SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 18, 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

917

CA 11-00680

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

NIAGARA FRONTIER COUNCIL OF AMERICAN YOUTH HOSTELS, INC., PLAINTIFF-APPELLANT,

V ORDER

AMERICAN YOUTH HOSTELS, INC., DOING BUSINESS AS HOSTELLING INTERNATIONAL-USA, DEFENDANT-RESPONDENT.

KAVINOKY COOK LLP, BUFFALO (LAURENCE K. RUBIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (RYAN K. CUMMINGS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 10, 2010. The order, insofar as appealed from, denied the motion of plaintiff to dismiss defendant's counterclaims.

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

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1013

KA 09-02654

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIENNE MARCH, ALSO KNOWN AS VANESSA GREGG,
DEFENDANT-APPELLANT.

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

ADRIENNE MARCH, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Shirley Troutman, A.J.), rendered December 21, 2009. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree (two counts), assault in the first degree (two counts) and criminal possession of a weapon in the second degree, and, upon her plea of guilty, of attempted forgery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentences imposed for the two counts of attempted murder in the first degree and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for resentencing on counts one and two of the indictment.

Memorandum: Defendant was convicted upon a jury verdict of, inter alia, two counts each of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [viii]; [b]) and assault in the first degree (§ 120.10 [1]). Preliminarily, we note that defendant appeals only from the judgment rendered on December 18, 2009, which was superseded by the judgment rendered on December 21, 2009. Nevertheless, we exercise our discretion, in the interest of justice, and treat the notice of appeal as valid (*see* CPL 460.10 [6]; *People v Lerario*, 50 AD3d 1396, *lv denied* 10 NY3d 961).

Turning to the merits, we reject defendant's contention that she received ineffective assistance of counsel based on defense counsel's failure to request that Supreme Court charge assault in the second degree (Penal Law § 120.05 [4]) as a lesser included offense of assault in the first degree (§ 120.10 [1]) under count six of the indictment. To the extent that defendant contends that defense

counsel was ineffective in failing to seek that charge after the jury retired to deliberate, her contention lacks merit because a request that a lesser included offense be charged must be made before the jury has commenced its deliberations or such a request is deemed to be waived (*see* CPL 300.50 [1]; *People v Duncan*, 46 NY2d 74, 80, *rearg denied* 46 NY2d 940, *cert denied* 442 US 910, *rearg dismissed* 56 NY2d 646). It is well settled that "[a] defendant is not denied effective assistance of trial counsel [where defense] counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see People v Crump*, 77 AD3d 1335, 1336, *lv denied* 16 NY3d 857).

Likewise, we reject defendant's contention that she was denied effective assistance of counsel based on defense counsel's failure to request, before the jury retired to deliberate, that the foregoing lesser included offense be charged. "Defendant failed to show the absence of a strategic explanation for defense counsel's" failure to request the charge (*People v Mendez*, 77 AD3d 1312, 1312-1313, *lv denied* 16 NY3d 799; *see People v Benevento*, 91 NY2d 708, 712), and "mere disagreement with trial strategy is insufficient to establish that defense counsel was ineffective" (*People v Henry*, 74 AD3d 1860, 1862, *lv denied* 15 NY3d 852).

Although we conclude that the sentence is not unduly harsh or severe, we conclude that the consecutive sentences imposed for attempted murder in the first degree under counts one and two are illegal, and that instead the sentences on those counts must be directed to run concurrently (*see People v Rosas*, 8 NY3d 493, 498; *People v Jackson*, 41 AD3d 1268, 1270, *lv denied* 10 NY3d 812, 11 NY3d 789). "A [c]onsecutive sentence is available if the Legislature has seen fit to provide that up to a particular point the acts of the defendant constitute one crime and that the acts of the defendant, committed thereafter, constitute a second crime and that each series of acts constitut[e] a separate crime . . . Here, by contrast, the same acts constitute both crimes. In other words, the same actus reus—the intentional murder of the same two victims—is the basis for both first degree murder convictions" (*Rosas*, 8 NY3d at 498 [internal quotation marks omitted]; *see* Penal Law § 70.25 [2]). The fact that defendant failed to preserve the issue of the illegality of the sentences on those counts for our review is of no moment, inasmuch as we cannot allow an illegal sentence to stand despite the lack of preservation (*see People v Yuson*, 83 AD3d 1502). Consequently, we modify the judgment by vacating the sentences imposed for attempted murder in the first degree, and we remit to Supreme Court for resentencing on counts one and two of the indictment.

Defendant's remaining contentions are raised in her pro se supplemental brief. Defendant contends that the parts of the judgment convicting her of assault in the first degree (Penal Law § 120.10 [1]) under counts five and six of the indictment must be reversed, and those counts dismissed, because assault in the first degree is a lesser included offense of attempted murder in the first degree (§§ 110.00, 125.27 [1] [a] [viii]; [b]). We reject that contention (*see generally People v Glover*, 57 NY2d 61, 64). We also reject

defendant's contention that she received ineffective assistance of counsel based on defense counsel's failure to request that attempted manslaughter in the first degree be submitted as a lesser included offense of attempted murder in the first degree. Viewing the evidence in the light most favorable to defendant (*see People v Martin*, 59 NY2d 704, 705; *People v Albanna*, 23 AD3d 1004, 1005), there is no reasonable view thereof to support a finding that defendant committed the lesser offense but not the greater (*see generally Glover*, 57 NY2d at 63). Thus, as previously noted, it cannot be said that defendant was denied effective assistance of counsel in the event that defense counsel does not make a motion or argument that has little or no chance of success (*see Stultz*, 2 NY3d at 287; *Crump*, 77 AD3d at 1336). In addition, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to support the intent elements of the attempted murder and assault crimes of which defendant was convicted (*see People v Bleakley*, 69 NY2d 490, 495; *see also People v Green*, 74 AD3d 1899, 1900, *lv denied* 15 NY3d 852; *People v Flecha*, 43 AD3d 1385, 1386, *lv denied* 9 NY3d 990).

