



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

DECISIONS FILED

APRIL 30, 2010

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

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. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

137

KA 06-03804

PRESENT: SMITH, J.P., CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL S. MORGAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW J. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL S. MORGAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered November 15, 2006. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and two counts of endangering the welfare of a child (§ 260.10 [1]). We reject the contention of defendant that County Court erred in denying his request to represent himself. "The request to represent oneself must be invoked clearly and unequivocally" (*People v LaValle*, 3 NY3d 88, 106; see *People v McIntyre*, 36 NY2d 10, 17). Here, however, the sole request by defendant to represent himself was equivocal because he made that request "as a way of obtaining the dismissal of . . . assigned counsel. [Indeed,] defendant's . . . request[] to proceed pro se [was] made in the alternative[inasmuch as] he sought to represent himself only because [the c]ourt refused to replace . . . assigned counsel[,] who had displeased him" (*People v Gillian*, 8 NY3d 85, 88). Consequently, viewing defendant's request in its immediate context and in light of the record before us, we cannot conclude that defendant made an unequivocal request to proceed pro se (see *id.*; *LaValle*, 3 NY3d at 106).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

139

KA 08-02246

PRESENT: SMITH, J.P., CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN D. THOMAS, DEFENDANT-APPELLANT.

JAMES L. DOWSEY, III, WEST VALLEY, FOR DEFENDANT-APPELLANT.

STEVEN D. THOMAS, DEFENDANT-APPELLANT PRO SE.

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered September 2, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [iv]). Defendant contends that his plea was not knowingly, voluntarily, or intelligently entered because County Court failed to recite the name of the person whom defendant called in violation of an order of protection and failed to specify the date of the telephone call. That contention is actually a challenge to the factual sufficiency of the plea allocution, which is encompassed by defendant's valid waiver of the right to appeal (*see People v Bailey*, 49 AD3d 1258, *lv denied* 10 NY3d 932). Defendant also failed to preserve that challenge for our review by failing to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665), and this case does not fall within the narrow exception to the preservation requirement (*see id.* at 666). Defendant further contends that he was denied effective assistance of counsel based on defense counsel's failure to preserve for our review his challenge to the factual sufficiency of the plea colloquy. To the extent that defendant's contention survives the plea and the waiver of the right to appeal (*see People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), we conclude that it is lacking in merit. The record establishes that "[d]efendant received 'an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel' " (*People v Balanean*, 55 AD3d 1353, 1353, *lv denied*

11 NY3d 895, quoting *People v Ford*, 86 NY2d 397, 404).

Defendant further contends that he was confused during the plea colloquy because "it was happening so fast" and thus that the court erred in denying his motion to withdraw the plea, which we note was not directed at a specific ground. We reject that contention inasmuch as the record establishes that defendant responded in the affirmative when the court asked him whether he understood the nature of the proceedings and the plea agreement, and had discussed the matter with his attorney (see *People v Alexander*, 97 NY2d 482, 485; *People v Beaty*, 303 AD2d 965, *lv denied* 100 NY2d 559; *People v Rickard*, 262 AD2d 1073, *lv denied* 94 NY2d 828).

Finally, defendant's challenge to the severity of the sentence, raised in his pro se supplemental brief, is encompassed by his valid waiver of the right to appeal (see *People v Lopez*, 6 NY3d 248, 255-256). In any event, the sentence is not unduly harsh or severe.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

140

TP 09-01423

PRESENT: SMITH, J.P., CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF LISA STOUGHTENGER, PETITIONER,

V

MEMORANDUM AND ORDER

GLADYS CARRION, AS COMMISSIONER OF NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, DAVID A. HANSELL, AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF TEMPORARY AND DISABILITY ASSISTANCE, AND DAVID SUTKOWY, AS COMMISSIONER OF ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

LEGAL AID SOCIETY OF MID-NEW YORK, SYRACUSE (MAUREEN P. KIEFFER OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENTS GLADYS CARRION, AS COMMISSIONER OF NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, AND DAVID A. HANSELL, AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF TEMPORARY AND DISABILITY ASSISTANCE.

ZACHARY L. KARMEN, SYRACUSE FOR RESPONDENT DAVID SUTKOWY, AS COMMISSIONER OF ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Donald A. Greenwood, J.], entered September 8, 2008) to review a determination of respondents. The determination terminated petitioner's child care benefits.

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

Memorandum: Petitioner mother commenced this CPLR article 78 proceeding seeking to annul the determination terminating her child care benefits for one of her children on the ground that the child's father lives in proximity to the child and was available to provide child care. Supreme Court denied "the relief sought by the [mother] challenging . . . respondents' conduct on the ground that it was arbitrary and capricious" and transferred the remaining issues to this Court. We note at the outset that, "[a]lthough the petition challenges the determination as 'arbitrary and capricious[]' [and an error of law,] 'it is apparent that a challenge is being made to the

factual findings [of the Administrative Law Judge following a fair hearing]. Thus, regardless of the terms used by [the mother], a substantial evidence issue has been raised, necessitating transfer to this [C]ourt' . . . We therefore 'review the petition de novo as if it had been properly transferred [in its entirety]' " (*Matter of Re/Max All-Pro Realty v New York State Dept. of State, Div. of Licensing Servs.*, 292 AD2d 831, 831, lv denied 98 NY2d 606; see *Matter of Hosmer v New York State Off. of Children & Family Servs.*, 289 AD2d 1042, 1042).

Contrary to the mother's contention, we conclude that the determination is supported by substantial evidence (see generally *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181; *Matter of Langler v County of Cayuga*, 68 AD3d 1775). Social Services Law § 410 establishes when a public welfare official is required to furnish child care benefits. In pertinent part, it states that "[s]uch care may be provided only in cases where it is determined, under criteria established by the department [of social services], that there is a need therefor because of [the] inability of the parents to provide care and supervision" Pursuant to 18 NYCRR 415.2, a family is eligible for child care benefits "when such care is not otherwise available from a legally responsible relative or caretaker . . . and the care is a necessary part of a plan for self support" (emphasis added). A legally responsible relative "is any person who is legally obligated to furnish support for a spouse and child, or child only" (18 NYCRR 347.2 [c]), and a caretaker is "the child's parent, legal guardian or caretaker relative, or any other person in *loco parentis* to the child" (18 NYCRR 415.1 [d]). Thus, the child's father must be deemed unavailable before the mother is eligible for child care benefits, and the record of the fair hearing does not establish that the father was unavailable for child care when petitioner terminated the child care benefits for that child. At the time of the determination, he resided at the same address as the mother, although in a separate residential unit, and he was unemployed. Further, the mother failed to present evidence of any court order, custody agreement or other circumstance rendering it inappropriate for him to care for the child.

The mother's procedural contentions were not raised during the fair hearing, and it is well established that "[a] petitioner may not raise a new claim in a proceeding pursuant to CPLR article 78 that was not raised in the administrative hearing under review" (*Matter of Myles v Doar*, 24 AD3d 677, 678; see *Matter of Ambery v Board of Trustees of N.Y. City Fire Dept., Art. I-B Pension Fund*, 298 AD2d 582, lv denied 100 NY2d 509; *Matter of Mecca v Dowling*, 210 AD2d 821, 824, lv denied 85 NY2d 809).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

148

CA 09-01645

PRESENT: SMITH, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

JOAN M. LEWIS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

FRANK LUSTAN AND CAROL LUSTAN,
DEFENDANTS-RESPONDENTS.

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

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 10, 2008 in a personal injury action. The order granted defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained while walking her dog by defendants' residence. Defendants' unleashed dog emerged from behind a car, barking. The dog ran toward plaintiff, startling her, whereupon she lost her balance and fell. We agree with plaintiff that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint. Defendants' own submissions in support of the motion raise a triable issue of fact whether defendants' dog had vicious propensities and, if so, whether defendants knew or should have known of those propensities (*see generally Collier v Zambito*, 1 NY3d 444, 446). "[A]n animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit" (*id.* at 447). "A known tendency to attack others, even in playfulness, as in the case of the overly friendly large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make the defendant[s] liable for damages resulting from such an act" (*Anderson v Carduner*, 279 AD2d 369, 369-370 [internal quotation marks omitted]; *see Pollard v United Parcel Serv.*, 302 AD2d 884). Here, we conclude that the deposition testimony of defendants that their barking dog

rushed toward cars and people on numerous occasions prior to the incident with plaintiff raises a triable issue of fact to defeat the motion (*see Pollard*, 302 AD2d at 884-885).

All concur except SMITH, J.P., and PINE, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm the order granting defendants' motion for summary judgment dismissing the complaint. In our view, there is no basis for imposing liability upon defendants under the circumstances of this case. The majority correctly sets forth the well-settled principle that "an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit" (*Collier v Zambito*, 1 NY3d 444, 447; *see Bard v Jahnke*, 6 NY3d 592, 597). "[W]hen harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in *Collier*" (*Petrone v Fernandez*, 12 NY3d 546, 550). That rule does not apply to the facts of this case, however, because the dog in question did not "reflect[] a proclivity to act in a way that put others at risk of harm" (*Collier*, 1 NY3d at 447).

The record establishes that plaintiff was walking her dog on a sidewalk at the end of defendants' driveway in the dark and that she fell to the ground after she was startled by defendants' dog. The dog came from behind defendants' vehicle in defendants' driveway and barked at plaintiff, but it did not in any manner come into contact with plaintiff. It is undisputed that, although the dog had previously run and barked in defendants' front yard, it had never " 'been known to growl, snap or bare its teeth' " at anyone (*Bard v Jahnke*, 6 NY3d 592, 597), nor is there evidence that the dog had bitten, jumped on, or come into contact with others on prior occasions. We agree with defendants that the dog's tendency to run and bark is merely common canine behavior that does not endanger anyone. Defendants therefore met their burden of establishing their entitlement to judgment as a matter of law under *Collier*, and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

165

CAF 09-01563

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

IN THE MATTER OF EDUARDO R.,
RESPONDENT-RESPONDENT.

ERIE COUNTY ATTORNEY, PETITIONER-APPELLANT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

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

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

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered July 21, 2009 in a proceeding pursuant to Family Court Act article 3. The order directed Erie County to transport respondent to Puerto Rico after a certain court date.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following Memorandum: Respondent was arraigned on a juvenile delinquency petition alleging two counts of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03). The petition subsequently was orally amended with the consent of the parties to allege a count of criminal possession of marijuana in the fifth degree (§ 221.10 [1]). Respondent entered a plea of guilty to the marijuana count. Family Court denied the request of the presentment agency to release respondent to his family and instead placed respondent in a secure detention facility. At the dispositional hearing, the court admitted in evidence diagnostic reports recommending probation supervision and admitted the testimony of respondent's mother, who had flown to New York from Puerto Rico for the hearing. The court adjudicated respondent a juvenile delinquent and granted him a conditional discharge for a 12-month period upon the condition that he leave Erie County in the custody of his mother and remain in Puerto Rico during the 12-month period. The court further ordered that Erie County obtain both an airplane ticket and transportation to the airport, with the assistance of federal authorities. Respondent and the presentment agency objected to the disposition on the ground that the conditions imposed were beyond the scope of Family Court Act § 350.2, and the court denied the objections.

Approximately six months later, respondent was arrested in Erie

County in violation of the order of conditional discharge, and petitioner requested that the matter be restored to Family Court's calendar. Respondent admitted that he had remained in Erie County and thus was found to have violated the terms of the conditional discharge. The court denied the presentment agency's request for updated diagnostic reports. The court instead issued an order "vacating" the prior order of conditional discharge and thereafter adhered to its original condition, ordering Erie County to transport respondent "back to Puerto Rico after his . . . court date." A Justice of this Court signed an order to show cause seeking to stay execution of that order pending appeal, pursuant to Family Court Act § 1114 (b).

Upon the court's revocation of the order of conditional discharge, the proceedings were returned to the dispositional phase of the application to restore the matter to the calendar. Pursuant to Family Court Act § 360.3 (6), if the court revokes an order of conditional discharge "it shall order a different disposition pursuant to [Family Court Act] § 352.2." We thus conclude that the court erred in again ordering respondent to be transported to Puerto Rico. Moreover, Family Court Act § 352.2 does not authorize the court to order a respondent to leave the county or country in which the incident occurred. Thus, we reverse the order and remit the matter to Family Court for further proceedings in compliance with Family Court Act § 360.3 (6).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

171

CA 09-01528

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND PINE, JJ.

THE BANKRUPTCY ESTATE OF THOMAS M. QUINN, BY
BANKRUPTCY TRUSTEE, THOMAS J. GAFFNEY, ESQ.,
PLAINTIFF-RESPONDENT,

V

ORDER

CHACCHIA & FLEMING, LLP AND DANIEL J.
CHACCHIA, DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (EARL K. CANTWELL OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

LEWIS & LEWIS, P.C., BUFFALO (ALLAN M. LEWIS OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 22, 2009 in a legal malpractice action. The order, insofar as appealed from, denied in part defendants' motion for summary judgment.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on February 3, 2010,

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

197

KA 08-02141

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ELVIN RIOS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered October 10, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), robbery in the first degree, and grand larceny in the fourth degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]) and one count of robbery in the first degree (§ 160.15 [3]). In appeal No. 2, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, three counts of forgery in the second degree (§ 170.10 [1]).

Defendant failed to preserve for our review his contention in appeal No. 1 that the conviction of burglary in the first degree and robbery in the first degree is not supported by legally sufficient evidence (*see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention in appeal No. 1 that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject the contention of defendant in each appeal that County Court erred in refusing to suppress the victim's identification of him in a photo array. The court was entitled to credit the testimony of the police officers at the suppression hearing that they did not urge

the victim to make a particular selection from the photo array. We perceive no basis to disturb that credibility determination inasmuch as it cannot be said that the photo array was unduly suggestive (see *People v Diggs*, 19 AD3d 1098, lv denied 5 NY3d 787, amended on rearg 21 AD3d 1438; see generally *People v Chipp*, 75 NY2d 327, 335, cert denied 498 US 833; *People v Prochilo*, 41 NY2d 759, 761).

Defendant further contends in each appeal that the court erred in consolidating the indictments for trial because he made the requisite showing of good cause why the indictments should be tried separately pursuant to CPL 200.20 (3). Even assuming, arguendo, that defendant preserved that contention for our review (see CPL 470.05 [2]), we conclude that it lacks merit. " '[T]he decision to consolidate separate indictments under CPL 200.20 [(4)] is committed to the sound discretion of the [court] in light of the circumstances of the individual case, and the decision is reviewable on appeal . . . only to the extent that there has been an abuse of that discretion as a matter of law' " (*People v Bankston*, 63 AD3d 1616, 1616, quoting *People v Lane*, 56 NY2d 1, 8; see CPL 200.20 [5]). Here, the offenses in each indictment were joinable pursuant to CPL 200.20 (2) (a) inasmuch as they were based upon the same criminal transaction (see CPL 40.10 [2]), and thus it cannot be said that the court abused its discretion in consolidating the indictments for trial (see CPL 200.20 [4], [5]; see generally *People v Brown*, 254 AD2d 781, 782, lv denied 92 NY2d 1029; *People v Nelson*, 133 AD2d 470, 471, lv denied 71 NY2d 971, 72 NY2d 864).

We reject the contention of defendant in each appeal that he was denied a fair trial by prosecutorial misconduct. To the extent that defendant contends that the prosecutor improperly elicited the testimony of a police detective who acknowledged that he was familiar with defendant prior to the date on which the offenses at issue were committed, the court struck that testimony and issued a curative instruction to which defendant did not object. Thus, "the curative instruction 'must be deemed to have corrected the alleged error[] to defendant's satisfaction' " (*People v Wallace*, 59 AD3d 1069, 1071, lv denied 12 NY3d 861). Defendant failed to preserve for our review his contention with respect to an allegedly improper comment by the prosecutor on summation (see *People v Douglas*, 60 AD3d 1377, lv denied 12 NY3d 914), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Finally, the sentence in each appeal is not unduly harsh or severe.

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

198

KA 09-01198

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ELVIN RIOS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered October 10, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the fourth degree (two counts), identity theft in the third degree (four counts), and forgery in the second degree (three counts).

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

Same Memorandum as in *People v Rios* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

226

KA 08-02549

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTWOIN HARRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 4, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the second degree.

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

Memorandum: Defendant appeals from three judgments convicting him following a single nonjury trial of three counts of criminal contempt in the second degree (Penal Law § 215.50 [3]) arising from his three violations of an order of protection. We reject the contention of defendant that the evidence at trial is legally insufficient to establish that he intended to violate the order of protection. A copy of the no-contact order of protection, which was issued to defendant in court and signed by him, was admitted in evidence at trial, and the victim testified that defendant made threats to her on each of the three occasions that he contacted her in violation of the order of protection. Viewing that evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant knew of the existence of the order of protection and intentionally violated it (*see generally People v Bleakley*, 69 NY2d 490, 495; *People v Wright*, 63 AD3d 1700, 1702). Also contrary to defendant's contention, viewing the evidence in light of the elements of the crimes in this nonjury trial (*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). Although defendant denied the victim's allegations during his trial testimony, Supreme Court was entitled to credit the testimony of the victim over

that of defendant (see *People v Lane*, 7 NY3d 888, 890; *People v Ange*, 37 AD3d 1143, 1144, lv denied 9 NY3d 839). "[T]hose who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" (*Lane*, 7 NY3d at 890), and it cannot be said that the court failed to give the evidence the weight it should be accorded (see generally *Bleakley*, 69 NY2d at 495).

We reject the further contention of defendant that the misdemeanor informations upon which he was prosecuted were jurisdictionally defective because they did not contain nonhearsay allegations that, if true, established his knowledge of the order of protection. A copy of the order of protection bearing defendant's signature was attached to the informations in appeal Nos. 1 and 2, and it is well settled that "a defendant's name on the signature line of an order of protection adequately supports an allegation that the defendant knew of the order's contents" (*People v Inserra*, 4 NY3d 30, 32). Contrary to defendant's contention, the fact that the attached copies of the order of protection were not certified does not render the informations jurisdictionally defective (see generally *People v Casey*, 95 NY2d 354, 362-363). Although a copy of the order of protection was not attached to the information in appeal No. 3, we nevertheless reject defendant's contention that the information was jurisdictionally defective (see *id.* at 359-360). "So long as the factual allegations of an information give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense," the information is sufficient to confer jurisdiction (*id.* at 360). The third information was signed by the victim, who alleged, inter alia, that the order of protection was issued to defendant in court. Even assuming, arguendo, that the victim's allegation is not based upon the victim's personal knowledge, we conclude that defendant's hearsay contention in appeal No. 3 does not implicate the court's jurisdiction and that defendant failed to preserve that contention for our review by a timely pretrial motion (see *id.* at 364; see also *People v Konieczny*, 2 NY3d 569, 575-576).

Finally, we agree with defendant that the sentence imposed in appeal No. 3 is illegal insofar as it imposes a period of probation in addition to a term of incarceration of two years (see Penal Law § 60.01 [2] [d]; § 65.00 [former (1) (closing para)]). We therefore modify the judgment in appeal No. 3 by vacating that part of the sentence imposing a period of probation (see *People v Furnia*, 223 AD2d 887, 887-888). The sentence as modified is not unduly harsh or severe.

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

227

KA 08-02547

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTWOIN HARRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 4, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the second degree.

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

Same Memorandum as in *People v Harris* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

228

KA 08-02548

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTWOIN HARRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 4, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part of the sentence imposing a period of probation and as modified the judgment is affirmed.

Same Memorandum as in *People v Harris* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

237

CA 09-00613

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

DEBORAH PATRICIA MUNDRICK, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

RICHARD THOMAS MUNDRICK, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR
DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Philip B. Dattilo, Jr., R.), entered May 21, 2008. The order, among other things, granted plaintiff's motion seeking modification of an order of spousal support and an award of counsel fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing in the first ordering paragraph that maintenance shall terminate upon the death of either party or upon plaintiff's valid or invalid remarriage and by denying plaintiff's motion in part and vacating the second ordering paragraph and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order that granted plaintiff's motion, pursuant to which plaintiff sought an increase in defendant's weekly maintenance obligation, the provision of health insurance from defendant, and an award of counsel fees. Contrary to defendant's contention, we conclude that plaintiff established a substantial change in circumstance warranting an increase in weekly maintenance (see Domestic Relations Law § 236 [B] [9] [b]). It is well settled that " 'the amount and duration of maintenance are matters committed to the sound discretion of the trial court' " (*Frost v Frost*, 49 AD3d 1150, 1150-1151). Here, plaintiff demonstrated that her expenses have increased based on the termination of defendant's employer-sponsored health insurance, forcing her to obtain Medicare at an increased cost, and that the existing maintenance award was insufficient to meet her needs with respect to health care (see generally *Matter of Baumgartner v Baumgartner* [appeal No. 2], 226 AD2d 1104). Because the increase in maintenance will offset plaintiff's health care costs, we agree with defendant, however, that Supreme Court erred in granting that part of plaintiff's motion seeking to direct defendant to provide health insurance for plaintiff. We therefore modify the order accordingly. Additionally, there was no testimony at the hearing on plaintiff's motion concerning the cost of

obtaining a health insurance policy for plaintiff, and the court therefore could not "consider an award of payment by [defendant] of this expense" (*S.A. v K.F.*, 22 Misc 3d 1115[A], 2009 NY Slip Op 50141[U], *19-20). We note that, although defendant was laid off from Eastman Kodak Company, Inc. in October 2006, the company that had provided his employer-sponsored health insurance, he is currently employed and is capable of maintaining and securing employment, while plaintiff is disabled and has demonstrated an inability to work. It is reasonable to conclude that defendant's financial situation will continue to be more favorable than that of plaintiff (see *Watrous v Watrous*, 292 AD2d 691, 693), and we thus conclude that the increase in defendant's maintenance obligation was not an abuse of discretion (see *Matter of Fuller v Fuller*, 11 AD3d 775).

In addition, we agree with defendant that the court erred in failing to include a provision that the award of maintenance "shall terminate upon the death of either party or upon [plaintiff's] valid or invalid remarriage" (Domestic Relations Law § 236 [B] [6] [c]; see *Filiaci v Filiaci*, 68 AD3d 1810, 1811-1812; *McLoughlin v McLoughlin*, 63 AD3d 1017, 1018). We therefore further modify the order accordingly.

Contrary to defendant's further contentions, the court's award of counsel fees was a proper exercise of discretion (see Domestic Relations Law § 237 [b]; *McBride-Head v Head*, 23 AD3d 1010; *Zielinski v Zielinski*, 289 AD2d 1017, 1018), and the hearing was properly conducted before a referee inasmuch as the parties signed an order of reference permitting the Referee to hear and decide all issues involved in these proceedings (see *Matter of Johnson v Streich-McConnell*, 66 AD3d 1526). Although the order of reference is attached as an appendix to plaintiff's brief on appeal, it "was before [Supreme] Court, [and thus] it is properly a part of the record on appeal" (*Matter of Westfall v Westfall*, 28 AD3d 1229, 1230, lv denied 7 NY3d 706).

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

251

KA 03-02629

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVON M. GRIFFIN, DEFENDANT-APPELLANT.

CHRISTINE M. COOK, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered August 11, 2003. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). On a prior appeal defendant challenged, *inter alia*, the voluntariness of both his waiver of the right to appeal and his plea, and we affirmed the judgment of conviction (*People v Griffin*, 24 AD3d 1316, *lv denied* 6 NY3d 813). We thereafter denied defendant's motion to vacate the judgment of conviction pursuant to CPL 440.10, but we granted his subsequent motion for a writ of error coram nobis (*People v Griffin*, 59 AD3d 1106). We agreed with defendant that he may have been denied effective assistance of appellate counsel by reason of defense counsel's failure to challenge County Court's failure to comply with the statutory mandates of CPL 400.21 (*see generally People v Borrell*, 12 NY3d 365, 369-370), and we therefore vacated our prior order affirming the judgment of conviction and determined that we would "consider the appeal de novo" (*Griffin*, 59 AD3d at 1106).

On this de novo appeal, we once again reject the challenge by defendant to the voluntariness of his waiver of the right to appeal (*see Griffin*, 24 AD3d 1316). Defendant further contends that his guilty plea was not voluntary, knowing or intelligent based on the court's alleged failure to address either his complaints concerning assigned counsel or his postplea statement that he "[didn't] even want this plea now." Although that contention is preserved for our review

because it was raised in defendant's CPL 440.10 motion (see generally *People v Bevins*, 27 AD3d 572, 572-573; *People v Ballinger*, 24 AD3d 792; *People v Kemp*, 10 AD3d 811, lv denied 4 NY3d 765; *People v Martin*, 7 AD3d 640, 641, lv denied 3 NY3d 677), we nevertheless conclude upon our review of the record that it lacks merit.

We agree with defendant, however, that the court erred in sentencing defendant as a first felony offender to a term of incarceration of 15 years plus a period of postrelease supervision of 2½ years, which defendant contends was his understanding of the terms of the plea agreement. When it became apparent at sentencing that defendant had a prior felony conviction, the People were required to file a second felony offender statement in accordance with CPL 400.21 and, if appropriate, the court was then required to sentence defendant as a second felony offender (see *People v Scarbrough*, 66 NY2d 673, revg on dissenting mem of Boomer, J., 105 AD2d 1107, 1107-1109; *People v Motley* [appeal No. 3], 56 AD3d 1158, 1159; *People v Ortiz*, 227 AD2d 902, 902-903). "[I]t is illegal to sentence a known predicate felon as a first offender" (*People v Holley*, 168 AD2d 992, 993), and "[t]he statutory requirement that a defendant with a predicate felony conviction be sentenced as a second felony offender was not intended 'to be circumvented by . . . the acquiescence of a sentencing Judge whenever he [or she] is inclined to extend leniency in violation of the legislative mandate' " (*Motley*, 56 AD3d at 1159, quoting *Scarbrough*, 105 AD2d at 1109).

Here, as defendant contends, he agreed to plead guilty based on his understanding that he would receive the agreed-upon sentence, i.e., a term of incarceration of 15 years and a period of postrelease supervision of 2½ years. If defendant is in fact a second felony offender, that period of postrelease supervision is illegal, requiring vacatur of the sentence and, indeed, vacatur of the plea, if defendant should choose to withdraw his plea. We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing in compliance with CPL 400.21. If the court upon remittal determines that defendant is a second felony offender, the court must afford defendant the opportunity to withdraw his plea or to be resentenced as a second felony offender (see *id.*; *Ortiz*, 227 AD2d at 903).

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

254

CA 09-02043

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

IN THE MATTER OF MM 1, LLC,
PETITIONER-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

SHERRY LAVANCHER, ASSESSOR OF TOWN OF ONONDAGA,
BOARD OF ASSESSMENT REVIEW FOR TOWN OF ONONDAGA,
RESPONDENTS-APPELLANTS-RESPONDENTS,
AND LAFAYETTE CENTRAL SCHOOL DISTRICT,
INTERVENOR-RESPONDENT-APPELLANT-RESPONDENT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE
(JOSEPH G. SHIELDS OF COUNSEL), FOR INTERVENOR-RESPONDENT-APPELLANT-
RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JOHN R. LANGEY OF COUNSEL),
FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (KEVIN G. ROE OF
COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 20, 2009 in a proceeding pursuant to RPTL article 7. The order, inter alia, dismissed the petition with permission to petitioner to commence a new proceeding pursuant to CPLR 205 within six months after termination of the proceeding.

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

Memorandum: Petitioner commenced this proceeding pursuant to RPTL article 7 challenging its real property tax assessment. Supreme Court granted the motion of intervenor-respondent Lafayette Central School District (District) and the cross motion of respondents Sherry Lavancher, Assessor of Town of Onondaga, and Board of Assessment Review for Town of Onondaga (collectively, Town respondents) "to the extent that they seek dismissal of the [p]etition pursuant to [RPTL 708 (3)] . . . with permission for [p]etitioner to commence a new proceeding within six months . . . pursuant to CPLR 205." We affirm. Addressing first petitioner's cross appeal, we reject the contention of petitioner that the court erred in dismissing the petition based on its failure to mail a copy of the petition and notice to the superintendent of schools of the District as required by RPTL 708 (3)

(see *Matter of Gatsby Indus. Real Estate, Inc. v Fox*, 45 AD3d 1480).

We reject the contention of the District and the Town respondents on appeal that the court erred in granting petitioner permission to commence a new proceeding pursuant to CPLR 205 (a). That statute provides that, "if [a proceeding] is timely commenced and is terminated in any other manner than by . . . a failure to obtain personal jurisdiction over the [respondent] . . . , the plaintiff . . . may commence a new [proceeding] upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new [proceeding] would have been timely commenced at the time of the commencement of the prior action and that service upon [respondent] is effected within such six-month period." Here, the original proceeding was timely commenced (see *id.*), and the Town respondents were properly served with process. Contrary to the contention of the District and the Town respondents, petitioner's failure to mail a copy of the petition and notice to the District as required by RPTL 708 (3) is not a jurisdictional defect (see *Matter of Brookview Apts. v Stuhlman*, 278 AD2d 825, 826). That mailing "does not of itself constitute 'service,' and is, in fact, insufficient to confer party status upon a school district" (*Matter of Village Sq. of Penna v Semon*, 290 AD2d 184, 186, *lv dismissed* 98 NY2d 647). We reject the District's further contention that the application of CPLR 205 (a) in the context of a proceeding pursuant to RPTL article 7 would unlawfully extend the 30-day period of limitations for the commencement of such a proceeding (see § 702 [2]; see generally *Gaines v City of New York*, 215 NY 533, 539).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

262

TP 09-02063

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

IN THE MATTER OF THERESA NICHOLS, PETITIONER,

V

MEMORANDUM AND ORDER

DEBORAH VANAMERONGEN, AS COMMISSIONER OF NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, AND MARY RICE, AS SECTION 8 ADMINISTRATOR OF HOUSING CHOICE VOUCHER PROGRAM AT PATHSTONE OF GENESEE COUNTY, RESPONDENTS.

OAK ORCHARD LEGAL SERVICES A DIVISION OF NEIGHBORHOOD LEGAL SERVICES, INC., BATAVIA (MARY STERMOLE OF COUNSEL), FOR PETITIONER.

DAVIDSON FINK LLP, ROCHESTER (FERNANDO SANTIAGO OF COUNSEL), FOR RESPONDENT MARY RICE, AS SECTION 8 ADMINISTRATOR OF HOUSING CHOICE VOUCHER PROGRAM AT PATHSTONE OF GENESEE COUNTY.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division in the Fourth Judicial Department by order of the Supreme Court, Genesee County [Robert C. Noonan, A.J.], entered October 9, 2009) to review a determination of respondent Mary Rice, as Section 8 Administrator of Housing Choice Voucher Program at PathStone of Genesee County. The determination terminated petitioner's housing assistance pursuant to the Section 8 Housing Choice Voucher Program.

It is hereby ORDERED that the motion is granted and the petition against respondent Deborah VanAmerongen, as Commissioner of New York State Division of Housing and Community Renewal, is dismissed, and

It is further ORDERED that the determination is unanimously confirmed without costs and the petition against respondent Mary Rice, as Section 8 Administrator of Housing Choice Voucher Program at PathStone of Genesee County, is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination following an administrative hearing terminating her housing assistance pursuant to the Section 8 Housing Choice Voucher Program (Section 8 program) (see 42 USC § 1437f [b] [1]) on the ground that she was not residing in the assisted unit in Batavia. At the outset, we agree with respondent Commissioner of New York State Division of Housing and Community Renewal that she is not a necessary party to this proceeding (see CPLR 1001 [a]; *Matter of Gwynn v Mulligan*, 2003 NY Slip Op 51257[U], *7), and we therefore grant her motion to dismiss the petition against her.

Petitioner contends that the Hearing Officer's determination is not supported by substantial evidence. We reject that contention. At the hearing, the Section 8 Administrator of Housing Choice Voucher Program at PathStone of Genesee County (respondent) presented a supporting deposition of one individual and a statement of another individual, both made under penalty of perjury, indicating that petitioner had been residing in their residence in Brockport for the past several months. In addition, respondent presented information from the post office stating that, five days after petitioner was notified that her Section 8 program benefits were being terminated, the assisted unit was listed as her new address, as well as a police report demonstrating that petitioner was arrested at the Brockport residence early one morning during the period of time when she was receiving housing assistance for the assisted unit in Batavia. The arresting officers discovered petitioner's residence in Brockport by searching computer records.

We conclude that those documents provide the requisite substantial evidence to support the determination that petitioner was not living in the assisted unit during the time period in question (see generally *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181). The claim of petitioner that she changed only her mailing address, not her residence, to Brockport presented an issue of credibility that the Hearing Officer was entitled to resolve against petitioner (see *Matter of Murtaugh v New York State Dept. of Env'tl. Conservation*, 42 AD3d 986, 987-988, lv dismissed 9 NY3d 971), and "[w]e may not weigh the evidence or reject [the Hearing Officer's] choice where the evidence is conflicting and room for a choice exists" (*Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69, 75; see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444; *Matter of Clouse v Allegany County*, 46 AD3d 1381).

We reject petitioner's further contention that the Hearing Officer erroneously shifted the burden of proof from respondent to petitioner at the hearing. The explanation by the Hearing Officer concerning her reasons for finding petitioner's evidence unconvincing did not establish that she shifted the burden of proof to petitioner. We note in any event that, although "a local housing authority 'has the burden of persuasion [at a Section 8 program termination hearing] and must initially present sufficient evidence to establish a prima facie case' " (*Ervin v Housing Auth. of Birmingham District*, 281 Fed Appx 938, 942, quoting *Basco v Machin*, 514 F3d 1177, 1182; see *Carter v Montgomery Hous. Auth.*, 2009 WL 3711565, 2010 US Dist LEXIS 23074 [MD Ala]), pursuant to *Basco*, the ultimate burden of production is on the petitioner (see 514 F3d at 1182).

We reject the contention of petitioner that she was denied due process because she was unable to cross-examine the individuals who made statements contained in the documents presented at the hearing. Hearsay is admissible at a Section 8 program termination hearing (see 24 CFR. 982.555 [e] [5]; *Williams v Housing Auth. of City of Raleigh*, 595 F Supp 2d 627, 631, *aff'd* 2009 WL 321628, 2009 US App LEXIS 2570 [4th Cir]; *Basco*, 514 F3d at 1182), and we conclude that the documents

in question, some of which were obtained during the course of a police investigation and were made under penalty of perjury, were reliable (see *U.S. Pipe & Foundry Co. v Webb*, 595 F2d 264, 270; *Robinson v District of Columbia Hous. Auth.*, 660 F Supp 2d 6, 12-14). "The principle that hearsay evidence is admissible in administrative proceedings would be vitiated if a party could object to its admission on the ground that he [or she] was denied [the] right to cross-examination" (*Beauchamp v De Abadia*, 779 F2d 773, 775-776; see *Gammons v Massachusetts Dept. of Hous. & Community Dev.*, 502 F Supp 2d 161, 165-166).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

277

CA 09-01916

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

STEPHEN NICHOLS, PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

XEROX CORPORATION, ROBERT MARA, INDIVIDUALLY
AND IN HIS CAPACITY AS AN EMPLOYEE OF XEROX
CORPORATION, AND MARIE HACK, INDIVIDUALLY AND
IN HER CAPACITY AS AN EMPLOYEE OF XEROX
CORPORATION, DEFENDANTS-RESPONDENTS-APPELLANTS.

NIRA T. KERMISCH, ROCHESTER, FOR PLAINTIFF-APPELLANT-RESPONDENT.

LITTLER MENDELSON, P.C., ROCHESTER (MARGARET A. CLEMENS OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court,
Monroe County (David Michael Barry, J.), entered July 10, 2009. The
order granted in part defendants' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by denying that part of the motion for
summary judgment dismissing the malicious prosecution cause of action
and reinstating that cause of action and by granting that part of the
motion for summary judgment dismissing the misrepresentation cause of
action and dismissing that cause of action and as modified the order
is affirmed without costs.

Memorandum: Plaintiff commenced this action against his
employer, defendant Xerox Corporation (Xerox), as well as his
supervisor, defendant Robert Mara and a coworker, defendant Marie
Hack, seeking damages based on, inter alia, Mara's alleged
misrepresentations to plaintiff that he would be promoted if he
transferred to Mara's work group. On a prior appeal, we determined
that Supreme Court erred in granting defendants' motion for partial
summary judgment dismissing the second through sixth causes of action,
and we reinstated those causes of action (*Nichols v Xerox Corp.*, 34
AD3d 1200). Plaintiff commenced a separate action against Hack for
malicious prosecution, which was consolidated with this action. The
parties thereafter conducted discovery, and the court granted
defendants' motion for summary judgment dismissing the amended
complaint with the exception of the third cause of action, for
misrepresentation.

We agree with plaintiff on his appeal that the court erred in

granting that part of defendants' motion for summary judgment dismissing the malicious prosecution cause of action against Hack, and we therefore modify the order accordingly. A cause of action for malicious prosecution requires four elements: "that a criminal proceeding was commenced; that it was terminated in favor of the accused; that it lacked probable cause; and that the proceeding was brought out of actual malice" (*Cantalino v Danner*, 96 NY2d 391, 394; see *Martinez v City of Schenectady*, 97 NY2d 78, 84; *Watson v City of Jamestown*, 56 AD3d 1289, 1291). Viewing the evidence in the light most favorable to plaintiff, the party opposing the motion (see *Esposito v Wright*, 28 AD3d 1142, 1143), we conclude that there are triable issues of fact whether Hack had probable cause to file a charge of harassment in the second degree against him and whether that proceeding was brought out of malice.

We agree with defendants on their cross appeal, however, that the court erred in denying that part of their motion seeking summary judgment dismissing the misrepresentation cause of action against Xerox and Mara, and we therefore further modify the order accordingly. According to plaintiff, in order to induce him to transfer to Mara's work group, Mara misrepresented to him that he would be promoted upon the transfer and that he relied on that misrepresentation in agreeing to the transfer. " 'A claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given' " (*H & R Project Assoc. v City of Syracuse*, 289 AD2d 967, 969; see *Hudson Riv. Club v Consolidated Edison Co. of N.Y.*, 275 AD2d 218, 220; *Dunlevy v New Hartford Cent. School Dist.*, 266 AD2d 931, 932, lv denied 94 NY2d 760). It is well settled that, "[a]bsent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party" (*Matter of De Petris v Union Settlement Assn.*, 86 NY2d 406, 410; see *Rooney v Tyson*, 91 NY2d 685, 689). As an employee at will, plaintiff could not have reasonably relied on Mara's alleged misrepresentations concerning the promotion. "In such circumstances, any reliance on representations of future intentions, such as job security or future changes, would be deemed unreasonable as a matter of law" (*Meyercord v Curry*, 38 AD3d 315, 316; see *Marino v Oakwood Care Ctr.*, 5 AD3d 740).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

279

CA 09-01619

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

PROGRESSIVE HALCYON INSURANCE COMPANY,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

AMY G. GIACOMETTI, MARLEY M. FIOCCO, STATE
FARM INSURANCE COMPANY, DEFENDANTS-RESPONDENTS,
VEHICLE ASSET UNIVERSAL LEASING TRUST, GENERAL
MOTORS ACCEPTANCE CORPORATION, CENTRAL
ORIGINATING LEASE TRUST,
DEFENDANTS-RESPONDENTS-APPELLANTS,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA, LLC, BUFFALO (KEVIN J.
KRUPPA OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (JONATHAN SCHAPP OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

JOHN J. DELMONTE, NIAGARA FALLS, FOR DEFENDANT-RESPONDENT AMY G.
GIACOMETTI.

LAW OFFICE OF JOHN J. FROMEN, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP
(EDWARD J. MARKARIAN OF COUNSEL), FOR DEFENDANT-RESPONDENT MARLEY M.
FIOCCO.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR
DEFENDANT-RESPONDENT STATE FARM INSURANCE COMPANY.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered January 28, 2009 in a declaratory judgment action. The judgment, among other things, denied in part plaintiff's motion for summary judgment.

It is hereby ORDERED that the judgment so appealed from is modified on the law by granting that part of the motion of plaintiff with respect to defendant Amy G. Giacometti and granting judgment in favor of plaintiff as follows:

It is ADJUDGED and DECLARED that plaintiff is not obligated to defend or indemnify defendant Amy G. Giacometti in the underlying personal injury actions,

by denying that part of the motion with respect to defendants Vehicle Asset Universal Leasing Trust, General Motors Acceptance Corporation and Central Originating Lease Trust and vacating the declaration, by granting in its entirety the cross motion of defendants Vehicle Asset Universal Leasing Trust, General Motors Acceptance Corporation and Central Originating Lease Trust and granting judgment in favor of those defendants as follows:

It is ADJUDGED and DECLARED that plaintiff is obligated to defend and indemnify those defendants in connection with the negligent entrustment cause of action in the underlying personal injury action,

and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: These three consolidated appeals arise from an automobile accident that occurred on an interstate highway in North Carolina. Shannon M. Doyle, a defendant in appeal Nos. 2 and 3, was driving a vehicle in which there were two passengers: Amy G. Giacometti, a defendant in appeal No. 1 and the plaintiff in appeal No. 2, and Marle M. Fiocco, a defendant in appeal No. 1 (in which she was incorrectly sued as Marley M. Fiocco) and the plaintiff in appeal No. 3. For reasons that are in dispute, Doyle steered the vehicle to the left, at which time Giacometti grabbed the steering wheel and pulled it to the right. The vehicle thereafter went off the road, became airborne, and crashed among trees, injuring the three women. Doyle had leased the vehicle from Vehicle Asset Universal Leasing Trust, General Motors Acceptance Corporation (GMAC), and Central Originating Lease Trust, defendants in appeal Nos. 1 and 3 (collectively, GMAC defendants), and the vehicle was insured by Progressive Halcyon Insurance Company (Progressive), the plaintiff in appeal No. 1.

Giacometti commenced a personal injury action against Doyle in Niagara County (appeal No. 2), and Fiocco commenced a personal injury action in the same county against Doyle, the GMAC defendants, and Giacometti (appeal No. 3). Doyle also commenced a personal injury action against Giacometti in the same county, the status of which cannot be discerned from the record before us. Finally, Progressive and Doyle initially commenced a declaratory judgment action in the same county, but Progressive thereafter filed an amended complaint omitting Doyle as a plaintiff (appeal No. 1), seeking judgment declaring that it is not obligated to defend or indemnify Giacometti in the underlying personal injury actions or the GMAC defendants in connection with Fiocco's cause of action asserting that they negligently entrusted the vehicle to Doyle. By the judgment in appeal No. 1, Supreme Court, inter alia, denied that part of Progressive's motion for summary judgment declaring that Progressive is not obligated to defend or indemnify Giacometti, and denied the cross motion of the GMAC defendants for summary judgment declaring that Progressive is obligated to defend and indemnify them in connection with the negligent entrustment cause of action in the underlying personal injury action commenced by Fiocco, and for summary judgment awarding them attorneys' fees incurred by them in their defense of the

declaratory judgment action. Progressive and the GMAC defendants each appeal from parts of that judgment. In her appeals from the orders in appeal Nos. 2 and 3, Doyle contends that the court erred in denying her motions for summary judgment dismissing the complaint in appeal No. 2, as well as the complaint in appeal No. 3 against her.

In appeal No. 1, we agree with Progressive that the court erred in denying that part of its motion for summary judgment declaring that it is not obligated to defend or indemnify Giacometti in the underlying personal injury actions. We therefore modify the judgment in appeal No. 1 accordingly. Progressive had disclaimed coverage with respect to Giacometti in those actions on the ground that Giacometti was not an insured person within the meaning of the terms of the policy issued to Doyle. That policy defines an "insured person" in relevant part as "any person with respect to an **accident** arising out of that person's use of a **covered vehicle** with the express or implied permission of **you** or a **relative**." We agree with Progressive that it met its burden of establishing that Giacometti had neither the express nor the implied permission of Doyle to use the vehicle. The evidence in the record, including the deposition testimony of Giacometti, establishes that she did not have express permission to take control of the steering wheel, and we further conclude on the record before us that Doyle did not impliedly consent to Giacometti's use of the vehicle in that manner (*see Allstate Ins. Co. v Gill*, 192 AD2d 1123; *Electric Ins. Co. v Boutelle*, 122 AD2d 332). The deposition testimony of Giacometti "that [s]he grabbed the wheel to prevent an accident does not create a question of fact on the issue of permissive use" (*Allstate Ins. Co.*, 192 AD2d at 1123-1124). It is well settled that, "[w]here the provisions of [an insurance] policy 'are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement' " (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232; *see Fulmont Mut. Ins. Co. v New York Cent. Mut. Fire Ins. Co.*, 4 AD3d 724, 725).

We reject the further contention of Giacometti and State Farm Insurance Company, a defendant in appeal No. 1 (State Farm), that any use of a vehicle is with permission of the owner pursuant to the presumption in Vehicle and Traffic Law § 388 (1). Initially, we agree with Giacometti and State Farm that Doyle, as the lessee of the vehicle for a period of more than 30 days, was an owner within the meaning of that statute (*see* §§ 128, 388 [3]). Furthermore, it is well settled that "proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied . . . Once the plaintiff meets its initial burden of establishing ownership, a logical inference of lawful operation with the owner's consent may be drawn from the possession of the operator . . . This presumption may be rebutted, however, by substantial evidence sufficient to show that a vehicle was not operated with the owner's consent" (*Murdza v Zimmerman*, 99 NY2d 375, 380 [internal quotation marks omitted]). Here, that presumption is inapplicable because it was overcome by substantial evidence that the use was without the permission of Doyle, and we therefore conclude that the court erred in denying that part of Progressive's motion.

We agree with the GMAC defendants in appeal No. 1, however, that the court erred in granting that part of Progressive's motion for summary judgment declaring that Progressive is not obligated to defend or indemnify them in connection with the negligent entrustment cause of action against them in the underlying personal injury action commenced by Fiocco and in denying as moot that part of their cross motion for summary judgment declaring that Progressive is obligated to defend and indemnify them in connection with that cause of action. We therefore further modify the judgment in appeal No. 1 accordingly. Although the court by its order in appeal No. 3 ultimately granted the motion of the GMAC defendants for summary judgment dismissing Fiocco's complaint against them, including the negligent entrustment cause of action against them, Progressive had commenced the action in appeal No. 1 before that motion was granted, and the GMAC defendants expended, inter alia, significant attorneys' fees in their defense of that cause of action before it was dismissed against them. "It is well established that a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63; see *Petr-All Petroleum Corp. v Fireman's Ins. Co. of Newark*, 188 AD2d 139, 142). Contrary to Progressive's contention, the fact "[t]hat the claimed negligence here is based upon the entrustment of the motor vehicle rather than, for example, its condition, in no way alters the unarguable fact that the claim arises out of the ownership and use of the vehicle" (*Progressive Cas. Ins. Co. v Jackson*, 151 Misc 2d 479, 483, *affd* 181 AD2d 1035). Thus, the GMAC defendants are entitled to indemnification from Progressive for their defense of Fiocco's negligent entrustment cause of action against them.

