SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 25, 2011

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. JEROME C. GORSKI

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

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CA 10-01279

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

STEVEN KOSTYO AND KAREN KOSTYO, INDIVIDUALLY
AND AS HUSBAND AND WIFE, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SCHMITT AND BEHLING, LLC, DEFENDANT-RESPONDENT.

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (ANDREW D. FANIZZI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA, LLC, BUFFALO (STEPHANIE G. ELLIOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 31, 2009 in a personal injury action. The order granted defendant's motion for summary judgment dismissing plaintiffs' complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the Labor Law § 240 (1) claim and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this common-law negligence and Labor Law action to recover damages for injuries sustained by Steven Kostyo (plaintiff) when he fell from the front porch roof of a rental property owned by defendant and rented by plaintiff Karen Kostyo, plaintiff's wife. At the time of the accident, plaintiff was fixing and "winterizing" a window over the front porch, which involved nailing together the wooden window frame that had fallen apart and placing plastic sheeting over the window. Supreme Court granted defendant's motion for summary judgment dismissing the complaint, but on appeal plaintiffs contend in their brief only that the court erred in granting that part of defendant's motion with respect to the Labor Law § 240 (1) claim, thus abandoning any issues with respect to the remainder of the complaint (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

We conclude that the court erred in granting defendant's motion with respect to the Labor Law § 240 (1) claim on the ground that plaintiff was performing only routine maintenance at the time of the accident (*cf. Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882). We therefore modify the order accordingly. "[D]eliniating between routine maintenance and repairs is frequently a close, fact-driven

issue" (*Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 987), and we conclude on the record before us that there is a question of fact precluding summary judgment on that issue. "[I]n order for work to constitute a 'repair' under Labor Law § 240 (1), there must be proof that the . . . object being worked upon was inoperable or not functioning properly" (*Goad v Southern Elec. Intl.*, 263 AD2d 654, 655). Here, plaintiffs raised a question of fact whether plaintiff was in fact repairing the window by their submission of evidence that the window on which plaintiff was working was not "functioning properly" (*id.*), i.e., it required securing because there was a risk that the window would fall out of the frame in the event that the window was opened (*see generally Short v Durez Div.-Hooker Chems. & Plastic Corp.*, 280 AD2d 972, 972-973).

We further agree with plaintiffs that defendant failed to establish as a matter of law that the actions of plaintiff were the sole proximate cause of his injuries. Thus, it cannot be said at this juncture of the litigation that "there is no view of the evidence . . . to support a finding that the [undisputed] absence of [any] safety devices was not a proximate cause of the injuries" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524, *rearg denied* 65 NY2d 1054).

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

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KA 09-01489

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GABRIEL M. WILLIAMS, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a rensentence of the Erie County Court (Sheila A. DiTullio, J.), rendered June 18, 2009. The judgment resentenced defendant pursuant to Penal Law § 70.85.

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

Memorandum: Defendant was convicted upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]) and robbery in the first degree (§ 160.15 [1]) based upon his admission that he repeatedly shot his neighbor in the head and stole property from him. In accordance with the plea agreement, County Court sentenced defendant to a determinate term of imprisonment of 20 years. That sentence was illegal, however, inasmuch as it did not include a period of postrelease supervision (PRS). The Department of Correctional Services (DOCS) subsequently administratively imposed a five-year period of PRS, which defendant successfully challenged in a CPLR article 78 proceeding. In granting defendant's petition, Supreme Court vacated the PRS component of the sentence imposed by DOCS. Defendant thereafter wrote a letter to County Court requesting "a resentencing hearing." The court granted defendant's request and appointed defense counsel to represent him. When defendant appeared in court with defense counsel for resentencing, defendant requested that the court vacate his guilty plea. The court denied that request and instead resentenced defendant to the original sentence of a determinate term of imprisonment of 20 years with no postrelease supervision.

We reject the contention of defendant that the court erred in refusing to vacate his guilty plea and in resentencing him to the sentence originally imposed. Because the original sentence was imposed between September 1, 1998 and June 30, 2008, the court was

authorized to resentence defendant pursuant to Penal Law § 70.85. The statute provides that, with the consent of the District Attorney, a court that imposed a determinate term of imprisonment without the mandatory period of PRS may, upon resentencing, "re[]impose the originally imposed determinate sentence of imprisonment without any term of [PRS], which then shall be deemed a lawful sentence." As the Court of Appeals recognized in *People v Boyd* (12 NY3d 390, 393-394), the purpose underlying section 70.85, as noted in the Governor's Approval Memorandum concerning that statute, was to " 'avoid the need for pleas to be vacated when the District Attorney consents to re[]sentencing without a term of PRS.' " We thus conclude that, inasmuch as the court properly resentenced defendant pursuant to section 70.85, defendant was not entitled to vacatur of his plea.

Defendant further contends that reversal is required because the court erred in failing to notify the Attorney General of defendant's challenge to the constitutionality of Penal Law § 70.85. We conclude that the People incorrectly concede that the court erred in failing to do so. The record establishes that defendant did not in fact challenge the constitutionality of section 70.85 or any other statute. Although defendant argued at the resentencing proceeding that his plea was unconstitutionally obtained because the court failed to advise him of the requirement of PRS, that argument is fundamentally different from an argument that section 70.85 is unconstitutional. In fact, neither defendant nor defense counsel mentioned section 70.85 during the resentencing proceeding. In any event, defendant's contention lacks merit because it was defendant's obligation to notify the Attorney General of any such constitutional challenge (*see Koziol v Koziol*, 60 AD3d 1433, 1434-1435, *appeal dismissed* 13 NY3d 763; *see also People v Whitehead*, 46 AD3d 715, *lv denied* 10 NY3d 772), and he failed to do so.

Finally, we conclude that defendant was not deprived of effective assistance of counsel at the resentencing proceeding (*see generally People v Baldi*, 54 NY2d 137, 147), and that the court did not abuse its discretion in denying defense counsel's request for an adjournment of that proceeding (*see People v Ippolito*, 242 AD2d 880, *lv denied* 91 NY2d 874).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

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CA 10-00050

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

KEVIN M. KING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SHARON A. KING, DECEASED, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

D.R. CHAMBERLAIN CORPORATION, FRANKLIN G. DOWNING, F.G. DOWNING DEVELOPMENT, INC., DOING BUSINESS AS TOWNE BMW, F.G. DOWNING TOWNE AUTOMOTIVE GROUP, DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MAURICE L. SYKES OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

JOHN J. FROMEN, BUFFALO, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 3, 2009 in a personal injury action. The order and judgment, among other things, granted plaintiff's cross motion for partial summary judgment and granted in part and denied in part the motion of defendants D.R. Chamberlain Corporation, Franklin G. Downing, F.G. Downing Development, Inc., doing business as Towne BMW, and F.G. Downing Towne Automotive Group for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeals signed by the attorneys for the parties on March 17, 2011,

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

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CA 10-00315

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

LAI NGUYEN, PLAINTIFF-APPELLANT,

V ORDER

WILLIAM E. KIRALY AND MARY L. KIRALY,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURGIO, KITA & CURVIN, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered October 28, 2009 in a personal injury action. The order, among other things, denied the motion of plaintiff for an order setting aside the jury 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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

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CA 10-01445

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

LAI NGUYEN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM E. KIRALY AND MARY L. KIRALY,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURGIO, KITA & CURVIN, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered October 28, 2009 in a personal injury action. The judgment dismissed the complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law with costs, the post-trial motion is granted in part, the verdict with respect to damages for past pain and suffering is set aside, the complaint is reinstated, and a new trial is granted on those damages only.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident. Following a trial, the jury found that plaintiff sustained a serious injury under only the 90/180-day category of serious injury set forth in Insurance Law § 5102 (d), but it awarded plaintiff zero damages. Plaintiff moved to set aside the verdict in part and for a new trial on damages only. According to plaintiff, the jury's finding that he did not sustain a serious injury under the significant limitation of use category and its award of zero damages were against the weight of the evidence. We conclude that Supreme Court erred in denying those parts of the post-trial motion seeking to set aside the verdict with respect to damages for past pain and suffering and for a new trial thereon.

It is well settled that "the amount of damages to be awarded for personal injuries is primarily a question for the jury" (*Nutley v New York City Tr. Auth.*, 79 AD3d 711, 712 [internal quotation marks omitted]), "the judgment of which is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony" (*Ortiz v 975 LLC*, 74 AD3d 485, 486; *Vaval v NYRAC, Inc.*, 31

AD3d 438, *lv dismissed* 8 NY3d 1020, *rearg denied* 9 NY3d 937). Nevertheless, an award of damages may be set aside when it "deviates materially from what would be reasonable compensation" (CPLR 5501 [c]; *see Miller v Weisel*, 15 AD3d 458, 459), and "a jury verdict will generally be considered flawed when a serious injury under the No-Fault Law is found or conceded, but the jury then makes no award for [past] pain and suffering" (*Zgrodek v McInerney*, 61 AD3d 1106, 1108; *see Vogel v Cichy*, 53 AD3d 877, 880; *Gillespie v Girard*, 301 AD2d 1018). For example, in *Hayes v Byington* ([appeal No. 2] 2 AD3d 1468, 1469), the jury found that the plaintiff sustained a serious injury under the 90/180-day category but awarded damages only for lost wages, and we concluded that the court erred in denying the plaintiff's motion to set aside the verdict except insofar as it found that the plaintiff sustained a serious injury and for a new trial on damages only. Here, we also conclude that "making no award for past pain and suffering after [determining] that plaintiff sustained a serious injury was a material deviation from reasonable compensation" (*Zgrodek*, 61 AD3d at 1109). We therefore reverse the judgment, grant the post-trial motion in part, set aside the verdict with respect to damages for past pain and suffering, reinstate the complaint, and grant a new trial on those damages only.

We reject plaintiff's contention that the court erred in denying the post-trial motion with respect to damages for lost wages and future pain and suffering. We also reject plaintiff's contention that the court erred in denying the post-trial motion with respect to the significant limitation of use category of serious injury. " 'A jury is not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony and/or the facts disclosed on cross-examination . . . Indeed, a jury is at liberty to reject an expert's opinion if it finds the facts to be different from those [that] formed the basis for the opinion or if, after careful consideration of all the evidence in the case, it disagrees with the opinion' " (*Cummings v Jiayan Gu*, 42 AD3d 920, 922-923). Here, the verdict with respect to the significant limitation of use category " 'was based upon a fair interpretation of the evidence' " (*Radish v DeGraff Mem. Hosp.*, 291 AD2d 873, 874), including the surveillance video of plaintiff several years after the accident, in which he was depicted moving about with no apparent limitations or discomfort.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

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CA 10-01740

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

KEVIN M. KING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SHARON A. KING, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

D.R. CHAMBERLAIN CORPORATION, FRANKLIN G. DOWNING, F.G. DOWNING DEVELOPMENT, INC., DOING BUSINESS AS TOWNE BMW, F.G. DOWNING TOWNE AUTOMOTIVE GROUP, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 2.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MAURICE L. SYKES OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN J. FROMEN, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered November 10, 2009 in a personal injury action. The order, among other things, denied in part the motion of defendants D.R. Chamberlain Corporation, Franklin G. Downing, F.G. Downing Development, Inc., doing business as Towne BMW, and F.G. Downing Towne Automotive Group to compel plaintiff to submit to further depositions pursuant to CPLR 3124.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on March 17, 2011,

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

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KA 09-01374

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL T. TOLIVER, DEFENDANT-APPELLANT.

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

SAMUEL T. TOLIVER, DEFENDANT-APPELLANT PRO SE.

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 June 25, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [4]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. County Court "did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Bentley*, 63 AD3d 1624, 1625, *lv denied* 13 NY3d 742; *see People v Dillon*, 67 AD3d 1382; *People v Williams*, 49 AD3d 1281, 1282, *lv denied* 10 NY3d 940). Defendant further contends that the court erred in denying his motion to withdraw his guilty plea on the ground that it was not knowingly, intelligently, and voluntarily entered. Although that contention "survives [defendant's] valid waiver of the right to appeal" (*People v Dozier*, 59 AD3d 987, 987, *lv denied* 12 NY3d 815; *see People v Murphy*, 71 AD3d 1466, *lv denied* 15 NY3d 754), we conclude that it is without merit. The contention of defendant that his plea was involuntary because he was coerced by defense counsel is belied by his responses to the court's questions during the plea colloquy, indicating that he was pleading guilty voluntarily and that no threats or promises had induced the plea (*see People v Gimenez*, 59 AD3d 1088, *lv denied* 12 NY3d 816; *People v Nichols*, 21 AD3d 1273, 1274, *lv denied* 6 NY3d 757).

Defendant's challenge to the severity of the sentence is encompassed by the valid waiver of the right to appeal (*see People v*

Lopez, 6 NY3d 248, 255-256; *People v Hidalgo*, 91 NY2d 733, 737). To the extent that the contention of defendant concerning ineffective assistance of counsel survives his guilty plea and his waiver of the right to appeal (*see People v Nichols*, 32 AD3d 1316, *lv denied* 8 NY3d 848, 988; *People v Fifield*, 24 AD3d 1221, 1222, *lv denied* 6 NY3d 775), we conclude that his contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

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KA 09-01202

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CYRESS JONES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (JOHN PATRICK FEROLETO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 27, 2009. 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.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of burglary in the first degree (Penal Law § 140.30 [2], [4]) and one count each of robbery in the first degree (§ 160.15 [4]) and robbery in the second degree (§ 160.10 [2] [a]), defendant contends that Supreme Court failed to comply with CPL 310.30 in responding to three notes from the jury during its deliberation. Defendant failed to preserve for our review his contention with respect to the second and third jury notes. We conclude that the court provided defense counsel with notice of the content thereof and with the substance of the court's intended response (*cf. People v Cook*, 85 NY2d 928, 931), and defendant failed to object at that time (*see People v Starling*, 85 NY2d 509, 516; *People v Cooley*, 48 AD3d 1091, *lv denied* 10 NY3d 861; *see also People v DeRosario*, 81 NY2d 801, 803). Contrary to defendant's contention, the court was not required to read the contents of those notes verbatim into the record (*see generally People v Kadarko*, 14 NY3d 426, 428-429). We conclude that defendant waived his contention with respect to the first jury note by consenting to allow the court to respond to requests for exhibits without consulting the attorneys (*see People v Ming Yuen*, 222 AD2d 613, *lv denied* 88 NY2d 851). In any event, that contention is without merit (*see id.*).

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).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

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KAH 09-00972

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JOHN D. VANILLE, PETITIONER-RESPONDENT,

V ORDER

SUPERINTENDENT, ORLEANS CORRECTIONAL FACILITY,
NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, NEW YORK STATE DIVISION OF PAROLE
AND NEW YORK STATE ATTORNEY GENERAL,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

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

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (VICKY L. VALVO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (Tracey A. Bannister, J.), entered May 8, 2009 in a proceeding pursuant to CPLR article 70. The order granted the petition for a writ of habeas corpus and directed respondent New York State Department of Correctional Services to release petitioner from custody.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see generally* CPLR 5501 [a] [1]; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

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KAH 09-01010

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JOHN D. VANILLE, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SUPERINTENDENT, ORLEANS CORRECTIONAL FACILITY,
NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, NEW YORK STATE DIVISION OF PAROLE
AND NEW YORK STATE ATTORNEY GENERAL,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

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

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (VICKY L. VALVO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Orleans County (Tracey A. Bannister, J.), entered May 8, 2009 in a proceeding pursuant to CPLR article 70. The judgment granted the petition for a writ of habeas corpus and discharged petitioner from the custody of respondents.

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

Memorandum: Respondents appeal from a judgment granting the petition seeking a writ of habeas corpus with respect to petitioner's civil commitment pursuant to Mental Hygiene Law article 10. We conclude that the appeal must be dismissed as moot. Here, there is no pending action that would provide a legal basis upon which petitioner may be detained, and thus "the rights of the parties cannot be affected by the determination of this appeal" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714; *see generally People ex rel. Hampton v Dennison*, 59 AD3d 951, *lv denied* 12 NY3d 711; *People ex rel. Cook v Leonardo*, 271 AD2d 773). We further conclude that this appeal does not fall within the exception to the mootness doctrine (*see generally Hearst*, 50 NY2d at 714-715).

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

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KA 10-00244

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY F. FASO, DEFENDANT-APPELLANT.

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

JEFFREY F. FASO, DEFENDANT-APPELLANT PRO SE.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered January 7, 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.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Defendant's contention that County Court erred in failing to offer him the opportunity to withdraw his guilty plea prior to enhancing the sentence is not preserved for our review (*see People v VanDeViver*, 56 AD3d 1118, *lv denied* 11 NY3d 931, 12 NY3d 788; *People v Perry*, 252 AD2d 990, *lv denied* 92 NY2d 929). In any event, that contention lacks merit. Defendant violated the plea agreement by failing to comply with the conditions thereof, and thus the court "was no longer bound by the plea promise and could properly impose an enhanced sentence" (*People v Figgins*, 87 NY2d 840, 841; *see VanDeViver*, 56 AD3d 1118; *see also People v Gibson*, 52 AD3d 1227). Defendant's further contention that his plea was not knowingly, intelligently and voluntarily entered is actually a challenge to the factual sufficiency of the plea allocution (*see People v Bullock*, 78 AD3d 1697). That challenge is not preserved for our review (*see People v Broadwater*, 69 AD3d 643, *lv denied* 14 NY3d 798), and it does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666). In any event, that challenge is without merit inasmuch as the plea allocution was not rendered factually insufficient by defendant's monosyllabic responses to the court's inquiries (*see People v Morris*, 78 AD3d 1613).

Defendant failed to preserve for our review his contention in his main and pro se supplemental briefs that the court was required to conduct a hearing with respect to the amount of restitution inasmuch

as he neither requested such a hearing nor objected to the amount of restitution at sentencing (*see People v Wright*, 79 AD3d 1789; *see generally People v Horne*, 97 NY2d 404, 414 n 3). In any event, defendant waived that contention because he stipulated to the amount of restitution (*see Wright*, 79 AD3d 1789). To the extent that defendant's contention in his main brief that he was denied effective assistance of counsel survives the plea (*see People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), we conclude that it is lacking in merit (*see generally People v Ford*, 86 NY2d 397, 404). The sentence is not unduly harsh or severe. Finally, defendant's contention in his pro se supplemental brief that the People failed to honor the executed plea agreement involves matters outside the record on appeal and thus is not properly before us (*see generally People v Egan*, 6 AD3d 1206, *lv denied* 3 NY3d 639).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

87.1

CA 09-02432

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

KAI LIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STRONG HEALTH, DEPARTMENT OF DENTISTRY,
UNIVERSITY OF ROCHESTER MEDICAL SCHOOL,
UNIVERSITY DENTAL FACULTY GROUP AND
DR. CARLO ERCOLI, DEFENDANTS-RESPONDENTS.
(AND ANOTHER ACTION.)
(APPEAL NO. 2.)

KAI LIN, PLAINTIFF-APPELLANT PRO SE.

OSBORN, REED & BURKE, LLP, ROCHESTER (CHRISTIAN C. CASINI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered August 12, 2009 in a dental malpractice action. The order granted defendants' cross motions for summary judgment dismissing the amended complaint in action No. 1 and the complaint in action No. 2 and denied the motion of plaintiff to compel discovery.

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

Same Memorandum as in *Lin v Strong Health* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2011]).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

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CA 10-01474

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

KAI LIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STRONG HEALTH, DEPARTMENT OF DENTISTRY,
UNIVERSITY OF ROCHESTER MEDICAL SCHOOL,
UNIVERSITY DENTAL FACULTY GROUP AND
DR. CARLO ERCOLI, DEFENDANTS-RESPONDENTS.
(AND ANOTHER ACTION.)
(APPEAL NO. 1.)

KAI LIN, PLAINTIFF-APPELLANT PRO SE.

OSBORN, REED & BURKE, LLP, ROCHESTER (CHRISTIAN C. CASINI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered May 25, 2010 in a dental malpractice action. The order settled the record on appeal from an order entered August 12, 2009.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the transcript of the oral argument on the motion and cross motions shall be included in the record on appeal in appeal No. 2 and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced action Nos. 1 and 2 seeking damages for the alleged dental malpractice of defendants in the installation of a bridge and a crown, respectively. Plaintiff moved pro se to compel discovery in both actions and defendants cross-moved for summary judgment dismissing the amended complaint in action No. 1 and the complaint in action No. 2. Supreme Court granted defendants' cross motions, dismissed both actions and denied as moot plaintiff's motion.

In appeal No. 1, plaintiff appeals from an order settling the record in appeal No. 2. We agree with plaintiff that Supreme Court erred in failing to include a transcript of oral argument on the motion and cross motions, and we therefore modify the order in appeal No. 1 accordingly. The record on appeal "must include any relevant transcripts of proceedings before the [court]" (*Gerhardt v New York City Tr. Auth.*, 8 AD3d 427, 427; *see* CPLR 5526; 22 NYCRR 1000.4 [a] [2]). We further conclude, however, that the remaining

papers that plaintiff seeks to include in the record were properly excluded because "the record on appeal is . . . limited to those papers that were before the court in deciding the motion[]" and cross motions (*Gui's Lbr. & Home Ctr., Inc. v Pennsylvania Lumbermens Mut. Ins. Co.*, 55 AD3d 1389, 1390; *see* CPLR 5526; 22 NYCRR 1000.4 [a] [2]).

In appeal No. 2, plaintiff appeals from the order that granted defendants' cross motions and denied as moot plaintiff's motion. We affirm. Defendants met their initial burden on the cross motions by submitting the affidavits of defendant Dr. Carlo Ercoli and defendants' expert witness. Those affidavits established that the conduct of defendants "was consistent with the applicable standard of care" (*O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1140, *appeal dismissed* 13 NY3d 834), and that their conduct did not cause plaintiff's alleged injuries (*see Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436). In opposition to the cross motions, plaintiff "failed to submit any affidavit from a [dental] expert to support the malpractice claim[s] and to refute [defendants'] submissions. The plaintiff thus failed to meet her burden of coming forward with appropriate evidentiary material establishing the existence of . . . triable issue[s] of fact" (*Thomas v Richie*, 8 AD3d 363, 364; *see Ericson v Palleschi*, 23 AD3d 608, 610; *see generally Fiore v Galang*, 64 NY2d 999, 1000-1001). Contrary to plaintiff's contention, expert affidavits were necessary to establish that her malpractice claims had merit because they do not constitute "matters within the ordinary experience of laypersons" (*Fiore*, 64 NY2d at 1001).

Plaintiff further contends that the court erred in granting defendants' cross motions because defendants failed to disclose certain X rays and dental impressions. We reject that contention (*see generally* CPLR 3212 [f]; *Walsh v Aspen Sq. Mgt., Inc.*, 46 AD3d 1411; *Kenworthy v Town of Oyster Bay*, 116 AD2d 628). The record establishes that, in response to plaintiff's revised demand for discovery, defendants offered to arrange a meeting where plaintiff could inspect those items or, in the alternative, defendants offered to make copies of the requested items at plaintiff's expense. Plaintiff did not accept either of defendants' offers, however, and thus "plaintiff did not 'demonstrate a reasonable attempt, prior to the [cross] motion[s], to pursue the discovery now claimed to be necessary' " (*Walsh*, 46 AD3d at 1412).

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

96

CA 08-01720

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

LAURA L. CAMPOPIANO AND THOMAS CAMPOPIANO,
INDIVIDUALLY AND AS HUSBAND AND WIFE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

PAUL J. VOLCKO, DEFENDANT-APPELLANT-RESPONDENT.

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

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

Appeal and cross appeal from a judgment of the Supreme Court, Monroe County (William P. Polito, J.), entered July 11, 2008. The appeal was held by this Court by order entered April 24, 2009, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (61 AD3d 1343). The proceedings were held and completed (Matthew A. Rosenbaum, J.).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying plaintiffs' post-trial motion except insofar as it sought to set aside the verdict with respect to damages for past pain and suffering and sought a new trial on those damages and vacating the award of damages for past pain and suffering and as modified the judgment is affirmed without costs, and a new trial is granted on damages for past pain and suffering only unless defendant, within 30 days of service of a copy of the order of this Court with notice of entry, stipulates to increase the award of damages for past pain and suffering to $100,000, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Laura L. Campopiano (plaintiff) when the vehicle she was driving collided with a vehicle driven by defendant. Defendant conceded that the accident resulted from his negligence, and a jury trial was held on the issues of serious injury and damages. The jury found that plaintiff sustained a serious injury only under the 90/180-day category rather than under all three categories alleged by plaintiffs, and it awarded damages only for past loss of earnings in the amount of $4,500. Plaintiffs moved to set aside the verdict based on, inter alia, juror misconduct. Supreme Court (Polito, J.)

granted defendant's cross motion for recusal of the court with respect to that part of plaintiffs' post-trial motion, which subsequently was denied by Supreme Court (Rosenbaum, J.). Following a retrial, the jury found that plaintiff sustained a serious injury under one of the two remaining categories and awarded total damages in the amount of $545,000. On a prior appeal, we concluded that the court erred in denying that part of plaintiffs' post-trial motion with respect to juror misconduct without conducting a hearing, and we therefore held the case, reserved decision and remitted the matter to Supreme Court (Rosenbaum, J.) for a hearing on the issue whether a juror improperly undertook the role of an expert juror during deliberations in the first trial (*Campopiano v Volcko* [appeal No. 2], 61 AD3d 1343, 1344-1345).

The evidence presented at the hearing upon remittal supports the conclusion of the court (Rosenbaum, J.) that the juror in question did not improperly undertake the role of an expert juror during deliberations, and thus we agree with the court that plaintiffs' motion to set aside the verdict insofar as it is based on juror misconduct should be denied (*see 23 Jones St. Assoc. v Beretta*, 280 AD2d 372; *cf. People v Maragh*, 94 NY2d 569, 574). The court (Polito, J.), however, erred in granting that part of plaintiffs' post-trial motion to set aside the verdict as against the weight of the evidence and for a new trial with respect to the jury's failure to determine that plaintiff sustained a serious injury under the remaining two categories alleged, i.e., permanent consequential limitation of use and significant limitation of use. We therefore modify the judgment accordingly. "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). The parties presented conflicting expert testimony with respect to those categories at the first trial, and the jury was free to reject the testimony of plaintiffs' expert witnesses (*see Cummings v Jiayan Gu*, 42 AD3d 920, 922-923; *Ruddock v Happell*, 307 AD2d 719, 721).

We further conclude that the court erred in granting those parts of plaintiffs' post-trial motion to set aside the verdict with respect to the award of damages for past lost wages and the failure to award future damages or damages on the derivative cause of action. We therefore further modify the judgment accordingly. A fair interpretation of the evidence supports the award for plaintiff's past lost wages (*see Sanfilippo v City of New York*, 272 AD2d 201, *lv dismissed* 95 NY2d 887; *see generally Lolik*, 86 NY2d at 746; *Inzinna v Brinker Rest. Corp*. [appeal No. 2], 302 AD2d 967, 968), as well as the failure to award any future damages (*see Sanfilippo*, 272 AD2d 201; *see also Roskwitalski v Fitzgerald*, 13 AD3d 1133, 1134; *McEwen v Akron Fire Co.*, 251 AD2d 1044). Further, a fair interpretation of the evidence supports the failure to award damages on the derivative cause of action (*see Yondt v Boulevard Mall Co.*, 306 AD2d 884).

The court properly granted that part of plaintiffs' motion seeking to set aside the verdict with respect to the failure to award damages for past pain and suffering. "The verdict is inconsistent insofar as the jury found that [plaintiff] sustained a substantial and disabling bodily injury or impairment and yet failed to award her any damages for . . . past pain and suffering" (*Hayes v Byington* [appeal No. 2], 2 AD3d 1468, 1469; *see Sanfilippo*, 272 AD2d 201). We therefore agree with the court that the failure to award any damages for past pain and suffering deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]; *Wojcik v Kent*, 21 AD3d 1410, 1412). Nevertheless, we conclude that the award for past pain and suffering of $100,000 following the retrial must be vacated inasmuch as the court erred in granting the remainder of plaintiff's post-trial motion, although we agree that such an award would be reasonable compensation. We therefore further modify the judgment accordingly, and we grant a new trial on damages for past pain and suffering only unless defendant, within 30 days of service of the order of this Court with notice of entry, stipulates to increase the award of damages for past pain and suffering to $100,000, in which event the judgment is further modified accordingly.

We have considered defendant's remaining contentions and conclude that none warrants further modification of the judgment.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

101

KA 09-01783

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHARLES E. MAYS, 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 (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered May 22, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

103

KA 07-00779

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN RIVERA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

BENJAMIN RIVERA, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Alex R. Renzi, J.), entered March 14, 2007. The order denied defendant's motions pursuant to CPL 440.10 to vacate the judgment convicting defendant of murder in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from an order of County Court (Renzi, J.) denying his CPL 440.10 motions to vacate the judgment of County Court (Wisner, J. [hereafter, trial court]) in appeal No. 2, convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]). We note at the outset that, following our prior affirmance of that judgment convicting defendant of murder (*People v Rivera,* 170 AD2d 962, *lv denied* 77 NY2d 999), defendant moved for a writ of error coram nobis. He contended that he was denied effective assistance of appellate counsel because defense counsel failed to raise an issue on direct appeal that would have resulted in reversal, i.e., that the trial court's jury instruction distorted the "course and furtherance" element of felony murder. We concluded that the issue may have merit and granted the motion (*People v Rivera,* 52 AD3d 1290), and we thus now consider de novo defendant's appeal from the judgment in appeal No. 2.

Addressing first appeal No. 2, we affirm the judgment. Defendant contends that, in its jury instructions, the trial court misstated an element of felony murder such that reversal is required. The felony murder statute provides in relevant part that "[a] person is guilty of

murder in the second degree when . . .[, a]cting either alone or with one or more other persons, he commits or attempts to commit [an enumerated felony], and, *in the course of and in furtherance* of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants" (Penal Law § 125.25 [3] [emphasis added]). In its main charge and its supplemental instructions, the trial court erroneously used the phrase "in the course of *or* in furtherance of such crime," thereby replacing the term "and" with "or." Defendant, however, failed to preserve that contention for our review because he never objected to the error (*see People v Griffin*, 48 AD3d 1233, 1236, *lv denied* 10 NY3d 840). Defendant further contends that the trial court violated CPL 310.30 by responding to a question from a juror without first consulting with counsel. Because defense counsel was aware of both the inquiry from the juror and the trial court's response thereto, she was required to object to the trial court's procedure in responding to the question in order to preserve defendant's contention for our review, and she failed to do so (*see People v Ramirez*, 15 NY3d 824, 825-826; *People v Peller*, 8 AD3d 1123, 1123-1124, *lv denied* 3 NY3d 679). 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]). 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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Addressing next appeal No. 1, we conclude that County Court properly denied defendant's motions seeking to vacate the judgment of conviction in appeal No. 2. Contrary to defendant's contention, he did not receive ineffective assistance of counsel based on defense counsel's failure to call an accomplice as a witness to testify at trial. Defense counsel's alternative decision to request a missing witness instruction with respect to that witness was a legitimate trial strategy (*see People v McCrone*, 12 AD3d 848, 850, *lv denied* 4 NY3d 800; *see generally People v Benevento*, 91 NY2d 708, 712-713), and the trial court in fact granted that request. Also contrary to defendant's contention, there was no *Brady* violation based on the People's alleged failure to provide him with that accomplice's plea colloquy. "The People are not required to turn over evidence where, as here, defendant 'knew of, or should reasonably have known of, the evidence and its exculpatory nature' " (*People v Singleton*, 1 AD3d 1020, 1021, *lv denied* 1 NY3d 580). Finally, County Court properly denied the motions to the extent that they sought to vacate the judgment on the ground of newly discovered evidence, i.e., a written statement by another accomplice. The motions, which were made almost three years after the written statement was issued, were not made with the requisite due diligence after the discovery of that evidence (*see People v Kandekore*, 300 AD2d 318, 319, *lv denied* 99 NY2d 616, *cert denied* 540 US 896). We note in any event that the statement, which contradicted the accomplice's prior statement to the police, was inherently unreliable recantation testimony and thus was insufficient by itself to warrant vacatur of the judgment (*see People v*

Thibodeau, 267 AD2d 952, 953, *lv denied* 95 NY2d 805; *People v Jackson*, 238 AD2d 877, 878-879, *lv denied* 90 NY2d 859).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

104

KA 08-00201

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN RIVERA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

BENJAMIN RIVERA, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Donald J. Wisner, J.), rendered July 21, 1989. 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.

Same Memorandum as in *People v Rivera* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2011]).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

105

KA 09-02119

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER REINHARDT, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), 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 (Walter W. Hafner, Jr., J.), rendered October 5, 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.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]), defendant contends that he did not knowingly, intelligently and voluntarily waive his right to appeal because his responses to questioning by County Court in connection with the waiver were monosyllabic. He further contends that the court's characterization of the right to appeal was "confusing" and inadequate. We reject defendant's contention and instead conclude that he validly waived the right to appeal (*see People v Lopez*, 6 NY3d 248, 256). Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution by failing to move to withdraw the plea or to vacate the judgment of conviction (*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's challenge to the court's suppression ruling is encompassed by his valid waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833; *People v McKeon*, 78 AD3d 1617). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

107

KA 10-00152

PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD L. COLEMAN, DEFENDANT-APPELLANT.

ADAM H. VAN BUSKIRK, AURORA, 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 November 12, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, burglary in the first degree, burglary in the second degree, criminal possession of a weapon in the third degree, resisting arrest and grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of burglary in the second degree and dismissing count three of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant was previously convicted upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]), resisting arrest (§ 205.30) and grand larceny in the third degree (§ 155.35 [1]) in satisfaction of an indictment charging him with those crimes and with robbery in the first degree (§ 160.15 [3]), burglary in the second degree (§ 140.25 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant was sentenced as a second felony offender to concurrent terms of imprisonment, the greatest of which was a determinate term of 18 years. This Court affirmed that judgment of conviction on appeal (*People v Coleman*, 13 AD3d 1234, *lv denied* 4 NY3d 829). County Court (Leone, J.) thereafter granted defendant's motion to vacate the judgment of conviction pursuant to CPL 440.10, and this Court affirmed the order granting defendant's motion based on the failure of County Court (Corning, J.) to advise him, prior to the entry of the plea, that he would be subject to a period of postrelease supervision (*People v Coleman*, 61 AD3d 1383).

Defendant now appeals from a judgment convicting him following a jury trial of the six counts in the indictment and sentencing him, inter alia, as a persistent felony offender to concurrent

indeterminate terms of imprisonment of 18 years to life on each felony count. We reject the contentions of defendant that the persistent felony offender sentencing scheme is unconstitutional (*see Portalatin v Graham*, 624 F3d 69, 93-94), that County Court (Leone, J.) sentenced him as a persistent felony offender for exercising his right to a jury trial and thus that such sentencing was vindictive (*see People v Miller*, 65 NY2d 502, 507-508, *cert denied* 474 US 951; *see generally People v Young*, 94 NY2d 171, 177-180, *rearg denied* 94 NY2d 876), and that his sentence is unduly harsh and severe. Also contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish defendant's identity as the perpetrator of the crimes (*see People v Jackson*, 78 AD3d 1685), and to establish that the board wielded by defendant constituted a dangerous instrument within the meaning of Penal Law § 10.00 (13) (*see Matter of Shakiea B.*, 53 AD3d 1057, 1059). We reject the contention of defendant that reversal is required based upon the procedure employed by the court after receiving a note from the jury that expressed concern about defendant's notetaking during jury selection but contained no substantive inquiry by the jurors (*see People v Ochoa*, 14 NY3d 180, 187-188; *People v Gruyair*, 75 AD3d 401, 402-403, *lv denied* 15 NY3d 852). Contrary to the further contention of defendant, he was not denied his statutory right to a speedy trial (*see* CPL 30.30). The People established that they timely announced readiness for trial following their unsuccessful appeal of the order granting defendant's CPL 440.10 motion (*see* CPL 30.30 [5] [a]; *see generally People v Contrearas*, 227 AD2d 907, 908). Defendant failed to preserve for our review his contention that the court erred in denying his challenge for cause to a prospective juror inasmuch as he did not exhaust his peremptory challenges prior to the completion of jury selection (*see People v Walter*, 34 AD3d 1259, 1260, *lv denied* 8 NY3d 845, 850).

As the People correctly concede, however, count three of the indictment, charging defendant with burglary in the second degree, must be dismissed as a lesser inclusory concurrent count of count two, charging defendant with burglary in the first degree (*see People v Skinner*, 211 AD2d 979, 980, *lv denied* 86 NY2d 741; *People v Gloss*, 83 AD2d 782). We therefore modify the judgment accordingly. We have considered defendant's remaining contentions and conclude that none warrants reversal of the judgment or further modification thereof.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

129

KA 09-01818

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SERRELL M. GAYTON, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, 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 (Dennis M. Kehoe, A.J.), rendered September 3, 2009. The judgment convicted defendant, upon a jury verdict, of scheme to defraud in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the indictment is dismissed and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him, following a jury trial, of scheme to defraud in the second degree (Penal Law § 190.60 [1]), defendant contends that the evidence is legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). We agree, and we therefore reverse the judgment. This case arises out of an investigation conducted by the Food and Drug Administration into allegations that BioMedical Tissue Services (BTS), a human tissue procurement agency, was falsifying documents and fabricating consent forms related to bone and tissue removed from cadavers awaiting cremation. Defendant was a licensed funeral director and the owner of a funeral home, and he entered into an agreement with BTS whereby BTS would obtain consent from the next of kin of the decedents and would provide defendant's funeral home with a "facility fee" for the recovery of bone and tissue. BTS subsequently recovered tissue and/or bone from two decedents at defendant's funeral home without the consent of their next of kin. Defendant received money from BTS in connection with those recoveries, as well as money from the decedent's next of kin for services rendered by the funeral home.