Finally, we have reviewed defendant's two remaining contentions in her pro se supplemental brief and conclude that neither warrants further modification or reversal of the judgment.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1070.1

CAF 11-02194

PRESENT: SCUDDER, P.J., SMITH, CENTRA, GREEN, AND GORSKI, JJ.

IN THE MATTER OF KYRA W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHAEL W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CHARLES J. GREENBERG, BUFFALO, 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 KYRA W.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered October 7, 2010 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined the subject child to be abused.

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

Same Memorandum as in *Matter of Chelsey B.* (___ AD3d ___ [Nov. 18, 2011]).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1070

CAF 10-01876

PRESENT: SCUDDER, P.J., SMITH, CENTRA, GREEN, AND GORSKI, JJ.

IN THE MATTER OF CHELSEY B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHAEL W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

CHARLES J. GREENBERG, BUFFALO, FOR RESPONDENT-APPELLANT.

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

JENNIFER M. LORENZ, ATTORNEY FOR THE CHILD, LANCASTER, FOR CHELSEY B.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered October 7, 2010 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined the subject child to be severely abused.

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

Memorandum: Respondent father appeals from an order of fact-finding determining that his older daughter is a severely abused child and that his younger daughter is derivatively abused. We note at the outset that Family Court subsequently issued separate orders of "fact-finding and disposition" with respect to each child, and we therefore exercise our discretion to deem the father to have taken appeals from those orders (*see generally* Family Ct Act § 1112 [a]; *Matter of Ariel C.W.-H.*, ___ AD3d ___ [Nov. 10, 2011]).

We reject the father's contention in appeal No. 1 that the finding that his older daughter is a severely abused child is not supported by clear and convincing evidence (*see Matter of Perry T.K.*, 16 AD3d 687; *see also* Family Ct Act § 1046 [b] [ii]). It is axiomatic that the "determination of Family Court is entitled to great weight and should not be disturbed unless clearly unsupported by the record" (*Matter of Shardanae T.-L.*, 78 AD3d 1631 [internal quotation marks omitted]), and that is not the case here. Petitioner proved by clear and convincing evidence that the father committed felony sex offenses against his older daughter in violation of Penal Law § 130.35 (4) and § 130.50 (4) (*see* Social Services Law § 384-b [8] [a] [ii]). The older daughter's out-of-court statements to a school counselor and a nurse practitioner were sufficiently corroborated by medical evidence

of sexual intercourse and the testimony of petitioner's validation expert (*see Matter of Breanna R.*, 61 AD3d 1338, 1340). Furthermore, the court was entitled to draw the strongest possible inferences against the father " 'as may be supported by other evidence in the record' " based upon his failure to testify (*Matter of Jeffrey D.*, 233 AD2d 668, 670; *see generally Matter of Anita J.F.*, 267 AD2d 1044, *lv denied* 94 NY2d 762). We further conclude that the court's finding of derivative abuse in appeal No. 2 with respect to the father's younger daughter was proper (*see generally Breanna R.*, 61 AD3d at 1340; *Matter of Derrick C.*, 52 AD3d 1325, 1326, *lv denied* 11 NY3d 705).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1071

CAF 11-01094

PRESENT: SCUDDER, P.J., SMITH, CENTRA, GREEN, AND GORSKI, JJ.

IN THE MATTER OF MARK D. COLEMAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MAUREEN M. MURPHY, RESPONDENT-RESPONDENT.

BUCCI LAW FIRM, PLLC, BALDWINSVILLE (ROSEMARY E. BUCCI OF COUNSEL), FOR PETITIONER-APPELLANT.

JOHN M. MURPHY, JR., PHOENIX, FOR RESPONDENT-RESPONDENT.

LISA M. FAHEY, ATTORNEY FOR THE CHILD, EAST SYRACUSE, FOR CASEY M.C.

Appeal from an order of the Family Court, Onondaga County (William Dowling, R.), entered November 16, 2010 in a proceeding pursuant to Family Court Act article 4. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Petitioner father commenced this proceeding pursuant to Family Court Act article 4 seeking to terminate his support obligation for the parties' son on the grounds that respondent mother had frustrated the father's visitation rights and that his son had abandoned him. The father appeals from an order dismissing his petition without prejudice "for lack of proper cause of action for filing." We agree with the father that the Referee erred in dismissing the petition without conducting a hearing. Indeed, the Referee was required to "conduct a hearing on [the] petition to modify a support order where the petition [was] 'supported by affidavit and other evidentiary material sufficient to establish a prima facie case for the relief requested.' Here, [the father] established a prima facie case for the relief requested with respect to child support by submitting evidentiary material establishing that his [son] had abandoned him. His submissions in support of the petition established that his repeated attempts at communication with his [son] had been refused and that [he] had expressed a clear wish to 'have nothing to do with' " the father (*Matter of Garcia v Barie*, 59 AD3d 1090; *see Matter of Saunders v Aiello*, 59 AD3d 1090, 1091; *cf. Matter of Hootnick v Cohen*, 193 AD2d 1092). In addition, the petition alleged that the mother had refused to permit the father to exercise his

visitation rights, and "a custodial parent's 'deliberate frustration' of visitation rights can, under appropriate circumstances, warrant the suspension of future child support payments" (*Hiross v Hiross*, 224 AD2d 662, 663). Consequently, we reverse the order, reinstate the petition, and remit the matter to Family Court for further proceedings thereon.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1087

