: February 11, 2009 JoAnn M. Wahl
Clerk of the Court

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

1549

KA 04-01216

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SUSAN M. BERRYHILL, DEFENDANT-APPELLANT.

WILLIAM F. COUGHLIN, PUBLIC DEFENDER, MAYVILLE (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (LYNN S. HODGENS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered February 23, 2004. The judgment convicted defendant, upon her plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting her, upon a plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [2]), defendant contends that County Court erred in refusing to suppress her statements to the police. We reject that contention. The court properly determined that defendant was not in custody at the time she made her statements, and "the court's determination will not be disturbed where, as here, it is supported in the record" (*People v Little*, 259 AD2d 1031, 1032, *lv denied* 93 NY2d 926; *see generally People v Prochilo*, 41 NY2d 759, 761). We reject the further contention of defendant that she was misled by deceptive police tactics when they allegedly informed her that one of the individuals questioning her was a mental health professional (*see generally People v Tarsia*, 50 NY2d 1, 11). The record of the suppression hearing establishes that the police introduced the individual in question as a professor, and he informed defendant that he taught courses in "psychological stress evaluation." Also contrary to the contention of defendant, the police did not induce her to make her statements by making "false promises" to her (*see People v Van Kuren*, 1 AD3d 960, 961, *lv denied* 1 NY3d 635).

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

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

1580

CA 08-00965

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

PETER SIMPSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TRACE EQUIPMENT CORPORATION,
DEFENDANT-APPELLANT.

TRACE EQUIPMENT CORPORATION,
THIRD-PARTY PLAINTIFF,

V

PALLETS PLUS, INC., THIRD-PARTY
DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (LAURENCE F. SOVIK OF COUNSEL), FOR DEFENDANT-APPELLANT.

STOCKTON, BARKER & MEAD, LLP, ALBANY (ROBERT S. STOCKTON OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

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

Appeals from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered April 21, 2008 in a personal injury action. The order denied the motion of defendant for leave to make a late motion for summary judgment and for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the claim for failure to warn and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his hand came into contact with the blades of an economy notcher sold by defendant-third-party plaintiff, Trace Equipment Corporation (Trace), to plaintiff's employer, third-party defendant, Pallets Plus, Inc. (Pallets). A note of issue was filed on December 5, 2007 and, by letter dated January 3, 2008, Trace and Pallets were notified that the matter had been assigned to a specified justice. Included with that letter was a copy of the Justice's local rules, one of which was that "[s]ummary judgment motions must be made

within thirty days following filing of the note of issue." Trace and Pallets did not receive the letter and accompanying local rules until January 7, 2008, at which time the deadline for moving for summary judgment had already expired. Trace moved for leave to make a late motion for summary judgment and for summary judgment dismissing the complaint, and Pallets joined in the motion. We conclude that Supreme Court abused its discretion in denying that part of the motion seeking leave to make a late motion for summary judgment inasmuch as Trace established that it would have been impossible for it to comply with the court's truncated deadline. We therefore modify the order accordingly. In our view, Trace "provided a 'satisfactory explanation for the untimeliness' of the proposed summary judgment motion and therefore established good cause for the delay in making the motion" (*Cooper v Hodge*, 13 AD3d 1111, 1112, quoting *Brill v City of New York*, 2 NY3d 648, 652; *see* CPLR 3212 [a]).

We conclude that plaintiff has abandoned the claim for failure to warn. Plaintiff failed to oppose that part of the motion seeking summary judgment dismissing that claim and, indeed, he concedes that he is no longer pursuing such a claim. We therefore further modify the order accordingly. We conclude, however, that Trace failed to establish its entitlement to summary judgment dismissing the claim for design defect inasmuch as Trace failed to establish that the economy notcher "met all applicable industry standards for safety and was reasonably safe for its intended use when it was manufactured" (*Gian v Cincinnati Inc.*, 17 AD3d 1014, 1016; *cf. Wesp v Carl Zeiss, Inc.*, 11 AD3d 965, 967). In addition, Trace failed to establish that the actions of plaintiff were the sole proximate cause of his injuries. The evidence submitted by Trace in support of its motion raises triable issues of fact concerning the circumstances in which plaintiff's hand came into contact with the blades of the economy notcher (*cf. Donuk v Sears, Roebuck & Co.*, 52 AD3d 456; *Amaya v L'Hommedieu*, 6 AD3d 638).

Entered: February 11, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1588

KA 05-02504

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP FLOWERS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered September 2, 2005. 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 reversed on the law, the plea is vacated, that part of the motion seeking to suppress defendant's statements made to the police during the execution of the search warrant is granted and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: On appeal 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]), defendant contends that the search warrant in question was not issued upon probable cause and that County Court therefore erred in refusing to suppress physical evidence seized during the execution of the search warrant. We reject that contention. It is well settled that "probable cause may be supplied, in whole or in part, [by] hearsay information, provided [that] it satisfies the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted" (*People v Bahr*, 35 AD3d 909, 910, *lv denied* 8 NY3d 919 [internal quotation marks omitted]; *see People v Parris*, 83 NY2d 342, 346). Here, probable cause for the search warrant was supplied by the firsthand knowledge of an experienced confidential informant whose reliability was established based on his previous participation in three controlled buys of cocaine from the residence that was the subject of the search warrant. Moreover, the confidential informant met with police officers immediately before and after the prior controlled buys. We thus conclude that the People satisfied both prongs of the *Aguilar-Spinelli* test (*see People v*

Johnson, 66 NY2d 398, 403; *cf. People v Elwell*, 50 NY2d 231, 237-242).

We agree with defendant, however, that the court erred in refusing to suppress his statements made to the police during the execution of the search warrant. At that time, a narcotics officer asked defendant how much cash he had in his pockets, and defendant responded that he had approximately $600. The police then found over $600 on defendant's person. Defendant was subsequently asked by the narcotics officer if he was the owner of $60 found in the kitchen of the residence that was the subject of the search warrant. Defendant denied ownership of the $60 at that time. When the narcotics officer later asked him the same question, defendant again denied ownership of the $60. According to the testimony of the narcotics officer at the suppression hearing, however, defendant also stated that "the only thing that was his was that weed" and that he "just sold weed." At the time of those statements, defendant was handcuffed and had not been advised of his *Miranda* rights.