Furthermore, with respect to the judgment in appeal No. 1, we note "that 'an insurer's responsibility to defend reaches the defense of any actions arising out of the occurrence,' and defense expenses are recoverable by the insured, including those incurred in defending against an insurer seeking to avoid coverage for a particular claim" (*National Grange Mut. Ins. Co. v T.C. Concrete Constr., Inc.*, 43 AD3d 1321, 1322, quoting *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21). Therefore, "an insured who prevails in an action brought by an insurance company seeking a declaratory judgment that it has no duty to defend or indemnify the insured may recover attorneys' fees regardless of whether the insurer provided a defense to the insured" (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 598; see *National Grange Mut. Ins. Co.*, 43 AD3d at 1322-1323). We therefore further modify the judgment in appeal No. 1 accordingly, and we remit the matter to Supreme Court to determine the amount of reasonable attorneys' fees to which the GMAC defendants are entitled in the declaratory judgment action following a hearing, if necessary (see *National Union Fire Ins. Co. of Pittsburgh, Pa. v City of Oswego*, 295 AD2d 905, 906-907).

We reject the contention of Doyle in appeal Nos. 2 and 3 that she established her entitlement to summary judgment dismissing the Giacometti complaint as well as the Fiocco complaint in its entirety

against her. We conclude that the negligent entrustment cause of action against Doyle in the Fiocco action is lacking in merit inasmuch as we have concluded that Doyle did not give Giacometti express or implied permission to take control of the steering wheel, and thus the court erred in denying that part of Doyle's motion in appeal No. 3. We therefore modify the order in appeal No. 3 accordingly. We further conclude, however, that the court properly denied that part of the motion of Doyle in appeal No. 2 for summary judgment dismissing the complaint and properly denied that part of her motion in appeal No. 3 for summary judgment dismissing the complaint against her, with the exception of the negligent entrustment cause of action. There are issues of fact on the record before us with respect to the complaint in appeal No. 2 and the remainder of the complaint in appeal No. 3 concerning Doyle's alleged negligence and whether such negligence caused the accident (*see generally Huff v Rodriguez*, 45 AD3d 1430, 1431; *Chilberg v Chilberg*, 13 AD3d 1089, 1090).

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

All concur except FAHEY, J., who dissents in part in accordance with the following Memorandum: I respectfully dissent in part. In my view, Supreme Court properly denied that part of the motion of plaintiff, Progressive Halcyon Insurance Company (Progressive), for summary judgment declaring that Progressive is not obligated to defend or indemnify defendant Amy G. Giacometti in the underlying personal injury actions. I therefore would affirm the judgment to the extent that it denied that part of Progressive's motion.

"In determining a dispute over insurance coverage, we first look to the language of the policy . . . We construe the policy in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect' " (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222; *see Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162, *rearg denied* 5 NY3d 825). "As with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court' " (*Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177). Where there are two reasonable but conflicting interpretations of the terms of an insurance policy, those terms are deemed ambiguous (*see Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326), and any issues involving coverage with respect to those terms are resolved in favor of the insured (*see White v Continental Cas. Co.*, 9 NY3d 264, 267; *Handelsman v Sea Ins. Co.*, 85 NY2d 96, 101, *rearg denied* 85 NY2d 924; *Trupo v Preferred Mut. Ins. Co.*, 59 AD3d 1044, 1045).

Here, the policy of insurance issued by Progressive provides that an "insured person" with respect to that part of the policy concerning liability to others is, *inter alia*, "any person with respect to an **accident** arising out of that person's use of a **covered vehicle** with the express or implied permission of **you** or a **relative**." In its

letter to Giacometti disclaiming coverage, Progressive wrote that "[o]ur investigation of this incident reveals that at the time of the motor vehicle accident [in question], you were operating the covered vehicle without the express or implied permission of the [lessee], Shannon M. Doyle. As such, you do not meet the definition of an 'insured person' as defined in the policy."

The fatal flaw in those statements is that "operation" of the vehicle by Giacometti is not at issue. Rather, at issue is, *inter alia*, Giacometti's use of a covered vehicle at the time of the accident. "Use" and "operation" of a motor vehicle are, of course, not interchangeable, inasmuch as "one who 'uses' a vehicle does not necessarily have to be 'operating' it" (8 Couch on Insurance 3d § 111:31, at 111-56 - 111-57). The "use" of a vehicle "includes more than driving or riding in an automobile; it extends to utilizing the vehicle as an instrumental means to an end in any manner intended or contemplated by the insured. 'Operation' is interpreted more narrowly than 'use' and is defined as the exercise of direction and control over the vehicle necessary to move the vehicle from one point to another (i.e., driving the vehicle)" (*id.*).

It is undisputed in this case that the incident giving rise to the underlying actions was an "accident" within the meaning of the policy, that the vehicle at issue is a "covered vehicle" within the meaning of the policy, and that Shannon M. Doyle, the lessee of the vehicle, is the "you" to whom the policy refers. Consequently, the review of the relevant policy provision necessarily turns on the definitions of the phrases "arising out of" and "express or implied permission," as well as the term "use." The policy does not define either of those phrases or that term.

The phrase "arising out of" "has been interpreted by [the Court of Appeals] to mean originating from, incident to, or having connection with . . . , and requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [internal quotation marks omitted]; *see generally United States Fire Ins. Co. v New York Mar. & Gen. Ins. Co.*, 268 AD2d 19, 21-22). Thus, the phrase "arising out of" covers the facts of this case.

The meaning of "express or implied permission" is fairly easy to ascertain. "Express permission," according to the Pattern Jury Instructions within the context of Vehicle and Traffic Law § 388, "may consist of direct statements or acts by or on behalf of the owner that clearly show consent to such operation or use" (PJI 2:245). "Implied permission," again within the context of section 388, may be established by more general or circumstantial evidence that includes previous conduct between the parties with respect to the vehicle in question or other similar vehicles that suggests that there was consent to the use of the particular vehicle on the occasion in question (*see id.*; *Atwater v Lober*, 133 Misc 652, 654). In my view, as will be discussed *infra*, Giacometti was a permissive user inasmuch as she was traveling in the vehicle with Doyle's permission.

The meaning of the term "use" is the pivotal issue in this case. The noun "use" has been defined as, inter alia, "the fact or state of being used," and the verb "use" has been defined as, inter alia, "to carry out a purpose or action by means of" (Webster's Third New International Dictionary 2523-2524 [2002]). In other words, "utilize" is a synonym of "use," which is precisely the conclusion reached in the Couch on Insurance treatise. There, as previously noted, "use" of a vehicle is defined as "includ[ing] more than driving or riding in an automobile; it extends to utilizing the vehicle as an instrumental means to an end in any manner intended or contemplated by the insured" (§ 111:31, at 111-56).

The definition of use in the Couch treatise is based on, inter alia, *Maryland Cas. Co. v Marshbank* (226 F2d 637) and *Gering v Merchants Mut. Ins. Co.* (75 AD2d 321). Addressing first the decision in *Gering*, I note that it sets forth an expansive definition of the term "use" of a vehicle, which "may include control of the vehicle while a flat tire is being repaired . . .; getting in and out of the car . . .; unloading a vehicle . . .; examining the vehicle's gas gauge while filling up its tank . . .; and supervising a [mentally challenged] child while being transported" (*id.* at 323; see *Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554, 560). *Maryland Cas. Co.* is more relevant to the facts of this case. There, the United States Court of Appeals for the Third Circuit reached the following conclusion with respect to the meaning of the terms "use" and "operation" within the context of an automobile insurance policy:

"The fallacy in the plaintiff's position is that the words 'use' and 'operation', which it seeks to equate as synonymous, are in this setting words of quite different meaning. [T]he 'use' of an automobile by an individual involves its employment for some purpose or object of the user while its 'operation' by him [or her] involves his [or her] direction and control of its mechanism as its driver for the purpose of propelling it as a vehicle. It is perfectly clear that an automobile is being used by an individual who is traveling in it regardless of whether it is being operated by him [or her,] or by another" (*id.* at 639).

In my view, *Maryland Cas. Co.* and the Couch treatise correctly conclude that the "use" of a vehicle is the equivalent of the "utilization" of a vehicle, and thus I conclude that Giacometti "used" the vehicle at the time of the accident in the sense that the vehicle facilitated the travel giving rise to the accident. Those authorities notwithstanding, the conclusion that Giacometti used the vehicle at the time of the accident is a logical corollary to existing case law on the issue of use of the vehicle. To the extent that closing the door of a vehicle may be deemed to be part of the process of using or operating the vehicle (see *Glouzwski v Ruback*, 3 AD2d 692; *Fireman's Fund Am. Ins. Co. v Olin of N.Y.*, 84 Misc 2d 504, 505), and to the extent that this Court has held that the act of opening a vehicle door to exit the vehicle constitutes "use and operation" of that vehicle

pursuant to Vehicle and Traffic Law § 388 (see *Henderson v New York Cent. Mut. Fire Ins. Co.*, 56 AD3d 1141, 1142-1143; cf. *Kohl v American Tr. Ins. Co.*, 59 AD3d 681, 682, lv granted 13 NY3d 711), it necessarily follows that utilizing a vehicle for acts that occur in the interim—including the acts of a passenger traveling from one point to another—may be fairly characterized as the “use” of that vehicle.

The foregoing discussion leads to this point: there is no dispute on this record that Giacometti’s use of the vehicle was permissive at least to the extent that Giacometti traveled in the vehicle. The cases upon which the majority relies are not controlling to the extent that Giacometti grabbed the steering wheel because, in those cases (*Allstate Ins. Co. v Gill*, 192 AD2d 1123; *Electric Ins. Co. v Boutelle*, 122 AD2d 332), the driver (in this case, Doyle) did not resist the efforts of the passenger to assume control of the vehicle.

In any event, in my view the issue of Giacometti’s control of the steering wheel is not dispositive of the coverage issue in this case. Most importantly, the language determining whether Giacometti is an insured under the policy is prefaced by the broad “arising out of” phrase, which is absent from the policies at issue in the *Allstate Ins. Co.* and *Electric Ins. Co.* cases on which the majority relies. Moreover, on these facts, the accident, which occurred after Giacometti grabbed the steering wheel from her seat on the passenger’s side of the vehicle, was arguably connected with her traveling in the vehicle, which was undeniably a use of that vehicle and a permissive one at that.

Consequently, the issue of coverage for Giacometti under the Progressive policy in the underlying actions is not ripe for summary judgment in Progressive’s favor (see generally *Bovis Lend Lease LMB, Inc. v American Alternative Ins. Co.*, 45 AD3d 397, 398). I therefore would affirm the judgment to the extent that it denied that part of Progressive’s motion for summary judgment declaring that Progressive is not obligated to defend or indemnify Giacometti in the underlying personal injury actions.

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

280

CA 09-01618

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

AMY G. GIACOMETTI, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SHANNON M. DOYLE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SUGARMAN LAW FIRM LLP, BUFFALO (KELLY J. PHILIPS OF COUNSEL), FOR
DEFENDANT-APPELLANT.

JOHN J. DELMONTE, NIAGARA FALLS, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered January 21, 2009 in a personal injury action. The order denied defendant's motion for summary judgment.

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

Same Memorandum as in *Progressive Halcyon Ins. Co. v Giacometti* (___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

281

CA 09-01617

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

MARLE M. FIOCCO, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SHANNON M. DOYLE, DEFENDANT-APPELLANT,
VEHICLE ASSET UNIVERSAL LEASING TRUST, GENERAL
MOTORS ACCEPTANCE CORPORATION, CENTRAL
ORIGINATING LEASE TRUST, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(APPEAL NO. 3.)

SUGARMAN LAW FIRM LLP, BUFFALO (KELLY J. PHILIPS OF COUNSEL), FOR
DEFENDANT-APPELLANT.

LAW OFFICE OF JOHN J. FROMEN, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP
(EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County
(Richard C. Kloch, Sr., A.J.), entered February 20, 2009 in a personal
injury action. The order, insofar as appealed from, denied the motion
of defendant Shannon M. Doyle for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting that part of the motion of
defendant Shannon M. Doyle seeking summary judgment dismissing the
fourth cause of action and dismissing that cause of action and as
modified the order is affirmed without costs.

Same Memorandum as in *Progressive Halcyon Ins. Co. v Giacometti*
(___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

284

CA 09-02291

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

PARKWAY PEDIATRIC AND ADOLESCENT MEDICINE LLC,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BENEDETTO VITULLO, M.D., DEFENDANT-APPELLANT,
GRETCHEN SMITH-BURKE, M.D. AND PAUL BURKE,
DEFENDANTS-RESPONDENTS.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (MARY JO S. KORONA OF
COUNSEL), FOR DEFENDANT-APPELLANT.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (MATTHEW
J. FUSCO OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND DEFENDANTS-
RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 14, 2009 in an action for, inter alia, breach of contract. The order denied the motion of Benedetto Vitullo, M.D. for summary judgment.

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

Memorandum: Plaintiff medical practice commenced this action seeking damages for, inter alia, breach of fiduciary duty and breach of contract. Benedetto Vitullo, M.D. (defendant), one of plaintiff's members, contends on appeal that Supreme Court erred in denying his motion for summary judgment seeking a determination that, pursuant to the terms of the Operating Agreement (agreement) between plaintiff and defendant, plaintiff must indemnify him for the attorney's fees and costs that he incurred in defending this action. We affirm.

"Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492). Here, the broad indemnification clause in the parties' agreement does not even refer to litigation between the parties to the agreement. The agreement thus does not make it "unmistakably clear" that the parties intended that plaintiff must indemnify defendant for attorney's fees and costs

arising from the instant litigation (*id.*; see *Digital Broadcast Corp. v Ladenburg Thalmann & Co., Inc.*, 49 AD3d 412; *Wal-Mart Stores, Inc. v United States Fid. & Guar. Co.*, 29 AD3d 315, 316; *cf. Western Beef Mariners Harbor, LLC v Vornado Forest Plaza, LLC*, 61 AD3d 745).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

306

TP 09-02172

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

IN THE MATTER OF BRYAN R. HAWKINS, PETITIONER,

V

MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

BRYAN R. HAWKINS, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF
COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered October 23, 2009) to review a determination of respondent. The determination found after a Tier III hearing that petitioner violated various inmate rules.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 113.14 (7 NYCRR 270.2 [B] [14] [iv]) and as modified the determination is confirmed without costs, and respondent is directed to expunge from petitioner's institutional record all references to the violation of that rule.

Memorandum: As respondent correctly concedes in this CPLR article 78 proceeding commenced by petitioner inmate, the determination that petitioner violated inmate rule 113.14 (7 NYCRR 270.2 [B] [14] [iv] [prohibiting, inter alia, the possession of unauthorized medication]), is not supported by substantial evidence. We conclude, however, that there is substantial evidence to support the determination that petitioner violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing to obey a direct order]) and 116.10 (7 NYCRR 270.2 [B] [17] [i] [inter alia, damaging or losing State property]). The misbehavior report, together with the hearing testimony of petitioner and a nurse, constituted substantial evidence that petitioner violated those inmate rules by refusing to move away from his cell door after repeatedly being directed to do so, and by then flushing down the toilet materials from a medicine wrapper after being directed not to do so (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966; *People ex rel. Vega v Smith*, 66 NY2d 130, 139). We therefore modify the determination and grant the petition in part by

annulling that part of the determination finding that petitioner violated inmate rule 113.14, and we direct respondent to expunge from petitioner's institutional record all references to the violation of that rule. Because the penalty has been served and there was no recommended loss of good time, there is no need to remit the matter to respondent for administrative reconsideration of the penalty imposed (see *Matter of Contrera v Coombe*, 236 AD2d 661, 662-663).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

314

KA 08-00305

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES A. PARKER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered February 21, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, criminal possession of a weapon in the second degree, assault in the second degree, reckless endangerment in the first degree and criminal possession of a weapon in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentence imposed for criminal possession of a weapon in the second degree shall run concurrently with the sentence imposed for assault in the first degree and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). We agree with defendant that the sentence imposed for criminal possession of a weapon in the second degree must run concurrently with the sentence imposed for assault in the first degree, and we therefore modify the judgment accordingly. "[T]here was no evidence of intent to intimidate the victim[s] separate from the intent to shoot [them]" (*People v Miles*, 288 AD2d 877, 877, lv denied 97 NY2d 758; see *People v Holland*, 13 AD3d 1101, lv denied 4 NY3d 853). Thus, " 'the weapon possession was not separate and distinct from the shooting[]' and consecutive sentences . . . are prohibited" (*People v Mercer*, 66 AD3d 1368, 1370, lv denied 13 NY3d 940).

Defendant further contends that his conviction of criminal possession of a weapon in the second degree must be reversed because he may have been convicted of an unindicted offense (see generally *People v Benet*, 45 AD3d 1449, 1450, lv denied 10 NY3d 761; *People v*

Watkins, 300 AD2d 1070, 1070-1071, *lv denied* 99 NY2d 659). We reject that contention. The People "presented evidence of one continuing act of possession rather than two separate acts of possession" (*Benet*, 45 AD3d at 1450). We note in addition that, during summation, the prosecutor "obviated any potential for juror confusion with respect to the possibility of two separate acts of possession" by specifying the moment when defendant committed the offense of criminal possession of a weapon in the second degree (*id.*).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

323

CA 09-02136

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT
OF THE ACCOUNT OF HSBC BANK USA, NA, AS
SUCCESSOR EXECUTOR OF THE ESTATE OF
EDWARD MAKOWSKI, DECEASED, RESPONDENT.

----- MEMORANDUM AND ORDER

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF
THE ACCOUNTS OF DAVID DALE, AS EXECUTOR OF
THE ESTATE OF EDWARD MAKOWSKI, DECEASED,
APPELLANT.

IN THE MATTER OF THE APPLICATION FOR REMOVAL OF
THE EXECUTOR IN THE ESTATE OF EDWARD MAKOWSKI,
DECEASED.

IN THE MATTER TO COMPEL THE FIDUCIARY TO
ACCOUNT IN THE ESTATE OF EDWARD MAKOWSKI,
DECEASED.

DAVID DALE, APPELLANT PRO SE.

MICHAEL J. RYAN, BUFFALO, FOR RESPONDENT HSBC BANK USA, NA.

O'BRIEN AND O'BRIEN, AMHERST (JAMES F. O'BRIEN OF COUNSEL), FOR
RESPONDENTS BENEFICIARIES OF THE ESTATE OF EDWARD MAKOWSKI, DECEASED.

Appeal from an order of the Surrogate's Court, Erie County
(Barbara Howe, S.), entered September 23, 2008. The order, inter
alia, denied the request of David Dale, as executor of the estate of
Edward Makowski, deceased, for a decree exonerating him with respect
to a prior order removing him as executor.

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

Memorandum: David Dale, the executor of decedent's estate before
HSBC Bank USA, NA (HSBC) became the successor executor, appeals from
an order denying his request for the issuance of a proposed decree
that would, inter alia, "exonerate[]" him in connection with a prior
order removing him as executor based on "his failure to provide an
adequate interim accounting" (*Matter of Makowski*, 13 AD3d 1210, 1211).
We previously determined that Surrogate's Court did not violate Dale's
due process rights when it permanently removed Dale as executor
"because his interim accounting did not meet the minimal legal
requirements for an accounting (see SCPA 719 [1]), nor did his interim

accounting comply with the terms specified by the court with respect thereto" (*id.* at 1212). We reject the contention of Dale that the stipulation of discontinuance executed by him, as well as the attorney of record for HSBC and the beneficiaries of the estate, restored him to the position of executor of the estate and nullified only those prior orders that were adverse to him. Pursuant to the terms of the stipulation of discontinuance, the actions referenced therein were "discontinued on the merits." By discontinuing an action, "the action is as if it never had been" (*Loeb v Willis*, 100 NY 231, 235; see *Hotel Prince George Affiliates v Grimbilas*, 241 AD2d 302, 303, *lv dismissed* 91 NY2d 887, *rearg denied* 91 NY2d 957). Thus, there was no pending action in which the Surrogate could issue Dale's proposed decree (see *Herald Sq. Foot Care Assoc. v Indemnity Ins. Co. of N. Am.*, 257 AD2d 551; *D'Amico v Nuzzo*, 194 AD2d 761).

Dale's contentions with respect to an order entered in March 2009 are not properly before us because Dale did not file a notice of appeal with respect to that order (see CPLR 5513 [a]; *DiSanto v DiSanto*, 29 AD3d 935). In any event, to the extent that it appears on the record before us that Dale contends with respect to that order that the Surrogate erred in refusing to recuse herself, we note that the request for recusal was made in a "responding affidavit" rather than by way of a motion on notice pursuant to CPLR 2211, and no appeal as of right would lie from that order (see CPLR 5701 [a] [2]; *New York State Div. of Human Rights v Oceanside Cove II Apt. Corp.*, 39 AD3d 608, 609). We note in addition that we are unable to conduct meaningful appellate review of any contentions with respect to that order because there is no proper record on appeal concerning the order (see 22 NYCRR 1000.4 [a] [2]; *Mergl v Mergl*, 19 AD3d 1146). Finally, the contention of Dale that this Court should recuse itself is made for the first time in his appellate brief rather than by way of a motion pursuant to 22 NYCRR 1000.13 and thus is not properly before us.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

324

CA 09-01997

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

BRENT C. CALEB AND ROSALIE A. CALEB,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

SEVENSON ENVIRONMENTAL SERVICES, INC.,
DEFENDANT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Orleans County (James H. Dillon, J.), entered December 23, 2008 in a breach of contract action. The order and judgment granted defendant's motion for a directed verdict and dismissed the amended complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the amended complaint is reinstated, and a new trial is granted.

Memorandum: Plaintiffs commenced this action seeking, inter alia, damages for breach of a contract pursuant to which defendants were to construct a pond on plaintiffs' property. On a prior appeal, this Court affirmed the order denying defendant's motion for summary judgment dismissing the complaint as time-barred. We held that defendant "failed to establish its entitlement to judgment dismissing the complaint as time-barred as a matter of law because there are issues of fact when construction was completed . . . and, indeed, whether it was completed. There is also an issue of fact whether a letter signed by defendant's president acknowledging the obligation of defendant to complete work under the contract had the effect of 'restarting the statute of limitations' " (*Caleb v Severson Env'tl. Servs., Inc.*, 19 AD3d 1090, 1091). A jury trial was held, and defendant moved for a directed verdict at the close of plaintiffs' case. We conclude that Supreme Court erred in granting the motion and in dismissing the amended complaint as time-barred.

It is well established that "[a] denial of a motion for summary judgment is not necessarily *res judicata* or the law of the case that

there is an issue of fact in the case that will be established at the trial' " (*Wyoming County Bank v Ackerman*, 286 AD2d 884). Nevertheless, "[i]f the facts at [trial] are substantially the same as those presented in the prior appeal, the trial court must adhere to this [C]ourt's determination of the controverted questions of law" (*Bolm v Triumph Corp.*, 71 AD2d 429, 434, *lv dismissed* 50 NY2d 801, 928). Because we concluded in the prior appeal that there is a triable issue of fact whether the letter signed by defendant's president restarted the statute of limitations (*Caleb*, 19 AD3d 1090; see General Obligations Law § 17-101), the court was bound by the doctrine of law of the case to submit that issue to the jury. Moreover, despite the expanded record in this appeal, there are triable issues of fact with respect to whether construction was completed and, if so, when it was completed (see *City of Rochester v Holmsten Ice Rinks*, 155 AD2d 939).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

340

CA 09-01622

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

SUZANN GROSS, INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF WILLIAM G. GROSS, M.D.,
DECEASED, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

HERTZ LOCAL EDITION CORP. AND JIM
CULLIGAN, INC., DEFENDANTS-APPELLANTS.

HERTZ LOCAL EDITION CORP., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

JIM CULLIGAN, INC., THIRD-PARTY
DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (TARA N.K. CROSS OF COUNSEL),
FOR DEFENDANT-APPELLANT HERTZ LOCAL EDITION CORP. AND THIRD-PARTY
PLAINTIFF-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (TIMOTHY J. PERRY OF COUNSEL), FOR
DEFENDANT-APPELLANT JIM CULLIGAN, INC. AND THIRD-PARTY DEFENDANT-
APPELLANT.

CONNORS & VILARDO, LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Diane Y.
Devlin, J.), entered October 29, 2008 in a wrongful death and personal
injury action. The order, inter alia, denied the motion of defendant
Hertz Local Edition Corp. for summary judgment dismissing the
complaint against it.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting in part the motion of
defendant Hertz Local Edition Corp. and dismissing the negligence
cause of action against it insofar as that cause of action is based on
the allegedly hazardous condition of the parking lot in question and
as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced these actions, which
subsequently were consolidated, seeking damages for the wrongful death
and conscious pain and suffering of her husband (decedent), who died

as a result of a head injury he sustained in the parking lot of an automobile dealership owned by defendant Jim Culligan, Inc. (Culligan). On the day of the accident, decedent brought his leased vehicle to Culligan for repairs and arranged to rent a vehicle from defendant Hertz Local Edition Corp. (Hertz), which used office space in Culligan's service area and parked its rental vehicles in Culligan's parking lot. Decedent slipped and fell on a patch of ice as he walked across the parking lot in the direction of his rental vehicle.

The complaint against Hertz asserts a cause of action sounding in negligence based on the allegedly hazardous condition of the parking lot and, as amplified by the amended bill of particulars, also based on the alleged failure of Hertz to obtain medical attention for decedent promptly after his fall. The complaint against Culligan, on the other hand, asserts a cause of action sounding in negligence based both on the allegedly hazardous condition of the parking lot and Culligan's alleged failure to obtain medical attention for decedent promptly after his fall. Supreme Court properly denied that part of the motion of each defendant seeking summary judgment dismissing the negligence cause of action against it insofar as that cause of action is based on the alleged failure to obtain medical attention for decedent promptly after his fall. Neither Culligan nor Hertz addressed that basis for the negligence cause of action in each complaint in their initial submissions in support of their respective motions, and thus the burden never shifted to plaintiff to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "Defendants' reply papers could not serve to supplement their initial moving papers inasmuch as it is well established that [t]he function of [reply papers] is to address arguments made in opposition to the position taken by the movant[s] and not to permit [them] to introduce new arguments in support of the motion" (*Paul v Cooper*, 45 AD3d 1485, 1486 [internal quotation marks omitted]).

We further conclude that the court properly denied that part of the motion of Culligan seeking summary judgment dismissing the negligence cause of action against it insofar as that cause of action is based on the allegedly hazardous condition of the parking lot. Culligan failed to meet its initial burden of establishing that it lacked constructive notice of the condition that caused decedent's fall (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188; *Conklin v Ulm*, 41 AD3d 1290, 1291). In any event, we conclude on the record before us that there is an issue of fact with respect to constructive notice, based on the affidavit of plaintiff's expert meteorologist concerning the icy condition of the parking lot (*see Walter*, 56 AD3d at 1188).

The court erred, however, in denying that part of the motion of Hertz seeking summary judgment dismissing the negligence cause of action against it insofar as that cause of action is based on the allegedly hazardous condition of the parking lot. Hertz met its initial burden by submitting evidence that it did not own, occupy or have a right to control or maintain the area of the parking lot where

decendent fell, thereby establishing as a matter of law that it owed "no duty of care with respect to any unsafe condition existing there" (*Masterson v Knox*, 233 AD2d 549, 550). Neither plaintiff nor Culligan raised a triable issue of fact to defeat that part of the motion of Hertz. We therefore modify the order accordingly.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

354

KA 06-00792

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LUIS R. ROBLES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 13, 2005. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of murder in the second degree (Penal Law § 125.25 [1], [3]). Contrary to the contention of defendant, Supreme Court properly admitted the testimony of one of his accomplices pursuant to the coconspirator exception to the hearsay rule. The People established a prima facie case of conspiracy " 'without recourse to the declarations [of that accomplice]' " (*People v Caban*, 5 NY3d 143, 148, quoting *People v Salko*, 47 NY2d 230, 238, rearg denied and remittitur amended 47 NY2d 1010). Indeed, the People established the existence of a conspiracy through "the acts and declarations of defendant" (*Salko*, 47 NY2d at 240). Contrary to the further contention of defendant, the court properly allowed the accomplice to testify with respect to statements made by defendant to him following defendant's arrest "inasmuch as those statements constituted evidence of consciousness of guilt" (*People v McCullen*, 63 AD3d 1708, 1710, lv denied 13 NY3d 747).

In addition, the testimony of the girlfriend of another accomplice (second accomplice) concerning a conversation between the second accomplice and defendant did not violate defendant's right of confrontation because the statements of the second accomplice during that conversation were not themselves testimonial in nature (see *People v Adames*, 53 AD3d 503, lv denied 11 NY3d 895; see generally *Crawford v Washington*, 541 US 36; *People v Goldstein*, 6 NY3d 119, 128-

129, *cert denied* 547 US 1159). We further note that the statements of the second accomplice also were admissible as an exception to the hearsay rule because the People established a prima facie case of conspiracy " 'without recourse to the [statements of the second accomplice]' " (*Caban*, 5 NY3d at 148, quoting *Salko*, 47 NY2d at 238).

Defendant failed to preserve for our review his contention that he was denied certain constitutional rights when the court failed to appoint a second interpreter while his own court-appointed interpreter was engaged in interpreting the testimony of two Spanish-speaking witnesses for the jury (*see People v Melendez*, 8 NY3d 886). In any event, we reject that contention. "There is no evidence that defendant's ability to communicate with [defense counsel] was compromised" or that defendant was otherwise prejudiced (*People v Cinero*, 243 AD2d 330, 331, *lv denied* 91 NY2d 870; *see People v Metellus*, 54 AD3d 601, 602, *lv denied* 11 NY3d 899).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the testimony of two of the People's witnesses was not incredible as a matter of law. The testimony "was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925) but, rather, it merely presented "credibility issues that were resolved by the jury, and we accord great deference to the jury's credibility determinations" (*People v Harris*, 56 AD3d at 1268).

Finally, the sentence is not unduly harsh or severe.

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

357

KA 07-00824

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DYANI A. GREGORY, 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 (John R. Schwartz, A.J.), rendered March 5, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]). The conviction arises from an incident in which a police officer heard loud music coming from an empty vehicle parked on a public street and observed defendant standing near the open driver's side window. The officer issued a noise ordinance violation to defendant and determined that the vehicle should be towed and impounded pursuant to a City of Rochester towing ordinance. During an inventory search of the vehicle, the officer found, inter alia, a handgun and hospital discharge papers bearing defendant's name. In pretrial motions and during the suppression hearing, defense counsel unsuccessfully attempted to demonstrate that defendant did not own or possess the vehicle and thus that the police lacked probable cause to arrest him inasmuch as there was no connection between defendant and the handgun.

We reject the contention of defendant that he was denied effective assistance of counsel based on defense counsel's unsuccessful attempt to establish that certain physical evidence should be suppressed (*see generally People v Baldi*, 54 NY2d 137, 147). That contention is "based largely on [defendant's] hindsight disagreement[] with defense counsel's . . . strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies" (*People v Morrison*, 48

AD3d 1044, 1045, *lv denied* 10 NY3d 867; *see People v Benevento*, 91 NY2d 708, 712-713).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

364

CA 08-02666

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

ALEXANDER LIFSON, EXECUTOR OF THE ESTATE OF
IRENE LIFSON, DECEASED,
PLAINTIFF-APPELLANT-RESPONDENT,

V

ORDER

CITY OF SYRACUSE, DEFENDANT-RESPONDENT-APPELLANT,
AND DEREK J. KLINK, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL),
FOR PLAINTIFF-APPELLANT-RESPONDENT.

RORY A. MCMAHON, CORPORATION COUNSEL, SYRACUSE (JAMES P. MCGINTY OF
COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court,
Onondaga County (Brian F. DeJoseph, J.), entered November 26, 2008.
The order denied the motions of plaintiff and defendant City of
Syracuse to set aside the verdict and for a new trial.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

365

CA 09-01739

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

ALEXANDER LIFSON, EXECUTOR OF THE ESTATE OF
IRENE LIFSON, DECEASED,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-RESPONDENT-APPELLANT,
AND DEREK J. KLINK, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL),
FOR PLAINTIFF-APPELLANT-RESPONDENT.

RORY A. MCMAHON, CORPORATION COUNSEL, SYRACUSE (JAMES P. MCGINTY OF
COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from a judgment of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered November 10, 2008. The judgment, inter alia, apportioned liability between defendant City of Syracuse and decedent upon a jury verdict.

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

Memorandum: Plaintiff, as executor of decedent's estate, commenced this action alleging that decedent was killed when a vehicle driven by defendant Derek J. Klink struck her while she was crossing the street. According to plaintiff, defendant City of Syracuse (City) was negligent in failing, inter alia, to provide for pedestrian safety at the intersection where the accident occurred. Supreme Court previously denied the motion of the City for summary judgment dismissing the complaint against it and, on a prior appeal, we modified the order by granting the motion insofar as the complaint alleged that the City "was negligent in its design of the intersection" (*Lifson v City of Syracuse*, 41 AD3d 1292, 1293). We concluded, however, that "the court properly denied [the City's] motion insofar as the complaint may be construed to allege the violation of" the continuing duty of the City to review its traffic plan for the intersection in light of the actual operation of that plan (*id.* at 1294; see *Friedman v State of New York*, 67 NY2d 271, 284), and the ensuing jury trial on the issue of the City's liability

was limited to that issue. The jury found that Klink was not negligent, that the City was 15% at fault, and that decedent was 85% at fault. The court denied the motions of plaintiff and the City to set aside the verdict and for a new trial pursuant to CPLR 4404 (a). Plaintiff appeals and the City cross-appeals from the judgment that, inter alia, dismissed the action against Klink and apportioned liability between the City and decedent.

We reject the contention of plaintiff on his appeal that the court erred in denying that part of his motion to set aside the verdict with respect to Klink as against the weight of the evidence. "A verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" (*Jaquay v Avery*, 244 AD2d 730, 730-731; see *Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *Tout v Zsiros*, 49 AD3d 1296, *lv denied* 10 NY3d 713). Here, the evidence, including Klink's trial testimony, established that Klink did not observe decedent when Klink began to turn at the intersection because decedent was not in the unmarked crosswalk and that he did not see her thereafter because he was suddenly and unexpectedly blinded by sun glare. The jury was entitled to credit that evidence in favor of Klink, and thus it cannot be said that the verdict with respect to Klink could not have been reached on any fair interpretation of the evidence (see generally *Sullivan v Goksan*, 49 AD3d 344; *Ellis v Borzilleri*, 41 AD3d 1170, 1171; *McDermott v Coffee Beanery Ltd.*, 9 AD3d 195, 207). Furthermore, we reject plaintiff's contention that sun glare does not constitute a defense to negligence as a matter of law (see e.g. *Benitez v Olson*, 6 AD3d 560, 561-562, *lv dismissed in part and denied in part* 3 NY3d 753). Also contrary to the contention of plaintiff, the court properly denied that part of his motion to set aside the verdict finding that decedent was 85% at fault as against the weight of the evidence. There is a fair interpretation of the evidence supporting a finding that decedent was outside of the unmarked crosswalk, requiring her to yield the right-of-way in accordance with Vehicle and Traffic Law § 1152 (a).

We reject plaintiff's contention that the court erred in giving an emergency instruction with respect to the assertion of Klink that he failed to observe decedent because he was blinded by sun glare. An emergency instruction is appropriate when the court determines that there is a reasonable view of the evidence supporting the occurrence of "a sudden and unforeseen emergency not of the actor's own making . . . [that] 'leaves little or no time for thought, deliberation or consideration' " (*Caristo v Sanzone*, 96 NY2d 172, 175, quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, *rearg denied* 77 NY2d 990). Here, there is a reasonable view of the evidence establishing that the sun glare was a sudden and unforeseen circumstance justifying the emergency instruction. The fact that the court deviated from PJI 2:14 to take into account the language of *Caristo* in the instruction did not render it erroneous. We reject plaintiff's further contention that the court's instruction defining the location of the unmarked crosswalk was also erroneous. That instruction was properly based on

the definition of an unmarked crosswalk set forth in Vehicle and Traffic Law § 110 (a) and the definition of a sidewalk set forth in section 144, as well as the application of section 110 to a "T" intersection (see *Fan v Buzzitta*, 42 AD2d 40, 41-43; see generally *Vanbenschoten v Pitarys*, 284 AD2d 912).

Contrary to the contention of the City on its cross appeal, the court properly admitted in evidence documents pertaining to its initial traffic plan for the intersection. Those documents were admitted for the limited purpose of providing a starting point for the ongoing duty of the City to review its traffic plan in light of the actual operation of the plan (see generally *Lifson*, 41 AD3d at 1293-1294). We reject the further contention of the City that the court erred in failing to instruct the jury that it had qualified immunity with respect to the original traffic plan. Although the court did not use the words "qualified immunity," it properly advised the jury of the limited issue before it. The City failed to preserve for our review its contention that the court erred in failing to instruct the jury that the City had a continuing duty to monitor the traffic situation at the intersection only when it was made aware of a dangerous traffic condition. In any event, we note that there was in fact a citizen complaint concerning the traffic situation at that intersection made in 1993. Finally, we reject the City's further contention that the verdict was inconsistent to the extent that the jury found that Klink was not negligent and that the City was 15% at fault (see generally *Gaston v Viclo Realty Co.*, 215 AD2d 174, *lv denied* 87 NY2d 804, *cert denied* 517 US 1169).

All concur except PERADOTTO, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent and would reverse because I agree with plaintiff on his appeal that Supreme Court erred in giving an emergency instruction with respect to the assertion of Derek J. Klink (defendant) that he failed to observe decedent because he was blinded by sun glare.

At approximately 4:00 P.M. on February 29, 2000, defendant was driving north on Harrison Place in defendant City of Syracuse (City). Defendant stopped at a stop sign at the intersection of Harrison Place and Harrison Street. Defendant looked to the left and to the right and then proceeded to make a left turn onto Harrison Street. According to defendant, he was in the process of making the left turn when his vision was momentarily obstructed by sun glare. Defendant took his eyes off the road and, when he looked back up again, he observed decedent approximately one foot in front of his vehicle. Defendant "slammed" on the brakes but was unable to avoid hitting decedent, who subsequently died as a result of her injuries.

Plaintiff, as executor of decedent's estate, commenced this action alleging, inter alia, that defendant was negligent in failing to avoid the collision. Following a trial, the jury found that Klink was not negligent, that the City was 15% at fault, and that decedent was 85% at fault.

Under the circumstances of this case, I conclude that the court

erred in giving an emergency instruction. In determining whether a party is entitled to such an instruction, a court is required "to make the threshold determination that there is some reasonable view of the evidence supporting the occurrence of a 'qualifying emergency' " (*Caristo v Sanzone*, 96 NY2d 172, 175, quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, *rearg denied* 77 NY2d 990). The emergency instruction is appropriate "where the evidence supports a finding that the party requesting the charge was confronted by 'a sudden and unexpected circumstance [that] leaves little or no time for thought, deliberation or consideration' " (*id.* at 175, quoting *Rivera*, 77 NY2d at 327). However, "[a]n emergency instruction is not proper where the situation is neither sudden nor unexpected or could have been reasonably anticipated in light of the surrounding circumstances" (*Smith v Perfectaire Co.*, 270 AD2d 410; see *Muye v Liben*, 282 AD2d 661, 662).

Here, there was no evidence presented at trial upon which a jury could reasonably have found that defendant was faced with an emergency situation. Specifically, defendant failed to establish that the sun glare that momentarily obstructed his vision was unexpected. Defendant never testified at trial that he was unaware that the sun was out or that he did not expect to be driving into the sun when he turned left to travel west on Harrison Street. To the contrary, defendant testified that he had previously looked to the left, i.e., to the west, and that he was familiar with the intersection in question. Notably, the accident occurred in late February at around 4:00 P.M. In my view, the glare of the sun in the late afternoon is not an emergency situation. Rather, it is a condition that should be anticipated as a routine occurrence at certain times of the day and in particular weather conditions.

This case is not unlike *Caristo* in which the Court of Appeals held that there was no qualifying emergency to justify an emergency instruction (96 NY2d at 175). The Court reasoned that, given the driver's "admitted knowledge of the worsening weather conditions, the presence of ice on the hill [could not] be deemed a sudden and unexpected emergency," despite the fact that the driver had not encountered ice on the roadways before losing control of his vehicle (*id.*). In my view, knowledge of weather conditions is akin to knowledge of lighting and/or sun conditions. It is well settled that a driver is required to be aware of dangers existing from weather, traffic and other conditions, including lighting conditions (see *Avila v Mellen*, 131 AD2d 408; see generally PJI 2:77). The defendant in *Avila* was driving eastbound and claimed that "he was temporarily blinded by the headlights of the westbound cars and thus . . . did not see [the plaintiff pedestrian] . . . until he was 10 feet or less away from her," and the Second Department held that he was not entitled to an emergency instruction (*id.* at 409).

In this case, defendant should have anticipated the possibility that he might encounter glare from the sun when he began to turn his vehicle to travel west into the setting sun. Because the condition defendant faced was not unexpected in light of the sunny weather and the time of day, defendant was not entitled to the benefit of an

emergency instruction (see *Caristo*, 96 NY2d at 175; *Smith*, 270 AD2d 410). I therefore would reverse the judgment, grant plaintiff's post-trial motion, set aside the verdict, reinstate the amended complaint against defendant and grant a new trial on liability.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

372

KA 09-00950

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL A. PROKOPIENKO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (RAY A. KYLES OF
COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (KURT D. SCHULTZ OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County
(Bernadette T. Romano, J.), rendered February 3, 2009. The judgment
convicted defendant, upon his plea of guilty, of criminal contempt in
the second degree.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law and the matter is remitted to Supreme
Court, Oneida County, for further proceedings on the misdemeanor
complaint.

Memorandum: In appeal No. 1, defendant appeals from a judgment
that, according to the certificate of conviction, convicted him upon
his guilty plea of criminal contempt in the second degree (Penal Law §
215.50 [3]) and, in appeal No. 2, he appeals from a judgment that
revoked a sentence of probation upon his conviction of criminal
contempt in the second degree separate from that in appeal No. 1 and
imposed a sentence of incarceration.

With respect to appeal No. 1, we reject defendant's contention
that Supreme Court erred in reopening the action, which had been
adjourned in contemplation of dismissal (ACD) pursuant to CPL 170.55.
The ACD was granted on July 23, 2007, and the People moved to reopen
the action on March 28, 2008, well within the statutory one-year
period (see CPL 170.55 [2]; CPL 530.11 [former (1)]). Likewise, there
is no merit to the contention of defendant that the court violated CPL
380.50 (1) on August 4, 2008. That statute concerns statements at
sentencing, and defendant was not sentenced on that date. The further
contention of defendant in appeal No. 1 that his waiver of the right
to appeal is unenforceable is misplaced inasmuch as that waiver
concerns only appeal No. 2.

Nevertheless, we conclude with respect to appeal No. 1 that the apparent contention of defendant that he was not convicted of the charge of criminal contempt in the second degree at issue in that appeal has merit. Defendant's acceptance of an ACD on that charge does not constitute a conviction of that crime. We therefore reverse the judgment in appeal No. 1 and remit the matter to Supreme Court for further proceedings on the misdemeanor complaint (*see generally People v Carnett*, 19 AD3d 703).

With respect to appeal No. 2, defendant contends that the court erred in imposing a sentence of probation without eliciting a guilty plea from him, and that his waiver of the right to appeal is unenforceable "because the entire proceeding was illegal." Although we are not entirely satisfied with the manner in which the court conducted the plea allocution in connection with that underlying judgment of conviction, we note that defendant's instant contentions concerning that plea proceeding are not properly before us on this appeal from the subsequent judgment in appeal No. 2 revoking the sentence of probation (*see People v Lawlor*, 49 AD3d 1270, *lv denied* 10 NY3d 936). Finally, the contention of defendant in appeal No. 2 that the court erred in sentencing him to a period of probation without affording him an opportunity to make a statement on his own behalf as required by CPL 380.50 (1) also is not properly before us on this appeal from the subsequent judgment in appeal No. 2 revoking the sentence of probation (*see Lawlor*, 49 AD3d 1270).

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

373

KA 09-00958

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL A. PROKOPIENKO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (RAY A. KYLES OF
COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (KURT D. SCHULTZ OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County
(Bernadette T. Romano, J.), rendered February 3, 2009. The judgment
revoked defendant's sentence of probation and imposed a sentence of
incarceration.

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

Same Memorandum as in *People v Prokopienko* ([appeal No. 1] ____
AD3d ____ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

376

KA 09-00947

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TRACI L. BOYZUCK, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

SUSAN H. LINDENMUTH, DISTRICT ATTORNEY, PENN YAN (JASON COOK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered February 3, 2009. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the second degree and criminal possession of a forged instrument in the second degree (six counts).

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 for criminal possession of a forged instrument in the second degree under counts 12, 14, 18, 19, 21 and 41 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 her, upon her plea of guilty, of one count of grand larceny in the second degree (Penal Law § 155.40 [1]) and six counts of criminal possession of a forged instrument in the second degree (§ 170.25). We reject defendant's contention that the imposition of consecutive sentences for the counts of criminal possession of a forged instrument was illegal. Defendant committed six distinct acts that formed the basis for those counts, and thus County Court was authorized to impose consecutive sentences (*see People v Day*, 73 NY2d 208, 211-212).

Nevertheless, we agree with defendant that the imposition of consecutive sentences for the counts of criminal possession of a forged instrument renders the sentence unduly harsh and severe. Here, the valid waiver by defendant of the right to appeal does not preclude her from challenging the severity of the sentence inasmuch as the court's statements concerning the maximum sentence that could be imposed were inconsistent, confusing and misleading (*see generally People v McNulty*, 70 AD3d 1127, 1128; *People v Gordon*, 53 AD3d 793). During the plea proceeding, the court advised defendant that she would be sentenced to a term of incarceration of 6 to 18 years. The court,

however, also told defendant three times during the plea proceeding that she could receive "up to 15 years in prison" for the crimes to which she was pleading guilty. Indeed, the court advised her that, if she did not cooperate with the Probation Department, the sentence promise would be withdrawn and she could "be sentenced to as much as a maximum permitted by law: that is, 15 years in prison." That statement not only reinforced the misstatement concerning the possible maximum term of incarceration, but it also suggested that an enhanced term of 15 years would be imposed as a sanction for defendant's failure to cooperate with the Probation Department. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences imposed for criminal possession of a forged instrument in the second degree under counts 12, 14, 18, 19, 21 and 41 of the indictment shall run concurrently with respect to each other (see CPL 470.15 [6] [b]).

Although the further contention of defendant that she was denied effective assistance of counsel survives her guilty plea and valid waiver of the right to appeal to the extent that she contends that the plea was infected by the alleged ineffective assistance (see *People v Kapp*, 59 AD3d 974, lv denied 12 NY3d 818), we nevertheless conclude that her contention lacks merit (see generally *People v Ford*, 86 NY2d 397, 404). Finally, the court properly directed defendant to pay a 10% surcharge on the restitution ordered based upon the affidavit of a Probation Department official indicating that "the actual cost of the collection and administration of restitution . . . exceeds [the initial 5% surcharge]" (Penal Law § 60.27 [8]; see *People v Bennett*, 52 AD3d 1236, 1236-1237, lv denied 11 NY3d 785).