KA 10-01635

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD J. SZYSZKOWSKI, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (JOHN C. LUZIER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered July 26, 2010. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony, criminal possession of stolen property in the fourth degree, unlawful operation of ATV on highway and operation of ATV without helmet.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Cattaraugus County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant was convicted following a jury trial of, inter alia, felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [ii]) and criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [1]). Defendant does not dispute that he was intoxicated when he was arrested or that the all-terrain vehicle (ATV) in question was stolen. He contends, however, that the evidence is legally insufficient to establish that he operated or possessed the ATV. We reject that contention. The circumstantial evidence presented by the People established that defendant was the person observed by the arresting police officer operating an ATV without a helmet shortly before defendant was arrested. The officer observed that the operator of the ATV wore a black hooded jacket and black pants, and that he had mud splattered on his clothing. Although the officer was unable to catch up to the ATV to effectuate a stop, he observed an ATV parked in the driveway of a house on a street in the area where the ATV was last seen. The ATV in the driveway was identical to the one previously observed by the officer, and its engine was warm to the touch. The resident of the house was a friend of defendant and indicated that defendant had arrived only moments before the officer did. She also informed the officer that she had no idea how the ATV arrived in her driveway but

that she heard a noise that sounded like an ATV moments before defendant arrived. In addition, when he emerged from the house at the officer's request, defendant was wearing a black hooded jacket and black pants, and he had mud splattered on his back. Finally, defendant lied to the officer concerning several matters and refused to provide his correct name and date of birth. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a " 'valid line of reasoning and permissible inferences [that] could lead a rational person' " to conclude that defendant operated and thereby possessed the ATV (*People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678).

We also reject defendant's contention that the evidence is legally insufficient to establish that the value of the ATV exceeded $1,000, an element of criminal possession of stolen property in the fourth degree (*see* Penal Law § 165.45). Pursuant to Penal Law § 155.20 (1), "value means the market value of the property at the time and place of the crime . . . ." Evidence concerning the value of certain property is sufficient so long as there is "a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold" (*People v Sheehy*, 274 AD2d 844, 845, *lv denied* 95 NY2d 938). Here, "[a]lthough the expert [who] appraise[d the ATV] did not examine [it] or have any knowledge of its condition, his testimony, taken together with the other evidence, established that the [ATV's] value was at least [$1,000]" (*People v Callendar*, 260 AD2d 315, 316, *lv denied* 93 NY2d 1015). The expert testified that the resale value of a 1996 Honda Foreman 400 ATV, such as the one possessed by defendant, was $1,100 "[i]f it starts up, runs and shifts good." Although, as noted above, the expert did not examine the ATV, there was sufficient evidence for the jury to conclude that it started, ran and shifted on the day that it was operated by defendant. Indeed, the arresting officer testified that the ATV was traveling at approximately 35 to 40 miles per hour when it passed by him shortly before defendant was arrested, and an employee of the ski resort that owned the ATV testified that it operated "fine" before it was stolen and did not need any repairs when it was returned after defendant's arrest.

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). Defendant failed to preserve for our review his contention that he was denied a fair trial with respect to one of the alleged instances of prosecutorial misconduct and, in any event, "we conclude that any alleged [prosecutorial] misconduct was not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Pruchnicki*, 74 AD3d 1820, 1822, *lv denied* 15 NY3d 855). The sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly recites that defendant was convicted of refusal to submit to a field breath test under Vehicle and Traffic Law § 1194 (1) (b), and it must therefore be amended to reflect that

defendant was acquitted of that charge (*see People v Saxton*, 32 AD3d 1286).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1091

KA 09-00768

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL NICHOLS, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., LIVINGSTON COUNTY CONFLICT DEFENDER, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered June 3, 2008. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree, criminal possession of stolen property in the third degree, criminal mischief in the fourth degree (two counts) and reckless endangerment 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, grand larceny in the third degree (Penal Law former § 155.35) and criminal possession of stolen property in the third degree (§ 165.50). We reject defendant's contention that County Court erred in refusing to suppress an in-court identification of defendant based on an unduly suggestive photo array identification procedure. The People met their burden of establishing the reasonableness of the police conduct in conducting the identification procedure in question, and defendant failed to meet his burden of proving that the procedure was unduly suggestive (*see People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833).

Defendant failed to renew his motion for a trial order of dismissal after presenting evidence, and thus he failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Pearson*, 26 AD3d 783, *lv denied* 6 NY3d 851). In any event, that contention is without merit (*see generally*

People v Bleakley, 69 NY2d 490, 495).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1092

KA 11-01024

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT PEALER, DEFENDANT-APPELLANT.

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

JASON L. COOK, DISTRICT ATTORNEY, PENN YAN (MEGAN PETER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered December 8, 2009. The judgment convicted defendant, upon a jury verdict, of driving while ability impaired and driving while intoxicated.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, felony driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [2]; § 1193 [1] [c] [ii]), defendant contends that County Court erred in admitting in evidence breath test calibration and simulator solution certificates (collectively, breath test documents) used in verifying the accuracy of the breathalyzer test. According to defendant, the admission of those records in evidence violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution (*see generally Crawford v Washington*, 541 US 36, 50-54). We reject that contention. The simulator solution certificate is a certified document indicating that a given sample of simulator solution contains a certain percentage of alcohol. The breath test calibration certificate is a certified document indicating that a breath test machine accurately measured a given sample of simulator solution to within plus or minus .01% weight per volume. Breath test calibration certificates are generated by employees of the New York State Division of Criminal Justice Services, while simulator solution certificates are generated by employees of the New York State Police. Both are used to establish that the breath test machine used in a particular case is accurate, a necessary foundational requirement for the admission of breath test results (*see People v Mertz*, 68 NY2d 136, 148). Here, the People offered the breath test documents in evidence, and the court admitted them as business records pursuant to CPLR 4518 (c), over defendant's

objection that such admission violated his right under *Crawford* to confront the government employees who certified the results.