We conclude that those statements should have been suppressed. Contrary to the People's contention, they were not made in response to a routine processing question (*cf. People v Rodney*, 85 NY2d 289, 293-294; *People v Langston*, 243 AD2d 728, *lv denied* 91 NY2d 871, 875). Rather, we note that "the People may not rely on the pedigree exception if the question[], though facially appropriate, [is] likely to elicit incriminating admissions because of the circumstances of the particular case" (*Rodney*, 85 NY2d at 293; *see Pennsylvania v Muniz*, 496 US 582, 602 n 14). Here, the narcotics officer testified at the suppression hearing that he questioned defendant for the purpose of completing a form that was required in the event of "an arrest *for narcotics*" (emphasis added). Cash indisputably plays a significant role as circumstantial evidence in narcotics cases (*see e.g. People v Sykes*, 47 AD3d 501, *lv denied* 10 NY3d 817*; People v Gadsden*, 192 AD2d 1103, *lv denied* 82 NY2d 718; *People v Orta*, 184 AD2d 1052, 1054-1055), however, and we conclude that "an objective observer with the same knowledge concerning the suspect as the police had would conclude that the [question of the narcotics officer concerning the ownership of cash found in the kitchen during the execution of the search warrant] was reasonably likely to elicit [an incriminating] response" (*People v Ferro*, 63 NY2d 316, 319, *cert denied* 472 US 1007; *see People v Marrow*, 301 AD2d 673, 675-676). Inasmuch as the erroneous suppression ruling may have affected defendant's decision to plead guilty, we conclude that the plea must be vacated (*see People v Brinson*, 186 AD2d 1063).

Entered: February 11, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

30

KA 08-00806

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. BAROODY, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, SPECIAL DISTRICT ATTORNEY FOR SENECA COUNTY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (W. Patrick Falvey, J.), rendered April 10, 2008. The judgment convicted defendant, upon a jury verdict, of petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of petit larceny (Penal Law § 155.25). We agree with defendant that reversal is required based on County Court's failure to charge the jury that his claim of right was a defense to the crime charged. The People presented evidence at trial that defendant, a Seneca County Deputy Sheriff, had instructed an auto shop employee to install two tires owned by Seneca County on defendant's personal vehicle. Defendant testified at trial that the owner of the auto shop had informed defendant that those tires had been "laying around [and] were not wanted." Defendant's testimony was supported by the testimony of a customer of the auto shop, who heard the owner tell defendant that items left at the shop for a period exceeding 30 days became the property of the auto shop, as well as by the testimony of State Police investigators to whom defendant related that he had been told by the owner of the auto shop that the tires were not wanted. Viewing the evidence in the light most favorable to defendant (*see People v Banks*, 76 NY2d 799, 800; *People v Ace*, 51 AD3d 1379, 1380, *lv denied* 11 NY3d 733), we conclude that the claim of right charge was warranted because there is a reasonable view of the evidence to support a finding that defendant took possession of the tires under a claim of right (*see Ace*, 51 AD3d at 1380; *cf. People v Cunningham*, 12 AD3d 1131, 1132, *lv denied* 5 NY3d 761). In view of our determination, we do not address defendant's remaining contentions.

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

74

KA 07-01838

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAVON M. RIDGEWAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered July 26, 2007. The judgment convicted defendant, upon a jury verdict, of, inter alia, murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in refusing to suppress his statements to the police because they were obtained in violation of his right to counsel. We reject that contention (*see generally People v Cohen*, 90 NY2d 632, 638-639; *People v Campbell*, 275 AD2d 984, *lv denied* 96 NY2d 732). The court also properly refused to allow defendant to present evidence at trial to enable the jury to determine whether his right to counsel had attached when he made those statements (*see People v Rogers*, 48 NY2d 167, 171-173). The determination of that issue "require[s] a knowledge of the criminal justice system which not only lay people, but even lawyers who are not active in such practice, do not possess" (*People v Medina*, 146 AD2d 344, 350, *affd* 76 NY2d 331, *rearg denied* 76 NY2d 890; *see also People v Bynum*, 275 AD2d 251, 252, *lv denied* 95 NY2d 961; *People v Calloway*, 171 AD2d 1037, 1038, *lv denied* 77 NY2d 992).

Defendant further contends that the court erred in admitting in evidence the grand jury testimony of the murder victim concerning earlier domestic incidents in which defendant harmed or antagonized her. Even assuming, arguendo, that the court erred in admitting that grand jury testimony (*cf. People v Maher*, 89 NY2d 456, 461-462; *People v Flowers*, 245 AD2d 1088, *lv denied* 91 NY2d 972), we conclude that any error in its admission is harmless (*see generally People v Crimmins*,

36 NY2d 230, 237). Defendant failed to preserve for our review his contention that the court erred in granting the People's motion to consolidate the indictments for trial purposes (*see People v McQueen*, 266 AD2d 240, *lv denied* 94 NY2d 826; *People v Nance*, 175 AD2d 662, *lv denied* 79 NY2d 830), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

77

KA 07-00590

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES J. CARNCROSS, DEFENDANT-APPELLANT.

BIANCO LAW OFFICE, SYRACUSE (STEWART F. HANCOCK, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered February 14, 2007. The judgment convicted defendant, upon a jury verdict, of aggravated criminally negligent homicide and reckless driving.

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 aggravated criminally negligent homicide (Penal Law § 125.11) and reckless driving (Vehicle and Traffic Law § 1212). The conviction arises out of an incident in which a New York State Trooper lost control of his vehicle and crashed into a tree while pursuing a motorcycle driven by defendant, who was traveling in excess of the speed limit. Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish that he possessed the requisite mens rea for criminally negligent homicide (*see People v Gray*, 86 NY2d 10, 19). The further contention of defendant that the evidence is legally insufficient to establish that he caused the death of the Trooper is without merit. "To be held criminally responsible for a homicide, a defendant's conduct must actually contribute to the victim's death . . . by 'set[ting] in motion' the events that result in the killing" (*People v DaCosta*, 6 NY3d 181, 184; *see People v Matos*, 83 NY2d 509, 511). "Liability will attach even if the defendant's conduct is not the sole cause of death . . . if the actions were a sufficiently direct cause of the ensuing death" (*DaCosta*, 6 NY3d at 184 [internal quotation marks omitted]; *see Matter of Anthony M.*, 63 NY2d 270, 280). Here, "the evidence was sufficient to prove that defendant's conduct 'set in motion and legally caused the death' " of the Trooper (*DaCosta*, 6 NY3d at 185).