"A person is guilty of a scheme to defraud in the second degree when he [or she] engages in a scheme constituting a systematic ongoing

course of conduct with intent to defraud more than one person or to obtain property from more than one person by false or fraudulent pretenses, representations or promises[] and so obtains property from one or more of such persons" (Penal Law § 190.60 [1]). Defendant contends that the money he received from BTS did not satisfy the statutory requirement that property actually be obtained from at least one of the persons sought to be defrauded and that such money did not constitute the property of the next of kin. Defendant further contends that there is no recognized property right in a dead body (*see generally Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50-53). The People respond that defendant defrauded the next of kin of their legal right to dispose of the decedents' bodies and that defendant was also financially rewarded for referring the decedents to BTS without consent, thereby deceiving their next of kin. The People contend that the fact that the money came from BTS does not render the conviction legally insufficient. We agree with defendant. Although the interest of next of kin in the bodies and body parts of their decedents may deserve legal protection, such rights and interests do not, under the current law, qualify as property (*see generally Colavito*, 8 NY3d at 50-53). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we nevertheless conclude that the People failed to establish that defendant obtained property from one of the persons sought to be defrauded (*see generally People v Mikuszewski*, 73 NY2d 407, 413). Thus, it cannot be said that " 'there is any valid line of reasoning and permissible inferences [that] could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial' " (*People v Cahill*, 2 NY3d 14, 57, quoting *Bleakley*, 69 NY2d at 495).

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

134

CA 10-00262

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

IN THE MATTER OF NIAGARA COUNTY, ON BEHALF OF ITS RESIDENTS, AND JOHN CERETTO, CLYDE L. BURMASTER, RICHARD E. UPDEGROVE AND PAUL B. WOJTASZEK, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED RESIDENTIAL CONSUMERS IN THE STATE OF NEW YORK, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

POWER AUTHORITY OF STATE OF NEW YORK, STATE OF NEW YORK, MICHAEL J. TOWNSEND, AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK, JAMES A. BESHA, SR., AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK, D. PATRICK CURLEY, AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK, ELISE M. CUSACK, AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK, JONATHAN D. FOSTER, AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK, AND EUGENE L. NICANDRI, AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK, RESPONDENTS-APPELLANTS.

TERRY L. BROWN, WHITE PLAINS (ARTHUR T. CAMBOURIS OF COUNSEL), AND WARD GREENBERG HELLER & REIDY LLP, ROCHESTER, FOR RESPONDENTS-APPELLANTS POWER AUTHORITY OF STATE OF NEW YORK, MICHAEL J. TOWNSEND, AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK, JAMES A. BESHA, SR., AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK, D. PATRICK CURLEY, AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK, ELISE M. CUSACK, AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK, JONATHAN D. FOSTER, AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK, AND EUGENE L. NICANDRI, AS TRUSTEE OF POWER AUTHORITY OF STATE OF NEW YORK.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS OF COUNSEL), FOR RESPONDENT-APPELLANT STATE OF NEW YORK.

WEBSTER SZANYI LLP, BUFFALO (CHARLES E. GRANEY OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeals, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 28, 2009 in a proceeding pursuant to CPLR article 78. The order denied the motions of respondents to dismiss the amended petition pursuant to CPLR 3211 (a) (3) and (7) and granted petitioners' motion

for leave to serve a complaint and discovery demands.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, respondents' motions to dismiss the amended petition are granted, petitioners' motion for leave to serve a complaint and discovery demands is denied and the amended petition is dismissed.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul certain temporary transfers and voluntary contributions (hereafter, payments) in the amount of $544 million from respondent Power Authority of State of New York (PASNY) to respondent State of New York (State). PASNY operates hydroelectric generation facilities located on and near the Niagara River, known collectively as the "Niagara Power Project" or the "Niagara Project." Respondents contend that Supreme Court erred in denying their motions to dismiss the amended petition and in granting petitioners' motion for leave to serve a complaint and discovery demands. We agree.

At the outset, we agree with respondents that the individual petitioners lack standing to challenge PASNY's payments to the State. A petitioner seeking to challenge a governmental or administrative action must show " 'injury in fact,' meaning that [he or she] will actually be harmed by the challenged administrative action" (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211). In other words, a petitioner must make a threshold showing that he or she "has sustained special damage, different in kind and degree from the community generally" (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 413, *rearg denied* 70 NY2d 694). "The existence of an injury in fact--an actual legal stake in the matter being adjudicated--ensures that the party seeking review has some concrete interest in prosecuting the action [that] casts the dispute 'in a form traditionally capable of judicial resolution' " (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772, quoting *Schlesinger v Reservists to Stop the War*, 418 US 208, 210-221). The injury, harm or damage cannot be conjectural, tenuous or hypothesized (*see New York State Assn. of Nurse Anesthetists*, 2 NY3d at 211, 214-215). Here, the individual petitioners failed to establish that they suffered an injury in fact as a result of the challenged payments. They allege that, as residential consumers of hydroelectric power, they are directly injured by PASNY's allegedly improper "diversion" of revenue to the State because they will pay more for electricity in the future as a result. We conclude, however, that the fact "[t]hat in the future the hypothesized harm might befall [residential consumers] does not at this time entitle [the individual petitioners] to maintain this [proceeding]" (*id.* at 214-215). Thus, the mere possibility of a future rate increase, without more, is insufficient to establish standing (*see generally id.*).

We also agree with the State that petitioner Niagara County (County) lacks capacity to maintain the proceeding, inasmuch as the County failed to establish that its claims fall within any recognized exception to the general rule barring suit against the State by a

municipality (*see Matter of County of Seneca v Eristoff*, 49 AD3d 950; *see generally City of New York v State of New York*, 86 NY2d 286). Even assuming, arguendo, that the County has capacity to sue the State (*see generally City of New York*, 86 NY2d 286), we conclude that it lacks standing. The County failed to establish that it suffered an injury in fact, and it cannot assert associational or representative standing inasmuch as the individual petitioners lack standing to maintain this proceeding (*see generally Matter of Brown v County of Erie* [appeal No. 2], 60 AD3d 1442, 1444).

In any event, we agree with respondents that the court erred in denying their motions to dismiss the amended petition for failure to state a cause of action pursuant to CPLR 3211 (a) (7). " 'It is well settled that bare legal conclusions and factual claims [that] are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action' " (*Olszewski v Waters of Orchard Park*, 303 AD2d 995, 995; *see Symbol Tech., Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 194). " 'When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one' " (*Olszewski*, 303 AD2d at 995; *see Kaufman v International Bus. Machs. Corp.*, 97 AD2d 925, 926, *affd* 61 NY2d 930).

We conclude that petitioners have no cause of action based upon federal law inasmuch as the Niagara Redevelopment Act ([NRA] 16 USC §§ 836-836a) does not protect residential consumers who, like the individual petitioners herein, purchase hydroelectric power from investor-owned utilities (IOUs). Rather, the NRA requires that, in disposing of 50% of the hydroelectric power from the Niagara Project, PASNY "shall give preference and priority to *public bodies and nonprofit cooperatives* within economic transmission distance" (16 USC § 836 [b] [1] [emphasis added]; *see Power Auth. of State of N.Y. v Federal Energy Regulatory Commn.*, 743 F2d 93, 103-104). Petitioners rely on the first clause of 16 USC § 836 (b) (1), which states that "at least 50[%] of the project power shall be available for sale and distribution *primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible*" (emphasis added). That language, however, is "precatory" in nature, and it "expresses a Congressional expectation, not a mandate" (*Power Auth. of State of N.Y.*, 743 F2d at 104). As the United States Court of Appeals for the Second Circuit explained, "Congress did not intend the customers of IOUs to receive preference power[] but rather mandated that they receive the benefit indirectly through the lower rates the private utilities would charge in response to the competition from the public bodies receiving preference power" (*Allegheny Elec. Coop., Inc. v Federal Energy Regulatory Commn.*, 922 F2d 73, 82, *cert denied* 502 US 810; *see Metropolitan Transp. Auth. v Federal Energy Regulatory Commn.*, 796 F2d 584, 591-592, *cert denied* 479 US 1085).

We agree with PASNY and the individual respondents, as trustees of PASNY (hereafter, PASNY respondents), that the court erred in

denying those parts of their motion to dismiss the claims for alleged violations of state law based on documentary evidence pursuant to CPLR 3211 (a) (1). The PASNY respondents submitted "documentary evidence definitively contradict[ing] . . . [and] conclusively dispos[ing] of" petitioners' state law claims (*Berardino v Ochlan*, 2 AD3d 556, 557). Pursuant to the Power Authority Act (Public Authorities Law § 1000 *et seq.*), PASNY "shall have the powers and duties . . . enumerated [therein], together with such others as may [thereafter] be conferred upon it by law" (§ 1002 [1]) and, here, the PASNY respondents submitted budget legislation expressly authorizing each of the challenged payments (*see* L 2009, ch 2, part A, § 2; L 2008, ch 59, part Y, § 7; part DD, § 1; L 2008, ch 57, part RR, § 11-a). To the extent that the budget legislation authorizing PASNY to make specified contributions to the State's general fund conflicts with any provision of the Power Authority Act, we agree with the PASNY respondents that the latter must yield to the former. "It is . . . a general rule of [statutory] construction that a prior general statute yields to a later specific or special statute" (*Erie County Water Auth. v Kramer*, 4 AD2d 545, 550, *affd* 5 NY2d 954; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 397; *County of Nassau v Town of Hempstead*, 84 AD2d 557, *lv dismissed* 55 NY2d 603, 606, 747, 921, 1037, *appeal dismissed* 56 NY2d 1031). Here, the budget bills are "not only the more specific statutory command[s], inasmuch as [they were] enacted specifically to provide for [the challenged payments], but [they are] also the later-enacted statute[s] vis-à-vis [Public Authorities Law § 1005 (5)]" (*People v Zephrin*, 14 NY3d 296, 301). Furthermore, each of the bills contains the phrase "[n]othwithstanding any provision of law to the contrary" or "[n]otwithstanding any law to the contrary," which is "the verbal formulation frequently employed for legislative directives intended to preempt any other potentially conflicting statute, wherever found in the State's laws" (*People v Mitchell*, 15 NY3d 93, 97).

Petitioners allege that the payments are unlawful because any and all surplus revenues of PASNY must be utilized to provide the "lowest possible rates" to residential consumers (Public Authorities Law § 1005 [5]). Indeed, the amended petition alleges that the court should "order[PASNY] to use any surplus from its operations relating to the Niagara Project for the benefit of residential consumers by *lowering their rates below actual costs*" (emphasis added). The statute does not, however, require PASNY to reduce their rates below cost (*see Auer v Dyson*, 125 Misc 2d 274, 277, *affd* 112 AD2d 803; *Auer v Dyson*, 110 Misc 2d 943, 949). Indeed, so long as PASNY is providing preference power at cost, i.e., "at prices representing cost of generation, plus capital and operating charges, plus a fair cost of transmission . . . [in order to] assure the resale of such power to domestic and rural consumers at the lowest possible price" (§ 1005 [5]), PASNY has fulfilled its statutory mandate and there is nothing in the Public Authorities Law prohibiting it from contributing surplus funds to the State (*see Auer*, 110 Misc 2d at 949).

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

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KA 10-00022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARRON W. LEWANDOWSKI, DEFENDANT-APPELLANT.

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered November 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.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20), defendant contends that the photo array was unduly suggestive. Defendant "forfeited the right to raise [that contention on appeal] because he pleaded guilty before [County Court] issued its suppression ruling" (*People v Fifield*, 24 AD3d 1221, 1222, *lv denied* 6 NY3d 775). In any event, defendant failed to preserve his contention for our review, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Magin*, 1 AD3d 1024).

Defendant's challenge to the factual sufficiency of the plea allocution is encompassed by his valid waiver of the right to appeal (*see People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789). In any event, defendant failed to preserve that challenge for our review by failing to move to withdraw the plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665). Although defendant's further contention that he is innocent and that his plea was coerced by defense counsel survives his valid waiver of the right to appeal (*see People v Wright*, 66 AD3d 1334, *lv denied* 13 NY3d 912), that contention is also unpreserved for our review (*see People v Lando*, 61 AD3d 1389, *lv denied* 13 NY3d 746). This case does not fall within the rare exception to the preservation rule set forth in *Lopez* (71 NY2d at 666), inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the

plea (*see People v Loper*, 38 AD3d 1178, 1179). In any event, "defendant's assertions of innocence and coercion [are] conclusory and belied by [his] statements during the plea colloquy" (*Wright*, 66 AD3d at 1334).

The contention of defendant that he was denied effective assistance of counsel does not survive the plea or his valid waiver of the right to appeal because defendant "failed to demonstrate 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 Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773 [internal quotation marks omitted]). In any event, the record establishes that defendant received meaningful representation (*see generally People v Ford*, 86 NY2d 397, 404).

Finally, defendant failed to preserve for our review his further contention that he was arrested without probable cause (*see People v Ojo*, 43 AD3d 1367, 1368, *lv denied* 10 NY3d 769, 11 NY3d 792), 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]).

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

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CA 10-00691

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

FLORINE ZANE, LISA ZANE-MORREALE,
SAVON KHIEMDAVANH AND SOUMBAY KHIEMDAVANH,
MINORS, BY THEIR GUARDIANS FLORINE ZANE AND
LISA ZANE-MORREALE, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MARK S. CORBETT, DEFENDANT,
AND D.A. BRIGHAM-MANLEY, DEFENDANT-RESPONDENT.

BOSMAN LAW FIRM, LLC, ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MITCHELL GORIS & STOKES, LLC, CAZENOVIA (MARK D. GORIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered October 27, 2009. The order and judgment granted the motion of defendant D.A. Brigham-Manley for a directed verdict of no cause of action.

It is hereby ORDERED that the order and judgment so appealed from is modified on the law by denying that part of the pretrial cross motion of defendant D.A. Brigham-Manley for summary judgment dismissing the fifth cause of action against her, denying that part of her motion at the close of proof at trial for judgment as a matter of law dismissing the sixth cause of action against her, reinstating the fifth and sixth causes of action against that defendant, granting those parts of plaintiffs' cross motion seeking leave to supplement the second amended complaint only with respect to the fifth and sixth causes of action, upon condition that plaintiffs shall serve the proposed pleading within 20 days of service of a copy of the order of this Court with notice of entry, and as modified the order and judgment is affirmed without costs, and a new trial is granted on the fifth and sixth causes of action against that defendant.

Memorandum: Plaintiffs commenced this action seeking, inter alia, damages for emotional distress that they sustained as a result of the actions of defendants. The facts of this case, developed in a week-long trial during which 13 witnesses testified for plaintiffs, are disturbing. The evidence established that plaintiff Florine Zane has lived in her house in Utica for 43 years. D.A. Brigham-Manley (defendant) moved into the house next door to Zane in approximately 1993 with her then-husband. The infant plaintiffs, who were 6 and 11

years old at the time most of the incidents took place, resided with Zane, their grandmother. Plaintiff Lisa Zane-Morreale is Zane's daughter and shares joint custody of the infant plaintiffs, her nephews, with Zane. Although Zane-Morreale did not live with Zane and the children, her testimony established that she was often present at Zane's house. The conflicts between plaintiffs and defendant began 10 years after defendant moved to that location, when defendant's husband moved out of defendant's house and defendant Mark S. Corbett, defendant's boyfriend, moved in. Over approximately the next 1½ years, Corbett began an unrelenting campaign of harassment against plaintiffs and their visitors, including swearing and making obscene gestures at them, blowing an air horn, videotaping as well as taking pictures of them, and shining a spotlight and red laser on them. For example, Zane testified at trial concerning incidents in which Corbett called her a "f*** asshole" and a "f*** fat ass bitch." She further testified that, any time someone came to her house, Corbett would come outside and would swear at the visitor.

Defendants' most disturbing conduct was directed at the infant plaintiffs. Zane testified that Corbett called the infant plaintiffs "crackheads" and "f*** little bastards" and made an obscene hand gesture toward them. The younger infant plaintiff testified at trial that both Corbett and defendant swore at him and his friends. He also testified that Corbett would stand outside and videotape him while he played with his friends. Although the testimony established that Corbett was the major offender of the outrageous conduct, the testimony further established that defendant was also a participant and in fact encouraged Corbett to engage in that conduct. For example, when Corbett was swearing at a member of plaintiffs' family, Corbett asked defendant, "Do you want me to beat his f*** ass?," to which she replied, "[Y]es, babe, beat his f*** ass." Corbett and defendant directed similar conduct toward an attorney on two occasions when the attorney visited Zane.

There are a multitude of similar examples of the behavior of defendant and Corbett documented throughout the record. There can be no dispute that such behavior is appalling and would be abhorrent to anyone living next door to them. Although Zane often telephoned the police regarding such behavior, the police would tell her that it was a "civil matter." In any event, those telephone calls had no effect on Corbett's behavior. Zane testified that, after the police came when she complained about Corbett shining a red light on her, he repeated that behavior after the police departed.

At the conclusion of the trial, Supreme Court granted defendant's motion for judgment as a matter of law against her, and directed that a judgment of no cause of action be entered in her favor. We agree with plaintiffs that the court erred in granting that part of defendant's motion with respect to the sixth cause of action against her, for negligence, and we therefore modify the order and judgment accordingly. Plaintiffs alleged in that cause of action, inter alia, that defendant was negligent in allowing the willful and malicious conduct of Corbett to occur at her residence. "A property owner, or one in control or possession of real property, has the duty to control

the conduct of those whom he [or she] permits to enter upon it . . .[,] provided that the owner knows that he [or she] can and has the opportunity to control the third-parties' conduct and is reasonably aware of the necessity for such control" (*Mangione v Dimino,* 39 AD2d 128, 129; *see D'Amico v Christie*, 71 NY2d 76, 85). Plaintiffs presented evidence establishing not only that defendant was aware of Corbett's conduct but that, as previously noted, she would join in and encourage his behavior.

Defendant contends that she did not have the opportunity to control Corbett's behavior because " '[a] reasonable opportunity or effective means to control a third person does not arise from the mere power to evict' that person as tenant" (*Torre v Burke Constr.*, 238 AD2d 941, 942). The evidence at trial, however, did not establish that defendant was Corbett's landlord but, rather, it suggested that Corbett was simply defendant's live-in boyfriend and thus was a guest on her property. Defendant further contends that she had no reason to be aware of the need to control Corbett because she did not know of any conduct by Corbett that endangered plaintiffs. The record belies that contention. Plaintiffs presented evidence that, inter alia, Corbett would shine a spotlight in Zane's eyes as she drove her vehicle in and out of her driveway, which created an unreasonable risk of harm to her. Based on the testimony presented by plaintiffs, it cannot be said that "it would . . . be utterly irrational for a jury to reach [a verdict in favor of plaintiffs]" on the negligence cause of action against defendant (*Cohen v Hallmark Cards*, 45 NY2d 493, 499).

We disagree with the dissent that plaintiffs cannot maintain the negligence cause of action against defendant because the harm to plaintiffs did not occur on defendant's property. Under the circumstances of this case, we conclude that such a narrow definition of a landowner's duty is untenable. Indeed, the facts in *DeRyss v New York Cent. R.R. Co.* (275 NY 85) support our position. In that case, defendant Joseph M. Hard, an employee of the defendant railroad, was working on a signal bridge owned and controlled by the railroad (*id.* at 89-90). While working, Hard permitted a non-employee of the railroad to climb up a ladder to the signal bridge and to use a rifle to shoot at ducks out in the river (*id.* at 90). In attempting to shoot the ducks, the non-employee shot and killed the plaintiff's decedent, who was sitting in a blind on property not owned by the railroad (*id.*). The case proceeded to trial, and the court, inter alia, found that Hard was liable as a matter of law (*id.* at 91). On appeal, the Court of Appeals affirmed that finding of liability, concluding that, "[i]f Hard, having control of the premises and the situation, not only permitted, but invited [the non-employee] to shoot at ducks in the river under circumstances and conditions [that] would indicate to a reasonably prudent [person] that it was dangerous to others so to do, he would be liable . . . for the consequences" (*id.* at 94). The Court determined that the issue was "whether reasonable care had been exercised" (*id.*). Thus, in *DeRyss*, the Court upheld a finding of liability against a person in possession of real property, despite the fact that the injury did not occur on that

property. We thus conclude that it is of no moment that the injury to plaintiffs occurred on property owned by Zane, rather than on defendant's property.

In our view, the Court of Appeals did not intend to depart from its ruling in *DeRyss* in its subsequent decision in *D'Amico v Christie*, relied upon by the dissent. In *D'Amico*, the Court concluded that "[l]andowners in general have a duty to act in a reasonable manner to prevent harm to those on their property . . .[, including] a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*D'Amico*, 71 NY2d at 85). The Court further concluded, however, that "the common-law doctrine relating to landowners' liability for dangerous conditions on their [property] . . . [was] wholly inapposite to the facts of [that] case" (*id.* at 87), in which an intoxicated employee left a company picnic and was in a motor vehicle accident several miles away (*id.* at 81). Thus, that case did not involve injury to a person on property adjacent to property owned by the defendant, as in *DeRyss* (275 NY at 90). In addition, we note that the Court cited to *DeRyss* in its decision in *D'Amico*, thereby upholding the viability of that case (*see D'Amico*, 71 NY2d at 85). Indeed, more recent cases continue to rely on *DeRyss* in imposing liability on owners of property, even where the injuries occurred on adjacent property (*see Murphy v Turian House*, 232 AD2d 535), and we believe the same result should occur here.

Plaintiffs' appeal from the order and judgment brings up for review the pretrial order granting in part defendant's cross motion for summary judgment dismissing the second amended complaint against her and denying plaintiffs' cross motion for leave to "supplement" the second amended complaint (*see* CPLR 5501 [a] [1]; *Burke v Crosson*, 85 NY2d 10, 15-16). We agree with plaintiffs that the court erred in granting that part of defendant's cross motion with respect to the fifth cause of action against her, for intentional infliction of emotional distress (IIED), and we therefore further modify the order and judgment accordingly.

"The tort [of IIED] has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121). Defendant contends that she was entitled to summary judgment dismissing the IIED cause of action against her because she established that the first and fourth elements did not apply, and plaintiffs failed to raise an issue of fact with respect to those elements. We reject that contention. With respect to the first element, plaintiffs alleged in their second amended complaint that, "[o]n a constant and even daily basis, the [d]efendants, without any just cause or provocation, [would] shout obscenities, vulgarities and use obscene nonverbal gestures directed at [plaintiffs]," videotape plaintiffs, and harass guests visiting plaintiffs. In their bill of particulars, plaintiffs gave specific examples of defendant's conduct

directed at plaintiffs. In support of her cross motion, defendant submitted the deposition testimony of Zane, which in fact supported the allegation of plaintiffs that defendant's conduct, which was repeated and often directed at the infant plaintiffs, was extreme and outrageous (*cf. Poliah v Westchester County Country Club, Inc.*, 14 AD3d 601; *Harville v Lowville Cent. School Dist.*, 245 AD2d 1106, *lv denied* 92 NY2d 808).

With respect to the fourth element of IIED, i.e., severe emotional distress, plaintiffs alleged that they "suffered fear, stress, pain, emotional upset, [and] great mental anguish." Again, in support of her cross motion, defendant submitted the deposition testimony of Zane that she consulted with her physician regarding her anxiety as a result of defendant's behavior and thus submitted evidence supporting the allegations of plaintiffs. Based on that testimony and the allegations in the pleadings, we conclude that defendant failed to meet her initial burden of establishing her entitlement to judgment as a matter of law dismissing the IIED cause of action against her with respect to Zane (*see generally Cavallaro v Pozzi*, 28 AD3d 1075, 1079). Even assuming, arguendo, that defendant met her initial burden on those parts of the cross motion concerning the IIED cause of action against her with respect to Zane-Morreale and the infant plaintiffs, we further conclude that plaintiffs raised a triable issue of fact regarding the fourth element of IIED with respect to those plaintiffs. In opposition to the cross motion, plaintiffs submitted the deposition testimony of Zane-Morreale, who testified that she suffered from sleeplessness and headaches as a result of defendants' conduct. She also testified that the younger infant plaintiff was treated by a medical provider because of defendants' conduct. We therefore conclude that "there exist[ed a special] likelihood of genuine and serious mental distress, arising from the special circumstances" (*Garcia v Lawrence Hosp.*, 5 AD3d 227, 228 [internal quotation marks omitted]). As we noted above, the harassment and outrageous conduct perpetrated by defendants against plaintiffs was unrelenting and lasted over 1½ years, and there is at a minimum an issue of fact whether severe emotional distress would result from that conduct.

Finally, plaintiffs, as limited by their brief on appeal, contend that the court erred in denying those parts of their cross motion seeking leave to supplement the second amended complaint only with respect to the fifth and sixth causes of action to include allegations of wrongdoing by defendants after the filing of the second amended complaint. We agree with plaintiffs, and we therefore further modify the order and judgment accordingly. It is well settled that, "[i]n the absence of prejudice or surprise, leave to [supplement] a pleading should be freely granted" (*Boxhorn v Alliance Imaging, Inc.*, 74 AD3d 1735, 1735; *see Bryndle v Safety-Kleen Sys., Inc.*, 66 AD3d 1396). Here, defendant cannot claim surprise or prejudice by the addition of such factual allegations, which did not form the basis for any new causes of action.

All concur except SCUDDER, P.J., and CARNI, J., who dissent in part and vote to affirm in the following Memorandum: We respectfully

dissent in part. We agree with the majority that the conduct of D.A. Brigham-Manley (defendant) and defendant Mark S. Corbett was reprehensible and has no place in a civil society. We conclude, however, that Supreme Court properly granted those parts of defendant's cross motion for summary judgment dismissing the fifth cause of action against her, for intentional infliction of emotional distress (IIED) with respect to plaintiff Lisa Zane-Morreale and the infant plaintiffs and properly granted that part of defendant's motion for judgment as a matter of law on the sixth cause of action against her, for negligence.

With respect to the IIED cause of action, we agree with the majority that the conduct attributable to defendant and Corbett, her live-in boyfriend, is particularly egregious and thus sufficient to support the "extreme and outrageous conduct" element of that cause of action (*Mitchell v Giambruno*, 35 AD3d 1040, 1041; *see Cavallaro v Pozzi*, 28 AD3d 1075, 1078-1079; *Stram v Farrell*, 223 AD2d 260, 265). We conclude, however, that defendant was entitled to summary judgment dismissing that cause of action insofar as it was asserted by Zane-Morreale and the infant plaintiffs. It is well established that plaintiffs pursuing a cause of action for IIED must establish not only that the conduct at issue was extreme and outrageous but also that they suffered "severe emotional distress" (*Howell v New York Post Co.*, 81 NY2d 115, 121). In support of her cross motion, defendant submitted plaintiffs' answer to the supplemental bill of particulars in which plaintiffs admitted that "[t]here [were] no doctors" that "treated, consulted with and/or examined" plaintiffs with respect to their alleged emotional distress. Defendant also submitted, however, the deposition testimony of plaintiff Florine Zane, in which she stated that she sought treatment from her primary care physician for symptoms attributable to defendants' conduct. Zane testified that she suffered from anxiety and sleeplessness and that she was prescribed medication to address those symptoms. We thus agree with the majority that defendant failed to establish her entitlement to judgment as a matter of law dismissing the IIED cause of action against her insofar as it was asserted by Zane (*see generally Cavallaro*, 28 AD3d at 1078-1079).

We conclude, however, that defendant met her initial burden of establishing that Zane-Morreale did not suffer from severe emotional distress. Even though plaintiffs, in opposition to defendant's cross motion, submitted evidence that Zane-Morreale suffered from headaches and sleeplessness as a result of defendants' conduct, plaintiffs' attorney conceded at oral argument of this appeal that Zane-Morreale did not have a sustainable cause of action for IIED. We therefore would affirm that part of the order and judgment granting defendant's cross motion with respect to the IIED cause of action against her insofar as it was asserted by Zane-Morreale.

With respect to the infant plaintiffs, plaintiffs submitted evidence in opposition to the cross motion that Zane-Morreale "believe[d]" the younger infant plaintiff may have been treated by a medical professional because he had "been frightened" by defendants' conduct. Plaintiffs failed to address any treatment sought by the

older infant plaintiff or any specific symptoms of distress exhibited by the infant plaintiffs. While there are occasions when severe emotional distress may be deemed genuine without the need for medical evidence (*see Garcia v Lawrence Hosp.*, 5 AD3d 227), we do not believe that this is such a case. The plaintiff in *Garcia* inadvertently smothered her one-day-old child who had been brought to her to breastfeed shortly after employees of the defendant hospital had medically sedated the plaintiff (*id.*). Under those circumstances, the emotional distress suffered by the plaintiff could be presumed. The presumption of emotional distress that arises from a mother inadvertently killing her own child cannot be equated to the alleged emotional distress arising from a neighbor's campaign of harassment. The lack of any evidence of medical or psychological treatment renders the claims of the infant plaintiffs for severe emotional distress conclusory and speculative (*see Roche v Claverack Coop. Ins. Co.*, 59 AD3d 914, 918; *Christenson v Gutman*, 249 AD2d 805, 808-809; *Erani v Flax*, 193 AD2d 777). We therefore would affirm that part of the order and judgment granting defendant's cross motion with respect to the IIED cause of action against her insofar as it was asserted by the infant plaintiffs.

With respect to the negligence cause of action, we conclude that the court properly granted that part of defendant's motion for judgment as a matter of law dismissing that cause of action against her. In their second amended complaint plaintiffs alleged that defendant was negligent in allowing or failing to control the conduct of Corbett while he was on defendant's premises. In support of her motion, defendant contended that she owed no duty to plaintiffs to control the conduct of Corbett. We agree.

It is well established that "[a] defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter [a] defendant can exercise such control" (*D'Amico v Christie*, 71 NY2d 76, 88; *see Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232-233; *Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8, *rearg denied* 72 NY2d 953). "This judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another. A duty may arise, however, where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant's actual control of the third person's actions[] or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others" (*Hamilton*, 96 NY2d at 233). No such relationship exists in this case.

Landowners also have a duty to protect those on their property "from foreseeable harm caused by the criminal conduct of others while they are on the premises . . . However, [that] duty does not extend beyond that limited class of plaintiffs to members of the community at large" (*id.*). As the Court of Appeals has written, "[l]andowners in general have a duty to act in a reasonable manner to prevent harm to those *on their property* . . .[, including] a duty to control the

conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*D'Amico*, 71 NY2d at 85 [emphasis added]; *see generally Di Ponzio v Riordan*, 224 AD2d 139, 142, *affd* 89 NY2d 578; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519). "[L]iability may be imposed only for *injuries that occurred on defendant's property[] or in an area under defendant's control* . . . [because the duty emanates] from the obligation of a landowner to keep its premises free of known dangerous conditions" (*D'Amico*, 71 NY2d at 85 [emphasis added]; *see Struebel v Fladd*, 75 AD3d 1164, 1165). Here, there is no dispute that plaintiffs were not injured on defendant's property or in an area under defendant's control.

The majority relies on *DeRyss v New York Cent. R.R. Co.* (275 NY 85) to support its conclusion that defendant owed plaintiffs a duty to control the conduct of Corbett, despite the fact that plaintiffs were not on defendant's property at the time in question. Inasmuch as *DeRyss* was decided over 50 years before *D'Amico*, we view *D'Amico* to be the controlling precedent. *D'Amico* explicitly limits the liability of landowners to injuries that occur on their premises.

"Despite often sympathetic facts in a particular case before them, courts must be mindful of the precedential, and consequential, future effects of their rulings[] and 'limit the legal consequences of wrongs to a controllable degree' " (*Lauer v City of New York*, 95 NY2d 95, 100). We thus conclude that defendant owed no duty to plaintiffs to control Corbett's conduct, although it was undisputably reprehensible and egregious. The facts of this case establish a cause of action against defendant for nuisance, not for negligence.

On the remaining issue, we agree with the majority that the court erred in denying those parts of plaintiffs' cross motion seeking leave to supplement the second amended complaint only with respect to the fifth and sixth causes of action.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

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CA 10-01721

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

ALEXANDROS TSOULIS,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ABBOTT BROS. II STEAK OUT, INC.,
DEFENDANT-APPELLANT-RESPONDENT.

PETRALIA, WEBB & O'CONNELL, P.C., ROCHESTER (ARNOLD R. PETRALIA OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

HALL AND KARZ, CANANDAIGUA (PETER ROLPH OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered April 8, 2010 in a breach of contract action. The order denied the motion of defendant and cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's cross motion for summary judgment on the cause of action for specific performance of the option to purchase and directing the parties to obtain a third appraisal to establish the price of the real property, and as modified the order is affirmed with costs.

Memorandum: Plaintiff commenced this action for, inter alia, specific performance of an option to purchase real property contained in the parties' lease agreement. Defendant appeals and plaintiff cross appeals from an order denying defendant's motion for summary judgment dismissing the complaint and denying plaintiff's cross motion for summary judgment on the complaint. Addressing first the cross appeal, we agree with plaintiff that Supreme Court erred in denying that part of the cross motion for summary judgment on the cause of action for specific performance of the option to purchase, and we therefore modify the order accordingly.

Pursuant to the option to purchase, plaintiff was required to pay rent, perform all other covenants in the lease agreement and notify defendant, in writing and during the term of the lease agreement, of his intention to exercise the option at least 60 days prior to the purchase. "[I]t is well settled that in order to validly exercise an option to purchase real property, one must strictly adhere to the terms and conditions of the option agreement" (*Weissman v Adler*, 187

AD2d 647, 648; *see Galapo v Feinberg*, 266 AD2d 150). Here, the record establishes that plaintiff complied with the conditions precedent and thus validly exercised the option to purchase (*see Kaygreen Realty Co., LLC v IG Second Generation Partners, LP*, 78 AD3d 1010, 1014; *cf. Galapo*, 266 AD2d 150; *see generally* 2 Dolan, Rasch's Landlord and Tenant—Summary Proceedings § 20:21, at 131 [4th ed]). We further conclude that plaintiff substantially and properly performed the terms and conditions of the option to purchase and that he is therefore entitled to specific performance (*see generally Arcy Paint Co. v Resnick*, 134 AD2d 392). We reject plaintiff's contention, however, that he is entitled to a credit for rent paid. Here, the lease agreement specifically provided that "[m]onthly rent shall continue to be paid by [plaintiff] after exercising [the] option [to purchase] and until closing [of the sale]" (*see Bostwick v Frankfield*, 74 NY 207, 212-213; *Barbarita v Shilling*, 111 AD2d 200, 201-202).

Contrary to defendant's contention on his appeal, the court properly denied his motion. Defendant's contention that plaintiff breached the option to purchase by failing to produce a formal contract within 60 days of notifying defendant of his intention to exercise the option to purchase is without merit. Furthermore, plaintiff was unable to execute such a contract based on defendant's improper conduct, including its withholding of two appraisal reports from plaintiff. Defendant further contends that the option to purchase constituted an unenforceable agreement to agree because the parties required the execution of a formal contract. We reject that contention inasmuch as the parties' lease agreement embodied all of the essential elements of the option to purchase (*see Sabetfard v Djavaheri Realty Corp.*, 18 AD3d 640, 641). Contrary to defendant's contention, plaintiff's failure to obtain a third appraisal of the property in question is not fatal to the option to purchase. Indeed, the record establishes that defendant withheld its two appraisals from plaintiff, and thus defendant is at fault for the failure to obtain the third appraisal. We therefore further modify the order by directing the parties to obtain the third appraisal to establish the price of the property in question (*see generally Arcy Paint Co.*, 134 AD2d 392). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

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KA 10-01100

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

EMMANUEL RODRIGUEZ, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), dated March 23, 2010. The order granted the suppression motion of defendant.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the motion to suppress evidence is denied, and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion to suppress evidence, i.e., a weapon and an oral statement made by defendant to a police officer. We reverse. The testimony at the suppression hearing established that an off-duty police officer was engaged in part-time employment, providing security at a bar in the City of Buffalo, when he was notified about a fight inside the bar. The off-duty officer brought one of the individuals involved in the fight outside and observed him walk to a vehicle. The off-duty officer heard the individual speak to another individual in Spanish about "a pistol" and "a gun." According to the testimony of the off-duty officer, upon hearing the conversation about a pistol and a gun, he used his cellular telephone to call an on-duty police officer, and he told the officer about the conversation. The officer who received the call, however, testified that the off-duty officer simply told him about a disturbance at the bar and did not mention a pistol or a gun.