The Confrontation Clause bars the admission of testimonial out-of-court statements made by a witness who is not subject to cross-examination (*see generally Crawford*, 541 US at 50-54; *People v Brown*, 13 NY3d 332, 338). The United States Supreme Court in *Crawford* explicitly declined "to spell out a comprehensive definition of 'testimonial' " (541 US at 68), but it stated that "some statements qualify under any definition[, including] *ex parte* testimony at a preliminary hearing[and s]tatements taken by police officers in the course of interrogations" (*id.* at 52). Since *Crawford* was decided, courts have struggled to come up with a comprehensive definition of the term "testimonial," but one factor that must be considered is the degree to which a statement is deemed accusatory, i.e., whether it "seeks to establish facts essential to the elements of the crime[s]" (*People v Encarnacion*, 87 AD3d 81, 90; *see Melendez-Diaz v Massachusetts*, ___ US ___, 129 S Ct 2527, 2532; *People v Rawlins*, 10 NY3d 136, 151-152, *cert denied sub nom. Meekins v New York*, ___ US ___, 129 S Ct 2856).

Here, the statements contained in the breath test documents are not accusatory in the sense that they do not establish an element of the crimes. Indeed, standing alone, the documents shed no light on defendant's guilt or innocence (*see People v Damato*, 79 AD3d 1060, 1061-1062; *see also People v Bush*, 66 AD3d 1488, *lv denied* 13 NY3d 905). The only relevant fact established by the documents is that the breath test instrument was functioning properly. The functionality of the machine, however, neither directly establishes an element of the crimes charged nor inculpates any particular individual. Thus, the government employees who prepared the records were "not defendant's 'accuser[s]' in any but the most attenuated sense" (*People v Freycinet*, 11 NY3d 38, 42), and the breath test documents were properly admitted in evidence over defendant's objection based on the Confrontation Clause (*see Damato*, 79 AD3d at 1061-1062; *People v Lebrecht*, 13 Misc 3d 45, 47-49; *Green v DeMarco*, 11 Misc 3d 451, 465-468).

Contrary to defendant's contention, this case is distinguishable from *Bullcoming v New Mexico* (___ US ___, 131 S Ct 2705, 2710), in which the Supreme Court held that the Confrontation Clause barred the admission in evidence of a forensic laboratory report certifying the defendant's blood alcohol content. In *Bullcoming*, the prosecution sought to admit evidence establishing that the defendant was intoxicated, which was an element of the crime charged (*id.* at 2709-2710). Here, in contrast, the breath test documents were offered merely to show that the breath test machine functioned properly, which is not an element of DWI. We note that the Supreme Court stated in *Melendez-Diaz* that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records" (___ US at ___ n 1, 129 S Ct 2532 n 1). The breath test documents at issue here are precisely the sort of documents to which the Supreme Court in *Melendez-Diaz* was referring. Although the footnote in *Melendez-Diaz*

is dicta, we find it to be persuasive, and it is indicative of how the Court would rule on the issue. It is also consistent with the Court of Appeals' interpretations of the Confrontation Clause (*see e.g. Freycinet*, 11 NY3d at 41-42; *Rawlins*, 10 NY3d at 152-154).

Defendant further contends that the court erred in refusing to suppress all evidence obtained by the police following the stop of his vehicle. We reject that contention. The arresting officer stopped defendant's vehicle because it had an unauthorized sticker on the rear window, in violation of Vehicle and Traffic Law § 375 (1) (b) (i). According to defendant, the stop was unlawful because the officer's primary motivation in stopping the vehicle was to investigate an anonymous tip that defendant was intoxicated, and the unauthorized sticker was a mere pretext to allow the officer to accomplish that purpose. Regardless of whether the stop was pretextual in nature, the court properly refused to suppress the evidence in question. As the Court of Appeals has explained, "where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate [the state or federal constitutions, and] . . . neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant" (*People v Robinson*, 97 NY2d 341, 349; *see Whren v United States*, 517 US 806, 812-813). We note that defendant does not dispute that he committed a traffic infraction in the officer's presence by having the unauthorized sticker on his vehicle's window.

We have reviewed defendant's remaining contentions and conclude that they are either unpreserved for our review or without merit.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1098

CA 11-00627

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

PAUL HUGHES AND TAMMY HUGHES,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MURNANE BUILDING CONTRACTORS, INC. AND
M.A. BONGIOVANNI, INC., DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-APPELLANT MURNANE BUILDING CONTRACTORS, INC.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR DEFENDANT-APPELLANT M.A. BONGIOVANNI, INC.

THE ROTHSCHILD LAW FIRM, P.C., EAST SYRACUSE (MARTIN J. ROTHSCHILD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 3, 2010 in a personal injury action. The order, insofar as appealed from, denied in part defendants' motions for summary judgment.