As defendant correctly concedes, he failed to preserve for our

review his contention that County Court erred in its jury charge (*see People v Richardson*, 203 AD2d 932, *lv denied* 84 NY2d 831), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contentions, the court did not abuse its discretion in granting the People's motion to disqualify defense counsel (*see People v Gordon*, 272 AD2d 133, 134, *lv denied* 95 NY2d 890; *People v Liuzzo*, 167 AD2d 963, *appeal dismissed* 77 NY2d 866), and the grand jury proceedings were not defective. We conclude with respect to the grand jury proceedings that the opinion testimony of a New York State Police Investigator concerning the ultimate issues of causation and whether the Trooper was acting in the course of his official duties at the time of his death did not improperly invade the province of the grand jury (*cf. People v Champion*, 247 AD2d 901, *lv denied* 91 NY2d 971). In any event, even assuming, arguendo, that the opinion testimony was improper, we note that "the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment" (*People v Huston*, 88 NY2d 400, 409), and that is not the case here. We further conclude that the prosecutor's legal instructions to the grand jury on causation were not " 'so misleading or incomplete as to substantially undermine the integrity of the proceedings' " (*People v Wooten*, 283 AD2d 931, 932, *lv denied* 96 NY2d 943, quoting *People v Caracciola*, 78 NY2d 1021, 1022).

Defendant further contends that the court erred in refusing to suppress his statements to the police because his right to counsel had attached when he made those statements, and he made the statements based on the advice of defense counsel, who was incompetent. We agree with defendant that his right to counsel had attached at the time he made the statements. In addition, we conclude that the general rule that "the State is not charged with the responsibility of guaranteeing effective legal representation upon the entry of counsel at the preaccusatory, investigatory stage of a criminal matter, i.e., before the commencement of formal adversarial judicial criminal proceedings" does not apply here (*People v Claudio*, 83 NY2d 76, 78). As the court properly determined, defendant's right to effective assistance of counsel attached when a violation of probation petition was filed shortly before defendant made those statements. We nevertheless conclude that suppression was not required inasmuch as defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: February 11, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

122

KA 07-00123

PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN THOMPSON, ALSO KNOWN AS "DESHAWN,"
DEFENDANT-APPELLANT.

THOMAS E. ANDRUSCHAT, EAST AURORA, FOR DEFENDANT-APPELLANT.

FRANK J. CLARK, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Timothy J. Drury, J.), rendered December 29, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the first degree (three counts), murder in the second degree (two counts), attempted murder in the second degree (two counts) and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, three counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]), and two counts each of murder in the second degree (§ 125.25 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]), defendant contends that County Court erred in refusing to sever the trials of defendant and the codefendant. We reject that contention. Joint trials are preferred where, as here, the same evidence will be used and the defendant and codefendant are charged with acting in concert (*see People v Mahboubian*, 74 NY2d 174, 183). Contrary to defendant's contention, severance was not "compelled" inasmuch as the core of each defense was not in irreconcilable conflict with the other (*id.* at 184; *cf. People v Kyser*, 26 AD3d 839, 840). Contrary to the further contention of defendant, there was no violation of his rights under *Bruton v United States* (391 US 123) or *Crawford v Washington* (541 US 36). Nothing in the trial testimony established that the codefendant made any statements or took any action that implicated defendant (*cf. Kyser*, 26 AD3d 839).

We reject the contention of defendant that the court erred in refusing to suppress identification testimony. Having viewed the photographic arrays shown to the witnesses, we conclude "that the

viewer's attention [would not be] drawn to any one photograph in such a way as to indicate that the police were urging a particular selection" (*People v Quinones*, 5 AD3d 1093, 1093, *lv denied* 3 NY3d 646; *see People v Davis*, 50 AD3d 1589, 1590, *lv denied* 11 NY3d 787), and there is no evidence in the record to support defendant's speculative assertion that witnesses may have conferred with each other between identification procedures (*cf. People v Ocasio*, 134 AD2d 293, 294). Although defendant also contends that the court erred in refusing to suppress his statements, we note that defense counsel "conceded the propriety of the suppression ruling" with respect to the statements and thus defendant's contention is not preserved for our review (*People v Williams*, 143 AD2d 162, 163; *see People v Wells*, 288 AD2d 408). In any event, we reject that contention. It is undisputed that defendant was not *Mirandized* and was subjected to interrogation at the time of the statements. The dispositive issue, however, is whether defendant was in custody, inasmuch as *Miranda* warnings are required only when a person is subjected to custodial interrogation (*see generally People v Huffman*, 41 NY2d 29, 33). Here, the court credited the testimony of the police officers in determining that defendant was not in custody when he was questioned by the police. Affording great deference to the credibility determinations of the hearing court (*see People v Prochilo*, 41 NY2d 759, 761), we conclude that the testimony of the police officers established that a reasonable person, innocent of any crime, would not have believed that he or she was in custody at the time of the questioning (*see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851).

Contrary to the further contention of defendant, he was not entitled to a pretrial hearing concerning the testimonial competency and capacity of the child witness. There was no " 'nonspeculative' " evidence of any improper influence exerted on that witness and thus no basis for a pretrial hearing to determine whether his testimony at trial would be tainted (*People v Kemp*, 251 AD2d 1072, 1072, *lv denied* 92 NY2d 900; *see People v Montalvo*, 34 AD3d 600, 601, *lv denied* 8 NY3d 883; *People v Nickel*, 14 AD3d 869, 870-871, *lv denied* 4 NY3d 834). For the same reasons, the court properly denied defendant's request for a pretrial psychological examination of that witness (*see generally People v Brown*, 7 AD3d 726, *lv denied* 3 NY3d 671). To the extent that defendant contends on appeal that the court "erred in failing to timely permit [defendant] to retain and make use of expert testimony relative to the identification of [defendant] by [the child witness]," we note that defendant did not join in the codefendant's request to retain an expert to review the mental health records of that witness. Defendant thus failed to preserve that contention for our review (*see generally People v Cook*, 286 AD2d 917, *lv denied* 97 NY2d 680; *People v Greening*, 254 AD2d 739, *lv denied* 92 NY2d 1032). In any event, for the same reasons previously noted, the contention lacks merit.