When two police officers responded to the call, the off-duty officer motioned to a nearby vehicle. Two individuals were inside the vehicle, and defendant was attempting to enter the rear passenger seat. One of the officers testified that he approached defendant to "see what was going on." He asked defendant "just how's it going, you know, what are you up to, you got some ID, can I talk to you for a minute." Defendant responded by stating, "I have something in my

pocket, but it's not mine." The officer observed what he described as an "oddly shaped" sock sticking out of defendant's right rear pocket. The officer testified that "it looked more like it might have been some type of firearm." The officer pulled on the sock and it felt "like a handgun."

County Court concluded that the People failed to meet their burden of establishing that the officer's reason for approaching defendant extended beyond mere curiosity and noted that defendant was not engaged in any criminal activity at the time of the approach. The court thus concluded that the officer detained defendant "without any information concerning the situation he was there to investigate" and therefore suppressed the evidence seized from defendant and a statement thereafter made by him.

The parties agree that this case involves the four-tier common-law analysis of police-civilian encounters set forth by the Court of Appeals in *People v De Bour* (40 NY2d 210). The parties further agree that the encounter between the police and defendant here was a level one encounter, in which the police may lawfully approach an individual and inquire about basic, non-threatening matters such as name, address and destination, as long as the police have "some articulable reason" for the questioning (*id.* at 213; *see People v Hollman*, 79 NY2d 181, 185). Indeed, such "questions need be supported only by an objective credible reason not necessarily indicative of criminality" (*Hollman*, 79 NY2d at 185). We conclude that the People met their burden of establishing that the officer had an objective credible reason, i.e., information from an off-duty police officer concerning a disturbance, justifying the officer's request for basic non-threatening information from defendant (*see People v Reyes*, 83 NY2d 945, 946, *cert denied* 513 US 991; *People v Rush*, 31 AD3d 1115, *lv denied* 7 NY3d 870). Thus, under the circumstances presented here, we conclude that the court erred in granting that part of defendant's omnibus motion seeking suppression.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

229

CA 10-01879

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

WILJEFF, LLC, PLAINTIFF-RESPONDENT,

V ORDER

UNITED REALTY MANAGEMENT CORP.,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KELLEY DRYE & WARREN LLP, NEW YORK CITY (JOSEPH A. BOYLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (DAVID J. EDWARDS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 14, 2009 in a breach of contract action. The order denied defendant's motion to strike plaintiff's complaint and granted plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

230

CA 10-01922

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

WILJEFF, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UNITED REALTY MANAGEMENT CORP.,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KELLEY DRYE & WARREN LLP, NEW YORK CITY (JOSEPH A. BOYLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (DAVID J. EDWARDS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a partial judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 21, 2009 in a breach of contract action. The partial judgment, among other things, awarded plaintiff the sum of $156,001.20 against defendant.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, damages arising out of defendant's breach of the Management Agreement (Agreement) between the parties, pursuant to which defendant was to manage a mixed-use complex (complex) owned by plaintiff. Plaintiff terminated the Agreement after defendant allegedly failed to perform its obligations thereunder, and defendant subsequently withdrew a certain sum from a bank account owned by plaintiff as a termination fee, alleging that it was entitled to such a fee because plaintiff had terminated the Agreement without cause. Supreme Court denied defendant's motion to strike the complaint, granted plaintiff's cross motion for partial summary judgment on the second cause of action, determining that plaintiff's termination of the Agreement was for cause, and entered judgment against defendant in the amount of the termination fee that it improperly withdrew, plus interest and costs. We affirm.

Addressing first the cross motion, we reject defendant's contention that the court erred in considering certain affidavits submitted in support of the cross motion inasmuch as defendant was not permitted to depose those affiants. "Although a [cross] motion for summary judgment may be opposed on the ground 'that facts essential to justify opposition may exist but cannot then be stated'. . ., 'the

opposing party must make an evidentiary showing supporting [that] conclusion, mere speculation or conjecture being insufficient' " (*Preferred Capital v PBK, Inc.*, 309 AD2d 1168, 1169; *see Newman v Regent Contr. Corp.*, 31 AD3d 1133, 1134-1135). Here, the record establishes that three of the four disputed affiants testified with respect to facts derived from documents within defendant's possession, and defendant thus failed to establish that the court should have denied the cross motion or issued a continuance to permit disclosure concerning those facts (*see Croman v County of Oneida*, 32 AD3d 1186; *see also Mancuso v Allergy Assoc. of Rochester*, 70 AD3d 1499, 1501). We further conclude that the court properly considered the affidavits of plaintiff's senior counsel submitted in support of the cross motion inasmuch as he testified, inter alia, to his "intimate[ ] familiar[ity]" with the issues central to the affidavits and this case. Consequently, his affidavits "constitute sound evidentiary proof with respect to the matters addressed therein" (*Matter of Jamaica Neighborhood Based Alliance Coalition v Department of Social Servs. of State of N.Y.*, 227 AD2d 40, 43, *appeal dismissed* 89 NY2d 1085, *lv denied* 90 NY2d 808).

Contrary to defendant's further contention, we conclude that plaintiff met its initial burden of establishing, pursuant to the terms of the Agreement, that there was a material breach of that contract and thus that it was entitled to partial summary judgment determining that its termination thereof was for cause. "As a general rule, rescission of a contract is permitted for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual[] or technical breach, but . . . only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract" (*Lenel Sys. Intl., Inc. v Smith*, 34 AD3d 1284, 1285 [internal quotation marks omitted]; *see Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284). Generally, the question whether a breach is material is for the finder of fact but, " 'where the evidence concerning the materiality is clear and substantially uncontradicted . . .[,] the question is a matter of law for the court to decide' " (*Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 892), and that is the case here. In support of the cross motion, plaintiff submitted the affidavit of its certified public accountant, who described gross mismanagement of the complex by defendant, as well as the affidavit of a marketing director who had performed work for plaintiff and indicated that defendant failed to engage in the requisite marketing efforts.

In opposition to the cross motion, defendant did not contradict those affidavits and instead attempted to establish that plaintiff was not entitled to summary judgment because it had not stated in sufficient detail the nature of the alleged breach. We conclude that defendant failed to raise a triable issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Pursuant to the termination provisions of the Agreement, a party terminating the Agreement must give notice to the other party "specifying in detail a material breach [thereof] . . . ." The

Agreement does not define "in detail" and, inasmuch as there is no extrinsic evidence establishing the meaning of that phrase, we may determine the question whether the notice letter provided sufficient detail as a matter of law (*see Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 88, *lv denied* 97 NY2d 603). Here, the letter by which plaintiff notified defendant of the breach of the Agreement alleged, inter alia, that defendant kept inaccurate tenant and financial records, that defendant failed to provide timely, complete and accurate financial and accounting information with respect to the complex's rent roll, accounts receivable and cash reconciliation information and that defendant failed to provide timely notice of delinquency to tenants and plaintiff. Defendant thereafter offered a detailed response to those allegations. Thus, the error of which defendant was provided notice was defendant's *general* ineptitude, rather than the *specific consequences* of its approach to the management of the complex. Such notice was sufficient pursuant to the terms of the Agreement. Indeed, the Agreement required that plaintiff, as the party seeking to terminate the Agreement, specify in detail a material breach, i.e., defendant's pervasive incompetence, rather than imposing upon plaintiff the heavier obligation of particularizing each and every effect of the breach.

Contrary to defendant's contention, the decision of the Court of Appeals in *Chinatown Apts. v Chu Cho Lam* (51 NY2d 786) does not compel a different determination. That case does not articulate a general rule that effective notice of termination of any contract must always contain a recitation of each and every specific provision of the contract that allegedly has been violated. Further, there is no merit to the contention of defendant that the court's reference in its written decision to "industry standards" requires reversal inasmuch as that reference was a passing remark not essential to the decision (*see generally Edgreen v Learjet Corp.*, 180 AD2d 562).

We further conclude that the court did not abuse its discretion in denying defendant's motion to strike the complaint. "It is well settled that '[t]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial court's exercise of such authority should not be disturbed' " (*Carpenter v Browning-Ferris Indus.*, 307 AD2d 713, 715). We have "repeatedly held that the striking of a pleading is appropriate only where there is a clear showing that the failure to comply with discovery demands is willful, contumacious[] or in bad faith" (*Perry v Town of Geneva*, 64 AD3d 1225, 1226 [internal quotation marks omitted]). Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse (*see Hill v Oberoi*, 13 AD3d 1095). Here, there is no merit to defendant's contention that plaintiff failed to disclose certain e-mails, and plaintiff had a reasonable excuse for failing to produce certain witnesses for deposition, given the location at which defendant requested to depose those witnesses (*see* CPLR 3110 [1]).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

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KA 10-00023

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE HALL, DEFENDANT-APPELLANT.

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

WILLIE HALL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 2, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of assault in the first degree (Penal Law § 120.10 [4]), defendant contends that his plea was not knowing, voluntary, and intelligent because it was coerced by Supreme Court. Defendant failed to move to withdraw his plea or to vacate the judgment of conviction on that ground and therefore failed to preserve his contention for our review (*see People v Carlisle*, 50 AD3d 1451, *lv denied* 10 NY3d 957). In any event, defendant's contention is belied by the record inasmuch as, during the plea proceeding, defendant denied that he had been threatened or otherwise influenced against his will into pleading guilty (*see People v Worthy*, 46 AD3d 1382, *lv denied* 10 NY3d 773; *People v Gradia*, 28 AD3d 1206, 1206-1207, *lv denied* 7 NY3d 756). Furthermore, defendant was not coerced into pleading guilty by virtue of the fact that the court merely informed him of the range of sentences that he faced if he proceeded to trial and was convicted (*see People v Boyde*, 71 AD3d 1442, 1443, *lv denied* 15 NY3d 747; *People v Lando*, 61 AD3d 1389, *lv denied* 13 NY3d 746). Also contrary to defendant's contention, under the circumstances of this case the court did not coerce him into pleading guilty by commenting on the likelihood that defendant would be acquitted of a particular charge or on the strength of the People's evidence against him (*see generally People v Hamilton*, 45 AD3d 1396, *lv denied* 10 NY3d 765; *People v Campbell*, 236 AD2d 877, 878; *People v King*, 169 AD2d 480, 481).

Defendant failed to preserve for our review his further contention that he was not properly adjudicated a second violent felony offender because neither the People nor the court complied with CPL 400.15 (*see People v Myers*, 52 AD3d 1229; *see also People v Tatum*, 39 AD3d 571; *see generally People v Bouyea*, 64 NY2d 1140, 1142-1143). In any event, that contention is without merit. The record establishes that there was "substantial compliance with CPL 400.15 . . . inasmuch as both defendant and defense counsel 'received adequate notice and an opportunity to be heard with respect to the prior conviction' " (*Myers*, 52 AD3d at 1230; *see generally Bouyea*, 64 NY2d at 1142). Finally, contrary to the contention of defendant in his pro se supplemental brief, the sentence is not unduly harsh or severe.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

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KA 07-00717

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAPHAEL CASTILLO, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered January 10, 2007. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Pabon*, 175 AD2d 270).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

241

KA 10-01094

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY REEB, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), entered April 8, 2010 pursuant to the 2009 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 2004 conviction of criminal sale of a controlled substance in the third degree.

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

Memorandum: On October 13, 2004 defendant was convicted upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and was sentenced as a second felony offender to an indeterminate term of incarceration of 6 to 12 years. That crime was committed on September 20, 2003. On January 21, 2010, defendant applied for resentencing pursuant to CPL 440.46. County Court denied the application on the ground that defendant was ineligible for resentencing because he had a predicate conviction for an "exclusion offense," i.e., "a crime for which [defendant] was previously convicted within the preceding ten years, excluding any time during which [he] was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, which was . . . a violent felony offense as defined in section 70.02 of the penal law" (CPL 440.46 [5] [a] [i]). On October 27, 1995, defendant was convicted of two class D violent felony offenses, committed on August 18, 1995 and September 5, 1994, respectively.

The court erred in denying defendant's application on the ground that the two violent felony offenses fall within the definition of "exclusion offense" because they were committed within the 10-year period preceding the instant controlled substance offense for which defendant seeks resentencing. The phrase "within the preceding ten

years" in CPL 440.46 (5) does not refer to the period between the previous felonies and the present felony but, rather, it refers to the 10-year period preceding the date of filing of the application for resentencing (*see People v Hill*, ___ AD3d ___ [Feb. 18, 2011]; *People v Sosa*, ___ AD3d ___ [Feb. 8, 2011]). The record, however, supports the People's contention that, taking into account the time during which defendant was incarcerated between the previous felonies and the present felony, defendant's application was premature (*see* CPL 440.46 [5] [a]), and thus the application was properly denied.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

242

KA 09-02146

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM F. MURRAY, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered January 27, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

243

KA 08-00867

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GABRIEL GILMORE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered March 7, 2008. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

244

KA 08-01807

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARNELL HOWARD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered April 10, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, criminal mischief in the fourth degree and resisting arrest.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, assault in the second degree (Penal Law § 120.05 [former (3)]) and resisting arrest (§ 205.30), defendant contends that County Court erred in instructing the jury with respect to Penal Law § 35.27, concerning the prohibited use of physical force to resist an arrest when the arrest is being made by a person who would reasonably appear to be a police officer or a peace officer. Defendant failed to preserve that contention for our review (*see People v Whitfield*, 72 AD3d 1610, *lv denied* 15 NY3d 811; *People v Bermudez*, 38 AD3d 1244, *lv denied* 8 NY3d 981), 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]). Contrary to the further contention of defendant, the court did not abuse its discretion in denying his request for youthful offender status, and we decline defendant's request that we exercise our interest of justice jurisdiction to afford him such status (*see People v Jock*, 68 AD3d 1816, *lv denied* 14 NY3d 801).

Defendant's additional contention that the court penalized him for exercising his right to a jury trial by imposing a sentence greater than that offered during plea negotiations is not preserved for our review because he did not raise that contention at the time of sentencing (*see People v Dorn*, 71 AD3d 1523; *People v Tannis*, 36 AD3d 635, *lv denied* 8 NY3d 927), and in any event that contention lacks merit (*see Dorn*, 71 AD3d at 1524). Defendant also failed to preserve

for our review his contention that the court erred in considering an uncharged crime in sentencing him (*see People v Leeson*, 299 AD2d 919, *lv denied* 99 NY2d 560; *see also People v Washington*, 291 AD2d 780, 781, *lv denied* 98 NY2d 682), 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 is not unduly harsh or severe.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

245

KA 07-01060

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATALIE D. RIVERS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF 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 a jury verdict, of course of sexual conduct against a child in the second degree, sexual abuse in the second degree, criminal sexual act 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 upon a jury verdict of, inter alia, course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]) and sexual abuse in the second degree (§ 130.60 [2]). We reject defendant's contention that County Court erred in admitting evidence of uncharged acts of physical abuse to which the victim was subjected, as well as acts witnessed by her. Such evidence is admissible " 'to explain the victim's failure to reveal the ongoing sexual assaults' " (*People v Bennett*, 52 AD3d 1185, 1187, *lv denied* 11 NY3d 734; *see People v Bassett*, 55 AD3d 1434, 1436, *lv denied* 11 NY3d 922). Contrary to defendant's contention, the court properly weighed the probative value of the evidence of those uncharged acts against its potential for prejudice, as demonstrated by the fact that the court admitted evidence of certain acts while precluding evidence of other acts (*see generally People v Alvino*, 71 NY2d 233, 241-242; *People v Ventimiglia*, 52 NY2d 350, 359-360). In any event, we note that the court provided the jury with explicit limiting instructions on multiple occasions concerning the evidence of those uncharged acts, "thus minimizing any potential prejudice to defendant" (*Bassett*, 55 AD3d at 1436).

Defendant further contends that she was deprived of a fair trial based on numerous instances of prosecutorial misconduct on summation. Defendant failed to preserve her contention for our review with

respect to the majority of the alleged instances of prosecutorial misconduct (*see People v Figgins*, 72 AD3d 1599, 1600, *lv denied* 15 NY3d 893; *People v Brink*, 57 AD3d 1484, 1486, *lv denied* 12 NY3d 851) and, in any event, her contention is without merit. Most of the prosecutor's comments with which she takes issue "were fair response to defense counsel's summation" (*Figgins*, 72 AD3d at 1600) and, even assuming, arguendo, that some of the alleged instances were improper, we conclude that "none was so egregious as to deny defendant a fair trial" (*People v Milczakowskyj*, 73 AD3d 1453, 1454, *lv denied* 15 NY3d 754).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

246

KA 08-00223

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAQUAWN O. JOHNSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 (Richard A. Keenan, J.), rendered November 1, 2007. 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.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). County Court properly refused to suppress defendant's statements to the police. The testimony at the suppression hearing supports the court's conclusion that those statements were not the product of a *Payton* violation. Defendant was not arrested at his home but, rather, he voluntarily consented to accompany the police officers to the police station and made the statements in question there (*see People v Locke*, 25 AD3d 877, 878-879, *lv denied* 6 NY3d 835; *People v Shene*, 291 AD2d 823, *lv denied* 98 NY2d 655).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

247

KA 99-02223

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY SHERROD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Ronald H. Tills, A.J.), rendered June 16, 1998. The judgment convicted defendant, upon a jury verdict, of kidnapping in the second degree, rape in the first degree (three counts), sodomy in the first degree (three counts), robbery in the second degree, sexual abuse in the first degree and unauthorized use of a vehicle in the first degree.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

248

KA 09-01869

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM LIGGINS, DEFENDANT-APPELLANT.

JAMES A. BAKER, ITHACA, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Oneida County Court (Michael L. Dwyer, J.), dated August 6, 2009. The order denied the motion of defendant pursuant to CPL 440.10 to vacate the judgment convicting him of murder in the second degree.

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

Memorandum: We previously reversed an order denying without a hearing defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [2]), and we remitted the matter for a hearing on defendant's contention that he was denied effective assistance of counsel (*People v Liggins*, 56 AD3d 1265). Following that hearing on remittal, County Court denied defendant's motion. We affirm.

"In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404). Here, defendant pleaded guilty to the murder count in satisfaction of the indictment, which also charged him with criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]). He was convicted as a juvenile offender and received the minimum sentence of incarceration of five years to life in accordance with the plea agreement (*see* § 70.05 [2] [a]; [3] [a]). The record establishes that the 15-year-old defendant fired a weapon six times at a speeding vehicle on a residential street at approximately 6:00 on a summer evening, after the driver failed to pay for drugs sold to him by defendant. Only one bullet struck the vehicle, which was just over 260 feet from defendant, and it then struck the driver, killing him.

Contrary to defendant's contention, the failure of defense counsel to make pretrial motions did not deprive him of meaningful representation. The record establishes that the plea offer would be available only for approximately two weeks following defendant's arraignment on the indictment and that defense counsel engaged in a thorough investigation of the facts and the evidence against defendant. Upon researching the law in light of the facts and evidence against defendant, defense counsel assessed the likelihood of success of motions to dismiss or reduce the indictment and to suppress defendant's statement to the police as well as the weapon that was recovered. Defense counsel also assessed the likelihood that defendant would be acquitted after a trial of the murder count, and would instead be convicted of the lesser included offense of manslaughter in the second degree (*see* § 125.15 [2]). As the court properly determined following the hearing on defendant's CPL 440.10 motion, defense counsel's determination that an acquittal of the murder count was unlikely is supported both by the record and the standard for depraved indifference murder applicable at the time of the offense (*see People v Register*, 60 NY2d 270, 276, *cert denied* 466 US 953; *cf. People v Feingold*, 7 NY3d 288). We therefore agree with the court that defendant received meaningful representation (*see Ford*, 86 NY2d at 404; *People v Colon*, 72 AD3d 558, *lv denied* 15 NY3d 850).

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

251

CA 10-01700

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

CRYSTAL M. GONYOU AND SCOTT A. GONYOU,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROBERTA D. MCLAUGHLIN, DEFENDANT,
JUSTIN M. SANMARTIN AND ROBERT F. NOVAK,
DEFENDANTS-RESPONDENTS.

RIVETTE & RIVETTE, P.C., SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LEVENE GOULDIN & THOMPSON, LLP, BINGHAMTON (SARAH E. NUFFER OF COUNSEL), FOR DEFENDANT-RESPONDENT JUSTIN M. SANMARTIN.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (GARY H. COLLISON OF COUNSEL), FOR DEFENDANT-RESPONDENT ROBERT F. NOVAK.

Appeal from an order and judgment (one paper) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered April 30, 2010 in a personal injury action. The order and judgment granted the motions of defendants Justin M. Sanmartin and Robert F. Novak for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motions are denied and the complaint is reinstated against defendants Justin M. Sanmartin and Robert F. Novak, and the matter is remitted to Supreme Court, Cayuga County, for further proceedings in accordance with the following Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Crystal M. Gonyou (plaintiff) while she was operating a vehicle that was involved in a multi-vehicle accident. Supreme Court erred in granting the motions of Justin M. Sanmartin and Robert F. Novak (defendants) seeking summary judgment dismissing the complaint against them. "On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Howard v Espinosa*, 70 AD3d 1091, 1091-1092 [internal quotation marks omitted]). Here, defendants failed to meet that burden inasmuch as, by their own submissions in support of their motions, they raised triable issues of fact whether plaintiff sustained a serious injury within the meaning of the statute (*see Phoung Le Nguyen v Wilson*, 8

AD3d 1036). Because defendants failed to meet their initial burden, we do not consider the sufficiency of plaintiffs' opposing papers (*see Swartz v Kalson*, 78 AD3d 1553, 1554). We note, however, that the court in its order determined that plaintiffs' cross motion was moot in light of the dismissal of the complaint against defendants. Because we are reinstating the complaint against defendants, we remit the matter to Supreme Court to determine plaintiffs' cross motion.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

252

CA 10-01675

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

GENERAL STAR NATIONAL INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.,
DEFENDANT-RESPONDENT.

GALBO & ASSOCIATES, BUFFALO (LEO C. KELLETT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (SHARON ANGELINO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John A. Michalek, J.), entered December 18, 2009. The judgment denied the motion of plaintiff for summary judgment, granted the cross motion of defendant, declared that plaintiff is obligated to provide indemnity coverage to defendant, and awarded defendant attorney's fees and costs.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, defendant's cross motion is denied, the declaration is vacated, and plaintiff's motion is granted.

Memorandum: Plaintiff appeals from a judgment that denied its motion for summary judgment seeking to recover the amount of $350,000 plus statutory interest, the sum advanced by plaintiff to settle a claim against defendant. In addition, Supreme Court granted defendant's cross motion seeking a declaration that plaintiff is obligated to indemnify defendant, as well as the attorney's fees and costs incurred in defending this action. We reverse. We agree with plaintiff that it was not required to provide timely disclaimer of coverage under Insurance Law § 3420 (d) inasmuch as its disclaimer was based on the fact that the underlying claim fell outside the scope of the policy's coverage, and was not based on a policy exclusion (*see generally Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-189). The policy at issue covered defendant, as a subsidiary of Niagara Frontier Transportation Authority (NFTA), for damages due to bodily injuries arising out of "the performance of [NFTA's] law enforcement duties," and here the underlying claim did not arise out of the performance of such duties. We further agree with plaintiff that it was not estopped from disclaiming coverage based on its timely

reservation of the "right to claim that the policy does not cover the situation at issue, while defending the action" (*O'Dowd v American Sur. Co. of N.Y.*, 3 NY2d 347, 355). Finally, inasmuch as defendant was not entitled to summary judgment in its favor on the merits, defendant was also not entitled to attorney's fees and costs incurred in defending this action (*see generally U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597-598).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

253

CA 10-02172

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

IN THE MATTER OF NEW YORK SCHOOLS INSURANCE RECIPROCAL, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA ARMITAGE, RESPONDENT-RESPONDENT.

ALEX CELNIKER, ROMAN A. CELNIKER AND LIBERTY MUTUAL INSURANCE COMPANY, PROPOSED ADDITIONAL RESPONDENTS-RESPONDENTS.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (LAUREN E. DILLON OF COUNSEL), FOR PETITIONER-APPELLANT.

LOUDEN LAW FIRM, P.C., MALTA (MICHELLE MURPHY-LOUDEN OF COUNSEL), FOR RESPONDENT-RESPONDENT PATRICIA ARMITAGE.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered February 10, 2010. 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 appeals from an order denying its petition seeking a permanent stay of arbitration. Respondent sought arbitration following petitioner's denial of her claim for no-fault insurance benefits. The propriety of the denial of benefits is a "dispute involving the insurer's liability to pay first party benefits" (Insurance Law § 5106 [b]), and we therefore conclude that Supreme Court properly refused to grant a permanent stay of arbitration (*see generally Ryder Truck Lines v Maiorano*, 44 NY2d 364, 368-369). Petitioner further contends that the issue whether the offset for workers' compensation benefits exceeds the monthly limit of first party benefits is not a matter for arbitration. We reject that contention (*see* § 5102 [a] [2]; *see generally* § 5106 [b]; *Matter of Johnson v Buffalo & Erie County Private Indus. Council*, 84 NY2d 13, 18-19; *Matter of Cady [Aetna Life & Cas. Co.]*, 96 AD2d 967, *affd* 61 NY2d 594). Finally, we reject petitioner's contention that, by refusing to grant a permanent stay of arbitration, the court denied petitioner its right to seek a loss-transfer claim from additional proposed respondents (*see generally Matter of Liberty Mut. Ins. Co.*

[Hanover Ins. Co.], 307 AD2d 40, 42-43).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

254

CA 10-02125

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

JEFF CONIBER, DOING BUSINESS AS JEFF CONIBER TRUCKING, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CENTER POINT TRANSFER STATION, INC., MATTHEW W. LOUGHRY AND KENNETH LOUGHRY, DEFENDANTS-APPELLANTS.

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered February 2, 2010 in a breach of contract action. The order, insofar as appealed from, denied the cross motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the cross motion is denied without prejudice and as modified the order is affirmed without costs.

Memorandum: Supreme Court properly concluded that it was premature to grant defendants' cross motion for summary judgment dismissing the complaint at this stage of the litigation, in view of the limited discovery that has been conducted (*see* CPLR 3212 [f]; *Sportiello v City of New York*, 6 AD3d 421). We further conclude, however, that the court should have denied the cross motion without prejudice (*see Hall v Rite Aid Corp.*, 37 AD3d 1160). We therefore modify the order accordingly.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

255

CA 10-01149

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

MARITA CAR RENTALS, DOING BUSINESS AS BUDGET RENT-A-CAR, PLAINTIFF-RESPONDENT,

V ORDER

GENERAL STAR MANAGEMENT COMPANY, ET AL., DEFENDANTS, AND DAMON & MOREY, LLP, DEFENDANT-APPELLANT.

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

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM J. BRENNAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered September 3, 2009. The order denied the motion of defendant Damon & Morey, LLP to dismiss the supplemental amended complaint.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on February 24, 2011,

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

256

CA 10-02260

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

OTU A. OBOT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MEDAILLE COLLEGE, DEFENDANT-RESPONDENT.

OTU A. OBOT, PLAINTIFF-APPELLANT PRO SE.

PHILLIPS LYTLE LLP, BUFFALO (ERICKA N. BENNETT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered May 25, 2010. The order struck and vacated the note of issue and certificate of readiness.

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

Memorandum: Inasmuch as no appeal lies as of right "from an ex parte order, including an order entered sua sponte" (*Sholes v Meagher*, 100 NY2d 333, 335; *see Bajrovic v Jeff Anders Trucking*, 52 AD3d 553), and permission to appeal has not been granted (*see* CPLR 5701 [c]), the appeal must be dismissed (*see Mohler v Nardone*, 53 AD3d 600).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

257

CA 10-01068

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

FS KIDS, LLC, DOING BUSINESS AS BUDWEY'S FOOD MARKET, MASK FOODS, INC., VALU HOME CENTERS, INC., KBLM FOODS, INC., DOING BUSINESS AS BLASDELL JUBILEE, KDJB FOODS, INC., DOING BUSINESS AS SAVE-A-LOT LACKAWANNA, GAIGE & SON GROCERY, INC., DOING BUSINESS AS CORNING JUBILEE, TJ'S MARKET, INC., DOING BUSINESS AS HORSEHEADS JUBILEE, BB&T SUPERMARKETS INC., DOING BUSINESS AS ATTICA JUBILEE, BNR-LARSON, LLC, DOING BUSINESS AS CORFU IGA, AND GIFT EXPRESS OF NEW YORK, INC., DOING BUSINESS AS THE MARKET IN THE SQUARE, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AS THEY, AS FORMER EMPLOYEE MEMBERS/PARTICIPANTS IN THE WHOLESALE AND RETAIL WORKERS' COMPENSATION TRUST OF NEW YORK, PLAINTIFFS-RESPONDENTS-APPELLANTS,

ORDER

V

COMPENSATION RISK MANAGERS, LLC, DEFENDANT-APPELLANT-RESPONDENT. (APPEAL NO. 1.)

HITCHCOCK & CUMMINGS, LLP, NEW YORK CITY (CHRISTOPHER B. HITCHCOCK OF COUNSEL), AND CONNORS & VILARDO, LLP, BUFFALO, FOR DEFENDANT-APPELLANT-RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered August 4, 2009 in a breach of contract action. The order, among other things, granted in part defendant's motion to dismiss plaintiffs' supplemental and amended complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Baker v 16 Sutton Place Apt. Corp.*, 2 AD3d 119, 120) and the cross appeal is dismissed without costs as abandoned

(*see Restey v Higgins*, 252 AD2d 954).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

258

CA 10-01069

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

FS KIDS, LLC, DOING BUSINESS AS BUDWEY'S FOOD MARKET, MASK FOODS, INC., VALU HOME CENTERS, INC., KBLM FOODS, INC., DOING BUSINESS AS BLASDELL JUBILEE, KDJB FOODS, INC., DOING BUSINESS AS SAVE-A-LOT LACKAWANNA, GAIGE & SON GROCERY, INC., DOING BUSINESS AS CORNING JUBILEE, TJ'S MARKET, INC., DOING BUSINESS AS HORSEHEADS JUBILEE, BB&T SUPERMARKETS INC., DOING BUSINESS AS ATTICA JUBILEE, BNR-LARSON, LLC, DOING BUSINESS AS CORFU IGA, AND GIFT EXPRESS OF NEW YORK, INC., DOING BUSINESS AS THE MARKET IN THE SQUARE, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AS THEY, AS FORMER EMPLOYEE MEMBERS/PARTICIPANTS IN THE WHOLESALE AND RETAIL WORKERS' COMPENSATION TRUST OF NEW YORK, PLAINTIFFS-RESPONDENTS,

ORDER

V

COMPENSATION RISK MANAGERS, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

HITCHCOCK & CUMMINGS, LLP, NEW YORK CITY (CHRISTOPHER B. HITCHCOCK OF COUNSEL), AND CONNORS & VILARDO, LLP, BUFFALO, FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered April 14, 2010 in a breach of contract action. The order, among other things, denied in part defendant's motion to dismiss plaintiffs' second amended 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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

259

TP 10-02012

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

IN THE MATTER OF EDDIE M. ROBINSON, PETITIONER,

V MEMORANDUM AND 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 (FRANK K. WALSH 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 October 1, 2010) to review a determination of respondents. The determination placed petitioner in involuntary protective custody.

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

Memorandum: Petitioner, an inmate in a correctional facility, commenced this CPLR article 78 proceeding seeking to annul the determination, following a hearing, that he should be placed into involuntary protective custody. The determination was based upon a letter that petitioner wrote criticizing the Muslim religion, which he showed to other inmates and sent to the facility's Imam. Contrary to the contention of petitioner, substantial evidence supports the determination that he should be placed into involuntary protective custody on the ground that he "may be a potential victim" (7 NYCRR 330.2 [b]; *see Matter of Bartley v Fischer*, 73 AD3d 1363). That evidence included petitioner's testimony at the hearing that he wrote the letter, as well as the testimony of an inmate to whom petitioner showed the letter, the correction officer who wrote the recommendation that petitioner be placed into involuntary protective custody, and the Imam (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966; *People ex rel. Vega v Smith*, 66 NY2d 130, 139). Petitioner's denial that he feared for his personal safety and his contention that he did not willingly absent himself from the hearing merely presented a credibility issue that the Hearing Officer was free to resolve against him (*see Matter of Miller v New York State Dept. of Correctional*

Servs., 295 AD2d 714).

Petitioner further contends that he was denied the right to confront the confidential witnesses against him. He did not raise that contention on his administrative appeal, and thus he failed to exhaust his administrative remedies with respect to that issue (*see Matter of Tifer v Coughlin*, 214 AD2d 1036; *Matter of Nelson v Coughlin*, 188 AD2d 1071, *appeal dismissed* 81 NY2d 834; *see generally Matter of Khan v New York State Dept. of Health*, 96 NY2d 879). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

261

TP 10-01476

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

IN THE MATTER OF CHARLES MCALLISTER, PETITIONER,

V ORDER

PATRICIA LECONEY, SUPERINTENDENT, CAPE VINCENT CORRECTIONAL FACILITY, RESPONDENT.

CHARLES MCALLISTER, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO 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, Jefferson County [Hugh A. Gilbert, J.], entered June 21, 2010) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

262

KA 09-02437

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PEREZ WATTS, DEFENDANT-APPELLANT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ROSEANN B. MACKECHNIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered September 29, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Lococo*, 92 NY2d 825, 827).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

263

KA 05-00837

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EARL J. REED, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Dennis M. Kehoe, A.J.), rendered March 17, 2005. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon 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, following a jury trial, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]), defendant contends that County Court erred in denying his motion to sever his trial from that of his codefendant. We reject that contention for the same reasons as those set forth in our decision in *People v Wilburn* (50 AD3d 1617, 1618, *lv denied* 11 NY3d 742), the appeal by defendant's codefendant. We reject defendant's further contention that the court erred in denying his request for an adverse inference charge with respect to the People's failure to present certain items of physical evidence. Those items were not obtained by the police, "and there [was] no indication that the People . . . had those items 'within their possession and control' " (*People v Tutt*, 305 AD2d 987, *lv denied* 100 NY2d 588). Finally, we reject defendant's contention that he was deprived of effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

264

KA 10-01364

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSEPH V. COSTANTINO, 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 (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered March 25, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Griffin*, 239 AD2d 936).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

265

CAF 10-00295

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

IN THE MATTER OF JULIANI B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT; ORDER

DENISE M., RESPONDENT-APPELLANT,
AND WALTER R., RESPONDENT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered December 30, 2009 in a proceeding pursuant to Family Court Act article 10. The order determined the subject child to be a neglected child by the acts and omissions of both respondents.

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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

269

CA 10-02252

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

IN THE MATTER OF COUNTY OF ERIE,
PETITIONER-RESPONDENT,

V ORDER

CIVIL SERVICE EMPLOYEES ASSOCIATION,
LOCAL 815, RESPONDENT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (DIANE M. ROBERTS OF COUNSEL), FOR RESPONDENT-APPELLANT.

MARTIN A. POLOWY, ACTING COUNTY ATTORNEY, BUFFALO (DAVID J. SLEIGHT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered February 11, 2010 in a proceeding pursuant to CPLR article 75. The order, among other things, granted the petition for a permanent stay of arbitration.

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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

270

CA 10-02238

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

JAMES CONTI AND DEBORAH CONTI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS WATER BOARD,
DEFENDANT-RESPONDENT.

LEONARD G. TILNEY, JR., LOCKPORT, FOR PLAINTIFFS-APPELLANTS.

HARRIS BEACH PLLC, BUFFALO (KIMBERLY A. COLAIACOVO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 26, 2010. The order granted the motion of defendant for summary judgment and dismissed 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: Plaintiffs commenced this action seeking to recover damages they sustained as the result of a sewage backup on their property, allegedly caused by defendant's failure to maintain its sewer system in a proper manner. We conclude that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint on the ground that it did not have prior notice of a defective or dangerous condition in the sewer system.

Defendant failed to meet its initial burden of establishing "that it had no notice of a dangerous condition [and did not have] reason to believe that the pipes [had] shifted or deteriorated and [were] likely to cause injury, and that it regularly inspected and maintained the subject sewer line" (*Azizi v Village of Croton-on-Hudson*, 79 AD3d 953, 955 [internal quotation marks omitted]; *see generally De Witt Props. v City of New York*, 44 NY2d 417, 423-424; *Fireman's Fund Ins. Co. v County of Nassau*, 66 AD3d 823, 824). In support of its motion, defendant submitted the affirmation of its attorney, who averred that defendant "had no notice of a dangerous condition or reason to believe that the pipes had shifted or deteriorated or were likely to cause injury." It is well established, however, that an affirmation submitted by an attorney who has no personal knowledge of the facts is without evidentiary value (*see Deronde Prods. v Steve Gen. Contr.*, 302

AD2d 989). Defendant's reliance on plaintiffs' response to one of its interrogatories in support of its motion is equally unavailing. Defendant asked plaintiffs to "[s]tate . . . any and all notice/claims made to [d]efendant[,] including the date, time, place, manner and mode of [such] notice [or claims] . . . ." In response thereto, plaintiffs provided the date that they served the notice of claim upon defendant. Contrary to defendant's contention, plaintiffs did not thereby concede that defendant lacked actual or constructive notice of the allegedly defective condition of the sewer system. Rather, plaintiffs alleged in their response to other interrogatories that defendant failed "to make . . . timely inspections and repairs to the sewers" near plaintiffs' residence and that "[t]he sinking and eventual collapse of the sewer main . . . were facts known or [that] could have been known with reasonable inspection by [d]efendant."