All concur except FAHEY and PINE, JJ., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part and would affirm inasmuch as, unlike the majority, we conclude that defendant's valid waiver of the right to appeal precludes this Court from exercising its power to review the severity of the sentence as a matter of discretion in the interest of justice (see generally *People v Lopez*, 6 NY3d 248, 255). When defendant appeared before County Court to enter her plea, defense counsel summarized the terms of the plea agreement, which included a plea of guilty to one count of grand larceny in the second degree and six counts of criminal possession of a forged instrument in the second degree. Defense counsel stated that the recommended sentence would be a term of incarceration of 2 to 6 years on the charge of grand larceny "with the other counts running consecutive but concurrent to the grand larceny charges." Defendant responded in the affirmative when the court asked defendant if she knew "that [she] could receive up to 15 years in prison for the crimes charged against [her] in th[e] indictment." At that point, the court reviewed the terms of the plea agreement, specifically noting that the promised sentence would consist of, inter alia, "a maximum of three years and a minimum of one year on the six counts [of criminal possession of a forged instrument] to be consecutive and . . . a maximum [of] six years and a minimum [of] two years on the grand larceny second count." Thereafter, the court asked defendant whether she understood that she was required to waive her

right to appeal as a condition of the plea, and she executed a written waiver of the right to appeal setting forth that her total term of incarceration would be 6 to 18 years. Defendant then entered her plea, and she was sentenced in accordance with the plea agreement.

The record of the plea colloquy thus establishes that, despite the court's erroneous statement that defendant could receive up to 15 years for the crimes to which she was pleading guilty, she thereafter was twice informed, before she entered her plea, of the specific sentence that she would receive pursuant to the plea agreement.

It is well established that a valid waiver of the right to appeal encompasses a challenge to the severity of the sentence where the defendant is informed of the specific sentence promised before waiving the right to appeal (*see id.* at 255; *People v Mingo*, 38 AD3d 1270; *People v Semple*, 23 AD3d 1058, *lv denied* 6 NY3d 852; *see also People v Gordon*, 43 AD3d 1330, *lv denied* 9 NY3d 1006). Because defendant was informed of the specific sentence promised before she waived the right to appeal, we conclude that her valid waiver of the right to appeal encompasses her challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255). Indeed, under these circumstances, "[a] defendant may not subsequently eviscerate [a plea] bargain by asking an appellate court to reduce the sentence in the interest of justice" (*id.* at 255-256). "The important goals of fairness and finality in criminal matters are accomplished only insofar as the parties are confident that the carefully orchestrated bargain of an agreed-upon sentence will not be disturbed as a discretionary matter" (*id.* at 256 [internal quotation marks omitted]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

386

CA 09-01623

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

JOHN CALDERON, JR., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

WALGREEN CO. AND WALGREEN EASTERN CO., INC.,
DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

VALERIO & KUFTA, P.C., ROCHESTER (MARK J. VALERIO OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered February 26, 2009 in a personal injury action. The order, insofar as appealed from, granted plaintiff's motion for partial summary judgment and denied in part defendants' cross motion for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when the scaffold he was dismantling tipped backward, causing him to fall to the ground. Supreme Court properly granted plaintiff's motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim. Plaintiff met his initial burden of establishing that the statute was violated and that the violation proximately caused his injuries, and defendants failed to raise a triable issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "A violation [of Labor Law § 240 (1)] occurs where a scaffold . . . is inadequate in and of itself to protect workers against the elevation-related hazards encountered while . . . dismantling that device, and it is the only safety device supplied" (*Cody v State of New York*, 52 AD3d 930, 931; *see Metus v Ladies Mile Inc.*, 51 AD3d 537; *Kyle v City of New York*, 268 AD2d 192, 197-198, *lv denied* 97 NY2d 608; *Pritchard v Murray Walter, Inc.*, 157 AD2d 1012, 1013). Even assuming, arguendo, that plaintiff was negligent in moving materials to the back of the scaffold, thereby causing the scaffold to become unbalanced, we conclude that the "actions [of plaintiff] 'render him [merely] contributorily negligent, a defense unavailable under [section 240 (1)]' " (*Gizowski v State of New York*, 66 AD3d 1348, 1349). "Because plaintiff established that a statutory

violation was a proximate cause of [his] injur[ies], [he] 'cannot be solely to blame for it' " (*Woods v Design Ctr., LLC*, 42 AD3d 876, 877, quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290).

The court also properly denied that part of defendants' cross motion seeking summary judgment dismissing the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-5.1 (b) and 12 NYCRR 23-5.3 (g). Those regulations are sufficiently specific to support that claim (see *Abreo v URS Greiner Woodward Clyde*, 60 AD3d 878, 880-881), and triable issues of fact exist whether the alleged violation of those regulations proximately caused plaintiff's injuries (see *Bobo v Slattery Assoc.*, 251 AD2d 439).

All concur except CENTRA, J.P., and CARNI, J., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part. We agree with defendants that Supreme Court erred in granting plaintiff's motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim and that the court should have granted that part of defendants' cross motion seeking summary judgment dismissing that claim. A defendant is not liable pursuant to Labor Law § 240 (1) where, as here, there is no evidence of a statutory violation and the plaintiff's own negligence was the sole proximate cause of the accident (see *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290-291). "[A]n accident alone does not establish a Labor Law § 240 (1) violation or causation" (*Blake*, 1 NY3d at 289).

In support of their cross motion, defendants submitted the expert affidavit of a safety engineer who, following his review of the entire pretrial record, opined that base plates are designed to prevent a scaffold from sinking into the ground or "walking" while in use, which the undisputed facts establish did not occur in this case. Thus, defendants' expert concluded that the absence of base plates on the scaffold in question was not a proximate cause of plaintiff's accident. In addition, defendants' expert concluded that the scaffold provided proper protection and that no other safety devices were required. He stated that "the only cause of the accidental tipping of the scaffold . . . was the action of the plaintiff in moving all the materials to the rear outrigger of the scaffold and throwing down the planks from the front outrigger and the front of the top of the scaffold, thus creating a situation where the scaffold was dangerously imbalanced and tipped over when the plaintiff moved to the rear of the scaffold." Thus, defendants established that this was not a case in which a scaffold collapsed "for no apparent reason" (*id.* at 289 n 8). Therefore, in our view, defendants established that they provided proper protection, that no other safety devices were necessary or applicable to the dismantling of the scaffold, and that the negligent actions of plaintiff were the sole proximate cause of the tipping of the scaffold and his injuries (see *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 555).

In opposition to the cross motion, plaintiff failed to submit competent evidence raising a triable issue of fact whether the statute was violated and, if so, whether such violation was a proximate cause of his injuries (*see generally Cahill*, 4 NY3d at 39). Even assuming, *arguendo*, that the absence of base plates constituted a violation of the statute, we conclude that plaintiff failed to raise a triable issue of fact whether the scaffold became unstable based on the absence of base plates, and not because of plaintiff's improper distribution of the load on the scaffold (*see Duda v Rouse Constr. Corp.*, 32 NY2d 405, 410; *cf. Costello v Hapco Realty*, 305 AD2d 445, 446).

We therefore would modify the order by denying plaintiff's motion and by granting that part of defendants' cross motion seeking summary judgment dismissing the Labor Law § 240 (1) claim and dismissing that claim.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

387

CA 09-01424

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

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

V

OPINION AND ORDER

DANIEL FARNSWORTH, RESPONDENT-APPELLANT,
FOR CIVIL MANAGEMENT PURSUANT TO ARTICLE 10
OF THE MENTAL HYGIENE LAW.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA
(MARGOT S. BENNETT OF COUNSEL), FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County
(Timothy J. Walker, A.J.), entered June 8, 2008 in a proceeding
pursuant to Mental Hygiene Law article 10. The order denied
respondent's motion to dismiss the petition.

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

Opinion by PINE, J.: At issue on this appeal is the
constitutionality of Mental Hygiene Law article 10 as applied to
persons such as respondent who were convicted of certain designated
felonies that were sexually motivated and were committed before the
effective date of article 10 (§ 10.03 [f], [g] [4]). Because sexual
motivation was not an element of the underlying designated felonies,
article 10 requires that the sexual motivation be established at the
civil commitment trial (§ 10.07 [c]), where the standard of proof is
clear and convincing evidence (§ 10.07 [d]). Respondent contends that
the application of the clear and convincing standard instead of the
reasonable doubt standard to the determination of the issue of sexual
motivation violates his constitutional rights to due process of law
and equal protection of the laws (US Const Amend XIV; NY Const, art I,
§§ 6, 11). We reject those contentions and conclude that Supreme
Court properly denied his motion to dismiss the article 10 petition.

I

Effective April 13, 2007, the New York Legislature enacted the
Sex Offender Management and Treatment Act ([SOMTA] L 2007, ch 7).
Section 10.01 of the Mental Hygiene Law, entitled "Legislative

findings," states that the Legislature finds

"[t]hat recidivistic sex offenders pose a danger to society that should be addressed through comprehensive programs of treatment and management. Civil and criminal processes have distinct but overlapping goals, and both should be part of an integrated approach that is based on evolving scientific understanding, flexible enough to respond to current needs of individual offenders, and sufficient to provide meaningful treatment and to protect the public."

The specified goals of the legislation were "to protect the public, reduce recidivism and ensure [that] offenders have access to proper treatment" (§ 10.01 [c]), and the Legislature recognized "[t]hat sex offenders in need of civil commitment are a different population from traditional mental health patients, who have different treatment needs and particular vulnerabilities" (§ 10.01 [g]).

In his Program Bill Memorandum, Governor Spitzer summarized the purpose of SOMTA:

"This bill enacts [SOMTA], which establishes comprehensive reforms to enhance public safety by allowing the State to continue managing sex offenders upon the expiration of their criminal sentences, either by civilly confining the most dangerous recidivistic sex offenders, or by permitting strict and intensive parole supervision of offenders who pose a lesser risk of harm. Treatment is mandated during both criminal and civil confinement and during the period of strict supervision. It also creates a new crime of a 'Sexually Motivated Felony,' and provides for enhanced terms of post-release [sic] supervision for all persons who commit felony sex offenses" (Bill Jacket, L 2007, ch 7, at 5; see also Senate Introducer Mem in Support, Bill Jacket, L 2007, ch 7, at 19).

Pursuant to Mental Hygiene Law § 10.07, a detained sex offender may be civilly committed if it is determined by clear and convincing evidence after a trial that the offender suffers from a mental abnormality, and the court thereafter concludes that the offender is a dangerous sex offender requiring confinement (§ 10.07 [d], [f]). "A '[d]etained sex offender' means a person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony," including individuals who have been convicted of a sex offense as defined in section 10.03 (p), and those convicted of a designated felony that was sexually motivated and committed prior to the effective date of article 10 (§ 10.03 [g] [1], [4]). A sex offense as defined in section 10.03 (p) (1) includes an act or acts that constitute any felony defined in article 130 of the

Penal Law, and a designated felony includes burglary in the second degree (§ 10.03 [f]). "[A] '[d]angerous sex offender requiring confinement' means a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]).

At the same time that the Legislature enacted article 10, it created a new crime under article 130 of the Penal Law, entitled sexually motivated felony (§ 130.91 [L 2007, ch 7, § 29]). That legislation also became effective on April 13, 2007, and subdivision (1) of section 130.91 provides that "[a] person commits a sexually motivated felony when he or she commits [any of the designated felonies set forth in section 10.03 (f)] for the purpose, in whole or substantial part, of his or her own direct sexual gratification." Those individuals who commit any of the designated felonies *after* the effective date of article 10 will be included in the scope of article 10 only if they were convicted of the newly enacted sexually motivated felony (see Mental Hygiene Law § 10.03 [g][1]; [p]). For those individuals, the element of sexual motivation, as with any element of a criminal offense, will have to be established beyond a reasonable doubt. With respect to those individuals who committed designated felonies *before* the effective date of article 10, however, the element of sexual motivation will have to be established at the civil commitment trial, where the applicable standard of proof is the lower clear and convincing standard (see § 10.03 [g] [4]; § 10.07 [d]).

II

The facts of this case are not in dispute and may be stated briefly. On June 20, 2005, respondent was convicted upon a plea of guilty of two counts of burglary in the second degree (Penal Law § 140.25 [2]) and was sentenced to concurrent terms of incarceration. As respondent neared his release date, petitioner filed a sex offender civil management petition contending, *inter alia*, that the underlying facts of respondent's crimes revealed a sexual motivation. Petitioner alleged that respondent had admitted that he burglarized various homes with the intent to molest young children. Although respondent never actually molested the children, he admitted that, on one occasion, he had removed the clothes and diaper from a two-year-old child, but fled the scene when the child began to cry.

Respondent has a criminal history replete with evidence of sexually motivated offenses. At age 15, he sexually abused two eight-year-old boys in his neighborhood. At age 19, he was observed masturbating in front of young boys while at a YMCA, and he violated his sentence of probation by refusing sex offender treatment. When respondent was 21, he was arrested for trespassing at a church and daycare facility and was found to be in possession of a photo album containing the pictures of small children who attended the church and daycare. Shortly after that arrest, respondent engaged in the conduct that resulted in the burglary convictions. When arrested for the

burglaries, he was located near a school where, over the course of several months, he had been observed watching the children.

Petitioner alleged that respondent was a detained sexual offender who fell within the ambit of article 10 because he was convicted of a designated felony under Mental Hygiene Law § 10.03 (f) "that was sexually motivated and [was] committed prior to the effective date of [article 10]" (§ 10.03 [g] [4]; see also § 10.03 [p] [4]). As previously noted, respondent moved to dismiss the petition on the ground that his constitutional rights to due process and equal protection were violated. According to respondent, the reasonable doubt standard should be applied to prove the element of sexual motivation, rather than the lower clear and convincing standard. That contention has not been conclusively addressed by any state court in New York, although one federal district court has addressed that contention in the context of determining whether to grant a preliminary injunction (*Mental Hygiene Legal Serv. v Spitzer*, 2007 WL 4115936, *4 [SD NY], *affd* 2009 WL 579445 [2nd Cir]). The District Court granted in part and denied in part plaintiffs' motion for a preliminary injunction. With respect to those individuals convicted of designated felonies before the effective date of article 10, the District Court concluded that, on the record before it, plaintiffs had not demonstrated a likelihood of success on the merits with respect to their contention that the application of the clear and convincing standard to prove the sexual motivation element violated due process (*id.* at *26). The District Court also concluded that there was a rational basis for the disparate treatment of those individuals convicted before and after the effective date of article 10 and thus rejected plaintiffs' equal protection argument (*id.* at *26 n 34). For the reasons that follow, we conclude that the order in this proceeding should be affirmed.¹

III

"There is a strong presumption that legislative enactments are constitutional" (*People v Knox*, 12 NY3d 60, 69, *cert denied* ___ US ___, 130 S Ct 552; see McKinney's Cons Laws of NY, Book 1, Statutes § 150; *Dalton v Pataki*, 5 NY3d 243, 255, *rearg denied* 5 NY3d 783, *cert denied* 546 US 1032). "While the presumption is not irrefutable,

¹The same due process infirmity that respondent alleges in this proceeding would apply equally to an individual charged with a sex offense who has been determined to be an incapacitated person (*see* Mental Hygiene Law § 10.03 [g] [2]). In that instance, Mental Hygiene Law § 10.07 (d) provides that the Attorney General may establish by clear and convincing evidence that the individual in fact engaged in the conduct constituting the criminal offense. Thus, for incapacitated persons, the elements of the past criminal offense will be established by clear and convincing evidence only. For individuals convicted of, *inter alia*, a sexual offense, including the newly enacted sexually motivated felony, or those determined to be not guilty by reason of mental disease or defect, the commission of the elements of the past criminal offense, however, has already been established beyond a reasonable doubt (*see Jones v United States*, 463 US 354, 363-364; *People v Lancaster*, 69 NY2d 20, 29, *cert denied* 480 US 922).

parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt' " (*LaValle v Hayden*, 98 NY2d 155, 161, quoting *People v Tichenor*, 89 NY2d 769, 773, cert denied 522 US 918; see *Dalton*, 5 NY3d at 255).

The due process challenge advanced by respondent concerns the procedure used to secure his commitment. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment" (*Mathews v Eldridge*, 424 US 319, 332). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner' " (*id.* at 333, quoting *Armstrong v Manzo*, 380 US 545, 552). Due process, however, "is not a technical conception with a fixed content unrelated to time, place and circumstances" (*Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v McElroy*, 367 US 886, 895, reh denied 368 US 869 [internal quotation marks omitted]; see *Mathews*, 424 US at 334). Rather, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands" (*Morrissey v Brewer*, 408 US 471, 481; see *Mathews*, 424 US at 334). The Supreme Court has held that

"identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" (*Mathews*, 424 US at 335; see *Mental Hygiene Legal Serv.*, 2007 WL 4115936, *4).

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . . 'It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection' . . . We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty" (*Foucha v Louisiana*, 504 US 71, 80). " 'The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement' . . . Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed" (*id.* at 79; see *Addington v Texas*, 441 US 418, 425 ["civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"]). The ultimate issue before us on this appeal is the appropriate standard of proof to be applied to the "backward-looking factual finding required for commitment" as a dangerous sex offender requiring commitment pursuant to Mental Hygiene Law § 10.03

(g) (4) (*United States v Shields*, 522 F Supp 2d 317, 330 [Mass]).

IV

The Supreme Court has addressed the due process requirements for civil commitment proceedings.

"In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions" (*Addington*, 441 US at 425).

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he [or she] should have in the correctness of factual conclusions for a particular type of adjudication' . . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision" (*id.* at 423, quoting *In re Winship*, 397 US 358, 370 [Harlan, J., concurring]).

"*Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants" (*Santosky v Kramer*, 455 US 745, 755).

In addressing the due process requirements for civil commitment proceedings, the Court in *Addington* and *Santosky* relied heavily on its decision in *Winship*, wherein the Court addressed the standard of proof required in civil juvenile delinquency proceedings (397 US 358). In *Winship*, the Supreme Court reversed the order of the New York Court of Appeals in *Matter of Samuel W.* (24 NY2d 196). In *Samuel W.*, the New York Court of Appeals had approved a preponderance of the evidence standard of proof for such proceedings based on the fact that the delinquency proceedings were not criminal and a delinquency finding was not the equivalent of a criminal conviction (*Winship*, 397 US at 365). The Supreme Court, however, recognized that the private interests at stake, i.e., loss of liberty and stigmatization, were the same in both criminal prosecutions and juvenile delinquency proceedings (*id.* at 363). The Court noted that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts" (*id.* at 365-366). Because the loss of

individual liberty was as great for juvenile delinquents as for criminals and because the application of the higher reasonable doubt standard would not adversely impact the government's prosecution of the juvenile, the Court held that due process required the application of the higher, reasonable doubt standard (*id.* at 366-367).

Winship informs our analysis in this case because it involves the application of a due process analysis to a civil proceeding that results in the loss of liberty and significant stigma, and many cases addressing the due process standard required for sexual offender commitment statutes have relied on the *Winship* analysis (see e.g. *Addington*, 441 US at 423; *United States v Comstock*, 507 F Supp 2d 522, 551-553, *affd* 551 F3d 274, *cert granted* ___ US ___, 129 S Ct 2828; *Mental Hygiene Legal Serv.*, 2007 WL 4115936, *18-19). We note that in *Addington*, however, the Supreme Court wrote that, "[u]nlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution" (*id.* at 428). The goals of civil commitment are meaningful treatment of sex offenders and the protection of the public (see Mental Hygiene Law § 10.01; *Jones v United States*, 463 US 354, 368). The goals of criminal punishment, however, are retribution, rehabilitation, deterrence, and prevention (see *United States v Brown*, 381 US 437, 458).

The Supreme Court has upheld civil commitment statutes that rely on a clear and convincing standard of proof (*Addington*, 441 US at 431-433). In upholding such statutes, the Court expressly noted that civil commitment statutes have layers of review and continuing opportunities for release (*id.* at 428-429). The Court in *Addington* juxtaposed criminal cases, where the inquiry concerning guilt is fact-based, against civil commitment cases, where the inquiry is whether the person suffered from a mental illness and, if so, whether the person presented a danger to himself or herself, or to others (*id.* at 429). The Court wrote that, "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous" (*id.*). Indeed, the Court in *Addington* stated that the reasonable doubt standard functioned in criminal proceedings only because that standard was "addressed to specific, knowable facts" (*id.* at 430).

In *Kansas v Hendricks* (521 US 346), the Supreme Court analyzed a civil commitment statute specifically focused on sexually violent predators. The Kansas statutes (Kan Stat Ann art 29A) permitted civil commitment for those convicted or charged with a sexually violent offense. Sexually violent offenses included various sex offenses and "any act which either at the time of sentencing . . . or subsequently during civil commitment proceedings . . . has been determined beyond a reasonable doubt to have been sexually motivated" (§ 59-29a02 [e] [13]). The statute also required that a court or jury determine whether the person was a sexually violent predator beyond a reasonable doubt (§ 59-29a07 [a]).

The Court in *Hendricks* was called upon to address whether due

process permitted the commitment of those with a mental abnormality or personality disorder not rising to the level of mental illness (521 US at 356-357). Although the Court did not address the standard of proof required for commitment in upholding the constitutionality of the statute, the Court otherwise noted that the statute specifically required proof beyond a reasonable doubt (*id.* at 352-353). Because the Kansas statute required evidence of past sexually violent behavior that had been established beyond a reasonable doubt and a present mental condition creating a likelihood of future sexually violent conduct (*id.* at 357), the Court found that the Kansas statute was "plainly of a kind with . . . other civil commitment statutes [requiring] a finding of future dangerousness, and then link[ing] that finding to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his [or her] dangerous behavior" (*id.* at 358). While the *Hendricks* case upholds the general premise that sexually violent offenders may be civilly committed, it does not address the specific issue in this case, to wit: whether due process requires that all of the elements of the past offense be established beyond a reasonable doubt.

V

As previously noted, we have found only one case addressing that specific issue insofar as it deals with article 10. In *Mental Hygiene Legal Serv.* (2007 WL 4115936), Judge Gerard E. Lynch was asked to grant preliminary injunctive relief and a temporary restraining order barring commitment of, inter alia, those individuals convicted of designated felonies that were sexually motivated and were committed before the effective date of article 10 and those individuals who were deemed incompetent to stand trial on the underlying sexual offense charges (*id.* at *1-2).

Judge Lynch recognized that for those individuals the proof of some or all of the elements of the underlying criminal offense would have to be established at the civil commitment hearing, where the standard of proof is the lower clear and convincing standard (*id.* at *17-26). Judge Lynch analyzed *Winship*, noting that the Supreme Court "has made clear that a legislature's declaration of the civil nature of confinement may be overcome only where there is 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it civil" (*id.* at *19, quoting *Hendricks*, 521 US at 361). Thus, Judge Lynch held that "[d]ue process therefore requires that when an individual is subject to the stigma of being labeled a 'sexual offender' and of a finding that he violated a criminal law triggering the possibility of institutional confinement, proof that he [or she] in fact committed the acts that form the basis for being labeled an 'offender' must be made beyond a reasonable doubt" (*id.* at *21). Because those individuals who had been deemed incompetent had not been convicted of the crimes of which they were accused and their ability to assist in the article 10 proceedings was questionable (*id.* at *20), Judge Lynch granted the preliminary injunction with respect to that portion of

Mental Hygiene Law § 10.07 (d) applying the clear and convincing standard of proof to those individuals (*id.* at *21).

With respect to those convicted of designated felonies before article 10 became effective, Judge Lynch did not reach the same result. Because those individuals had already been convicted of a serious crime beyond a reasonable doubt and thus had already faced the loss of liberty and stigma associated with such a conviction (*id.* at *23), he noted that the only further determination needed was that the felony for which the person was convicted was "sexually motivated" (*id.*). Applying the three factors set forth in *Mathews*, Judge Lynch determined that the liberty interest at stake had already been compromised by the criminal conviction; that there was little risk of an erroneous finding that the individual was a sex offender because of the narrowness of the issue and the small population of individuals who would fall within that category; and that there was little justification for the lower standard of proof because, for those convicted after the effective date of article 10, the sexual motivation element would have to be established beyond a reasonable doubt as part of the newly enacted sexually motivated felony statute (*id.* at *23-24; see Penal Law § 130.91).

Despite the fact that Judge Lynch questioned the constitutionality of applying the lower standard to those convicted of designated felonies before the effective date of article 10, he denied injunctive relief for that category of offenders. Judge Lynch reasoned that, because *Addington* permitted commitment of individuals based only on a finding of mental illness and dangerousness and applying only the clear and convincing standard, it appeared "somewhat anomalous to hold that a state may not civilly commit or subject to an extended treatment regime an individual who has already been convicted of a serious crime based on clear and convincing evidence that he [or she] is mentally abnormal and dangerous, along with the additional finding that his [or her] previous crime was committed with a sexual motivation" (*id.* at *26). Thus, for that narrow category of offenders who were convicted of designated felonies before the effective date of article 10, Judge Lynch concluded that the plaintiffs had not demonstrated a likelihood of success on the merits (*id.* at *26). The Second Circuit affirmed the order of Judge Lynch, noting that its conclusion, "like any ruling on a preliminary injunction, [did] not preclude a different resolution . . . on a more fully developed record" (2009 WL 579445 at *2).

In our view, the decision of Judge Lynch in *Mental Hygiene Legal Serv.* is well reasoned and discusses all of the relevant law on due process. We conclude, however, that he relied too heavily on a *Winship* analysis. It is true that a criminal conviction or conduct that would result in a criminal conviction if the offender were competent to stand trial are prerequisites to the application of article 10. Thus, the comparison to juvenile delinquents in *Winship* is understandable. As we previously noted, however, the Supreme Court in *Addington* recognized that civil commitment statutes have layers of review and continuing opportunities for release (441 US at 428-429).

Although the Court in *Addington* wrote that civil commitment proceedings could "in no sense be equated to a criminal prosecution" (*id.* at 428), the Court in that case was reviewing a civil commitment statute that focused on mental illness and dangerousness, concepts that are based on psychiatric diagnoses. As Judge Lynch recognized in *Mental Hygiene Legal Serv.*, article 10 commitments are predicated on criminal conduct. Thus, article 10 cases, as opposed to other civil commitment cases, are more analogous to the juvenile delinquency proceedings at issue in *Winship*. The next issue for our determination is whether they are so analogous as to require the application of the reasonable doubt standard for all fact-based determinations concerning the past conduct.

VI

As did Judge Lynch in *Mental Hygiene Legal Serv.*, we will address the three factors set forth in *Mathews*.

The first factor is the private interests affected by the official action. Here, the most significant private interests affected are personal liberty and freedom from confinement. The *Addington* decision has established that those interests, while fundamental in nature, are subordinate to the interests of protecting society from those who have been deemed mentally ill and dangerous based on clear and convincing evidence (see 441 US at 428-429). Thus, there is no requirement that a person even commit a criminal offense before being deprived of liberty. The Supreme Court in *Hendricks* also permitted the application of a clear and convincing standard insofar as it concerned mental abnormalities or personality disorders not rising to the level of a mental illness (521 US at 356-360). In *Hendricks*, however, the Kansas statute required that all of the elements of the past sexually violent conduct be established beyond a reasonable doubt, and thus *Hendricks* does not stand for the proposition that the application of a lower standard of proof for those retrospective factual determinations is proper.

In our view, it is significant that the Supreme Court in *Addington* recognized that states could choose to impose a higher standard of proof but that a higher standard was not constitutionally required (see 441 US at 430-431). The Court recognized that "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold" (*id.* at 431). While there is a minimum level of protection below which no state can go, the fact that some states provide greater protections does not require New York to do the same. Because the Supreme Court has upheld the application of the clear and convincing standard as a basis for the civil commitment of individuals and the deprivation of their personal liberty, we conclude that the first *Mathews* factor, the significance of the personal interests affected, does not mandate application of the reasonable doubt standard.

With respect to the second *Mathews* factor, the risk of an erroneous deprivation of the individual's private interests and the

value of additional safeguards, we recognize that the determination of sexual motivation is fact-based and, unlike issues of mental illness and future dangerousness, it is a determination capable of being proven beyond a reasonable doubt (see *Mental Hygiene Legal Serv.*, 2007 WL 4115936, at *22). As Judge Lynch noted, those convicted of designated felonies before the effective date of article 10 have already been found guilty of a serious felony beyond a reasonable doubt (*id.* at *23). Thus, the risk of an erroneous deprivation of liberty is significantly lower with respect to those individuals. The only factual issue remaining is whether the prior felony was committed with a sexual motivation. Recognizing that the standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision" (*Addington*, 441 US at 423), we conclude that the application of the clear and convincing standard does not create an unacceptable risk of an erroneous deprivation of liberty. Although the application of the higher standard of proof may serve as an additional safeguard, we conclude that its application would not add appreciably to the effectiveness of Mental Hygiene Law article 10 as a whole. Our conclusion in that respect is intertwined with the analysis of the third factor in *Mathews*.

With respect to that third factor, we conclude that the application of the higher standard would not seriously impede the State's goal of committing sex offenders who pose a threat to society because of their inability to control their behavior. The higher standard is applied almost exclusively to the other individuals who fall within the ambit of article 10 and, contrary to petitioner's contention, the application of the two different standards would not confuse a jury. We note that numerous states specifically require that a judge or jury first determine the sexual motivation element beyond a reasonable doubt before proceeding to determine the overall need for civil commitment (see e.g. Ariz Rev Stat Ann § 36-3707 [a]; Fla Stat Ann § 394.912 [9] [h]; Iowa Code Ann § 229A.2 [10] [g]; Kan Stat Ann § 59-29a02 [e] [13]; Tex Stat & Codes Ann § 841.002 [8]; Wash Rev Code § 71.09.020 [17]; Wis Stat Ann § 980.01 [6]; § 980.05 [3] [b]). Thus, we recognize that New York could have provided for the higher standard without any major fiscal or administrative burdens.

Nevertheless, although New York could have imposed the higher standard of proof, the issue before us is whether New York's failure to do so violates an individual's due process rights. We conclude that it does not. The application of the lower standard of proof for the one element of sexual motivation does not, in our view, increase or decrease the scope of Mental Hygiene Law article 10 in any substantial way, nor does it improperly allocate the risk of error between New York State and a respondent (see *Addington*, 441 US at 423). The evidence of sexual motivation likely will be established through the trial transcript, the plea proceeding transcript or, as in this case, by a confession signed and sworn to by the respondent, a former criminal defendant. If the record contains such evidence, then we envision that there will be a finding, under either standard, of sexual motivation. If the record lacks such evidence, then we envision that there will be a finding, under either standard, that

sexual motivation was absent.

VII

Like the District Court in *Mental Hygiene Legal Serv.*, we cannot conclude that due process requires that all of the elements of a past conviction be established beyond a reasonable doubt, in view of the fact that the Supreme Court has held that an individual may be committed based on clear and convincing evidence that such individual is mentally ill and dangerous, without proof of any prior criminal conviction at all.

We acknowledge that the courts of the United States are split, and that the states with sex offender commitment statutes overwhelmingly provide for a reasonable doubt standard when addressing the retrospective factual determination. Indeed, we have provided citations to the statutes of some of those states.

We also note, however, that the federal statute and some states, including Minnesota, North Dakota, and Oregon, do not require any conviction and apply the lower clear and convincing standard (see 18 USC § 4248; Minn Stat Ann § 253B *et seq.*; ND Century Code Ann § 25-03.3-01 *et seq.*; Or Rev Stat § 426.005 *et seq.*). The federal statute applies to any individual in the custody of the Bureau of Prisons because of a conviction or because that individual is awaiting a determination of competence, and it also applies to any individual whose criminal charges were dismissed based on his or her mental condition. The statute permits commitment upon a finding, by clear and convincing evidence, that the individual is sexually dangerous. A " 'sexually dangerous person' [within the meaning of that statute is] a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others" (18 USC § 4247 [a] [5]). Federal courts are split on whether the clear and convincing standard comports with due process (see *United States v Carta*, 503 F Supp 2d 405, 409-410, *affd* 592 F3d 34, 43 [1st Cir]; *United States v Comstock*, 507 F Supp 2d 522, 551-552, *affd* 551 F3d 274 [4th Cir], *cert granted* ___ US ___, 129 S Ct 2828; *United States v Abregana*, 574 F Supp 2d 1123, 1135-1136 [Haw]; *Shields*, 522 F Supp 2d at 330-331).

VIII

Based on the foregoing, we conclude that, while it may have been preferable for the Legislature to have imposed the higher reasonable doubt standard for all "backward-looking factual finding[s]" (*Shields*, 522 F Supp 2d at 330), due process does not require the application of that standard.

IX

We likewise conclude that the statute does not violate respondent's constitutional right to equal protection. A person raising an equal protection challenge must first establish the applicable level of scrutiny, which is determined by whether the

statute involves a suspect class or interferes with the exercise of a fundamental right (see generally *Affronti v Crosson*, 95 NY2d 713, 718-719, cert denied 534 US 826). We note at the outset that "[t]he Supreme Court has not squarely addressed the appropriate level of scrutiny to apply to civil commitment statutes" (*Shields*, 522 F Supp 2d at 340).

Respondent does not identify the suspect class to which he allegedly belongs or the fundamental right that is purportedly implicated. Based on the reasoning of Chief Judge Kaye in her concurring opinion in *Grumet v Board of Educ. of Kiryas Joel Vil. School Dist.* (81 NY2d 518, 534, affd 512 US 687), we conclude that respondent does not belong to a suspect class. We conclude, however, that Mental Hygiene Law article 10 interferes with a fundamental right. "Fundamental rights are those 'deeply rooted in this Nation's history and tradition' . . . They include the right to marry . . . ; the right to have children . . . ; the right to decide how one's children will be educated . . . ; and the right to engage in private consensual sexual activity" (*Knox*, 12 NY3d at 67). Fundamental rights are not "implicated every time a governmental regulation intrudes on an individual's 'liberty' " (*Immediato v Rye Neck School Dist.*, 73 F3d 454, 463, cert denied 519 US 813; see *Knox*, 12 NY3d at 66-67), but the Supreme Court has held that "[f]reedom from physical restraint [is] a fundamental right" (*Foucha*, 504 US at 86; see *Anonymous v City of Rochester*, 56 AD3d 139, 146, affd 13 NY3d 35; cf. *United States v Weed*, 389 F3d 1060, 1071; *Shields*, 522 F Supp 2d at 340; *Carta*, 503 F Supp 2d at 408).

Where, as here, a fundamental right is implicated, then a statute "will be sustained only if it is narrowly tailored to serve a compelling state interest" (*Hernandez v Robles*, 7 NY3d 338, 375; see *Golden v Clark*, 76 NY2d 618, 623-624; *Immediato*, 73 F3d at 460). It is undisputed that New York State has a compelling interest in committing and treating those who are mentally ill and dangerous to themselves or others (see *Matter of K.L.*, 1 NY3d 362, 370; *Rivers v Katz*, 67 NY2d 485, 495-496, rearg denied 68 NY2d 808; see generally *Addington*, 441 US at 426), and we conclude that Mental Hygiene Law § 10.07 (d) as it applies to those detained sex offenders who were convicted of designated felonies that were sexually motivated and committed before the effective date of article 10 is narrowly tailored to serve the State's interest. Those individuals are equally as dangerous as those who commit the newly enacted sexually motivated felony. Based on the Ex Post Facto Clause of the US Constitution, however, the State could not have tried and convicted anyone of the sexually motivated felony before it was enacted, nor may it retroactively seek to obtain such a conviction (see generally US Const, art I, § 10, cl [1]).

Because the statute survives under the strict scrutiny required when a fundamental right is implicated, the statute necessarily survives the lower level of scrutiny that would be required where, as here, no suspect class is identified (see *Nordlinger v Hahn*, 505 US 1, 10; *Affronti*, 95 NY2d at 718).

X

Based on the foregoing, we conclude that respondent has failed to meet his "initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt' " (*LaValle*, 98 NY2d at 161, quoting *Tichenor*, 89 NY2d at 773; see *Dalton*, 5 NY3d at 255). Accordingly, we conclude that the order denying respondent's motion to dismiss the petition should be affirmed.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

389

CA 09-01880

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

IN THE MATTER OF ERIC C., PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

NEW YORK STATE POLICE, RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF COUNSEL), FOR RESPONDENT-APPELLANT.

DADD, NELSON & WILKINSON, ATTICA (JAMES M. WUJCIK OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered December 1, 2008. The order, among other things, granted the amended petition seeking expungement of certain records.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the directive in the first ordering paragraph that the records in question be expunged and directing that the records be sealed and by vacating the second and third ordering paragraphs and as modified the order is affirmed without costs.

Memorandum: Supreme Court erred in granting the amended petition seeking expungement of all records generated or possessed by respondent in connection with its 2008 investigation of petitioner pursuant to Family Court Act § 375.3. That section provides that "[n]othing contained in . . . article [3 of the Family Court Act] shall preclude the court's use of its inherent power to order the expungement of court records" (emphasis added). Thus, that section does not provide the court with the authority to direct expungement of respondent's records with respect to the subject investigation. Moreover, even assuming, arguendo, that section 375.3 permitted expungement of those records, we conclude that the court abused its discretion in ordering expungement because the investigation was not terminated for reasons consistent with complete innocence (see *Matter of Dorothy D.*, 49 NY2d 212, 216; cf. *Matter of Anthony P.*, 65 AD2d 294, *affd* 49 NY2d 1022). Nevertheless, respondent correctly concedes that the subject records may be sealed. We therefore grant the alternative relief sought in the amended petition, i.e., the sealing of those records (see § 375.1 [1], [2] [h]), and we modify the order

accordingly.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

390

CA 09-02231

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

BERTHA DAIL, AS EXECUTOR OF THE ESTATE OF
LOUIS R. WHITE, JR., DECEASED,
PLAINTIFF-RESPONDENT,

V

OPINION AND ORDER

MERCHANTS MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MARCO
CERCONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

BURGETT & ROBBINS, LLP, JAMESTOWN (ROBERT A. LIEBERS OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered January 20, 2009 in a breach of contract action. The order denied the motion of defendant to dismiss the complaint.

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

Opinion by CARNI, J.: This appeal presents the issue whether the one-year extension of time in CPLR 210 (a) to commence an action that is afforded to a decedent's representative applies to the standard two-year period of limitations contained in homeowner's insurance policies, such as defendant's policy, pursuant to Insurance Law § 3404 (e). For the reasons that follow, we conclude that Supreme Court properly determined that it does and thus that the order denying defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) should be affirmed.

The underlying facts are not in dispute. On February 18, 2005, defendant issued a homeowner's policy to plaintiff's decedent. On December 5, 2005, while the policy was in effect, the insured premises and its contents were destroyed by fire. On October 31, 2006, defendant denied decedent's claim for policy benefits and, on July 5, 2007, decedent died. On May 16, 2008, plaintiff was issued letters testamentary appointing her as the executor of the insured's estate. On July 3, 2008, plaintiff commenced this action as executor of decedent's estate, seeking to recover under the policy. The "conditions" section of the policy provides in relevant part that "[n]o action can be brought [against us] unless the action is started

within two years after the date of loss."

Here, when measured from the date of the loss, i.e., December 5, 2005, the action, which as noted was commenced on July 3, 2008, exceeded the two-year period of limitations. Plaintiff contends, however, that the tolling provision of CPLR 210 (a) extended her time in which to commence this action until one year after decedent's death, or until July 5, 2008. We agree.

CPLR 210 (a), entitled "Death of claimant," states: "Where a person entitled to commence an action dies before the expiration of the time within which the action must be commenced and the cause of action survives, an action may be commenced by his [or her] representative within one year after his [or her] death." Defendant contends that the Legislature did not include any language in CPLR 210 (a) that would permit the application of the death toll to a contractual period of limitations. Defendant also contends that the satisfaction of the two-year contractual period of limitations is a "condition precedent" to bringing an action against it and thus in any event is not subject to the statutory toll.

Our review of the applicable case law in New York State discloses that the courts have uniformly applied tolling provisions to the two-year period of limitations contained in policies of insurance in accordance with Insurance Law § 3404 (e). In *S & J Deli v New York Prop. Ins. Underwriting Assn.* (119 AD2d 652), the Second Department rejected the defendant insurer's contention that the period of limitations was a "condition precedent" and held that "[t]he toll contained in CPLR 203 (b) (5) is directly applicable to the limitations period set forth in a fire insurance policy" (*id.*). In addition, the First Department applied the "[i]nfancy, insanity" toll contained in CPLR 208 to the two-year period of limitations in an insurance policy (*Bookstein v Republic Ins. Co.*, 266 AD2d 113).

We reject defendant's "condition precedent" theory inasmuch as the cause of action to recover damages for breach of contract based on a fire or a homeowner's insurance policy existed at common law and was not created by the insurance statute containing the two-year period of limitations (see *S & J Deli*, 119 AD2d 652; Insurance Law § 3404 [e]).² It has never been incumbent upon an insured to plead and prove compliance with the applicable statute of limitations as a condition precedent in commencing a breach of contract action under the common law against an insurer. Moreover, we perceive no indication in the language of Insurance Law § 3404 (e) indicating that the two-year period of limitations was intended to be in the nature of a condition precedent (*cf. Kahn v Trans World Airlines*, 82 AD2d 696, 709).

We therefore conclude that the "death toll" in CPLR 210 (a) is

²To the extent that our decision in *Howe v Mill Owners Mut. Fire Ins. Co. of Iowa* (241 App Div 336) may be construed to the contrary, we note that it was decided prior to the enactment of Insurance Law § 3404 (e) and thus should no longer be followed.

applicable to an action against an insurer where the policy at issue contains the two-year limitations period contained in Insurance Law § 3404 (e).

Accordingly, we conclude that the order should be affirmed.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

394

KA 07-02497

PRESENT: SCUDDER, P.J., SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

IAN HUNTER, DEFENDANT-APPELLANT.

ANNA JOST, TONAWANDA, FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered September 6, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Livingston County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). We agree with defendant that County Court erred in enhancing the sentence by imposing restitution at sentencing inasmuch as restitution was not included as part of the plea agreement. Although defendant failed to preserve that contention for our review (*see People v Cooke*, 21 AD3d 1339), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We conclude that the court should have afforded defendant the opportunity to withdraw his plea prior to ordering him to pay restitution (*see Cooke*, 21 AD3d 1339; *People v Therrien*, 12 AD3d 1045). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the promised sentence or to afford defendant the opportunity to withdraw his plea.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

397

KA 09-00581

PRESENT: SCUDDER, P.J., SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROMARIS GLANTON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (DAVID V. SHAW OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Stephen R. Sirkin, J.), rendered May 30, 2008. 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 is granted and the matter is remitted to Wayne County Court for further proceedings on the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Contrary to the contention of defendant, County Court did not err in denying that part of his motion seeking to suppress physical evidence obtained during a search of his person. Defendant correctly concedes that the officer in fact had probable cause to do so (*see generally People v Chestnut*, 43 AD2d 260, 261-262, *affd* 36 NY2d 971; *People v Black*, 59 AD3d 1050, 1051, *lv denied* 12 NY3d 851), and we conclude under the circumstances of this case that the limited intrusion of the officer in reaching underneath defendant's clothing did not render the scope of the search unreasonable (*see People v Butler*, 27 AD3d 365, 369, *lv dismissed* 6 NY3d 893; *cf. People v Mitchell*, 2 AD3d 145, 147-148).

We agree with defendant, however, that the court erred in denying that part of his motion seeking to suppress statements that he made to the police. As the People candidly concede, defendant's initial statements were the product of custodial interrogation and were made before defendant received *Miranda* warnings (*see People v Morales*, 25

AD3d 624, 625, *lv denied* 6 NY3d 815). The People contend, however, that defendant's subsequent statements to the police, made after defendant waived his *Miranda* rights, were attenuated from the initial statements and thus were not tainted by those initial statements that were illegally obtained (*see People v Samuels*, 11 AD3d 372, 372-373, *lv denied* 4 NY3d 802; *see generally People v Bethea*, 67 NY2d 364, 367-368). The People failed to raise that contention before the suppression court, however, and it therefore is not properly before us (*see generally People v Morales*, 292 AD2d 253, 254). In any event, we conclude that the People's contention is without merit (*see Morales*, 25 AD3d at 625; *cf. Samuels*, 11 AD3d at 372-373). We therefore conclude that the plea in appeal No. 1 must be vacated "[i]nasmuch as the erroneous suppression ruling may have affected defendant's decision to plead guilty" (*People v Flowers*, 59 AD3d 1141, 1143; *see generally People v Grant*, 45 NY2d 366, 379-380).

Further, the record establishes that the plea agreement in appeal No. 1 was contingent upon defendant's plea of guilty to one count of the indictment at issue in that appeal and to one count of the indictment at issue in appeal No. 2. Thus, the plea in appeal No. 2 must be vacated as well (*see generally People v Fuggazzatto*, 62 NY2d 862), and both matters remitted to County Court for further proceedings on the indictments.

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

398

KA 09-00582

PRESENT: SCUDDER, P.J., SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROMARIS GLANTON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (DAVID V. SHAW OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Stephen R. Sirkin, J.), rendered May 30, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Same Memorandum as in *People v Glanton* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

404

KA 08-00850

PRESENT: SCUDDER, P.J., SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYMOND CLYDE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

RAYMOND CLYDE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Robert B. Wiggins, J.), rendered March 24, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts), unlawful imprisonment in the first degree and promoting prison contraband in the first degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law and a new trial is granted on counts two through five of the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [7]). We agree with defendant that County Court erred in failing to articulate a reasonable basis on the record for its determination to restrain defendant in shackles during the trial. "The shackling of a defendant in the presence of the jury is inherently prejudicial and constitutes reversible error unless a reasonable basis therefor is in the record or it is clear that the jury was not prejudiced thereby" (*People v Vigliotti*, 203 AD2d 898, 898; see generally *People v Rouse*, 79 NY2d 934, 935; *People v Mendola*, 2 NY2d 270). Inasmuch as the record establishes that the shackles were visible to the jury (*cf. People v Tascarella*, 227 AD2d 888, 888-889, lv denied 89 NY2d 867), we cannot agree with the conclusion of the dissent that the jury was not prejudiced thereby and thus that the error is harmless (*cf. People v Sykes*, 224 AD2d 986; *Vigliotti*, 203 AD2d at 898). To the contrary, "where a court, without adequate justification [articulated on the record], orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation" (*Deck v Missouri*, 544 US 622, 635). In

view of our determination of defendant's contention, we need not consider the remaining contentions in appeal No. 1 raised by defendant in his main brief and pro se supplemental brief. In the interest of judicial economy, however, we note that we also agree with defendant that the court abused its discretion in refusing to preclude the prosecutor from questioning medical experts on the issue whether the victim's injuries met the legal definitions of physical injury and serious physical injury set forth in the Penal Law (see *People v Forcione*, 156 AD2d 952, lv denied 75 NY2d 919). "[T]he ultimate determination whether those injuries satisfied the statutory definition[s] was not beyond the ken of the typical juror" (*id.* at 952).

In appeal No. 2, the People appeal from an order insofar as it granted that part of defendant's motion for a trial order of dismissal pursuant to CPL 290.10 (1) with respect to count one of the indictment, charging attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]). We conclude that the court properly granted that part of defendant's motion inasmuch as the requisite evidence of defendant's intent to rape the victim by the use of forcible compulsion, a necessary element of the crime charged, was legally insufficient (*cf. People v Lamagna*, 30 AD3d 1052, 1053, lv denied 7 NY3d 814; see generally *People v Bleakley*, 69 NY2d 490, 495).

All concur except SCUDDER, P.J., who dissents and votes to affirm in the following Memorandum: In appeal No. 1, the majority concludes that the failure of County Court to articulate a reasonable basis on the record for its determination that defendant should be shackled during trial requires reversal, in the absence of a showing that defendant was not prejudiced by reason thereof. The majority also concludes that the court erred in admitting in evidence two medical opinions on the issues of whether defendant's actions created a substantial risk of serious physical injury with respect to one of the individuals assaulted (victim No. 1), and whether the second individual assaulted (victim No. 2) sustained a physical injury. In appeal No. 2, the majority concludes that the evidence of defendant's intent to rape victim No. 1 is legally insufficient. I respectfully dissent in both appeals.