Defendant's further challenge to the capacity of the child witness to testify as a sworn witness lacks merit. The child witness was 11 years old at the time of trial and thus was presumed to have the capacity to testify under oath (*see* CPL 60.20 [1], [2]). In any

event, " '[t]he determination of the trial court [with respect to witness competency] should be sustained particularly where the testimony is received and the weight to be given it is left to the jury, unless there is a clear abuse of discretionary power' " (*see People v Parks*, 41 NY2d 36, 46), and we perceive no abuse of discretion on the record before us. The trial court was in the best position "to observe manner, demeanor and presence of mind" of the witness and to make appropriate inquiries (*id.*).

We further conclude that the court did not improvidently exercise its discretion in denying defendant's request for additional peremptory challenges during the joint trial (*see People v Rolle*, 4 AD3d 542, 544, *lv denied* 3 NY3d 647; *cf. People v Hines*, 109 AD2d 893, *lv denied* 66 NY2d 764), and we conclude that the court properly denied defendant's *Batson* challenge. The prosecutor set forth race-neutral reasons for striking the prospective juror in question, inasmuch as the prospective juror had a prior conviction as well as a relative with a prior conviction (*see People v Cuthrell*, 284 AD2d 982, 982-983; *see generally People v Gajadhar*, 38 AD3d 127, 137, *affd* 9 NY3d 438).

Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Contrary to defendant's further contention, because a trial court has "the inherent power . . . to control its own calendar" (*People v Trait*, 70 AD2d 1057, 1057; *see People v Cangiano*, 40 AD2d 528, 529), we conclude that the court did not abuse or improvidently exercise its discretion in refusing to adjourn sentencing to enable defendant to prepare a written CPL article 330 motion (*see People v Williams*, 302 AD2d 903; *People v Cummings*, 284 AD2d 907, *lv denied* 97 NY2d 640, 680). Finally, we conclude that the sentence of life without parole is not unduly harsh or severe. Defendant was convicted of attempting to kill two children and killing four people, one of whom was holding her 11-month-old baby in her arms.

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

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

136

CA 08-01877

PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND PINE, JJ.

SHIRLEY JOHNSON AND DONALD W. JOHNSON, JR.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PANERA, LLC, DEFENDANT-APPELLANT.

THE CAMBS LAW FIRM, LLP, CAMILLUS (PETER J. CAMBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (K. JOHN WRIGHT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered July 1, 2008 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant either created or had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Shirley Johnson (plaintiff) when she slipped and fell on a slippery substance near the beverage bar in defendant's restaurant. We conclude that Supreme Court erred in denying defendant's motion for summary judgment dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant either created or had actual notice of the allegedly dangerous condition, and we therefore modify the order accordingly. We further conclude, however, that the court properly denied defendant's motion to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant had constructive notice of the allegedly dangerous condition. Although defendant submitted evidence establishing that, according to its general policy, the manager on duty and an associate were to inspect the floor near the beverage bar at least every 15 minutes, defendant failed to submit evidence establishing that the general policy was followed on the day of plaintiff's accident. Thus, defendant failed to meet its initial burden of establishing "that the [slippery substance] had not been on the floor for a sufficient length of time

to permit an employee to discover and remedy the condition" (*Mancini v Quality Mkts.*, 256 AD2d 1177, 1178; *see Cooper v Carmike Cinemas, Inc.*, 41 AD3d 1279, 1280).

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

142

KA 08-01577

PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND PINE, JJ.

IN THE MATTER OF THE THIRD REPORT OF
THE SENECA COUNTY SPECIAL GRAND JURY OF
JANUARY 2007.
---------- MEMORANDUM AND ORDER
SOLE NAMED PUBLIC OFFICIAL, APPELLANT;

R. MICHAEL TANTILLO, SPECIAL DISTRICT
ATTORNEY OF SENECA COUNTY, RESPONDENT.

GEIGER AND ROTHENBERG, LLP, ROCHESTER (DAVID ROTHENBERG OF COUNSEL), FOR APPELLANT.

R. MICHAEL TANTILLO, SPECIAL DISTRICT ATTORNEY OF SENECA COUNTY, CANANDAIGUA, RESPONDENT PRO SE.

Appeal from an order of the Seneca County Court (Dennis F. Bender, J.), dated March 6, 2008. The order accepted Report Number 3 of the January 2007 Seneca County Special Grand Jury and directed the filing of the report as a public record.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the report is sealed.

Memorandum: This is an appeal by a public official of Seneca County from an order directing that a grand jury report be filed as a public record. As we determined in our decision in *Matter of Second Report of Seneca County Special Grand Jury of January 2007* (___ AD3d ___ [Feb. 6, 2009]), County Court erred in ordering the filing because the instructions of the special prosecutor concerning the public official's duties were vague and inadequate, and thus the grand jury was improperly "permitted to substitute its judgment for that of the public official[]" without any indication that the public official failed to act in accordance with the prescribed duties of the position (*Matter of Reports of Grand Jury of County of Montgomery Impaneled on Apr. 30, 1979*, 100 AD2d 692, 692; *see Matter of June 1982 Grand Jury of Supreme Ct. of Rensselaer County*, 98 AD2d 284, 285).

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

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

159

CA 07-02675

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

HOLLY L. SCHULTZ, PLAINTIFF-RESPONDENT,
AND ERIC SCHULTZ,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

PENSKE TRUCK LEASING CO., L.P., PENSKE TRUCK LEASING CORPORATION, DALE ALAN MILLER,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

WALSH & WILKINS, BUFFALO (CHRISTOPHER E. WILKINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (MARK CAMPANELLA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (CHARLES F. BURKWIT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered November 21, 2007 in a personal injury action. The order, insofar as appealed from, denied the motion of defendants Penske Truck Leasing Co., L.P., Penske Truck Leasing Corporation and Dale Alan Miller seeking partial summary judgment or, in the alternative, severance.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Holly L. Schultz, plaintiff wife, as a result of two motor vehicle accidents. The first accident occurred in January 2004 when the vehicle owned and operated by Eric Schultz, plaintiff husband, collided with a vehicle owned by defendants Penske Truck Leasing Co., L.P. and Penske Truck Leasing Corporation and operated by defendant Dale Alan Miller (collectively, Penske defendants). Plaintiff wife was a passenger in the vehicle driven by plaintiff husband. The second accident occurred in March 2004 when a vehicle in which plaintiff wife was a passenger collided with a vehicle owned and operated by defendant Bryan D. Wright. The Penske defendants appeal from an order that, inter alia, denied their motion seeking partial summary judgment dismissing the causes of actions with respect to the January 2004 accident on the ground that plaintiff wife did not

sustain a serious injury within the meaning of Insurance Law § 5102 (d) or, in the alternative, seeking to sever those causes of action from the causes of action with respect to the March 2004 accident. Plaintiff husband also appeals from the order insofar as it denied that part of the motion of the Penske defendants seeking severance, inasmuch as he had joined in the motion as a counterclaim defendant with respect to the January 2004 accident. We affirm.