Although defendant contends that plaintiffs failed to establish that it had notice of a dangerous or defective condition in the sewer system, it was defendant's burden on the motion to come forward with evidence in admissible form establishing its entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendant's failure to meet its initial burden requires denial of the motion, "regardless of the sufficiency of [plaintiffs'] opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *see Ayotte v Gervasio*, 81 NY2d 1062, 1063).

In light of our conclusion, we do not address plaintiffs' remaining contentions.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

272

CA 10-01891

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

ALTON J. COLEMAN, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOANNE COLEMAN, DEFENDANT-RESPONDENT.

TERRENCE G. BARKER, ROCHESTER, FOR PLAINTIFF-APPELLANT.

DENNIS R. DAWSON, GENESEO, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Livingston County (Philip A. Litteer, R.), entered December 11, 2009 in a divorce action. The judgment, inter alia, directed plaintiff to pay weekly maintenance, to pay maintenance arrears in two equal installments, and granted defendant a distributive award totaling $5,500.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sixth decretal paragraph and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff appeals from a judgment of divorce that, inter alia, directed him to pay $275 per week in maintenance and to pay maintenance arrears in two equal installments, as well as granted defendant a distributive award totaling $5,500. We reject plaintiff's contention that the Referee erred in imputing income of $12,000 to him. It is well settled that "a 'court may properly find a true or potential income higher than that claimed where the party's account of his or her finances is not credible' " (*Sharlow v Sharlow*, 77 AD3d 1430, 1431). We see no basis to disturb the Referee's conclusion that plaintiff had been underreporting his income on his tax returns, especially in light of plaintiff's receipt of various items of personal property for which he "bartered" but that he did not report on his tax returns (*see id.*; *Beroza v Hendler*, 71 AD3d 615, 617, *lv dismissed* 15 NY3d 905; *Matter of Rubley v Longworth*, 35 AD3d 1129, 1130-1131, *lv denied* 8 NY3d 811).

We reject plaintiff's further contention that the Referee abused his discretion in setting the amount of maintenance, inasmuch as the record demonstrates that he properly weighed the factors set forth in Domestic Relations Law § 236 (B) (6) (*see Frost v Frost*, 49 AD3d 1150, 1150-1151; *see generally Hartog v Hartog*, 85 NY2d 36, 51). We agree with plaintiff, however, that there is an inadequate basis in the record to award defendant $2,000 per year for a period of two years based on plaintiff's decision to claim the parties' son and

defendant's daughter from a prior relationship on his individual tax returns. No evidence was presented with respect to the benefit that plaintiff received or the amount defendant would have obtained had she been allowed to claim the children on her own tax returns. We therefore modify the judgment accordingly (*see generally Dietz v Dietz*, 203 AD2d 879, 882; *Bofford v Bofford*, 117 AD2d 643, 645, *lv dismissed* 68 NY2d 808).

We reject plaintiff's contention that the Referee abused his discretion in awarding $1,500 to defendant for funds withdrawn from her bank account by plaintiff without her permission, inasmuch as plaintiff's own testimony established that those funds were defendant's separate property (*cf. Askew v Askew*, 268 AD2d 635, 637). Finally, we conclude that the Referee did not abuse his discretion in directing plaintiff to pay maintenance arrears in two equal installments three months apart (*see Jarkow v Jarkow*, 276 AD2d 748; *Matter of Mays v Mays*, 51 AD2d 550).

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

275

CA 10-01198

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

IN THE MATTER OF VINCENT F. GIGLIOTTI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CYNTHIA A. BIANCO, AS SUPERINTENDENT OF SCHOOLS OF CITY SCHOOL DISTRICT OF CITY OF NIAGARA FALLS, RUSSELL PETROZZI, AS PRESIDENT OF NIAGARA FALLS BOARD OF EDUCATION, NIAGARA FALLS BOARD OF EDUCATION AND SCHOOL DISTRICT OF CITY OF NIAGARA FALLS,
RESPONDENTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

REDEN & O'DONNELL, LLP, BUFFALO (TERRY M. SUGRUE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered March 19, 2010 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the award of attorneys' fees and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination terminating his employment with respondent School District of City of Niagara Falls (District) for failure to comply with the District's residency policy, which requires District employees to be domiciliaries of the City of Niagara Falls. Supreme Court properly granted the petition. It is well established that "domicile means living in [a] locality with intent to make it a fixed and permanent home" (*Matter of Newcomb*, 192 NY 238, 250). Further, "[a]n existing domicile . . . continues until a new one is acquired, and a party . . . alleging a change in domicile has the burden to prove the change by clear and convincing evidence" (*Matter of Hosley v Curry*, 85 NY2d 447, 451, *rearg denied* 85 NY2d 1033; *see Matter of Larkin v Herbert*, 185 AD2d 607, 608). "For a change to a new domicile to be effected, there must be a union of residence in fact and an 'absolute and fixed intention' to abandon the former and make the new locality a fixed and permanent home" (*Hosley*, 85 NY2d at 451, quoting *Newcomb*, 192 NY at 251; *see Matter of Johnson*

v Town of Amherst, 74 AD3d 1896, *lv denied* 15 NY3d 712).

Here, the evidence presented to respondent Niagara Falls Board of Education established that petitioner was a lifelong resident of Niagara Falls. Beginning in 1992 or 1993, petitioner resided with his elderly mother at a residence in Niagara Falls after his divorce from his first wife. In April 2007, while he was temporarily laid off from his employment with the District, petitioner married his longtime girlfriend, in part because he was at risk of losing his health benefits. Petitioner and his wife agreed that petitioner would continue to live in Niagara Falls with his mother, while his wife would continue to live at her residence in Ransomville, New York, which she purchased before the marriage. Petitioner's personal effects remained at his residence in Niagara Falls, although he keeps a set of golf clubs and some clothing at his wife's residence in Ransomville. Petitioner resides with his wife in Ransomville on weekends. Petitioner listed the Niagara Falls address on, inter alia, his federal income tax forms, his New York State driver's license, his social security card, his marriage certificate, and bank and credit statements. Moreover, petitioner's vehicle is registered at the Niagara Falls address, and he is registered to vote in Niagara Falls. We thus conclude that the determination that petitioner changed his domicile from Niagara Falls to Ransomville was arbitrary and capricious (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231).

Contrary to respondents' contention, this proceeding does not involve a substantial evidence issue requiring transfer to this Court (*see* CPLR 7803 [4]; 7804 [g]). A substantial evidence issue " 'arises only where a quasi-judicial hearing has been held and evidence taken pursuant to law' " (*Matter of Bonded Concrete v Town Bd. of Town of Rotterdam*, 176 AD2d 1137, 1137-1138). Here, the District did not conduct a hearing before terminating petitioner's employment, nor was such a hearing "required by statute or law" (*Matter of Colton v Berman*, 21 NY2d 322, 329; *see Matter of O'Connor v Board of Educ. of City School Dist. of City of Niagara Falls*, 48 AD3d 1254, *lv dismissed* 10 NY3d 928; *see generally Matter of Felix v New York City Dept. of Citywide Admin. Servs.*, 3 NY3d 498, 501).

We agree with respondents, however, that the court erred in awarding attorneys' fees to petitioner, and we therefore modify the judgment accordingly. "In New York the general rule is that each litigant is required to absorb the cost of his [or her] own attorney[s'] fees . . . in the absence of a contractual or statutory liability" (*Larsen v Rotolo*, 78 AD3d 1683, 1683-1684 [internal quotation marks omitted]). Petitioner contends, however, that the award is warranted as a sanction for frivolous conduct pursuant to 22 NYCRR 130-1.1. We reject that contention. A court may award attorneys' fees pursuant to that regulation "only upon a written decision setting forth the conduct on which the award . . . is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded . . . to be

appropriate" (22 NYCRR 130-1.2; *see Ikeda v Tedesco*, 70 AD3d 1498) and, here, the court failed to disclose its basis for awarding attorneys' fees to petitioner (*see Carnicelli v Carnicelli*, 300 AD2d 1093).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

280

KA 10-00812

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY P. DIOGUARDI, ALSO KNOWN AS ANTHONY DIOGUARDI, 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 May 12, 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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

283

TP 10-00458

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

IN THE MATTER OF FRANKLIN JOEL T. HAMPTON, JR.,
PETITIONER,

V MEMORANDUM AND ORDER

ROBERT A. KIRKPATRICK, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, AND HENRY LEMONS, JR., INTERIM CHAIRMAN, NEW YORK STATE DIVISION OF PAROLE, RESPONDENTS.

FRANKLIN JOEL T. HAMPTON, JR., PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN 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 February 18, 2010) to review a determination of respondents. The determination revoked petitioner's parole after a final parole revocation hearing.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the second, third and fifth ordering paragraphs and dismissing the petition and as modified the judgment is affirmed without costs.

Memorandum: We agree with petitioner that Supreme Court (Feroleto, J.), upon determining that petitioner was not entitled to habeas corpus relief, erred in converting this habeas corpus proceeding into one pursuant to CPLR article 78 inasmuch as "the sole basis for petitioner's continued incarceration is the determination of the Parole Board to revoke petitioner's parole" (*Matter of Zientek v Herbert*, 199 AD2d 1075, 1076; *see People ex rel. Brazeau v McLaughlin*, 233 AD2d 724, 725, *lv denied* 89 NY2d 810; *People ex rel. Smith v Mantello*, 167 AD2d 912). Consequently, there was no basis for the order issued by Supreme Court (Michalski, A.J.) transferring the proceeding to this Court pursuant to CPLR 7804 (g). We therefore modify the judgment accordingly. On the merits, we conclude that the court (Feroleto, J.) properly denied habeas corpus relief to petitioner, and we further modify the judgment by dismissing the petition. Contrary to petitioner's contention, the evidence presented at the final parole revocation hearing established by the requisite preponderance of the evidence that he violated a condition of his

parole (*see People ex rel. Shannon v Khahaifa*, 74 AD3d 1867, *lv dismissed* 15 NY3d 868). Issues of credibility were for the resolution of the Administrative Law Judge (ALJ) (*see Matter of Johnson v Alexander*, 59 AD3d 977; *Matter of Miller v Board of Parole*, 278 AD2d 697), who was entitled to consider hearsay evidence (*see People ex rel. Fryer v Beaver*, 292 AD2d 876; *see generally Matter of Currie v New York State Bd. of Parole*, 298 AD2d 805). Petitioner's further contention that the ALJ was biased "lacks support in the record and, further, there is no proof that the outcome of this case flowed from the alleged bias" (*Brazeau*, 233 AD2d at 726; *see Matter of Castro v Russi*, 216 AD2d 968, *lv denied* 86 NY2d 711).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

284

KAH 10-00656

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
TERRY DEGRAFINREID, PETITIONER-APPELLANT,

V ORDER

S. KHAHAIFA, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY AND HENRY LEMONS, JR.,
INTERIM CHAIRMAN, NEW YORK STATE DIVISION
OF PAROLE, RESPONDENTS-RESPONDENTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered January 14, 2010 in a habeas corpus proceeding. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see People ex rel. Kendricks v Smith*, 52 AD2d 1090).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

285

KAH 10-00654

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DAVID MCCULLOUGH, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF PAROLE,
RESPONDENT-RESPONDENT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated decision and order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered February 19, 2010 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: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that he allegedly did not receive timely notice of the final parole revocation hearing pursuant to Executive Law § 259-i (3) (f) (iii), nor did he receive effective assistance of counsel at the final hearing. We conclude that Supreme Court properly denied the petition. First, the record establishes that petitioner waived any issues concerning the allegedly untimely notice of the final parole revocation hearing at the time of that hearing (*see People ex rel. Webster v Travis*, 277 AD2d 546; *People ex rel. Medina v Superintendent*, 101 AD2d 871). Second, habeas corpus relief is not available based on petitioner's alleged denial of effective assistance of counsel at the final parole revocation hearing because he would not be entitled to immediate release from incarceration on that ground (*see People ex rel. Shannon v Khahaifa*, 74 AD3d 1867, *lv dismissed* 15 NY3d 868). We note that, although this Court has the power to convert this proceeding into one pursuant to CPLR article 78, we deem such conversion to be inappropriate on the record before us (*see id.* at 1867-1868).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

286

KAH 10-00417

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
FRANCIS AULETA, PETITIONER-APPELLANT,

V ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (M. William Boller, A.J.), entered January 19, 2010 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.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

287

CAF 10-01090

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

IN THE MATTER OF KAYLIN C., KRISTEN C.,
AND KORINA C.

WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

AMANDA W., RESPONDENT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. DADD, COUNTY ATTORNEY, WARSAW (JAMIE B. WELCH OF COUNSEL), FOR PETITIONER-RESPONDENT.

TERESA KOWALCZYK, ATTORNEY FOR THE CHILDREN, WARSAW, FOR KAYLIN C., KRISTEN C., AND KORINA C.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered April 26, 2010 in a proceeding pursuant to Family Court Act article 10. The order terminated respondent's parental rights and granted petitioner custody and guardianship of the subject children.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

288

CAF 10-00644

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

IN THE MATTER OF STEUBEN COUNTY SUPPORT
COLLECTION UNIT AND JUDITH A. ROSE,
PETITIONER-RESPONDENT,

V ORDER

NEIL T. KELLY, RESPONDENT-APPELLANT.

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

ALAN P. REED, COUNTY ATTORNEY, BATH (RUTH A. CHAFFEE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered March 2, 2010 in a proceeding pursuant to Family Court Act article 4. The order determined, inter alia, that respondent had willfully failed to obey an order of the court.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Hess v Flint*, 5 AD3d 1079).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

290

CA 10-02048

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

JAMES E. MCMANUS, PLAINTIFF-RESPONDENT,

V ORDER

COUNTY OF ONONDAGA, ONONDAGA COUNTY HOUSING DEVELOPMENT FUND, COMPANY, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MARY J. FAHEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOTTAR LEONE, PLLC, SYRACUSE (AARON J. RYDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 10, 2010 in a personal injury action. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment pursuant to Labor Law § 240 (1).

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

291

CA 10-00933

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

DAVID NEUMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STUART A. FRANK, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (CHRISTOPHER G. TODD OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, ROCHESTER (DOUGLAS A. FOSS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered March 25, 2010. The order, inter alia, directed defendant Stuart A. Frank to produce certain documents.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part the motion for leave to renew and vacating the directives that defendant Stuart A. Frank disclose his unredacted cellular telephone records for the period from October 1, 2004 to December 31, 2007 and his unredacted tax returns for the years 2004 through 2007 and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings with respect to those cellular telephone records and tax returns in accordance with the following Memorandum: Plaintiff commenced this action alleging, inter alia, that Stuart A. Frank (defendant), a partner in defendant law firm, committed legal malpractice and breached his fiduciary duty to plaintiff during the course of representing him by acting in a manner that conflicted with plaintiff's interests. Plaintiff moved for leave to renew his motion seeking to compel discovery by defendant and in addition sought a protective order striking defendant's demands for supplemental interrogatories and for the production of documents. Defendant cross-moved for an order compelling plaintiff to respond to his discovery demands, and both defendants cross-moved for partial summary judgment dismissing the first cause of action, for breach of fiduciary duty, as duplicative of the second cause of action, for legal malpractice.

Addressing defendants' cross motion for partial summary judgment, we conclude that Supreme Court properly denied the cross motion with respect to defendant, the sole appellant. "A cause of action for legal malpractice must be based on 'the existence of an

attorney-client relationship at the time of the alleged malpractice' " (*TVGA Eng'g, Surveying, P.C. v Gallick* [appeal No. 2], 45 AD3d 1252, 1256; *see Compis Servs., Inc. v Greenman*, 15 AD3d 855, *lv denied* 4 NY3d 709). The fiduciary duty of an attorney, however, "extends both to current clients and former clients and thus is broader in scope than a cause of action for legal malpractice" (*TVGA Eng'g, Surveying, P.C.*, 45 AD3d at 1256; *see Greene v Greene*, 47 NY2d 447, 453). Thus, a cause of action for legal malpractice based upon alleged misconduct occurring during the attorney's representation of the plaintiff is not duplicative of a cause of action for breach of fiduciary duty based upon alleged misconduct occurring after the termination of the representation (*see Country Club Partners, LLC v Goldman*, 79 AD3d 1389, 1391; *Kurman v Schnapp*, 73 AD3d 435, 435-436). Although plaintiff alleged in the amended complaint that defendant's misconduct occurred during the period from October 2004 to May 2005, when defendant represented plaintiff in transactions related to the development of a shopping center, defendant testified at his deposition that he withdrew from representing plaintiff at some point prior to April 11, 2005. Therefore, based on defendant's own deposition testimony, defendants failed to meet their initial burden of establishing that the breach of fiduciary duty cause of action is duplicative of the legal malpractice cause of action for the period between May 2005 and the as yet unspecified date prior to April 11, 2005 when defendant ceased to represent plaintiff (*see Country Club Partners, LLC*, 79 AD3d at 1391; *Kurman*, 73 AD3d at 435-436).

Contrary to defendant's further contention, plaintiff's motion for leave to renew with respect to discovery was based upon facts unavailable at the time of the prior motion (*see* CPLR 2221 [e] [2]). Also contrary to defendant's contention, the court did not abuse its broad discretion to supervise discovery by ordering defendant to produce unredacted financial records (*see generally* CPLR 3101 [a]; *Cain v New York Cent. Mut. Fire Ins. Co.*, 38 AD3d 1344). We further conclude, however, that the court erred in ordering defendant to disclose his unredacted cellular telephone records for the period from October 1, 2004 to December 31, 2007 without first submitting those records to the court for an in camera review, to determine which cellular telephone calls "are material and related to" this action and to protect the confidentiality of defendant's other clients (*Carter v Fantauzzo*, 256 AD2d 1189, 1190). In addition, the court erred in ordering defendant to produce his unredacted tax returns for the years 2004 through 2007 without first conducting "an in camera review of the tax returns in question to determine whether full disclosure is required and to minimize the intrusion into [defendant's] privacy" (*id.*). Plaintiff made "the requisite showing that those tax returns were indispensable to this litigation and that relevant information possibly contained therein was unavailable from other sources" (*Lauer's Furniture Stores v Pittsford Place Assoc.*, 190 AD2d 1054; *see Carter*, 256 AD2d at 1190) but, as noted, defendant nevertheless was entitled to an in camera review before producing those tax returns. We therefore modify the order accordingly, and we remit the matter to Supreme Court to determine those parts of the motion for leave to renew following an in camera review of the cellular telephone records

and tax returns at issue.

Finally, we conclude that the court properly granted that part of plaintiff's motion for a protective order and properly denied defendant's cross motion seeking to compel further discovery. Defendant's discovery demands were duplicative of prior discovery demands, and "[defendant] ha[s] not demonstrated that [plaintiff] has been nonresponsive or that a further response is needed" (*Ranne v Huff*, 11 AD3d 952, 953; *see generally* CPLR 3101 [a]; *M&T Bank Corp. v Gemstone CDO VII, Ltd.*, 78 AD3d 1664).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

293

CA 10-01650

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

CLEAR SKIES OVER ORANGEVILLE,
PETITIONER-APPELLANT,

V ORDER

TOWN BOARD OF TOWN OF ORANGEVILLE, SUSAN MAY,
HANS BOXLER, JR., JAMES HERMAN, ANDREW FLINT,
AND TOM SCHABLOSKI, IN THEIR CAPACITIES AS TOWN
BOARD MEMBERS, RESPONDENTS-RESPONDENTS,
AND STONEY CREEK ENERGY LLC,
INTERVENOR-RESPONDENT-RESPONDENT.

LAW OFFICE OF GARY A. ABRAHAM, ALLEGANY (GARY A. ABRAHAM OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICE OF DAVID M. DIMATTEO, WARSAW (DAVID M. DIMATTEO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR INTERVENOR-RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Patrick H. NeMoyer, J.), entered April 21, 2010. The judgment dismissed the petition and complaint, insofar as it seeks relief pursuant to CPLR article 78, and declared that municipal respondents did not act unlawfully in enacting Local Law No. 2 of 2009.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

294

CA 10-02149

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

GREGORY A. DEKDEBRUN AND PATRICIA A. DEKDEBRUN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CHERYL KANE, ALSO KNOWN AS CHERYL KERNS, AND
RANDALL KANE, DEFENDANTS-RESPONDENTS.

MCGEE & GELMAN, BUFFALO (MICHAEL R. MCGEE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

THOMAS J. CASERTA, JR., NIAGARA FALLS, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered June 3, 2010 in a proceeding pursuant to RPAPL article 8. The order denied plaintiffs' motion for partial summary judgment.

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

Memorandum: Plaintiffs and defendants own adjoining properties and, in 2009, plaintiffs commenced this action pursuant to RPAPL 871 seeking, inter alia, an order directing defendants to remove an exhaust fan from the rear wall of their restaurant. According to plaintiffs, the exhaust fan encroached on their property by approximately 1.5 feet and interfered with a staircase they had recently constructed on their property. Supreme Court erred in denying plaintiffs' motion for partial summary judgment on the first cause of action, seeking the removal of the encroaching exhaust fan.

Based on the evidence in the record before us, it is undisputed that the fan had continuously existed in its current location, in an open and notorious manner, since defendant Cheryl Kane, also known as Cheryl Kerns, purchased the property in 1993. In opposition to plaintiffs' motion, Kane contended that defendants raised an issue of fact whether they obtained the right to have the exhaust fan remain in its present location by virtue of adverse possession. We reject that contention. Plaintiffs correctly contend that defendants failed to raise an issue of fact on the theory of adverse possession because they failed to establish that their use of plaintiffs' property was hostile and under a claim of right for the requisite 10-year period. Although defendants, in their answer, denied that the fan encroached

on plaintiffs' property, their attorney at oral argument on the motion admitted both that the fan encroached on plaintiffs' property and that "[t]here was permission" and "consent" for the encroachment. Following oral argument, plaintiffs submitted affidavits from their predecessors in title and defendants' predecessors in title establishing that there had been permission for the initial encroachment. Plaintiffs' predecessors in title asserted that they consented to the initial encroachment and "accommodated the various owners of the [r]estaurant in a spirit of neighborly cooperation" until they sold their property to plaintiffs in 2002, four years after defendants purchased the property with the exhaust fan and seven years before plaintiffs commenced this action.

"To acquire title to real property by adverse possession . . . the possessor . . . [must] establish that the character of the possession is hostile and under a claim of right, actual, open and notorious, exclusive and continuous . . . for the statutory period of 10 years" (*Snyder v Fabrizio*, 2 AD3d 1464, 1464-1465 [internal quotation marks omitted], *lv denied* 2 NY3d 703; *see Walling v Przybylo*, 7 NY3d 228, 232; *Corigliano v Sunick*, 56 AD3d 1121). Although defendants correctly contend that hostility may be presumed if all of the other elements of adverse possession have been established, "if it can be shown that the initial use was permissive, then adverse possession does not commence until such permission or authority has been repudiated and renounced and the possessor thereafter has assumed the attitude of hostility to any right in the real owner" (*Chaner v Calarco*, 77 AD3d 1217, 1218 [internal quotation marks omitted]; *see Hinkley v State of New York*, 234 NY 309, 316; *Taillie v Rochester Gas & Elec. Corp.*, 68 AD3d 1808, 1809; *Koudellou v Sakalis*, 29 AD3d 640, 641). The element of hostility may be established by " 'a distinct assertion of a right hostile to the owner' " (*Koudellou*, 29 AD3d at 641; *see Goldschmidt v Ford St., LLC*, 58 AD3d 803, 805). Based on the evidence submitted by plaintiffs and the admission by defendants' attorney at oral argument of the motion, plaintiffs established as a matter of law that the initial use of their property by defendants' predecessor in title was permissive and that there was no distinct assertion of a hostile right by defendants more than 10 years before plaintiffs commenced this action. Thus, the record establishes as a matter of law that defendants did not acquire any rights to plaintiffs' property through adverse possession.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

295

CA 10-02095

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

DANIEL SNYDER, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

DAWN SNYDER, DEFENDANT-APPELLANT-RESPONDENT.

HOGAN WILLIG, AMHERST (GEFFREY GISMONDI OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PATRICK C. O'REILLY OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered January 20, 2010. The order, among other things, denied defendant's motion for a money judgment, pursuant to Domestic Relations Law Section 244, in the amount of $3,500 together with costs and attorneys' fees and denied plaintiff's cross motion for attorney's fees and sanctions.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

296

CA 10-01693

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

JOANN RIPKA, PLAINTIFF-APPELLANT,

V ORDER

ROBBIE RIPKA, DEFENDANT-RESPONDENT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered October 26, 2009 in a divorce action. The amended judgment amended the equitable distribution of the marital assets of the parties.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

297

CA 10-02104

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

SRINIVASAN VENKATARAMAN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MAYA ROSE VENKATARAMAN, DECEASED, AND SUZANNE VENKATARAMAN, INDIVIDUALLY, PLAINTIFFS-APPELLANTS,

V ORDER

JUDITH ORTMAN-NABI, M.D., ALLCARE FOR WOMEN OB/GYN, LLP, CECILIA STEARNS, C.N.M., JENNIFER (LAMM) FIELD, C.N.M., SISTERS OF CHARITY HOSPITAL OF BUFFALO, CATHOLIC HEALTH SYSTEM, INC., DOING BUSINESS AS SISTERS OF CHARITY HOSPITAL OF BUFFALO, SARBJIT SINGH VILKHU, M.D., KATHERINE STUTZMAN, R.N., DEFENDANTS-RESPONDENTS, AND S. PIECZOKA, D.O., DEFENDANT.

ROSENTHAL, SIEGEL & MUENKEL, LLP, BUFFALO (ELLEN M. KREBS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (JENNIFER R. SCHARF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JUDITH ORTMAN-NABI, M.D., ALLCARE FOR WOMEN OB/GYN, LLP, CECILIA STEARNS, C.N.M., AND JENNIFER (LAMM) FIELD, C.N.M.

DAMON MOREY LLP, BUFFALO (CHRISTINA G. HOLDSWORTH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SISTERS OF CHARITY HOSPITAL OF BUFFALO, CATHOLIC HEALTH SYSTEM, INC., DOING BUSINESS AS SISTERS OF CHARITY HOSPITAL OF BUFFALO, AND KATHERINE STUTZMAN, R.N.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR DEFENDANT-RESPONDENT SARBJIT SINGH VILKHU, M.D.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered December 28, 2009 in a medical malpractice action. The order granted the motions of defendants Judith Ortman-Nabi, M.D., Allcare for Women OB/GYN, LLP, Cecilia Stearns, C.N.M., Jennifer (Lamm) Field, C.N.M., Sisters of Charity Hospital of Buffalo, Catholic Health System, Inc., doing business as Sisters of Charity Hospital of Buffalo, Sarbjit Singh Vilkhu, M.D., and Katherine Stutzman, R.N. to preclude plaintiffs from presenting proof or evidence that Suzanne Venkataraman suffered emotional distress or emotional damages as a result of the death of Maya Rose Venkataraman.

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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

298

CA 10-02237

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

SEAN HIRT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PAUL MANCUSO, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFF-APPELLANT.

EDWARD Z. MENKIN, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered August 17, 2010. The order and judgment granted the motion of defendants Paul Mancuso and Michael Durso for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was allegedly assaulted by defendants Michael Durso and Joseph Mazza at the direction of defendant Paul Mancuso. Supreme Court properly granted defendants' motion seeking summary judgment dismissing the complaint. Defendants met their initial burden by establishing that the action, commenced more than one year after the alleged assault, is time-barred (*see* CPLR 215 [3]), and plaintiff failed to raise a triable issue of fact whether the limitations period was extended by virtue of CPLR 215 (8) (a), based on the commencement of a federal criminal action against Mancuso. The record establishes that the criminal action against Mancuso was not "commenced with respect to the event or occurrence from which [plaintiff's] claim . . . arises" (*id.*; *see generally Christodoulou v Terdeman*, 262 AD2d 595, 596). In any event, two of the three defendants, i.e., Durso and Mazza, are not "the same defendant" against whom the criminal action was commenced (CPLR 215 [8] [a]; *see Villanueva v Comparetto*, 180 AD2d 627, 629; *see also Jordan v Britton*, 128 AD2d 315, 320).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

299

TP 10-02236

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

IN THE MATTER OF RAHEEM OLIVER, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (EDWARD L. CHASSIN OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered November 8, 2010) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III hearing, that he violated inmate rule 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon possession]). Contrary to petitioner's contention, the determination is supported by substantial evidence. The misbehavior report, together with the testimony of the correction officer who wrote it and the photographs of the shanks found in a light fixture, constitutes substantial evidence supporting the determination that petitioner violated inmate rule 113.10 (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966; *People ex rel. Vega v Smith*, 66 NY2d 130, 140).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

300

KA 10-00052

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEREK G. THOMAS, ALSO KNOWN AS DEREK THOMAS,
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 June 2, 2009. 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.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

301

KA 08-01759

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVIS D. SPRAGUE, DEFENDANT-APPELLANT.

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

ALVIS D. SPRAGUE, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered June 5, 2008. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]), defendant contends in his pro se supplemental brief that County Court erred in imposing an enhanced sentence without affording him an opportunity to withdraw his plea. That contention is not preserved for our review because defendant did not object to the enhanced sentence, nor did he move to withdraw the plea or to vacate the judgment of conviction (*see People v Fortner*, 23 AD3d 1058; *People v Sundown*, 305 AD2d 1075). In any event, defendant's contention lacks merit. "When a defendant violates a condition of the plea agreement, the court is no longer bound by the agreement and is free to impose a greater sentence without offering [the] defendant an opportunity to withdraw his [or her] plea" (*People v Santiago*, 269 AD2d 770, 770; *see People v Figgins*, 87 NY2d 840; *People v Cato*, 226 AD2d 1066, *lv denied* 88 NY2d 877). The record establishes that defendant was clearly informed of the consequences of his failure to appear at sentencing and the date on which sentencing was scheduled, and he nevertheless failed to appear on that date. The remaining contentions of defendant in his pro se supplemental brief are without merit. Contrary to the contention of defendant in his main brief, the sentence is not unduly

harsh or severe.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

303

KA 10-02030

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ZACHARIAH PIRON, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), 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 (Jeffrey R. Merrill, A.J.), rendered November 17, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of marihuana in the second degree.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

304

KA 09-00286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN CURRY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Matthew J. Murphy, III, A.J.), rendered January 14, 2009. The judgment convicted defendant, upon a nonjury verdict, of aggravated criminal contempt (three counts) and aggravated harassment 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, after a bench trial, of three counts of aggravated criminal contempt (Penal Law § 215.52 [3]) and one count of aggravated harassment in the second degree (§ 240.30 [1] [a]), based upon evidence that he wrote a series of threatening letters to his ex-girlfriend, her mother, and his teenaged daughter. Contrary to the contention of defendant, County Court properly admitted in evidence additional letters to establish his identity as the author of the letters at issue (*see generally People v Molineux*, 168 NY 264, 293-294). Defendant had previously pleaded guilty to criminal contempt on two occasions, admitting that he sent letters threatening one of the victims in this case. The People established the similarities between the letters in those cases and the ones at issue here, including their content, writing style, paper, and envelopes, and they also established that in all cases defendant had sent multiple, nearly identical letters on the same day. Thus, the People presented clear and convincing evidence that defendant committed the prior crimes by using a distinctive and unique modus operandi, which was sufficiently similar to the manner in which the crimes herein were committed to be probative of defendant's identity as the perpetrator (*see generally People v Mateo*, 93 NY2d 327, 332; *People v Alvino*, 71 NY2d 233, 242; *People v Robinson*, 68 NY2d 541, 549-550). Consequently, the court properly concluded that " 'the mere proof that the defendant had committed [the prior] similar act[s was] highly probative of the fact that he committed the one

charged' " (*People v Allweiss*, 48 NY2d 40, 47-48, quoting *People v Condon*, 26 NY2d 139, 144).

Viewing the evidence in light of the elements of the crimes in this bench 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). Although there was conflicting testimony with respect to whether the handwriting on the letters at issue matched that of defendant, and thus "an acquittal would not have been unreasonable" (*Danielson*, 9 NY3d at 348), we conclude that, "[b]ased on the weight of the credible evidence, the court . . . was justified in finding the defendant guilty beyond a reasonable doubt" (*id.*; *see People v Romero*, 7 NY3d 633, 642-643). " 'Great deference is to be accorded to the fact[]finder's resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony' " (*People v Gritzke*, 292 AD2d 805, 805-806, *lv denied* 98 NY2d 697; *see People v Mosley*, 59 AD3d 961, *lv denied* 12 NY3d 918, 13 NY3d 861), and we perceive no reason to disturb the court's credibility determinations.

Finally, the sentence is not unduly harsh or severe.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

305

KA 07-02434

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL S. BELL, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

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

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

306

CAF 10-00620

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

IN THE MATTER OF MICHAEL C. AND VINCENT C.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

MICHAEL C., RESPONDENT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR RESPONDENT-APPELLANT.

ALAN P. REED, COUNTY ATTORNEY, BATH (JESSICA M. DRAKE OF COUNSEL), FOR PETITIONER-RESPONDENT.

VIVIAN CLARA STRACHE, ATTORNEY FOR THE CHILDREN, BATH, FOR MICHAEL C. AND VINCENT C.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered January 29, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent.

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 on the ground of permanent neglect and transferring guardianship and custody of the children to petitioner. The children were placed in foster care after the father left them with a caregiver who was under the influence of drugs and alcohol. Contrary to the father's contention, petitioner established by clear and convincing evidence that the father permanently neglected the children inasmuch as he "failed substantially and continuously or repeatedly to maintain contact with or plan for the future of the child[ren] although . . . able to do so" (*Matter of Star Leslie W.*, 63 NY2d 136, 142; *see Matter of Whytnei B.*, 77 AD3d 1340).

We reject the father's further contention that Family Court abused its discretion in refusing to enter a suspended judgment following the dispositional hearing (*see Matter of Elijah D.*, 74 AD3d 1846; *Matter of Maryline A.*, 22 AD3d 227). Although the father completed a 28-day inpatient substance abuse program, he subsequently failed drug tests and has been continuously noncompliant with court-ordered interventions. "[T]he record supports the court's determination that any progress made by the father 'was not sufficient

to warrant any further prolongation of the child[ren's] unsettled familial status' " (*Matter of Tiara B.*, 70 AD3d 1307, 1308, *lv denied* 14 NY3d 709).

In addition, we reject the father's contention that he received ineffective assistance of counsel. "It is axiomatic that, because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings" (*Elijah D.*, 74 AD3d at 1847 [internal quotation marks omitted]). A parent alleging ineffective assistance of counsel has the burden of demonstrating both that he or she was denied meaningful representation and that the deficient representation resulted in actual prejudice (*see Matter of James R.*, 238 AD2d 962). Here, the father neither alleged nor demonstrated that he was actually prejudiced by any of counsel's shortcomings. His contention that counsel was ineffective "is impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on his behalf" (*Matter of Devonte M.T.*, 79 AD3d 1818, 1819).

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

308

CAF 10-00832

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

IN THE MATTER OF LOKI C., WILLOW C.,
ANNASTASIA C., AND THOR C.
---------- ORDER
CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT;

RONNIE C., RESPONDENT,
AND CAROL C., RESPONDENT-APPELLANT.

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

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILDREN, MACHIAS, FOR LOKI C., WILLOW C., ANNASTASIA C., AND THOR C.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered March 15, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued the placement of the children with petitioner until the completion of the next permanency hearing.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Giovanni K.* [appeal No. 1.], 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

309

CAF 09-02111

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

IN THE MATTER OF HASSAN E. AND JAMEELAH L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

KACHOYA H., RESPONDENT-APPELLANT.

BERNADETTE M. HOPPE, BUFFALO, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR HASSAN E. AND JAMEELAH L.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered October 2, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, revoked a suspended judgment and 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 that, inter alia, revoked a suspended judgment and terminated her parental rights with respect to the children who are the subject of this proceeding. With respect to the contention of the mother that petitioner failed to establish that she violated the terms of the suspended judgment, "it is well established that, during the period of the suspended judgment, the parent[] must comply with the terms and conditions set forth in the judgment that are designed to ameliorate [his or her] actions" (*Matter of Ronald O.*, 43 AD3d 1351, 1352 [internal quotation marks omitted]). "If [petitioner] establishes 'by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights' " (*Matter of Shad S.*, 67 AD3d 1359, 1360; *see* Family Ct Act § 633 [f]). Here, contrary to the contention of the mother, a preponderance of the evidence supports Family Court's determination that she violated numerous terms of the suspended judgment and that it is in the children's best interests to terminate her parental rights (*see Matter of Terrance M.*, 75 AD3d 1147; *Matter of Giovanni K.*, 68 AD3d 1766, *lv denied* 14 NY3d 707).