In appeal No. 1, the majority correctly concludes that the court erred in failing to articulate on the record a reasonable basis for its determination that shackles were warranted (see *People v Buchanan*, 13 NY3d 1, 4; *People v Rouse*, 79 NY2d 934, 935). I further agree with the majority that such shackling was prejudicial to defendant, and that the error implicates a constitutional right. However, I disagree with the majority that the error is not subject to harmless error analysis.

Victim No. 1, a female civilian motor vehicle operator at Auburn Correctional Facility, was walking to the storehouse and loading dock area of the prison when she was attacked by defendant, an inmate. Defendant grabbed her from behind, put her in a headlock close to his body, and covered her mouth and nose with his hand. When victim No. 1

struggled, defendant slammed her against the wall, face first, and he shoved a sock or towel that he had brought to the scene into her mouth, making it difficult for her to breathe. Victim No. 1 managed to dislodge the sock or towel sufficiently to enable her to scream for help, but defendant warned her that he would kill her if she did not shut up. He then shoved his fist into her kidney, inserted the sock or towel back into her mouth, and pushed her to her knees onto the floor. He grabbed her by her hair and, according to victim No. 1, he yanked her head back as far as he could. He simultaneously covered her mouth and nose, thereby cutting off her air supply. Victim No. 1 testified that she could feel her eyes rolling into the back of her head and that she started to pass out, but she was able to move defendant's hands and dislodge the sock or towel so that she could breathe, whereupon she begged defendant not to hurt her. Defendant instead shoved victim No. 1 onto the floor, face first, bouncing her face off of the cement in the process. Victim No. 1 tried to scream, but defendant pushed the sock or towel back into her mouth and told her to shut up, using expletives. He then punched her in the face, dazing her, and he pulled one of her hands behind her back and tied that hand with something that he had brought to the scene. When victim No. 1 refused to give defendant her other hand, defendant sat on her back while straddling her with his legs, and he grabbed her other hand and tied her hands together.

At that moment, victim No. 2, another prison employee, approached the scene in order to investigate the noise. From a security mirror located by a corner of the hallway, he observed defendant straddling the back of victim No. 1 while tying her hands together with white strips of cloth. Victim No. 2 then activated an alarm, turned the corner and yelled. Defendant climbed off the victim's back and proceeded to run down the hall toward victim No. 2, covering his face with his left arm. Although victim No. 2 managed to trip defendant, defendant stood up and threw victim No. 2 against the wall. He then punched victim No. 2 in the head, knocking him unconscious.

Defendant's assault of victim No. 2 was witnessed by a third employee, who saw defendant run into the loading dock area. A lock-down was ordered for the entire area, and defendant was thereafter found in the yard, soaked with sweat and behaving in a nervous manner. Victim No. 2 and the third employee thereafter identified defendant as the perpetrator. New York State Police investigators later retrieved a sock, brown leather work gloves, a roll of tape, a green towel, and a torn piece of sheet from the hallway where victim No. 1 was attacked. When analyzed for bodily fluids, both gloves, the green towel, and the tee shirt worn by victim No. 1 testified positive for seminal fluid. Sperm was found on the left glove and the green towel, which matched a buccal swab subsequently obtained from defendant.

In my view, the above-described evidence, which was virtually uncontroverted at trial, overwhelmingly proved defendant's perpetration of the crimes in appeal No. 1. Applying the test for constitutional harmless error, I conclude that, "in light of the totality of the evidence, there is no reasonable possibility" that the

improper shackling of defendant contributed to his conviction and thus that the error is harmless beyond a reasonable doubt (*People v Douglas*, 4 NY3d 777, 779; see generally *People v Crimmins*, 36 NY2d 230, 237; *People v Crampton*, 107 AD2d 998, 999). Notably, the jury necessarily knew from the facts and elements of the crimes charged that defendant was incarcerated in a state correctional facility when he committed the crimes (see generally *People v Brunson*, 68 AD3d 1551, 1556). Also, the court properly charged the jury with respect to the presumption of innocence and directed that the verdict could be based only on the evidence presented at trial.

I do not agree with the majority that harmless error analysis is inapplicable to the type of error committed here, i.e., where the court fails to articulate a reasonable basis on the record for its determination to restrain a defendant, nor do I see any reason why this particular error should be treated differently from other errors that implicate constitutional rights (cf. *People v Lopez*, 207 AD2d 658, 659, *lv denied* 84 NY2d 937). The recognition that the error can be harmless and that reversal is not required per se whenever a defendant is improperly restrained at trial are supported by the fact that proper limiting or cautionary instructions can negate the effect of such an error (see *People v Gilmore*, 12 AD3d 1155, 1156; *People v Felder* [appeal No. 2], 201 AD2d 884, 885, *lv denied* 83 NY2d 871), and by the fact that reversal is not required where a jury's observation of a defendant in restraints is merely inadvertent (see *People v Harper*, 47 NY2d 857, 858; *People v Montgomery*, 1 AD3d 984, 985, *lv denied* 1 NY3d 631; *People v Russ*, 300 AD2d 1031, 1032, *lv denied* 99 NY2d 632). Whether an error is harmless entails an analysis different from that applied in determining whether a defendant is prejudiced by the error. As previously noted, I agree with the majority that defendant was prejudiced. Nevertheless, I conclude that, in view of the overwhelming evidence, there is no reasonable possibility that such prejudice contributed to the verdict (see *People v Gonzalez*, 55 AD2d 656; see generally *Crimmins*, 36 NY2d at 237). I therefore would affirm the judgment in appeal No. 1 despite the court's error in failing to articulate a reasonable basis for defendant's restraints. I also would affirm the judgment despite the arguably erroneous admission in evidence of the aforementioned testimony of the two medical witnesses. Because of the overwhelming evidence of defendant's guilt, there is no significant possibility that the jury would have acquitted defendant if that testimony had not been permitted (see *Crimmins*, 36 NY2d at 242).

In appeal No. 2, I do not agree with the majority that the evidence is legally insufficient to establish defendant's intent to rape victim No. 1. "A verdict is legally sufficient when, viewing the facts in [the] light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349; see generally *People v Bleakley*, 69 NY2d 490, 495). In this case, defendant grabbed victim No. 1 from behind, and he assaulted her and restrained her using items that he had assembled prior to the crime

and had brought with him to the scene. Sperm was found on two of those items, and that sperm matched a buccal swab obtained from defendant. In addition, seminal fluid was found on four of the items, including the tee shirt worn by victim No. 1. While defendant's conduct may have been consistent with an attempt to escape rather than an attempt to rape victim No. 1, the test for legal sufficiency does not require that the crime in question be the only possible crime for which there is legally sufficient evidence. It requires only that the evidence, when viewed in the light most favorable to the People, establish a valid line of reasoning and permissible inferences from which a rational jury could find that the elements of the crime in issue were proven beyond a reasonable doubt. In my view, given the existence of seminal fluid at the scene, the jury could rationally infer that defendant's intent in restraining victim No. 1 was to rape her. I therefore would reverse the order insofar as appealed from in appeal No. 2, deny defendant's motion for a trial order of dismissal in its entirety, reinstate count one of the indictment and the verdict convicting defendant of that count, and remit the matter to County Court for sentencing on the conviction of attempted rape in the first degree.

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

405

KA 08-00851

PRESENT: SCUDDER, P.J., SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

RAYMOND CLYDE, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

RAYMOND CLYDE, DEFENDANT-RESPONDENT PRO SE.

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

Appeal from an order of the Cayuga County Court (Robert B. Wiggins, J.), entered December 28, 2007. The order, insofar as appealed from, granted in part defendant's motion for a trial order of dismissal and dismissed count one of the indictment.

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

Same Memorandum as in *People v Clyde* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

All concur except SCUDDER, P.J., who dissents and votes to reverse the order insofar as appealed from in accordance with the same dissenting Memorandum as in *People v Clyde* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

411

CA 09-02252

PRESENT: SCUDDER, P.J., SCONIERS, GREEN, AND GORSKI, JJ.

THOMAS H. KHEEL, BENEFICIARY AND REMAINDERMAN
OF THE JULIAN KHEEL FAMILY TRUST,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

JULIAN MARK KHEEL & JOELLE KHEEL, COTRUSTEES
OF THE JULIAN KHEEL FAMILY TRUST, ET AL.,
DEFENDANTS,
AND ROKEL VENTURE, DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (GORDON J. LIPSON OF COUNSEL), FOR
DEFENDANT-APPELLANT.

THOMAS H. KHEEL, ITHACA, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered March 4, 2009. The order, inter alia, ordered that the purchaser of certain property deposit one half of the purchase price of the property in escrow pending further order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the third ordering paragraph and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Plaintiff is a beneficiary and remainderman of defendant Julian Kheel Family Trust (Trust), which has a 50% ownership interest in defendant Rokel Venture (Rokel), a joint venture formed by plaintiff's father and others for the purpose of buying, selling and managing commercial property. One of the cotrustees personally owns another 25% share of Rokel. Rokel is the owner of undeveloped real property located adjacent to the campus of Rochester Institute of Technology (hereafter, property). A real estate development corporation purchased an option to buy the property from Rokel for \$600,000. Believing that the property would better serve the purposes of the Trust if it were leased rather than sold, plaintiff commenced this action seeking, inter alia, to remove the cotrustees, and he filed a notice of pendency. Rokel moved to cancel the notice of pendency pursuant to CPLR article 65, seeking costs, disbursements and attorneys' fees, and plaintiff cross-moved to remove the cotrustees. Supreme Court granted the motion on the ground that the Trust, and thus plaintiff, had no ownership, possessory, or usage interest in the property but rather had only a 50% interest in Rokel, which was an interest in personal property rather than real

property (see generally *5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 316, 321; *Felske v Bernstein*, 173 AD2d 677, 678; *Liffiton v DiBlasi*, 170 AD2d 994). The court also denied the cross motion and ordered the purchaser of the property to deposit one half of the purchase price of the property in escrow pending further order of the court.

We agree with Rokel that the court erred in ordering that one half of the purchase price of the property be deposited in escrow, and we therefore modify the order accordingly. The court determined that plaintiff's notice of pendency was improperly filed because the action to which it related did not "affect the title to, or the possession, use or enjoyment of" the property as required by CPLR 6501 (see generally *5303 Realty Corp.*, 64 NY2d at 321). The cancellation of a notice of pendency for failure to comply with CPLR 6501 is not a proper basis for an escrow of funds relating to the property that was the subject of the improper notice of pendency, and CPLR article 65 does not provide for an escrow of such funds. The court's reliance on our decision in *Liffiton v DiBlasi* (170 AD2d 994) is misplaced because, in that case, the defendants sought an order approving the sale of the property at issue on the condition that the proceeds be held in escrow as alternate relief in their motion to dismiss the complaint (*id.*).

Finally, because the court failed to address that part of Rokel's motion seeking costs, disbursements and attorneys' fees, we remit the matter to Supreme Court to determine that part of the motion.

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

423.1

KA 10-00730

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAWRENCE GUINYARD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 6, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is otherwise affirmed.

Memorandum: Defendant was convicted following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). As a result of an error in the original sentence, defendant was resentenced and, in appeal No. 1, he appeals from the resentence. In appeal No. 2, defendant appeals from the judgment of conviction. Addressing first appeal No. 2, we conclude that Supreme Court properly refused to suppress defendant's statements to the police. Contrary to the contention of defendant, the court properly concluded that he was not in custody when the police were questioning him. It is well settled that, in determining whether a defendant was in custody, "the subjective beliefs of the defendant are not to be the determinative factor. The test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position" (*People v Yukl*, 25 NY2d 585, 589, cert denied 400 US 851; see *People v Paulman*, 5 NY3d 122, 129). The evidence presented at the suppression hearing established that "defendant, inter alia, voluntarily agreed to accompany the police to the precinct, was not physically restrained, never protested or requested an attorney, and was read and waived [his] *Miranda* rights . . . , prior to answering questions and giving inculpatory statements" (*People v Brown*, 44 AD3d 966, lv denied 9 NY3d 1031). We thus

conclude that a reasonable person in defendant's position would have felt free to leave.

Contrary to the further contention of defendant, the court was not required to suppress his statements based on his mental disabilities. The intelligence of a defendant is only one factor to be considered by a court when determining whether his or her waiver of *Miranda* rights was voluntary (see *People v Williams*, 62 NY2d 285, 288-290). Here, the evidence presented at the suppression hearing established "that defendant understood the meaning of the *Miranda* warnings prior to waiving his rights" (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915; see *People v Hernandez*, 46 AD3d 574, 575-576, *lv denied* 11 NY3d 737; *People v Jones*, 41 AD3d 736, *lv denied* 9 NY3d 877).

Defendant contends that he was denied a fair trial based on the court's failure to impose any sanctions upon the People for their delay in turning over *Brady* material. The record establishes, however, that defendant had a meaningful opportunity to use that material (see *People v Wood*, 40 AD3d 663, 664, *lv denied* 9 NY3d 928; see generally *People v Cortijo*, 70 NY2d 868, 870) and, in any event, his failure to request such sanctions renders his contention unpreserved for our review (see generally *People v Bryant*, 298 AD2d 845, 846, *lv denied* 99 NY2d 556).

Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). We reject the further contention of defendant that he was denied effective assistance of counsel (see generally *People v Turner*, 5 NY3d 476, 480; *People v Baldi*, 54 NY2d 137, 147). To the extent that defendant contends that defense counsel failed to make certain motions, it is well settled that the failure to make motions with little or no chance of success does not constitute ineffective assistance of counsel (see *People v Lewis*, 67 AD3d 1396; *People v DeHaney*, 66 AD3d 1040). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (see generally *Baldi*, 54 NY2d at 147).

Finally, with respect to appeal No. 1, we conclude that the resentence is not unduly harsh or severe.

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

423

KA 08-02394

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAWRENCE GUINYARD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered September 29, 2008. Defendant was resentenced upon his conviction of murder in the second degree and criminal possession of a weapon in the third degree.

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

Same Memorandum as in *People v Guinyard* ([appeal No. 2] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

433

CA 09-01999

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

CHANG HAN KIM AND BOOK SOON KIM,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

CLYMER CENTRAL SCHOOL, SCHOOL BOARD OF
CLYMER CENTRAL SCHOOL DISTRICT, BARNES
CONSTRUCTION COMPANY, DEFENDANTS-RESPONDENTS,
ENVIRONMENTAL PRODUCTS & SERVICES, INC.,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

WEBSTER SZANYI LLP, BUFFALO (CHARLES E. GRANEY OF COUNSEL), FOR
DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Chautauqua County (John T. Ward, A.J.), entered November 7, 2008 in a personal injury action. The order, inter alia, granted the motion of plaintiffs for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' motion and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Chautauqua County, for further proceedings in accordance with the following Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action to recover damages for injuries sustained by Chang Han Kim (plaintiff) when he fell from a ladder while removing asbestos from defendant Clymer Central School. Defendant Environmental Products & Services, Inc. (EPS) appeals from an order that, inter alia, granted the motion of plaintiffs for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1). We conclude that plaintiffs met their initial burden by "establish[ing] that there was a violation of the statute, which was the proximate cause of [plaintiff's] injuries" (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 236). We further conclude, however, that EPS raised a triable issue of fact whether the actions of plaintiff were the sole proximate cause of his injuries and thus whether plaintiffs are not entitled to partial summary judgment (*see generally Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554). We therefore modify the order accordingly.

Although EPS further contends that Supreme Court erred in failing to dismiss the Labor Law § 241 (6) claim, we note that the order on appeal expressly provides that it does not address the Labor Law § 241 (6) claim. Indeed, it would not be necessary for the court to address that claim in view of its resolution of plaintiffs' motion with respect to section 240 (1). "Inasmuch as the [Labor Law § 241 (6)] issue is no longer moot, we remit the matter to Supreme Court [to determine those parts of the motion of EPS and the motion of defendants Clymer Central School, School Board of Clymer Central School District and Barnes Construction Company for summary judgment dismissing that claim]" (*Murray v Lancaster Motorsports, Inc.*, 27 AD3d 1193, 1196).

We have considered the remaining contention of EPS and conclude that it is without merit.

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

436

CA 09-00059

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

MORGAN L. CHIPLEY, INDIVIDUALLY AND AS MOTHER
AND NATURAL GUARDIAN OF KADIN A. BROWN, AN
INFANT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GRANT W. STEPHENSON, M.D., INDIVIDUALLY AND
DOING BUSINESS AS DR. GRANT W. STEPHENSON
FAMILY MEDICINE, WESTFIELD MEMORIAL HOSPITAL,
INC., AND RICHARD J. DEFRANCO, M.D.,
INDIVIDUALLY AND DOING BUSINESS AS G&P GYNE
CARE AND/OR G&P GYNE CARE, INC.,
DEFENDANTS-RESPONDENTS.

ROLAND M. CERCONI, PLLC, BUFFALO (ROLAND M. CERCONI OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ANGELO S. GAMBINO OF
COUNSEL), FOR DEFENDANT-RESPONDENT GRANT W. STEPHENSON, M.D.,
INDIVIDUALLY AND DOING BUSINESS AS DR. GRANT W. STEPHENSON FAMILY
MEDICINE.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF
COUNSEL), FOR DEFENDANT-RESPONDENT WESTFIELD MEMORIAL HOSPITAL, INC.

DAMON MOREY LLP, BUFFALO (JESSE B. BALDWIN OF COUNSEL), FOR
DEFENDANT-RESPONDENT RICHARD J. DEFRANCO, M.D., INDIVIDUALLY AND DOING
BUSINESS AS G&P GYNE CARE AND/OR G&P GYNE CARE, INC.

Appeal from an order of the Supreme Court, Chautauqua County
(Timothy J. Walker, A.J.), entered November 25, 2008 in a medical
malpractice action. The order granted defendants' motions for summary
judgment.

It is hereby ORDERED that the order so appealed from is modified
on the law by denying the motions of defendants Grant W. Stephenson,
M.D., individually and doing business as Dr. Grant W. Stephenson
Family Medicine, and Richard J. DeFranco, M.D., individually and doing
business as G&P Gyne Care and/or G&P Gyne Care, Inc., and reinstating
the complaint against them and as modified the order is affirmed
without costs.

Memorandum: Plaintiff commenced this medical malpractice action,
individually and on behalf of her son, seeking damages for injuries

sustained when plaintiff gave birth to her son. We agree with plaintiff that Supreme Court erred in granting the motions of defendants Grant W. Stephenson, M.D., individually and doing business as Dr. Grant W. Stephenson Family Medicine, and Richard J. DeFranco, M.D., individually and doing business as G&P Gynecare, P.C., incorrectly sued as G&P Gyne Care and/or G&P Gyne Care, Inc., for summary judgment dismissing the complaint against them, and we thus modify the order accordingly. Although those defendants met their initial burden of establishing their entitlement to judgment as a matter of law, we conclude that the affidavit of plaintiff's expert submitted in opposition to the respective motions raised triable issues of fact sufficient to defeat the motions (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We reject Stephenson's contention, as an alternative ground for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130), that plaintiff's expert was not qualified to render an opinion with respect to Stephenson's treatment of plaintiff and her son (*cf. Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 842). Indeed, plaintiff's expert had 40 years of experience in the field of obstetrics and gynecology and was affiliated with the hospital where the delivery occurred for the purpose of consulting on problematic cases in that field. We also reject the contention of DeFranco, as an alternative ground for affirmance, that the court abused its discretion in considering plaintiff's opposing papers (*cf. Mosheyeva v Distefano*, 288 AD2d 448). Although we agree with DeFranco that plaintiff's expert relied on facts not in evidence at one point in his affirmation, we conclude that the remainder of that affirmation was properly based on the facts in evidence. We thus conclude that the opinion of plaintiff's expert that the injuries sustained by plaintiff and her son " 'were caused by a deviation from relevant industry standards . . . preclude[s] a grant of summary judgment in favor of [DeFranco]' " (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544; *see Tuorto v Jadali*, 62 AD3d 784; *see also Cooper v St. Vincent's Hosp. of N.Y.*, 290 AD2d 358). Contrary to DeFranco's further contention, plaintiff's bill of particulars in response to the demand by DeFranco was not insufficient inasmuch as it provided the requisite general statement " 'of the acts or omissions constituting the negligence claimed' " (*Stidham v Clerk*, 57 AD3d 1369, 1369).

We reject, however, plaintiff's contention that the court erred in granting that part of the motion of defendant Westfield Memorial Hospital, Inc. (WMH) for summary judgment dismissing the claim that it violated the Emergency Medical Treatment and Active Labor Act ([EMTALA] 42 USC § 1395dd). Even assuming, arguendo, that the EMTALA claim was properly pleaded, we agree with the court that it is time-barred inasmuch as the action was commenced approximately two years and six months after the EMTALA claim accrued (*see* 42 USC § 1395dd [d] [2] [C]). Contrary to plaintiff's further contention, the toll for infancy does not apply to extend the statute of limitations with respect to that claim (*see Vogel v Lindle*, 23 F3d 78, 80). In any event, the EMTALA claim is without merit because the record contains no evidence of disparate treatment of plaintiff by WMH (*see generally*

Lidge v Niagara Falls Mem. Med. Ctr. [appeal No. 2], 17 AD3d 1033, 1035).

Finally, we note that plaintiff does not contend that the court erred in granting those parts of the motion for summary judgment dismissing the negligence and breach of contract causes of action against WMH, and she therefore has abandoned any issues concerning those causes of action (see *Ciesinski v Town of Aurora*, 202 AD2d 984).

All concur except SMITH, J.P., who dissents in part and votes to affirm in the following Memorandum: I respectfully disagree with the majority's conclusion that plaintiff raised triable issues of fact in opposition to the motions of the Stephenson and DeFranco defendants (collectively, defendants) for summary judgment dismissing the complaint against them. I therefore dissent in part and would affirm the order.

In support of their motion, defendants had the initial "burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff [and her son were] not injured thereby" (*Murray v Hirsch*, 58 AD3d 701, 702, *lv denied* 12 NY3d 709; see *O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, *appeal dismissed* 13 NY3d 834). As plaintiff correctly concedes, they met that burden, whereupon "[t]he burden then shifted to plaintiff[] to raise triable issues of fact by submitting a physician's affidavit [or affirmation] both attesting to a departure from accepted practice and containing the attesting [physician's] opinion that the defendant[s'] omissions or departures were a competent producing cause of the injur[ies]" (*O'Shea*, 64 AD3d at 1141 [internal quotation marks omitted]). Contrary to the contention of plaintiff, she failed to raise the requisite triable issues of fact by submitting her expert's affirmation in opposition to defendants' motions.

The affirmation of plaintiff's expert identified several alleged failures of defendants, including their failure to order an amniocentesis, to have a "backup" plan for plaintiff's cesarean section, and to advise plaintiff to go immediately to another hospital when she went into labor. The expert failed, however, to identify a standard of care requiring that such steps be taken or to indicate that the failure to take such steps was a departure from accepted practice. Where, as here, "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . , the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544; see *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357). In any event, even assuming, arguendo, that the affirmation established that defendants' treatment constituted a departure from accepted practice, I conclude that plaintiff failed to raise a triable issue of fact sufficient to defeat the motions because her expert did not ultimately conclude that defendants' omissions or departures were a proximate cause of the injuries sustained by plaintiff and her son (see *Pigut v Leary*, 64 AD3d 1182; *Murray v Hirsch*, 58 AD3d 701, 703, *lv denied* 12 NY3d 709; *Mosezhnik v Berenstein*, 33 AD3d 895, 897; cf. *Selmensberger*

v Kaleida Health, 45 AD3d 1435, 1436).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

439

KA 06-01347

PRESENT: SMITH, J.P., CENTRA, LINDLEY, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS BARNISH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT 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 (Anthony F. Aloï, J.), rendered October 25, 2005. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, burglary in the first degree (two counts), criminal possession of a weapon in the third degree, criminal mischief in the third degree and unlawful imprisonment 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, assault in the first degree (Penal Law § 120.10 [1]), defendant contends that the evidence is legally insufficient to establish that the victim sustained a serious physical injury. By failing to move for a trial order of dismissal on that ground, defendant failed to preserve his contention for our review (see *People v Gray*, 86 NY2d 10, 19; *People v Brown*, 67 AD3d 1427). In any event, we reject that contention. Viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that defendant caused serious physical injury to the victim by striking him repeatedly in the head and body with a claw hammer (see generally *People v Bleakley*, 69 NY2d 490, 495). The wound to the victim's forehead was closed by 55 stitches in three layers of muscle, tissue and skin, and the treating physician testified that the victim would have permanent scarring. Indeed, the scarring on the victim's forehead was visible when the victim testified at trial, approximately seven months after the injury was sustained.

Finally, we reject the contention of defendant that he was denied effective assistance of counsel. Viewing the evidence, the law and

the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

444

KA 08-01771

PRESENT: SMITH, J.P., CENTRA, LINDLEY, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRIAN COOPER, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered August 5, 2008. The judgment convicted defendant, upon a nonjury verdict, of rape in the third degree and criminal sexual act in the third degree.

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

Memorandum: On appeal from a judgment convicting him of rape in the third degree (Penal Law § 130.25 [3]) and criminal sexual act in the third degree (§ 130.40 [3]), defendant contends that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Supreme Court was entitled to credit the testimony of the victim that defendant forced her to have sexual contact with him over the testimony of defendant that the sexual contact was consensual. The testimony of the victim was corroborated by that of her cousin and defendant's cousin, who testified that they overheard defendant make incriminating statements during a telephone conversation with the victim shortly after incidents occurred. Although a different result would not have been unreasonable, we accord great deference to the credibility determinations of the court, which was able to view the witnesses and observe their demeanor, and it cannot be said that the court failed to give the evidence the weight it should be accorded (*see generally id.*).

We also reject the further contention of defendant that the court erred in denying his pro se post-trial motion for reassignment of counsel without appointing new counsel. In our view, it cannot be said in the context of that motion that defense counsel "took a

position that was adverse to that of defendant and became a witness against him" (*People v Chaney*, 294 AD2d 931, 932; see *People v Hutchinson*, 57 AD3d 1013, 1014-1015, *lv denied* 12 NY3d 817). Finally, the sentence is not unduly harsh or severe.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

449

CAF 09-02234

PRESENT: SMITH, J.P., CENTRA, LINDLEY, SCONIERS, AND PINE, JJ.

IN THE MATTER OF JAVIER R.,
RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

ONEIDA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

WILLIAM L. KOSLOSKY, LAW GUARDIAN, UTICA, FOR RESPONDENT-APPELLANT.

LINDA M.H. DILLON, COUNTY ATTORNEY, UTICA (RAYMOND F. BARA OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered March 25, 2009 in a proceeding pursuant to Family Court Act article 3. The order, inter alia, adjudicated respondent to be a juvenile delinquent.

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

Memorandum: Respondent appeals from an order adjudicating him to be a juvenile delinquent based upon a finding that he committed acts that, if committed by an adult, would constitute the crime of attempted robbery in second degree (Penal Law §§ 110.00, 160.10 [1]). Respondent contends that the presentment agency's failure to provide him with the transcript of the testimony of the complaining witness from the corespondent's hearing constitutes a *Rosario* violation. The transcript was not prepared because the hearing in question had occurred only the day before, and respondent declined Family Court's offer for an adjournment to allow the transcript to be produced (*cf. Matter of John G.*, 91 AD2d 685). We thus conclude that respondent waived his contention by declining the court's offer for an adjournment (*see generally People v Welch*, 2 AD3d 1354, 1356, *lv denied* 2 NY3d 747).

Respondent failed to preserve for our review his contention that the evidence is legally insufficient to establish that he used force and was "aided by another person actually present" to support the finding that he committed acts constituting the crime of attempted robbery in second degree (Penal Law § 160.10 [1]; *see People v Gray*, 86 NY2d 10, 19). In any event, respondent's contention lacks merit. Viewed in the light most favorable to the presentment agency, the evidence at the hearing established that respondent shoved the victim and was aided by at least one companion in the immediate vicinity (*see People v Elliot*, 57 AD3d 1095, 1096-1097, *lv denied* 12 NY3d 783;

Matter of Tyrone S., 232 AD2d 318).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

450

CA 09-01104

PRESENT: SMITH, J.P., CENTRA, LINDLEY, SCONIERS, AND PINE, JJ.

JUSTIN M. SHUBBUCK, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SEAN W. CONNERS AND DENISE M. SABUDA,
DEFENDANTS-APPELLANTS.

RIVKIN RADLER LLP, UNIONDALE (MELISSA M. MURPHY OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered September 30, 2008 in a personal injury action. The judgment awarded plaintiff damages against defendants upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the taxicab he was driving collided with a vehicle operated by defendant Sean W. Connors and owned by defendant Denise M. Sabuda. Contrary to defendants' contention, Supreme Court properly granted that part of plaintiff's pretrial motion for partial summary judgment on the issue whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350). The case thereafter proceeded to trial, whereupon the jury rendered a verdict in favor of plaintiff and awarded him damages for past and future medical expenses, lost wages, and pain and suffering. There is no merit to the contention of defendants that the finding of the jury that plaintiff's negligence was not a substantial factor in causing the accident is against the weight of the evidence. It cannot be said that the verdict "could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [internal quotation marks omitted]).

With respect to the award of damages, defendants contended in their post-trial motion that the evidence is legally insufficient to support the award with respect to future lost wages and future medical expenses. We reject that contention. " 'It is axiomatic that loss of earnings must be established with reasonable certainty . . . and the

initial burden of proving lost wages is on the [plaintiff]' . . . 'Recovery for lost earning capacity is not limited to a plaintiff's actual earnings before the accident, however, and the assessment of damages may instead be based upon future probabilities' " (*Huff v Rodriguez*, 45 AD3d 1430, 1433; see *Kirschhoffer v Van Dyke*, 173 AD2d 7, 10). At trial, plaintiff presented uncontroverted testimony in support of his claim for future lost wages that the construction company where he was employed as a supervisor paid him \$4.50 less per hour than other supervisors because of his physical limitations, which limitations the medical proof established were the direct result of his injuries. This Court has previously determined that a plaintiff's testimony concerning earnings may alone be legally sufficient to support a claim for lost wages (see *Dickerson v Woodbridge Constr. Group*, 274 AD2d 945, 946; *Butts v Braun*, 204 AD2d 1069, 1069-1070). In this case, it cannot be said "that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499). The same reasoning set forth in *Cohen* applies equally with respect to the award of damages for future medical expenses.

All concur except SMITH, J.P., and PINE, J., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part and would set aside the award of damages for future lost wages. It is well settled that future lost wages must be established with reasonable certainty and that plaintiff had the initial burden of proof with respect to that issue (see generally *Huff v Rodriguez*, 45 AD3d 1430, 1433; *Man-Kit Lei v City Univ. of N.Y.*, 33 AD3d 467, 469-470, *lv denied* 8 NY3d 806; *Tassone v Mid-Valley Oil Co.*, 5 AD3d 931, 932, *lv denied* 3 NY3d 608). Here, the sole evidence presented at trial with respect to that issue was the unsubstantiated testimony of plaintiff, who testified that he earned \$10 per hour as a manager following the accident, that other managers earned \$15 per hour, and that, in his opinion, they received higher wages because the injuries he sustained in the accident rendered him unable to perform the physical labor they performed. Other than plaintiff's unsubstantiated opinions, there was no evidence establishing the reason for the pay differential or, indeed, whether there was such a pay differential. Such speculative and "[u]nsubstantiated testimony, without documentation, is insufficient to establish [future lost wages]" (*Lodato v Greyhawk N. Am., LLC*, 39 AD3d 494, 496). Although plaintiff was not required to present expert testimony to establish his claim for future lost wages (see generally *Kirschhoffer v Van Dyke*, 173 AD2d 7, 10), he nevertheless failed to meet his burden of establishing his future lost wages with the requisite reasonable certainty by, e.g., providing documentary evidence "demonstrating the difference between what he is now able to earn and what he could have earned if he had not been injured" (*Burdick v Bratt*, 203 AD2d 950, 951, *lv denied* 84 NY2d 801). Indeed, "the record is devoid of any W-2 forms, tax returns or other documentation of income earned . . . We thus conclude that, even if plaintiff's testimony [was] fully credited, [it was] insufficient to support the amount of damages awarded by the jury" (*O'Brien v Mbugua*, 49 AD3d 937, 940; see *Faas v*

State of New York, 249 AD2d 731, 732-733). We therefore would modify the judgment by granting that part of defendants' post-trial motion seeking to set aside the award of damages for future lost wages and setting aside that award.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

454

CA 09-02108

PRESENT: SMITH, J.P., CENTRA, LINDLEY, SCONIERS, AND PINE, JJ.

SHARON COOPER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MARCO
CERCONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGAN WILLIG, AMHERST (JENNIFER L. FAY OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered February 19, 2009 in a breach of contract action. The order denied defendant's motion to dismiss the amended 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 second through sixth causes of action and the claim for punitive damages and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action against her insurer after her claim for property damage to her home was denied. Supreme Court properly denied defendant's motion to dismiss the amended complaint insofar as defendant contended that the action was barred by the contractual limitations period in its insurance policy, i.e., two years. Although defendant met its initial burden of proof, plaintiff raised an issue of fact whether an exception to the contractual limitations period applies (see *Snyder v Allstate Ins. Co.*, 70 AD3d 670; see also *Phillip F. v Roman Catholic Diocese of Las Vegas*, 70 AD3d 765). "Construing the amended complaint in the generous light to which it is entitled on a motion to dismiss" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318, citing *Leon v Martinez*, 84 NY2d 83, 87-88), we conclude that it alleges facts that, if true, support a determination that defendant should be estopped from relying on the contractual limitations period because it "engaged in a course of conduct [that] lulled [her] into inactivity in the belief that [her] claim would ultimately be processed" (*Minichello v Northern Assur. Co. of Am.*, 304 AD2d 731, 732; cf. *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966; *Neary v Nationwide Mut. Fire Ins. Co.*, 17 AD3d 331).

We further conclude that the court properly denied defendant's motion insofar as defendant contended that dismissal of the amended complaint was warranted based on the alleged willful failure of plaintiff to cooperate with its investigation of her claim. An insurer's burden in attempting to disclaim coverage based on an insured's alleged willful lack of cooperation "has been termed a heavy one . . . and requires a showing that the insured's attitude was one of willful and avowed obstruction . . . involving a pattern of noncooperation for which no reasonable excuse [is] offered" (*Ingarra v General Acc./PG Ins. Co. of N.Y.*, 273 AD2d 766, 767 [internal quotation marks omitted]; see *Dlugosz v Exchange Mut. Ins. Co.*, 176 AD2d 1011, 1013). Here, although plaintiff admittedly did not provide defendant with all of the documents requested by it, she has offered reasons for failing to do so, and the issue concerning the validity of those reasons cannot be determined as a matter of law on the record before us.

We agree with defendant, however, that the court erred in denying its motion insofar as it sought dismissal of the second through sixth causes of action for failure to state a cause of action (see CPLR 3211 [a] [7]), as well as the claim for punitive damages, and we therefore modify the order accordingly. The second and third causes of action, for defendant's bad faith in refusing to settle plaintiff's claim, should have been dismissed because they do not allege conduct by defendant constituting the requisite "gross disregard of the insured's interests" necessary to support such causes of action (*Cappelletti v Unigard Ins. Co.*, 222 AD2d 1029, 1032 [internal quotation marks omitted]; see *Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453, *rearg denied* 83 NY2d 779). The fourth and fifth causes of action, for fraud, should have been dismissed because they merely restate plaintiff's first cause of action, for breach of contract (see *Schunk v New York Cent. Mut. Fire Ins. Co.*, 237 AD2d 913, 915; *Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220, 222).

The sixth cause of action, for the violation of General Business Law § 349, likewise should have been dismissed inasmuch as this is a private contractual dispute, "unique to the parties" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25), and the statute "was not intended to supplant an action to recover damages for breach of contract between parties to an arm's length contract" (*Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 148, *lv dismissed in part and denied in part* 87 NY2d 937; see *Graham v Eagle Distrib. Co.*, 224 AD2d 921, *lv dismissed* 88 NY2d 962). Finally, the claim for punitive damages should have been dismissed inasmuch as there is no indication that defendant's alleged conduct was "activated by evil or reprehensible motives" (*Gravitt v Newman*, 114 AD2d 1000, 1002; see 235 *E. 4th Street, LLC v Dime Sav. Bank of Williamsburgh*, 65 AD3d 976; *Peltier v Wakhloo*, 20 AD3d 870, 871).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

461

KA 09-01460

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NADIRAH BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 6, 2008. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her after a nonjury trial of assault in the second degree (Penal Law § 120.05 [4]) and endangering the welfare of a child (§ 260.10 [1]). Defendant contends that the evidence is legally insufficient to establish that the victim sustained a serious physical injury or that defendant acted recklessly. Because in moving for a trial order of dismissal defendant contended only that the evidence is legally insufficient to establish that she acted recklessly, she failed to preserve for our review that part of her contention with respect to serious physical injury (*see People v Gray*, 86 NY2d 10, 19). In any event, that part of her contention is without merit (*see People v Irwin*, 5 AD3d 1122, *lv denied* 3 NY3d 642; *People v Gagliardo*, 283 AD2d 964, *lv denied* 96 NY2d 901; *People v Higgins*, 124 AD2d 966, *lv denied* 69 NY2d 828). With respect to that part of defendant's contention that is preserved for our review, we conclude that the evidence is legally sufficient to establish that she acted recklessly, i.e., that she was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that [her actions would cause serious physical injury to the victim, and that the risk was] of such nature and degree that disregard thereof constitute[d] a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (§ 15.05 [3]).

We reject the contention of defendant that she was deprived of a

fair trial by prosecutorial misconduct. "Defendant failed to object to the prosecutor's cross-examination of defendant . . . , and thus failed to preserve for our review h[er] contentions concerning [that] alleged prosecutorial misconduct" (*People v Gibson*, 280 AD2d 903, lv denied 96 NY2d 862; see CPL 470.05 [2]). In any event, with respect to those unpreserved contentions as well as the contentions that are preserved for our review, we conclude that any "improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Gonzalez*, 206 AD2d 946, 947, lv denied 84 NY2d 867; see *People v Parks*, 120 AD2d 920, 921, lv denied 67 NY2d 1055).

Also contrary to the contention of defendant, she was not denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147). Defendant alleges that defense counsel was ineffective based, inter alia, on his failure to move to suppress certain evidence. Defendant failed to establish, however, that such a motion, if made, would have been successful (see *People v Peterson*, 19 AD3d 1015, lv denied 6 NY3d 851; *People v Phelps*, 4 AD3d 863, 864, lv denied 2 NY3d 804). With respect to defendant's remaining allegations of ineffective assistance of counsel, we conclude that "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*Baldi*, 54 NY2d at 147). Finally, the sentence is not unduly harsh or severe.

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

463

TP 09-02606

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

IN THE MATTER OF EDDIE M. ROBINSON, PETITIONER,

V

ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES, AND JOHN
LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL
FACILITY, RESPONDENTS.

EDDIE M. ROBINSON, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF
COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered December 21, 2009) to review a determination of respondents. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

465

KA 07-01270

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CHRIS T. WILSON, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered April 4, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

466

KA 09-01284

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DALE M. STEWART, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered May 29, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

469

CAF 09-01184, CAF 09-01191

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

IN THE MATTER OF DONATAE J., SELENA F., AND
TATYANNA F.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

SHAWNA F. AND XAVIER P., RESPONDENTS-APPELLANTS.

ORDER

ABBIE GOLDBAS, UTICA, FOR RESPONDENT-APPELLANT SHAWNA F.

JOHN T. NASCI, ROME, FOR RESPONDENT-APPELLANT XAVIER P.

JEFFERY G. TOMPKINS, UTICA, FOR PETITIONER-RESPONDENT.

PAUL M. DEEP, LAW GUARDIAN, UTICA, FOR DONATAE J., SELENA F., AND
TATYANNA F.

Appeals from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered May 11, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject children.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

470

CAF 09-00248

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

IN THE MATTER OF HEATHER A. INGERSOLL,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

LONNIE S. PLATT, RESPONDENT-APPELLANT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR
RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., LAW GUARDIAN, UTICA, FOR BRANDON S.P. AND
BRET M.P.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered January 15, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded sole custody of the parties' children to petitioner.

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

Memorandum: Respondent father appeals from an order modifying the parties' existing joint custody arrangement, with physical custody with petitioner mother and visitation with the father, by awarding the mother sole custody of the parties' two children and continuing visitation with the father. We reject the father's contention that the order is not supported by a sound and substantial basis in the record. Family Court properly determined that there was a substantial change in circumstances that warranted modification of the existing joint custody order in the best interests of the children. The record establishes offensive behavior of the father toward the mother in the presence of the children, his sporadic and often nonexistent exercise of visitation with the children, and his refusal to accept the medical diagnosis of the older child or cooperate with the treatment of that child (see generally *Eschbach v Eschbach*, 56 NY2d 167, 171; *Matter of Hurlburt v Behr*, 70 AD3d 1266; *Matter of Omahen v Omahen*, 64 AD3d 975). In addition, the parties' acrimonious relationship and inability to communicate with each other renders the existing joint custody arrangement inappropriate (see *Omahen*, 64 AD3d at 975-976; *Matter of Betro v Carbone*, 50 AD3d 1583, 1584; *Matter of Rhubarb v Rhubarb*, 15 AD3d 936). "The determination of the court is entitled to great deference, and where, as here, it is based upon a sound and substantial basis in the record, it will not be disturbed" (*Matter of*

Lewis R.E. v Deloris A.E., 37 AD3d 1092, 1093).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

475

CA 09-00897

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

IN THE MATTER OF CITY OF ROME,
PETITIONER-RESPONDENT,

V

ORDER

RAILROAD PROPERTY DEVELOPMENT CORP.,
RESPONDENT-APPELLANT.

ABBIE GOLDBAS, UTICA, FOR RESPONDENT-APPELLANT.

DIANE M. MARTIN-GRANDE, CORPORATION COUNSEL, ROME, FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered April 13, 2009. The order granted petitioner's application for an administrative search warrant.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 6 and 19, 2010, and by Stephanie Eisenberg for respondent on April 8, 2010,

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

476

CA 09-02411

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

1093 GROUP, LLC, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MARY JANE CANALE, DEFENDANT-APPELLANT.

GREGORY V. CANALE, GLENS FALLS, FOR DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, BUFFALO (JOHN G. HORN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered January 22, 2009. The judgment was entered in favor of plaintiff and against defendant in the amount of \$48,434.20, plus attorneys' fees, upon plaintiff's cross motion for summary judgment for the cost of remediation under Navigation Law article 12.

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

Memorandum: Plaintiff commenced this action to recover damages arising from the leakage of petroleum products from underground storage tanks on its property. We agree with defendant, a former owner of the property, that Supreme Court erred in granting plaintiff's cross motion for summary judgment insofar as it sought judgment in the amount of \$48,434.20 for remediating the petroleum contamination on the property, plus attorneys' fees, based on defendant's liability for the cost of remediation under article 12 of the Navigation Law.

In support of its cross motion, plaintiff had the initial burden of establishing that defendant " 'actually caused or contributed to such damage' and thus is liable as a 'discharger' pursuant to Navigation Law § 181 (1)" (*Patel v Exxon Corp.*, 43 AD3d 1323, 1323; *see Tifft v Bigelow's Oil Serv., Inc.*, 70 AD3d 1248, 1249; *Kramer v Oil Servs., Inc.*, 56 AD3d 730, 731). In addition, a subsequent purchaser such as plaintiff may not seek to recover under the Navigation Law from a prior owner if the leak occurred during the time in which the subsequent purchaser owned the property (*see Hjerpe v Globerman*, 280 AD2d 646), because "a 'claim' may only be asserted by an injured person 'who is not responsible for the discharge' " (*Fuchs & Bergh, Inc. v Lance Enters., Inc.*, 22 AD3d 715, 717, quoting § 172

[3]). "The statutory scheme makes clear that liability as a 'discharger' is based upon conduct, not status. Article 12 speaks in terms of imposition of liability upon 'dischargers' or persons 'responsible for the discharge' . . .[,] and [d]ischarge is defined, in turn, in terms of an 'action or omission resulting in' a petroleum spill (Navigation Law § 172 [8]). Nothing in the statute could be construed as making a landowner responsible solely because it is a landowner" (*Drouin v Ridge Lbr.*, 209 AD2d 957, 958). Here, plaintiff failed to meet its initial burden of establishing in support of its cross motion that the discharge occurred while defendant owned the property in question rather than, inter alia, during the time in which plaintiff owned it. Furthermore, because plaintiff failed to meet its initial burden on the cross motion, we do not examine the sufficiency of defendant's opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

We reject the further contention of defendant, however, that the court should have granted her motion for a change of venue. "A motion for a change of venue is addressed to the sound discretion of the court and, absent an improvident exercise of discretion, the court's determination will not be disturbed on appeal" (*County of Onondaga v Home Ins. Cos.*, 265 AD2d 896). We agree with plaintiff that defendant "failed to establish that the convenience of material witnesses and the ends of justice would be promoted by the change" (*Stratton v Dueppengiesser*, 281 AD2d 991, citing CPLR 510 [3]).

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

480

TP 09-02471

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

IN THE MATTER OF ATO CLYBURN, PETITIONER,

V

ORDER

GREGORY J. KADIEN, SUPERINTENDENT, GOWANDA CORRECTIONAL FACILITY, AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENTS.

ATO CLYBURN, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [John L. Michalski, A.J.], entered December 2, 2009) to review a determination of respondents. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

481

KA 08-00120

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ALVIN J. HANCOCK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered March 14, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

482

KA 09-01252

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

FRANK LEVEILLE, II, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered January 9, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

483

KA 09-00206

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RONNIE WOODS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered October 3, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of burglary in the first degree (Penal Law § 140.30 [2]). Defendant failed to preserve for our review his contention that County Court erred in allowing the People to present evidence of certain prior bad acts inasmuch as defendant did not object to the evidence on that ground (*see* CPL 470.05 [2]; *see also* *People v Moore*, 41 AD3d 1202, 1204, *lv denied* 9 NY3d 879). In any event, the testimony of the victim's boyfriend that defendant had asked him to sell drugs and that he had repeatedly refused was relevant to defendant's motive and his relationship with the victim (*see* *People v Chebere*, 292 AD2d 323, *lv denied* 98 NY2d 673; *People v Guitierrez*, 272 AD2d 58; *People v Pucci*, 77 AD2d 916, *lv denied* 51 NY2d 883). Further, the probative value of that testimony outweighed its potential for prejudice (*see* *People v Kelly*, 71 AD3d 1520).

Defendant made only a general motion for a trial order of dismissal and thus failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see* *People v Gray*, 86 NY2d 10, 19). In any event, that challenge lacks merit (*see generally* *People v Bleakley*, 69 NY2d 490, 495). Defendant also failed to preserve for our review his contention that the court erred in failing to afford him the opportunity to provide input concerning the court's response to two of the jury notes (*see* *People v Peller*, 8 AD3d 1123, *lv denied* 3 NY3d 679). In any event, the record establishes that defendant and defense counsel were present when the court read those jury notes and

that defendant thus had ample opportunity to provide input with respect to the court's responses (see generally *People v Brown*, 23 AD3d 491, lv denied 6 NY3d 774).

Viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Finally, we reject the contention of defendant that he was denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147; *People v Lewis*, 67 AD3d 1396, lv denied 14 NY3d 772; *People v Maryon*, 20 AD3d 911, 912-913, lv denied 5 NY3d 854).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

484

KA 07-00255

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES S. COBB, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered December 3, 2004. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [former (2)]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). Defendant failed to preserve for our review his contention that the trial evidence is legally insufficient to establish that he intended to kill the victim "inasmuch as his motion to dismiss was not specifically directed at that alleged insufficiency" (*People v Parsons*, 30 AD3d 1071, 1072, lv denied 7 NY3d 816; see *People v Gray*, 86 NY2d 10, 19). In any event, that contention lacks merit. The "[i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Price*, 35 AD3d 1230, 1231, lv denied 8 NY3d 919, 926; see *People v Massey*, 61 AD3d 1433, lv denied 13 NY3d 746; *People v Geddes*, 49 AD3d 1255, 1256, lv denied 10 NY3d 863). The evidence, viewed in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621), establishes that defendant pointed a gun at the victim from less than 20 feet away, "aimed at a part of the victim's body where death producing injuries were apt to occur," and fired twice (*People v Caruso*, 34 AD3d 863, 864, lv denied 8 NY3d 879; see e.g. *People v Diggs*, 56 AD3d 795, lv denied 12 NY3d 757; *People v German*, 243 AD2d 647, lv denied 91 NY2d 892).

Defendant failed to preserve for our review his further contention that the evidence before the grand jury was legally insufficient to establish his intent to kill the victim (see *People v Agee*, 57 AD3d 1486, *lv denied* 12 NY3d 813) and, in any event, that contention "is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence" (CPL 210.30 [6]; see *People v Baker*, 67 AD3d 1446; *People v Dixon*, 50 AD3d 1519, *lv denied* 10 NY3d 958). Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495).

Defendant contends that the admission in evidence of the tape recording of the 911 telephone call constituted impermissible bolstering. That contention is not preserved for our review (see *People v Castaneda*, 192 AD2d 475) and, in any event, it lacks merit (see *People v Dann*, 17 AD3d 1152, 1153, *lv denied* 5 NY3d 761; see generally *People v Buie*, 86 NY2d 501). Contrary to the further contention of defendant, County Court did not abuse its discretion in denying his request to redact certain portions of the transcript of the 911 telephone call (see *People v Knight*, 280 AD2d 937, 939, *lv denied* 96 NY2d 864; *People v Gandy*, 152 AD2d 909, *lv denied* 74 NY2d 896). We reject the contention of defendant that the court also abused its discretion in denying his request to sequester the jury (see CPL 310.10), inasmuch as "the law presumes that the jury . . . follow[ed] the court's instructions" not to read, view or listen to any media coverage of the case (*People v Moore*, 71 NY2d 684, 688).

Defendant further contends that the court's instructions on the justification defense were erroneous. After defendant raised his initial objections to those instructions, the court issued curative instructions to the jury, and defendant neither made any additional requests nor objected to the curative instructions. "Under [those] circumstances, the curative instructions must be deemed to have corrected the [alleged] error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944; see *People v Young*, 234 AD2d 922, *lv denied* 89 NY2d 1017), and defendant is deemed to have " 'waived appellate review' " of his present contention (*People v Pivnick*, 277 AD2d 1000, 1001, *lv denied* 96 NY2d 786). In any event, the court's instructions with respect to the justification defense constituted "a correct statement of the law when viewed in [their] entirety . . . and adequately conveyed to the jury 'the correct principles of law to be applied to the case' " (*People v Bolling*, 24 AD3d 1195, 1197, *affd* 7 NY3d 874; see *People v Lluveres*, 15 AD3d 848, 849, *lv denied* 5 NY3d 807; see generally *People v Goetz*, 68 NY2d 96). Defendant contends for the first time on appeal that the court failed to instruct the jury with respect to the use of ordinary physical force, and he therefore failed to preserve that contention for our review (see CPL 470.05 [2]; see e.g. *People v Green*, 43 AD3d 1279, 1281, *lv denied* 9 NY3d 1034; *People v Bonner*, 256 AD2d 1219, 1220, *lv denied* 93 NY2d 871). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6]

[a]).

Defendant further contends that the court erred in denying his request for a jury instruction on temporary and lawful possession of a weapon (see CJI2d[NY] Possession: Temporary and Lawful Possession). We reject that contention. There was no reasonable view of the evidence "tending to establish that, once possession [was] obtained, the weapon [was] not . . . used in a dangerous manner" (*People v Williams*, 50 NY2d 1043, 1045; see *People v Hayes*, 51 AD3d 688, lv denied 11 NY3d 737; *People v Matos*, 224 AD2d 326, lv denied 88 NY2d 850).

Although defendant contends that the court erred in denying his request for a substitution of assigned counsel, that contention is not properly before us inasmuch as the record establishes that defendant abandoned that request (see *People v Clark*, 24 AD3d 1225, lv denied 6 NY3d 832; *People v Hobart*, 286 AD2d 916, lv denied 97 NY2d 683). Defendant further contends that he was denied effective assistance of counsel. To the extent that defendant's contention is based on defense counsel's alleged failure to conduct an investigation or to pursue the justification defense, it involves matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL 440.10 (see *People v Griffin*, 48 AD3d 1233, 1236, lv denied 10 NY3d 840). We otherwise conclude that defendant received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

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

485

KA 08-01015

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LEE A. GLENN, DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 5, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (two counts), burglary in the second degree and unlawful imprisonment 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, inter alia, two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [b]), defendant contends that the conviction is not supported by legally sufficient evidence. By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve that contention for our review (*see People v Lane*, 7 NY3d 888, 889; *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although one of the victims was unable to identify defendant, the People presented strong identification testimony from the other victim, and thus it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v McQueen*, 170 AD2d 696, 697, *lv denied* 78 NY2d 924; *see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his further contention that several of the prosecutor's comments during summation constituted prosecutorial misconduct inasmuch as he failed to object to those comments (*see People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). With respect to an additional comment by the prosecutor on summation concerning "manufactured evidence," defendant contends that

County Court's response to his objection was improper. Defendant, however, did not object to that response and thus failed to preserve that contention for our review (see CPL 470.05 [2]). 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]). Finally, the sentence is not unduly harsh or severe.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

486

KA 07-01649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ALVIN J. HANCOCK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered June 20, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

487

KA 09-01251

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

FRANK LEVEILLE, II, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered January 9, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the third degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

488

CAF 09-00834

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

IN THE MATTER OF ROYSTAR T.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SAMARIAN B., RESPONDENT-APPELLANT.

CONVERSE & MORELL, LLP, PALMYRA (BRUCE A. ROSEKRANS OF COUNSEL), FOR
RESPONDENT-APPELLANT.

GARY LEE BENNETT, LYONS, FOR PETITIONER-RESPONDENT.

TRACEY L. FOX, LAW GUARDIAN, SODUS, FOR ROYSTAR T.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered February 11, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to one of her children on the ground of permanent neglect. We affirm. The mother contends that Family Court was biased against her, as evidenced by certain statements made by the court. We reject that contention. The first statement to which the mother objects involved separate proceedings concerning one of her other children. The remaining statements concerned the mother's residence and finances, and thus the statements were relevant to the issue whether the mother had failed to "plan for the future of the child, although physically and financially able to do so" (Social Services Law § 384-b [7] [a]; see Family Ct Act § 611).

Contrary to the mother's further contention, the court did not abuse its discretion in refusing to enter a suspended judgment, determining instead that the best interests of the child would be served by terminating the mother's parental rights and freeing the child for adoption. "The progress made by [the mother] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child's unsettled familial status" (*Matter of Maryline A.*, 22 AD3d 227, 228; see *Matter of Arella D.P.-D.*, 35 AD3d 1222, lv denied 8 NY3d 809; *Matter of Jose R.*, 32 AD3d 1284, 1285, lv denied 7 NY3d 718). At the time of the

dispositional hearing, the child was 4½ years old and had been placed in foster care on three separate occasions because of the mother's substance abuse, beginning at the time of the child's birth. Although the record established that the mother made progress in treatment and maintained her sobriety for intermittent periods, the record also established that she relapsed each time the child was returned to her care (see *Matter of Raine QQ.*, 51 AD3d 1106, *lv denied* 10 NY3d 717). We thus conclude that the court properly determined that "[f]reeing the child for adoption provided him with prospects for permanency and some sense of the stability he deserved, rather than the perpetual limbo caused by unfulfilled hopes of returning to [the mother's] care" (*id.* at 1107).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

489

CAF 09-00478

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

IN THE MATTER OF SHANNON D. WILDER,
PETITIONER-APPELLANT,

V

ORDER

THOMAS F. WILDER, RESPONDENT-RESPONDENT.

BRAUTIGAM & BRAUTIGAM, L.L.P., FREDONIA (MICHAEL K. BOBSEINE OF
COUNSEL), FOR PETITIONER-APPELLANT.

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

ANN LEONARD ANDERSON, LAW GUARDIAN, ORCHARD PARK, FOR TYLER J.W. AND
ALLISON M.W.

Appeal from an order of the Family Court, Cattaraugus County
(Michael L. Nenno, J.), entered February 2, 2009 in a proceeding
pursuant to Family Court Act article 6. The order dismissed the
petition for modification of custody.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs for reasons stated in the report of
the Judicial Hearing Officer.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

490

CAF 09-02454

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

IN THE MATTER OF EDUARDO R.,
RESPONDENT-RESPONDENT.

ERIE COUNTY ATTORNEY,
PETITIONER-APPELLANT.
(APPEAL NO. 2.)

MEMORANDUM AND ORDER

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

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

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered September 9, 2009 in a proceeding pursuant to Family Court Act article 3. The order adjourned the proceeding in contemplation of dismissal.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following Memorandum: Family Court erred in entering an order adjourning the juvenile delinquency proceeding in contemplation of dismissal. Family Court Act § 315.3 provides that the court may, at any time prior to entering a finding pursuant to section 352.1, order that the proceeding be adjourned in contemplation of dismissal. Here, the court had previously made a finding that respondent was a juvenile delinquent pursuant to section 352.1, and thus the court lacked the authority to adjourn the proceeding in contemplation of dismissal. Rather, once the court "vacated" the prior order of conditional discharge, it was mandated by Family Court Act § 360.3 (6) to order a different disposition pursuant to section 352.2, and an adjournment in contemplation of dismissal is not listed as a possible disposition therein. We therefore reverse the order and remit the matter to Family Court for further proceedings in compliance with Family Court Act § 360.3 (6).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

491

CA 09-01013

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

WINFORD H. LEWIS, PLAINTIFF-RESPONDENT,

V

ORDER

MARY ELIZABETH LEWIS, ALSO KNOWN AS BETSY
LEWIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

UNDERBERG & KESSLER LLP, ROCHESTER (JENNIFER A. MEREAU OF COUNSEL),
FOR DEFENDANT-APPELLANT.

LAW OFFICES OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J.
VERRILLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Philip B. Dattilo, Jr., R.), entered June 28, 2008 in a divorce action. The order, insofar as appealed from, directed defendant to pay maintenance to plaintiff.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

492

CA 09-01015

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

WINFORD H. LEWIS,
PLAINTIFF-APPELLANT-RESPONDENT,

V

ORDER

MARY ELIZABETH LEWIS, ALSO KNOWN AS BETSY
LEWIS, DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICES OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J.
VERRILLO OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (JENNIFER A. MEREAU OF COUNSEL),
FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an amended judgment of the Supreme Court, Monroe County (Stephen K. Lindley, J.), entered September 4, 2008 in a divorce action. The amended judgment, inter alia, directed defendant to pay maintenance to plaintiff.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

494

CA 09-00913

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

JANICE RIVENBURG, PLAINTIFF-RESPONDENT,

V

ORDER

HIGHLAND HOSPITAL OF ROCHESTER AND
UNIVERSITY OF ROCHESTER, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

OSBORN REED & BURKE, LLP, ROCHESTER, MAURO GOLDBERG & LILLING LLP,
GREAT NECK (BARBARA D. GOLDBERG OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

WEINSTEIN MURPHY, ROCHESTER (DAVID L. MURPHY OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered April 22, 2009 in a medical malpractice action. The order denied the motion of defendants for judgment notwithstanding the verdict.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

495

CA 09-01848

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

JANICE RIVENBURG, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

HIGHLAND HOSPITAL OF ROCHESTER AND
UNIVERSITY OF ROCHESTER, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

OSBORN REED & BURKE, LLP, ROCHESTER, MAURO GOLDBERG & LILLING LLP,
GREAT NECK (BARBARA D. GOLDBERG OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

WEINSTEIN MURPHY, ROCHESTER (DAVID L. MURPHY OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (David Michael Barry, J.), entered April 22, 2009 in a medical malpractice action. The judgment awarded plaintiff money damages upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained as the result of defendants' alleged medical malpractice. We conclude that Supreme Court properly denied defendants' post-trial motion for judgment notwithstanding the verdict or, in the alternative, to set aside the verdict on damages for past and future pain and suffering on the ground that it deviated materially from what would be reasonable compensation. Contrary to defendants' contention, we conclude that the jury verdict with respect to liability is not against the weight of the evidence inasmuch as it cannot be said that "the evidence so preponderate[d] in favor of [defendants] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [internal quotation marks omitted]; see *Homan v Herzig* [appeal No. 2], 55 AD3d 1413; *Odom v Binghamton Giant Mkts.*, 237 AD2d 686, 687). The parties presented conflicting expert testimony with respect to whether defendants' treatment of plaintiff deviated from the applicable standard of care and the effect thereof on the progression of her condition and the ultimate loss of her colon. "The decision to credit plaintiff's experts was within the province of the jury, and '[t]he verdict is one that reasonable jurors could have rendered on the basis of the conflicting expert testimony' " (*Stewart*

v Olean Med. Group, P.C., 17 AD3d 1094, 1096). Further, defendants successfully sought to exclude the testimony of an expert taken outside the presence of the jury, and they therefore cannot now rely on that testimony to challenge the verdict.

We reject defendants' contention that the court erred in allowing plaintiff to raise an alternative theory of liability at trial that was not set forth in her bill of particulars or expert disclosures. The challenged testimony did not set forth a separate theory of liability but, rather, that testimony provided a possible explanation for why the treatment provided to plaintiff during her second hospital admission was ineffective in saving her colon (*cf. Lidge v Niagara Falls Mem. Med. Ctr.* [appeal No. 2], 17 AD3d 1033, 1035). Moreover, plaintiff's expert disclosures complied with the requirements of CPLR 3101 (d) (1) (*see Green v Kingdom Garage Corp.*, 34 AD3d 1373, 1374).

We conclude that the court properly denied defendants' request for an "error in judgment" charge. "That charge is appropriate only in a narrow category of medical malpractice cases in which there is evidence that [the] defendant[s] . . . considered and chose among several medically acceptable treatment alternatives" (*Martin v Lattimore Rd. Surgicenter*, 281 AD2d 866, 866; *see Nestorowich v Ricotta*, 97 NY2d 393, 399-400), and this case does not fall within that narrow category (*see Vanderpool v Adirondack Neurosurgical Specialists, P.C.*, 45 AD3d 1477, 1478). We further conclude that the court did not abuse its discretion in precluding defendants from presenting expert testimony concerning the potential side effects of a particular antibiotic. None of plaintiff's treating physicians testified at trial that he or she declined to treat plaintiff with that antibiotic because of any potential side effects (*see generally Dufel v Green*, 84 NY2d 795, 797-798; *Wylie v Consolidated Rail Corp.*, 261 AD2d 955, 956, *lv denied* 93 NY2d 816).

Finally, we conclude that the award for past and future pain and suffering does not "deviate[] materially from what would be reasonable compensation" (CPLR 5501 [c]; *see Ellis v Emerson*, 57 AD3d 1435, 1436-1437).

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

496

CA 09-01346

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

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

V

ORDER

HUNT CONSTRUCTION GROUP, INC.,
DEFENDANT-APPELLANT-RESPONDENT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (JOHN G. POWERS OF COUNSEL), FOR
DEFENDANT-APPELLANT-RESPONDENT.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 13, 2009 in an action for breach of contract. The order granted in part the motion of plaintiff to dismiss certain amended counterclaims.

Now, upon reading and filing the stipulation of discontinuance of appeals signed by the attorneys for the parties on April 2, 2010,

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

498

CA 09-01787

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF
FINAL ACCOUNT OF MANUFACTURERS AND TRADERS
TRUST COMPANY, PETITIONER-RESPONDENT-APPELLANT,
AS EXECUTOR UNDER LAST WILL AND TESTAMENT OF
JOHN CLARKE ADAMS.

MEMORANDUM AND ORDER

PETER ADAMS AND CYNTHIA ADAMS, INDIVIDUALLY AND
AS TESTAMENTARY TRUSTEES OF THEIR CHILDREN
ARMAND ADAMS AND MAXINE ADAMS, AND MARC ADAMS,
RESPONDENTS-APPELLANTS-RESPONDENTS.

WILLIAMS & WILLIAMS, ROCHESTER (MITCHELL T. WILLIAMS OF COUNSEL), FOR
RESPONDENTS-APPELLANTS-RESPONDENTS PETER ADAMS AND CYNTHIA ADAMS,
INDIVIDUALLY AND AS TESTAMENTARY TRUSTEES OF THEIR CHILDREN ARMAND
ADAMS AND MAXINE ADAMS.

HARRIS BEACH PLLC, PITTSFORD (ANDREW Q. CONROY OF COUNSEL), FOR
RESPONDENT-APPELLANT-RESPONDENT MARC ADAMS.

HISCOCK & BARCLAY, LLP, SYRACUSE (JOHN D. COOK OF COUNSEL), FOR
PETITIONER-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Surrogate's Court,
Onondaga County (Peter N. Wells, S.), entered December 17, 2008. The
order, among other things, denied that part of respondents' motion for
an award of counsel fees.

It is hereby ORDERED that said cross appeal is unanimously
dismissed and the order is otherwise affirmed without costs.

Memorandum: Petitioner commenced this proceeding as the executor
of decedent's estate seeking approval of its account. Respondents,
the beneficiaries of the estate, filed various objections. Following
a trial, Surrogate's Court concluded, inter alia, that petitioner was
negligent in its fiduciary duty by failing to discover certain assets
of the estate consisting of a block of IBM stock, and the Surrogate
imposed a surcharge for petitioner's failure to marshal the estate
assets and sell that stock. Respondents thereafter moved for, inter
alia, an award of counsel fees, and the Surrogate refused to award
such fees. Although it is well settled that a Surrogate has the
discretion to order a fiduciary to pay counsel fees (*see generally*
Matter of Garvin, 256 NY 518, 521; *Matter of Manufacturers & Traders*
Trust Co., 66 AD3d 1377, 1380-1381; *Matter of Birnbaum v Birnbaum*, 157
AD2d 177, 191), here, the Surrogate did not abuse his discretion in

refusing to award counsel fees based on his conclusion that there was no evidence of bad faith, fraud, self-dealing or theft (see *Matter of Saxton*, 274 AD2d 110, 121). We further conclude, based on the colloquy during oral arguments before the Surrogate, that he was aware that he had the discretion to order petitioner to pay counsel fees. In light of our determination, we dismiss petitioner's cross appeal as moot.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

499

CA 09-01074

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

PATRICK E. BURNS, PLAINTIFF-APPELLANT,

V

ORDER

LEE A. KROENING, ANN KROENING, INDIVIDUALLY
AND AS EXECUTRIX OF THE ESTATE OF ALBERT
KROENING, DECEASED, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

NORMAN J. LERUM, P.C., CHICAGO, ILLINOIS (NORMAN J. LERUM, OF THE
ILLINOIS BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND COHEN &
LOMBARDO, P.C., BUFFALO, FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from a judgment and order (one paper) (denominated order)
of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.),
entered February 4, 2009 in a personal injury action. The judgment
and order denied the motion of plaintiff to set aside a jury verdict
and for a new trial.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

501

CA 09-02169

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

MITCHELL FARNHAM AND SANDRA FARNHAM,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

BRIAN J. MEDER, DEFENDANT-RESPONDENT.

MISERENDINO, SEEGERT & ESTOFF, P.C., BUFFALO (JONATHAN D. ESTOFF OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered January 2, 2009 in a personal injury action. The judgment and order granted the motion of defendant for a directed verdict dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Mitchell Farnham (plaintiff) when he was knocked down by defendant's bull while chasing the bull from plaintiffs' property. On a prior appeal, we affirmed the order denying defendant's motion for summary judgment dismissing the complaint (*Farnham v Meder*, 45 AD3d 1315). We conclude that Supreme Court properly granted defendant's motion for a directed verdict at the close of plaintiffs' proof on the ground that plaintiffs failed to establish that the bull had a vicious propensity.

It is well settled that "a bull is a domestic animal as defined in Agricultural and Markets Law § 108 (7)" (*Bard v Jahnke*, 6 NY3d 592, 596), and "that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities . . . Vicious propensities include 'the propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " (*Collier v Zambito*, 1 NY3d 444, 446; see *Bard*, 6 NY3d at 596-597). In *Collier*, the Court of Appeals held that "an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity

results in the injury giving rise to the lawsuit" (1 NY3d at 447). Once it is established that the owner of the animal had knowledge of its vicious propensity, the owner becomes strictly liable for the resulting injury (see *Bard*, 6 NY3d at 597). The Court of Appeals has explicitly "reject[ed] the notion that a negligence cause of action survives *Collier* and *Bard*" (*Petrone v Fernandez*, 12 NY3d 546, 550), and it has held that the "owner's liability is determined solely by application of the rule articulated in *Collier*" (*Bard*, 6 NY3d at 599 [emphasis added]; see *Petrone*, 12 NY3d at 550; *Lista v Newton*, 41 AD3d 1280, 1282).

Although it was undisputed that defendant knew that his bull had a propensity to break free of its enclosure and wander onto plaintiffs' property, plaintiffs failed to establish either that the bull had "a proclivity to act in a way that puts others at risk of harm" or that defendant knew of such a proclivity (*Collier*, 1 NY3d at 447). The bull's proclivity to wander was not the proclivity that resulted in the injury to plaintiff. Rather, the act that precipitated plaintiff's injury was the aggressive act of the bull in spinning around and knocking plaintiff to the ground, and plaintiff testified at trial that the bull had never acted aggressively before the day he was injured. Thus, we conclude that the evidence, viewed in the light most favorable to plaintiffs, established as a matter of law that there was no rational process by which the jury could have found in their favor (see *Hargis v Sayers* [appeal No. 2], 38 AD3d 1228, 1229).

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

504

KA 09-00156

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH THIELE, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., CONFLICT DEFENDERS,
WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF
COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Livingston County Court (Dennis S. Cohen, J.), rendered September 11, 2008. Defendant was resentenced following his conviction, upon his plea of guilty, of sodomy in the first degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law, the original sentence is reinstated and the matter is remitted to Livingston County Court for proceedings pursuant to CPL 470.45.

Memorandum: County Court erred in resentencing defendant pursuant to Correction Law § 601-d to a period of postrelease supervision after defendant had completed serving his determinate sentence of imprisonment and had been released from confinement (see *People v Williams*, 14 NY3d 198, ___; *People v Appleby*, 71 AD3d 1545; *People v Peterkin*, 71 AD3d 1402). We therefore conclude that reversal is required.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

505

KA 09-02574

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

ORDER

STEVEN TARANTINO, DEFENDANT-RESPONDENT.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR APPELLANT.

EDWARD R. HAMMOCK, FLUSHING (NORMAN P. EFFMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Wyoming County Court (Mark H. Dadd, J.), dated November 26, 2008. The order reduced the first count of the indictment.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

506

KA 08-01761

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KYLE ALLISON, DEFENDANT-APPELLANT.

MICHAEL B. JONES, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 18, 2007. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him, following a plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that he was denied effective assistance of counsel. That contention does not survive defendant's plea of guilty and the valid waiver by defendant of the right to appeal inasmuch as defendant does not contend that " 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance' " (*People v Wright*, 66 AD3d 1334, lv denied 13 NY3d 912). Furthermore, defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665), and this case does not fall within the rare exception to the preservation requirement (*id.* at 666). Finally, the waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

508

KA 08-01055

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANDRES AYALA, DEFENDANT-APPELLANT.

LAWRENCE A. SCHULZ, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Erie County Court (Michael L. D'Amico, J.), entered August 21, 2007. The order determined that defendant is a level one risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level one risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 et seq.), defendant contends that County Court erred in determining that he is subject to SORA's registration requirements because the record establishes that he poses no risk of reoffense. We reject that contention. "SORA requires defendant to register based upon his conviction of an enumerated sex offense, not because of his level of dangerousness" (*People v Hood*, 16 AD3d 778, 779, lv denied 4 NY3d 853; see generally *People v Knox*, 12 NY3d 60, 65, cert denied ___ US ___, 130 S Ct 552). Pursuant to Correction Law § 168-a (3), defendant is a sexually violent offender by virtue of his 1986 conviction of sodomy in the first degree (Penal Law former § 130.50 [1]), and SORA does not "include a 'no risk' category that exempts purportedly nondangerous offenders from having to register" (*Hood*, 16 AD3d at 779).

Contrary to the further contention of defendant, we conclude that he was provided effective assistance of counsel at the SORA hearing (see *People v Carey*, 47 AD3d 1079, 1080, lv denied 10 NY3d 893). Defendant's contentions concerning the underlying conviction and the appeal from that judgment of conviction are not properly before us on this appeal from the order determining his risk level, inasmuch as the SORA determination is not part of the criminal action (see *People v*

Wright, 53 AD3d 963, *lv denied* 11 NY3d 710).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

509

KA 08-02186

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

REESEIE NASH, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered September 19, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

510

KA 08-01188

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAJSHEEM L. RICHARDSON, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered February 29, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the plea is vacated, and the matter is remitted to Jefferson County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), defendant contends that County Court erred in refusing to suppress a photo array identification based on the alleged intoxication of the identifying witness. We reject that contention. Although the sobriety of the identifying witness may be relevant with respect to the issue of the reliability of the identification, it has no bearing on the issue before the court in determining whether to suppress the identification, i.e., "whether the identification[] resulted from impermissibly suggestive police conduct" (*People v Barton*, 164 AD2d 917, 918). Additionally, because the photo array was not unduly suggestive, it is of no moment that "the police compiled the photo array based upon their own suspicion of the perpetrator rather than a description given by the . . . victim" (*People v Scott*, 60 AD3d 1483, 1484, *lv denied* 12 NY3d 859).

Defendant further contends that there was insufficient evidence of guilt in the record and thus that the court erred in accepting his *Alford* plea. Although defendant failed to preserve that contention for our review, we exercise our power to address it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]; *People v Oberdorf*, 5 AD3d 1000, 1000-1001). "In New York, such a plea is

allowed only when, as in *Alford* itself, it is the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt" (*Matter of Silmon v Travis*, 95 NY2d 470, 475). Here, although the prosecutor stated during the plea colloquy that four eyewitnesses would testify at trial that they saw defendant stab the victim, the record does not support that statement. To the contrary, the three police statements in the record are equivocal and, indeed, are more exculpatory than inculpatory in nature. Moreover, the one eyewitness who initially provided the police with a positive identification of defendant as the attacker made another statement to the police the following day suggesting that she may have identified the wrong person. The record is devoid of any support for defendant's guilt other than the prosecutor's unsubstantiated statement during the plea colloquy. Thus, although defendant made a knowing and voluntary choice to enter an *Alford* plea, we conclude that the court erred in accepting the plea because the record does not contain the requisite "strong evidence of actual guilt" (*Silmon*, 95 NY2d at 475; see *Oberdorf*, 5 AD3d at 1001; see also *People v Alexander*, 97 NY2d 482, 486 n 3). We therefore reverse the judgment, vacate defendant's plea of guilty, and remit the matter to County Court for further proceedings on the indictment.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

513

CA 09-02331

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF JOSEPH A. SHUGATS,
CLAIMANT-RESPONDENT,

V

ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
RESPONDENT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MARK R. AFFRONTI OF
COUNSEL), FOR RESPONDENT-APPELLANT.

DEMPSEY & DEMPSEY, BUFFALO (HELEN KANEY DEMPSEY OF COUNSEL), FOR
CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick
H. NeMoyer, J.), entered June 1, 2009. The order granted the
application of claimant for leave to serve a late notice of claim.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

516

CA 09-02528

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

PETER ALEKSANDROWICZ,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

CANTELLA & COMPANY, INC.,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANTS.

WINGET, SPADAFORA & SCHWARTZBERG, LLP, NEW YORK CITY (HARRIS B. KATZ
OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LAW OFFICE OF GERARD A. STRAUSS, HAMBURG (GERARD A. STRAUSS OF
COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered March 12, 2009. The order denied the motion of defendant Cantella & Company, Inc. to dismiss the amended complaint.

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

Memorandum: We conclude with respect to the appeal by defendant Cantella & Company, Inc. (Cantella) that Supreme Court properly denied its motion to dismiss the amended complaint pursuant to CPLR 3211 (a) (7). As the court properly held, the failure of Cantella to include a copy of the amended complaint with its motion papers is a fatal defect requiring denial of the motion (*see Soule v Lozada*, 232 AD2d 825). Further, although plaintiff and Cantella address the merits of plaintiff's causes of action in their briefs on appeal, we are unable to determine Cantella's motion in the interest of judicial economy because "neither [the original nor the amended] complaint was made part of the record" (*Jiggetts v Dowling*, 3 AD3d 326, 327, *lv denied* 3 NY3d 603; *cf. Soule*, 232 AD2d 825). We reject the contention of plaintiff on his cross appeal that the court abused its discretion in denying his application for costs and attorney's fees pursuant to 22 NYCRR 130-1.1 inasmuch as plaintiff failed to establish that Cantella's motion was "completely without merit in law" and thus that the motion was "frivolous" (22 NYCRR 130-1.1 [c] [1]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

517

CA 09-01444

PRESENT: SCUDDER, P.J., MARTOCHE, LINDLEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF MITCHELL KALWASINSKI,
PETITIONER-APPELLANT,

V

ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES,
RESPONDENT-RESPONDENT.

MITCHELL KALWASINSKI, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court,
Wyoming County (Mark H. Dadd, A.J.), entered April 6, 2009 in a
proceeding pursuant to CPLR article 78. The judgment granted
respondent's motion to dismiss the petition as untimely.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

518

CA 09-01531

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

TRACI BUTLER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

STAGECOACH GROUP, PLC, COACH USA, INC.,
INDIVIDUALLY AND DOING BUSINESS AS COACH
CANADA, INC., TRENTWAY-WAGAR, INC., ERIE
COACH LINES COMPANY, RYAN A. COMFORT,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

CLARK, GAGLIARDI & MILLER, P.C., WHITE PLAINS (LAWRENCE T. D'ALOISE,
JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered March 24, 2009 in a personal injury action. The order granted the motion of defendants Stagecoach Group, PLC, Coach USA, Inc., individually and doing business as Coach Canada, Inc., Trentway-Wagar, Inc., Erie Coach Lines Company, and Ryan A. Comfort and determined that the law of Ontario, Canada concerning noneconomic damages applies to this action.

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

Memorandum: These 12 consolidated appeals concern four separate but related actions seeking damages for injuries and/or wrongful death resulting from the collision of a tractor-trailer parked on the shoulder of Route 390 and a chartered bus transporting a young women's hockey team from Ontario, Canada. The bus was leased by defendant Erie Coach Lines Company (Erie Coach Lines) from defendant Trentway-Wagar, Inc. (Trentway-Wagar), and was operated by defendant Ryan A. Comfort (collectively, bus defendants).

Plaintiffs contend that Supreme Court erred in granting the motion of defendant Coach Canada, Inc. in appeal No. 12 and the motions of defendants Stagecoach Group, PLC and Coach USA, Inc., individually and doing business as Coach Canada, Inc., in appeal Nos. 7 through 9 (collectively, parent corporation defendants), seeking summary judgment dismissing the respective complaints against them.

We note at the outset, in the interest of judicial economy, that those appeals taken by plaintiffs are moot in light of a settlement agreement between the parties entered into after the notices of appeal were filed. We may take judicial notice of events that occur after a notice of appeal is filed that render an appeal moot (*see generally Matter of Giovanni K.*, 62 AD3d 1242, *lv denied* 12 NY3d 715). Pursuant to the terms of that agreement, the liability of the bus defendants for the accident was 90% and the liability of the defendants associated with the tractor-trailer (truck defendants) was 10%, while no liability was apportioned to the parent corporation defendants. We therefore dismiss appeal Nos. 7 through 9 and appeal No. 12 as moot.

In any event, plaintiffs' contention with respect to those appeals is without merit. Plaintiffs contend that they raised an issue of fact whether the parent corporation defendants exercised complete control over the bus defendants sufficient to pierce the corporate veil (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-142), or whether the bus defendants merely acted as the agent of the parent corporation defendants in arranging the charter trip that is the subject of the actions (*see Hallock v State of New York*, 64 NY2d 224, 231). We reject that contention. Indeed, plaintiffs submitted the deposition testimony of the president of Trentway-Wagar setting forth the corporate relationships between the bus defendants and the parent corporation defendants and establishing that the trip was arranged by Trentway-Wagar and Erie Coach Lines, without any participation on the part of the parent corporation defendants. The fact that Trentway-Wagar owns the trade name "Coach Canada," which was displayed on the bus involved in this matter, does not compel a different result.

We reject the further contention of plaintiffs in appeal Nos. 1 through 6 and appeal Nos. 10 and 11 that the court erred in determining that the law of Ontario, Canada concerning noneconomic damages is applicable. As a preliminary matter, we conclude that the court did not abuse its discretion by taking judicial notice of Ontario law regarding noneconomic damages despite the failure of defendants to raise the applicability of the law as an affirmative defense and to provide the substance of the law in their pleadings in accordance with CPLR 3016 (e). We agree with the Third Department that, because CPLR 4511 (b) permits the court to take judicial notice of the laws of foreign countries that are presented "prior to the presentation of any evidence at the trial," the court is not barred from doing so based on a party's failure to comply with the requirement in 3016 (e) that the substance of such laws shall be set forth in the pleading (*see Burns v Young*, 239 AD2d 727, 728; *cf. Bank of N.Y. v Nickel*, 14 AD3d 140, 148-149, *appeal dismissed* 4 NY3d 843, *lv dismissed* 4 NY3d 846).

We reject plaintiffs' further contention in appeal Nos. 1 through 6 and appeal Nos. 10 and 11 that Ontario law limiting noneconomic damages is procedural rather than substantive in nature, and thus that New York law should apply. It is well established that the measure of damages is substantive (*see Davenport v Webb*, 11 NY2d 392, 393), and we thus conclude that the court properly applied a conflict of laws

analysis with respect to the law applicable to the issue of noneconomic damages. It is undisputed that there is an actual conflict of law issue inasmuch as Ontario law limits recovery for pain and suffering, while New York law does not (see generally *Matter of Allstate Ins. Co. [Stolarz--New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223). The plaintiffs seek the application of New York law to the noneconomic damages, and the bus defendants and the truck defendants seek the application of Ontario law to those damages.

"In resolving this choice of law issue, the preferred analytical tool in tort cases is to apply interest analysis . . . Under that analysis, the law of the jurisdiction having the greatest interest in the litigation will be applied and . . . the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict" (*Dorsey v Yantambwe*, 276 AD2d 108, 110, *lv denied* 96 NY2d 712 [internal quotation marks omitted]). Where, as here, the conflicting laws are loss-allocating, we apply the rules set forth by the Court of Appeals in *Neumeier v Kuehner* (31 NY2d 121, 128; see *Cooney v Osgood Mach.*, 81 NY2d 66, 73-74). The first *Neumeier* rule provides that, if the parties to the lawsuit share a common domicile, as do plaintiffs and the bus defendants, the law of their domicile applies (see *Cooney*, 81 NY2d at 74; *Schultz v Boy Scouts of Am.*, 65 NY2d 189, 199-200). Where, however, the parties are domiciled in different jurisdictions, as are plaintiffs and the truck defendants, the law of the site of the tort shall apply unless "it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants" (*Neumeier*, 31 NY2d at 128).

With respect to plaintiffs and the bus defendants, we conclude that the first *Neumeier* rule shall apply (see *Schultz*, 65 NY2d at 201; *Dorsey*, 276 AD2d at 111). As the Court of Appeals explained, by applying the law of the parties' common domicile, the risk of forum shopping is reduced; the charge that the "forum-locus is biased in favor of its own laws and in favor of rules permitting recovery" is rebutted; and "the concepts of mutuality and reciprocity support consistent application of the common-domicile law" (*Schultz*, 65 NY2d at 201). Moreover, "[t]he domiciliary jurisdiction, which has weighed the competing considerations underlying the loss allocation rule at issue, has the greater 'interest in enforcing the decisions of both parties to accept both the benefits and the burdens of identifying with that jurisdiction and to submit themselves to its authority' " (*Cooney*, 81 NY2d at 73). Indeed, the Supreme Court of Canada determined in a trilogy of cases that such awards are not compensatory in nature, and that it is appropriate to limit damages for nonpecuniary losses because of the social impact of very large awards (see *Andrews v Grand & Toy Alberta Ltd.*, 2 SCR 229; *Thorton v Prince George School Dist. No. 57*, 2 SCR 267; *Arnold v Teno*, 2 SCR 287).

With respect to the truck defendants, the third *Neumeier* rule applies inasmuch as the parties are domiciled in Ontario, Canada and Pennsylvania. As noted above, no party seeks to have Pennsylvania law

applied to this issue. We reject plaintiffs' contention that New York law should apply under this rule because it is the site of the tort, and because both plaintiffs and the truck defendants purposely traveled to New York for recreational and business purposes, respectively. Rather, we conclude that the exception to the general rule that the law of the forum wherein the tort occurred should apply because, under the circumstances presented here, "displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants" (*Neumeier*, 31 NY2d at 128). We conclude that, while applying Ontario law "may not affirmatively advance the substantive law purposes of New York, it will not frustrate those interests because New York has no significant interest in applying its own law to this dispute" (*Schultz*, 65 NY2d at 201). Furthermore, because the parties have stipulated that the truck defendants are only 10% liable for the accident, those defendants may pay more for non-pecuniary damages if New York law is applied to them, than the bus defendants, who are 90% liable, would pay because the damages are capped by Ontario law. Thus, we conclude that applying New York law would "produc[e] great uncertainty for [the] litigants" (*Neumeier*, 31 NY2d at 128; see *Dorsey*, 276 AD2d at 111).

Finally, we conclude that plaintiffs failed to meet the "heavy burden" of establishing that the application of Ontario law violates the public policy of New York (*Schultz*, 65 NY2d at 202). The Court of Appeals stated that "resort to the public policy exception should be reserved for those foreign laws that are truly obnoxious" (*Cooney*, 81 NY2d at 79), and that is not the case here. Even assuming, arguendo, that the Ontario law limiting damages violates the public policy of this State, we nevertheless conclude that plaintiffs failed to "establish that there are enough important contacts between the parties, the occurrence and the New York forum to implicate our public policy and thus preclude enforcement of the foreign law" (*Schultz*, 65 NY2d at 202). As in *Schultz*, plaintiffs traveled to New York for a brief time for recreational purposes, and such limited contact is not sufficient to implicate the public policy of New York with respect to noneconomic damages (see *id.* at 201-202). Contrary to plaintiffs' contention, *Kilberg v Northeast Airlines* (9 NY2d 34) does not compel a different result. In *Kilberg*, the Court of Appeals refused to apply Massachusetts law limiting pecuniary damages in a wrongful death action to the damages resulting from the death of a New York resident, who purchased a plane ticket in New York and flew from New York to Massachusetts, where the plane crashed. The Court concluded there were sufficient contacts to invoke the public policy of New York, and that to apply the limitation on damages with respect to its own citizen would violate the public policy of this State (see *id.* at 40).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

519

CA 09-01532

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

TRACI BUTLER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

STAGECOACH GROUP, PLC, ET AL., DEFENDANTS,
J&J HAULING, INC., JOSEPH R. FRENCH,
INDIVIDUALLY AND DOING BUSINESS AS J&J
TRUCKING, INC., AND/OR J&J HAULING, INC.,
AND PAMELA ZEISET, AS ADMINISTRATRIX OF THE
ESTATE OF ERNEST D. ZEISET, JR., DECEASED,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CLARK, GAGLIARDI & MILLER, P.C., WHITE PLAINS (LAWRENCE T. D'ALOISE,
JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO
OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered March 24, 2009 in a personal injury action. The order granted the motion of defendants J&J Hauling, Inc., Joseph R. French, individually and doing business as J&J Trucking, Inc., and/or J&J Hauling, Inc., and Pamela Zeiset, as administratrix of the estate of Ernest D. Zeiset, Jr., deceased, and determined that the law of Ontario, Canada concerning noneconomic damages applies to this action.

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

Same Memorandum as in *Butler v Stagecoach Group, PLC* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

520

CA 09-01534

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

COURTNEY COWAN, KELLY COWAN AND BRIAN COWAN,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

STAGECOACH GROUP, PLC, COACH USA, INC.,
INDIVIDUALLY AND DOING BUSINESS AS COACH
CANADA, INC., TRENTWAY-WAGAR, INC., ERIE
COACH LINES COMPANY, RYAN A. COMFORT,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

CLARK, GAGLIARDI & MILLER, P.C., WHITE PLAINS (LAWRENCE T. D'ALOISE,
JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County
(Thomas M. Van Strydonck, J.), entered March 24, 2009 in a personal
injury action. The order granted the motion of defendants Stagecoach
Group, PLC, Coach USA, Inc., individually and doing business as Coach
Canada, Inc., Trentway-Wagar, Inc., Erie Coach Lines Company, and Ryan
A. Comfort and determined that the law of Ontario, Canada concerning
noneconomic damages applies to this action.

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

Same Memorandum as in *Butler v Stagecoach Group, PLC* ([appeal No.
1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

521

CA 09-01535

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

COURTNEY COWAN, KELLY COWAN AND BRIAN COWAN,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

STAGECOACH GROUP, PLC, ET AL., DEFENDANTS,
J&J HAULING, INC., JOSEPH R. FRENCH,
INDIVIDUALLY AND DOING BUSINESS AS J&J
TRUCKING, INC., AND/OR J&J HAULING, INC.,
AND PAMELA ZEISET, AS ADMINISTRATRIX OF THE
ESTATE OF ERNEST D. ZEISET, JR., DECEASED,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 4.)

CLARK, GAGLIARDI & MILLER, P.C., WHITE PLAINS (LAWRENCE T. D'ALOISE,
JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO
OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered March 24, 2009 in a personal injury action. The order granted the motion of defendants J&J Hauling, Inc., Joseph R. French, individually and doing business as J&J Trucking, Inc., and/or J&J Hauling, Inc., and Pamela Zeiset, as administratrix of the estate of Ernest D. Zeiset, Jr., deceased, and determined that the law of Ontario, Canada concerning noneconomic damages applies to this action.

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

Same Memorandum as in *Butler v Stagecoach Group, PLC* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

522

CA 09-01537

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

MEAGAN GODWIN, CARRIE LONG AND CARLEIGH WELDON,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

STAGECOACH GROUP, PLC, COACH USA, INC.,
INDIVIDUALLY AND DOING BUSINESS AS COACH
CANADA, INC., TRENTWAY-WAGAR, INC., ERIE
COACH LINES COMPANY, RYAN A. COMFORT,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 5.)

CLARK, GAGLIARDI & MILLER, P.C., WHITE PLAINS (LAWRENCE T. D'ALOISE,
JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County
(Thomas M. Van Strydonck, J.), entered March 24, 2009 in a personal
injury action. The order granted the motion of defendants Stagecoach
Group, PLC, Coach USA, Inc., individually and doing business as Coach
Canada, Inc., Trentway-Wagar, Inc., Erie Coach Lines Company, and Ryan
A. Comfort and determined that the law of Ontario, Canada concerning
noneconomic damages applies to this action.

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

Same Memorandum as in *Butler v Stagecoach Group, PLC* ([appeal No.
1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

523

CA 09-01538

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

MEAGAN GODWIN, CARRIE LONG AND CARLEIGH WELDON,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

STAGECOACH GROUP, PLC, ET AL., DEFENDANTS,
J&J HAULING, INC., JOSEPH R. FRENCH,
INDIVIDUALLY AND DOING BUSINESS AS J&J
TRUCKING, INC., AND/OR J&J HAULING, INC.,
AND PAMELA ZEISET, AS ADMINISTRATRIX OF THE
ESTATE OF ERNEST D. ZEISET, JR., DECEASED,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 6.)

CLARK, GAGLIARDI & MILLER, P.C., WHITE PLAINS (LAWRENCE T. D'ALOISE,
JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO
OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered March 24, 2009 in a personal injury action. The order granted the motion of defendants J&J Hauling, Inc., Joseph R. French, individually and doing business as J&J Trucking, Inc., and/or J&J Hauling, Inc., and Pamela Zeiset, as administratrix of the estate of Ernest D. Zeiset, Jr., deceased, and determined that the law of Ontario, Canada concerning noneconomic damages applies to this action.

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

Same Memorandum as in *Butler v Stagecoach Group, PLC* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

524

CA 09-01533

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

TRACI BUTLER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

STAGECOACH GROUP, PLC, COACH USA, INC.,
INDIVIDUALLY AND DOING BUSINESS AS COACH
CANADA, INC., TRENTWAY-WAGAR, INC., ERIE
COACH LINES COMPANY, RYAN A. COMFORT,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 7.)

CLARK, GAGLIARDI & MILLER, P.C., WHITE PLAINS (LAWRENCE T. D'ALOISE,
JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County
(Thomas M. Van Strydonck, J.), entered March 24, 2009 in a personal
injury action. The order granted the motion of defendants Stagecoach
Group, PLC, Coach USA, Inc., individually and doing business as Coach
Canada, Inc., Trentway-Wagar, Inc., Erie Coach Lines Company, and Ryan
A. Comfort for summary judgment.

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

Same Memorandum as in *Butler v Stagecoach Group, PLC* ([appeal No.
1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

525

CA 09-01536

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

COURTNEY COWAN, KELLY COWAN, AND BRIAN COWAN,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

STAGECOACH GROUP, PLC, COACH USA, INC.,
INDIVIDUALLY AND DOING BUSINESS AS COACH
CANADA, INC., TRENTWAY-WAGAR, INC., ERIE
COACH LINES COMPANY, RYAN A. COMFORT,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 8.)

CLARK, GAGLIARDI & MILLER, P.C., WHITE PLAINS (LAWRENCE T. D'ALOISE,
JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County
(Thomas M. Van Strydonck, J.), entered March 24, 2009 in a personal
injury action. The order granted the motion of defendants Stagecoach
Group, PLC, Coach USA, Inc., individually and doing business as Coach
Canada, Inc., Trentway-Wagar, Inc., Erie Coach Lines Company, and Ryan
A. Comfort for summary judgment.

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

Same Memorandum as in *Butler v Stagecoach Group, PLC* ([appeal No.
1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

526

CA 09-01539

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

MEAGAN GODWIN, CARRIE LONG, AND CARLEIGH WELDON,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

STAGECOACH GROUP, PLC, COACH USA, INC.,
INDIVIDUALLY AND DOING BUSINESS AS COACH
CANADA, INC., TRENTWAY-WAGAR, INC., ERIE
COACH LINES COMPANY, RYAN A. COMFORT,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 9.)