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

Memorandum: Defendants appeal, as limited by their briefs, from an order insofar as it denied their motions for summary judgment seeking dismissal of the common-law negligence cause of action, which is based on the doctrine of "danger invites rescue" (hereafter, rescue doctrine). Defendant Murnane Building Contractors, Inc. (Murnane) was the general contractor on a construction project that involved the installation of a large pipe in a trench. The trench was 1,200 feet long and 40 feet deep. Defendant M.A. Bongiovanni, Inc. (Bongiovanni) was the excavation subcontractor on the project, and it hired the company that employed Paul Hughes (plaintiff) to provide security at the construction site. Plaintiff, a security guard who worked the evening shift, was injured when he responded to a call on his cell phone from Wayne Sistrunk, an employee of Bongiovanni who had fallen from an extension ladder into the trench. According to plaintiff, who was the only other person at the site, Sistrunk begged him for help and told him to come right away. Plaintiff climbed down a stair tower to reach the trench floor and walked toward an excavator in the area where he thought Sistrunk was located. While walking on the trench floor, plaintiff allegedly sank deep into the mud. Plaintiff managed

to pull himself out of the mud by grabbing onto the excavator, but he was allegedly injured in the process. After escaping the mud, plaintiff walked back up the stair tower and discontinued any efforts to assist Sistrunk. In the meantime, Sistrunk called 911, and emergency responders arrived at the construction site. The responders removed Sistrunk from the trench and treated plaintiff for chest pains.

According to plaintiffs, defendants' negligence caused Sistrunk to fall into the trench, which, in turn, caused plaintiff to attempt to rescue Sistrunk. Thus, plaintiffs allege that defendants are liable to them for their negligence toward Sistrunk. We conclude that Supreme Court properly denied those parts of defendants' motions seeking summary judgment dismissing the common-law negligence cause of action because defendants failed to meet their initial burden of establishing as a matter of law that the rescue doctrine is inapplicable.

Defendants contend that the rescue doctrine does not apply because plaintiff could not have reasonably believed that Sistrunk was in imminent peril when plaintiff descended into the trench to attempt to rescue him, and because plaintiff's rescue attempt was unreasonable. We reject those contentions. Although the rescue doctrine requires "more than a mere suspicion of danger" (*Provenzo v Sam*, 23 NY2d 256, 261; *see Snyder v Kramer*, 94 AD2d 860, *affd for the reasons stated* 61 NY2d 961), the reasonableness of a plaintiff's perception of danger and the rescue effort itself is "generally a question for the trier of fact" (*Gifford v Haller*, 273 AD2d 751, 753; *see Wagner v International Ry. Co.*, 232 NY 176, 181-182; *Rucker v Andress* [appeal No. 2], 38 AD2d 684). "[T]he wisdom of hindsight is not determinative . . . So long as the rescue attempted can be said to have been a reasonable course of conduct at the time, it is of no import that the danger was not as real as it appeared" (*Provenzo*, 23 NY2d at 260; *see O'Connor v Syracuse Univ.*, 66 AD3d 1187, 1191, *lv dismissed* 14 NY3d 766).

Here, plaintiff received a phone call from Sistrunk, who said that he had fallen in the trench and that plaintiff needed to help him immediately. Plaintiff testified at his deposition that Sistrunk sounded like he was in pain and panicking and that he cried, "Help me, help me, help me." Plaintiff further testified that he thought Sistrunk could have been dying. It cannot be said on the record before us that plaintiff's belief in that regard was unreasonable as a matter of law. Given the depth of the trench and the cold weather, Sistrunk's death or further serious injury as a result of the fall or from exposure thereafter was more than an imaginative or speculative possibility (*see Provenzo*, 23 NY2d at 261; *see generally Rucker*, 38 AD2d 684). Indeed, Sistrunk fell unconscious for a time and was exhibiting hypothermic symptoms when he was rescued. We therefore conclude that "the record . . . supports a logical inference that plaintiff . . . was motivated by a reasonable belief of imminent peril" (*O'Connor*, 66 AD3d at 1190; *see also Villoch v Lindgren*, 269 AD2d 271, 273). In addition, although plaintiff's rescue attempts appear to have been wholly ineffective, the rescue doctrine is not

rendered inapplicable by "the futility of the plaintiff's sacrifice" (*Wagner*, 232 NY at 181). The evidence submitted by defendants in support of their motions failed to establish that plaintiff's rescue efforts were unreasonable as a matter of law or that plaintiff's actions were "so rash under the circumstances as to constitute an intervening and superseding cause" of his alleged injuries (*Rodriguez v Property for People*, 291 AD2d 220, 221).

Defendants further contend that the rescue doctrine is inapplicable here because their liability to Sistrunk is predicated solely on the theory of strict liability pursuant to Labor Law § 240 (1). Even assuming, arguendo, that the rescue doctrine is inapplicable where the liability to the rescued person is predicated upon an alleged violation of Labor Law § 240 (1) rather than negligence (*see Del Vecchio v State of New York*, 246 AD2d 498, 499-500; *cf. McCoy v American Suzuki Motor Corp.*, 136 Wash 2d 350, 356, 961 P2d 952, 956), we conclude that plaintiffs have sufficiently pleaded their case as one predicated upon defendants' negligence, and defendants failed to establish their lack of negligence as a matter of law (*see generally Niagara Frontier Transp. Auth. v City of Buffalo Sewer Auth.*, 1 AD3d 893, 895).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1117

CA 11-01069

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

KAREN L. SALVATO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LARRY P. SALVATO, DEFENDANT-APPELLANT.

LAW OFFICE OF MARK A. YOUNG, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

HANDELMAN, WITKOWICZ & LEVITSKY, ROCHESTER (STEVEN M. WITKOWICZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered November 12, 2010 in a divorce action. The judgment, inter alia, granted plaintiff a divorce.