"Finally, the mother did not ask the court to consider

post-termination contact with the children 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 children' " (*Matter of Christopher J.*, 60 AD3d 1402, 1403; *see Matter of Andrea E.*, 72 AD3d 1617, *lv denied* 15 NY3d 703).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

310

CAF 10-01172

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

IN THE MATTER OF MICHAEL KAPUSCINSKI,
PETITIONER-RESPONDENT-RESPONDENT,

V ORDER

GISELLE JELLETT, RESPONDENT-PETITIONER-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (ELIZABETH A. GENUNG OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

WALTER J. BURKARD, DEWITT, FOR PETITIONER-RESPONDENT-RESPONDENT.

KELLY M. CORBETT, ATTORNEY FOR THE CHILDREN, FAYETTEVILLE, FOR BRAYDIN K. AND BRENTEN K.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered August 4, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the parties' children to petitioner-respondent.

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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

311

CA 10-02142

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

LINDA GALLEY, PLAINTIFF-RESPONDENT,

V ORDER

GARY CLARK, DEFENDANT-APPELLANT.

WILLIAMSON, CLUNE & STEVENS, ITHACA (JOHN H. HANRAHAN, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered May 28, 2010 in a personal injury action. The order denied the motion of defendant for summary judgment.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

313

CA 10-01673

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

MARLINO GRESS, MAURICE HOWIE, TIMOTHY M. JOHNSON AND ABRAHAM MCKINNEY, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED PERSONS, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BYRON BROWN, AS MAYOR, CITY OF BUFFALO, AND BUFFALO FISCAL STABILITY AUTHORITY, DEFENDANTS-APPELLANTS.

DAVID RODRIGUEZ, ACTING CORPORATION COUNSEL, BUFFALO (TIMOTHY A. BALL OF COUNSEL), FOR DEFENDANTS-APPELLANTS BYRON BROWN, AS MAYOR, AND CITY OF BUFFALO.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR DEFENDANT-APPELLANT BUFFALO FISCAL STABILITY AUTHORITY.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN M. LICHTENTHAL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from a judgment and order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered October 28, 2009. The judgment and order, inter alia, granted the motion of plaintiffs for partial summary judgment and declared that defendant Buffalo Fiscal Stability Authority does not have the authority to freeze the wages of plaintiffs, denied and dismissed defendants' affirmative defenses, and denied the cross motions of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this class action on behalf of former and current City of Buffalo Public Works Department seasonal, at-will sanitation employees seeking, inter alia, damages resulting from the alleged failure of defendants Byron Brown, as Mayor, and the City of Buffalo (collectively, City defendants) to pay plaintiffs in compliance with the Buffalo Living Wage Ordinance ([Living Wage Ordinance] City of Buffalo Code § 96-19). The City defendants and defendant Buffalo Fiscal Stability Authority (BFSA) each appeal from a judgment and order that, inter alia, granted plaintiffs' motion for partial summary judgment declaring that the BFSA does not have the authority to freeze plaintiffs' wages. We reject defendants' contention that Supreme Court erred in denying the respective cross

motions of the City defendants and the BFSA for summary judgment dismissing the amended complaint on the ground that the action is actually a CPLR article 78 proceeding to which the four-month statute of limitations is applicable. "The appropriate [s]tatute of [l]imitations is determined by the substance of the action and the relief sought" (*Bennett Rd. Sewer Co. v Town Bd. of Town of Camillus*, 243 AD2d 61, 66). Plaintiffs originally commenced this action against only the City defendants, seeking damages for their violation of the Living Wage Ordinance, and they thereafter amended the complaint to include a cause of action for a declaration against the BFSA when defendants raised as an affirmative defense the wage freeze imposed by the BFSA from April 2004 to June 2007. Thus, the gravamen of the action is not a challenge to the BFSA's determination to impose a wage freeze, either in general or as applied to plaintiffs. Rather, plaintiffs commenced this action to recover damages based on the City defendants' alleged violation of the wage requirements set forth in the Living Wage Ordinance (*cf. Matter of Foley v Masiello*, 38 AD3d 1201, 1202), and they amended the complaint to seek a declaration regarding the rights of the BFSA with respect to plaintiffs' wages in response to defendants' assertion of the wage freeze as an affirmative defense.

We reject defendants' further contention that the court erred in declaring that the wage freeze imposed by the BFSA was inapplicable to plaintiffs' wages. Pursuant to the BFSA Act, the BFSA "shall be empowered to order that all increases in salary or wages of employees of the [C]ity . . . [that] will *take effect* after the date of the order *pursuant to collective bargaining agreements, other analogous contracts or interest arbitration awards*, now in existence or hereafter entered into, requiring such salary or wage increases as of any date thereafter are suspended" (Public Authorities Law § 3858 [2] [c] [i] [emphasis added]). Defendants do not contend that the terms of plaintiffs' employment are governed by a collective bargaining agreement (CBA) or that there is an applicable interest arbitration award. Further, even assuming, arguendo, that some of the terms of plaintiffs' employment as seasonal workers can be determined by reference to the CBA governing permanently employed sanitation workers, we conclude that plaintiffs are not entitled to any scheduled wage increases pursuant to that CBA. Instead, plaintiffs' scheduled wage increases "take effect" pursuant to the Living Wage Ordinance, and thus those wage increases are outside the purview of the BFSA's authority (*id.*; *see Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208-209). We have reviewed defendants' remaining contentions and conclude that they are without merit.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

323

KA 07-00930

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TREVIS D. BAKER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered February 28, 2007. 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 for reasons stated in the decision at suppression court.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

324

KA 10-00026

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY DEAN, 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 (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered December 11, 2009. 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 (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

326

KA 10-00502

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES E. HUDSON, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZIUBA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered December 14, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree (two counts).

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

327

KA 10-01050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SIR RAVEN R., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an adjudication of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered March 2, 2010. Defendant was adjudicated a youthful offender upon his plea of guilty to robbery in the second degree.

It is hereby ORDERED that the adjudication so appealed from is unanimously affirmed (*see People v Lococo*, 92 NY2d 825, 827).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

328

KA 07-00931

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TREVIS D. BAKER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered February 28, 2007. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

329

KA 10-00245

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARQUIS PARKS, ALSO KNOWN AS MARQUIS TILLS,
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 (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered June 12, 2009. 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 (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

332

KA 08-00650

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL L. WELLBORN, ALSO KNOWN AS GHOST,
DEFENDANT-APPELLANT.

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 Supreme Court, Monroe County (John R. Schwartz, A.J.), rendered October 1, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, burglary in the first degree, robbery in the second degree and burglary 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, inter alia, robbery in the first degree (Penal Law § 160.15 [4]) and burglary in the first degree (§ 140.30 [4]).

We reject defendant's contention that he did not receive effective representation at trial (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant failed to meet his burden of " 'demonstrat[ing] the absence of strategic or other legitimate explanations' " for certain alleged failures of defense counsel (*People v Benevento*, 91 NY2d 708, 712), and we note that other alleged shortcomings of defense counsel identified by defendant are belied by the record. Defendant failed to preserve for our review his contention that he was denied a fair trial based on prosecutorial misconduct during summation (*see* CPL 470.05 [2]) and, in any event, that contention lacks merit. The alleged misconduct by the prosecutor on summation, including statements that the case was "simple" and that certain inferences were "pretty clear," remained within " 'the broad bounds of rhetorical comment permissible' " during summations (*People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854).

Finally, 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). While a different result would not have been unreasonable, upon our review of the record we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see Bleakley*, 69 NY2d at 495). "The fact that two of the People's witnesses had unsavory backgrounds . . . does not render their respective testimony incredible as a matter of law" (*People v Adams*, 302 AD2d 601, *lv denied* 100 NY2d 592).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

334

CA 10-02242

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

WILLIAM GALLUP AND ANN GALLUP, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF ANDREW GALLUP AND BENJAMIN GALLUP, MINORS UNDER 18 YEARS OF AGE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

SUMMERSET HOMES, LLC,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

DUCHARME, HARP & CLARK, LLP, CLIFTON PARK (CHERYL L. SOVERN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 10, 2010 in a breach of contract action. The order granted in part and denied in part the motion of defendant Summerset Homes, LLC for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendant Summerset Homes, LLC seeking summary judgment dismissing the third, sixth, and seventh causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiffs, individually and on behalf of their children, commenced this action seeking damages for personal injuries and property damage they sustained as a result of mold contamination in their home. We note at the outset that Supreme Court has dismissed the amended complaint against the remaining defendant, and thus the action is now only against Summerset Homes, LLC (defendant), which built the home. Plaintiff William Gallup entered into a purchase contract with defendant for the construction of the home, and the contract included a limited warranty. Less than two years after moving into the home, plaintiffs vacated the residence. Later testing of the home confirmed the presence of at least four different types of mold in the basement and other areas of the home. In their amended complaint, plaintiffs alleged causes of action sounding in breach of contract, tort, and breach of warranty. Defendant moved for summary

judgment dismissing the amended complaint, and the court granted those parts of the motion with respect to the second, fourth and fifth causes of action, for negligence and strict products liability. The court denied the motion with respect to the first cause of action, for breach of contract, and the third, sixth and seventh causes of action, for breach of warranty. Defendant appeals and plaintiffs cross-appeal.

We reject plaintiffs' contention that the court erred in granting the motion with respect to the negligence and strict products liability causes of action. This is yet another example of a case in which causes of action for contract and tort appear to overlap, i.e., "where the parties' relationship initially is formed by contract, but there is a claim that the contract was performed negligently" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551). "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated . . . This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389). "[M]erely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort" (*Sommer*, 79 NY2d at 551). In considering whether plaintiffs have viable tort causes of action, we must also consider "the nature of the injury, the manner in which the injury occurred and the resulting harm" (*id.* at 552).

Here, the nature of the injury and the resulting harm sound in tort, but the manner in which the injury occurred sounds in contract. Plaintiffs allege that the mold formed because of defendant's defective workmanship and/or materials, i.e., defendant's failure to exercise due care in its performance of the contract. The injury did not occur because of an "abrupt, cataclysmic occurrence" (*id.*; *see Syracuse Cablesystems v Niagara Mohawk Power Corp.*, 173 AD2d 138, 142-143). We thus agree with the court that plaintiffs' tort causes of action are not viable because there is no legal duty owed by defendant that is independent of the contract (*see Lantzy v Advantage Bldrs., Inc.*, 60 AD3d 1254, 1255-1256; *Rothstein v Equity Ventures*, 299 AD2d 472, 474; *Burnell v Morning Star Homes*, 114 AD2d 657, 658-659).

We agree with defendant, however, that the court erred in denying those parts of its motion seeking summary judgment dismissing the third, sixth, and seventh causes of action, for breach of warranty. We therefore modify the order accordingly. As noted above, the contract contained a limited warranty, and the sixth cause of action alleges a breach of the housing merchant implied warranty set forth in General Business Law § 777-a. Contrary to plaintiffs' contention, that limited warranty complied with the requirements set forth in General Business Law § 777-b, which provides that the housing merchant implied warranty in section 777-a may be excluded where, as here, the buyer is offered a limited warranty under section 777-b. Thus, the court erred in denying defendant's motion with respect to the sixth cause of action (*cf. Latiuk v Faber Constr. Co.*, 269 AD2d 820). In

addition, the court erred in denying the motion with respect to the third cause of action, for breach of common-law express and implied warranties, because it is precluded by the limited warranty (*see Fumarelli v Marsam Dev.*, 92 NY2d 298, 305; *Bedrosian v Guzy*, 32 AD3d 1194, 1195-1196). We further conclude that the court erred in denying the motion with respect to the seventh cause of action, for breach of the limited warranty offered to plaintiffs pursuant to General Business Law § 777-b. Plaintiffs did not comply with the written notice of claim requirement for the one-year and two-year limited warranty provisions, and thus they are entitled to recover, if at all, only under the six-year warranty provision (*see Lantzy*, 60 AD3d at 1255; *Rothstein*, 299 AD2d at 474-475). The six-year warranty covered only major structural defects, which are defined as defects resulting in actual physical damage to a load-bearing portion of the home affecting its load-bearing functions to the extent the home becomes "unsafe, unsanitary, or otherwise unlivable." While the mold infestation in plaintiffs' home certainly rendered it "unsafe, unsanitary, [and] otherwise unlivable," it did not affect the load-bearing functions of the home. Plaintiffs therefore do not have a viable cause of action for breach of the six-year warranty (*see generally Finnegan v Brooke Hill, LLC*, 38 AD3d 491, 492).

Finally, we conclude that the court properly denied that part of defendant's motion for summary judgment dismissing the first cause of action, for breach of contract, which is the sole remaining cause of action. As a general rule, the existence of a statutory limited warranty precludes common-law causes of action, including causes of action for breach of contract (*see Fumarelli*, 92 NY2d at 305; *Lantzy*, 60 AD3d at 1255; *Latiuk*, 269 AD2d at 820). A breach of contract cause of action, however, is precluded only to the extent it is based on the breach of warranty (*see Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1075-1076; *Biancone v Bossi*, 24 AD3d 582, 584). Here, plaintiffs have stated violations of "specific provisions of [the contract] other than the warranty provisions," and thus the court properly denied that part of defendant's motion with respect to the breach of contract cause of action (*Tiffany at Westbury Condominium*, 40 AD3d at 1076; *see Biancone*, 24 AD3d at 584). We have considered the remaining contentions of the parties and conclude that they are without merit.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

337

CA 10-01572

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

JOHN T. SIWULA, PLAINTIFF-APPELLANT,

V ORDER

TOWN OF HORNELLSVILLE AND RAYMOND KRING, INDIVIDUALLY AND AS SUPERINTENDENT OF HIGHWAYS OF TOWN OF HORNELLSVILLE, DEFENDANTS-RESPONDENTS.

DANIEL T. STUTZMAN, RESPONDENT.

JOHN T. SIWULA, PLAINTIFF-APPELLANT PRO SE.

SHULTS AND SHULTS, HORNELL (DAVID A. SHULTS OF COUNSEL), FOR RESPONDENT.

PATRICK F. MCALLISTER, TOWN ATTORNEY, WAYLAND, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Steuben County Court (Peter C. Bradstreet, J.), entered November 25, 2009. The order granted the application of Daniel T. Stutzman, pursuant to Highway Law § 312, to confirm the jury's determination that a private road across his property was not necessary.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

338

CA 10-01313

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

MURRAY J.S. KIRSHTEIN, AS GUARDIAN AND AS ADMINISTRATOR OF THE ESTATE OF GEORGE J. TAPPER, DECEASED, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

AMERICU CREDIT UNION (FORMERLY UP STATE FEDERAL CREDIT UNION), DEFENDANT-APPELLANT, ET AL., DEFENDANT.
(AND A THIRD-PARTY ACTION.)
(ACTION NO. 1.)

MURRAY J.S. KIRSHTEIN, AS ADMINISTRATOR OF THE OF THE ESTATE OF GEORGE J. TAPPER, DECEASED, PLAINTIFF-RESPONDENT,

V

GENERAL ELECTRIC COMPANY, LOEWS CORPORATION, WACHOVIA CORPORATION, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(AND A THIRD-PARTY ACTION.)
(ACTION NO. 2.)
(APPEAL NO. 1.)

NASTO LAW FIRM, YORKVILLE (JOHN A. NASTO, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROSSI AND MURNANE, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a partial order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered January 20, 2010. The partial order and judgment, insofar as appealed from, awarded plaintiff shares of stock as well as accrued dividends and interest on those dividends.

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

Opinion by CENTRA, J.P.:

I

In appeal No. 1, defendants AmeriCU Credit Union (formerly Up State Federal Credit Union) (AmeriCu), General Electric Company (GE), Loews Corporation (Loews), and Wachovia Corporation (Wachovia) appeal from a "Partial Order and Judgment" awarding plaintiff various shares of stock of GE, Loews, and Wachovia, plus accrued dividends and interest, upon a jury verdict in favor of plaintiff on a cause of action for wrongful registration pursuant to UCC 8-404. In appeal No. 2, defendant Toys-"R"-Us, Inc. (Toys) appeals from a judgment ordering Toys to pay plaintiff the sum of $263,017.80 with interest until the date of payment. This appeal raises issues regarding a jury instruction and the remedy to which a plaintiff is entitled upon prevailing on a cause of action for wrongful registration.

II

The procedural background of this case is set forth in our prior decision in an appeal from an order denying the motion of the corporate defendants mentioned above, as well as AmeriCu (collectively, defendants), for summary judgment dismissing the complaint in the consolidated actions against them, which at that time had only one cause of action remaining, for wrongful registration (*Kirshtein v AmeriCU Credit Union*, 65 AD3d 147). Following the issuance of our decision, a jury trial was held on that sole cause of action under UCC 8-404. The evidence presented at trial established that plaintiff's decedent died on December 2, 2001 when he was 95 years old. Four years prior to his death, i.e., between December 1997 and September 1998, decedent transferred shares of stock of GE, Loews, Wachovia, and Toys worth over $300,000 to his caregiver, who had been caring for him since June 1997. Although no evidence was submitted regarding decedent's mental incapacity at the precise time that the transfers were made, plaintiff submitted evidence establishing that decedent was mentally incompetent both before and after the times in which those transfers were made. Plaintiff submitted evidence that decedent was hospitalized for four days in July 1996 after a police officer found decedent sitting in his car on the shoulder of a road, disoriented. Decedent showed signs of dementia during that hospital stay, which was documented by hospital personnel. An attorney testified that he met with decedent in 1996 for the execution of his will, but the attorney determined that decedent did not have the mental capacity to execute a will. Plaintiff also submitted evidence that, although decedent was taken to the emergency room in May 1997 for a broken arm, decedent did not know how he had sustained that injury.

Plaintiff also called an expert psychiatric witness, who testified that decedent's July 1996 hospitalization and May 1997 emergency room treatment showed that decedent was delusional and confused, and that he was not mentally competent. The expert testified that the dementia was not a transitory condition, inasmuch as decedent exhibited the dementia throughout the four-day hospitalization, and it persisted in May 1997. When decedent was moved into a nursing home in 1999, the admitting physician noted on decedent's chart that decedent had "known dementia, probably secondary to Alzheimer's Disease." The expert opined that decedent was not able

to understand the nature of the stock transfers.

Defendants in turn called an expert witness in geriatric medicine to testify at trial. She agreed that the hospital records indicated that decedent had dementia in July 1996, but she could not "make a statement about his competence." She suggested that decedent's dementia could have been caused by agitation or stress from being in the hospital, and that it possibly was merely a temporary condition.

The jury found that, on the dates that decedent executed documents that transferred shares of stock to someone else, i.e., the caregiver, he lacked the mental capacity to enter into a contract. Supreme Court thereupon ordered GE, Loews, and Wachovia to issue specified shares of stock to plaintiff, dividends that had accrued on the stock, and interest on those dividends. Because Toys no longer had stock to issue, the court ordered it to pay plaintiff the value of the shares that were wrongfully registered, plus interest.

III

Defendants first contend that the court erred in its instruction to the jury. The court instructed the jury that plaintiff had the burden to prove by clear and convincing evidence that, at the time of the stock transfers, decedent lacked the mental capacity to enter into a contract. Upon plaintiff's request, the court further instructed the jury on the presumption of continuance pursuant to PJI 7:50. That is, the court instructed the jury that, if it found "by clear and convincing evidence . . . that [decedent] lacked mental capacity at a time prior to his entering the transactions in question, the law presumes that such mental incapacity continue[d] at the time he executed those documents."

The presumption of continuance provides that "[p]roof of the existence of a person, an object, a condition or a tendency at a given time raises a presumption that it continued for as long as is usual with things of that nature" (Prince, Richardson on Evidence § 3-122 [Farrell 11th ed]; *see Cummins v County of Onondaga*, 84 NY2d 322, 326). "There is a legal presumption of continuance. A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty months since, justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue. So of ownership and non-residence" (*Wilkins v Earle*, 44 NY 172, 192).

Although the New York Pattern Jury Instructions include an instruction for the presumption of continuance only with respect to will contests (*see* PJI 7:50), the presumption of continuance is not limited to issues of a person's capacity (*see e.g. People v Scandore*, 3 NY2d 681, 684 *and Pollock v Rapid Indus. Plastics Co.*, 113 AD2d 520 [presumption of continuance of ownership]; *MacRae v Chelsea Fibre Mills*, 145 App Div 588, 589-591 [lights were out in a storeroom, presumption that unlit condition continued]; *see also McDermott v City of New York*, 201 AD2d 339, *lv denied* 83 NY2d 761 [despite allegation that a contractor did not properly barricade an opening, presumption

of continuance charge not given to the jury because no proof that the opening had been barricaded on the last business day prior to the accident]).

We reject defendants' initial contention that the instruction should not have been given because there was no prior "adjudication" of incompetency. There is no requirement that there be an adjudication of incompetency to warrant the instruction. Rather, mere evidence of incompetency is sufficient, and such evidence was presented here (*see generally* 2 NY PJI2d 7:50, at 1420 [2011]). Defendants next contend that, while the presumption of continuance is appropriate in will contests, it is not appropriate here because it reverses the burden of proof from establishing incapacity, as contended by plaintiff, to establishing capacity, as contended by defendants. We note that defendants failed to preserve that contention for our review (*see Fitzpatrick & Weller, Inc. v Miller*, 21 AD3d 1374, 1375), but we conclude that it is without merit in any event.

We agree with defendants that the burden of proof in will contests is different from the burden of proof in this case. Specifically, in an action to probate a will, the proponent of the will must establish the decedent's testamentary capacity once that capacity has been challenged (*see e.g. Matter of Paigo*, 53 AD3d 836, 838-839), while here plaintiff has the burden of establishing decedent's incapacity. The presumption of continuance of incapacity set forth in PJI 7:50 favors the opponent in a case involving a will contest, but in this case it favors plaintiff. In *Cummins* (84 NY2d at 324), the issue was whether the evidence was sufficient to support the jury's damage verdict for conscious pain and suffering where the decedent drowned after she lost control of her car and it flipped over and landed in a pond. The Court of Appeals agreed with this Court that there was no evidence presented by the plaintiff from which the jury could infer that the decedent was conscious for any period of time following the accident (*see id.*). The plaintiff argued that the presumption of continuance doctrine should be applied to establish the decedent's conscious pain and suffering because she was conscious and driving just before the accident (*see id.* at 326). We had held that the presumption of continuance was not applicable because "it cannot be said that it would be usual for a driver of a car to remain conscious after the car had spun off the shoulder of the road and had turned over while dropping down an embankment, especially where the medical examiner could not say, in view of the bruises he found on the scalp of the body, whether [the] decedent was conscious before the car entered the water" (*Cummins*, 198 AD2d 875, 876-877). On appeal, the Court of Appeals rejected the plaintiff's argument on the ground that it was not preserved for its review (*see Cummins*, 84 NY2d at 326). The Court noted, however, that the "proposed extension and application of the so-called presumption of continuance into this conscious pain and suffering area of the law . . . would have to be weighed carefully in an appropriate case, because availability and application of the rule would affect long-standing and delicate burdens of proof and major risk and damage policy allocations" (*id.*).

In our view, it was proper for the court to issue the instruction to which defendants object in this case. The jurors here were instructed, in accordance with well-settled law, that plaintiff had the burden to prove by clear and convincing evidence that, at the time decedent executed the transfers, he lacked the mental capacity to enter into a contract (*see Sears v First Pioneer Farm Credit, ACA*, 46 AD3d 1282, 1284-1285; *Matter of Mildred M.J.*, 43 AD3d 1391; *Feiden v Feiden*, 151 AD2d 889, 890). We conclude that the presumption of continuance instruction did not shift the burden of proof to defendants. Despite the instruction, plaintiff retained the burden to convince the jury that decedent lacked mental capacity. Indeed, as is properly the gist of the charge, it is usual that a person's capacity or incapacity at a given time continues in the future (*cf. Cummins*, 198 AD2d at 876-877).

IV

Defendants next contend that the court erred in awarding interest on the dividends issued by GE, Loews, and Wachovia. Pursuant to UCC 8-404 (b), "an issuer that is liable for wrongful registration . . . shall provide the person entitled to the security with a like certificated or uncertificated security, and any payments or distributions that the person did not receive as a result of the wrongful registration." Defendants do not dispute that the court properly awarded to plaintiff shares of stock of GE, Loews, and Wachovia, plus the dividends that had accrued, and in fact those defendants stipulated that they would provide such stock and dividends. Defendants contend, however, that plaintiff is not entitled to interest on the dividends. We reject that contention.

CPLR 5001 (a) provides that "[i]nterest shall be recovered upon a sum awarded . . . because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property . . . ." There is no provision in UCC 8-404 (b) prohibiting a court from awarding interest on the accrued dividends. In fact, that section broadly states that the person who is the victim of the wrongful registration is entitled to "any payments or distributions that the person did not receive," and we agree with the court that interest is to be included as a component of such a payment. Pursuant to UCC 1-103, "[u]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions" and, pursuant to the common law, courts have awarded interest on dividends (*see Scovenna v American Tel. & Tel. Co.*, 54 Misc 2d 74, 80-82; *Hill v American Tel. & Tel. Co.*, 37 NYS2d 957, 959). We thus conclude that plaintiff is entitled to interest on the award of dividends herein, under UCC 8-404 (b) (*see generally First Natl. Bank of Boston v Hovey*, 10 Mass App Ct 715, 724-725, 412 NE2d 889, 895).

V

Finally, defendants contend that the court erred in awarding plaintiff a monetary sum against Toys. It is undisputed that Toys was unable to issue shares of stock to plaintiff, inasmuch as Toys was acquired by an investment group as the result of a merger transaction

in July 2005 and all outstanding shares of Toys' stock were at that time converted into a specified monetary amount per share. The holders of Toys' stock prior to the merger were divested of corporate ownership and received the monetary amount of their shares, and post-merger Toys' stock is not traded on a public market or exchange.

As set forth above, UCC 8-404 (b) provides that an entity liable for wrongful registration must issue to the person entitled to the security, inter alia, "a like certificated or uncertificated security" to the person making the demand. That section further provides that, "[i]f an overissue would result, the issuer's liability to provide the person with a like security is governed by [s]ection 8-210" (*id.*). Section 8-210 (a) in turn defines an "overissue" as "the issue of securities in excess of the amount the issuer has corporate power to issue" and, significantly, section 8-210 (d) provides that, "[i]f a security is not reasonably available for purchase, a person entitled to issue or validation may recover from the issuer the price the person or the last purchaser for value paid for it with interest from the date of the person's demand."

Toys contended at trial and continues to contend on appeal that there was no "overissue" here and thus that plaintiff is not entitled to the remedy set forth in section 8-210 (d). Toys, however, also correctly contends that it cannot issue stock to plaintiff. Thus, according to Toys' contentions, plaintiff is thereby left with no remedy for the wrongful registration by Toys. We cannot condone that unconscionable result. Rather, under such circumstances, we are compelled to conclude that the court properly issued a monetary award to plaintiff in accordance with UCC 8-210 (d). We note that, under the common law, an entity with no shares of stock to transfer was required to pay the person who would have been entitled to such shares the monetary value of the shares (*see Pollock v National Bank*, 7 NY 274, 279) and, as we previously noted, the Uniform Commercial Code provides that, "[u]nless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions" (UCC 1-103). While it is perhaps unfortunate that UCC 8-404 (b) identifies only an "overissue" as an exception to the rule that stock must be transferred, we nevertheless conclude that a case such as this, in which there are no longer any shares of stock to transfer to the person entitled to receive them, is similar to the case of an overissue. Indeed, in the event of an overissue, the entity does not have the "corporate power to issue" the security (UCC 8-210 [a]) and, similarly, Toys no longer has the authority to issue any stock to plaintiff in view of the aforementioned merger transaction. Moreover, like the trial court, we agree that it is appropriate to rely on UCC 1-106 (1), in which the Legislature made clear that "[t]he remedies provided by [the Uniform Commercial Code] shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . ." Thus, in light thereof, we conclude that plaintiff is entitled to receive the monetary value of the shares to which he is entitled because he otherwise is left with no remedy against Toys.

Accordingly, the partial order and judgment in appeal No. 1 and the judgment in appeal No. 2 should be affirmed.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

339

CA 10-01686

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

MURRAY J.S. KIRSHTEIN, AS GUARDIAN AND AS ADMINISTRATOR OF THE ESTATE OF GEORGE J. TAPPER, DECEASED, PLAINTIFF,

V

OPINION AND ORDER

AMERICU CREDIT UNION (FORMERLY UP STATE FEDERAL CREDIT UNION), DEFENDANT,
ET AL., DEFENDANT.
(AND A THIRD-PARTY ACTION.)
(ACTION NO. 1.)

MURRAY J.S. KIRSHTEIN, AS ADMINISTRATOR OF THE ESTATE OF GEORGE J. TAPPER, DECEASED, PLAINTIFF-RESPONDENT,

V

TOYS-“R”-US, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(AND A THIRD-PARTY ACTION.)
(ACTION NO. 2.)
(APPEAL NO. 2.)

NASTO LAW FIRM, YORKVILLE (JOHN A. NASTO, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROSSI AND MURNANE, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered March 31, 2010. The judgment, among other things, ordered defendant Toys-“R”-Us to pay plaintiff the sum of $263,017.80.

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

Same Opinion by CENTRA, J.P., as in *Kirshtein v AmeriCU Credit Union* ([appeal No. 1] ___ AD3d ___ [Mar. 25, 2011]).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

340

CA 10-02263

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

CAROL A. AHERN, INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF DONNA RUBACHA, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

RONALD H. SIROTA, INDIVIDUALLY AND DOING
BUSINESS AS STRATEGIC FINANCIAL PLANNING,
STRATEGIC FINANCIAL PLANNING, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

SICHENZIA ROSS FRIEDMAN FERENCE LLP, NEW YORK CITY (CHRISTOPHER P. MILAZZO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CARROLL & CARROLL LAWYERS, P.C., SYRACUSE (JOHN BENJAMIN CARROLL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 10, 2010. The order, insofar as appealed from, denied the motion of defendants Ronald H. Sirota, individually and doing business as Strategic Financial Planning, and Strategic Financial Planning, Inc. to compel arbitration and dismiss the first amended complaint.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

344.1

CA 10-02022

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

DAVID SMALLEY AND JUDITH SMALLEY,
PLAINTIFFS-RESPONDENTS,

V ORDER

HARLEY-DAVIDSON MOTOR COMPANY, INC.,
AND STAN'S HARLEY-DAVIDSON, INC.,
DEFENDANTS-APPELLANTS.

QUARLES & BRADY LLP, MILWAUKEE, WISCONSIN (LARS E. GULBRANDSEN, OF THE WISCONSIN BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND HARTER SECREST & EMERY LLP, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

LADUCA LAW FIRM, LLP, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered July 29, 2010. The order, insofar as appealed from, granted the cross motion of plaintiffs for leave to amend 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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

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CA 10-01730

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

JOAN HAYMON, INDIVIDUALLY AND AS MOTHER AND
NATURAL GUARDIAN OF LEONARD HAYMON, AN INFANT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DONALD J. PETTIT, DEFENDANT,
AND CITY OF AUBURN, DEFENDANT-RESPONDENT.

DAMON MOREY LLP, BUFFALO (STEVEN M. ZWEIG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JOHN C. ROSSI, CORPORATION COUNSEL, AUBURN, RIVKIN RADLER LLP, UNIONDALE (CHERYL F. KORMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered November 4, 2009 in a personal injury action. The judgment granted summary judgment to defendant City of Auburn and dismissed the amended complaint against that defendant.

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

Memorandum: Plaintiff commenced this action, individually and on behalf of her 14-year-old son, seeking damages for injuries he sustained when he was struck by a vehicle operated by defendant Donald J. Pettit. Plaintiff's son had been standing with a group of children outside a stadium owned and operated by defendant Auburn Community Non-Profit Baseball Association, Inc. (Baseball Association). There was a baseball game in progress in the stadium, and plaintiff's son was struck by Pettit's vehicle while he was running across the street in defendant City of Auburn (City) in an attempt to catch a baseball that was hit out of the stadium. On a prior appeal, we determined that Supreme Court erred in denying the Baseball Association's motion for summary judgment dismissing the complaint and cross claims against it (*Haymon v Pettit*, 37 AD3d 1194, *affd* 9 NY3d 324, *rearg denied* 10 NY3d 745), and plaintiff now appeals from a judgment granting the City's motion for summary judgment dismissing the amended complaint against it. In affirming our order in the prior appeal, the Court of Appeals wrote that "[t]here are inherent risks associated with crossing the street. Those risks are multiplied when doing so indiscriminately . . . We must assume that adults, and children of [the] age [of plaintiff's son], will act prudently in doing so" (*Haymon*, 9 NY3d at 329). The City met its initial burden on the

motion by establishing that it did not owe a legally recognized duty to plaintiff (*see Gilson v Metropolitan Opera*, 5 NY3d 574, 576-577), and plaintiff failed to raise an issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

345

KA 07-00949

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUNIOR A. BANAH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered August 24, 2004. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [2] [b]). Contrary to defendant's contention, County Court did not abuse its discretion in denying defendant's request for substitution of counsel without making a further inquiry. It is apparent from the record that defendant disagreed with defense counsel's advice that he accept a favorable plea offer, and thus we conclude that the court properly determined that defendant's request for new counsel was not based upon "good cause" (*People v Linares*, 2 NY3d 507, 510; *cf. People v Sides*, 75 NY2d 822, 824-825).

Defendant failed to preserve for our review his further contention that the court erred in permitting a police officer to testify with respect to the victim's showup identification of defendant (*see People v Jordan*, 261 AD2d 947, *lv denied* 93 NY2d 1003; *see generally People v Love*, 57 NY2d 1023, 1025). In any event, any such error is harmless in light of the overwhelming proof of defendant's guilt, i.e., "strong and unequivocal identification testimony" of the victim (*People v Cruz*, 214 AD2d 952, 953, *lv denied* 86 NY2d 793), and the physical evidence recovered in proximity to the location where defendant was stopped by police, and there is no significant probability that defendant would have been acquitted but

for the error (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

346

KA 09-01893

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT ELAMIN, 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 (Russell P. Buscaglia, A.J.), rendered July 17, 2009. The judgment convicted defendant, upon a nonjury verdict, of unauthorized use of a vehicle in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of unauthorized use of a vehicle in the third degree (Penal Law § 165.05 [1]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Gray,* 86 NY2d 10, 19) and, in any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). The victim identified defendant at trial as one of the two men who were using his vehicle. A police officer testified that he observed a vehicle matching the description of the victim's vehicle and, when he attempted to pull it over, two men fled from the vehicle and abandoned it. Another officer located defendant, who matched the description of one of the men who fled from the victim's vehicle, in proximity thereto. Viewing the evidence in light of the elements of the crime in this nonjury trial (*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 Bleakley*, 69 NY2d at 495).

Defendant contends that he received ineffective assistance of counsel because defense counsel failed to argue at the *Wade* hearing that the detention of defendant for purposes of a photo array was unlawful pursuant to *People v Hicks* (68 NY2d 234). We reject that contention. " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense]

counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712, quoting *People v Rivera*, 71 NY2d 705, 709; *see People v Gregory*, 72 AD3d 1522, *lv denied* 15 NY3d 805), and defendant failed to meet that burden. The officer who detained defendant after locating him in proximity to the victim's vehicle testified at the *Wade* hearing that defendant was transported to the police station for purposes of conducting a photo array with the victim within only a few minutes of being detained. That testimony established that the length of the detention was minimal and lawful (*see Hicks*, 68 NY2d at 243; *People v Dibble*, 43 AD3d 1363, 1364-1365, *lv denied* 9 NY3d 1032). When the officer subsequently testified at trial that she was mistaken in her testimony at the *Wade* hearing and that the detention of defendant prior to the photo array lasted approximately one hour, defense counsel could have moved to reopen the *Wade* hearing (*see generally People v Bryant*, 43 AD3d 1377, 1378, *lv denied* 9 NY3d 1031; *People v Walker*, 269 AD2d 843, *lv denied* 94 NY2d 953). Defendant, however, failed to establish that there was no legitimate explanation for defense counsel's failure to do so (*see People v Waliyuddin*, 286 AD2d 915, *lv denied* 97 NY2d 659). Indeed, we note that, at a reopened *Wade* hearing, the People could have called the victim to testify to establish that he had an independent basis for his in-court identification of defendant (*see People v Hill*, 53 AD3d 1151; *see generally People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

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

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

349

KA 07-02580

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID EVERETT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered October 16, 2007 and October 29, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, operating a motor vehicle without a certificate of inspection, license plate display violation and operating a motor vehicle without a license.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of assault in the second degree and dismissing count one of the indictment and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, assault in the second degree (Penal Law § 120.05 [3]), defendant contends that the evidence is legally insufficient to support the assault conviction. We agree. Pursuant to Penal Law § 120.05 (3), "[a] person is guilty of assault in the second degree when . . ., [w]ith intent to prevent . . . a police officer . . . from performing a lawful duty . . ., he or she causes physical injury to such . . . police officer . . . ." Here, an officer was injured while he was attempting to pat down defendant after he and another officer pulled over defendant's vehicle. Although the People established that the police properly stopped defendant's vehicle for violations of the Vehicle and Traffic Law and asked defendant to exit the vehicle because he had no identification, we conclude that the pat-down search of defendant for "officer safety" was illegal. A pat-down search of a traffic offender is not authorized "unless, when the vehicle is stopped, there are reasonable grounds for suspecting that the officer is in danger or there is probable cause for believing that the offender is guilty of a crime rather than merely a simple traffic infraction" (*People v Marsh*, 20 NY2d 98, 101). Here, the officers did not have any "knowledge of some

fact or circumstance that support[ed] a reasonable suspicion that the [defendant was] armed or pose[d] a threat to [their] safety" (*People v Batista*, 88 NY2d 650, 654). The Court of Appeals has expressly declined to adopt the decision of the United States Supreme Court in *Michigan v Long* (463 US 1032), "which found that an intrusion by the police 'could be justified purely on the *theoretical* basis . . . that harm could occur after the investigation is terminated and the suspect is permitted to reenter his [or her] vehicle' " (*People v Mundo*, 99 NY2d 55, 58, quoting *People v Torres*, 74 NY2d 224, 232 n 4). Thus, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence was legally insufficient to establish that the officer was injured while undertaking a lawful duty (*see generally People v Bleakley*, 69 NY2d 490, 495). We therefore modify the judgment by reversing that part convicting defendant of assault in the second degree and dismissing count one of the indictment. In light of our conclusion, we do not reach defendant's remaining contentions.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

350

KA 08-01688

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN P. DEMUS, DEFENDANT-APPELLANT.