CLARK, GAGLIARDI & MILLER, P.C., WHITE PLAINS (LAWRENCE T. D'ALOISE,
JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County
(Thomas M. Van Strydonck, J.), entered March 24, 2009 in a personal
injury action. The order granted the motion of defendants Stagecoach
Group, PLC, Coach USA, Inc., individually and doing business as Coach
Canada, Inc., Trentway-Wagar, Inc., Erie Coach Lines Company, and Ryan
A. Comfort for summary judgment.

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

Same Memorandum as in *Butler v Stagecoach Group, PLC* ([appeal No.
1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

527

CA 09-01547

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

SHEILA ELIZABETH EDWARDS, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF RICHARD F. EDWARDS, DECEASED, AND AS ADMINISTRATRIX OF THE ESTATE OF BRIAN EDWARDS, DECEASED, KELLY ELIZABETH EDWARDS, JANNA MARIE DESMARAIS, ROBERT JOSEPH DESMARAIS, TRACY LYNN DESMARAIS, JENNA M. UNDERWOOD, PATRICIA UNDERWOOD, DONALD UNDERWOOD, CARLY A. LABADIE, GUY P. LABADIE, NANCY LABADIE, MICHAEL W. COWAN, TORY J. GAULT, RANDY MICHAEL PAGEAU, LINDA JEAN PAGEAU, JASON P. MAILLOUX, MARCEL MAILLOUX, LOU-ANN MAILLOUX, TIFFANY STROUD, GARY LANGILL, AND CARRIE LANGILL, PLAINTIFFS-APPELLANTS,

MEMORANDUM AND ORDER

V

ERIE COACH LINES COMPANY, COACH CANADA, INC., TRENTWAY-WAGAR, INC., RYAN A. COMFORT, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 10.)

SEEGER WEISS LLP, NEW YORK CITY (TERRI ANNE BENEDETTO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered March 24, 2009 in an action for personal injury and wrongful death. The order granted the motion of defendants Erie Coach Lines Company, Coach Canada, Inc., Trentway-Wagar, Inc., and Ryan A. Comfort and determined that the law of Ontario, Canada concerning noneconomic damages applies to this action.

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

Same Memorandum as in *Butler v Stagecoach Group, PLC* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

528

CA 09-01548

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

SHEILA ELIZABETH EDWARDS, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF RICHARD F. EDWARDS, DECEASED, AND AS ADMINISTRATRIX OF THE ESTATE OF BRIAN EDWARDS, DECEASED, KELLY ELIZABETH EDWARDS, JANNA MARIE DESMARAIS, ROBERT JOSEPH DESMARAIS, TRACY LYNN DESMARAIS, JENNA M. UNDERWOOD, PATRICIA UNDERWOOD, DONALD UNDERWOOD, CARLY A. LABADIE, GUY P. LABADIE, NANCY LABADIE, MICHAEL W. COWAN, TORY J. GAULT, RANDY MICHAEL PAGEAU, LINDA JEAN PAGEAU, JASON P. MAILLOUX, MARCEL MAILLOUX, LOU-ANN MAILLOUX, TIFFANY STROUD, GARY LANGILL, AND CARRIE LANGILL, PLAINTIFFS-APPELLANTS,

MEMORANDUM AND ORDER

V

ERIE COACH LINES COMPANY, ET AL., DEFENDANTS, J&J TRUCKING, J&J HAULING, INC., JOSEPH R. FRENCH, AND PAMELA ZEISET, AS ADMINISTRATRIX OF THE ESTATE OF ERNEST D. ZEISET, JR., DECEASED, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 11.)

SEEGER WEISS LLP, NEW YORK CITY (TERRI ANNE BENEDETTO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered March 24, 2009 in an action for personal injury and wrongful death. The order granted the motion of defendants J&J Trucking, J&J Hauling, Inc., Joseph R. French and Pamela Zeiset, as administratrix of the estate of Ernest D. Zeiset, Jr., deceased, and determined that the law of Ontario, Canada concerning noneconomic damages applies to this action.

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

Same Memorandum as in *Butler v Stagecoach Group, PLC* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

529

CA 09-01549

PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ.

SHEILA ELIZABETH EDWARDS, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF RICHARD F. EDWARDS, DECEASED, AND AS ADMINISTRATRIX OF THE ESTATE OF BRIAN EDWARDS, DECEASED, KELLY ELIZABETH EDWARDS, JANNA MARIE DESMARAIS, ROBERT JOSEPH DESMARAIS, TRACY LYNN DESMARAIS, JENNA M. UNDERWOOD, PATRICIA UNDERWOOD, DONALD UNDERWOOD, CARLY A. LABADIE, GUY P. LABADIE, NANCY LABADIE, MICHAEL W. COWAN, TORY J. GAULT, RANDY MICHAEL PAGEAU, LINDA JEAN PAGEAU, JASON P. MAILLOUX, MARCEL MAILLOUX, LOU-ANN MAILLOUX, TIFFANY STROUD, GARY LANGILL, AND CARRIE LANGILL, PLAINTIFFS-APPELLANTS,

MEMORANDUM AND ORDER

V

ERIE COACH LINES COMPANY, COACH CANADA, INC., TRENTWAY-WAGAR, INC., RYAN A. COMFORT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 12.)

SEEGER WEISS LLP, NEW YORK CITY (TERRI ANNE BENEDETTO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Thomas M. Van Strydonck, J.), entered March 24, 2009 in an action for personal injury and wrongful death. The order granted the motion of defendants Erie Coach Lines Company, Coach Canada, Inc., Trentway-Wagar, Inc., and Ryan A. Comfort for summary judgment.

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

Same Memorandum as in *Butler v Stagecoach Group, PLC* ([appeal No. 1] ___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

530

KA 09-00937

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JAMAICA NEWBERN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny
M. Wolfgang, J.), rendered March 16, 2009. The judgment convicted
defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

531

KA 09-00938

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JAMAICA NEWBERN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny
M. Wolfgang, J.), rendered March 16, 2009. The judgment convicted
defendant, upon his plea of guilty, of robbery in the first degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

533

KA 09-00181

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JUNIOR GAYLE, ALSO KNOWN AS ANTHONY GAYLE,
DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF
COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (DAVID E. GANN OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 2, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of marihuana in the first degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

534

KA 05-02423

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

BRUCE C. STEPHENS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON 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 (Anthony F. Aloi, J.), rendered October 7, 2004. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

535

KA 07-01050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

EMANUEL P. GARZONE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS 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 (Patricia D. Marks, J.), rendered April 10, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

536

CAF 09-00998

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

IN THE MATTER OF JOHN R. GOOSSEN,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KAREN A. GOOSSEN, RESPONDENT-APPELLANT.

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

MICHAEL D. SCHMITT, LAW GUARDIAN, ROCHESTER, FOR JOHN G., JR., GAVIN G., EMILY G., DANE G., LAUREN G. AND MARINA G.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered December 19, 2008 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, granted that part of the petition seeking sole custody of the parties' two younger children.

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

Memorandum: Respondent mother appeals, as limited by her brief, from an order insofar as it granted that part of petitioner father's petition seeking sole custody of the parties' two youngest children. We affirm. Family Court's determination following a hearing that the best interests of those children would be served by an award of sole custody to the father is entitled to great deference (*see generally Eschbach v Eschbach*, 56 NY2d 167, 173-174). "Among the factors to be considered [in determining whether the best interests of the children will be served by a change in custody] are the quality of the home environment and the parental guidance the custodial parent provides for the child[ren] . . . , the ability of each parent to provide for the child[ren's] emotional and intellectual development . . . , the financial status and ability of each parent to provide for the child[ren] . . . , the relative fitness of the respective parents, and the length of time the present custody arrangement has been in effect" (*Matter of Krebsbach v Gallagher*, 181 AD2d 363, 364, *lv denied* 81 NY2d 701; *see Matter of Kristi L.T. v Andrew R.V.*, 48 AD3d 1202, 1204, *lv denied* 10 NY3d 716). Here, we do not disturb the court's determination inasmuch as the record establishes that "it is based on careful weighing of [the] appropriate factors" (*Matter of Pinkerton v Pensyl*, 305 AD2d 1113, 1114), and it has a sound and substantial basis in the record (*see Matter of Krug v Krug*, 55 AD3d 1373; *Matter of*

Angel M.S. v Thomas J.S., 41 AD3d 1227; *Matter of Amy L.W. v Brendan K.H.*, 37 AD3d 1060).

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

537

CAF 08-02592

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

IN THE MATTER OF KIMBERLY BERLING
AND RICHARD DEMING, PETITIONERS-RESPONDENTS,

V

ORDER

TINA GLOVER, ALSO KNOWN AS TINA PARKER,
RESPONDENT-APPELLANT.

IN THE MATTER OF TINA GLOVER, ALSO KNOWN AS
TINA PARKER, PETITIONER-APPELLANT,

V

KIMBERLY BERLING AND RICHARD DEMING,
RESPONDENTS-RESPONDENTS.

IN THE MATTER OF GERALD DEMING AND SHARON
DEMING, PETITIONERS-RESPONDENTS,

V

KIMBERLY BERLING, RICHARD DEMING,
RESPONDENTS-RESPONDENTS,
AND TINA GLOVER, ALSO KNOWN AS TINA PARKER,
RESPONDENT-APPELLANT.

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

CHARLES J. GREENBERG, BUFFALO, FOR PETITIONER-RESPONDENT AND
RESPONDENT-RESPONDENT KIMBERLY BERLING.

MARCEL LAJOY, ALBANY, FOR PETITIONER-RESPONDENT AND
RESPONDENT-RESPONDENT RICHARD DEMING.

BONITA J. STUBBLEFIELD, LAW GUARDIAN, PIFFARD, FOR DANIEL D.

Appeal from an order of the Family Court, Livingston County
(Marianne Furfure, J.), entered July 24, 2008 in a proceeding pursuant
to Family Court Act article 6. The order, insofar as appealed from,
denied the petition of respondent-petitioner Tina Glover, also known
as Tina Parker, for custody of Daniel D.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

538

CAF 09-00688

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

IN THE MATTER OF DEMARIAH A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

REBECCA B., RESPONDENT,
AND DEMARIO A., RESPONDENT-APPELLANT.

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC.,
BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR DEMARIAH A.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered March 18, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, terminated the parental rights of respondent Demario A.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to the child in question on the ground of mental illness. We affirm. Petitioner met its burden of demonstrating by clear and convincing evidence that the father is presently and for the foreseeable future unable to provide proper and adequate care for his child by reason of mental illness (see Social Services Law § 384-b [4] [c]; [6] [a]). "The failure of the [court-appointed] psychologist to provide a precise, clinically accepted diagnosis does not render his testimony legally insufficient to satisfy the statutory mandate" (*Matter of Dylan K.*, 269 AD2d 826, 827, *lv denied* 95 NY2d 766). Contrary to the contention of the father, the foundation for the psychologist's testimony was sufficient (see *Matter of Shahida M.*, 59 AD3d 976, *lv denied* 12 NY3d 708).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

540

CAF 09-00875

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

IN THE MATTER OF KYLE K. AND KARA K.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

HARRY K., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC.,
BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR KYLE K. AND KARA K.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered March 20, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: On a prior appeal, we modified an order granting two petitions seeking to terminate the parental rights of respondent father with respect to his two children on the grounds of, respectively, mental illness and permanent neglect (*Matter of Kyle K.*, 49 AD3d 1333, *lv denied* 10 NY3d 715). We dismissed the petition alleging that the father suffered from mental illness, and we remitted the matter to Family Court for a dispositional hearing on the petition alleging permanent neglect (*id.*). The father now appeals from the order terminating his parental rights following that dispositional hearing.

We agree with the father that the court erred in precluding him from cross-examining witnesses at the dispositional hearing concerning the stability of the foster home environment, which in this case is likewise the prospective adoptive home environment. "Unlike a fact-finding hearing [that] resolves the issue of permanent neglect and in which the best interests of the child[ren] play no part in the court's determination, the court in the dispositional hearing must be concerned only with the best interests of the child[ren]" (*Matter of Star Leslie W.*, 63 NY2d 136, 147; see Family Ct Act § 631; *Matter of Brendan S.*, 39 AD3d 1189). Among the factors to be considered at such a hearing are the environment and the stability of the prospective

adoptive home (see e.g. *Matter of Shaianna Mae F.*, 69 AD3d 437; *Matter of Jaiheem M.S.*, 62 AD3d 569). We conclude, however, that the error is harmless because the evidence, "including [the father's] own testimony . . . provides extensive support for the court's disposition" (*Matter of Leroy C.*, 24 AD3d 143, 144, lv denied 6 NY3d 708, rearg denied 7 NY3d 736).

We reject the father's further contention that the court abused its discretion in refusing to enter a suspended judgment. The children had been living for four years with the foster parents, who wished to adopt them, and the children, who were teenagers at the time of the dispositional hearing, wished to be adopted by the foster parents. Furthermore, "[t]he progress made by [the father] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child[ren's] unsettled familial status" (*Matter of Maryline A.*, 22 AD3d 227, 228; see *Matter of Donovan W.*, 56 AD3d 1279, lv denied 11 NY3d 716; *Matter of Kaseem J.*, 52 AD3d 1321).

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

541

CAF 09-01176

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

IN THE MATTER OF KAREN A. GOOSSEN,
PETITIONER-APPELLANT,

V

ORDER

JOHN R. GOOSSEN, RESPONDENT-RESPONDENT.

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

MICHAEL D. SCHMITT, LAW GUARDIAN, ROCHESTER, FOR JOHN G., JR., GAVIN
G., EMILY G., DANE G., LAUREN G. AND MARINA G.

Appeal from an order of the Family Court, Monroe County (Joan S.
Kohout, J.), entered December 19, 2008 in a proceeding pursuant to
Family Court Act article 8. The order dismissed the petition.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

543

CA 09-02393

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

BRIAN POULSEN, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

LIGHTHOUSE ASSEMBLY AT HIGH FALLS,
DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (ROBERT M. SHADDOCK OF COUNSEL), FOR
DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (BRETT L. MANSKE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered March 27, 2009 in a personal injury action. The order denied the motion of defendant for a change of venue.

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

Memorandum: We conclude that Supreme Court properly denied defendant's motion for a change of venue of this action from Erie County to Monroe County. Defendant failed to meet its "burden of demonstrating that the convenience of material witnesses would be better served by the change" (*Davis v Firman*, 53 AD3d 1101, 1102 [internal quotation marks omitted]; see CPLR 510 [3]; *Rochester Drug Coop., Inc. v Marcott Pharmacy N. Corp.*, 15 AD3d 899).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

545

CA 09-02308

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

ALBERT G. FRACCOLA, JR., PLAINTIFF-APPELLANT,

V

ORDER

PHYLLIS FRACCOLA, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

ALBERT G. FRACCOLA, JR., PLAINTIFF-APPELLANT PRO SE.

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered February 5, 2009. The order, among other things, granted the motion of defendant Phyllis Fraccola for summary judgment.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

547

CA 09-02327

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

JUSTIN W. FRANCIS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SUSANNE FRANCIS, DEFENDANT-RESPONDENT.

PALMER, MURPHY & TRIPI, BUFFALO (THOMAS ALLAN PALMER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NICHOLAS LOCICERO, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Janice M. Rosa, J.), entered June 17, 2009 in a divorce action. The judgment, inter alia, determined the child support obligations of the parties.

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

Memorandum: Plaintiff father appeals from an order that, inter alia, determined the child support obligations of the parties and their respective shares of education expenses. We note at the outset that, although the father appeals from the order rather than the subsequent judgment of divorce, in the exercise of our discretion we treat the notice of appeal as valid and deem the appeal as taken from the judgment (*see* CPLR 5520 [c]; *Miller v Richardson*, 48 AD3d 1298, 1300, *lv denied* 11 NY3d 710; *Gordon v Gordon*, 210 AD2d 929).

The father contends that Supreme Court failed to set forth the factors it considered in applying the statutory formula to the combined parental income in excess of \$80,000 and that the combined parental income should have been capped at \$100,000. We reject that contention. The court did not abuse its discretion in setting a cap of \$160,000 for the combined parental income, and it properly set forth the factors it considered in deviating from the \$80,000 statutory cap (*see* Domestic Relations Law § 240 [1-b] [f]; *Matter of Cassano v Cassano*, 85 NY2d 649, 653; *Corasanti v Corasanti*, 296 AD2d 831).

The contention of the father that the court erred in directing him to pay his pro rata share of the children's private school tuition lacks merit. "[A] parent is not obligated to pay for the cost of [the children's] private schooling unless special circumstances exist"

(*Matter of Cassano v Cassano*, 203 AD2d 563, 564, *affd* 85 NY2d 649; see *Lannen v Lannen*, 231 AD2d 931). "The relevant factors that comprise special circumstances include the educational background of the parents, the [children's] academic ability, and the parents' financial ability to provide the necessary funds" (*Lannen*, 231 AD2d at 932; see *Cassano*, 203 AD2d at 564). Based on those factors, we conclude that special circumstances exist in this case (see Domestic Relations Law § 240 [1-b] [c] [7]; *cf.* *Cassano*, 203 AD2d at 565; *Lannen*, 231 AD2d 931).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

548

CA 09-02605

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

CARMELLA M. EDWARDS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ST. ELIZABETH MEDICAL CENTER,
DEFENDANT-RESPONDENT.

THE GOLDEN LAW FIRM, UTICA (LAWRENCE W. GOLDEN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

GALE & DANCKS, LLC, SYRACUSE (MATTHEW J. VANBEVEREN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered March 16, 2009 in a personal injury action. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she tripped and fell over a metal trash can while visiting her husband in a hospital owned by defendant. We conclude that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint. Even assuming, arguendo, that defendant met its initial burden of establishing its entitlement to summary judgment, we conclude that plaintiff raised triable issues of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We agree with plaintiff that the court erred in determining that the affidavit of her expert safety engineer submitted in opposition to the motion was without foundation, speculative and lacking probative value. Plaintiff's expert relied upon his review of the complete record, as well as his experience and training in biomechanics and human factors analysis. The expert cited scientific literature concerning "trip points" and perception, and he discussed the necessary "visual cue[s]" required for an individual to avoid obstacles in his or her path (*see generally Tesak v Marine Midland Bank*, 254 AD2d 717).

We further agree with plaintiff that there is a triable issue of fact whether the trash can protruded into the aisle in the hospital room, creating a dangerous condition (*see Dietzen v Aldi Inc.* [New

York], 57 AD3d 1514). Although defendant contends that the location of the trash can was open and obvious, we conclude that there is a triable issue of fact whether the sink in the hospital room obscured plaintiff's line of sight. In any event, defendant would not be relieved of its duty to keep the property in a safe condition even if the allegedly dangerous condition was open and obvious (*see id.* at 1514-1515; *Moloney v Wal-Mart Stores*, 2 AD3d 508, 510).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

550

CA 09-00759

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

STEPHEN TURNER, PLAINTIFF-RESPONDENT,

V

ORDER

CSX TRANSPORTATION, INC. AND CONSOLIDATED
RAIL CORPORATION, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), ANSPACH
MEEKS ELLENBERGER LLP, BUFFALO, AND BURNS, WHITE & HICTON, LLC,
PITTSBURGH, PENNSYLVANIA, FOR DEFENDANTS-APPELLANTS.

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (PATRICK DONOGHUE OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County
(Frederick J. Marshall, J.), entered November 18, 2008 in a personal
injury action. The judgment awarded plaintiff money damages upon a
jury verdict.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

551

CA 09-01612

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

STEPHEN TURNER, PLAINTIFF-RESPONDENT,

V

ORDER

CSX TRANSPORTATION, INC. AND CONSOLIDATED
RAIL CORPORATION, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), ANSPACH
MEEKS ELLENBERGER LLP, BUFFALO, AND BURNS, WHITE & HICTON, LLC,
PITTSBURGH, PENNSYLVANIA, FOR DEFENDANTS-APPELLANTS.

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (PATRICK DONOGHUE OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 29, 2008 in a personal injury action. The order, insofar as appealed from, granted in part plaintiff's motion in limine and denied in part defendants' motion in limine.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 224; *see also* CPLR 5701 [a] [2] [v]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

552

CA 09-01613

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

STEPHEN TURNER, PLAINTIFF-RESPONDENT,

V

ORDER

CSX TRANSPORTATION, INC. AND CONSOLIDATED
RAIL CORPORATION, DEFENDANTS-APPELLANTS.
(APPEAL NO. 4.)

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), ANSPACH
MEEKS ELLENBERGER LLP, BUFFALO, AND BURNS, WHITE & HICTON, LLC,
PITTSBURGH, PENNSYLVANIA, FOR DEFENDANTS-APPELLANTS.

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (PATRICK DONOGHUE OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 23, 2009 in a personal injury action. The order denied defendants' motion for, inter alia, a new trial.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

553

CA 09-01614

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

STEPHEN TURNER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CSX TRANSPORTATION, INC. AND CONSOLIDATED
RAIL CORPORATION, DEFENDANTS-APPELLANTS.
(APPEAL NO. 5.)

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), ANSPACH
MEEKS ELLENBERGER LLP, BUFFALO, AND BURNS, WHITE & HICTON, LLC,
PITTSBURGH, PENNSYLVANIA, FOR DEFENDANTS-APPELLANTS.

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (PATRICK DONOGHUE OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Erie County
(Frederick J. Marshall, J.), entered March 4, 2009 in a personal
injury action. The amended judgment awarded plaintiff money damages
upon a jury verdict.

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

Memorandum: Defendants appeal from an amended judgment awarding
plaintiff damages for injuries he sustained as a result of the
excessive lateral motion of the locomotive that he was operating on
September 5, 2003, during the course of his employment by defendant
CSX Transportation, Inc. (CSX). Contrary to defendants' contention,
we conclude that Supreme Court properly granted those parts of
plaintiff's cross motion for partial summary judgment on the issue of
CSX's negligence under the Federal Employers' Liability Act ([FELA] 45
USC § 51 *et seq.*) and the Federal Locomotive Inspection Act ([LIA] 49
USC § 20701 *et seq.*) with respect to the two causes of action seeking
damages for the injuries plaintiff sustained on September 5, 2003.
Plaintiff established in support of his cross motion that he was
violently thrown about the interior of the locomotive as a result of
the excessive lateral motion of the locomotive, and we thus conclude
that plaintiff met his initial burden of establishing as a matter of
law that CSX violated its duty pursuant to the LIA "to keep all the
parts and appurtenances of [its] locomotives in proper condition and
safe to operate without unnecessary peril to life or limb" (*Mosco v*
Baltimore & Ohio R.R., 817 F2d 1088, 1091, *cert denied* 484 US 851; *see*
King v Southern Pac. Transp. Co., 855 F2d 1485, 1489). A violation of
the LIA establishes "negligence per se under the FELA" (*Coffey v*

Northeast Ill. Regional Commuter R.R. Corp. [Metra], 479 F3d 472, 477; see *Urie v Thompson*, 337 US 163, 189). Defendants failed to raise a triable issue of fact concerning the condition of the locomotive when plaintiff experienced the excessive lateral motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude that the court properly refused to use defendants' proposed jury instructions and verdict sheet with respect to apportionment. Even assuming, arguendo, that a jury may apportion a plaintiff's damages between a preexisting condition and the aggravation of that condition caused by a railroad's negligence (see e.g. *Sauer v Burlington N. R.R. Co.*, 106 F3d 1490, 1494; *Stevens v Bangor & Aroostook R.R. Co.*, 97 F3d 594, 596, 601-603; cf. *Norfolk & W. Ry. Co. v Ayers*, 538 US 135, 159-160), we conclude that the court's "instructions made it clear to the jury that [plaintiff] was entitled to recover only for those injuries that were caused by defendants' negligence" (*Kirschhoffer v Van Dyke*, 173 AD2d 7, 9; see PJI 2:282; cf. *Wylie v Consolidated Rail Corp.*, 261 AD2d 955, lv denied 93 NY2d 816). Further, the instructions, as a whole, "adequately conveyed the sum and substance of the applicable law" (*Ellis v Borzilleri*, 41 AD3d 1170, 1171).

Finally, we reject defendants' contention that we should revisit our recent decision in *Canazzi v CSX Transp., Inc.* ([appeal No. 2] 61 AD3d 1347) and change the standard of causation used in FELA actions. As we concluded in *Canazzi*, "[p]ursuant to [the] FELA, the issue of causation turns on whether [a] defendant's negligence played any part, even the slightest, in contributing to [a plaintiff's] injury" (*id.* at 1348 [internal quotation marks omitted]). That language is taken in part from the United States Supreme Court's decision in *Rogers v Missouri Pac. R.R. Co.* (352 US 500, 506), and it has been used repeatedly by the courts of this State (see e.g. *Sneddon v CSX Transp.*, 46 AD3d 1345, 1346; *Robinson v CSX Transp.*, 40 AD3d 1384, 1386, lv denied 9 NY3d 815).

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

554

KA 08-01018

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANDREW FIGGINS, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (DAVID E. GANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered May 1, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]). According to the evidence presented by the People at trial, defendant and three accomplices went to the apartment where the victim resided in order to rob him, whereupon defendant shot the victim, causing his death. Defendant contends that County Court erred in admitting evidence that the victim previously had been robbed by two of the accomplices. Defendant himself first elicited that evidence from a witness, however, and we therefore conclude that he waived any objection to its admission (*see generally People v Backus*, 67 AD3d 1428, *lv denied* 13 NY3d 936; *People v Brown*, 57 AD3d 1461, *lv denied* 12 NY3d 814, 923).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition to presenting the testimony of the three accomplices implicating defendant, the People also presented the statement of defendant to the police in which he admitted that he was with the accomplices during the robbery, and they presented evidence that defendant's DNA was found on the murder weapon. Defendant contends that the court erred in admitting in evidence a surveillance video that depicted a vehicle being parked and four individuals walking toward the crime scene. Even assuming, arguendo, that the court erred in admitting that video

in evidence because it was not properly authenticated (see generally *People v Patterson*, 93 NY2d 80, 84), we conclude that any error in its admission is harmless (see generally *People v Crimmins*, 36 NY2d 230, 241-242).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial based on prosecutorial misconduct on summation (see *People v Brink*, 57 AD3d 1484, 1486, *lv denied* 12 NY3d 851; *People v Wellsby*, 30 AD3d 1092, *lv denied* 7 NY3d 796). In any event, that contention is without merit. Certain comments by the prosecutor were fair response to defense counsel's summation (see *People v Jackson*, 46 AD3d 1408, 1408-1409, *lv denied* 10 NY3d 841), and any alleged misconduct by the prosecutor in his remaining remarks to which defendant now objects was not so egregious as to deprive defendant of a fair trial (see *People v Johnston*, 43 AD3d 1273, 1275, *lv denied* 9 NY3d 1007; *People v Early*, 266 AD2d 881, 882, *lv denied* 94 NY2d 918). Finally, defendant received effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147), and the sentence is not unduly harsh or severe.

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

555

KA 09-01025

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JONATHAN J. CONNOLLY, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 23, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree and attempted arson in the third degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

556

KA 09-02064

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JOSEPH BOUSE, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (MARK C. CURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Oneida County Court (Michael L. Dwyer, J.), rendered February 27, 2009. Defendant was resentenced upon his conviction of assault in the second degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

557

KA 09-00300

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JONATHAN C. MAYBACK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 23, 2009. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

558

KA 09-00315

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MARK D. TOOLEY, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 22, 2009. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

Now, upon reading and filing the stipulation to withdraw brief and discontinue appeal signed by defendant on February 4, 2010 and the attorneys for the parties on March 25 and 26, 2010,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

560

KA 07-01136

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHAZARAY A. GREEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered February 21, 2007. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentence imposed for criminal possession of a weapon in the second degree shall run concurrently with the sentence imposed for manslaughter in the second degree and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the second degree (Penal Law § 125.15 [1]), criminal possession of a weapon in the second degree (§ 265.03 [1] [b]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). We agree with defendant that the sentence imposed for criminal possession of a weapon in the second degree must run concurrently with the sentence imposed for manslaughter in the second degree, and we therefore modify the judgment accordingly. "Given the element of intent to use the weapon unlawfully against another and the lack of any evidence that defendant intended to use his weapon unlawfully against another apart from its use in the shooting, the crimes of criminal possession of a weapon in the second degree and [manslaughter] must be regarded as a 'single act or omission' " (*People v Manor*, 38 AD3d 1257, 1259, lv denied 9 NY3d 847, quoting § 70.25 [2]; see *People v Hamilton*, 4 NY3d 654, 657-658). The record belies defendant's further contention that County Court failed to consider rehabilitation in determining the appropriate sentence to impose. Indeed, the record establishes that the court considered rehabilitation in "perform[ing] the delicate balancing necessary to accommodate the public and private interests represented

in the criminal process" in sentencing a defendant (*People v Farrar*, 52 NY2d 302, 306). The record also fails to support defendant's contention that, in sentencing defendant, the court considered crimes of which defendant was acquitted (see *People v Ealey*, 272 AD2d 269, 270, *lv denied* 95 NY2d 865).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

562

KA 09-01373

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SAMUEL A. MCLAUGHLIN, 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 (Matthew J. Murphy, III, J.), rendered June 2, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Lococo*, 92 NY2d 825, 827).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

563

CAF 09-00129

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF AARON H., DANIEL H.,
JESSE H., JOSHUA H., AND HALEY H.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BARBARA H., RESPONDENT-APPELLANT.

PAUL M. DEEP, UTICA, FOR RESPONDENT-APPELLANT.

JEFFERY G. TOMPKINS, ROME, FOR PETITIONER-RESPONDENT.

JOHN G. KOSLOSKY, LAW GUARDIAN, UTICA, FOR AARON H., DANIEL H.,
JESSE H., JOSHUA H., AND HALEY H.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered December 23, 2008 in a proceeding pursuant to Family Court Act article 10. The order, among other things, vacated an order that had dismissed a petition alleging abuse and neglect.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, inter alia, granted petitioner's motion seeking to vacate an order that had dismissed a petition alleging that the mother had severely abused two of her children and had derivatively abused and neglected her three remaining children. Subsequent to the dismissal of that petition, the mother entered an *Alford* plea with respect to the sexual abuse of one of her children. Although we agree with the mother that the judgment of conviction upon her guilty plea does not constitute newly discovered evidence within the meaning of CPLR 5015 (a) (2) to warrant vacatur of the prior order, we conclude that Family Court properly exercised its inherent authority to vacate the prior order in the interest of justice (*see* CPLR 4404 [b]; *Matter of Chomik v Sypniak*, 70 AD3d 1336). Such inherent authority "should be resorted to only to relieve a party 'from judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect' " (*Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739, 742; *see Quinn v Guerra*, 26 AD3d 872, 873, *appeal dismissed* 7 NY3d 741). Here, even absent any specific admissions by the mother during her plea colloquy inasmuch as she entered an *Alford* plea, her conviction of sexual abuse constituted conclusive proof of the abuse allegations in the petition

with respect to that child (see *Matter of Laurali M.*, 248 AD2d 983; *Matter of Denise J.*, 133 AD2d 687). The conviction of sexual abuse therefore directly contradicted the testimony of the mother in Family Court, i.e., that she did not sexually abuse the child in question (see *Matter of Derrick C.*, 55 AD3d 1320; *Laurali M.*, 248 AD2d 983; see generally *Matter of Silmon v Travis*, 95 NY2d 470, 475). Thus, the court properly exercised its discretion in vacating the prior order pursuant to CPLR 4404 (b), based on fraud (cf. *Quinn*, 26 AD3d at 874). Further, although a post-trial motion pursuant to CPLR 4404 generally must be filed within 15 days after a court's decision (see CPLR 4405), we note that "a trial court has the power to set aside its decision in a nonjury case on its own initiative and, in doing so, may ignore the 15-day limitation set forth in CPLR 4405" (*Matter of Alison VV.*, 211 AD2d 988, 989).

The mother failed to preserve for our review her remaining contentions on appeal (see *Matter of Seth M.*, 66 AD3d 1448, lv dismissed 13 NY3d 922) and, in any event, we conclude that they are without merit.

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

569

CA 09-01657

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

NEW YORK MUNICIPAL INSURANCE RECIPROCAL,
AS SUBROGEE OF TOWN OF WOLCOTT,
PLAINTIFF-RESPONDENT,

V

ORDER

W.P. MAHONEY ENTERPRISES, INC.,
DEFENDANT-RESPONDENT-APPELLANT,
AND TITAN STEEL SERVICES, INC.,
DEFENDANT-APPELLANT-RESPONDENT.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, ALBANY (THOMAS M. WITZ
OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT.

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER,
UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Wayne
County (John B. Nesbitt, A.J.), entered June 23, 2009 in a subrogation
action. The order denied the motion of defendant Titan Steel
Services, Inc. for summary judgment.

It is hereby ORDERED that said cross appeal is unanimously
dismissed (*see Moncion v Infra-Metals Corp., Div. of Preussag Intl.*
Co., 20 AD3d 310, 312; *see also* CPLR 5511) and the order is otherwise
affirmed without costs.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

573

CA 09-02466

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

PIERRE KAMGUIA, M.D., PLAINTIFF-APPELLANT,

V

ORDER

FREDERICK MCWAYNE, MICHAEL QUIGLEY AND
ROTHSCHILD/BREUER ASSOCIATES, LLC,
DEFENDANTS-RESPONDENTS.

PIERRE KAMGUIA, PLAINTIFF-APPELLANT PRO SE.

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

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered February 2, 2009 in an action for malicious prosecution and false arrest. The order granted the motion of defendants for summary judgment dismissing the amended complaint.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

574

CA 09-02032

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

DAVID WAHRENDORF AND MARY KATHLEEN WAHRENDORF,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

CITY OF OSWEGO, DEFENDANT,
EDWARD J. HARRINGTON, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS THIRD WARD ALDERMAN OF
OSWEGO CITY COUNCIL, AND TRADITIONAL FAMILY
BUILDERS, INC., DEFENDANTS-APPELLANTS.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

LAW OFFICE OF DANIEL R. SEIDBERG, LLC, SYRACUSE (DANIEL R. SEIDBERG OF
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered December 22, 2008. The order, insofar as appealed from, denied the motion of defendants Edward J. Harrington, individually and in his official capacity as Third Ward Alderman of Oswego City Council, and Traditional Family Builders, Inc. to dismiss the complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendants Edward J. Harrington, individually and in his official capacity as Third Ward Alderman of the Oswego City Council, and Traditional Family Builders, Inc. is granted and the complaint against those defendants is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for defamatory statements that allegedly were made by Edward J. Harrington (defendant) in two separate postings on a Web site registered to defendant and operated by him. According to plaintiffs, defendant is "the Chairman and/or Chief Executive Officer" of defendant Traditional Family Builders, Inc. (TFB). Supreme Court erred in denying the motion of defendant and TFB to dismiss the complaint against them for, inter alia, failure to state a cause of action (see CPLR 3211 [a] [7]), on the ground that the statements at issue are constitutionally protected expressions of opinion. In determining whether defendant's statements constitute actionable factual assertions as opposed to nonactionable opinions, it is necessary to "examine the content of the [statements as a] whole as well as [their] tone and [their] apparent

purpose" (*Steinhilber v Alphonse*, 68 NY2d 283, 293; see *Brian v Richardson*, 87 NY2d 46, 51). Here, the tone of the statements at issue "is ironic, sarcastic and caustic; 'it is evident that the [statements were] intended to be invective expressed in the form of heavy-handed and nonsensical humor' " (*Cook v Relin*, 280 AD2d 897, 898, quoting *Steinhilber*, 68 NY2d at 293). Defendant characterized plaintiffs as "slumlords" and "sociopaths" and referred to plaintiff David Wahrendorf as "Clarabell," who was the clown on the Howdy Doody Show. Defendant also described one of plaintiffs' rental properties as a "garbage heap" and a "pig pen." We conclude that those statements "amounted to no more than name-calling or . . . general insult[s]" (*DePuy v St. John Fisher Coll.*, 129 AD2d 972, 973, *lv denied* 70 NY2d 602), and were "clearly part of the attempt at humor prevailing throughout" (*Steinhilber*, 68 NY2d at 293). We conclude, therefore, that the allegedly defamatory statements are not actionable as a matter of law and thus that the court erred in denying the motion of defendant and TFB to dismiss the complaint against them for failure to state a cause of action.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

575

CA 09-02549

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

ANTHONY FOTI AND CAROL FOTI,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

ROBERT ROMEYN NOFTSIER, JR., ALICE
NOFTSIER, BRUCE TABOLT, JAMES TABOLT,
MICHAEL A. TABOLT AND CHRISTINE A.
TABOLT, DEFENDANTS-RESPONDENTS.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CAPONE LAW FIRM, LLP, WATERTOWN (ANDREW N. CAPONE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS ROBERT ROMEYN NOFTSIER, JR. AND ALICE NOFTSIER.

ADAM R. MATTESON, LOWVILLE, FOR DEFENDANTS-RESPONDENTS BRUCE TABOLT,
JAMES TABOLT, MICHAEL A. TABOLT AND CHRISTINE A. TABOLT.

Appeal from an order of the Supreme Court, Lewis County (Joseph D. McGuire, J.), entered February 27, 2009 in an action pursuant to RPAPL article 15. The order denied the motion of plaintiffs for summary judgment.

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

Memorandum: Plaintiffs own parcels of property that are bisected by a river, the parcels north of which are separated from the nearest road by properties owned by the Noftsier defendants. The parcel south of the river is separated from the nearest road by property owned by the Tabolt defendants. We conclude that Supreme Court properly denied the motion of plaintiffs for summary judgment, seeking a declaration granting them an easement by necessity over defendants' property, "with the exact location of the easement to be held in abeyance pending negotiations between the parties."

We note at the outset that, although it appears that the court concluded in its order that plaintiffs' action is time-barred, the court did not in fact dismiss the action. With respect to the Noftsier defendants, they did not contend that the action was time-barred either in a pre-answer motion to dismiss the action or in their amended answer, and we therefore conclude that they waived that defense (see CPLR 3211 [a] [5]; [e]). The Tabolt defendants, however,

timely raised that defense in their amended answer. In view of the fact that all of the parties have addressed on appeal the issue whether the action is time-barred, we too address it in the interest of judicial economy. We conclude that there is an issue of fact whether the action is in fact time-barred, and thus that the court properly did not ultimately dismiss the action against the Tabolt defendants on that ground. "[G]enerally, the period of limitations to be applied should depend upon the form of the remedy [sought] rather than the theory of liability" (*Rahabi v Morrison*, 81 AD2d 434, 439; see *Matter of Paver & Wildfoerster [Catholic High School Assn.]*, 38 NY2d 669, 676). Here, in their amended complaint plaintiffs seek, inter alia, relief in the form of an injunction, i.e., to enjoin defendants from interfering with their use of their easements by necessity, and "the equitable remedy of injunction . . . is governed by the six-year period" of CPLR 213 (1) (*Rahabi*, 81 AD2d at 439; see *Filby v Brooks*, 105 AD2d 826, 828, *affd* 66 NY2d 640).

We reject plaintiffs' contention that there was a continuous interference on the part of the Tabolt defendants, inasmuch as there was neither a physical obstruction of nor an interference with plaintiffs' alleged easement of necessity (*cf. Filby*, 105 AD2d at 828; see generally *Bloomingtons, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 64-65; *Castle Assoc. v Schwartz*, 63 AD2d 481, 488). Here, plaintiffs had no cause of action for an injunction against the Tabolt defendants until those defendants interfered with plaintiffs' alleged right to use the property of the Tabolt defendants for egress or ingress to their own parcels (see *Filby*, 105 AD2d at 828; *Castle Assoc.*, 63 AD2d at 488). In an affidavit submitted in support of plaintiffs' motion, plaintiff Anthony Foti averred that plaintiffs demanded and were denied access across the Tabolt defendants' property in the year 2000 and several times thereafter. Although plaintiffs' request for injunctive relief based on the year 2000 demand would be barred by the six-year statute of limitations (see CPLR 213 [1]; *Rahabi*, 81 AD2d at 439), each subsequent demand and denial would give rise to a new cause of action for injunctive relief (see *Filby*, 105 AD2d at 828). The record does not establish when plaintiffs made those subsequent demands following the demand in the year 2000, and thus the issue whether plaintiffs' action against the Tabolt defendants is time-barred cannot be determined as a matter of law on the record before us.

We further conclude that the court properly denied plaintiffs' motion against both the Noftsier and Tabolt defendants on the merits. In order to establish the existence of an easement by necessity, plaintiffs were required to prove by clear and convincing evidence "unity [and the subsequent separation] of title and, further, that at the time of severance [in 1904] an easement over defendants' property was absolutely necessary in order to obtain access to plaintiff[s]' land" (*Astwood v Bachinsky*, 186 AD2d 949, 950; see generally *Palmer v Palmer*, 150 NY 139, 146-147). As plaintiffs correctly concede, the availability of access to their property by a navigable waterway would defeat their entitlement to easements by necessity (see *McQuinn v Tantalio*, 41 AD2d 575, *lv denied* 32 NY2d 610; *Bauman v Wagner*, 146 App

Div 191, 196). Inasmuch as the existence and extent of an easement by necessity is determined based on the circumstances as they existed at the time of severance (see *Wolfe v Belzer*, 184 AD2d 691; *Robinson v Byrne*, 278 App Div 783), we reject plaintiffs' contention that evidence that the river in question was not navigable subsequent to the severance of the parcels in 1904 is relevant. Further, the 1893 property deeds submitted by plaintiffs in support of their motion provide no legible facts from which to infer that the river in question was not in fact navigable in 1904.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

576

KA 09-00933

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

MICHAEL C. STODDARD, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (MELISSA L. CIANFRINI OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 26, 2009. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

577

KA 08-00859

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

TRAVIS LEWIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), 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 (Alex R. Renzi, J.), rendered January 30, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

578

KA 08-02401

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARQUIS C. HUCKS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., J.), entered October 24, 2008. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court erred in relying on the case summary prepared by the Board of Examiners of Sex Offenders. We reject that contention. The case summary constitutes reliable hearsay and thus may be considered by the court in determining defendant's risk level (*see People v Howe*, 49 AD3d 1302; *People v Roman*, 41 AD3d 1288, *lv denied* 9 NY3d 809; *People v Vacanti*, 26 AD3d 732, *lv denied* 6 NY3d 714).

Even assuming, arguendo, that defendant's further contention that the court erred in refusing to grant him a downward departure from his presumptive risk level is preserved for our review (*see People v Clark*, 66 AD3d 1366, *lv denied* 13 NY3d 713), we conclude that it lacks merit. Defendant failed to provide clear and convincing evidence of special circumstances to warrant a downward departure (*see Correction Law § 168-n [3]; People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708; *People v McDaniel*, 27 AD3d 1158, *lv denied* 7 NY3d 703).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

579

KA 08-01906

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DERRICK R. FULTON, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (MARK C. CURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (MATTHEW P. WORTH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered August 8, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), robbery in the first degree and robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of burglary in the first degree (Penal Law § 140.30 [2], [4]) and robbery in the second degree (§ 160.10 [1], [2] [a]) and one count of robbery in the first degree (§ 160.15 [4]). By failing to object to County Court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his contention that the ruling constitutes an abuse of discretion (see *People v Caswell*, 49 AD3d 1257, *lv denied* 11 NY3d 735, 740). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Contrary to defendant's further contention, the court properly ordered the sentence imposed for robbery in the first degree to run consecutively to the sentences imposed on the two counts of burglary in the first degree (see *People v Yong Yun Lee*, 92 NY2d 987, 989; *People v Sanchez*, 31 AD3d 1218, *lv denied* 7 NY3d 869, 870). The sentence is not unduly harsh or severe.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

580

KA 09-00511

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

BRIAN J. SYRELL, DEFENDANT-APPELLANT.

CYNTHIA B. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 30, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

582

KA 08-01035

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AHKEEM J. WHITFIELD, DEFENDANT-APPELLANT.

CHRISTINE M. COOK, SYRACUSE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered April 22, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of murder in the second degree (Penal Law § 125.25 [1]), arising from the death of the 10-month-old daughter of defendant's girlfriend. Defendant failed to preserve for our review his contention that County Court's instructions to the jury on the charge of murder in the second degree were confusing and misleading inasmuch as he failed to object to those instructions (*see People v Bermudez*, 38 AD3d 1244, *lv denied* 8 NY3d 981). Defendant likewise failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct on summation (*see People v West*, 70 AD3d 1508). 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]). Defendant further contends that the court erred in denying his request for a circumstantial evidence charge. The evidence presented at trial, however, consisted of both circumstantial and direct evidence, and thus the circumstantial evidence charge was not required (*see People v Johnson*, 21 AD3d 1395, *lv denied* 5 NY3d 883).

Contrary to the contention of defendant, the court properly refused to suppress his statements to the police. The court concluded that defendant was not in custody when he made those statements, and we accord great deference to the court's findings of fact and credibility determinations, which are supported by the record (*see People v Correa*, 62 AD3d 406, *lv denied* 13 NY3d 743; *People v Davis*, 58 AD3d 896, 898).

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

584

KAH 09-01462

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MELVIN SMITH, PETITIONER-RESPONDENT,

V

ORDER

MELVIN WILLIAMS, SUPERINTENDENT, WILLARD DRUG
TREATMENT CAMPUS, RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF
COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Seneca County
(Dennis F. Bender, A.J.), entered March 3, 2009 in a habeas corpus
proceeding. The judgment granted the petition and directed release of
petitioner to parole supervision.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs and the petition is
dismissed (*see People ex rel. Van Steenburg v Wasser*, 69 AD3d 1135;
People ex rel. Muhammad v Bradt, 68 AD3d 1391; *People ex rel.*
Almodovar v Berbary, 67 AD3d 1419, *lv denied* 14 NY3d 703).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

585

CAF 09-00425

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

IN THE MATTER OF GABRIEL L. RAMOS,
PETITIONER-RESPONDENT,

V

ORDER

DARCY A. RAMOS, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered January 16, 2009 in a proceeding pursuant to Family Court Act article 6. The order granted sole custody of the parties' children to petitioner.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

586

CAF 09-00079

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

IN THE MATTER OF DONELL S. AND REMELL P.-R.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JESSICA R., RESPONDENT,
AND DONELL S., RESPONDENT-APPELLANT.

CHRISTINE M. COOK, SYRACUSE, FOR RESPONDENT-APPELLANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MARY J. FAHEY OF COUNSEL),
FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, LAW GUARDIAN, MANLIUS, FOR DONELL S. AND REMELL P.-R.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered November 24, 2008 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, adjudged that respondent Donell S. had neglected the subject children.

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

Memorandum: Respondent father appeals from an order that adjudicated respondents' child and the older child of respondent mother to be neglected children. We reject the contention of the father that he is not a person legally responsible for the care of the mother's older child (*see generally* Family Court Act § 1012 [g]). Family Court found the father to be less credible than petitioner's witnesses with respect to the issues of where and with whom he was living during the relevant time period, and the court's credibility determinations are entitled to deference (*see Matter of Daniel R.*, 70 AD3d 839; *Matter of Jesse XX.*, 69 AD3d 1240, 1243; *Matter of Shalyse WW.*, 63 AD3d 1193, 1196, *lv denied* 13 NY3d 704). Significantly, petitioner's witnesses established that the father and the mother were living together as a family during that time, and we thus conclude that the father acted as the functional equivalent of a parent with respect to the mother's older child, rendering him a person legally responsible for that child's care (*see Matter of Yolanda D.*, 88 NY2d 790, 795-796; *Matter of Jamaal NN.*, 61 AD3d 1056, 1057, *lv denied* 12 NY3d 711; *Matter of Rebecca X.*, 18 AD3d 896, 898, *lv denied* 5 NY3d 707).