We conclude that Supreme Court properly denied that part of the motion seeking partial summary judgment dismissing the causes of action with respect to the January 2004 accident. According to plaintiff wife, she sustained a serious injury under the significant disfigurement, permanent consequential limitation of use, and significant limitation of use categories. The Penske defendants met their initial burden on the motion with respect to those categories by submitting an affidavit and report of the physician who examined plaintiff wife at their request. The physician stated in her affidavit and report that the injuries allegedly sustained by plaintiff wife, which ultimately resulted in surgical intervention and a scar, were not causally related to the January 2004 accident but, rather, they were attributable to her degenerative disc disease (*see Fryar v First Student, Inc.*, 21 AD3d 525, 526; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456). We conclude, however, that plaintiffs raised a triable issue of fact precluding summary judgment by submitting objective evidence of plaintiff's C5-6 herniated disc injury (*see Chmiel v Figueroa*, 53 AD3d 1092, 1093; *Yoonessi v Givens*, 39 AD3d 1164, 1165; *Coleman v Wilson*, 28 AD3d 1198). Plaintiffs also submitted evidence raising a triable issue of fact with respect to the resulting scar (*see Cushing v Seemann*, 247 AD2d 891, 892). We further conclude that the court did not abuse its discretion in denying that part of the motion seeking severance (*see generally Rapini v New Plan Excel Realty Trust, Inc.*, 8 AD3d 1013; *Southworth v Macko*, 294 AD2d 920).

Entered: February 11, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 07-00724

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARVIN FORSYTHE, DEFENDANT-APPELLANT.

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

MARVIN FORSYTHE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered December 20, 2005. The judgment convicted defendant, upon a jury verdict, of attempted criminal possession of a controlled substance in the first degree and attempted 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 him upon a jury verdict of attempted criminal possession of a controlled substance in the first degree (Penal Law §§ 110.00, 220.21 [1]) and attempted criminal possession of a controlled substance in the third degree (§§ 110.00, 220.16 [1]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish his constructive possession of the controlled substance, his intent to commit the crimes, or his attempt to do so (*see People v Gray*, 86 NY2d 10, 19). In any event, his contention is without merit. With respect to constructive possession, the People were required to "show that the defendant exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband [was] found or over the person from whom the contraband [was] seized" (*People v Manini*, 79 NY2d 561, 573). Here, the People presented evidence that defendant went to an apartment at approximately 10:30 A.M. looking for a package that was supposed to be delivered by the United Parcel Service (UPS). Shortly thereafter, UPS received calls inquiring about why the package, which had an incorrect address, was not delivered. When UPS called the telephone number listed on the package, the man who answered the telephone gave the correct address. UPS then informed the man that the package would be delivered, and the police, who were aware that the package contained

cocaine, arranged a controlled delivery to that location. Shortly before the package was delivered, the police observed defendant in the area of the address where the package was to be delivered, pacing back and forth. After the package was delivered, defendant was located nearby, and the telephone number of one of the cellular telephones in his possession was the telephone number listed on the package. That evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that defendant had the requisite control over the package and the location where it was delivered (*see People v Johnson*, 54 AD3d 969, 970-971).

The evidence is also legally sufficient to establish that defendant intended to possess the cocaine and to sell it (*see People v Hawkins*, 45 AD3d 989, 991, *lv denied* 9 NY3d 1034; *People v Robinson*, 26 AD3d 202, *lv denied* 7 NY3d 762), and that he attempted to commit the crimes. "In order to constitute an attempt, the defendant's 'conduct must have passed the stage of mere intent or preparation to commit a crime' " (*People v Naradzay*, 11 NY3d 460, ___, quoting *People v Mahboubian*, 74 NY2d 174, 189). The "defendant must have 'engaged in conduct that came "dangerously near" commission of the completed crime' " (*id.* at ___, quoting *People v Kassebaum*, 95 NY2d 611, 618, *cert denied* 532 US 1069, *rearg denied* 96 NY2d 854). Here, defendant's conduct came dangerously near possession of the cocaine. Indeed, defendant did not come into possession of the cocaine solely because the police intercepted the package before he could do so (*see People v Bens*, 5 AD3d 391, 391-392, *lv denied* 2 NY3d 796).

County Court properly denied defendant's request for a circumstantial evidence charge inasmuch as there was direct evidence of defendant's constructive possession of the cocaine (*see People v Moni*, 13 AD3d 262, 262-263, *lv denied* 4 NY3d 833; *cf. People v Brian*, 84 NY2d 887, 889; *see generally People v Daddona*, 81 NY2d 990, 992). The court also properly charged the lesser included offense of attempted criminal possession of a controlled substance in the first degree because there was a reasonable view of the evidence to support that charge (*see People v Rosica*, 199 AD2d 773, 774-775, *lv denied* 83 NY2d 876; *see generally People v Glover*, 57 NY2d 61, 63). Defendant failed to preserve for our review his contention in his pro se supplemental brief that the first prong of *Glover* was not met, i.e., that the offense was not of lesser grade or degree (*see* CPL 470.05 [2]). In any event, that contention is without merit. CPL 1.20 (37), which defines the term lesser included offense, provides in relevant part that, "[i]n any case in which it is legally possible to attempt to commit a crime, an attempt to commit such crime constitutes a lesser included offense with respect thereto." "[T]he first prong of the *Glover* test [thus] is irrelevant" in this case (*People v Shreve*, 167 AD2d 698, 699).