CRAIG P. SCHLANGER, SYRACUSE, 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 (Walter W. Hafner, Jr., J.), rendered April 25, 2008. The judgment convicted defendant, upon a jury verdict, of 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 fifth degree (Penal Law § 220.06 [5]). Defendant contends that County Court erred in refusing to suppress evidence recovered from his person on the ground that the search warrant for his person and residence was not based upon probable cause. We reject that contention. The court reviewed, inter alia, the recording of the sworn testimony of the confidential informant before City Court, which issued the search warrant, and it properly relied upon the ability of City Court to assess the credibility of the confidential informant (*see People v Ashley*, 2 AD3d 1321, *lv denied* 4 NY3d 851). We therefore conclude that County Court properly determined that the testimony of the confidential informant provided "the veracity or reliability of the source of the information, and . . . the basis of [his] knowledge" and thus that the search warrant was based upon probable cause (*People v Griminger*, 71 NY2d 635, 639). Defendant further contends that the search warrant was based upon stale information inasmuch as the affidavit of the police investigator submitted in support of the warrant application referenced two controlled buys from defendant that occurred several weeks prior to that application. That contention is not preserved for our review (*see People v Ming*, 35 AD3d 962, 964, *lv denied* 8 NY3d 883) and, in any event, it is without merit inasmuch as the testimony of the confidential informant established that the activity was ongoing (*see People v Coleman*, 26 AD3d 773, 774, *lv denied* 7 NY3d 754).

We conclude that the court properly refused to charge the jury on the lesser included offense of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03). The People presented expert testimony that the cocaine recovered from defendant weighed in excess of 1,200 milligrams, more than double the weight requirement for a conviction of criminal possession of a controlled substance in the fifth degree (*see* § 220.06 [5]). We therefore conclude that there is no reasonable view of the evidence that defendant committed the lesser offense but not the greater (*see People v Bolden*, 70 AD3d 1352, *lv denied* 14 NY3d 838; *see generally People v Davis*, 14 NY3d 20, 22-23).

Contrary to defendant's contention, he received effective assistance of counsel. We note that the record establishes that defendant insisted that defense counsel pursue a defense of entrapment, based upon the theory that defendant was contacted by the person who sold him cocaine at the behest of the police, who promptly seized it from defendant. The record further establishes that defense counsel unsuccessfully attempted to dissuade defendant from pursuing that defense. Thus, the record belies defendant's contention that defense counsel was ineffective for pursuing that defense. 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). Finally, the sentence is not unduly harsh or severe.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

351

KA 09-01060

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN R. MCLELLAN, DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (Robert C. Noonan, A.J.), rendered February 27, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of criminal sexual act in the second degree (Penal Law § 130.45 [1]). Although, as the People correctly concede, defendant's challenge to the legality of the sentence survives his waiver of the right to appeal (*see People v Christopher T.*, 48 AD3d 1131), we reject defendant's contention that the imposition of consecutive sentences was illegal. The facts and circumstances that defendant admitted during the plea allocution establish that he committed two separate and distinct acts of oral sexual conduct that formed the basis for the two counts of criminal sexual act to which he pleaded guilty. Thus, County Court was authorized to impose consecutive sentences (*see People v Quirk*, 73 AD3d 1089, *lv denied* 15 NY3d 955; *see generally People v Laureano*, 87 NY2d 640, 643-644).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

353

CAF 10-01392

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

IN THE MATTER OF AKYRA A.-N.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

BRANDY P., RESPONDENT-APPELLANT.

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 21, 2010 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 for reasons stated in the decision at Family Court.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

354

CAF 09-02015

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

IN THE MATTER OF RUTH M. CHAPPELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRUCE C. DIBBLE, RESPONDENT-APPELLANT.

SCHLATHER, STUMBAR, PARKS & SALK, ITHACA (DAVID M. PARKS OF COUNSEL), FOR RESPONDENT-APPELLANT.

JASON J. BOWMAN, ATTORNEY FOR THE CHILD, ONTARIO, FOR RICHARD D.

Appeal from an order of the Family Court, Ontario County (James R. Harvey, J.H.O.), entered September 4, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified the parties' judgment of divorce by awarding primary physical custody of the parties' child 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 prior judgment of divorce by awarding primary physical custody of the parties' child to petitioner mother and visitation to the father. We conclude at the outset that Family Court had jurisdiction over this proceeding because the initial custody determination was made by a court of this State, i.e., Supreme Court, as part of the judgment of divorce (*see* Domestic Relations Law § 76-a [1]). We further conclude that the exceptions set forth in Domestic Relations Law § 76-a (1) do not apply under the circumstances here. Contrary to the father's contention, the court was not required to decline to exercise its jurisdiction based on any unjustifiable conduct of the mother (*see* § 76-g [1]).

With respect to the merits, we conclude that the court was in the best position to evaluate the character and credibility of the witnesses, and we accord great weight to the court's determination regarding custody (*see Matter of Paul C. v Tracy C.*, 209 AD2d 955). The court weighed the appropriate factors in determining that modification of the judgment by awarding primary physical custody to the mother was in the best interests of the child, and that determination has a sound and substantial basis in the record (*see*

Matter of Jones v Houck, 280 AD2d 969).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

356

CA 10-00731

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

FARID POPAL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HARVEY J. SLOVIS, ESQ., DEFENDANT-RESPONDENT.

FARID POPAL, PLAINTIFF-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered January 7, 2010. The order granted plaintiff's motion for leave to renew and, upon renewal, adhered to the prior determination denying plaintiff's motion for permission to proceed as a poor person pursuant to CPLR 1101.

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

Memorandum: Plaintiff commenced this action seeking monetary damages, allegedly resulting from the failure of defendant, his former attorney, to return unearned legal fees and unused funds for litigation expenses advanced to defendant prior to his representation of plaintiff in a criminal matter. Supreme Court denied plaintiff's motion for permission to proceed as a poor person pursuant to CPLR 1101, and plaintiff moved for leave to renew the motion. The court granted leave to renew and, upon renewal, adhered to its original determination. In denying the motion, the court determined that, although plaintiff had submitted a letter from an attorney attesting to the merits of his case, he had not sufficiently demonstrated that his underlying causes of action were meritorious. We agree with plaintiff that his action "is not frivolous or, stated another way, that the [action] has arguable merit" (*Nicholas v Reason*, 79 AD2d 1113; *see Matter of Young v Monroe County Clerk's Off.*, 46 AD3d 1379). "Although the determination whether to grant permission to proceed as a poor person lies within the sound discretion of the . . . court . . ., we conclude under the circumstances presented herein that the court abused its discretion in denying the motion" (*Young*, 46 AD3d at 1380).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

358

CA 10-02232

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

CAROL H. GRIECO, AS EXECUTRIX OF THE ESTATE
OF JOHN P. GRIECO, DECEASED,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, JANIERIO D. ALDRIDGE, M.D.,
BUFFALO THORACIC SURGICAL ASSOCIATES, P.C.,
IAN M. BROWN, R.P.A.C., TAMMY B. ERVOLINA,
R.P.A.C., ROBERT J. GAMBINO, R.P.A.C.,
DEFENDANTS-RESPONDENTS-APPELLANTS,
AND THOMAS J. CUMBO, M.D., DEFENDANT-RESPONDENT.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (TERRY D. SMITH OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT KALEIDA HEALTH.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KATHLEEN M. SWEET OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS JANIERIO D. ALDRIDGE, M.D., BUFFALO THORACIC SURGICAL ASSOCIATES, P.C., IAN M. BROWN, R.P.A.C., TAMMY B. ERVOLINA, R.P.A.C., AND ROBERT J. GAMBINO, R.P.A.C.

BROWN & TARANTINO, LLC, BUFFALO (KIMBERLY A. CLINE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

DECARO & KAPLEN LLP, PLEASANTVILLE (SHANA DECARO OF COUNSEL), FOR NEW YORK STATE ACADEMY OF TRIAL LAWYERS, AMICUS CURIAE.

KERN, AUGUSTINE, CONROY & SCHOPPMAN, P.C., GARDEN CITY (DONALD R. MOY OF COUNSEL) FOR THE MEDICAL SOCIETY OF THE STATE OF NEW YORK, AMICUS CURIAE.

Appeal and cross appeals from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 8, 2010 in a medical malpractice action. The order denied in part and granted in part the motions and cross motion of defendants to compel medical authorizations.

Now, upon reading and filing the stipulation withdrawing defendants' appeals signed by the attorneys for plaintiff, defendant Kaleida Health, and defendants Janierio D. Aldridge, M.D., Buffalo Thoracic Surgical Associates, P.C., Ian M. Brown, R.P.A.C., Tammy B.

Ervolina, R.P.A.C. and Robert J. Gambino, R.P.A.C. on November 24, 2010,

It is hereby ORDERED that said cross appeals taken by defendant Kaleida Health and by defendants Janierio D. Aldridge, M.D., Buffalo Thoracic Surgical Associates, P.C., Ian M. Brown, R.P.A.C., Tammy B. Ervolina, R.P.A.C., and Robert J. Gambino, R.P.A.C. are unanimously dismissed upon stipulation and the order is otherwise affirmed without costs.

Memorandum: Plaintiff, as executrix of the estate of her husband (decedent), commenced this action seeking damages for, inter alia, the alleged medical malpractice on the part of defendants in the care and treatment of decedent. Supreme Court granted in part the motion of defendants Janierio D. Aldridge, M.D., Buffalo Thoracic Surgical Associates, P.C., Ian M. Brown, R.P.A.C., Tammy B. Ervolina, R.P.A.C. and Robert J. Gambino, R.P.A.C., as well as the motion of defendant Thomas J. Cumbo, M.D. and the cross motion of defendant Kaleida Health, seeking, inter alia, to compel plaintiff to execute medical authorizations compliant with the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d *et seq.*) permitting defendants to interview decedent's treating physicians with respect to the medical information relevant to this case (*see generally Arons v Jutkowitz*, 9 NY3d 393, 409, 415). We affirm. Contrary to the contention of plaintiff, the court properly directed her to attach to the authorizations "a list of the allegations of negligence set forth in [her] bill of particulars" inasmuch as such information limits the scope of disclosure to only those medical conditions relevant thereto (*see generally id.* at 410). Further, the standardized form that the court directed plaintiff to use for the authorizations clearly states that the physician to be interviewed is permitted to discuss only the listed medical conditions, that the purpose of the interview is to assist defendants, that it is not at the request of plaintiff and that, despite plaintiff's authorization, the physician is free to decline defendants' request for an interview.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

359

CA 10-00205

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

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

V MEMORANDUM AND ORDER

CHARLES KALCHTHALER, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, SYRACUSE (MAUREEN T. KISSANE OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MICHAEL CONNOLLY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (William D. Walsh, A.J.), entered November 17, 2009 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and a new trial is granted.

Memorandum: On appeal from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility, respondent contends that Supreme Court erred in denying his challenge for cause to a prospective juror. We agree. We note at the outset that challenges to the jury impanelment procedures in Mental Hygiene Law article 10 proceedings implicate a respondent's fundamental right to a jury trial (*see Matter of State of New York v Muench*, 68 AD3d 1677; *see generally* § 10.07 [b]), and the procedure set forth in CPL 270.20 governing challenges for cause in a criminal trial applies here (*see* § 10.07 [b]). Pursuant to that procedure, when a prospective juror makes statements that cast serious doubt on his or her ability to render an impartial verdict, that juror must be excused for cause unless the juror provides an "unequivocal assurance that [he or she] can set aside any bias and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614). We agree with respondent that the prospective juror in question did not provide such an unequivocal assurance and thus that respondent should not have had to use a peremptory challenge with respect to that prospective juror (*see id.* at 614-615). Inasmuch as respondent exhausted all of his peremptory challenges before the completion of jury selection, reversal is required (*see* CPL 270.20 [2]; *cf. People v*

Lynch, 95 NY2d 243, 248). In light of our determination, we do not address respondent's remaining contentions.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

363

CA 10-01847

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

EMILY CAMHI, PLAINTIFF-APPELLANT,

V ORDER

ERIC W. RUCKERT, DDS AND
ORAL & MAXILLOFACIAL SURGERY ASSOCIATES,
DEFENDANTS-RESPONDENTS.

DAVIDSON FINK, LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ASHLEY D. HAYES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 22, 2010 in a dental malpractice action. The order granted defendants' motion for summary judgment dismissing plaintiff's complaint.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

365

CA 10-02091

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

MARGARITA ZULEY, M.D., PLAINTIFF-RESPONDENT,

V ORDER

ELIZABETH WENDE BREAST CARE, LLC, WENDE LOGAN-YOUNG, M.D., STAMATIA DESTOUNIS, M.D., PHILIP MURPHY, M.D., POSY SEIFERT, D.O., AND PATRICIA SOMERVILLE, M.D., DEFENDANTS-APPELLANTS.

UNDERBERG & KESSLER LLP, BUFFALO (THOMAS F. KNAB OF COUNSEL), FOR DEFENDANTS-APPELLANTS ELIZABETH WENDE BREAST CARE, LLC, STAMATIA DESTOUNIS, M.D., PHILIP MURPHY, M.D., POSY SEIFERT, D.O., AND PATRICIA SOMERVILLE, M.D.

BOYLAN, BROWN, CODE, VIGDOR & WILSON, LLP, ROCHESTER (DAVID K. HOU OF COUNSEL), FOR DEFENDANT-APPELLANT WENDE LOGAN-YOUNG, M.D.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered May 14, 2010. The order denied in part defendants' motions for summary judgment dismissing the complaint.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

366

CA 10-02054

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

LISANN JACOBS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TILE SHOPPE ENTERPRISES, INC.,
DEFENDANT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (KYLE C. REEB OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAVID P. FELDMAN, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 14, 2010. The order denied plaintiff's motion for partial summary judgment.

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

Memorandum: Supreme Court properly denied plaintiff's motion for partial summary judgment. We note at the outset that the only cause of action addressed in plaintiff's brief on appeal is the fourth cause of action, for breach of warranty, and she addresses only that part of the cause of action with respect to breach of warranty of fitness for a particular purpose (*see* UCC 2-315). Thus, that is the only issue properly before us. We affirm. Plaintiff met her initial burden on the motion by establishing that she relied on defendant's representations that the tile she purchased was fit for a particular purpose, i.e., outdoor use (*see* UCC 2-315; *see also Bimini Boat Sales, Inc. v Luhrs Corp.*, 69 AD3d 782, 783; *see generally Saratoga Spa & Bath v Beeche Sys. Corp.*, 230 AD2d 326, 331, *lv dismissed and lv denied* 90 NY2d 979). In opposition to the motion, however, defendant raised a triable issue of fact by submitting the results of objective testing demonstrating that the tile was in fact fit for outdoor use (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

367

KA 10-00085

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GARY B. CLARK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered October 19, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

368

KA 10-00061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER MONROE, ALSO KNOWN AS LUV,
DEFENDANT-APPELLANT.

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (MELVIN BRESSLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered October 5, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the restitution ordered and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant contends that his arrest was not supported by probable cause and that County Court therefore erred in refusing to suppress statements made by defendant to the police, as well as physical evidence seized incident to his arrest. We reject that contention. Where hearsay information forms at least in part the basis for probable cause, the information must satisfy " 'the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted' " (*People v Flowers*, 59 AD3d 1141, 1142). Here, the police had probable cause to arrest defendant based on information imparted to the police by the confidential informant who purchased cocaine from defendant. With respect to the reliability requirement, the police verified the accuracy of the information provided by the confidential informant by monitoring the drug transactions (*see People v Glover*, 23 AD3d 688, 689, *lv denied* 6 NY3d 776) and, with respect to the basis of knowledge requirement, the People established that the confidential informant participated in the drug transactions involving defendant (*see People*

v Ketcham, 93 NY2d 416, 420).

We agree with defendant, however, that the court erred in ordering defendant to pay restitution "inasmuch as the recipient of the restitution[, Wayne County,] was not a 'victim' as defined by Penal Law § 60.27 (4) (b)" (*People v Glasgow*, 12 AD3d 1172, 1172-1173, *lv denied* 4 NY3d 763; *see People v Watson*, 197 AD2d 880, 880-881). We therefore modify the judgment accordingly. "Although a defendant may agree to pay [restitution] as part of a plea agreement" (*People v Pelkey*, 63 AD3d 1188, 1191, *lv denied* 13 NY3d 748; *see* CPL 570.56), there is no evidence in this case that defendant did so. Finally, the sentence imposing concurrent terms of incarceration to be followed by a period of postrelease supervision is not unduly harsh or severe.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

369

KA 09-00403

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD J. WASHINGTON, III, 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 judgment of the Oneida County Court (Barry M. Donalty, J.), rendered December 13, 2006. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Oneida County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). Before pleading guilty, defendant moved to dismiss the indictment on the ground that the integrity of the grand jury proceedings was impaired and defendant was "possibly prejudiced" because the individual listed as the foreperson of the grand jury was in fact the father or other close relative of defendant's former girlfriend, and both the former girlfriend and defendant were previously parties to an order of protection. We agree with defendant that County Court erred in denying the motion without first conducting a hearing. We note at the outset that, contrary to the People's contention, the challenge by defendant "is to the integrity of the grand jury proceeding . . ., and such a challenge survives defendant's guilty plea" (*People v Gilmore*, 12 AD3d 1155, 1155-1156; *see generally People v Hansen*, 95 NY2d 227, 230-231; *People v Crumpler*, 70 AD3d 1396, 1397, *lv denied* 14 NY3d 839).

With respect to the merits of defendant's contention, CPL 210.45 (5) provides that a court may deny a motion to dismiss the indictment pursuant to CPL 210.20 without conducting a hearing if "(a) [t]he moving papers do not allege any ground constituting legal basis for the motion . . .; or (b) [t]he motion is based upon the existence or occurrence of facts, and the moving papers do not contain sworn allegations supporting all the essential facts; or (c) [a]n allegation of fact essential to support the motion is conclusively refuted by

unquestionable documentary proof." If the court does not deny the motion pursuant to CPL 210.45 (5), it must either grant the motion without conducting a hearing under circumstances specified in CPL 210.45 (4), or "it must conduct a hearing and make findings of fact essential to the determination thereof" (CPL 210.45 [6]). Here, as noted, the moving papers contained allegations that the integrity of the grand jury proceedings was impaired and defendant was "possibly prejudiced" based on the fact that the foreperson allegedly was the father or other close relative of defendant's former girlfriend and the fact that defendant and his former girlfriend were parties to an order of protection that had been issued. Allegations that a specified grand juror was "incapable of performing his [or her] duties because of bias or prejudice" provide a legal basis for a motion to dismiss the indictment (CPL 190.20 [2] [b]; *see People v Connolly*, 63 AD3d 1703, 1705; *People v Revette*, 48 AD3d 886, 886-887). Moreover, the moving papers contained the requisite sworn allegations of the essential facts asserted in support of the motion (*see* CPL 210.45 [5] [b]), and the People did not conclusively refute defendant's allegations with "unquestionable documentary proof" (CPL 210.45 [5] [c]). We therefore hold the case, reserve decision, and remit the matter to County Court to conduct a hearing on defendant's motion (*see* CPL 210.45 [6]; *see generally People v White*, 72 AD2d 913, 914).

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

370

KA 10-01055

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONNIE A. KOONCE, 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 March 22, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the fifth degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Griffin*, 239 AD2d 936).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

371

TP 10-02127

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

IN THE MATTER OF VARREL MITCHELL, PETITIONER,

V ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENTS.

VARREL MITCHELL, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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 [Penny M. Wolfgang, J.], entered June 15, 2010) 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 the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

372

KA 08-00122

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER L. WESTER, ALSO KNOWN AS C-MURDER,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 21, 2007. The judgment convicted defendant, upon his plea of guilty, of kidnapping in the second degree and 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 plea of guilty of kidnapping in the second degree (Penal Law § 135.20) and assault in the second degree (§ 120.05 [2]). We reject defendant's contention that his attorney became a witness against him and that he was thereby denied effective assistance of counsel. Contrary to defendant's contention, the statements of defense counsel in response to defendant's pro se motion to withdraw his guilty plea were not adverse to defendant (*see People v Guerra-Pena*, 46 AD3d 1469, *lv denied* 10 NY3d 765). In any event, even if defendant is correct that the statements were adverse to him, the record conclusively establishes that Supreme Court's "rejection of [the] motion was not influenced by" those statements (*People v Nawabi*, 265 AD2d 156, *lv denied* 94 NY2d 865). We also reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to make any arguments on defendant's behalf at sentencing. There is no showing that any arguments by defense counsel would have impacted the court's sentencing decision and, thus, "the failure of [defense] counsel to speak on defendant's behalf at sentencing d[id] not constitute ineffective assistance of counsel" (*People v Adams*, 247 AD2d 819, 819, *lv denied* 91 NY2d 1004, 1008).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

373

KA 10-00183

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CRYSTAL M. WALDEN, DEFENDANT-APPELLANT.

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

KEITH SLEP, DISTRICT ATTORNEY, BELMONT, FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered August 13, 2009. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated, a class D felony.

Now, upon reading and filing the stipulation to withdraw appeal signed by defendant on February 28, 2011 and by the attorneys for the parties on March 4 and 8, 2011,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

374

CAF 10-00078

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

IN THE MATTER OF IMANI D.W.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, ORDER
PETITIONER-RESPONDENT;

CHRISTINE W., RESPONDENT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR RESPONDENT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, FOR IMANI D.W.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered November 27, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order denied respondent's request for post-termination contact with her child.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

375

CAF 10-00743

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

IN THE MATTER OF RICHARD YELTON, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRANDIE L. FROELICH, RESPONDENT-APPELLANT.

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

GEORGE C. MURAD, UTICA, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (John E. Flemma, J.H.O.), entered March 15, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded primary physical custody of the subject children to petitioner.

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

Memorandum: Respondent mother appeals from an order that, inter alia, modified the parties' existing custody arrangement, to which the parties had stipulated, by awarding primary physical custody of the parties' children to petitioner father. We reject the mother's contention that the father failed to make the requisite showing of a change in circumstances to warrant alteration of the existing arrangement, pursuant to which she had primary physical custody. "[A]n existing [custody] arrangement that is based upon a stipulation of the parties is entitled to less weight than a disposition after a plenary trial . . ., and here there was a sufficient change in circumstances to warrant a modification of the existing custody arrangement" (*Matter of Alexandra H. v Raymond B.H.*, 37 AD3d 1125, 1126 [internal quotation marks omitted]). The record establishes that, after the parties entered into the stipulation, the mother changed jobs and moved several times, requiring the children to change school districts. In addition, the mother left the children for three months to explore employment opportunities in Florida and to spend time with her boyfriend there, and she transferred her professional license as a certified nurse assistant to Florida, thus jeopardizing her ability to obtain employment in New York. Those changed circumstances, along with the evidence presented at the hearing on the father's custody petition that his residence and employment remained consistent since the time of the stipulation and that the children thrived in his care, "constitute the requisite evidentiary showing of a 'change of circumstances warranting a reexamination of the existing

custody arrangement' " (*Matter of Amy L.M. v Kevin M.M.*, 31 AD3d 1224, 1225).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

376

CAF 10-00488

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

IN THE MATTER OF LEOPOLIAN P., III,
AND STEPHEN M., JR.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

TIFFANY B., RESPONDENT-APPELLANT,
AND LEOPOLIAN P., II, RESPONDENT.

THOMAS N. MARTIN, ROCHESTER, FOR RESPONDENT-APPELLANT.

CARACCIOLI & NELSON, PLLC, WATERTOWN (ANNALISE M. DYKAS OF COUNSEL), FOR PETITIONER-RESPONDENT.

KIMBERLY A. WOOD, ATTORNEY FOR THE CHILDREN, WATERTOWN, FOR LEOPOLIAN P., III AND STEPHEN M., JR.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered January 29, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent mother.

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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

378

CA 10-01589

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

DAVID F. STEVER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HSBC BANK USA, N.A., HSBC PAYMENT SERVICES (USA), INC., HSBC NORTH AMERICA HOLDINGS, INC., HSBC USA, INC., DEFENDANTS-APPELLANTS, AND ASSET REALTY, LLC, DEFENDANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COTE, LIMPERT & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered April 14, 2010 in a personal injury action. The order, among other things, denied the motion of defendants HSBC Bank USA, N.A., HSBC Payment Services (USA), Inc., HSBC North America Holdings, Inc., and HSBC USA, Inc. for summary judgment dismissing plaintiff's complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he drove his vehicle into a light stanchion in a parking lot controlled by defendants-appellants (collectively, HSBC defendants). We agree with the HSBC defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint against them. We note at the outset that, as limited by their brief on appeal, they have abandoned any issue with respect to their request for alternative relief concerning plaintiff's supplemental bill of particulars and further discovery by them (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

In support of the motion, the HSBC defendants submitted the affidavit of an architect experienced in the design of parking lots who inspected the parking lot in question and concluded that the placement of the light stanchions within was not defective, "that the amount of light provided by the stanchions offered adequate lighting for the . . . parking lot," and that the parking lot and the light stanchions were properly designed. We conclude that the HSBC

defendants met their initial burden on the motion by the submission of that affidavit (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In opposition to the motion, plaintiff submitted the affidavit of a licensed engineer who opined that the subject light stanchion, which was modified following the accident, was unsafe at the time of the accident. That engineer, however, "failed to present evidence that he had any practical experience with, or personal knowledge of, [either stanchions or parking lots] such as [those] at issue here, nor did [he] demonstrate such personal knowledge or experience with [stanchion or parking lot design] in general" (*O'Boy v Motor Coach Indus., Inc.*, 39 AD3d 512, 514). Indeed, although he recited in his affidavit "that he is a licensed engineer, . . . no further information was offered to establish any specialized knowledge, experience, training, or education with regard to [the relevant subject matter] so as to qualify him as an expert" (*Hofmann v Toys "R" Us, NY Ltd. Partnership*, 272 AD2d 296; *see Paul v Cooper*, 45 AD3d 1485, 1486-1487; *cf. Bickom v Bierwagen*, 48 AD3d 1247, 1247-1248). Consequently, we conclude that the conclusions of plaintiff's engineer were insufficient to raise a triable issue of fact in this design defect case (*see generally Zuckerman*, 49 NY2d at 562).

We further conclude that there is no merit to plaintiff's contention that the court properly denied the motion because there is an issue of fact whether the HSBC defendants are liable for failing to remedy or warn of a dangerous condition, i.e., the dark color of the stanchion into which plaintiff drove his vehicle. "It is well established that [an entity that controls certain property] is liable for a dangerous or defective condition on [that] property when [the entity] created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it" (*Pommerenck v Nason*, 79 AD3d 1716, 1716 [internal quotation marks omitted]; *see Clifford v Woodlawn Volunteer Fire Co., Inc.*, 31 AD3d 1102, 1103). Here, there is no indication in the record that the HSBC defendants created the allegedly dangerous or defective condition. In addition, those defendants established in support of their motion that they had neither actual nor constructive notice of that condition and a reasonable time in which to remedy it (*see McKee v State of New York*, 75 AD3d 893, 895), and plaintiff failed to raise a triable issue of fact in opposition (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838).

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

379

CA 10-02009

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

DAVID J. OLIN, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE THRUWAY AUTHORITY AND NEW YORK STATE DEPARTMENT OF TRANSPORTATION, DEFENDANTS-RESPONDENTS.
(CLAIM NO. 112120.)

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA, LLC, BUFFALO (MICHAEL T. FEELEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered December 8, 2009. The order denied the motion of claimant for partial summary judgment pursuant to Labor Law § 240 (1).

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

380

CA 10-01581

PRESENT: CENTRA, J.P., CARNI, GREEN, AND GORSKI, JJ.

KEVIN T. STOCKER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

2900 TRANSIT ROAD LLC, DEFENDANT-APPELLANT.

THE GARAS LAW FIRM, LLP, BUFFALO (JOHN C. GARAS OF COUNSEL), FOR DEFENDANT-APPELLANT.

KEVIN T. STOCKER, TONAWANDA, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 10, 2010. The order, insofar as appealed from, directed the Erie County Comptroller to distribute surplus funds to the members of defendant corporation.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is denied in part in accordance with the following Memorandum: Defendant corporation was formed for the purpose of "acquiring, developing, operating, leasing and otherwise dealing in real estate, specifically 6024 Main Street, Williamsville, New York." Defendant executed a mortgage with respect to that property, which was subsequently acquired by plaintiff, a member of defendant. Plaintiff commenced the instant mortgage foreclosure action when defendant defaulted on the mortgage and, following the foreclosure sale, surplus funds were deposited with the Erie County Comptroller (Comptroller) by agreement of the parties. Plaintiff thereafter moved, inter alia, for an order dissolving defendant corporation and directing the Comptroller to distribute the surplus funds pursuant to defendant's Operating Agreement.

As limited by its brief, defendant corporation contends that Supreme Court erred in granting that part of plaintiff's motion seeking an order directing the Comptroller to distribute the surplus funds to the members of defendant corporation in proportion to their membership interests. We agree. The surplus funds resulting from the foreclosure sale belong to defendant corporation (*see First Fed. Sav. & Loan Assn. of Rochester v Brown*, 78 AD2d 119, 123, *appeal dismissed* 53 NY2d 939).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

381

CA 10-01909

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

THERESA ROACH, PLAINTIFF-RESPONDENT,

V ORDER

JOSEPH V. MARRA AND SUSAN E. MARRA,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (LEO T. FABRIZI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN F. DONOHUE, TONAWANDA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 22, 2010 in a personal injury action. The order granted the motion of plaintiff for summary judgment on the issue of liability, sua sponte granted plaintiff summary judgment on the issue of threshold injury and denied the cross motion of defendants for summary judgment.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on February 11 and 22, 2011,

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

382

CA 10-00906

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

IN THE MATTER OF JON M. LADELFA, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF CHARLES MICHAEL LADELFA, DECEASED, PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

GERALD A. CONIGLIO, OBJECTANT-APPELLANT.

GERALD A. CONIGLIO, OBJECTANT-APPELLANT PRO SE.

Appeal from a decree of the Surrogate's Court, Livingston County (Dennis S. Cohen, A.S.), entered June 15, 2009. The decree judicially settled the account of Jon M. LaDelfa, Administrator of the Goods, Chattels and Credits of Charles Michael LaDelfa, deceased.

It is hereby ORDERED that the decree so appealed from is unanimously modified on the law by granting objectant's claim against the estate and as modified the decree is affirmed without costs and the matter is remitted to Surrogate's Court, Livingston County, for further proceedings in accordance with the following Memorandum: Objectant appeals from a decree of Surrogate's Court that settled the final account of petitioner, the administrator of decedent's estate, and, in so doing, denied objectant's claim against the estate for unpaid rent allegedly owed to him by decedent. We agree with objectant that the Surrogate erred in denying his claim. We therefore modify the decree accordingly, and we remit the matter to Surrogate's Court for further proceedings. Once objectant's claim was allowed by petitioner, as the administrator, and no parties who would be adversely affected by the claim filed objections thereto, the claim was prima facie valid (*see* SCPA 1807 [1]; *Matter of Dole*, 168 App Div 253; *Matter of Mayer*, 46 Misc 2d 537, 540). Indeed, it was "just as effective . . . as a judgment of a court of competent jurisdiction" (*Matter of Warrin*, 56 App Div 414, 416). The Surrogate was thus required to "confirm the allowance . . . and direct that [it] be paid" (*Matter of Fitzpatrick*, 123 Misc 779, 781), and the Surrogate could not require petitioner, as the administrator, to prove that the claim was legally valid (*see Matter of Myers*, 36 App Div 625, 627; *Matter of Wilson*, 127 Misc 518, 522-523).

To the extent that objectant raises arguments on behalf of petitioner, who also had a claim rejected (*see generally* SCPA 1805), those arguments are not properly before this Court because petitioner has not taken an appeal from the decree (*see Hecht v City of New York*,

60 NY2d 57, 63).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

383

CA 10-02185

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

ANTHONY COMMISSO AND VIKKI COMMISSO,
INDIVIDUALLY AND AS PARENTS AND NATURAL
GUARDIANS OF ZACHARY COMMISSO, AN INFANT
UNDER THE AGE OF FOURTEEN YEARS,
PLAINTIFFS-RESPONDENTS, MEMORANDUM AND ORDER

V

LYNDA GREENLEAF AND GERALD GREENLEAF,
DEFENDANTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. SKIFF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PETER M. HOBAICA LLC, UTICA (GEORGE E. CURTIS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered March 15, 2010 in a personal injury action. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiffs, individually and on behalf of their son, commenced this action to recover damages for injuries he sustained when he fell from his bicycle while he was under the supervision of defendants, at daycare. According to plaintiffs, defendants failed to provide adequate supervision for their son, who was then seven years old and was being badgered by another child who also was on a bicycle. We conclude that Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint. "A person to whom the custody and care of a child is entrusted by a parent 'is obliged to provide adequate supervision and may be held liable for foreseeable injuries proximately resulting from the negligent failure to do so' " (*Brennan v Sinski*, 31 AD3d 1108, 1109; *see Singh v Persaud*, 269 AD2d 381; *see generally Mirand v City of New York*, 84 NY2d 44, 50-51). Here, defendants failed to meet their initial burden on the motion inasmuch as their own submissions in support thereof raise issues of fact whether the accident was foreseeable and whether they provided adequate supervision (*see Oliverio v Lawrence Pub. Schools*, 23 AD3d 633, 634-635; *Douglas v John Hus Moravian Church of Brooklyn, Inc.*, 8 AD3d 327, 328). Defendants' failure to meet their initial burden "requires denial of the motion, regardless of the sufficiency of the

opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

384

CA 10-01140

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

DEWEY R. BARROW AND LISA M. BARROW,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

D.L. GORDON DUBOIS AND PAUL D. DUBOIS,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

HORIGAN, HORIGAN & LOMBARDO, P.C., AMSTERDAM (JAMES A. LOMBARDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CALLI, CALLI & CULLY, UTICA (HERBERT J. CULLY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered December 11, 2009 in a personal injury action. The judgment awarded plaintiffs money damages upon a jury verdict.

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

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by Dewey R. Barrow (plaintiff) when the motor vehicle in which he was a passenger struck a tree after being forced off the road by a vehicle owned by defendant D.L. Gordon Dubois and driven by defendant Paul D. Dubois. The issue of liability was resolved in favor of plaintiffs, and a jury trial on the issue of damages was conducted. At the close of plaintiffs' proof, defendants moved for judgment as a matter of law pursuant to CPLR 4401 on the ground that plaintiffs failed to establish a prima facie case that plaintiff sustained a serious injury pursuant to Insurance Law § 5102 (d) within the only remaining category before the jury, i.e., the 90/180-day category of serious injury, and Supreme Court denied defendants' motion. The jury ultimately found, inter alia, that plaintiff sustained a serious injury under the 90/180-day category and awarded plaintiffs damages for pain and suffering in the amount of $115,000. The court denied defendants' post-trial motion to set aside the verdict as against the weight of the evidence. We affirm.

We note at the outset that it is well established in the Fourth Department that resolution of the issue of liability necessarily includes a determination that plaintiff sustained a serious injury

(*see Ruzycki v Baker,* 301 AD2d 48, 51-52). We thus are constrained to conclude, based on defendants' motion pursuant to 4401 for judgment as a matter of law on the ground that plaintiff did not sustain serious injury, that only the issue of negligence had previously been decided in plaintiffs' favor, and that the case proceeded to trial on the issues of liability and damages.