We reject the further contention of the father that the evidence

does not support the court's determination that he neglected respondents' child. The court based that determination on its finding that the father was aware of the mother's alcohol and/or substance abuse but allowed the mother to care for the child overnight. A finding of neglect is warranted where an individual legally responsible for the care of a child permits that child to be cared for by individuals known to be unsuitable caregivers (*see generally Matter of Lashina P.*, 52 AD3d 293; *Matter of James C.*, 47 AD3d 712; *Matter of Angelina W.*, 43 AD3d 1370). Here, the mother and respondents' child tested positively for cocaine at the time of the child's birth and the mother's explanation to the father with respect to those test results was not credible. In addition, the father was present during an incident prior to the date on which he allowed the mother to care for the child overnight, in which another individual attempted to deliver marihuana to respondents' residence.

Even assuming, *arguendo*, that we agree with the father that the court did not adequately state the grounds for its determination, we conclude that the error is harmless because the determination is " 'amply support[ed]' " by the record (*Matter of Latifah C.*, 34 AD3d 798, 799; *see Matter of Amber VV.*, 19 AD3d 767, 768-769; *Matter of Aishia O.*, 284 AD2d 581, 584). Finally, the father failed to preserve for our review his contention that he was punished for exercising his right to a fact-finding hearing rather than accepting an adjournment in contemplation of dismissal (*see generally Matter of Ashley L.C.*, 68 AD3d 1742; *Matter of Vanessa S.*, 20 AD3d 924).

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

589

CA 09-02525

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

ALDO FARNETI, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

AT&T, DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JOSEPH C. DOLE OF COUNSEL),
FOR DEFENDANT-APPELLANT.

JACOBS & JACOBS, ESQS., STAMFORD (ANDREW STAMMEL OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered October 26, 2009. The order, insofar as appealed from, denied in part the motion of defendant to dismiss the first cause of action.

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

Memorandum: Supreme Court properly denied, without prejudice to renew, that part of defendant's motion pursuant to CPLR 3211 (a) (7) seeking to dismiss the first cause of action insofar as it alleges breach of an employment contract. In determining that part of the motion, the court was required to "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88). Here, plaintiff has alleged facts that state a cause of action for breach of contract based upon documents allegedly setting forth the terms of defendant's offer of employment and plaintiff's acceptance thereof. Those documents, however, are not included in the record, and thus the court properly denied the motion in part without prejudice to renew (*see Gatz v Foster*, 159 AD2d 482).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

596

CA 09-02604

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

IN THE MATTER OF THE ARBITRATION BETWEEN
LIVERPOOL PUBLIC LIBRARY, PETITIONER-APPELLANT,

AND

MEMORANDUM AND ORDER

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL
1000, AFSCME, A.F.L.-C.I.O., LIVERPOOL PUBLIC
LIBRARY UNIT OF ONONDAGA LOCAL 834,
RESPONDENT-RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NADINE C. BELL OF COUNSEL),
FOR PETITIONER-APPELLANT.

D. JEFFREY GOSCH, SYRACUSE, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 6, 2009 in a proceeding pursuant to CPLR article 75. The order denied the petition for a stay of arbitration.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration of a disciplinary grievance by respondent on behalf of one of its members, an employee of petitioner, on the ground that the grievance was not arbitrable. Contrary to petitioner's contention, Supreme Court properly denied the petition. Although the question of arbitrability is generally one for judicial determination, here the parties have "evinced a 'clear and unmistakable' agreement to arbitrate arbitrability as part of their alternative dispute resolution choice" in their collective bargaining agreement (CBA) (*Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 46; see generally *AT&T Tech., Inc. v Communications Workers of Am.*, 475 US 643, 649). Article 8 of the CBA, which governs disciplinary grievance procedures, incorporates by reference the general arbitration procedures set forth in Article 7, which governs grievances related to the CBA itself. Pursuant to those procedures, where either party to the CBA alleges that a grievance is not subject, in whole or in part, to arbitration, "the Arbitrator shall be required . . . to rule upon the question of . . . arbitrability in advance of receiving evidence upon any other issue." Inasmuch as that provision is not modified or curtailed by Article 8,

the court properly denied the petition.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

597

KA 08-01065

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FRED VANGORDER, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KELLEY PROVO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered April 10, 2008. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 et seq.). We reject defendant's contention that the assessment of 15 points for drug or alcohol abuse is not supported by the requisite clear and convincing evidence (*see generally* § 168-n [3]). Defendant admitted to the probation officer who prepared his presentence report that he was currently using marihuana. Although defendant completed a substance abuse treatment program while he was incarcerated, "his recent history of abstinence while incarcerated is not necessarily predictive of his behavior when no longer under such supervision" (*People v Warren*, 42 AD3d 593, 594, *lv denied* 9 NY3d 810; *see People v Legall*, 63 AD3d 1305, 1306, *lv denied* 13 NY3d 706). Defendant further contends that he was improperly assessed 15 points for not accepting responsibility, based on his refusal to participate in a certain program. An admission of guilt was a prerequisite to participation in that program, and defendant contends that he thereby would be compelled to violate his right against self-incrimination. We reject that contention. While defendant stated that he refused "to waive [his] constitutional rights" by admitting his guilt, we note that the Double Jeopardy Clause protects him from further prosecution with respect to any offenses to which the admission of guilt applies, and thus his contention is without merit (*see People v Palladino*, 46 AD3d 864, 865-866, *lv denied* 10 NY3d 704). Finally, defendant was properly assessed five points for a prior misdemeanor conviction,

regardless of when it occurred.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

598

KA 08-02643

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SHANE P. KALB, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered March 13, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (two counts).

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

600

KA 09-00918

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DAVON JONES, ALSO KNOWN AS DAVON NEASON, ALSO
KNOWN AS "ANIMAL," DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DAVID W. BENTIVEGNA OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered March 24, 2009. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree and assault in the second degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

601

KA 07-02650

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DEBRA L. KNAUBER, DEFENDANT-APPELLANT.

HARRINGTON & MAHONEY, BUFFALO (JAMES P. HARRINGTON OF COUNSEL), FOR
DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT R. ZICKL OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 10, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the second degree, criminal sexual act in the second degree and sexual abuse in the second degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

602

KA 07-01768

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

IMRAN A. ALLICK, DEFENDANT-APPELLANT.

CHRISTOPHER S. BRADSTREET, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered March 19, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, criminal possession of a controlled substance in the fifth degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). After the jury rendered its verdict but prior to sentencing, defendant waived his right to appeal from the judgment in exchange for a promised sentence with respect to the crimes that were the subject of the jury verdict as well as a concurrent sentence with respect to his admission of a violation of probation. "The waiver was knowing and voluntary, and there is no indication that it was elicited in order to 'conceal error or prosecutorial overreaching' that occurred at trial" (*People v Turck*, 305 AD2d 1072, 1072, lv denied 100 NY2d 566; see *People v Haupt*, 16 AD3d 1079, lv denied 5 NY3d 763). The valid waiver by defendant of the right to appeal encompasses his contentions concerning both the admission in evidence of certain drug records and the weight of the evidence (see *People v Dickerson*, 309 AD2d 966, 967, lv denied 1 NY3d 596).

Defendant further contends that he was denied effective assistance of counsel based on defense counsel's failure to object to the admission in evidence of the alleged drug records, and to argue that a key prosecution witness was an accomplice (see CPL 60.22 [2]). To the extent that defendant's contention survives the waiver of the right to appeal (see *Turck*, 305 AD2d at 1073), we conclude that it is

without merit (see generally *People v Baldi*, 54 NY2d 137, 147). We note at the outset that we reject the assertion of defendant that the loss of the trial exhibit containing the drug records precludes appellate review of his contention that he was denied effective assistance of counsel with respect to the admission in evidence of the trial exhibit. The information in that exhibit may be gleaned from the record, which includes another exhibit that is a photocopy of at least some of the records contained in that missing exhibit, "and there is no dispute with respect to the accuracy of th[e] information" in the missing trial exhibit (*People v Jackson*, 11 AD3d 928, 930, lv denied 3 NY3d 757; see generally *People v Yavru-Sakuk*, 98 NY2d 56, 60). Thus, we are indeed able to determine whether defense counsel was ineffective in failing to object to the admission of the drug records in evidence, and we conclude that he was not ineffective for failing to do so. "There can be no denial of effective assistance of [defense] counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152; see *People v Ennis*, 11 NY3d 403, 414-415, cert denied ___ US ___, 129 S Ct 2383). Here, an objection by defense counsel to the admission of the alleged drug records in evidence would have had little or no chance of success (see *People v Rosario*, 223 AD2d 492, 493, lv denied 88 NY2d 884). In addition, an argument by defense counsel that the prosecution witness in question was an accomplice also would have had little or no success. That witness was "[a]n informant acting as an agent of the police without the intent to commit a crime [and thus was] not an accomplice whose testimony require[d] corroboration" (*People v Brown*, 2 AD3d 1423, 1424, lv denied 1 NY3d 625; see *People v Thaddies*, 50 AD3d 1249, lv denied 10 NY3d 965).

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

603

KA 09-00508

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CLINTON B. GAMLEN, DEFENDANT-APPELLANT.

CYNTHIA B. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN N. BAUERSFELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered January 13, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

605

CAF 09-00708

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

IN THE MATTER OF ANDREA E.

STEBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

VALERIE E., RESPONDENT-APPELLANT.

MARY P. DAVISON, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

FREDERICK H. AHRENS, JR., COUNTY ATTORNEY, BATH (JAMES B. DOYLE, III,
OF COUNSEL), FOR PETITIONER-RESPONDENT.

DEETZA G. BENNO, LAW GUARDIAN, BATH, FOR ANDREA E.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered March 20, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, terminated respondent's parental rights.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her daughter based on a finding of permanent neglect and freeing her daughter for adoption. The mother failed to preserve for our review her contention that Family Court should have entered a suspended judgment (*see Matter of Charles B.*, 46 AD3d 1430, 1431, *lv denied* 10 NY3d 705) and, in any event, that contention lacks merit. "[T]he record supports the court's determination that any progress made by the [mother] 'was not sufficient to warrant any further prolongation of the child's unsettled familial status' " (*Matter of Tiara B.*, 70 AD3d 1307, 1308). Furthermore, "the mother did not ask the court to consider post-termination contact with the child[] in question or to conduct a hearing on that issue, and we conclude in any event that she 'failed to establish that such contact would be in the best interests of the child[]' " (*Matter of Christopher J.*, 60 AD3d 1402, 1403).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

606

CAF 09-01275

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

IN THE MATTER OF LAURIE WOOD,
PETITIONER-RESPONDENT,

V

ORDER

ROBERT LYNCHESKY, RESPONDENT-APPELLANT.

THE ODORISI LAW FIRM, EAST ROCHESTER (TERRENCE C. BROWN-STEINER OF
COUNSEL), FOR RESPONDENT-APPELLANT.

ROMEO & SCHMITT, P.C., ROCHESTER (MICHAEL J. SCHMITT OF COUNSEL), FOR
PETITIONER-RESPONDENT.

TANYA J. CONLEY, LAW GUARDIAN, ROCHESTER, FOR DAVID L. AND SAMANTHA L.

Appeal from an order of the Family Court, Monroe County (Julie A. Gordon, R.), entered August 8, 2008 in a proceeding pursuant to Family Court Act article 6. The order granted the petition.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

607

CAF 09-01947

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

IN THE MATTER OF BRITTANY LOUISA BALLS,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

RYAN DOLIVER, RESPONDENT-APPELLANT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR
RESPONDENT-APPELLANT.

A.J. BOSMAN, ROME, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (John E. Flemma, J.H.O.), entered April 18, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole custody of the parties' child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Oneida County, for a hearing on the petition.

Memorandum: Respondent father appeals from an order granting petitioner mother sole custody of the parties' child. We agree with the father that Family Court erred in granting the petition. First, to the extent that the court entered the order upon "default" based on the father's failure to appear in court, that was error. "The record establishes that the father was represented by counsel, and we have previously determined that, '[w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded' " (*Matter of Pollard v Pollard*, 63 AD3d 1628; see *Matter of Hopkins v Gelia*, 56 AD3d 1286). Second, the court erred in granting the petition without conducting an evidentiary hearing. " '[U]nless there is sufficient evidence before the court to enable it to undertake a comprehensive independent review of the [child]'s best interests . . . , a determination of a custody matter should only be made after a full evidentiary hearing' . . . [and t]he record does not contain sufficient evidence supporting the award of sole legal custody to [the mother]" (*Matter of David A.A. v Maryann A.*, 41 AD3d 1300, 1300; see *Hopkins*, 56 AD3d 1286). We therefore reverse the order and

remit the matter to Family Court for a hearing on the petition.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

608

CA 09-00915

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

GEORGE EAGAN GINTHER, PLAINTIFF-APPELLANT,

V

ORDER

ROBERT A. CRAWFORD, JR., ESQ., AND KNOER,
CRAWFORD & BENDER, LLP, DEFENDANTS-RESPONDENTS.

GEORGE EAGAN GINTHER, PLAINTIFF-APPELLANT PRO SE.

HISCOCK & BARCLAY, LLP, BUFFALO (FRANK V. BALON OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered September 4, 2008 in a legal malpractice action. The order and judgment, among other things, granted defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed with costs.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

609

CA 09-01345

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

IN THE MATTER OF SORRENTO LACTALIS, INC.,
PETITIONER-RESPONDENT,

V

ORDER

NORMAN L. POLANSKI, JR., MAYOR, CITY OF
LACKAWANNA, CITY COUNCIL OF CITY OF
LACKAWANNA, JAMES L. MICHEL, CHIEF, CITY
OF LACKAWANNA POLICE DEPARTMENT, AND
CITY OF LACKAWANNA, RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR
RESPONDENTS-APPELLANTS.

PHILLIPS LYTTLE LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 15, 2009 in a proceeding pursuant to CPLR article 78. The order stayed respondents from taking action to enforce section 215.53 of the City of Lackawanna Municipal Code pending determination of the proceeding.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on April 12, 2010,

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

611

CA 09-02366

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

SHELIA BENSON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TREVOR M. LILLIE AND SUIT-KOTE CORP.,
DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (KYLE C. REEB OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

LAW OFFICES OF RICHARD S. BINKO, CHEEKTOWAGA (SARA T. WALLITT OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered July 8, 2009 in a personal injury action. The order denied defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when her vehicle, which had come to a complete stop at an intersection, was rear-ended by a vehicle driven by defendant Trevor M. Lillie and owned by defendant Suit-Kote Corp. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident, and we conclude that Supreme Court properly denied their motion. In support of the motion, defendants submitted medical records of plaintiff indicating that she had cervical and lumbar spine injuries following the accident. Although defendants contended in support of their motion that those injuries were attributable to prior accidents, they failed to submit evidence establishing as a matter of law that the injuries were entirely attributable to those prior accidents and were not exacerbated by the accident in question (*see Endres v Shelba D. Johnson Trucking, Inc.*, 60 AD3d 1481, 1483; *McKenzie v Redl*, 47 AD3d 775, 776-777).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

612

CA 09-01876

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

SHAWN TYSZKA, LISA TYSZKA, LAT HOLDING, INC.,
TYSZKA, LLC, CHERYL GRENGA, EUGENE GRENGA,
GINNYJO, LLC, BRIAN CLARK, LISA CLARK, MAKE &
TAKE GOURMET – CLIFTON PARK, LLC, FORMERLY
KNOWN AS FRESH COAT PAINTING, LLC,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

MAKE AND TAKE HOLDING, LLC, ET AL., DEFENDANTS,
AND BOND, SCHOENECK & KING, PLLC,
DEFENDANT-RESPONDENT.

EINBINDER & DUNN, LLP, NEW YORK CITY (MICHAEL EINBINDER OF COUNSEL),
FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered December 17, 2008. The order, insofar as appealed from, granted the motion of defendant Bond, Schoeneck & King, PLLC and dismissed the complaint against it.

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

Memorandum: Plaintiffs entered into agreements with defendant Make and Take Holding, LLC (Make and Take) to operate franchises, and they commenced this action seeking damages based on alleged violations of the Franchise Sales Act ([Act] General Business Law § 680 *et seq.*) after the franchises were closed. Supreme Court properly granted the motion of Bond, Schoeneck & King, PLLC (defendant), a law firm, to dismiss the complaint against it for failure to state a cause of action. The first cause of action alleged, *inter alia*, that defendant willfully and materially aided Make and Take in selling the franchises and thus was liable pursuant to General Business Law § 691. Pursuant to section 691 (1), a person who offers or sells a franchise in violation of specified sections of General Business Law article 33 "is liable to the person purchasing the franchise for damages" Section 691 (3) provides in relevant part that "[a]n employee of a person so liable[], who materially aids in the act o[r] transaction constituting the violation[] is also liable jointly and severally with and to the same extent as the . . . employer." We reject plaintiffs'

contention that defendant is an employee of Make and Take. Section 691 (3) does not define employee, and we thus interpret that term using its common law definition (see generally *Nationwide Mut. Ins. Co. v Darden*, 503 US 318, 322-323). Under the common law, "the relationship created between an attorney and his [or her] client is that of principal and agent" (*Burger v Brookhaven Med. Arts Bldg.*, 131 AD2d 622, 624). Defendant was thus either an agent of Make and Take or an independent contractor, and was not its employee (see *Bynog v Cipriani Group*, 1 NY3d 193, 196, rearg denied 2 NY3d 794).

The second cause of action, which was asserted only against defendant, alleged that it aided and abetted the violation of the Act in derogation of the common law. Section 691 (5) provides that, "[e]xcept as explicitly provided in this article, civil liability in favor of any private party shall not arise against a person by implication from or as a result of the violation of a provision of this article or a rule, regulation or order hereunder. Nothing in this article shall limit a liability which may exist by virtue of any other statute or under common law if this article were not in effect." We agree with the determination of the court in its written decision that "[t]he final sentence of the provision preserves [preexisting] common law claims which would exist under the common law if the Act were not in effect, [but that], here, the only violation alleged as against [defendant] is aiding and abetting a violation of the Act itself, not a free-standing common law violation. For claims arising out of statutory violations of the Act, the Act itself provides the plaintiffs with their exclusive remedy."

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

619

KA 09-01126

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BENJAMIN M. SICOLI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered December 4, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the third degree and reckless endangerment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the third degree (Penal Law § 120.00 [2]) and reckless endangerment in the second degree (§ 120.20). We reject the contention of defendant that, by imposing a sentence that included two months of intermittent incarceration, County Court punished him for exercising his right to testify at trial. The court was entitled to assess the credibility of defendant's testimony and to consider that credibility assessment when determining the sentence to be imposed (*see generally United States v Grayson*, 438 US 41, 54-55; *People v Vanluvender*, 35 AD3d 238, 239, *lv denied* 8 NY3d 928). Defendant failed to preserve for our review his further contention that the court sentenced him for conduct of which he was acquitted (*see* CPL 470.05 [2]), and we decline to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the verdict sheet "unduly emphasized the 'guilty' option by listing it before the 'not guilty' option" (*People v Gaviria*, 67 AD3d 701, 702; *see People v Watts*, 58 AD3d 647, *lv dismissed* 12 NY3d 763, *lv denied* 12 NY3d 789). Defendant failed to preserve for our review his further contention that the court erred in questioning a prospective juror whom defendant had successfully challenged for cause in the presence of the other

prospective jurors (see CPL 470.05 [2]). In any event, that contention is without merit. The responses of the juror to the court's questions indicated only that he believed defendant would not have been arrested unless there was some evidence against him, and defendant failed to demonstrate that he was prejudiced by the questioning.

Finally, the court properly granted the People's request to amend the indictment to correct the mental states necessary for assault in the third degree under count four and reckless endangerment in the second degree under count five. Contrary to defendant's contention, the omission of the word "criminal" in count four and the word "recklessly" in count five does not render those counts factually insufficient pursuant to CPL 200.70 (2) (b). In addition, each of those counts incorporated the statute defining the crime charged, which "operate[d] without more to constitute allegations of all the elements of the crime required by explicit provision of the statute itself or by judicial gloss overlaid thereon, if any, for conviction under that statute" (*People v Cohen*, 52 NY2d 584, 586; see *People v D'Angelo*, 98 NY2d 733, 735; *People v Ray*, 71 NY2d 849, 850). We note in any event that defendant was acquitted of assault in the third degree under count four.

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

620

KA 09-00736

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRENT ZAFUTO, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 22, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, petit larceny and criminal possession of stolen property in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]). Contrary to the contention of defendant, County Court did not abuse its discretion in continuing the trial in his absence. The court had given defendant the requisite warnings pursuant to *People v Parker* (57 NY2d 136, 141), and he therefore waived his right to be present at trial (see *People v Lewis*, 57 AD3d 1505, lv denied 12 NY3d 785). Further, the court made a proper inquiry and placed its reasoning on the record for determining that defendant's absence was deliberate (cf. *People v Law*, 198 AD2d 857, 858, lv denied 83 NY2d 807; see generally *People v Brooks*, 75 NY2d 898, mot to amend remittitur granted 76 NY2d 746).

Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). "Issues with respect to 'the credibility of prosecution witnesses concerning the voluntariness of the confession were for the jury to decide, and there is no basis in the record to disturb the jury's resolution of those issues' " (*People v Warney*, 299 AD2d 956, 957, lv denied 99 NY2d 633). Finally, the sentence is not unduly

harsh or severe.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

623

KA 09-00406

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DANIEL ZANGHI, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Craig J. Doran, J.), entered January 9, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

624

KA 08-02379

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VARNER HARRIS, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 19, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]) in connection with the shooting of two police officers. Even assuming, arguendo, that we agree with defendant that his waiver of the right to appeal was not knowingly, voluntarily and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256), and thus that it does not encompass his contention that Supreme Court erred in refusing to suppress his statements to the police (*see People v Littleton*, 62 AD3d 1267, 1268, *lv denied* 12 NY3d 926), we nevertheless reject that contention. 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 sentence is not unduly harsh or severe.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

625

CAF 09-00889

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

IN THE MATTER OF JANE H.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

SUSAN H., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT OF
COUNSEL), FOR RESPONDENT-APPELLANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MARY J. FAHEY OF COUNSEL),
FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Bryan R. Hedges, J.), entered March 30, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudicated respondent's child to be a neglected child.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

626

CAF 09-00887

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

IN THE MATTER OF GENEVA L. BURRIS,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT J.K. LOVING, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered April 8, 2009 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, found that respondent willfully violated an order of child support.

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

Memorandum: Respondent father appeals from an order finding that he willfully violated an order of child support and sentencing him to 30 days in jail. To the extent that the father's contentions herein are the same as those raised in *Matter of Paige v Paige* (50 AD3d 1542), we affirm for the reasons set forth therein. We add only that, contrary to the further contentions of the father, Family Court properly refused to issue a suspended commitment order (see *Matter of Monet v Frazer*, 40 AD3d 1223, 1224; cf. *Matter of Heyn v Burr*, 19 AD3d 896), and the father received meaningful representation (see generally *Matter of Moore v Blank*, 8 AD3d 1090, lv denied 3 NY3d 606).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

627

CAF 09-00542

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

IN THE MATTER OF ROMANYA J.-M.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

MELISSA M., RESPONDENT-APPELLANT.

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MARY J. FAHEY OF COUNSEL),
FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered February 25, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the custody of petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Francis S. [Wendy H.]*, 67 AD3d 1442, *lv denied* 14 NY3d 702).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

628

CAF 09-02467

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

IN THE MATTER OF BRADLEY W. MURPHY,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

REA M. PEACE, RESPONDENT-APPELLANT.

HUNT & BAKER, HAMMONDSPORT (TRAVIS J. BARRY OF COUNSEL), FOR
RESPONDENT-APPELLANT.

DICERBO & PALUMBO, OLEAN (MICHAEL MORGAN OF COUNSEL), FOR
PETITIONER-RESPONDENT.

MICHAEL D. BURKE, LAW GUARDIAN, OLEAN, FOR ETHAN L.P.

Appeal from an order of the Family Court, Cattaraugus County (Lynn L. Hartley, J.H.O.), entered October 26, 2009 in a proceeding pursuant to Family Court Act article 6. The order denied the petition of respondent to modify a prior custody order.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs, and respondent is directed to return the child to petitioner at the expense of respondent within five days after service of the order of this Court with notice of entry.

Memorandum: Respondent mother appeals from an order that denied her petition seeking to modify a prior custody order by granting permission for the parties' child to relocate with her to Addison, New York. We affirm. Relying on *Matter of Sara P. v Richard T.* (175 Misc 2d 988, 992-993), the mother contends that, because the parties are joint custodial parents, the Judicial Hearing Officer (JHO) erred in applying the relocation standard set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741). That contention is raised for the first time on appeal and thus is not properly before us (see CPLR 5501 [a] [3]; see generally *Matter of Shad S.*, 67 AD3d 1359; *Matter of Wood v Hargrave*, 292 AD2d 795, lv denied 98 NY2d 608). In any event, the mother's contention lacks merit (see *Matter of Pamela H. v Cordell W.*, 43 AD3d 1319).

A parent seeking permission for a child to relocate with him or her has the burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests (see *Tropea*, 87 NY2d at 741). We conclude that the JHO properly considered

the relevant factors set forth in *Tropea*. Further, his determination that the mother failed to establish that the lives of the mother and the child would "be enhanced economically, emotionally and educationally by the move" has a sound and substantial basis in the record and thus should not be disturbed (*id.* at 741; see *Matter of Cunningham v Sudduth*, 50 AD3d 1623; *Matter of Jennifer L.B. v Jared R.B.*, 32 AD3d 1174, 1175; see generally *Matter of Battaglia v Hopkins*, 280 AD2d 953). "Although the mother cited her desire to promote a relationship between the child and his half sibling as one reason for seeking permission for the relocation, she offered no evidence that such relocation was necessary to accomplish [that] goal" (*Matter of Dickerson v Robenstein*, 68 AD3d 1179, 1180-1181). Because the court's order was stayed during the pendency of the appeal by an order of this Court, the parties have continued to have alternating periods of physical custody of the child. We thus direct the mother to return the child to the father at the expense of the mother within five days after service of the order of this Court with notice of entry.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

632

CA 09-02383

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

RUTH FEDESON AND JAMES FEDESON,
PLAINTIFFS-RESPONDENTS,

V

ORDER

HOWARD JOHNSON TIKI RESORT INN, HOWARD JOHNSON
TIKI MOTOR INN, TIKI MOTOR INN CORP., HOWARD
JOHNSON MOTOR LODGES, INC., PRIME HOSPITALITY
CORP., CENDANT HOSPITALITY, AND WYNDHAM
WORLDWIDE CORPORATION, DEFENDANTS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA, LLC, BUFFALO (MICHAEL T.
FEELEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MARK D. GROSSMAN, NIAGARA FALLS, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph
A. Boniello, III, J.), entered June 15, 2009 in a personal injury
action. The order denied defendants' motion to dismiss the complaint.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

633

CA 08-02568

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

BARBARA A. MISLIN, INDIVIDUALLY AND AS
ADMINISTRATOR AND DISTRIBUTE OF THE ESTATE OF
THEODORE W. MISLIN, SR., DECEASED, AND AS
ADMINISTRATOR AND DISTRIBUTE OF THE ESTATE
OF THEODORE W. MISLIN, JR., DECEASED,
PLAINTIFF-APPELLANT,

V

ORDER

CITY OF TONAWANDA SCHOOL DISTRICT, ANDREW
FREEDMAN, INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS SCHOOL ATTORNEY FOR CITY OF
TONAWANDA SCHOOL DISTRICT, DIANA D. GREENE,
INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS
SUPERINTENDENT OF CITY OF TONAWANDA SCHOOL
DISTRICT, AND BOARD OF EDUCATION OF CITY OF
TONAWANDA SCHOOL DISTRICT,
DEFENDANTS-RESPONDENTS.

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

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS CITY OF TONAWANDA SCHOOL DISTRICT, DIANA D.
GREENE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF
CITY OF TONAWANDA SCHOOL DISTRICT, AND BOARD OF EDUCATION OF CITY OF
TONAWANDA SCHOOL DISTRICT.

DAMON MOREY LLP, BUFFALO (STEVEN ZWEIG OF COUNSEL), FOR
DEFENDANT-RESPONDENT ANDREW FREEDMAN, INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY AS SCHOOL ATTORNEY FOR CITY OF TONAWANDA SCHOOL DISTRICT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered September 18, 2008 in an action for negligence and wrongful death. The order granted the motions of defendants to dismiss the complaint.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

636

CA 09-01994

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

WILLIAM P. SAUNDERS, PLAINTIFF-APPELLANT,

V

ORDER

ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.

MODICA & ASSOCIATES, ATTORNEYS, PLLC, ROCHESTER (STEVEN V. MODICA OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF ROBERT A. DURR, SYRACUSE (MARK A. VENTRONE OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered May 1, 2009 in a personal injury action. The order granted the motion of defendant for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 14, 2010,

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

639

KA 06-02980

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FELDER BRADLEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW J. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered August 25, 2006. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that County Court erred in refusing to redact medical records concerning the victim's shoulder injury before admitting the records in evidence. The disputed excerpts of the records state that the victim had been diagnosed with a fracture of his "right shoulder/scapula" and, because the records were directly related to the diagnosis and treatment of the victim, they were admissible without redaction (*see People v Harris*, 132 AD2d 940, 941). Defendant's objections to the admissibility of the disputed excerpts "go to the weight [there]of . . . and not to [their] admissibility" (*People v Davis*, 95 AD2d 837, 838). Defendant further contends that, even in the absence of any error in the admission of the medical records, the court erred in denying his request for a charge on causation, i.e., that the jury should have been instructed that it could consider evidence regarding the victim's shoulder injury only if it found that defendant caused that injury. We reject that contention, in view of our conclusion that there was no issue at trial with respect to the causation of the victim's shoulder injury. The victim testified that defendant caused his shoulder injury and that, when he was taken to the hospital, he was treated for injuries to his head and shoulder. In addition, the victim testified that he had no head or shoulder problems before he was struck with the bat.

Finally, defendant contends that he was entitled to an expanded

circumstantial evidence charge. We agree with the People that defendant's statements to the victim, immediately prior to and after the incident, constitute admissions of guilt and thus that a circumstantial evidence charge was not warranted (*see People v Pagen*, 159 AD2d 6, *lv denied* 76 NY2d 895; *see also People v Rumble*, 45 NY2d 879), let alone an expanded charge. We note in any event that a witness testified that she heard a "clunk" and observed defendant standing over the victim while the victim was holding his head. She further testified that, several moments later, the victim ran by the witness and was bleeding from his head. Thus, there was other direct evidence of defendant's guilt such that a circumstantial evidence charge was not warranted (*cf. People v Silva*, 69 NY2d 858, 859).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

640

KA 09-00815

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRYAN D. PRINGLE, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Spencer J. Ludington, A.J.), rendered March 5, 2009. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of criminal sexual act in the second degree (Penal Law § 130.45 [1]) and sentencing him to a term of imprisonment. We note at the outset that we do not consider the contentions of defendant concerning his inability to pay for drug and alcohol treatment. The record establishes that County Court found that the People failed to meet their burden of proof with respect to their allegations that defendant violated the conditions of his probation by failing to comply with drug and alcohol treatment requirements, and thus there is no issue with respect to defendant's alleged inability to pay for that treatment.

Contrary to the contention of defendant, the court properly determined that the People met their burden of proving by a preponderance of the evidence that defendant otherwise violated the terms and conditions of his probation (see *People v Donohue*, 64 AD3d 1187; *People v Bergman*, 56 AD3d 1225, lv denied 12 NY3d 756). The People presented evidence that defendant missed four required sex offender treatment appointments (see *Donohue*, 64 AD3d at 1188), possessed pornographic materials, and failed to stay away from a park frequented by children, as directed by his probation officer (cf. *People v DeMoney*, 55 AD3d 953, 954). In addition, defendant's probation officer testified at the violation hearing that she observed defendant at a convenience store while he was on probation, and that

his travel log did not contain the required entry reflecting that trip. That nonhearsay testimony provided the necessary " 'residuum of competent legal evidence' " that defendant violated a condition of his probation (*id.*), by establishing that defendant failed to maintain the required log of his daily travel (*see generally People v Roberge*, 293 AD2d 913, 914, *lv denied* 98 NY2d 680). Finally, the sentence is not unduly harsh or severe.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

641

KA 07-02556

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALEX J. HEARD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered May 3, 2007. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of assault in the second degree (Penal Law § 120.05 [2]). Defendant failed to preserve for our review his contention that the indictment is duplicitous (*see People v Backus*, 67 AD3d 1428, 1429, *lv denied* 13 NY3d 936), 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]*). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

642

KAH 09-00211

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
NAPOLEON QUINN, PETITIONER-APPELLANT,

V

ORDER

JAMES MORRISSEY, SUPERINTENDENT, BUTLER
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

TYSON BLUE, MACEDON, FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wayne County
(Stephen R. Sirkin, A.J.), entered December 11, 2008 in a habeas
corpus proceeding. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs as moot (*see People ex rel. Hampton v Dennison*, 59 AD3d
951, *lv denied* 12 NY3d 711).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

643

KAH 08-02094

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RYDELLE LEWIS, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CARL B. HUNT, SUPERINTENDENT, GROVELAND
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., WARSAW (NEAL J. MAHONEY
OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered August 14, 2008 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: Contrary to the contention of petitioner, Supreme Court did not err in summarily denying his petition seeking a writ of habeas corpus. Pursuant to CPLR 7003 (a), the court possessed the authority to deny the petition on the ground that "it appear[ed] from the petition or the documents annexed thereto" that petitioner was not illegally detained. Here, the documents annexed to the petition, including the transcript of the final parole revocation hearing, support the court's conclusion that the determination of the Board of Parole revoking petitioner's parole is supported by substantial evidence (see *People ex rel. Muhammad v Bradt*, 68 AD3d 1391).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

644

CAF 06-01035

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

IN THE MATTER OF GUADALUPE MATTHEWS,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

EDWARD MATTHEWS, RESPONDENT-APPELLANT.

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

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT OF
COUNSEL), FOR PETITIONER-RESPONDENT.

THEODORE W. STENUF, LAW GUARDIAN, MINOA, FOR AARON M. AND ANNA M.

Appeal from an order of the Family Court, Onondaga County (Robert J. Rossi, J.), entered March 22, 2006 in a proceeding pursuant to Family Court Act article 6. The order, among other things, continued the award of physical and legal custody of the parties' children to petitioner.

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

Memorandum: Respondent father appeals from an order that, *inter alia*, continued the award of physical and legal custody of the parties' two children to petitioner mother, reduced the father's visitation with the children to one weekend every three months, and prohibited the father from discussing religion with the children. Contrary to the father's contention, Family Court did not abuse its discretion in continuing the award of custody to the mother. The ability of the father over that of the mother to provide for certain material needs of the children is only one factor to consider in determining the best interests of the children (*see generally Matter of Maher v Maher*, 1 AD3d 987, 988-989). Here, the record further establishes that the father frequently disparaged the mother in the children's presence, consistently used his religion in an attempt to alienate the mother from the children, and disregarded court orders concerning the mother's right to choose the religious upbringing of the children. Affording great deference to the court's credibility assessments (*see generally Eschbach v Eschbach*, 56 NY2d 167, 173; *Matter of Thayer v Ennis*, 292 AD2d 824), we conclude that the court's custody determination is supported by "a sound and substantial basis in the record" and thus should not be disturbed (*Matter of James D. v Tammy W.*, 45 AD3d 1358). We further conclude that the court's

determination that effectively denies the father visitation with the children is supported by " 'compelling reasons and substantial evidence that such visitation is detrimental to the child[ren]'s welfare' " (*Murek v Murek* [appeal No. 2], 292 AD2d 839, 840; see *Matter of Adam H.*, 195 AD2d 1074), and thus has a sound and substantial basis in the record (see *Matter of Brocher v Brocher*, 213 AD2d 544, *lv denied* 86 NY2d 701). Furthermore, in light of the evidence in the record that the father harmed the children by disobeying court orders and using religion to alienate them from the mother, we conclude that the court did not abuse its discretion by prohibiting the father from discussing religion with the children. Although "the court would be intruding on . . . [the] First Amendment rights [of the father] were it to enjoin [him] from discussing religion with his child[ren] absent a showing that the child[ren] will thereby be harmed," here, as noted, there was such a showing (*Matter of Bentley v Bentley*, 86 AD2d 926, 927; *cf. Matter of Booth v Booth*, 8 AD3d 1104, 1106, *lv denied* 3 NY3d 607).

Finally, the father failed to preserve for our review his contention that the court erred in admitting a report containing recommendations that were based on inadmissible hearsay inasmuch as he did not object to the admission of that report on that specific ground (see *Balsz v A & T Bus Co.*, 252 AD2d 458). In any event, any error in the admission of that report is harmless because the record otherwise contains ample admissible evidence to support the court's determination (see *Lubit v Lubit*, 65 AD3d 954, 955-956, *lv denied* 13 NY3d 716; *Murtari v Murtari*, 249 AD2d 960, 961, *appeal dismissed* 92 NY2d 919).

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

647

TP 09-02312

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

IN THE MATTER OF CHARLES K. STODOLKA,
PETITIONER,

V

MEMORANDUM AND ORDER

STARPOINT CENTRAL SCHOOL DISTRICT AND BOARD
OF EDUCATION OF STARPOINT CENTRAL SCHOOL
DISTRICT, RESPONDENTS.

BRANDT, ROBERSON & BRANDT, P.C., LOCKPORT (ROBERT S. ROBERSON OF
COUNSEL), FOR PETITIONER.

SARGENT & COLLINS, LLP, WILLIAMSVILLE (RICHARD G. COLLINS OF COUNSEL),
FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Niagara County [Ralph A. Boniello, III, J.], entered October 19, 2009) to annul a determination of respondents. The determination, inter alia, terminated the employment of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination finding him guilty of disciplinary charges and terminating his employment as director of school facilities and operations of respondent Starpoint Central School District (School District) following a hearing pursuant to Civil Service Law § 75. We reject the contention of petitioner that he was denied due process when the Hearing Officer refused to adjourn the hearing based on petitioner's alleged medical condition (see generally *Matter of Frederick G. v New York State Cent. Register of Child Abuse & Maltreatment*, 53 AD3d 1075, 1076). Petitioner did not respond in a timely manner to the Hearing Officer's reasonable request for medical documentation to support the adjournment, and the documentation that petitioner ultimately submitted does not support his contention that he was physically unable to attend the hearing (see *Matter of Rodriguez v Chassin*, 235 AD2d 832, 834). In any event, the record establishes that petitioner was absent only for a portion of the direct examination of one witness and that he otherwise was present for the remaining 14 days of the hearing, including all cross-examination. We reject the further contention of petitioner that he

was deprived of due process based on the fact that respondents served their bill of particulars after the commencement of the hearing. Petitioner did not request a bill of particulars from them until the day before the commencement of the hearing, and respondents served the bill of particulars before the second day of testimony, prior to the cross-examination of any witnesses.

Also contrary to petitioner's contention, respondents "did not have a duty to warn the petitioner that his conduct was improper prior to bringing a proceeding against him" (*Matter of Leotta v Hasl*, 134 AD2d 429, 430). We note that, nevertheless, petitioner was repeatedly warned in his annual evaluations that he was required to arrive to work promptly at 8:00 A.M. and that his repeated and unexcused tardiness was unacceptable. Indeed, in a written memorandum from the School District's superintendent, petitioner was specifically warned that "further action w[ould] be taken" if he continued to be late to work. We further conclude that petitioner was not denied his right to due process based on the fact that a single witness testified at the hearing that petitioner was tardy more frequently than was specified in the bill of particulars. The notice of charges together with the bill of particulars adequately apprised petitioner of the nature of the charges against him, thereby enabling him to prepare and present a defense to the charges (*see generally* Civil Service Law § 75 [2]; *Matter of Fitzgerald v Libous*, 44 NY2d 660, 661).

Finally, we conclude that the determination insofar as it is challenged by petitioner is supported by the requisite substantial evidence, i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see* CPLR 7803 [4]), and that, under the circumstances of this case, the penalty of termination of employment is not "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Smeraldo v Rater*, 55 AD3d 1298, 1299 [internal quotation marks omitted]).

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

648

OP 09-02550

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

IN THE MATTER OF LEON R. KOZIOL, INDIVIDUALLY
AND AS NATURAL PARENT OF CHILD A AND CHILD B,
AND ON BEHALF OF PARENTS AND CHILDREN SIMILARLY
SITUATED, PETITIONER,

V

MEMORANDUM AND ORDER

MARTHA WALSH HOOD, ACTING JUDGE OF STATE OF
NEW YORK, MICHAEL DALEY, ACTING FAMILY COURT
JUDGE OF STATE OF NEW YORK, WILLIAM L. KOSLOSKY,
ATTORNEY FOR THE CHILD, KELLY HAWSE-KOZIOL,
CUSTODIAL PARENT OF THE STATE OF NEW YORK,
UNIFIED COURT SYSTEM AND STATE OF NEW YORK,
RESPONDENTS.

LEON R. KOZIOL, UTICA, PETITIONER PRO SE.

WILLIAM L. KOSLOSKY, UTICA, RESPONDENT PRO SE.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) seeking, inter alia, relief in the nature of prohibition and mandamus.

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

Memorandum: We dismiss this CPLR article 78 petition seeking, inter alia, relief in the nature of prohibition and mandamus. "[P]etitioner here has failed to demonstrate a clear legal right to either of these remedies [that] could not be safeguarded through alternative remedies" (*Matter of Galinson v Graci*, 182 AD2d 819, 820; see *Matter of Susskind v Stanger*, 122 AD2d 213, 214-215; *Matter of Raysor v Stern*, 68 AD2d 786, 788-789, lv denied 48 NY2d 605, cert denied 446 US 942, reh denied 457 US 1127).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

649

CA 09-02572

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

MICKEY BRUNSON, PLAINTIFF-APPELLANT,

V

ORDER

LONNELL STRONG AND SHAZETTE ALLISON,
DEFENDANTS-RESPONDENTS.

ERNEST D. SANTORO, ESQ., P.C., ROCHESTER (ERNEST D. SANTORO OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court,
Monroe County (David Michael Barry, J.), entered February 23, 2009.
The judgment awarded plaintiff money damages following an inquest on
damages upon the default of defendants.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

650

CA 09-02526

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

MICHELLE EDGETT, INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF KIYA EDGETT, AN INFANT,
AND CHRISTINA JAQUAY, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NORTH FORK BANK, ET AL., DEFENDANTS.

NORTH FORK BANK, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

KAREN CLARELLI, DOING BUSINESS AS KC RECOVERY,
ET AL., DEFENDANTS,
AND NORTHWAY EXCHANGE AUTO AUCTION, THIRD-PARTY
DEFENDANT-APPELLANT.

CRUSER, MITCHELL & NOVITZ, LLP, MELVILLE (BETH S. GEREG OF COUNSEL),
FOR THIRD-PARTY DEFENDANT-APPELLANT.

STOKES ROBERTS & WAGNER, P.C., ITHACA (PAUL E. WAGNER OF COUNSEL), FOR
THIRD-PARTY PLAINTIFF-RESPONDENT.

CONWAY & KIRBY, LLP, LATHAM (ANDREW W. KIRBY OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County
(Michael E. Daley, J.), entered February 17, 2009 in a personal injury
action. The order, insofar as appealed from, denied the motion of
third-party defendant Northway Exchange Auto Auction to dismiss the
third amended third-party complaint against it.

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

Memorandum: In an action to recover damages for personal
injuries sustained in a motor vehicle accident, third-party defendant
Northway Exchange Auto Auction (Northway) appeals from an order that,
inter alia, denied its motion for summary judgment dismissing the
third amended third-party complaint against it. Supreme Court
properly denied the motion, regardless of its merits, inasmuch as
Northway failed to provide in support of its motion a copy of all of
the third-party pleadings (see CPLR 3212 [b]; *D.J. Enters. of WNY v*

Benderson, 294 AD2d 825).

We note in addition that, although defendant North Fork Bank (North Fork) purports to cross-appeal from those parts of the order denying its cross motion for summary judgment dismissing the fourth amended complaint against it and for summary judgment on the third amended third-party complaint against Northway, that cross appeal was deemed dismissed nine months after the service of the notice of appeal based on North Fork's failure to perfect it (see 22 NYCRR 1000.12 [b]). North Fork has not moved to vacate that dismissal (see 22 NYCRR 1000.13 [g]), and thus its requests for affirmative relief are not before us.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

652

CA 09-02067

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

HARRY CHACON-CHAVEZ, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CITY OF ROCHESTER, DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (STEVEN E. PEIPER OF COUNSEL), FOR
DEFENDANT-APPELLANT.

BRENNA, BRENNA & BOYCE, PLLC, ROCHESTER (SHELDON W. BOYCE OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered December 29, 2008 in a personal injury action. The order granted the motion of plaintiff for partial summary judgment on liability.

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

Memorandum: Plaintiff commenced this Labor Law action seeking damages for injuries he allegedly sustained when the ladder upon which he was standing slipped, causing him to fall. Supreme Court properly granted plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action. Labor Law § 240 (1) includes ladders as a device that must be "so constructed, placed and operated as to give proper protection" to a worker. Here, it is undisputed that the ladder was not secured to the roof at the time of plaintiff's accident, and thus plaintiff met his initial burden of establishing as a matter of law that the ladder "was not so placed . . . as to give proper protection to plaintiff" (*Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1136 [internal quotation marks omitted]). We reject defendant's contention that the conduct of plaintiff was the sole proximate cause of his injuries and thus that the court erred in granting plaintiff's motion. "In support of that contention, defendant was required to present 'some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may [have been] the sole proximate cause of . . . [his] injuries' " (*id.* at 1137). Here, by its own submissions, defendant established that the ladder was inadequately secured.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

653

CA 09-01879

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS
BY PROCEEDING IN REM PURSUANT TO ARTICLE 11
OF REAL PROPERTY TAX LAW BY COUNTY OF ONTARIO, MEMORANDUM AND ORDER
PETITIONER-RESPONDENT.

SUSAN M. HELSER, RESPONDENT-APPELLANT.

MUEHE AND NEWTON, LLP, CANANDAIGUA (DAVID J. WHITCOMB OF COUNSEL), FOR
RESPONDENT-APPELLANT.

JASON S. DIPONZIO, P.C., ROCHESTER (JASON S. DIPONZIO OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Ontario County Court (Craig J. Doran, J.), entered June 22, 2009 in a proceeding pursuant to RPTL article 11. The order denied the motion of respondent seeking, inter alia, to reopen a default judgment of foreclosure.

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

Memorandum: Supreme Court properly denied the motion of respondent seeking, inter alia, to reopen the default judgment of foreclosure in this proceeding pursuant to RPTL article 11, title 3. "A motion to reopen a default judgment of tax foreclosure 'may not be brought later than one month after entry of the judgment' " and respondent's motion, brought outside that time limitation, therefore was untimely (*Matter of Foreclosure of Tax Liens by County of Clinton [Tupaz]*, 17 AD3d 914, 915, quoting RPTL 1131).