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

Memorandum: Defendant appeals from a judgment of divorce that, inter alia, directed him to pay maintenance and child support. Contrary to defendant's contention, Supreme Court properly determined the amount of child support. In determining a parent's income for purposes of child support, the court shall deduct from income any maintenance paid to a spouse "provided the order or agreement provides for a specific adjustment . . . in the amount of child support payable upon the termination of . . . maintenance to such spouse" (Domestic Relations Law § 240 [1-b] [b] [5] [vii] [C]). Here, there was no provision for an adjustment of child support upon the termination of maintenance, and thus there was no basis for the court to deduct maintenance from defendant's income in determining the amount of child support (*cf. Schiffer v Schiffer*, 21 AD3d 889, 890-891; *Kessinger v Kessinger*, 202 AD2d 752, 753-754). We further conclude that, although defendant testified at trial that his current earnings were less than his earnings from the previous year, the court did not abuse its discretion in using his income from the previous year to calculate child support. Defendant failed to provide a consistent explanation for the decrease in his income from his employment at his family's business.

Contrary to defendant's further contention, the court did not abuse its discretion in awarding maintenance to plaintiff of $1,000 a month for a period of four years (*see McCarthy v McCarthy*, 57 AD3d 1481, 1481-1482). "[T]he amount and duration of maintenance are

matters committed to the sound discretion of the trial court" (*Boughton v Boughton*, 239 AD2d 935, 935). Here, the court considered all the factors set forth in Domestic Relations Law § 236 (B) (6) (a), and properly balanced plaintiff's reasonable needs against defendant's ability to pay (*see Torgersen v Torgersen*, 188 AD2d 1023, 1024, *lv denied* 81 NY2d 709).

The court properly awarded plaintiff a credit for her separate property interest in the marital residence in the amount of $25,000. "It is well settled that a spouse is entitled to a credit for his or her contribution of separate property toward the purchase of the marital residence" (*Juhasz v Juhasz*, 59 AD3d 1023, 1024, *lv dismissed* 12 NY3d 848; *see Hendershott v Hendershott*, 299 AD2d 880, 880-881; *Judson v Judson*, 255 AD2d 656, 657). The uncontroverted evidence established that plaintiff used $25,000 that she received from her mother as a down payment for the marital residence. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1122

CA 11-00320

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

COLLEEN O'BRIEN, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

LARRY J. BAINBRIDGE AND FEDEX GROUND PACKAGE SYSTEM, INC., DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 1.)

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

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered September 14, 2010 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint and denied the cross motion of plaintiff for partial summary judgment on the issue of serious injury.

It is hereby ORDERED that said appeal from the order insofar as it denied defendants' motion is unanimously dismissed and the order is affirmed without costs.

Same Memorandum as in *O'Brien v Bainbridge* ([appeal No. 2] ___ AD3d ___ [Nov. 18, 2011]).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1123

CA 11-00322

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

COLLEEN O'BRIEN, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

LARRY J. BAINBRIDGE AND FEDEX GROUND PACKAGE SYSTEM, INC., DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 2.)

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

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered November 22, 2010 in a personal injury action. The order granted the motion of defendants for leave to reargue and, upon reargument, granted in part the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendants' motion with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d) and dismissing the complaint, as amplified by the amended bill of particulars, to that further extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the United States Postal Service vehicle she was driving was broadsided at an intersection in the City of Buffalo by a delivery truck owned and operated by defendant Larry J. Bainbridge pursuant to a contract for package delivery with defendant FedEx Ground Package System, Inc. In appeal No. 1, defendants appeal and plaintiff cross-appeals from an order denying defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) and denying plaintiff's cross motion for partial summary judgment on the issue of serious injury. We note at the outset that, in her original bill of particulars, plaintiff alleged that she sustained four categories of serious injury, i.e, the significant disfigurement, permanent loss of use, significant limitation of use and 90/180-day categories. In her amended bill of particulars, however, which predates Supreme Court's decision in appeal No. 1, plaintiff added the category of permanent consequential

limitation of use. In its written decision underlying the order in appeal No. 1, the court addressed only the initial four categories in denying defendants' motion, but did not address the additional fifth category. Thus, the permanent loss of use category remained intact despite the court's failure to address it expressly in the order, inasmuch as the decision controls the order in the case of a discrepancy between the two (*see generally Matter of Edward V.*, 204 AD2d 1060), and neither party challenges the court's ruling with respect to that category.

In appeal No. 2, defendants appeal and plaintiff cross-appeals from an order granting defendants' motion for leave to reargue and, upon reargument, granting those parts of defendants' motion for summary judgment dismissing the complaint, as amplified by the amended bill of particulars, with respect to the permanent consequential limitation of use and the significant limitation of use categories of serious injury. The court denied the motion with respect to the three remaining categories of serious injury allegedly sustained by plaintiff, but the court expressly addressed only two of those categories, i.e., the significant disfigurement and the 90/180-day categories. We note at the outset that appeal No. 1 must be dismissed insofar as the order therein addresses defendants' motion, because such order was superseded by the order in appeal No. 2 with respect defendants' motion (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985). We further note that plaintiff in appeal No. 2 did not seek leave to reargue her cross motion in appeal No. 1.

With respect to appeal No. 2, we conclude that the court properly granted those parts of defendants' motion with respect to the permanent consequential limitation of use and the significant limitation of use categories of serious injury. Contrary to plaintiff's contention, defendants met their initial burden on the motion with respect to those categories, and plaintiff failed to submit the requisite objective evidence of plaintiff's alleged injury "to satisfy the statutory serious injury threshold" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350). The evidence submitted by plaintiff consisted primarily of subjective complaints of pain, which are insufficient to satisfy the statutory threshold (*see Gaddy v Eyler*, 79 NY2d 955, 957-958). Although plaintiff also submitted some physician findings of loss of range of motion, it is well settled that "a finding of reduced range of motion *alone* is insufficient to support a finding of serious injury because such a determination is based on subjective complaints of pain, [and this record is otherwise] devoid of any independent objective medical evidence of a serious injury" (*Durham v New York E. Travel, Inc.*, 2 AD3d 1113, 1115; *see Parreno v Jumbo Trucking, Inc.*, 40 AD3d 520, 523-524). Moreover, we agree with defendants in appeal No. 2 that the court erred in denying that part of their motion with respect to the 90/180-day category inasmuch as there is no "objective evidence of a medically determined injury or impairment of a non-permanent nature" (*Zeigler v Ramadhan*, 5 AD3d 1080, 1081 [internal quotation marks omitted]). We therefore modify the order in appeal No. 2 accordingly.