Defendant further contends that the prosecutor engaged in prosecutorial misconduct by making improper references to him and that the court's failure to give proper curative instructions denied him a fair trial. Defendant failed to object to most of the allegedly

improper comments and, when defense counsel made an objection, the court issued a curative instruction that the jury is presumed to have followed (*see People v Rivera*, 281 AD2d 927, 928, *lv denied* 96 NY2d 906). We decline to exercise our power to address as a matter of discretion in the interest of justice the remainder of the allegedly improper comments to which defendant failed to object (*see People v Hall*, 53 AD3d 1080, 1083, *lv denied* 11 NY3d 855). The further contention of defendant that he was denied effective assistance of counsel on the People's interlocutory appeal is based on matters outside the record and thus must be pursued by way of a motion pursuant to CPL article 440 (*see People v Keith*, 23 AD3d 1133, 1134-1135, *lv denied* 6 NY3d 815). In his pro se supplemental brief, defendant also contends that defense counsel was ineffective in failing to make a specific trial order of dismissal motion and in failing to object to the People's request to charge a lesser included offense on other grounds. That motion and objection would have been unsuccessful, and thus it cannot be said that defense counsel was thereby ineffective (*see People v McDuffie*, 46 AD3d 1385, 1386, *lv denied* 10 NY3d 867; *People v Rivera*, 45 AD3d 1487, 1488, *lv denied* 9 NY3d 1038; *People v Ayala*, 27 AD3d 1087, 1088-1089, *lv denied* 6 NY3d 892).

We have considered the remaining contentions of defendant in his main and pro se supplemental briefs and conclude that they are without merit.

Entered: February 11, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 07-00685

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE E. MILLER, DEFENDANT-APPELLANT.

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

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered January 8, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]) and robbery in the second degree (§ 160.10 [1]). Contrary to the contention of defendant, "[o]n the record here, it cannot be said as a matter of law that [County Court] erred in finding that defendant was capable of understanding the immediate import of the *Miranda* warnings. Indeed, defendant's expert witness[ ] testified to that effect" (*People v Williams*, 62 NY2d 285, 290). Based upon the evidence at the suppression hearing, the court properly determined that "[t]he People met 'their initial burden of establishing the legality of the police conduct and defendant's waiver of rights,' and defendant failed to establish that he did not waive those rights, or that the waiver was not knowing, voluntary and intelligent" (*People v Grady*, 6 AD3d 1149, 1150, *lv denied* 3 NY3d 641).

The general motion by defendant for a trial order of dismissal is insufficient to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19) and, in any event, that challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contentions that he was deprived of a fair trial by prosecutorial misconduct on summation (*see* CPL 470.05 [2]; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849), and that the prosecutor improperly usurped the role of the court by providing the jury with legal instructions (*see People v France*, 265 AD2d 424, *lv denied* 94 NY2d 823). In any event, those contentions are without merit. The further contention of defendant that he was denied effective assistance of counsel based on defense counsel's failure to challenge the impartiality of a juror concerns matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Keith*, 23 AD3d 1133, 1134-1135, *lv denied* 6 NY3d 815). Insofar as defendant may be deemed to contend that he was denied effective assistance of counsel based on defense counsel's representation viewed in its entirety, we conclude that defendant's contention lacks merit (*see generally People v Baldi*, 54 NY2d 137, 147).

By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his present challenge to that ruling (*see People v Caito*, 23 AD3d 1135; *People v Rodriguez*, 21 AD3d 1400). In any event, that contention lacks merit (*see generally People v Hayes*, 97 NY2d 203, 207-208).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: February 11, 2009 JoAnn M. Wahl
Clerk of the Court

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

204

CA 08-01398

PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND PINE, JJ.

ROBIN E. BELLASSAI AND ROSARIO BELLASSAI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROBERTS WESLEYAN COLLEGE, DEFENDANT-RESPONDENT.

ROBERTS WESLEYAN COLLEGE, THIRD-PARTY PLAINTIFF,

V

SODEXHO MARRIOTT MANAGEMENT, INC., THIRD-PARTY
DEFENDANT-RESPONDENT.

FINUCANE AND HARTZELL, LLP, PITTSFORD (LEO G. FINUCANE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF LAURIE G. OGDEN, ROCHESTER (LOUISE A. BOILLAT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

FIX SPINDELMAN BROVITZ & GOLDMAN, P.C., FAIRPORT (ROY Z. ROTENBERG OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered August 22, 2007 in a personal injury action. The order and judgment granted the motions of defendant and third-party defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by Robin E. Bellassai (plaintiff), an employee of third-party defendant, when she slipped and fell on the wet floor of a dining hall on defendant's campus. We conclude that Supreme Court properly granted the motion of defendant, joined in by third-party defendant, for summary judgment dismissing the complaint. Those parties met their " 'burden of establishing that [defendant] did not create the dangerous condition that caused plaintiff to fall and did not have actual or constructive notice thereof' " (*Wesolek v Jumping Cow Enters., Inc.*, 51 AD3d 1376, 1377; *see generally Fasolino v Charming Stores*, 77 NY2d 847; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838). "Plaintiffs' speculation with respect

to the source of the [wetness] and the length of time it was on the floor is insufficient to raise a triable issue of fact" to defeat the motions (*Anthony v Wegmans Food Mkts., Inc.*, 11 AD3d 953, 954). Further, defendant's alleged " 'general awareness' that a dangerous condition may be present [on the floor in the area of plaintiff's fall] is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall" (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969; *see generally Gallais-Pradal v YWCA of Brooklyn*, 33 AD3d 660; *Palermo v Roman Catholic Diocese of Brooklyn, N.Y.*, 20 AD3d 516). For the same reason, there is no merit to plaintiffs' further contention that a prior lawsuit concerning a slip-and-fall allegedly caused by wetness in a different portion of the dining hall several years before plaintiff's accident was sufficient to provide notice of the condition at issue in this case.

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

216

KA 07-01643

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH R. LORE, DEFENDANT-APPELLANT.

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

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered February 20, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [4]), defendant contends that he did not knowingly, intelligently and voluntarily waive his right to appeal. We reject that contention (*see People v Ball*, 20 AD3d 925, *lv denied* 5 NY3d 850; *People v Chrispen*, 306 AD2d 916, *lv denied* 100 NY2d 619). The valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737). Defendant's challenge to the factual sufficiency of the plea allocution is also encompassed by the valid waiver of the right to appeal (*see Ball*, 20 AD3d 925) and, in any event, defendant failed to preserve that challenge for our review (*see People v Lopez*, 71 NY2d 662, 665). Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of rape in the first degree under Penal Law § 130.35 (4), and it must therefore be amended to reflect that he was convicted of attempted rape in the first degree under Penal Law §§ 110.00 and 130.35 (4) (*see People v Martinez*, 37 AD3d 1099, *lv denied* 8 NY3d 947).