We conclude that the court did not err in denying defendants' motion for judgment as a matter of law pursuant to CPLR 4401 on the issue of whether plaintiff sustained a serious injury in the motor vehicle accident. In order to grant such a motion, the trial court must find that, "upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556; *see Cummings v Jiayan Gu*, 42 AD3d 920, 921). In determining such a motion pursuant to CPLR 4401, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in [the] light most favorable to the nonmovant" (*Szczerbiak*, 90 NY2d at 556). Pursuant to Insurance Law § 5102 (d), "[t]o qualify as a serious injury under the 90/180-day category, there must be objective evidence of a medically determined injury or impairment of a non-permanent nature . . . as well as evidence that plaintiff's activities were curtailed to a great extent by that injury" (*Zeigler v Ramadhan*, 5 AD3d 1080, 1081 [internal quotation marks omitted]; *see Licari v Elliott*, 57 NY2d 230, 236). Here, "there was abundant evidence that plaintiff's activities were curtailed to a great degree for the requisite period of time following the motor vehicle accident" (*Cummings*, 42 AD3d at 921). Contrary to defendants' contention, the record contains the requisite evidence that plaintiff sustained a serious injury that was caused by the accident. A nurse practitioner diagnosed plaintiff as having sustained a cervical strain in the accident, and that diagnosis was supported by the nurse practitioner's observations that plaintiff had a limited range of motion in his neck and by objective evidence of crepitus in plaintiff's neck (*see Guerra v Fuez*, 145 AD2d 873, 873-874).

We further conclude that the court properly denied defendants' motion to set aside the verdict as against the weight of the evidence, inasmuch as it cannot be said that "the evidence so preponderated in favor of the [defendants] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Jaquay v Avery,* 244 AD2d 730, 731; *see* CPLR 4404 [a]; *Lolik v Big V Supermarkets*, 86 NY2d 744, 746). Here, the jury's verdict in favor of plaintiffs was based on a fair interpretation of the evidence (*see generally Cummings*, 42 AD3d at 923).

Finally, we cannot agree with defendants that the award of $115,000 for past pain and suffering deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]; *Ellis v Emerson*, 57 AD3d 1435, 1436-1437; *Gehrer v Eisner*, 19 AD3d 851, 852-853; *Osiecki v Olympic Regional Dev. Auth.*, 256 AD2d 998). The evidence, viewed in the light most favorable to plaintiffs, established that

plaintiff sustained a cervical strain that resulted in, inter alia, chronic neck pain and headaches, limited range of motion in his neck, as well as difficulty in sleeping and in walking. In addition, the injury prevented plaintiff from returning to work for several months, and plaintiff was unable to enjoy many of the activities that he previously enjoyed, such as hunting, shooting, and attending his son's sporting events.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

385

CA 10-01142

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

DEWEY R. BARROW AND LISA M. BARROW,
PLAINTIFFS-RESPONDENTS,

V ORDER

D.L. GORDON DUBOIS AND PAUL D. DUBOIS,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

HORIGAN, HORIGAN & LOMBARDO, P.C., AMSTERDAM (JAMES A. LOMBARDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CALLI, CALLI & CULLY, UTICA (HERBERT J. CULLY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered March 11, 2010 in a personal injury action. The order denied the motion of defendants to set aside the jury verdict pursuant to CPLR 4404 (a).

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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

386

CA 10-01204

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

KENNETH ASH, PLAINTIFF-RESPONDENT,

V ORDER

WINDOW SPECIALIST, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

NESPER, FERBER & DIGIACOMO, LLP, AMHERST (GABRIEL J. FERBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF PHILIP A. MILCH, BUFFALO (PHILIP A. MILCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 15, 2010 in a breach of contract action. The order, among other things, determined that defendant owed plaintiff the sum of $103,553.33 plus statutory interest.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Laborers Intl. Union of N. Am., Local 210, AFL-CIO v Shevlin-Manning, Inc.*, 147 AD2d 977).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

387

CA 10-01205

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

KENNETH ASH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WINDOW SPECIALIST, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

NESPER, FERBER & DIGIACOMO, LLP, AMHERST (GABRIEL J. FERBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF PHILIP A. MILCH, BUFFALO (PHILIP A. MILCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered May 3, 2010 in a breach of contract action. The judgment awarded plaintiff the sum of $184,053.23.

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

Memorandum: Plaintiff commenced this action seeking damages for defendant's alleged breach of the parties' employment agreement. Following a bench trial, Supreme Court concluded that defendant failed to pay plaintiff bonuses owed to him, and calculated the amount of those bonuses pursuant to the formula for computing such bonuses set forth in the employment agreement. Under that formula, plaintiff was to receive 50% of "Net Sales" as a bonus, defined as "gross sales received by [defendant] for window installations performed by crews supervised by [plaintiff], less 48% thereof for overhead, less the cost of goods sold by such crews, and less direct labor costs of such crews."

" 'On a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence' " (*Treat v Wegmans Food Mkts., Inc.*, 46 AD3d 1403, 1404). Contrary to defendant's contention, a fair interpretation of the evidence supports the court's conclusion that the expenses identified by defendant as "direct cost of sales" are encompassed within categories of expenses already deducted from "Net Sales" pursuant to the employment agreement. The court therefore properly calculated plaintiff's bonus without deducting "direct cost of sales" from "Net Sales" in determining the bonus to which plaintiff was

entitled.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

388

CA 10-00987

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

DAVID SZMANIA AND DEBORAH SZMANIA,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 111596.)
(APPEAL NO. 1.)

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered January 22, 2009 in a personal injury action. The order, insofar as appealed from, denied in part the motion of claimants to compel the production of documents.

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

Same Memorandum as in *Szmania v State of New York* ([appeal No. 2] __ AD3d __ [Mar. 25, 2011]).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

389

CA 10-00989

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

DAVID SZMANIA AND DEBORAH SZMANIA,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 111596.)
(APPEAL NO. 2.)

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered August 27, 2009 in a personal injury action. The order, insofar as appealed from, denied in part the motion of claimants to compel the production of documents.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the first ordering paragraph with respect to demand number one in claimants' "Notice to Produce Documents and Things" dated January 14, 2008 and as modified the order is affirmed without costs and the matter is remitted to the Court of Claims for further proceedings in accordance with the following Memorandum: Claimants commenced this action seeking damages for injuries sustained by David Szmania (claimant), an off-duty police officer, when he was assaulted by a resident of the West Seneca Developmental Center, a facility operated by the New York State Office of Mental Retardation and Developmental Disabilities. The resident had fled from the facility and was in the neighborhood of the facility at the time of the assault. In appeal No. 1, claimants appeal from an order denying in part their motion to compel disclosure and, in appeal No. 2, they appeal from an order also denying in part their subsequent motion to compel disclosure.

With respect to appeal No. 1, we conclude that the Court of Claims properly determined that certain portions of the relevant incident reports, as well as additional incident notification forms, were precluded from disclosure pursuant to Education Law § 6527 (3) and Mental Hygiene Law § 29.29. Contrary to claimants' contention, the court properly concluded, following an in camera review, that the portions of the relevant incident reports and the incident

notification forms in question were exempt from disclosure inasmuch as they were prepared in connection with a quality assurance review function (*see generally Katherine F. v State of New York*, 94 NY2d 200, 205; *Klingner v Mashioff*, 50 AD3d 746, 747).

With respect to appeal No. 2, claimants contend that the court erred in denying that part of their motion to compel defendant to produce the "West Seneca Developmental Center File" (File), including all medical and psychiatric records, for the resident who assaulted claimant. Generally, claimants are "not entitled to the medical information contained in [a resident-patient's] clinical record absent a showing that the privilege [pursuant to CPLR 4504] ha[s] been waived . . ., and absent a finding that the interests of justice significantly outweigh[ ] the need for and the right of the patient's confidentiality" (*J.Z. v South Oaks Hosp.*, 67 AD3d 645, 645-646; *see generally* Mental Hygiene Law § 33.13 [c]). Claimants contend that here the resident waived any applicable privilege by pleading not responsible by reason of mental disease or defect in the related criminal proceeding (*see generally* Penal Law § 40.15; *Webdale v North Gen. Hosp.*, 7 Misc 3d 947, 955, *affd* 24 AD3d 153). We agree with that contention only to the extent that the resident, by so pleading, waived any privileges applicable to his psychiatric records and documents relating to his mental condition at the time of the assault (*see* § 40.15; *People v Al-Kanani*, 33 NY2d 260, 264-265, *cert denied* 417 US 916; *People v Harris*, 109 AD2d 351, 362-363, *lv denied* 66 NY2d 919; *see generally People v Bloom*, 193 NY 1, 8; *Carter v Fantauzzo*, 256 AD2d 1189, 1190). "The waiver of the . . . privilege . . . does not permit discovery of information involving unrelated illnesses and treatments" (*Carter*, 256 AD2d at 1190). Thus, an in camera review of the File is required to determine which, if any, of the resident's medical records relate to the asserted affirmative defense (*see generally Sohan v Long Is. Coll. Hosp.*, 282 AD2d 597, 598). We further conclude that, upon remittal for such review, notice should be provided to the resident and/or his representative so that he may have an opportunity to be heard on this matter. In addition, an in camera review is required to determine whether the File contains other information to which claimants are entitled, i.e., "information of a nonmedical nature relating to any prior assaults or similar violent behavior by the [resident]" (*id.*; *see J.Z.*, 67 AD3d 645; *Moore v St. John's Episcopal Hosp.*, 89 AD2d 618, 619), but only to the extent that such information is not exempt from disclosure pursuant to Education Law § 6527 (3) and Mental Hygiene Law § 29.29. Finally, we note that, despite the resident's waiver, disclosure of the relevant medical and psychiatric files may not be ordered until there has been a finding pursuant to Mental Hygiene Law § 33.13 (c) (7) "that disclosure will not reasonably be expected to be detrimental to the [resident] . . . or another" individual (*see generally L.T. v Teva Pharms. USA, Inc.*, 71 AD3d 1400, 1401). We therefore modify the order by vacating that part of the first ordering paragraph with respect to the File, and we remit the matter to the Court of Claims for an in camera review of the File, following notice to the resident and/or his representative and an opportunity to be heard on the issue of discovery of the File. The court must then decide that part of claimants' motion seeking

discovery of the File following such in camera review, and make a finding pursuant to Mental Hygiene Law § 33.13 (c) (7), if warranted.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

390

KA 10-00665

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKY L. WINTERS, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

RICKY L. WINTERS, DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (DIANE M. ADSIT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered December 10, 2009. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony (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 felony driving while intoxicated (Vehicle and Traffic Law § 1192 [2], [3]; § 1193 [1] [c] [former (ii)]), and he contends that County Court erred in imposing an enhanced sentence without affording him an opportunity to withdraw his plea. We reject that contention. The record establishes that the court informed defendant during the plea proceeding that it could impose an enhanced sentence in the event that he failed to appear at sentencing. "By failing to appear at the scheduled sentencing, defendant violated the terms of the plea agreement and [the c]ourt was no longer bound by the agreed-upon sentence . . . Notwithstanding defendant's proffered excuse for his absence, we [conclude] that the court was justified in imposing the enhanced sentence" (*People v Goodman*, 79 AD3d 1285, 1286; *see People v Goldstein*, 12 NY3d 295, 301; *People v Perkins*, 291 AD2d 925, *lv denied* 98 NY2d 654). The sentence is not unduly harsh or severe.

In his pro se supplemental brief, defendant contends that he was denied effective assistance of counsel because the attorney assigned to represent him at sentencing failed to take notes during a conversation with defendant and failed to inform the court, during a conference in chambers, of issues that defendant wished to be addressed. That contention is based upon matters outside the record

on appeal and is thus properly raised by way of a motion pursuant to CPL article 440 (*see People v Jones*, 79 AD3d 1773; *People v Manuel*, 79 AD3d 1817). Defendant further contends that the attorney assigned to represent him at sentencing made statements adverse to defendant during the sentencing proceeding. Even assuming, arguendo, that the attorney took a position adverse to defendant, we conclude that reversal is not warranted because the statements in question did not "contribute to any rulings against defendant" (*People v Guerra-Pena*, 46 AD3d 1469, *lv denied* 10 NY3d 765; *see People v Moye*, 13 AD3d 1123, *lv denied* 4 NY3d 833).

We have reviewed the remaining contention of defendant in his pro se supplemental brief and conclude that it is without merit.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

396

KA 09-02476

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ODIS KNIGHT, DEFENDANT-APPELLANT.

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (CHRISTOPHER BOKELMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered March 5, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree, robbery in the first degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking Wayne County Court's oral directive that defendant never again enter Wayne County or travel within 50 miles of the victim's home and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, burglary in the first degree (Penal Law § 140.30 [2]) and robbery in the first degree (§ 160.15 [3]). As the People correctly concede, County Court erred in orally modifying the order of protection issued at the time of sentencing. We therefore modify the judgment by striking those oral modifications. The written order of protection remains in effect. We decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Martinez*, 55 AD3d 1334, *lv denied* 11 NY3d 927; *People v Bosse*, 23 AD3d 1063, *lv denied* 6 NY3d 809). Finally, the sentence is not unduly harsh or severe.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

397

KA 09-00595

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RALPH P. FERENCHAK, DEFENDANT-APPELLANT.

REBECCA A. CRANCE, SYRACUSE, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered November 15, 2007. 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 reversed on the law, the misdemeanor information is dismissed and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal contempt in the second degree (Penal Law § 215.50 [3]), arising from his violation of an order of protection. We agree with defendant that the misdemeanor information upon which he was prosecuted was jurisdictionally defective because it did not contain allegations that, if true, established his knowledge of the order of protection (*see generally* CPL 100.15 [3]; 100.40 [1] [c]; *People v Kalin*, 12 NY3d 225, 228-229; *cf. People v Inserra*, 4 NY3d 30, 32-33). "It is a fundamental and nonwaivable jurisdictional prerequisite that an information state the crime with which the defendant is charged and the particular facts constituting that crime . . . In order for an information to be sufficient on its face, every element of the offense charged and the defendant's commission thereof must be alleged" (*People v Hall*, 48 NY2d 927, 927, *rearg denied* 49 NY2d 918). Here, the factual portion of the misdemeanor information alleges that defendant violated an order of protection issued on a particular date and recites the circumstances underlying that violation, but it does not allege that defendant was served with the order of protection, that he was present in court when it was issued or that he signed the order of protection (*cf. Inserra*, 4 NY3d at 32-33; *People v Casey*, 95 NY2d 354, 360; *People v Harris*, 72 AD3d 1492, 1493, *lv denied* 15 NY3d 774). The complainant's supporting deposition does not reference the order of protection. Although a copy of the

order of protection was attached to the misdemeanor information, the order of protection states that it was issued on an ex parte basis, and there is no indication on the face thereof that it was served upon defendant.

We therefore reverse the judgment, dismiss the misdemeanor information and remit the matter to County Court for proceedings pursuant to CPL 470.45. In light of our determination, we need not address defendant's remaining contentions.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

398

KA 10-00819

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

THOMAS WASHINGTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 7, 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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

399

KA 09-02164

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE B. HINES, ALSO KNOWN AS "T,"
DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ROMOLO CANZANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Stephen R. Sirkin, A.J.), rendered October 14, 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.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Contrary to the contention of defendant, the record establishes that he was sentenced in accordance with the terms of the plea bargain (*see People v Green*, 277 AD2d 970, *lv denied* 96 NY2d 759). By pleading guilty, defendant forfeited his further contention with respect to the People's alleged violation of CPL 160.50 (*see generally People v Nunez*, 73 AD3d 1469, *lv denied* 15 NY3d 808).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

400

KA 06-03712

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TIMOTHY L. DUNBAR, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (WILLIAM G. PIXLEY OF COUNSEL), 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 November 15, 2005. 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: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

402

KA 10-00081

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRIAN BOSLEY, DEFENDANT-APPELLANT.

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

BRIAN BOSLEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered September 14, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

409

CA 10-00841

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

HARRIET C. BOARDMAN, PLAINTIFF-APPELLANT,

V ORDER

CHURCH OF THE TRANSFIGURATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR PLAINTIFF-APPELLANT.

CHARLES A. HALL, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered June 27, 2009. The order granted the motion of defendant for summary judgment dismissing the amended complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *see also* CPLR 5501 [a] [1]).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

410

CA 10-00842

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

HARRIET C. BOARDMAN, PLAINTIFF-APPELLANT,

V ORDER

CHURCH OF THE TRANSFIGURATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR PLAINTIFF-APPELLANT.

CHARLES A. HALL, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (David Michael Barry, J.), entered August 18, 2009. The amended order granted the motion of defendant for summary judgment dismissing the amended complaint and authorized defendant to enter a judgment with costs and disbursements.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

411

CA 10-00843

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

HARRIET C. BOARDMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHURCH OF THE TRANSFIGURATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR PLAINTIFF-APPELLANT.

CHARLES A. HALL, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David Michael Barry, J.), entered September 30, 2009. The judgment granted defendant costs and disbursements.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first and second causes of action and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking injunctive relief and monetary damages based upon water damage to her property allegedly caused by the construction and expansion of defendant's building and parking lot. Supreme Court properly granted that part of defendant's motion seeking summary judgment dismissing the third cause of action, for trespass. Defendant met its initial burden of establishing that it did not intend to cause water to enter onto plaintiff's property (*see Theofilatos v Koleci*, 105 AD2d 514), and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The court erred, however, in granting those parts of the motion seeking summary judgment dismissing the first and second causes of action, for a permanent injunction and damages based on private nuisance, respectively. Defendant established its entitlement to judgment as a matter of law dismissing those causes of action (*see Langdon v Town of Webster*, 238 AD2d 888, *lv denied* 90 NY2d 806). Plaintiff, however, raised a triable issue of fact whether the drainage system installed by defendant in connection with the improvements to its property caused the diversion of surface water onto plaintiff's property (*cf. id.*). We therefore modify the judgment accordingly.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

419

KA 10-01175

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TIMOTHY M. SCHREINER, DEFENDANT-APPELLANT.

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

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (AMANDA M. CHAFEE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Steuben County Court (Marianne Furfure, A.J.), entered March 29, 2010. 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.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

428

CA 10-01696

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

LAURIE REBON, PLAINTIFF-APPELLANT,

V ORDER

DONNA YORK, AS EXECUTRIX OF THE ESTATE OF
WARREN M. HELDWEIN, DECEASED,
DEFENDANT-RESPONDENT.

DONNA YORK, AS EXECUTRIX OF THE ESTATE OF
WARREN M. HELDWEIN, DECEASED, THIRD-PARTY
PLAINTIFF,

V

JUSTIN REBON, THIRD-PARTY DEFENDANT-RESPONDENT.

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

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (PAMELA S. SCHALLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered May 19, 2010 in a personal injury action. The order granted the motion of defendant for summary judgment dismissing the complaint and granted the motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

1070

CA 10-00873

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

JOHN R. SHERK, PLAINTIFF-APPELLANT,

V ORDER

LEHIGH CONSTRUCTION GROUP, INC., RIGHTEOUS BABE RECORDS, INC., RIGHTEOUS BABE MUSIC, INC., 341 DELAWARE, INC., 341 DELAWARE LENDER, LLC, ASBURY DEVELOPMENT, L.P., ASBURY DEVELOPMENT, LLC, ASBURY MASTER TENANT, LLC, CITY OF BUFFALO, AND BUFFALO RENEWAL AGENCY, DEFENDANTS-RESPONDENTS.

LEHIGH CONSTRUCTION GROUP, INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

LANCET-ARCH, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (HOWARD B. COHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (DONALD B. EPPERS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFF-RESPONDENT.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered November 13, 2009 in a personal injury action. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment pursuant to Labor Law § 240 (1).

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 22, 2011,

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

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

1487

KA 09-01463

PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAJERE SMIKLE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BORIS I. KARASCH, TIMOTHY P. MURPHY, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered June 4, 2009. 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, upon a jury verdict, of burglary in the first degree (Penal Law § 140.30 [4]), for unlawfully entering an occupied apartment with a handgun in an apparent attempt to steal money or drugs. Defendant failed to preserve for our review his contention that Supreme Court failed to comply with CPL 310.30 in connection with four jury notes and an oral request from a juror (*see People v Starling*, 85 NY2d 509, 516; *People v Peller*, 8 AD3d 1123, *lv denied* 3 NY3d 679), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject the related contention of defendant that the court's alleged improper handling of the jury notes is a mode of proceedings error that need not be preserved by a timely objection inasmuch as, here, the court read the jury notes into the record before responding and thus fulfilled its "core responsibility" under CPL 310.30 (*People v Kisoon*, 8 NY3d 129, 134; *see Starling*, 85 NY2d at 516; *People v Vazquez*, 28 AD3d 1100, 1101, *lv denied* 9 NY3d 965).

We further conclude that the court's *Sandoval* ruling did not constitute a " 'clear abuse of discretion,' " warranting reversal (*People v Nichols*, 302 AD2d 953, 953, *lv denied* 99 NY2d 657; *see People v Reid*, 34 AD3d 1273, 1274, *lv denied* 8 NY3d 884). The prior convictions in question bore directly on the credibility of defendant, inasmuch as they involved acts of dishonesty by him (*see People v Robles*, 38 AD3d 1294, 1295, *lv denied* 8 NY3d 990), and they reflected

a willingness on his part to place his interests above those of society (*see People v Thomas*, 8 AD3d 506, *lv denied* 3 NY3d 682; *People v Bell*, 249 AD2d 777, 778, *lv denied* 92 NY2d 922). The court similarly did not abuse its discretion in allowing the prosecutor to question defendant concerning the underlying facts of a juvenile delinquency adjudication in Family Court (*see People v Gray*, 84 NY2d 709, 712). We note that, although the record incorrectly refers to that adjudication as a youthful offender adjudication, it is permissible to question a defendant with respect to the underlying acts of either type of adjudication (*see id.*).

Defendant made only a general motion for a trial order of dismissal and thus failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, we reject that contention inasmuch as defendant was identified by two eyewitnesses at trial (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crime of burglary 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 further reject the contention of defendant that the 10-year term of incarceration imposed is unduly harsh and severe, particularly in view of the fact that defendant has a prior felony conviction and could have been sentenced to as much as a 25-year term of incarceration. Finally, we have reviewed defendant’s remaining contentions and conclude that they are without merit.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

1511

KA 09-02220

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANA P. BROWN, DEFENDANT-APPELLANT.

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

DANA P. BROWN, DEFENDANT-APPELLANT PRO SE.

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered September 24, 2009. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, sexual abuse in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, predatory sexual assault against a child (Penal Law § 130.96). Defendant moved pro se to dismiss the indictment on the ground that he was denied his right to a speedy trial pursuant to CPL 30.30, but he failed to contest the specific statutory exclusions on which the People thereafter relied. It is well settled that, "once the People identify the statutory 'exclusions on which they intend to rely,' the defendant preserves challenges to the People's reliance on those exclusions for appellate review by 'identify[ing] any legal or factual impediments to the use of [those] exclusions' . . . The purpose of adhering to strict rules of preservation in [that] context is to provide the court with an 'opportunity to remedy the problem and thereby avert reversible error' " (*People v Goode*, 87 NY2d 1045, 1047). Defendant therefore failed to preserve for our review his contentions regarding those exclusions. In any event, those contentions are without merit. The People timely announced their readiness for trial within six months of the commencement of the criminal action (*see* CPL 30.30 [1] [a]). The People correctly concede that they are chargeable with the delay between August 21, 2008, when County Court dismissed the first indictment, and September 26, 2008, when the People announced their readiness for trial on the second indictment. That delay

notwithstanding, the total prereadiness time chargeable to the People was 40 days, and only an additional 13 days of postreadiness delay is chargeable to the People. "Thus, the record establishes that the total period of time chargeable to the People is less than six months" (*People v Figueroa*, 15 AD3d 914, 915).

Contrary to the further contention of defendant, the court properly refused to suppress his statements to the police. The record of the *Huntley* hearing establishes that defendant was not subject to custodial interrogation and thus that *Miranda* warnings were not required (*see generally People v Centano*, 76 NY2d 837, 838; *People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851).

Defendant contends that he was denied a fair trial based on the testimony of a police investigator with respect to the video recording that defendant showed to the victim and which was obtained by the investigator. Defendant failed to object to the prosecutor's comments on summation concerning that testimony, including the prosecutor's use of the name of the video recording, and thus his contention with respect to those comments is not preserved for our review (*see People v Beggs*, 19 AD3d 1150, 1151, *lv denied* 5 NY3d 803). Defendant also failed to preserve for our review his contention that the court failed to clarify its jury instruction regarding that testimony inasmuch as he failed to object to that charge (*see People v Nenni*, 269 AD2d 785, 786, *lv denied* 95 NY2d 801; *People v Ocasio*, 241 AD2d 933, *lv denied* 90 NY2d 908). In any event, defendant's contentions are without merit. The victim testified that she watched a certain movie at the direction of defendant, and thus the investigator's testimony that such a video recording existed was admissible to support her testimony, and the prosecutor was permitted to comment on that evidence in summation.

Defendant also failed to preserve for our review his contention that the court permitted improper bolstering of the victim's testimony (*see People v Rodriguez*, 284 AD2d 952, *lv denied* 96 NY2d 924; *People v Dunn*, 204 AD2d 919, 920-921, *lv denied* 84 NY2d 907). In any event, that contention is without merit. With respect to the testimony of the first witness in question, we note that the court sustained defendant's objection to that testimony and thus it cannot be said that the court permitted improper bolstering through the testimony of that witness. With respect to the testimony of the second witness in question, we note that the witness merely testified that the victim indicated that her father was the perpetrator. Even assuming, arguendo, that the witness's testimony constituted improper bolstering, we conclude that the error is harmless inasmuch as the evidence of defendant's guilt was overwhelming and there was no significant probability that defendant would have been acquitted but for the error (*see People v Rice*, 75 NY2d 929, 932; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant failed to preserve for our review his further contention that the first count of the indictment is duplicitous (*see People v Sponburgh*, 61 AD3d 1415, *lv denied* 12 NY3d 929; *People v*

Pyatt, 30 AD3d 265, *lv denied* 7 NY3d 869), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject the contention of defendant in his pro se supplemental brief that he was denied effective assistance of counsel based on, inter alia, defense counsel's failure to move to dismiss the first count of the indictment as duplicitous. "To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's failure to [make such a motion]" (*People v Rivera*, 71 NY2d 705, 709). Here, defendant failed to meet that burden, and thus defense counsel's purported "failure, 'without more, is insufficient to demonstrate ineffective assistance' " (*People v Hibbard*, 27 AD3d 1196, 1197, *lv denied* 7 NY3d 790; *see People v Hardy*, 49 AD3d 1232, *affd* 13 NY3d 805).

We disagree with the dissent's conclusion that "there can be no doubt that a motion to dismiss counts one and two on duplicity grounds would have been successful and resulted in the dismissal of those counts." To the contrary, the court could have denied the motion and instead given a jury instruction that would have "eliminated any 'danger that the jury convicted defendant of an unindicted act or that different jurors convicted defendant based on different acts' " (*People v Gerstner*, 270 AD2d 837, 838; *see e.g. People v Wise*, 49 AD3d 1198, 1199, *lv denied* 10 NY3d 940, 966; *People v Caballero*, 23 AD3d 1031, 1032, *lv denied* 6 NY3d 846). Thus, defense counsel was confronted with a tactical determination regarding which course of action was in defendant's best interests, and defendant failed to meet his burden of establishing that defense counsel did not have a strategic or other valid reason for his alleged deficiency. Furthermore, where, as here, the defendant challenges defense counsel's failure, inter alia, to make a motion, "prudence dictates that the issue of ineffective assistance of counsel be raised in a posttrial application . . . where 'a thorough evaluation of each claim based on a complete record' can be made" (*People v Zeh*, 289 AD2d 692, 695, quoting *Rivera*, 71 NY2d at 709; *see People v Marcial*, 41 AD3d 1308, 1309, *lv denied* 9 NY3d 878). "We further conclude on the record before us that the cumulative effect of defense counsel's alleged deficiencies, viewed in totality and as of the time of the representation, did not deprive defendant of effective assistance of counsel" (*Marcial*, 41 AD3d at 1309; *see generally People v Satterfield*, 66 NY2d 796, 798-799; *People v Baldi*, 54 NY2d 137, 147).

The sentence is not unduly harsh or severe. We have considered the remaining contentions of defendant in his main and pro se supplemental briefs and conclude that they are without merit.

All concur except CARNI and LINDLEY, JJ., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully disagree with the conclusion of our colleagues that we should not review defendant's duplicity contention as a matter of discretion in the interest of justice. Inasmuch as defense counsel failed to move to dismiss the first and second counts of the

indictment on duplicity grounds, we also disagree with the majority's conclusion that defendant received effective assistance of counsel. We therefore dissent in part.

Defendant contends that count one of the indictment, charging him with predatory sexual assault against a child (Penal Law § 130.96), was rendered duplicitous by the evidence at trial. That count alleges underlying conduct constituting criminal sexual act in the first degree (§ 130.50 [4]). Because the People charged defendant with predatory sexual assault of a child based on a single-act theory, the rule prohibiting duplicity applies (*see People v Keindl*, 68 NY2d 410, 420-421, *rearg denied* 69 NY2d 823). Although count one is not duplicitous on its face inasmuch as it alleges a single act (*see* CPL 200.50 [3]-[7]; *Keindl*, 68 NY2d at 417-418), that count was rendered duplicitous by the testimony of the victim tending to establish the commission of multiple criminal acts during the period of time specified in count one (*see People v Bracewell*, 34 AD3d 1197, 1198; *People v Dalton*, 27 AD3d 779, 781, *lv denied* 7 NY3d 754, 811; *People v Jelinek*, 224 AD2d 717, 718, *lv denied* 88 NY2d 880, *cert denied* 519 US 900). Based on that evidence, "it is impossible to verify that each member of the jury convicted defendant for the same criminal act" (*Dalton*, 27 AD3d at 781). Thus, because count one was rendered duplicitous as a matter of well-settled law but defense counsel failed to move to dismiss that count, the question becomes whether this Court should exercise its discretion to review defendant's contention in the interest of justice (*see* CPL 470.15 [6] [a]).

The duplicity principle is designed to protect the accused against successive prosecutions in violation of the Double Jeopardy Clauses of the U.S. and N.Y. Constitutions (*see generally People v First Meridian Planning Corp.*, 86 NY2d 608, 615). "State and Federal constitutional prohibitions against double jeopardy are deemed so fundamental that they are preserved despite the failure to raise them at the trial level" (*People v Michallow*, 201 AD2d 915, 916, *lv denied* 83 NY2d 874). The prohibition against duplicity contained in CPL 200.30 [1] is essential because it "furthers not only the functions of notice to a defendant and of assurance against double jeopardy, but [it] also ensures the reliability of the unanimous verdict" (*Keindl*, 68 NY2d at 418). We recognize that this case does not present a double jeopardy problem per se. Nonetheless, the fundamental and compelling reasons behind the duplicity principle present interest of justice and constitutional concerns that warrant our review (*see People v Jones*, 165 AD2d 103, 109, *lv denied* 77 NY2d 962). Those reasons transcend the nature of any particular crime or the individual characteristics of any particular defendant. Indeed, they are fundamental to our principles of justice. In light of the indisputable merit in defendant's duplicity contention, we conclude that it should be reached—as this Court and others have previously done under similar circumstances (*see People v Bennett*, 52 AD3d 1185, 1186, *lv denied* 11 NY3d 734; *Bracewell*, 34 AD3d at 1198; *see also Jones*, 165 AD2d at 109).

Although defendant limited his duplicity contention to count one

of the indictment, it is readily apparent that count two of the indictment, charging defendant with the single-act crime of sexual abuse in the first degree (Penal Law § 130.65 [3]), was also rendered duplicitous by the trial evidence.

Defendant contends in his pro se supplemental brief that he was denied effective assistance of counsel based upon, inter alia, defense counsel's failure to move to dismiss the first count of the indictment as duplicitous. "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152; *see People v Hobot*, 84 NY2d 1021, 1022; *People v Flores*, 84 NY2d 184, 188-189). To establish ineffective assistance of counsel, a defendant must "demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient performance (*People v Rivera*, 71 NY2d 705, 709). Here, there can be no doubt that a motion to dismiss counts one and two on duplicity grounds would have been successful and resulted in the dismissal of those counts. We find no legitimate strategic or tactical explanation for defense counsel's failure to move to dismiss the two most serious counts of the indictment and instead expose defendant to conviction and possible further subsequent prosecution on one or more of the unspecified criminal sexual acts, as well as the risk of a less than unanimous jury verdict on each of the two duplicitous counts. While the majority concludes that a post-trial application and a " 'complete record' " is necessary for a thorough evaluation of defendant's contention concerning ineffective assistance of counsel, we see no need for such process inasmuch as the trial evidence rendered counts one and two patently duplicitous and thus provided a "clear-cut and completely dispositive" basis for their dismissal (*People v Turner*, 5 NY3d 476, 481). We therefore conclude that, with respect to counts one and two, defendant was denied the right to effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

We would therefore modify the judgment as a matter of discretion in the interest of justice and on the law by reversing those parts convicting defendant of predatory sexual assault against a child under count one of the indictment and sexual abuse in the first degree under count two of the indictment and dismissing those counts of the indictment without prejudice to the People to re-present any appropriate charges under those counts of the indictment to another grand jury.

Entered: March 25, 2011 Patricia L. Morgan
Clerk of the Court

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

1528

CA 10-00907

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

JAMES C. KUHN, PLAINTIFF-RESPONDENT,

V ORDER

CAMELOT ASSOCIATION, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BURGETT & ROBBINS LLP, JAMESTOWN (MARY SPEEDY HAJDU OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered February 4, 2010 in a personal injury action. The order granted the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1) and denied the cross motion of defendant for summary judgment.

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

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

1529

CA 10-01057

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

JAMES C. KUHN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CAMELOT ASSOCIATION, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BURGETT & ROBBINS LLP, JAMESTOWN (MARY SPEEDY HAJDU OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered March 29, 2010 in a personal injury action. The order granted the motion of defendant for leave to reargue and, upon reargument, adhered to the prior decision granting plaintiff's motion for partial summary judgment and denying defendant's 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 while working on the roof of a building owned by defendant. According to plaintiff, who was employed by nonparty Watkins Builders, Inc. (Watkins Builders) at the time of the accident, he stepped from the roof onto an elevated platform attached to a Gradall forklift (hereafter, forklift), and the forklift tipped over, causing him to fall to the ground. Supreme Court granted plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim and denied defendant's cross motion for summary judgment dismissing the amended complaint. The court subsequently granted defendant's motion for leave to reargue its opposition to the motion and for leave to reargue its cross motion and, upon reargument, the court adhered to its prior decision. We affirm.

We reject at the outset the contention of defendant that plaintiff's motion was premature pursuant to CPLR 3212 (f). Even assuming, arguendo, that "facts essential to justify opposition" to the motion could be gleaned from depositions of employees of Watkins Builders (CPLR 3212 [f]), we conclude that defendant failed to demonstrate that such information was within plaintiff's " 'exclusive

knowledge and possession' " (*Wright v Shapiro*, 16 AD3d 1042, 1043; *cf. Terranova v Emil*, 20 NY2d 493, 497). Moreover, defendant failed to establish that it could not have deposed the nonparty witnesses during the approximately two-year period between the commencement of the action and plaintiff's motion (*see Guarino v Mohawk Containers Co.*, 59 NY2d 753; *Avraham v Allied Realty Corp.*, 8 AD3d 1079; *Witte v Incorporated Vil. of Port Washington N.*, 114 AD2d 359).

With respect to the merits, we conclude that plaintiff met his initial burden on the motion by establishing that he "was not furnished with the requisite safety devices and that the absence of appropriate safety devices was a proximate cause of his injuries" (*Williams v City of Niagara Falls*, 43 AD3d 1426, 1427; *see Felker v Corning Inc.*, 90 NY2d 219, 224; *Ganger v Anthony Cimato/ACP Partnership*, 53 AD3d 1051, 1052). In opposition to the motion, defendant failed to raise a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of his accident" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40). Although defendant contends that plaintiff should have utilized a ladder as a safety device, it presented no evidence that plaintiff had been instructed to use a ladder or that plaintiff knew or should have known to use a ladder " 'based on his training, prior practice[] and common sense' " (*Ganger*, 53 AD3d at 1053; *see Ewing v Brunner Intl., Inc.*, 60 AD3d 1323). The owner of Watkins Builders summarily asserted in an affidavit that "all employees knew" not to use the forklift to transport personnel, but he did not aver that he or anyone else instructed plaintiff to avoid using the forklift in that manner. Indeed, there is no evidence that plaintiff "received specific instructions to use a [ladder rather than the forklift] while [ascending and descending the roof] and chose to disregard those instructions" (*Cahill*, 4 NY3d at 39). To the contrary, the deposition testimony of plaintiff and his coworkers established that the forklift was provided to them at the job site and that it had been used to transport workers, as well as materials, during the weeks prior to plaintiff's accident. Further, it is undisputed that plaintiff's foremen observed, facilitated and participated in the use of the forklift for the transport of workers (*see generally Rico-Castro v Do & Co. N.Y. Catering, Inc.*, 60 AD3d 749, 750; *Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879, 880-881). Indeed, one of the foremen, who had previously worked out of the forklift at an elevated height, had placed the forklift adjacent to the roof where plaintiff was working, and that foreman was operating the forklift at the time of the accident. The other foreman was on the roof with plaintiff when plaintiff used the forklift to descend therefrom. Thus, inasmuch as the forklift was furnished by plaintiff's employer and its use as an alternative safety device for transporting personnel was approved by plaintiff's supervisors, it cannot be said that plaintiff's decision to use the forklift rather than the ladder to descend from the roof is the sole proximate cause of the accident (*see generally Cahill*, 4 NY3d at 39; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290; *Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1137).