In addition, the court properly concluded that petitioner complied with the notice provisions of RPTL 1124 and 1125 and that such compliance satisfied respondent's due process rights (*see Matter of Harner v County of Tioga*, 5 NY3d 136, 138; *Matter of County of Clinton [Bouchard]*, 29 AD3d 79, 82). Petitioner sent notice of the foreclosure proceeding both by certified mail and ordinary first class mail to respondent's address (*see* RPTL 1125 [1] [b] [i]). Although the certified mailing was returned by the United States postal service, petitioner had no further obligation to provide notice of the proceeding after 45 days passed and the first class mailing was not returned (*see id.; Harner*, 5 NY3d at 138). Upon receiving information that the postal service had a forwarding address for respondent, however, petitioner sent notice of the proceeding by certified and first class mail to the forwarding address, and again only the

certified mailing was returned. Under those circumstances, petitioner was entitled to conclude that respondent was attempting to evade notice (see *Harner*, 5 NY3d at 140-141; *Bouchard*, 29 AD3d at 83). Contrary to respondent's contention, due process did not require petitioner to conduct further inquiry into respondent's whereabouts. It is undisputed that respondent was incarcerated at the time the notices were mailed, but a search of the "public record" would not have disclosed her whereabouts (RPTL 1125 [1] [e]; see *Kennedy v Mossafa*, 100 NY2d 1, 10).

Further, knowledge that respondent was incarcerated cannot be imputed to petitioner (see *Matter of County of Sullivan [Spring Lake Retreat Ctr., Inc.]*, 39 AD3d 1095, 1096; cf. *Robinson v Hanrahan*, 409 US 38). "As record owner, [r]espondent bore the responsibility of updating [her] address to protect [her] ownership interests. [Her] failure to fulfill this duty does not render [petitioner's] procedures constitutionally infirm," inasmuch as petitioner fully complied with its statutory obligation to provide notice of the foreclosure proceeding (*Harner*, 5 NY3d at 141). Finally, we reject the contention of respondent that the statutory period for redemption was so short that it deprived her of due process (see *Matter of City of Lockport [Marine Midland Bank]*, 187 AD2d 993).

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

657

CA 09-02152

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

IN THE MATTER OF ERIE COUNTY SHERIFF'S POLICE
BENEVOLENT ASSOCIATION, RONALD BLECKINGER,
CHARLES BURKHARDT, PAUL CONSTANTINO, ROBERT
FIORETTI, LOUIS GONZALEZ, MARCIA KRUYNSKI,
ALLEN KUBIAK, KEVIN LOFTUS, JAMES MCMAHON,
DAVID O'BRIEN, VINCENT PUPO, NORMAN REDEYE,
THOMAS RICH, MARK ROKITKA, JAMES RYAN, SYLVAN
SCIRRI, RAYMOND SPENCER, LONNIE WILLIAMS,
ALFRED MUSSACHIO (DECEASED), BENJAMIN CRESPO,
WILLIAM ROGOWSKI, PEDRO PABON, LORENDA WILLIAMS,
JENNIFER CATANIA, STEPHEN RAIPORT, RYAN LEHIGH,
FRANK DISPENZA, THOMAS DUDEK, ROBERT SLOEIR,
TIMOTHY CARNEY, ROBERT BRAEUNER, BRADLEY HEBLER,
DAVID KARNEY, CATHERINE LANNEN, CARL ANDOLINA,
NICHOLAS BUDNEY, WILLIAM COOLEY, PATRICK
HUMISTON, ANDREW KIEFER, JOHN LAKE, PAUL O'BRIEN,
JAMES UNGER, MARK DONAHUE, KRISTINE MURRAY-MACK,
FRANK LORENZO, DAVID DILLON, MARK TUCZYNSKI,
TIMOTHY TAYLOR, SUSAN PUMA, DOUGLAS TUBINAS,
CHARLES TIRONE, SHARON SAVANNAH, ROBERT
RUTKOWSKI, LARRY BRAND, JR., JAMES MAZUR, AND
RICHARD MANLEY,
PETITIONERS/PLAINTIFFS-RESPONDENTS,

ORDER

V

COUNTY OF ERIE AND ERIE COUNTY SHERIFF,
RESPONDENTS/DEFENDANTS-APPELLANTS

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (JEANNINE M. PURTELL OF
COUNSEL), FOR RESPONDENTS/DEFENDANTS-APPELLANTS.

BARTLO, HETTLER & WEISS, KENMORE (PAUL D. WEISS OF COUNSEL), FOR
PETITIONERS/PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered June 12, 2009 in a CPLR article 75 proceeding and breach of contract action. The order granted the motion of petitioners/plaintiffs for partial summary judgment on the issue of liability.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs.

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

658

CA 09-02348

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

IN THE MATTER OF JUDY COLTON, INDIVIDUALLY
AND AS PRESIDENT OF NORTHWEST AMHERST
RESIDENTS ASSOCIATION, INC., A NOT-FOR-PROFIT
CORPORATION, OMAR ELNASSER, JOSEPH GRIFASI,
ANN GRIFASI, LUCIAN PARLATO, JOSEPHINE
PARLATO, AND DANIEL WARD, INDIVIDUALLY AND AS
A MEMBER OF TOWN BOARD OF TOWN OF AMHERST,
PETITIONERS-APPELLANTS,

MEMORANDUM AND ORDER

V

TOWN BOARD OF TOWN OF AMHERST, ET AL.,
RESPONDENTS,
AND CIMINELLI DEVELOPMENT COMPANY, INC.,
RESPONDENT-RESPONDENT.

RICHARD J. LIPPES & ASSOCIATES, BUFFALO (GREGG S. MAXWELL OF COUNSEL),
FOR PETITIONERS-APPELLANTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered January 16, 2009 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted the motion of respondent Ciminelli Development Company, Inc. to dismiss the petition insofar as it is brought by petitioner Daniel Ward, individually and as a member of Town Board of Town of Amherst.

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

Memorandum: Petitioners commenced this proceeding pursuant to CPLR article 78 challenging respondents' actions with respect to the proposed development of vacant property in the Town of Amherst (Town). Supreme Court properly granted the motion of respondent Ciminelli Development Company, Inc. to dismiss the petition insofar as it is brought by petitioner Daniel Ward, individually and as a member of the Town Board, a respondent herein. Ward lacks standing to bring this proceeding in his individual capacity as a resident of the Town because "[h]e failed to allege any 'injury that is in some way different from that of the public at large' " (*Matter of Oaks v Town of Phelps*, 55 AD3d 1257). In addition, Ward lacks standing to bring this proceeding in his capacity as a member of the Town Board (see *Caruso v New York City Police Dept. Pension Funds, Arts. 1 & 2*, 72 NY2d 568, 574-576). The record does not support the contention of

Ward that the challenged actions of the Town Board nullified his vote and usurped his power as a Town Board member, thereby providing him with standing (*cf. Silver v Pataki*, 96 NY2d 532, 539-540, *rearg denied* 96 NY2d 938). Rather, Ward is merely a member of the Town Board who voted in the minority with respect to the proposed development, and he thus has not suffered any injury sufficient to provide him with standing (*see Matter of Posner v Rockefeller*, 26 NY2d 970).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

659

KA 09-00509

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRUCE GOODRUM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered February 17, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a jury trial, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence establishing that he acted as an accomplice because his motions for trial orders of dismissal were not specifically directed at that alleged insufficiency (*see People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). In any event, we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that County Court erred in refusing to give a proper circumstantial evidence charge. Indeed, inasmuch as there was both direct and circumstantial evidence of defendant's guilt with regard to defendant's constructive possession of the controlled substance (*see People v Wilson*, 284 AD2d 958, *lv denied* 96 NY2d 943), no circumstantial evidence charge was warranted (*see People v Daddona*, 81 NY2d 990, 992; *People v Perez*, 259 AD2d 274, *lv denied* 93 NY2d 976; *cf. People v David*, 234 AD2d 787, *lv denied* 89 NY2d 1034). By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his contention that the ruling constitutes an abuse of discretion (*see People v*

Brown, 39 AD3d 1207, *lv denied* 9 NY3d 921; *People v Alston*, 27 AD3d 1141, 1141-1142, *lv denied* 6 NY3d 892). 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: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

663

KA 08-02016

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES WORKMAN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered July 29, 2008. The order denied the motion of defendant pursuant to CPL 440.30 (1-a) for DNA testing of certain evidence.

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

Memorandum: Supreme Court properly denied the postjudgment motion of defendant pursuant to CPL 440.30 (1-a) seeking DNA testing of hair and retesting of other evidence secured in connection with his 1996 conviction of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). We previously affirmed the judgment convicting defendant of those crimes (*People v Workman*, 256 AD2d 1218, *lv denied* 93 NY2d 931). Although hair found in the hotel room where the murder occurred and on the murder weapon did not belong to either defendant or the victim, the jury was aware of that fact at the time of trial. The evidence at trial also established that the unidentified hair could have been in the hotel room for a long period of time and could have been transferred onto the murder weapon when it was placed on the floor. Thus, defendant failed to establish that, " 'if [DNA] results [concerning the hair] had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable' to him" (*People v Burr*, 17 AD3d 1131, 1132, *lv denied* 5 NY3d 760, 804, quoting CPL 440.30 [1-a] [a]; see *People v Pitts*, 4 NY3d 303, 311, *rearg denied* 5 NY3d 783). Further, prior DNA testing established the presence of defendant's semen on the hotel bed sheets and the victim's blood on the murder weapon, and those test results were admitted in evidence at trial. Although defendant sought to have that evidence retested using newer DNA testing procedures, he failed to establish that any DNA evidence from that retesting would

have exonerated him (*see People v Brown*, 36 AD3d 961, *lv denied* 8 NY3d 919, 920).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

664

KA 09-02358

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ARTHUR R. POBLACKI, DEFENDANT-APPELLANT.

LOTEMPPIO & BROWN, P.C., BUFFALO (FRANK L. LOTEMPPIO, JR., OF COUNSEL),
FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L.
CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered May 8, 2009. The judgment convicted defendant, after a nonjury trial, of felony driving while intoxicated, speeding, and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [former (i)]), speeding (§ 1180 [d]), and resisting arrest (Penal Law § 205.30). Defendant failed to preserve for our review his contention that the evidence is not legally sufficient to support the conviction of driving while intoxicated and resisting arrest because his motion for a trial order of dismissal with respect to those counts "was not specifically directed at the ground advanced on appeal" (*People v Vassar*, 30 AD3d 1051, 1052, *lv denied* 7 NY3d 796; *see People v Hawkins*, 11 NY3d 484, 491-493; *People v Gray*, 86 NY2d 10, 19). In any event, we reject that contention. Furthermore, viewing the evidence in light of the elements of the crime of driving while intoxicated in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect thereto is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

665

KA 07-01061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRYANT JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered March 13, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth 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 criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

668

CAF 09-00426

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

IN THE MATTER OF EDWARD KLOCK,
PETITIONER-RESPONDENT,

V

ORDER

MAUREEN KLOCK, RESPONDENT-APPELLANT.

WEIL GOTSHAL & MANGES LLP, NEW YORK CITY (JESSICA N. WALDER OF
COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Herkimer County (Henry A. LaRaia, J.), entered January 14, 2009 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, terminated the child support obligation of petitioner.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

669

CAF 09-00622

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

IN THE MATTER OF JENNIFER R. KNUTH,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TROY J. WESTFALL, RESPONDENT-RESPONDENT.

ANDREW J. CORNELL, WELLSVILLE, FOR PETITIONER-APPELLANT.

FERN S. ADELSTEIN, LAW GUARDIAN, OLEAN, FOR LOGAN W.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered February 25, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Contrary to the contention of petitioner mother, Family Court properly granted respondent father's motion to dismiss the petition seeking to modify a prior custody order without conducting a hearing on the petition. "A hearing is not automatically required whenever a parent seeks modification of a custody order" (*Matter of Wurmlinger v Freer*, 256 AD2d 1069; see *David W. v Julia W.*, 158 AD2d 1, 6-7). Where, as here, the petitioner fails to demonstrate a sufficient "change in circumstances . . . , there is no basis for modification and dismissal of [the] petition is warranted" (*Matter of Reese v Jones*, 249 AD2d 676, 677; see *Matter of Di Fiore v Scott*, 2 AD3d 1417).

The mother failed to preserve for our review her further contention that the court abused its discretion in dismissing the petition without conducting a *Lincoln* hearing inasmuch as she failed to request such a hearing (see *Matter of Lopez v Robinson*, 25 AD3d 1034, 1037; *Matter of Picot v Barrett*, 8 AD3d 288, 289). In any event, we reject that contention (see *Matter of Charles M.O. v Heather S.O.*, 52 AD3d 1279; *Matter of Thompson v Thompson*, 267 AD2d 516, 519).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

670

CAF 09-01163

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

IN THE MATTER OF CANDICE ROUSSEAU,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

LISA A. KRAFT, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

CHERYL L. HITZEL, SPRING BROOK, FOR RESPONDENT-APPELLANT.

THOMAS A. DEUSCHLE, LAW GUARDIAN, WEST SENECA, FOR BRANDON W.

DOMINIC PAUL CANDINO, LAW GUARDIAN, BUFFALO, FOR JAISON W.

Appeal from an order of the Family Court, Erie County (Marjorie C. Mix, J.H.O.), entered April 23, 2009 in a proceeding pursuant to Family Court Act article 6. The order granted the petition to modify an order of visitation.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Erie County, for a hearing on the petition.

Memorandum: With respect to the order in appeal No. 1, we agree with respondent mother that Family Court erred in failing to conduct a hearing before granting the petition in which petitioner grandmother sought to modify an order setting forth a visitation schedule with the mother's children. " 'Determinations affecting custody and visitation should be made following a full evidentiary hearing, not on the basis of conflicting allegations' " (*Matter of Kenneth M. v Monique M.*, 48 AD3d 1174, 1174-1175). "Based upon the record before us, we are unable to determine whether the court 'possessed sufficient information to render an informed determination that was consistent with the child[ren]'s best interests' " (*Matter of Hopkins v Gelia*, 56 AD3d 1286). We therefore reverse the order in appeal No. 1 and remit the matter to Family Court for a hearing on the petition.

With respect to the order in appeal No. 2, the mother has not raised any issues concerning that order in her brief on appeal, and we thus deem any such issues abandoned (*see Matter of Sportello v Sportello* [appeal No. 1], 70 AD3d 1446; *Ciesinski v Town of Aurora*,

202 AD2d 984).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

671

CAF 09-01164

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

IN THE MATTER OF LISA A. KRAFT,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CANDICE ROUSSEAU, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

CHERYL L. HITZEL, SPRING BROOK, FOR PETITIONER-APPELLANT.

THOMAS A. DEUSCHLE, LAW GUARDIAN, WEST SENECA, FOR BRANDON W.

DOMINIC PAUL CANDINO, LAW GUARDIAN, BUFFALO, FOR JAISON W.

Appeal from an order of the Family Court, Erie County (Marjorie C. Mix, J.H.O.), entered April 23, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same Memorandum as in *Matter of Rousseau v Kraft* (___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

680

CA 09-02321

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

MAUREEN ANN GOLLEL, PLAINTIFF-RESPONDENT,

V

ORDER

RICHARD MICHAEL GOLLEL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVIDSON FINK LLP, ROCHESTER (S. GERALD DAVIDSON OF COUNSEL), FOR
DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Gail A. Donofrio, A.J.), entered September 10, 2009 in a divorce action. The order denied defendant's motion to dismiss the complaint and granted plaintiff's cross motion for legal fees.

Now, upon the stipulation discontinuing action signed by the attorneys for the parties on February 18, 2010 and filed in the Monroe County Clerk's Office on February 24, 2010,

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

681

CA 09-02322

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

MAUREEN ANN GOLLEL, PLAINTIFF-RESPONDENT,

V

ORDER

RICHARD MICHAEL GOLLEL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVIDSON FINK LLP, ROCHESTER (S. GERALD DAVIDSON OF COUNSEL), FOR
DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Gail A. Donofrio, A.J.), entered October 9, 2009 in a divorce action. The order, insofar as appealed from, upon reargument adhered to the court's prior decision denying defendant's motion to dismiss the complaint.

Now, upon the stipulation discontinuing action signed by the attorneys for the parties on February 18, 2010 and filed in the Monroe County Clerk's Office on February 24, 2010,

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1116/08

CA 07-02611

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

GLACIAL AGGREGATES LLC, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF YORKSHIRE, DEFENDANT-APPELLANT.

ANTHONY DI FILIPPO, III, EAST AURORA, FOR DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered August 27, 2007 in a declaratory judgment action. The judgment, upon a jury verdict, declared, *inter alia*, that the mining of sand and gravel aggregate was a lawful nonconforming use on certain property of plaintiff and awarded money damages to plaintiff. The judgment was reversed by order of this Court entered December 31, 2008 in a memorandum decision (57 AD3d 1362), and plaintiff appealed to the Court of Appeals from the order of this Court, and the Court of Appeals on February 18, 2010 reversed the order in an opinion and remitted the case to this Court for consideration of issues raised but not determined on the appeal to this Court (14 NY3d 127),

Now, upon remittitur from the Court of Appeals and having considered the issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed without costs.

Memorandum: On a prior appeal in *Glacial Aggregates LLC v Town of Yorkshire* (57 AD3d 1362), we granted defendant's motion for a directed verdict, which had been denied by Supreme Court during a jury trial. We granted judgment in favor of defendant declaring that plaintiff's mining of sand and gravel aggregate on the property in question (property) was not a lawful nonconforming use of the property as a sand and gravel mine and that plaintiff did not acquire a vested right to mine the property. The Court of Appeals reversed our order and remitted the case to this Court "for consideration of issues raised but not determined," in light of our reversal (*Glacial Aggregates LLC v Town of Yorkshire*, 14 NY3d 127, 138).

Upon remittitur, we conclude that Supreme Court properly denied defendant's motion "to dismiss and/or" for summary judgment dismissing the amended complaint. In support of the motion, defendant contended, inter alia, that plaintiff did not have a nonconforming use at the time the zoning ordinance was enacted and did not have a vested right to mine the property. Even assuming, arguendo, that defendant met its initial burden in that respect, we conclude that the court properly determined that plaintiff raised triable issues of fact sufficient to defeat the motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff established that it had invested several hundred thousand dollars to purchase the land and to obtain permits from the Department of Environmental Conservation to mine the property; that it had cleared trees and built a haul road; that it designed and purchased the materials to build the bridge required as part of the permit; and that it monitored wells and engaged in test drilling.

Defendant further contended in support of its motion that the cause of action pursuant to 42 USC § 1983 was time-barred because the action was commenced more than three years after the zoning ordinance prohibiting mining activities was enacted, on June 11, 2001. It is axiomatic that the statute of limitations begins to run when a cause of action accrues (see *Britt v Legal Aid Socy.*, 95 NY2d 443, 446). Here, defendant advised plaintiff by letter dated July 8, 2004 that it was not authorized by defendant to mine the property, and the cause of action in question accrued based on that letter (see *Dinerman v City of N. Y. Admin. for Children's Servs.*, 50 AD3d 1087). The action was commenced on August 23, 2004, and thus the cause of action pursuant to 42 USC § 1983 was timely.

In addition, defendant contended in support of its motion that plaintiff's cause of action pursuant to 42 USC § 1983 was not ripe for judicial review. "Civil rights claims are not justiciable until the municipality has 'arrived at a definitive position on the issue that inflicts an actual, concrete injury' " (*Town of Orangetown v Magee*, 88 NY2d 41, 50, quoting *Williamson County Regional Planning Commn. v Hamilton Bank of Johnson City*, 473 US 172, 193). Here, plaintiff was unable to obtain financing for the full-scale mining operation because defendant advised plaintiff in the letter dated July 8, 2004 that plaintiff was not authorized to mine the property. Under the circumstances of this case, we reject defendant's contention that defendant's Town Board was not authorized to make the determination that plaintiff was prohibited from engaging in mining activities. Thus, we conclude that defendant had " 'arrived at a definitive position on the issue that inflict[ed] an actual, concrete injury' " on plaintiff (*id.*), and thus that the cause of action pursuant to 42 USC § 1983 was indeed ripe for judicial review.

Finally, contrary to defendant's contention, we conclude that the evidence at trial established that plaintiff did not abandon the nonconforming use of the property. "Abandonment does not occur unless there has been a complete cessation of the nonconforming use," and that is not the case here (*Matter of Marzella v Munroe*, 69 NY2d 967, 968; cf. *Matter of Vite, Inc. v Zoning Bd. of Appeals for Town of*

Greenville, 282 AD2d 611).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1248

CA 09-00073

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

STEPHEN TURNER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CSX TRANSPORTATION, INC. AND CONSOLIDATED
RAIL CORPORATION, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

COLLINS, COLLINS & DONOGHUE, P.C., BUFFALO (PATRICK DONOGHUE OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), ANSPACH
MEEKS ELLENBERGER LLP, BUFFALO, AND BURNS, WHITE & HICTON, LLC,
PITTSBURGH, PENNSYLVANIA, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 9, 2008 in a personal injury action. The order, insofar as appealed from, granted in part the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained during the course of his employment as a locomotive engineer by defendants. Plaintiff asserted two causes of action against defendant CSX Transportation, Inc. based on its alleged violations of the Federal Locomotive Inspection Act ([LIA] 49 USC § 20701 *et seq.*) and the Federal Employers' Liability Act ([FELA] 45 USC § 51 *et seq.*) with respect to injuries that he sustained as a result of the excessive lateral motion of the locomotive that he was operating on September 5, 2003. Plaintiff also asserted two causes of action based on defendants' alleged violations of the LIA and the FELA with respect to injuries that were allegedly sustained over the course of his employment as a result of his continuous exposure to excess vibration and lateral motion of the locomotives.

Defendants moved for summary judgment dismissing the second amended complaint, and Supreme Court granted the motion in part by dismissing the fourth cause of action, which alleged occupational injuries based on defendants' violation of the LIA. A jury trial on the remaining causes of action was held, and plaintiff was awarded over \$2.7 million in damages. Following the trial, the order granting the motion in part was entered October 9, 2008, and plaintiff appeals from that order. A final judgment was entered November 18, 2008 and

an amended judgment was entered March 4, 2009. Plaintiff has conceded that, if we affirm the amended judgment from which plaintiff also appealed (*Turner v CSX Transp., Inc.* [appeal No. 5], ___ AD3d ___ [Apr. 30, 2010]), this appeal would be moot. Inasmuch as we are affirming the amended judgment (*id.*), we dismiss this appeal as moot.

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

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1330

CA 09-00333

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

IN THE MATTER OF THE ARBITRATION BETWEEN
NEW HAMPSHIRE INSURANCE COMPANY,
PETITIONER-APPELLANT,

AND

MEMORANDUM AND ORDER

ADAM BOBAK, RESPONDENT-RESPONDENT,
ET AL., RESPONDENT.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR
PETITIONER-APPELLANT.

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered July 2, 2008 in a proceeding pursuant to CPLR article 75. The order denied the petition seeking to stay arbitration.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Adam Bobak, a respondent in appeal No. 1 and the petitioner in appeal No. 2, commenced a personal injury action in Pennsylvania seeking damages for injuries he sustained as a result of a motor vehicle accident in that state. He subsequently submitted a claim for supplemental uninsured/underinsured motorist (SUM) benefits pursuant to his employer's insurance policy with New Hampshire Insurance Company (NHIC), the petitioner in appeal No. 1 and a respondent in appeal No. 2. Bobak sought arbitration following the denial of his claim by NHIC. On a prior appeal we modified the order, granting in part the petition of AIG Claims Services, Inc. (AIG), a respondent in appeal No. 2, seeking on behalf of NHIC a permanent stay of arbitration pursuant to CPLR article 75 (*Matter of AIG Claims Servs., Inc. v Bobak*, 39 AD3d 1178). In our decision, we concluded that the "[a]rbitration should be stayed, not permanently, but pending the determination of the issue[s] of insurance coverage" (*id.* at 1179).

While that prior appeal was pending in this Court, NHIC commenced an action in Beaver County, Pennsylvania seeking a declaration with respect to the insurance coverage issues. Based on the record before

us, it appears that the Pennsylvania action is still pending. Nevertheless, an arbitration date was scheduled at Bobak's request. NHIC then commenced a second proceeding pursuant to CPLR article 75 seeking to stay that arbitration based, inter alia, on the ground that it would be conducted in violation of this Court's prior order staying the arbitration pending the determination of the insurance coverage issues. In appeal No. 1, NHIC appeals from an order denying the petition in that second proceeding. Based on that order, the arbitration was conducted and, in appeal No. 2, NHIC, along with AIG and another entity, appeal from a judgment that, inter alia, confirmed the arbitration award of \$1,028,524.40 to Bobak.

We agree with NHIC in appeal No. 1 that Supreme Court erred in failing to comply with our order staying the arbitration pending a determination of the insurance coverage issues. "Trial courts are without authority to vacate or modify orders . . . or to reverse holdings of this [C]ourt" (*Maracina v Schirrmeister*, 152 AD2d 502, 502-503; see *Wiener v Wiener*, 10 AD3d 362; *Webb v Zogaria*, 4 AD3d 757). The language of our order was unequivocal and, in any event, "if there [were] any uncertainty as to the effect of the language employed, the remedy [would be] an application to [this C]ourt to amend it" (*City of New York v Scott*, 178 Misc 2d 836, 843).

Contrary to the dissent, we are unpersuaded that the limited record in this case supports the court's determination that "NHIC unreasonably delayed the determination of the issues of insurance coverage and thereby waived its right to seek a further stay of the arbitration." There is no evidence in the record concerning the reasons for the delay in resolving the Pennsylvania declaratory judgment action, and thus we may not conclude that NHIC is to blame for any delay. Bobak's contention at oral argument of this appeal that state and local rules prohibit him from advancing the case is without merit. Pursuant to Pennsylvania law, any party may move to dismiss an action as abandoned (see generally Pennsylvania Rules of Jud. Admin. rule 1901; *Jacobs v Halloran*, 551 Pa 350, 354-355, 710 A2d 1098, 1100-1101), and the Beaver County Local Rules of Civil Procedure permit any party to move to schedule a case management conference (see Beaver County Local Rules Civ Pro LR 212.4). We therefore reverse the order in appeal No. 1.

With respect to appeal No. 2, NHIC contends that the court erred in confirming the arbitration award because the award violated public policy and the arbitrator exceeded his powers. We note at the outset that NHIC preserved that contention for our review by AIG's commencement of the first proceeding pursuant to CPLR article 75, on behalf of NHIC, seeking a stay of arbitration and by seeking a stay of arbitration in this Court pending the issuance of our decision with respect to the appeal of that order prior to participating in the arbitration (*cf. Matter of Commerce & Indus. Ins. Co. v Nester*, 90 NY2d 255, 261-262; *Matter of Windsor Group v Gentilcore*, 8 AD3d 582).

Based on the record before us, we are unable to determine whether public policy prohibits confirmation of the arbitration award or whether the arbitrator exceeded his powers. "[SUM] coverage will be

available [only] where the limits of liability of the motor vehicle liable for the damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by the insured's polic[ies]" (*Matter of State Farm Mut. Auto. Ins. Co. v Roth*, 206 AD2d 376, lv denied 84 NY2d 812; see Insurance Law § 3420 [f] [2] [A]; *Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 953; *Matter of Allstate Ins. Co. v DeMorato*, 262 AD2d 557). NHIC contends that Reliance Insurance Company (Reliance) issued a primary policy covering the vehicle of the individual responsible for the motor vehicle accident and that Travelers Insurance Company (Travelers) issued an excess policy covering that vehicle. NHIC further contends that the limits of those policies exceed its SUM coverage. Bobak, however, contends that Reliance provided no coverage of the vehicle at issue because it became insolvent, that the Ohio Insurance Guaranty Association has assumed responsibility for Reliance's liabilities but will provide coverage only that is excess to SUM coverage, and that Travelers has disclaimed liability. There is no documentary or other evidence in the record upon which we are able to rely to assess the accuracy of those contentions. It is well settled that "the threshold issue of whether the offending vehicle was insured on the date of the accident is for the court to determine prior to arbitration of a claim for [SUM] benefits" (*Matter of American Intl. Ins. Co. v Dibua*, 13 AD3d 365, lv denied 4 NY3d 706; see *Matter of Empire Mut. Ins. Co. [Stroud--Boston Old Colony Ins. Co.]*, 36 NY2d 719, 720-721). Here, as noted, there has been no resolution of that threshold issue, and the record is not sufficient to permit this Court to determine that issue and thus to assess the propriety of the judgment in appeal No. 2. We therefore hold that appeal and reserve decision. We remit the matters in appeal Nos. 1 and 2 to Supreme Court for determination of the issues of insurance coverage (see generally *Matter of Mercury Ins. Group v Ocana*, 46 AD3d 561, 563; *Matter of Allstate Ins. Co. v Anderson*, 303 AD2d 496, 497-498), inasmuch as it appears that there has been no final determination of those issues in the Pennsylvania declaratory judgment action. We direct the court upon remittal to join all necessary parties (see generally *Matter of Eagle Ins. Co. [Villegas--State Farm Mut. Auto. Ins. Co.]*, 307 AD2d 879), and to conduct a framed-issue hearing to determine the issues of insurance coverage (see generally *Matter of General Assur. Co. v Rahmanov*, 56 AD3d 332, 333; *Matter of Travelers Indem. Co. v Fernandez*, 55 AD3d 746, 748). We further direct the court upon remittal in appeal No. 1 to make a new determination of the petition seeking a permanent stay of arbitration.

All concur except MARTOCHE, J.P., and GREEN, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. As noted by the majority, we concluded on a prior appeal in this case with respect to the first petition seeking to stay the arbitration in question that the "[a]rbitration should be stayed, not permanently, but pending the determination of the issue[s] of insurance coverage" in a declaratory judgment action commenced in Pennsylvania by New Hampshire Insurance Company (NHIC), the petitioner in appeal No. 1 and a respondent in appeal No. 2 (*Matter of AIG Claims Servs., Inc. v Bobak*, 39 AD3d 1178, 1179). At the time of the prior appeal, the

Pennsylvania action had been pending for over five months. Another 14 months had elapsed when NHIC commenced the second proceeding in New York seeking to stay the arbitration. NHIC does not dispute that it did nothing further, in the Pennsylvania action or otherwise, to resolve the insurance coverage issues. Contrary to the view of the majority, we conclude in appeal No. 1 that Supreme Court properly interpreted our prior order when it denied NHIC's petition in the second proceeding to stay the arbitration. "A stay can be a drastic remedy, 'on the simple basis that justice delayed is justice denied' " (660 Riverside Dr. Aldo Assoc. v Marte, 178 Misc 2d 784, 786). The stay in our prior order was not of indefinite duration and was not intended to allow NHIC to benefit from its inactivity. Indeed, in our view the court properly concluded that NHIC unreasonably delayed the determination of the issues of insurance coverage and thereby waived its right to seek a further stay of the arbitration (see *Progressive Northeastern Ins. Co. v Vandusen*, 22 Misc 3d 1128[A], 2009 NY Slip Op 50321[U], *2-3; see also *Matter of Connecticut Indem. Ins. Co. [Laperla]*, 21 AD3d 1262).

We further conclude that, contrary to the view of the majority in appeal No. 2, the court properly confirmed the arbitration award. NHIC "did not meet its heavy burden of demonstrating that the arbitrator's award is violative of a strong public policy . . . [or] totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of Buffalo Professional Firefighters Assn. Local 282 [City of Buffalo]*, 12 AD3d 1087, 1088 [internal quotation marks omitted]). We therefore would affirm the order and the judgment in appeal Nos. 1 and 2, respectively.

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

1331

CA 09-00404

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

IN THE MATTER OF THE ARBITRATION BETWEEN
ADAM BOBAK, PETITIONER-RESPONDENT,

AND

MEMORANDUM AND ORDER

AIG CLAIMS SERVICES, INC., NEW HAMPSHIRE
INSURANCE COMPANY AND AMERICAN INTERNATIONAL
GROUP, INC., RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR
RESPONDENTS-APPELLANTS.

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the
Supreme Court, Erie County (Joseph G. Makowski, J.), entered December
22, 2008 in a proceeding pursuant to CPLR article 75. The judgment
confirmed the arbitration award.

It is hereby ORDERED that the case is held, the decision is
reserved and the matter is remitted to Supreme Court, Erie County, for
further proceedings in accordance with the same Memorandum as in
Matter of New Hampshire Ins. Co. (Bobak) (___ AD3d ___ [Apr. 30,
2010]).

All concur except MARTOCHE, J.P., and GREEN, J., who dissent and
vote to affirm in the same dissenting Memorandum as in *Matter of New
Hampshire Ins. Co. (Bobak)* (___ AD3d ___ [Apr. 30, 2010]).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court

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

1517

KA 08-02523

PRESENT: SCUDDER, P.J., FAHEY, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHIAL E. FOSTER, DEFENDANT-APPELLANT.

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

MICHIAL E. FOSTER, DEFENDANT-APPELLANT PRO SE.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered November 5, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, that part of the motion seeking to suppress statements made by defendant to a confidential informant after July 17, 1997 is granted and a new trial is granted.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [2]), defendant contends that County Court erred in refusing to suppress certain statements he made to a confidential informant (CI) in connection with the murder of his girlfriend. The People stipulate that the CI was acting as an agent of the police when defendant made the statements. We agree with defendant that suppression is required with respect to certain statements, and we thus reverse the judgment.

According to the evidence presented at the suppression hearing, defendant's girlfriend was reported missing on May 30, 1996, and the last time that she was seen was on May 29, 1996, entering defendant's van. Despite the efforts of the police to locate the victim, her remains were not found for more than 11 years after her disappearance, when a passerby discovered them in a wooded area. Defendant was thereafter indicted for the murder.

Defendant contends that his indelible right to counsel attached when he agreed to speak to the police about the victim's disappearance and was accompanied to two interviews by an attorney who represented him in Family Court on pending paternity and custody proceedings in connection with the victim's two children. Defendant admitted during

the second of those interviews that he possessed a sawed-off shotgun, and he was thereafter charged with criminal possession of a weapon and convicted of that offense. While incarcerated on that conviction, the police arranged for the CI in question to be housed in defendant's cell in order to obtain information concerning the victim's disappearance and probable murder.

Contrary to the contention of defendant, the suppression court properly determined that his indelible right to counsel had not attached with respect to the statements that he made to the CI prior to July 17, 1997 inasmuch as, until that date, he did not invoke his right to counsel to the police who interviewed him while he was incarcerated. The indelible right to counsel attaches in two situations: "upon the commencement of formal proceedings, whether or not the defendant has actually retained or requested a lawyer . . .[, and] where an uncharged individual has actually retained a lawyer in the matter at issue or, while in custody, has requested a lawyer in that matter" (*People v West*, 81 NY2d 370, 373-374). Here, the record establishes that the attorney representing defendant in the Family Court matters accompanied him to the two interviews with the police in order to ensure that he did not say anything that would have a negative effect in the Family Court proceedings, and we conclude that she was not retained "in the matter at issue" (*id.*). With respect to the contention of defendant that his right to counsel had indelibly attached based upon the representation of his attorney on the weapons possession charge, we conclude that the statements made to the CI prior to July 17, 1997 were made after that attorney-client relationship had terminated (*see id.* at 377; *see generally People v Robles*, 72 NY2d 689, 698). We therefore conclude that defendant failed to establish that he was represented by that attorney either in the missing person matter or the weapons possession charge at the time he made statements to the CI (*see generally People v Rosa*, 65 NY2d 380, 387).

We agree with defendant, however, that his indelible right to counsel attached on July 17, 1997, when defendant told the police who spoke with him at the correctional facility that he would not talk to them without an attorney present. The suppression court properly determined that the mere fact that defendant was incarcerated does not render the questioning custodial (*see People v Carrasquillo*, 50 AD3d 1547, *lv denied* 11 NY3d 735). Nevertheless, we conclude in this case that the People failed to meet their burden of establishing that defendant knowingly and voluntarily waived his right to counsel when he divulged the details of the murder and disposal of the body to the CI several days after he had invoked his right to counsel (*see People v Davis*, 75 NY2d 517, 523), particularly in view of the fact that, in determining whether the People met that burden, "the courts must indulge every reasonable presumption against waiver" (*id.*).

With respect to defendant's conversations with the CI, who as the People have conceded was acting as an agent of the police, "the full panoply of constitutional provisions and curative measures applies" (*People v Esposito*, 37 NY2d 156, 160). After defendant had invoked

his right to counsel, the police directed the CI to advise him that he would no longer assist him with the plan that defendant had devised to convince the police that the victim was still alive, unless defendant "came clean" with the CI with respect to how he had killed the victim. Defendant then described the murder, admitted that the victim's daughter was present, and described how he allegedly disposed of the body. The police did not believe defendant's story with respect to the disposal of the body, however, and they further directed the CI to tell defendant that the story was not credible. At that time, defendant provided the CI with what the police believed to be the true version of events, i.e., that defendant disposed of the body in a wooded, marshy area that in fact matched the description of the area in which the victim's remains were eventually discovered. We conclude based on the record of the suppression hearing that defendant's conduct was not "so unambiguous that a hearing court would be warranted in inferring from the circumstances that the earlier request for counsel had been withdrawn" (*Davis*, 75 NY2d at 523). Defendant did not initiate further contact with the police after he invoked his right to counsel and, by virtue of the fact that he was incarcerated, we conclude that the suppression court erred in determining that the failure of defendant to retain counsel for the nearly two weeks during which he made incriminating statements to the CI evinced his intent to withdraw his request for counsel (*see generally id.*). Because defendant's statements to the CI concerning the murder of the victim and the disposal of the body corroborate the eyewitness testimony of the victim's daughter and, because the statements concerning the cause of death are corroborated by evidence that was found at the site where the body was discovered, we conclude that there is a "reasonable possibility that the error [in refusing to suppress those statements] might have contributed to defendant's conviction" and that the error thus was not harmless beyond a reasonable doubt (*People v Crimmins*, 36 NY2d 230, 237).

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

All concur except GORSKI, J., who dissents in part in accordance with the following Memorandum: I must respectfully dissent in part. Although I agree with the ultimate conclusion of the majority that reversal is required in this case, I conclude, unlike my colleagues, that defendant's indelible right to counsel attached prior to July 17, 1997. On May 31, 1996, defendant agreed to meet with the police at 10:00 A.M. for an interview in connection with the disappearance of his girlfriend. At approximately 9:30 A.M. that day, the investigating officer received a telephone call from the office of the Public Defender informing him that a specified attorney would accompany defendant when he met with the police that day, and that they would arrive at 11:00 A.M. Defendant and the attorney in fact arrived at the police station for the interview shortly after the designated time. In my view, the act of defendant in contacting the office of the Public Defender, the act of personnel from that office in rescheduling the interview so that an attorney for defendant could be present, and the act of the attorney from that office in accompanying defendant to the interview "adequately apprised the

police that [defendant] had retained an attorney with respect to the matter under investigation and that he wished his attorney to be present during questioning" (*People v Ellis*, 58 NY2d 748, 750). Although defendant allegedly told the investigating officer that the attorney "was there so [defendant] didn't say anything to hurt his Family Court case," I cannot agree with the majority that defendant's alleged statement is sufficient to establish that the attorney had not been retained "in the matter at issue" prior to July 17, 1997 (*People v West*, 81 NY2d 370, 373-374). Indeed, inasmuch as the Family Court proceedings in question involved the two children of defendant and his then-missing girlfriend, it is difficult to conceive how the matters could be construed as unrelated. I note in addition that the attorney also accompanied defendant to a subsequent polygraph examination conducted in connection with the girlfriend's disappearance. I therefore conclude that the suppression court erred in refusing to suppress the statements made by defendant to the confidential informant (CI) prior to July 17, 1997 and would grant that part of defendant's omnibus motion seeking to suppress those statements as well as those made to the CI after that date.

MOTION NO. (102/85) KA 02-01300. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES PINKY BROWN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, GREEN, AND PINE, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1277/97) KA 10-00320. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL HILL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., MARTOCHE, CARNI, LINDLEY, AND GREEN, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1104/07) KA 05-02034. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JERRY L. JOHNSON, DEFENDANT-APPELLANT. -- Motion for reconsideration denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, GREEN, AND GORSKI, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1125/07) KA 06-01069. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN E. AKIN, DEFENDANT-APPELLANT. -- Motion for reargument, or in the alternative, leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, GREEN, AND PINE, JJ. (Filed Apr. 30, 2010.)

MOTION NOS. (101-102/09) KA 05-00310. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARNELL MOSLEY, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 07-00892. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARNELL MOSLEY, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, GREEN, AND

GORSKI, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (775/09) KA 07-02013. -- THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT, V JACK ANDERSON, DEFENDANT-APPELLANT. -- Motion for writ of
error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO,
CARNI, AND GREEN, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1225/09) CA 09-00612. -- CRYSTAL RUN NEWCO, LLC,
PLAINTIFF-RESPONDENT-APPELLANT, V UNITED PET SUPPLY, INC., DOING BUSINESS
AS THE PET COMPANY, DEFENDANT-APPELLANT-RESPONDENT. -- Motion for
reargument or leave to appeal to the Court of Appeals denied. PRESENT:
SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1315/09) KA 08-00629. -- THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT, V CHRISTOPHER E. MARCH, DEFENDANT-APPELLANT. -- Motion for writ
of error coram nobis denied. PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO,
GREEN, AND PINE, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1354/09) CA 09-00229. -- MICHAEL PASSUCCI,
PLAINTIFF-RESPONDENT, V THE HOME DEPOT, INC., THE HOME DEPOT SPECIAL
SERVICES, INC., MICHAEL BLAIR AND MICHAEL KEITH NAZAR,
DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of
Appeals denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, AND PINE, JJ.
(Filed Apr. 30, 2010.)

MOTION NO. (1365/09) CA 09-00977. -- IN THE MATTER OF MARK A. MATTESON,
PETITIONER-APPELLANT, V NEWFANE CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,

RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, AND PERADOTTO, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1573/09) CA 09-01144. -- **DEBORAH HIMMELSBACH, PLAINTIFF-RESPONDENT, V PATRICK GEORGE, DEFENDANT-APPELLANT.** -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1577/09) CA 08-01863. -- **CHARLES R. MCLAUGHLIN AND CHERYL MCLAUGHLIN, PLAINTIFFS-RESPONDENTS, V MIDROX INSURANCE COMPANY, DEFENDANT-APPELLANT, RONALD D. BLODGETT, DAVID J. BLODGETT, RONALD D. BLODGETT AND DAVID J. BLODGETT, DOING BUSINESS AS BLODGETT BROTHERS PARTNERSHIPS, DEFENDANTS-RESPONDENTS.** (APPEAL NO. 1.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1578/09) CA 08-02196. -- **CHARLES R. MCLAUGHLIN AND CHERYL MCLAUGHLIN, PLAINTIFFS-RESPONDENTS, V MIDROX INSURANCE COMPANY, DEFENDANT-APPELLANT, RONALD D. BLODGETT, DAVID J. BLODGETT, RONALD D. BLODGETT AND DAVID J. BLODGETT, DOING BUSINESS AS BLODGETT BROTHERS PARTNERSHIPS, DEFENDANTS-RESPONDENTS.** (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1579/09) CA 08-02420. -- **RUBY JORDAN, FORMERLY KNOWN AS RUBY PREMO, PLAINTIFF-RESPONDENT, V RICHARD PREMO, DEFENDANT-APPELLANT.** --

Motion for reargument or leave to appeal to the Court of Appeals denied.

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1600/09) TP 09-01245. -- IN THE MATTER OF RHONDA MANGUS, PETITIONER, V NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES AND NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, FAHEY, AND CARNI, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1621/09) CA 09-01435. -- PAUL CWIKLINSKI AND LISE CWIKLINSKI, PLAINTIFFS-RESPONDENTS, V SEARS, ROEBUCK & CO., INC., EMERSON ELECTRIC CO., AND VERMONT AMERICAN CORPORATION, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied; cross motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND PINE, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1658/09) CA 09-00534. -- EUGENE TAILLIE, ET AL., PLAINTIFFS, AND KEVIN TAILLIE, PLAINTIFF-APPELLANT, V ROCHESTER GAS AND ELECTRIC CORPORATION, AND R.E. GINNA NUCLEAR POWER PLANT LLC, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, CENTRA, AND FAHEY, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (1681.3/09) CA 08-02271. -- NICOLE S. MAURER,
PLAINTIFF-RESPONDENT-APPELLANT, V TOPS MARKETS, LLC,
DEFENDANT-APPELLANT-RESPONDENT. (APPEAL NO. 3.) -- Motion for reargument
denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.
(Filed Apr. 30, 2010.)

MOTION NO. (15/10) TP 09-01616. -- IN THE MATTER OF DANA RENE GIGNAC, R.
PH., DOING BUSINESS AS SARATOGA PHARMACY, PETITIONER, V DAVID A. PATERSON,
IN HIS OFFICIAL CAPACITY AS GOVERNOR OF STATE OF NEW YORK, RICHARD F.
DAINES, M.D., IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF NEW YORK STATE
DEPARTMENT OF HEALTH, AND JAMES G. SHEEHAN, IN HIS OFFICIAL CAPACITY AS
MEDICAID INSPECTOR GENERAL OF OFFICE OF MEDICAID INSPECTOR GENERAL,
RESPONDENTS. -- Motion for reargument denied. PRESENT: SCUDDER, P.J.,
PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Apr. 30, 2010.)

MOTION NO. (18/10) CA 09-01909. -- SCOTT VANBUSKIRK, CLAIMANT-APPELLANT, V
STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 107578.) -- Motion for
leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J.,
PERADOTTO, CARNI, GREEN, AND GORSKI, JJ. (Filed Apr. 30, 2010.)

KAH 09-00949. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. SHELTIERE
BROOKS, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-RESPONDENT. -- Appeal dismissed without
costs as moot. Counsel's motion to be relieved of assignment granted.
(Appeal from Judgment of Supreme Court, Wyoming County, Mark H. Dadd, J. -
Habeas Corpus). PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, GORSKI, AND

GREEN, JJ. (Filed Apr. 30, 2010.)

KAH 09-01174. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. JOHN COVINGTON, PETITIONER-APPELLANT, V HAROLD GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (see *People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Cayuga County, Mark Fandrich, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, GORSKI, AND GREEN, JJ. (Filed Apr. 30, 2010.)

KA 09-00597. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN DUNN, DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: Appeal unanimously dismissed and matter remitted to Erie County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or counsel for defendant (see *People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, CENTRA, AND FAHEY, JJ. (Filed Apr. 30, 2010.)

KAH 08-00804 AND KAH 08-00805. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. GARNETT R. LEACOCK, PETITIONER-APPELLANT, V DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- Motion for reargument, or in the alternative, leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND PINE, JJ. (Filed Apr. 30, 2010.)

KA 09-00207. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARVIN RICHARDSON, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Erie County, John L. Michalski, J. - Criminal Possession of a Weapon, 2nd Degree). PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, GORSKI, AND GREEN, JJ. (Filed Apr. 30, 2010.)

KA 09-00386. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIE L. WILSON, JR., DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: Appeal unanimously dismissed and matter remitted to Ontario County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., MARTOCHE, SMITH, CENTRA, AND FAHEY, JJ. (Filed Apr. 30, 2010.)