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 05-00315

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JIMMIE LEE EVANS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered January 12, 2005. The judgment convicted defendant, upon a jury verdict, of, inter alia, aggravated unlicensed operation of a motor vehicle 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 after a jury trial of, inter alia, aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511.03 [3]) and reckless driving (§ 1212). Defendant presented evidence after County Court denied that part of his motion for a trial order of dismissal with respect to the count of reckless driving at the close of the People's case and thus failed to preserve for our review his challenge to the legal sufficiency of the evidence in support of that conviction (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Although the challenge by defendant to the legal sufficiency of the evidence with respect to the conviction of aggravated unlicensed operation of a motor vehicle is preserved for our review (*see People v Payne*, 3 NY3d 266, 273, *rearg denied* 3 NY3d 767), we conclude that defendant's challenge is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that the admission of an exhibit containing documents prepared by the Department of Motor Vehicles (DMV) violated his right of confrontation (*see People v Bolling*, 49 AD3d 1330, 1331; *see generally Crawford v Washington*, 541 US 36), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice

(*see* CPL 470.15 [6] [a]). We note that "[t]he fact that defendant's trial occurred before the decision of the United States Supreme Court in *Crawford . . .* has no bearing on the preservation requirement" (*People v Rivera*, 33 AD3d 450, 451, *lv denied* 7 NY3d 928). We reject defendant's further contention that the DMV documents were not admissible as business records, inasmuch as a DMV investigator testified that the exhibit containing those documents was generated and maintained in the regular course of business (*see* CPLR 4518 [a]). The objection by defendant to the admission of that exhibit did not encompass his present contention that some of the documents were not business records because they were not prepared at the time of mailing. Thus, that contention is not preserved for our review (*see generally People v Balls*, 69 NY2d 641). In addition, defendant failed to preserve for our review his contention that there was an insufficient foundation for the testimony of a New York State Trooper concerning the speed at which defendant's vehicle was traveling, as demonstrated by a radar instrument, inasmuch as defendant failed to object to that testimony. We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, "[d]efense counsel's failure to timely facilitate defendant's intention to testify before the Grand Jury does not, per se, amount to a denial of effective assistance of counsel under the circumstance of this case" (*People v Wiggins*, 89 NY2d 872, 873). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: February 11, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 05-01807

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN C. WATKINS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Dennis M. Kehoe, J.), rendered June 16, 2005. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of two counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (1), (4)]). We reject defendant's contention that the conviction is not supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The testimony of the People's principal witness did not require corroboration inasmuch as there is no evidence that the witness shared defendant's criminal intent or, indeed, was aware that defendant possessed a weapon in the trunk of the vehicle owned and driven by defendant (*see* CPL 60.22 [1], [2]; *see generally People v Jones*, 73 NY2d 902, *rearg denied* 74 NY2d 651). We agree with defendant that the police lacked probable cause for his warrantless arrest and that County Court (John J. Connell, J.) thus erred in refusing to suppress his statement to the police that followed the illegal arrest (*see People v Ortiz*, 31 AD3d 1112, 1113-1114, *lv denied* 7 NY3d 869; *People v Williams*, 191 AD2d 989, 990, *lv denied* 82 NY2d 729). We conclude, however, that the error is harmless beyond a reasonable doubt inasmuch as there is no reasonable possibility that the error might have contributed to the conviction (*see generally People v Crimmins*, 36 NY2d 230, 237). The statement in question was exculpatory and, in any event, it was cumulative of other evidence at the trial (*see People v Hernandez*, 43 AD3d 1412, 1413, *lv denied* 9 NY3d 1034; *see generally People v Smith*, 97 NY2d 324, 330).

Finally, we conclude that County Court (Dennis M. Kehoe, J.) properly denied defendant's challenge for cause to a prospective juror. Initially, we note that the contention of defendant is properly before us because he exercised a peremptory challenge to the prospective juror and thereafter exhausted his peremptory challenges before jury selection was completed (*see People v Nicholas*, 98 NY2d 749, 752). We reject that contention, however, because the relationship of the prospective juror with one of the People's witnesses was not " 'of such nature that it [was] likely to preclude him from rendering an impartial verdict' " (*People v Pickren*, 284 AD2d 727, 727, *lv denied* 96 NY2d 923, quoting CPL 270.20 [1] [c]; *cf. People v Branch*, 46 NY2d 645, 651; *see generally People v Provenzano*, 50 NY2d 420, 424). Although the prospective juror's statements concerning that witness demonstrated "a state of mind likely to preclude impartial service," the prospective juror was able to "give unequivocal assurance [that he could] set aside any bias and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614; *see People v Horsey*, 45 AD3d 1378, 1379, *lv denied* 10 NY3d 766).

Entered: February 11, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 08-01591

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

DONALD CHAMPAGNE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LINDA PECK, DEFENDANT-RESPONDENT.

STANLEY LAW OFFICES, LLP, SYRACUSE (KEITH YOUNG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FRANK A. BERSANI, JR., SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered April 8, 2008 in a personal injury action. The order granted the motion of defendant for summary judgment, dismissed the complaint and denied the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff, a plumber, commenced this action seeking to recover damages for injuries he sustained when the top tread on the basement stairs of a home owned by defendant collapsed as he was descending the stairs to perform work in the basement. Supreme Court erred in granting the motion of defendant for summary judgment dismissing the complaint, and we therefore modify the order accordingly. Defendant met her initial burden by establishing that she neither created nor had actual or constructive notice of the allegedly dangerous condition of the stairs (*see Wesolek v Jumping Cow Enters., Inc.*, 51 AD3d 1376; *see generally Di Sanza v City of New York*, 11 NY3d 766; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662). We conclude, however, that the photographs of the staircase and an expert's affidavit submitted by plaintiff in opposition to the motion were sufficient to raise a triable issue of fact whether defendant created or had constructive notice of the allegedly defective stairs (*see generally Gordon*, 67 NY2d at 837-838).