Finally, with respect to the significant disfigurement category of serious injury based upon the scars on plaintiff's leg, we conclude that the issue whether " 'a reasonable person viewing the plaintiff's [leg] in its altered state would regard the condition as unattractive, objectionable or as the subject of pity or scorn' " presents an issue of fact that cannot be resolved by way of summary judgment (*Waldron v Wild*, 96 AD2d 190, 194; *see Savage v Delacruz*, 100 AD2d 707, 707-708). Thus, the issue of whether plaintiff's scars constitute a significant disfigurement should be decided by the trier of fact, along with the remaining category of permanent loss of use.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1124

KA 10-01144

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORNELL LONG, 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 (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 21, 2009. The appeal was held by this Court by order entered February 18, 2011, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (81 AD3d 1432). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision and remitted the matter to Supreme Court for compliance with Correction Law § 168-n (3), based on the court's failure "to set forth the findings of fact and conclusions of law upon which it based its determination" (*People v Long*, 81 AD3d 1432, 1433). We agree with defendant that, upon remittal, the court failed to set forth its findings of fact and conclusions of law in an adequate manner, i.e., the court failed to note the "evidence upon which" its determination was based (*People v Smith*, 11 NY3d 797, 798), and the court was required to provide more than "a generic listing of factors" (*People v Miranda*, 24 AD3d 909, 911). Nevertheless, we conclude that "the record before us is sufficient to enable us to make our own findings of fact and conclusions of law, thus rendering [further] remittal unnecessary" (*People v Urbanski*, 74 AD3d 1882, 1883, *lv denied* 15 NY3d 707; *see People v Pardo*, 50 AD3d 992, *lv denied* 11 NY3d 703).

Upon exercising our authority to make findings of fact and conclusions of law, we conclude that the court properly determined that defendant is a level two risk under the Sex Offender Registration Act (Correction Law § 168 *et seq.*). In the prior appeal, we determined that the court properly assessed 15 points against defendant under the risk factor for number and nature of prior crimes (*Long*, 81 AD3d at 1433), and we now conclude that, contrary to

defendant's contention, the People met their burden of proving that 15 points should be assessed against him under the risk factor for drug or alcohol abuse. Because "[a]n assessment of 15 points is warranted under that risk factor where[, inter alia,] 'an offender . . . was abusing drugs and or alcohol at the time of the offense' " (*People v McClam*, 63 AD3d 1588, 1589, *lv denied* 13 NY3d 704, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 15 [2006]), we conclude that defendant's admission that he was drinking alcohol during the 1½-hour period immediately preceding his offense provides a sufficient basis upon which to assess the points (*see People v Robinson*, 55 AD3d 708, 708, *lv denied* 11 NY3d 713).

Inasmuch as defendant "does not contest the court's determination with respect to any of the other risk factors[,] we therefore do not address them" (*Urbanski*, 74 AD3d at 1883). Thus, we conclude that the remainder of the court's determination is valid, and that the court properly determined defendant to be a level two risk.

Entered: November 18, 2011 Patricia L. Morgan
Clerk of the Court

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

1131

KA 11-00895

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NYESHIA S. GIBSON, DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered December 17, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her following a jury trial of assault in the first degree (Penal Law § 120.10 [1]). Defendant preserved for our review her contention that the evidence is legally insufficient to establish that she struck the victim with a high-heeled shoe, but she failed to preserve for our review her further contention that the evidence is legally insufficient to establish that she intended to cause serious physical injury to the victim (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that both of those contentions are without merit. In light of the testimony of the victim and several eyewitnesses, each of whom provided an account of the altercation in question, the jury reasonably could have found that defendant struck the victim in the eye with the three-inch heel of her shoe. The medical testimony of the victim's ophthalmologist established that the victim sustained injuries that left her permanently blind in her right eye and that those injuries were caused by a penetrating blow from a non-blunt object at least one inch in length. Thus, the People established that the victim suffered a serious physical injury (*see* § 10.00 [10]), and the jury concluded that such injury was caused by defendant. Inasmuch as the eyewitnesses testified that defendant instigated the altercation and that she jumped on the victim while holding her shoe with the heel facing out and swung the hand in which she held the shoe toward the victim's face, the jury could have inferred defendant's intent from her conduct (*see People v Terk*, 24 AD3d 1038, 1039).

Under the circumstances described by the eyewitnesses, defendant's high-heeled shoe qualified as a " '[d]angerous instrument' " (§ 10.00 [13]; *see People v Lev*, 33 AD3d 362; *People v Edwards*, 16 AD3d 226, 227, *lv denied* 5 NY3d 762).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although "an acquittal would not have been unreasonable" based on the conflicting accounts of what occurred during the altercation (*Danielson*, 9 NY3d at 348), we afford the appropriate deference to the jury's credibility determinations (*see People v Flagg*, 59 AD3d 1003, *lv denied* 12 NY3d 853), and we conclude that "the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*Danielson*, 9 NY3d at 348).