All concur except SMITH, J.P., and CARNI, J., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part. In our view, Supreme Court erred in granting plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim upon granting defendant's motion for leave to reargue, inter alia, its opposition to plaintiff's motion. Defendant raised a triable issue of fact whether plaintiff's own conduct was the sole proximate cause of his injuries. The record establishes that, on the date of his accident, plaintiff was employed by nonparty Watkins Builders, Inc. (Watkins Builders) to perform roofing work. Plaintiff accessed the roof of a building owned by defendant by way of a ladder. Plaintiff, however, exited the roof by stepping onto a three-sided makeshift plywood box attached by chains to the forks of a raised Gradall forklift (hereafter, forklift), despite the fact that the ladder he had used to access the roof was still in place. Once plaintiff stepped onto the platform, the forklift tipped over, causing plaintiff to fall to the ground.

The record is devoid of evidence that anyone from Watkins Builders instructed plaintiff with respect to the appropriate means to access or exit the roof. Instead, the record establishes that the use of the forklift to access or exit the roof had been an informal practice devised by Watkins Builders' employees. Thus, plaintiff was presented with two means of descending from the roof, i.e., the forklift and the ladder, and he was neither encouraged nor discouraged from using either means. The record further establishes that plaintiff had received training from previous employers regarding the use of a ladder but that he had not received any training with respect to a forklift and had never used a forklift as a means of transporting workers before his employment with Watkins Builders. Consequently, we conclude that a triable issue of fact exists whether plaintiff, " 'based on his training, prior practice[] and common sense, knew or should have known' " to use the ladder instead of the forklift to exit the roof (*Gimeno v American Signature, Inc.*, 67 AD3d 1463, 1464, *lv dismissed* 14 NY3d 785; *cf. Montgomery v Federal Express Corp.*, 4 NY3d 805).

The majority relies on *Rico-Castro v Do & Co N.Y. Catering, Inc.* (60 AD3d 749, 750) and *Pichardo v Aurora Contrs., Inc.* (29 AD3d 879, 880-881) in support of its position that plaintiff's own conduct was not the sole proximate cause of his injuries because the foremen observed, facilitated and participated in the use of the forklift to transport workers. Those cases, however, are distinguishable from this case. Although the unsafe devices at issue in *Rico-Castro* and *Pichardo* were used by the plaintiffs in those cases at the direction of, or with the tacit approval of, their superiors, there were no other safety devices available for those plaintiffs to perform the required work (*see Rico-Castro*, 60 AD3d at 750-751; *Pichardo*, 29 AD3d at 880-881). In contrast, here, plaintiff unilaterally declined to use another available means of descending from the roof. Thus, "we conclude that defendant[] raised triable issues of fact whether safe alternative means of descending from the roof were available to plaintiff and whether his failure to use those alternative means was the sole proximate cause of his injur[ies]" (*Harris v Hueber-Breuer*

Constr. Co., Inc., 67 AD3d 1351, 1352-1353; *see Montgomery*, 4 NY3d 805; *cf. Willard v Thomas Simone & Son Bldrs., Inc.*, 45 AD3d 1276, 1277-1278). We would therefore modify the order by denying plaintiff's motion.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

1600

CA 10-01608

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

VINCENT B. BETETTE, JR., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF VINCENT B. BETETTE, SR., DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE AND MONROE COMMUNITY HOSPITAL, DEFENDANTS-APPELLANTS.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (JAMES L. GELORMINI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (CHRISTIAN N. VALENTINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered April 8, 2010 in an action for, inter alia, wrongful death. The order granted the motion and cross motion of plaintiff for leave to amend the complaint and denied the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting those parts of defendants' motion seeking to dismiss the complaint insofar as it asserts the failure to provide defendants' employees with proper training and the failure to warn plaintiff's decedent of the allegedly dangerous condition of the door handle and as modified the order is affirmed without costs.

Memorandum: Plaintiff, individually and as administrator of decedent's estate, commenced this action seeking damages for, inter alia, the conscious pain and suffering and wrongful death of decedent, who died while he was a resident of defendant Monroe Community Hospital (MCH), a skilled nursing facility. Decedent had been discharged to the care of the facility upon leaving a hospital where he had been treated after he had fallen in his home. Decedent had previously been a patient of MCH a month earlier, again after being discharged from a hospital after having fallen at his home. During his first stay at MCH, decedent fell on two occasions and, during his instant discharge there, MCH had installed bed and chair alarms to alert staff in the event that decedent attempted to ambulate without assistance, but it is undisputed that bed rails were not used. On the day of the accident, plaintiff alleged that decedent activated the call button to obtain assistance in getting to the bathroom. When the call went unanswered, decedent left his bed in an effort to get to the

bathroom, whereupon the alarm sounded. Decedent fell upon leaving his bed, however, and he required 130 stitches to repair the laceration that he sustained when he impaled his arm on the door handle. Decedent died two days later of congestive heart failure, and the death certificate noted that the laceration was a "significant condition[] contributing to death but not related to cause given in Part 1 (a)," i.e., congestive heart failure.

Plaintiff served a timely notice of claim asserting negligence claims, and the summons and complaint alleged two causes of action for negligence, seeking damages for wrongful death and conscious pain and suffering. Plaintiff alleged that defendants were negligent in, inter alia, failing to supervise decedent, failing to use bed rails to prevent decedent from getting out of bed, failing to provide MCH staff with proper training, failing to install the door handle so that it would not constitute a dangerous condition, and failing to warn decedent of that dangerous condition.

Plaintiff thereafter moved for leave to amend the complaint to add a cause of action under Public Health Law § 2801-d, while defendants moved for summary judgment dismissing the complaint arguing, inter alia, that some of plaintiff's claims sounded in medical malpractice rather than negligence. Plaintiff then cross-moved for leave to amend the complaint to add a cause of action for medical malpractice and for an extension of time to file and serve the requisite certificate of merit and notice of medical malpractice. Supreme Court granted plaintiff's motion and cross motion and denied defendants' motion.

We note at the outset that, in opposition to defendants' motion, plaintiff abandoned his claims alleging the failure to provide proper training for MCH employees and the failure to warn of an allegedly dangerous condition (*see Ciesinski v Town of Aurora*, 202 AD2d 984). We thus conclude that the court erred in denying defendants' motion with respect to those claims, and we therefore modify the order accordingly.

We reject defendants' contention that the court erred in granting the motion of plaintiff seeking leave to amend the complaint to add a cause of action under Public Health Law § 2801-d. It is well settled that "[l]eave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757; *see Carro v Lyons Falls Pulp & Paper, Inc.*, 56 AD3d 1276, 1277). Defendants contend, however, that the court erred in allowing amendment of the complaint to add the Public Health Law § 2801-d cause of action because that cause of action was not included in the notice of claim. We conclude under the circumstances of this case that the notice of claim may be corrected pursuant to General Municipal Law § 50-e (6) to include that new cause of action. Pursuant to section 50-e (6), a court in its discretion may permit the correction of a notice of claim where there has been a "mistake, omission, irregularity or defect made in good faith . . ., provided it shall appear that the other party was not prejudiced thereby." Here, plaintiff asserted a

good faith basis for his initial failure to include the Public Health Law § 2801-d cause of action in the notice of claim. He contended that he did not include that cause of action because, prior to our decision in *Kash v Jewish Home & Infirmary of Rochester N.Y., Inc.* (61 AD3d 146), we did not allow a plaintiff to assert both a cause of action for wrongful death and a cause of action under section 2801-d. While defendants are correct that General Municipal Law § 50-e (6) ordinarily "is not applicable in an attempt to state a new theory of recovery" (*Hines v City of Buffalo*, 79 AD2d 218, 226), there are exceptions to that general rule. For example, courts have granted leave to serve a supplemental or amended notice of claim to add a derivative cause of action for loss of consortium (*see Lopes v Metropolitan Tr. Auth.*, 66 AD3d 744, 745; *Sciolto v New York City Tr. Auth.*, 288 AD2d 144), and a claim for wrongful death where such claim "results from the same facts as were alleged in a timely and otherwise admittedly valid notice of claim for personal injuries" (*Ramos v New York City Tr. Auth.*, 60 AD3d 517, 519; *see Matter of Scheel v City of Syracuse*, 97 AD2d 978). Likewise, the corrected notice of claim in this case results from the same timely alleged facts. The determinative factors are whether the plaintiff has shown a good faith basis for the correction and an absence of prejudice to the defendants, and plaintiff has made that showing here.

We reject defendants' further contention that the court erred in denying that part of their motion with respect to the premises liability claim. The door handle at issue was installed with the handle facing up rather than facing down or horizontally, and plaintiff alleged that the upward-facing door handle constituted a dangerous condition. Assuming, arguendo, that defendants met their initial burden of establishing that the door handle did not constitute a dangerous condition, we conclude that plaintiff raised a triable issue of fact with respect thereto by submitting the affidavit of his expert, a registered architect and professional engineer (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The expert had experience in building and renovation projects and was in fact familiar with the design and installation of the type of door handle at issue. In his view, that type of door handle was more dangerous than others because of its thin and open-ended handle, which was more likely to cause injury to someone than other door handles that are more blunt, rounded, or closed-ended. According to plaintiff's expert, the decision on how to install a door handle should be made only after considering the type of facility, the location of the door handle within that facility, and the individuals who will be using the door handle. He opined that the upward-facing door handle was a dangerous condition under the circumstances, where the facility treated elderly patients who had difficulty with ambulation and balance.

Although we agree with defendants that plaintiff's claims sound in both negligence and medical malpractice (*see Smee v Sisters of Charity Hosp. of Buffalo*, 210 AD2d 966, 967; *see generally Bleiler v Bodnar*, 65 NY2d 65, 72-73), we reject defendants' contention that the court erred in granting plaintiff's cross motion for leave to file and

serve a late certificate of merit (*see* CPLR 3012-a) and a notice of medical malpractice action (*see* CPLR 3406 [a]). A court in its discretion may extend a plaintiff's time to file and serve those items "upon such terms as may be just and upon good cause shown" (CPLR 2004; *see Tewari v Tsoutsouras*, 75 NY2d 1, 11-12; *Dye v Leve*, 181 AD2d 89). We agree with plaintiff that he has shown good cause for the delay (*see generally Rice v Vandenebossche*, 185 AD2d 336). We have considered defendants' remaining contention and conclude that it is without merit.

All concur except PERADOTTO, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part. In my view, Supreme Court erred in granting plaintiff's motion for leave to amend the complaint to add a cause of action under Public Health Law § 2801-d and also erred in denying that part of defendants' motion for summary judgment seeking dismissal of the premises liability claim. I would therefore further modify the order accordingly.

As set forth by the majority, plaintiff's decedent was a resident of defendant Monroe Community Hospital (MCH), a skilled nursing facility, at the time of his death. When no one responded to his call to obtain assistance in getting to the bathroom, decedent got out of bed and, in attempting to walk to the bathroom unassisted, he fell onto the door handle to his room, piercing his right arm. Decedent died two days later of congestive heart failure. The death certificate listed the "[s]uperficial laceration of [his] right forearm" as a "significant condition[] contributing to [his] death." Plaintiff served a timely notice of claim dated June 27, 2005, asserting claims of negligence, and thereafter commenced this action in February 2006. The complaint asserted two causes of action for negligence and sought damages for wrongful death and decedent's conscious pain and suffering. Plaintiff alleged that defendants were negligent in, inter alia, failing to "provide one-on-one supervision" for decedent, failing to respond in a prompt manner to decedent's request for assistance, and "fail[ing] to install or cause to install the door handle[] in a down-facing position so that [it] would not create a dangerous condition."

In September 2009, plaintiff moved for leave to amend the complaint to include a cause of action under Public Health Law § 2801-d. Defendants then moved for summary judgment dismissing the complaint contending, inter alia, that the premises liability claim was without merit inasmuch as the door handle at issue was not inherently dangerous and, indeed, was a "standard health care facility fixture."

I agree with defendants that the court erred in granting plaintiff's motion for leave to amend the complaint. The majority concludes that, under the circumstances of this case, "the notice of claim may be corrected pursuant to General Municipal Law § 50-e (6) to include that new cause of action" under Public Health Law § 2801-d. Notably, plaintiff did not seek leave to serve a late notice of claim under General Municipal Law § 50-e (5), nor did he seek to "correct[]"

the notice of claim pursuant to General Municipal Law § 50-e (6), which applies to a "mistake, omission, irregularity or defect made in good faith in the notice of claim." Indeed, General Municipal Law § 50-e (6) was raised for the first time by defendants in opposition to plaintiff's motion for leave to amend the complaint and, in reply, plaintiff asserted only that no notice of claim was required with respect to the proposed Public Health Law § 2801-d cause of action. Plaintiff continues to make that same assertion on appeal.

In any event, even assuming, arguendo, that plaintiff sought relief under General Municipal Law § 50-e (6), I conclude that such relief is unavailable here. It is well established that "[a]mendments of a substantive nature are not within the purview of General Municipal Law § 50-e (6)" (*Herron v City of New York*, 223 AD2d 676). Rather, General Municipal Law § 50-e "merely authorizes the correction of good faith, nonprejudicial, technical defects or omissions, not substantive changes in the theory of liability" (*Scott v City of New York*, 40 AD3d 408, 410; *see Herron*, 223 AD2d 676; *Hines v City of Buffalo*, 79 AD2d 218, 226). Here, the proposed amendment to the complaint does not correct a "mistake, omission, irregularity or defect" in the notice of claim (General Municipal Law § 50-e [6]). Instead, the proposed cause of action predicated upon Public Health Law § 2801-d, seeking attorneys' fees pursuant to Public Health Law § 2801-d (6) and punitive damages based on the alleged willful deprivation and reckless disregard of decedent's rights, "constituted a new and separate time-barred claim against the defendants" (*Young v A. Holly Patterson Geriatric Ctr.*, 17 AD3d 667, 667; *see* § 50-e [5]). Although the majority states that the "corrected" notice of claim "results from the same timely alleged facts," in my view the assertion of a new cause of action, including a new theory of liability for punitive damages, is sufficient to remove the proposed amendment from the purview of General Municipal Law § 50-e (6) (*see White v New York City Hous. Auth.*, 288 AD2d 150; *Hines*, 79 AD2d at 226; *Colena v City of New York*, 68 AD2d 898, 900).

I further agree with defendants that the court erred in denying that part of their motion seeking summary judgment dismissing the premises liability claim. The majority assumes, arguendo, that defendants met their initial burden, and then concludes that plaintiff raised a triable issue of fact in any event. In my view, defendants met their initial burden of establishing that the door handle did not constitute an unreasonably dangerous condition, and plaintiff failed to raise a triable issue of fact (*see Palmer v Barnes & Noble Booksellers, Inc.*, 34 AD3d 1287, 1288). Defendants submitted, inter alia, an affidavit of MCH's director of facilities service (hereafter, director) whose duties include "supervising the engineering and non-medical operational requirements" for the facility. In his affidavit, the director explained that the "push-pull" handles on the door of decedent's room at MCH are a "standard type design for handles that are commonly used in health care facilities." Indeed, he averred that such "push-pull" handles are "specifically designed to be used in health care institutions on patient doors . . . [and] are specifically marketed to hospitals and health care institutions as 'Hospital Push/Pulls.' " On the date of the incident, the handles of the door

to decedent's room were mounted with one handle facing upward and the other handle facing downward, which the director described as "a typical installation as authorized by the manufacturer and as commonly installed in health care institutions." The director noted that, when decedent's door was closed, the "up handle" faced the hallway while the "down handle" faced the interior of decedent's room. The director further averred that he was unaware of any prior injuries resulting from an upward facing door handle in his more than 10 years of experience in the field, and that in his opinion "an upward facing door handle such as was present in this case was not a dangerous condition."

In addition, defendants submitted the manufacturer's installation instructions for the door handle at issue, which state that there are six mounting positions for the door handle, including the one handle up/one handle down position utilized in decedent's room. Indeed, the installation template provided by the manufacturer depicts an upward facing pull handle and a downward facing push handle. Defendants also submitted marketing materials for hospital push/pull handles, which indicate that "[h]andles can be mounted up, down, horizontal or any combination" thereof.

As noted, I disagree with the majority that plaintiff raised a triable issue of fact in opposition to the motion (*see generally Zuckerman v City of New* York, 49 NY2d 557, 562). Plaintiff submitted an affidavit of his expert, a registered architect and professional engineer, who averred that he was familiar with the design and installation of the type of door handle at issue. Plaintiff's expert opined that the door handle at issue is more dangerous than other types of door handles because of its "thin" handle and "dagger-like tip," which are more likely to cause injury than "other types of door handles or door knobs, which are more blunt, rounded, and/or closed-ended." The expert's repeated descriptions of the door handle as "dagger-like," however, are belied by the photograph attached to his affidavit and other photographs of push/pull handles contained in the record. Those photographs in fact depict a rounded, blunt handle. Plaintiff's expert further asserted that "[t]he installation and maintenance of the door handle at MCH in an upward facing position was not in accordance with good and accepted custom, practices and standards with respect to the design and maintenance of a long term care facility." However, plaintiff's expert failed to " 'identify any specific industry standard upon which he relied in regard to the [door handle], nor did [he] supply any specific statutory or building code violations' " (*Palmer*, 34 AD3d at 1288; *see Bax v Allstate Health Care, Inc.*, 26 AD3d 861, 864). "The affidavit 'was thus speculative and not sufficiently probative to defeat [that part of] defendant[s'] motion for summary judgment' " (*Palmer*, 34 AD3d at 1288; *see Bax*, 26 AD3d at 864). The mere fact that MCH *could* have installed the door handle at issue with both handles facing downward does not warrant the conclusion that it *should* have done so or that the failure to do so created an unreasonably dangerous condition.

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

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

1608

KA 07-01907

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC D. HILL, DEFENDANT-APPELLANT.

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

ERIC D. HILL, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered July 19, 2007. 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]). The contention of defendant that he was deprived of a fair trial by prosecutorial misconduct on summation is not preserved for our review (*see* CPL 470.05 [2]) and, in any event, that contention is without merit. The alleged instances of prosecutorial misconduct were "either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Anderson*, 52 AD3d 1320, 1321, *lv denied* 11 NY3d 733).

We reject the contention of defendant in his main and pro se supplemental briefs that he was denied effective assistance of counsel. Defendant was arrested in Alabama more than one year after the murders. The record does not contain any evidence of an " 'innocent explanation' " for defendant's presence in Alabama at that time (*People v Solimini*, 69 AD3d 657, 658, *lv denied* 14 NY3d 893). Contrary to the contention of defendant, we conclude that defense counsel's failure to request a jury charge regarding consciousness of guilt based upon defendant's flight was a valid tactical decision to avoid unnecessarily focusing the attention of the jury on defendant's travel to Alabama following the murders (*see* CJI2d [NY] Consciousness of Guilt; *see generally People v Peake*, 14 AD3d 936, 937-938).

Defendant was not denied effective assistance of counsel based on defense counsel's failure to object to the allegedly improper comments by the prosecutor on summation inasmuch as those comments did not constitute prosecutorial misconduct (*see generally People v Caban*, 5 NY3d 143, 152). With respect to the alleged ineffective assistance of defense counsel in cross-examining the eyewitness and in stipulating to the admission in evidence of an autopsy photograph of one of the victims for the limited purpose of identifying him, we conclude that, when viewed as a whole, defense counsel's efforts reflect "a reasonable and legitimate strategy under the circumstances and evidence presented" (*People v Benevento*, 91 NY2d 708, 713). We therefore conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147; *People v Workman*, 277 AD2d 1029, 1032, *lv denied* 96 NY2d 764).

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 also reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject the further contention of defendant in his pro se supplemental brief that he was denied the right to be present at a critical stage of the proceedings, i.e., a discussion between the prosecutor and the court with respect to the prosecutor's intention to compel defendant to show his gold teeth to the jury (*cf. People v Dokes*, 79 NY2d 656, 662). The Fifth Amendment privilege against self-incrimination does not preclude a defendant from being required to reveal the physical characteristics of his or her body (*see People v Havrish*, 8 NY3d 389, 393, *cert denied* 552 US 886; *People v Slavin*, 1 NY3d 392, 398, *cert denied* 543 US 818), nor is there any requirement that the prosecutor provide defendant with pretrial notice of the intent to use such evidence (*see People v Holmes*, 304 AD2d 1043, 1044, *lv denied* 100 NY2d 642). Thus, the discussion between the prosecutor and the court regarding that issue was "not only noncritical[] but, as a matter of law, unnecessary" (*People v Contreras*, 12 NY3d 268, 273).

We also reject the contention of defendant in his pro se supplemental brief that he was denied a fair trial by the admission in evidence of certain autopsy photographs of the murder victims. "The general rule is that photographs of the deceased are admissible if they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence[] or to corroborate or disprove some other evidence offered or to be offered" (*People v Pobliner*, 32 NY2d 356, 369, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905). "Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant" (*id*. at 370), and that is not the case here. "[T]he [two] photographs at issue were relevant to prove the identity of the murder victim[s] . . ., and thus the court did not abuse its discretion in admitting the photographs in evidence" (*People v Jones*, 43 AD3d 1296, 1298, *lv denied* 9 NY3d 991, 10 NY3d 812).

Entered: March 25, 2011

Patricia L. Morgan
Clerk of the Court

MOTION NO. (175/94) KA 10-01955. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KHARYE JARVIS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND GREEN, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (1477/99) KA 99-00267. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN GLOVER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (1550/00) KA 97-05058. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN HORACE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND GORSKI, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (255/03) KA 01-02132. -- THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT, V EDDIE ORTIZ, DEFENDANT-RESPONDENT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND GREEN, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (445/06) KA 05-00193. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD F. MILLS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)

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 leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, LINDLEY, AND GREEN, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (882/10) KA 07-01910. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SERGIO PONDER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND GORSKI, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (899/10) KA 09-00902. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V THOMAS B. SIMCOE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GREEN, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (1077/10) CA 10-00534. -- ARLENE S. GARLAND, AS EXECUTRIX OF THE ESTATES OF RICHARD T. SHANOR AND GENELLE M. SHANOR, DECEASED, PLAINTIFF-APPELLANT-RESPONDENT, V RLI INSURANCE COMPANY, DEFENDANT-RESPONDENT-APPELLANT, ET AL., DEFENDANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND SCONIERS, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (1440/10) CA 10-00847. -- IN THE MATTER OF COUNTY OF NIAGARA, PETITIONER-RESPONDENT, V RICHARD F. DAINES, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH AND NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

(Filed Mar. 25, 2011.)

MOTION NO. (1444/10) CA 10-00947. –- DONNA PRINCE LYNCH, INDIVIDUALLY AND AS THE PARENT AND NATURAL GUARDIAN OF PHILIP LAWRENCE LYNCH, AND AS THE ADMINISTRATRIX OF THE ESTATE OF TIMOTHY JOHN LYNCH, DECEASED, PLAINTIFF-RESPONDENT-APPELLANT, V MIKE WATERS AS THE FIRE CONTROL COORDINATOR OF COUNTY OF ONONDAGA AND COUNTY OF ONONDAGA, DEFENDANTS-APPELLANTS-RESPONDENTS. MIKE WATERS AS FIRE CONTROL COORDINATOR OF COUNTY OF ONONDAGA AND COUNTY OF ONONDAGA, THIRD-PARTY PLAINTIFFS-APPELLANTS, V THE POMPEY HILL FIRE DISTRICT, THE POMPEY HILL FIRE DEPARTMENT, RICHARD ABBOTT, IN HIS OFFICIAL CAPACITY AS AN ASSISTANT CHIEF OF THE POMPEY HILL FIRE DEPARTMENT, MARK KOVALEWSKI, IN HIS OFFICIAL CAPACITY AS AN ASSISTANT CHIEF OF THE POMPEY HILL FIRE DEPARTMENT, THE VILLAGE OF MANLIUS, THE MANLIUS FIRE DEPARTMENT, RAYMOND DILL, IN HIS OFFICIAL CAPACITY AS A DEPUTY CHIEF OF THE MANLIUS FIRE DEPARTMENT, THIRD-PARTY DEFENDANTS-RESPONDENTS, AND JOSEPH MESSINA, THIRD-PARTY DEFENDANT. (APPEAL NO. 2.) –- Motion insofar as it sought in the alternative leave to appeal to the Court of Appeals be and the same hereby is denied and the motion insofar as it sought reargument is granted in part and, upon reargument, the majority memorandum and order entered December 30, 2010 (79 AD3d 1709) is vacated and the following majority memorandum and order is substituted therefor:

It is hereby ordered that the amended order so appealed from is modified on the law by denying those parts of the motion of third-party defendants the Pompey Hill Fire District, the Pompey Hill Fire Department, Richard Abbott, in his official capacity as an Assistant Chief of the Pompey Hill Fire Department, and Mark Kovalewski, in his official capacity

as an Assistant Chief of the Pompey Hill Fire Department, for summary judgment dismissing the complaint against the Pompey Hill Fire District and the Pompey Hill Fire Department, denying the motion of third-party defendants the Village of Manlius and the Manlius Fire Department, reinstating the third-party complaint against third-party defendants the Pompey Hill Fire District, the Pompey Hill Fire Department, the Village of Manlius and the Manlius Fire Department and granting those parts of plaintiff's cross motion to dismiss the affirmative defenses of those third-party defendants pursuant to General Municipal Law § 205-b and as modified the amended order is affirmed without costs, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action, individually and as the parent and natural guardian of her son and the administratrix of the estate of her husband (decedent), seeking damages for, inter alia, the wrongful death of decedent. Decedent, a volunteer firefighter, was killed while fighting a fire that started in the basement of a house located in the Town of Pompey. According to plaintiff, defendants-third-party plaintiffs (hereafter, defendants) are liable pursuant to General Municipal Law § 205-a. Defendants thereafter commenced a third-party action for common-law contribution "and/or" indemnification. Supreme Court granted the motion of third-party defendants the Pompey Hill Fire District and the Pompey Hill Fire Department (collectively, Pompey Hill defendants) and third-party defendants Richard Abbott and Mark Kovalewski, in their official capacities as Assistant Chiefs of the Pompey Hill Fire Department (collectively, individual defendants), as well as the motion of third-party defendants the Village of Manlius and the Manlius Fire Department (collectively, Manlius defendants), for summary judgment dismissing the third-party complaint against them. The court also denied

defendants' cross motion for leave to amend the third-party complaint to include, inter alia, allegations of willful negligence on the part of third-party defendant Raymond Dill, in his official capacity as Deputy Chief of the Manlius Fire Department, the Pompey Hill defendants and the Manlius defendants and denied as moot plaintiff's cross motion to dismiss "any [and] all affirmative defense[s] brought by any parties under Firefighters' Benefit Law [§] 19 and General Municipal Law [§] 205-b . . . ." In addition, the court sua sponte dismissed the third-party complaint against Dill.

We note at the outset that this Court improperly deemed plaintiff's cross appeal from the amended order abandoned and dismissed for failure to perfect within nine months of service of the notice of appeal (*see* 22 NYCRR 1000.12 [b]). The cross motion of plaintiff for permission for an extension of time to file her brief encompassed both the court's original order and the amended order, and this Court incorrectly granted that cross motion only with respect to the original order. In view of our error, we exercise our discretion to treat the cross appeal from the amended order as properly perfected (*see generally* CPLR 5520 [c]; *Crane-Hogan Structural Sys., Inc. v ESLS Dev., LLC*, 77 AD3d 1302).

We agree with defendants on their appeal and with plaintiff on her cross appeal that the Pompey Hill defendants and the Manlius defendants are not immune from liability pursuant to General Municipal Law § 205-b. We thus conclude that the court erred in granting those parts of the motion of the Pompey Hill defendants and the individual defendants seeking summary judgment dismissing the complaint against the Pompey Hill defendants and in granting the motion of the Manlius defendants. For the same reasons, we

conclude that the court erred in denying those parts of plaintiff's cross motion seeking to dismiss the affirmative defenses of the Pompey Hill defendants and the Manlius defendants pursuant to section 205-b. We therefore modify the amended order accordingly. "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208). Inasmuch as "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583; *see Feher Rubbish Removal, Inc. v New York State Dept. of Labor, Bur. of Pub. Works*, 28 AD3d 1, 3-4, *lv denied* 6 NY3d 711). "If the 'language . . . is clear and unambiguous, courts must give effect to its plain meaning' " (*Matter of M.B.*, 6 NY3d 437, 447, quoting *State of New York v Patricia II.*, 6 NY3d 160, 162).

Pursuant to General Municipal Law § 205-b, "[m]embers of duly organized volunteer fire companies . . . shall not be liable civilly for any act or acts done by them in the performance of their duty as volunteer firefighters, except for wilful negligence or malfeasance" (emphasis added). Thus, under the plain language of the statute, the immunity conferred by section 205-b applies only to individual volunteer firefighters, not their municipal employers (*see Rosenberg v Fuller Rd. Fire Dept.*, 34 AD2d 653, 654, *affd* 28 NY2d 816; *Sawyer v Town of Lewis*, 6 Misc 3d 1024[A], 2003 NY Slip Op 51751[U], *6, *mod on other grounds* 11 AD3d 938; *see Tobacco v North Babylon Volunteer Fire Dept.*, 182 Misc 2d 480, 483-484, *affd* 276 AD2d 551; *Ryan v Town of Riverhead*, ___ Misc 3d ___ [Mar.

23, 2010], 2010 NY Slip Op 30661[U]). The court thus properly granted those parts of the motion of the Pompey Hill and individual defendants for summary judgment dismissing the complaint against the individual defendants. There is nothing in the statute, however, that similarly confers immunity upon fire districts or other municipal entities. To the contrary, the second sentence of section 205-b provides that "fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters duly appointed to serve therein in the operation of vehicles owned by the fire district upon the public streets and highways of the fire district" (emphasis added). Indeed, General Municipal Law § 205-b is entitled "Relief of volunteer firefighters engaged in the performance of duty as such firefighters from civil liability and liability of fire districts for the acts of volunteer firefighters." The plain language of the statute thus reflects the Legislature's dual purposes in enacting section 205-b: first, to immunize volunteer firefighters from civil liability for ordinary negligence and, second, to shift liability for such negligence to the fire districts that employ them (*see Sikora v Keillor*, 17 AD2d 6, 8, *affd* 13 NY2d 610).

The Pompey Hill defendants and the Manlius defendants contend that the Legislature intended that fire departments and municipalities be subject to vicarious liability only for firefighters' negligent operation of vehicles. Their reliance on the second sentence of General Municipal Law § 205-b in support of that contention is misplaced. In *Thomas v Consolidated Fire Dist. No. 1 of Town of Niskayuna* (50 NY2d 143), the Court of Appeals rejected a similar contention, namely, that section 205-b impliedly exempts fire districts from liability except as specifically provided by that section. The Court explained the historical context of section 205-b: "Although the State waived its immunity from liability in 1929 with the

enactment of section 8 of the Court of Claims Act, this waiver of immunity was not found to be applicable to the local subdivisions of the State until 1945, when [the Court of Appeals] issued its decision in *Bernardine v City of New York* (294 NY 361). It thus appears that in 1934, the year [General Municipal Law §] 205-b was enacted, the Legislature had intended to expand, not restrict, the liability of fire districts . . . In other words, the Legislature sought to assure that there would be some liability on the part of the fire districts where previously there had been some doubt. To now read section 205-b as restricting liability--as exempting a fire district from liability in all situations other than that prescribed in the section--would be error" (*id*. at 146 [emphasis added]).

The Pompey Hill defendants and the Manlius defendants further contend that, because individual firefighters are immune from liability pursuant to General Municipal Law § 205-b, they cannot be held vicariously liable for the alleged negligence of those firefighters. We reject that contention. The Court of Appeals rejected a similar argument in *Tikhonova v Ford Motor Co.* (4 NY3d 621, 623), concluding that a vehicle owner may be held vicariously liable pursuant to Vehicle and Traffic Law § 388 for the negligence of a diplomat driver who is immune from suit under 22 USC § 254d. The Court distinguished *Sikora* (13 NY2d 610, *affg* 17 AD2d 6), in which it "affirmed, without opinion, the Appellate Division's determination that no liability attaches to a vehicle owner where the negligent driver (a volunteer firefighter) was immune from suit under General Municipal Law § 205-b" (*Tikhonova*, 4 NY3d at 625). The Court noted that a contrary result in *Sikora* "would have discouraged volunteers from responding to emergencies by reducing the number of people willing to lend vehicles to those volunteers" (*id*.). Here, the policy reasons underlying the immunity afforded to volunteer firefighters individually, i.e., to encourage

individuals to volunteer for public service and to protect their personal assets from liability for ordinary negligence do not apply to the entities that employ them (*see id.*; *Sikora*, 17 AD2d at 7-8; *see also* Sponsor's Mem, Bill Jacket, L 1934, ch 489; Letter from Firemen's Assn of State of NY, April 28, 1934, at 1, Bill Jacket, L 1934, ch 489).

With respect to the contention of plaintiff that the court erred in denying that part of her cross motion to dismiss the Pompey Hill defendants' affirmative defense based upon Volunteer Firefighters' Benefit Law § 19, we note that the court did not address the merits of that issue because it denied plaintiff's cross motion as moot. In view of our determination, we conclude that plaintiff's cross motion with respect that issue is no longer moot, and we therefore remit the matter to Supreme Court to determine that part of plaintiff's cross motion. Finally, we note that neither defendants on their appeal nor plaintiff on her cross appeal raised any issue concerning the court's sua sponte dismissal of the third-party complaint against Dill, and they therefore have abandoned any issues with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

All concur except FAHEY, J., who dissents in part and votes to grant the motion for reargument in part but in addition votes to grant leave to appeal to the Court of Appeals, the alternative relief sought in the motion. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (1463/10) CA 10-01412. -- ALEXANDRA BENSHOFF, PLAINTIFF-APPELLANT, V ADAM R. RAKOCZY, ET AL., DEFENDANTS, AND NIAGARA MOHAWK POWER CORPORATION, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals and to amend the record denied.

PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND GORSKI, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (1485/10) CA 10-01624. -- VICTOR DEMJANENKO, PLAINTIFF-RESPONDENT, V VIRGINIA L. DEMJANENKO, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, GREEN, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (1547/10) KA 09-00200. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HILLERY M. DUPLEASIS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, GREEN, AND GORSKI, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (1580/10) CA 10-01340. -- C. BRUCE LAWRENCE, ESQ., TRUSTEE IN BANKRUPTCY FOR ROGER JACKSON, PLAINTIFF-RESPONDENT-APPELLANT, V GUARDSMARK, LLC, DEFENDANT-APPELLANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals and to stay the pending trial in Supreme Court denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)

MOTION NO. (1615/10) CA 10-00897. -- VALERIE SHANE, PLAINTIFF-APPELLANT, V CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY, CENTRO OF ONEIDA, INC. AND STEPHEN PIZUR, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: FAHEY, J.P., CARNI, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)

KA 09-00739. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIE COOPER, 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 Monroe County Court, John R. Schwartz, A.J. - Absconding from Temporary Release, 1st Degree). PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)

KA 08-00889. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAMAR J. COOPER, 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 Monroe County Court, Frank P. Geraci, Jr., J. - Sexual Abuse, 1st Degree). PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)

KA 09-00737. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DALE EAVES, 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 Yates County Court, W. Patrick Falvey, J. - Failure to Register Change of Address). PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)

KA 08-02130. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DONALD D. HARRIS, 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 Monroe County Court, Stephen T. Miller, A.J. - Attempted Criminal Possession of a

Controlled Substance, 5th Degree). PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)

KA 09-01886. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DUSTIN S. HARRIS, 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 Ontario County Court, William F. Kocher, J. - Violation of Probation). PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)

KA 11-00274. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DUSTIN S. HARRIS, 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 Ontario County Court, William F. Kocher, J. - Criminal Contempt, 1st Degree). PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)

KA 11-00464. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KIMBERLY A. LEARN, DEFENDANT-APPELLANT. –- Motion to dismiss granted. Memorandum: Appeal unanimously dismissed and matter remitted to Cattaraugus 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., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Mar. 25, 2011.)

KA 08-01261. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL PATTERSON, 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 Monroe County Court, Stephen T. Miller, A.J. - Criminal Mischief, 4th Degree). PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)

KA 08-01799. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALINA PHELPS, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon a guilty plea of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), and was sentenced to a determinate term of imprisonment of four years and five years postrelease supervision, to be served concurrently with a determinate sentence imposed on the same date for a separate felony conviction. Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). However, because the record reflects that defendant committed the instant violent felony offense while awaiting sentence on the prior offense, we find that a nonfrivolous issue exists as to whether concurrent sentences were illegally imposed (*see* Penal Law § 70.25 [2-b]). Therefore, we relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Steuben County Court, Joseph William Latham, J. - Attempted Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed March 25, 2011.)

CAF 10-00911. -- IN THE MATTER OF CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF TAMMY L. SOSA, PETITIONER-RESPONDENT, V MARCUS D. VEASLEY, RESPONDENT-APPELLANT. -- Appeal dismissed without costs as moot. Counsel’s motion to be relieved of assignment granted. (Appeal from Order of Family Court, Cattaraugus County, Michael L. Nenno, J. - Wilful Violation). PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Mar. 25, 2011.)