We further conclude on the record before us that the doctrine of res ipsa loquitur provides an additional basis for denying defendant's motion (*see Torres v Cordice*, 11 Misc 3d 23, 24; *see generally Morejon v Rais Constr. Co.*, 7 NY3d 203, 209). This, however, is not an

"exceptional case in which no facts are left for determination," and thus the court properly denied plaintiff's cross motion for summary judgment (*Morejon*, 7 NY3d at 212).

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

234

KA 05-02074

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. SINGLETON, DEFENDANT-APPELLANT.

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

DAVID J. SINGLETON, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Walter W. Hafner, Jr., J.), rendered August 5, 2005. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and burglary in the first degree.

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of one count each of robbery in the first degree (Penal Law § 160.15 [4]) and burglary in the first degree (§ 140.30 [4]), defendant contends that County Court erred in refusing to strike the testimony of one of the victims adduced through two interpreters. The victims are natives of India, and the victim in question understood some English. We note at the outset that defendant's contention is preserved for our review only with respect to the testimony adduced through the second of the two interpreters (*see* CPL 470.05 [2]), and we decline to exercise our power to review defendant's contention with respect to the first interpreter as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We conclude that the court did not err in refusing to strike the testimony of the victim in question based upon the alleged inaccuracies in the second interpreter's translation. Although defendant established that there were some errors in that translation, he failed to establish that he "was prejudiced by those errors" (*People v Dat Pham*, 283 AD2d 952, *lv denied* 96 NY2d 900; *see People v Restivo*, 226 AD2d 1106, 1107, *lv denied* 88 NY2d 883). In any event, the record establishes that any errors were corrected either through objections made by defense counsel that were sustained by the court,

or through defense counsel's cross-examination of the victim using the third and fourth interpreters (*see Restivo*, 226 AD2d at 1107).

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

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CAF 07-01594

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF GRABIEL V.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NOEMI D., RESPONDENT-APPELLANT,
ET AL., RESPONDENT.
(APPEAL NO. 1.)

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

JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT.

MICHAEL J. SULLIVAN, LAW GUARDIAN, FREDONIA, FOR GRABIEL V.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered June 13, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, adjudged that the child is a permanently neglected child and terminated the parental rights of respondent Noemi D.

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

Memorandum: In these four appeals, respondent mother appeals from orders adjudicating her children to be permanently neglected and terminating her parental rights with respect to them. Contrary to the mother's contention in each appeal, petitioner established that it exercised the requisite diligent efforts to strengthen the parent-child relationship by "provid[ing] the assistance necessary for the [mother] to overcome the particular conditions that separated [her] from [her children]" (*Matter of Jesus JJ.*, 232 AD2d 752, 753, *lv denied* 89 NY2d 809; *see* Social Services Law § 384-b [7] [a], [f]; *Matter of Sheila G.*, 61 NY2d 368, 373; *cf. Matter of Olivia L.*, 41 AD3d 1226, 1227). We further conclude that petitioner established that the mother permanently neglected her children (*see* § 384-b [7] [a]). "[A]lthough [the mother] did cooperate with [petitioner] to some degree and made limited progress in other areas, [she] nevertheless failed to address and overcome the primary problem that led to the children's removal in the first instance" (*Matter of Michelle F.*, 222 AD2d 747, 749; *see Matter of Kerensa D.* [appeal No. 2], 278 AD2d 878, *lv denied* 96 NY2d 707). The " 'unwillingness on [the mother's] part to recognize and address the [children's]

particular, specialized needs was properly considered by [Family Court] as evidence of a failure to take the steps necessary to provide [the children] with appropriate care' " (*Matter of Noemi D.*, 43 AD3d 1303, 1303, *lv denied* 9 NY3d 814).

Even assuming, arguendo, that the mother preserved for our review her contention that the dispositional hearing was "deficient," we reject that contention. The court's procedure in conducting the hearing was proper (*see* Family Ct Act § 625 [a]; *Matter of Justina Rose D.*, 28 AD3d 659, 660-661; *Matter of Baby Boy G.*, 219 AD2d 549). We further conclude on the record before us that the failure of the mother's attorney to present any evidence at the dispositional hearing, without more, does not constitute ineffective assistance of counsel. At the fact-finding hearing, the mother's attorney thoroughly cross-examined petitioner's witnesses and presented witnesses on the mother's behalf, and the mother has failed to establish that the failure to present evidence at the dispositional hearing "caused her to suffer actual prejudice" (*Matter of Nicholas GG.*, 285 AD2d 678, 679; *see Matter of Tommy R.*, 298 AD2d 967, 968, *lv denied* 99 NY2d 505).

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

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

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CAF 07-01595

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF KELVIN D.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NOEMI D., RESPONDENT-APPELLANT,
ET AL., RESPONDENT.
(APPEAL NO. 2.)

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

JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT.

MICHAEL J. SULLIVAN, LAW GUARDIAN, FREDONIA, FOR KELVIN D.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered June 13, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, adjudged that the child is a permanently neglected child and terminated the parental rights of respondent Noemi D.

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

Same Memorandum as in *Matter of Grabiel V.* (___ AD3d ___ [Feb. 11, 2009]).

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

244

CAF 07-01596

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF BIENVENIDO V., JR.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NOEMI D., RESPONDENT-APPELLANT,
ET AL., RESPONDENT.
(APPEAL NO. 3.)

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

JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT.

MICHAEL J. SULLIVAN, LAW GUARDIAN, FREDONIA, FOR BIENVENIDO V., JR.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered June 13, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, adjudged that the child is a permanently neglected child and terminated the parental rights of respondent Noemi D.

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

Same Memorandum as in *Matter of Grabiel V.* (___ AD3d ___ [Feb. 11, 2009]).

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court

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

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CAF 07-01597

PRESENT: MARTOCHE, J.P., FAHEY, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF YOVANI V.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NOEMI D., RESPONDENT-APPELLANT,
ET AL., RESPONDENT.
(APPEAL NO. 4.)

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

JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT.

MICHAEL J. SULLIVAN, LAW GUARDIAN, FREDONIA, FOR YOVANI V.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered June 13, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, adjudged that the child is a permanently neglected child and terminated the parental rights of respondent Noemi D.

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

Same Memorandum as in *Matter of Grabiel V.* (___ AD3d ___ [Feb. 11, 2009]).

Entered: February 11, 2009

JoAnn M. Wahl
Clerk of the Court