Contrary to defendant's further contention, Supreme Court did not abuse its discretion in refusing to adjudicate her a youthful offender (*see generally People v Shrubsall*, 167 AD2d 929, 930). Although defendant had no prior criminal record and the Department of Probation recommended that she be afforded youthful offender status, defendant was the first aggressor in the altercation and committed a serious offense that resulted in a permanent and severe injury to the victim. In addition, defendant has a prognosis for lawful behavior that is fair at best and has failed to accept responsibility. Taken together, those factors support the determination denying defendant's request for youthful offender status (*see People v Francis*, 83 AD3d 1119, 1123, *lv denied* 17 NY3d 806). The sentence is not unduly harsh or severe.

Finally, defendant contends that the People committed a *Brady* violation by failing to disclose promptly a report prepared by a security officer who was present at the scene of the altercation. We reject that contention. The District Attorney's Office did not receive the report in question until three to four hours prior to the time when the prosecutor provided it to defendant, and the prosecutor did not actually receive and have the opportunity to read the report until just before she provided it to defendant. Even assuming, arguendo, that the report was exculpatory, we conclude under those circumstances that the People did not "suppress[ ]" the report (*People v Fuentes*, 12 NY3d 259, 263, *rearg denied* 13 NY3d 766). In any event, "we conclude that reversal is not warranted inasmuch as defendant received [the report] in time for its effective use at trial" (*People v Comfort*, 60 AD3d 1298, 1300, *lv denied* 12 NY3d 924 [internal quotation marks omitted]).

Entered: November 18, 2011 Patricia L. Morgan
Clerk of the Court

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

1132

KA 07-01267

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMMY L. WASHINGTON, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, 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 May 2, 2005. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, gang assault 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 jury verdict of assault in the first degree (Penal Law § 120.10 [1]), gang assault in the second degree (§ 120.06) and assault in the second degree (§ 120.05 [2]). Defendant contends that he was denied a fair trial based on the prosecutor's improper questions on cross-examination concerning whether the prosecution witnesses were lying or were liars. That contention is not preserved for our review inasmuch as defendant failed to object to those questions (*see* CPL 470.05 [2]), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We note, however, that such questions were improper (*see People v Paul*, 229 AD2d 932; *People v Paul*, 212 AD2d 1020, 1021, *lv denied* 85 NY2d 912; *People v Edwards*, 167 AD2d 864, *lv denied* 77 NY2d 877). As this Court stated over 20 years ago, "[o]n numerous occasions, we have forcefully condemned prosecutorial cross-examination which compels a defendant to state that witnesses lied in their testimony" (*People v Eldridge*, 151 AD2d 966, 966, *lv denied* 74 NY2d 808). Unfortunately, we find it necessary once again to forcefully condemn such improper conduct by the prosecutor.

Defendant's challenge to the legal sufficiency of the evidence is also unpreserved for our review because defendant made only a general motion for a trial order of dismissal that was not based on the grounds set forth on appeal (*see People v Gray*, 86 NY2d 10, 19; *People*

v Clark, 42 AD3d 957, 958, *lv denied* 9 NY3d 960). In any event, that challenge is lacking in merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We reject defendant's further contention that he was denied effective assistance of counsel. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that 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 lacking in merit.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1146.1

KAH 11-00458

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ROBERT CASS, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SIBATU KHAHAIFA, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT-APPELLANT.

MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Orleans County (James P. Punch, A.J.), entered May 17, 2010 in a habeas corpus proceeding. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Respondent appeals from an order granting the petition for a writ of habeas corpus. We note at the outset that the order was subsumed in the final judgment, from which no appeal was taken. Nevertheless, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the judgment (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *see also* CPLR 5520 [c]), and we reverse. Petitioner was not entitled to habeas corpus relief because he violated a condition of postrelease supervision, which was properly imposed before petitioner completed the originally imposed sentence of imprisonment (*see People v Lingle*, 16 NY3d 621, 629-633).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1149

KA 08-01880

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMONE D. BELL, DEFENDANT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered July 16, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]). Contrary to defendant's contention, his " 'waiver [of the right to appeal] is not invalid on the ground that [County Court] did not specifically inform [him] that his general waiver of the right to appeal encompassed the court's suppression rulings' " (*People v Graham*, 77 AD3d 1439, 1439, *lv denied* 15 NY3d 920). Thus, defendant's contention that the court erred in refusing to suppress contraband found on his person and in the vehicle in which he was a passenger is encompassed by his valid waiver of the right to appeal (*see People v Kemp*, 94 NY2d 831, 833).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1154

CAF 10-01612

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

IN THE MATTER OF JON WARD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TRACY WARD, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR RESPONDENT-APPELLANT.

NANCY J. BIZUB, ATTORNEY FOR THE CHILD, BUFFALO, FOR SAMANTHA W.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered June 29, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order awarding sole custody of the parties' daughter to petitioner father, with supervised visitation to the mother, in a proceeding pursuant to Family Court Act article 6. In appeal No. 2, the mother appeals from an order denying her motion to reopen and reschedule a "mediated conference" that was held by Family Court after the custody hearing. The purpose of the conference was for the parties to reach an agreement with respect to the mother's visitation rights. When the mother failed to appear, however, the court thereafter entered the order in appeal No. 1, which provided for supervised visitation to the mother.

We note at the outset that, contrary to the mother's contention, the court did not err in transferring temporary custody of the parties' daughter to the father prior to the custody hearing inasmuch as the father demonstrated the necessary exigent circumstances warranting the temporary transfer (*see Matter of Acquard v Acquard*, 244 AD2d 1010). In any event, even assuming, arguendo, that the court erred in transferring temporary custody to the father, we conclude that reversal of the order in appeal No. 1 is not required because the court "subsequently conducted the requisite evidentiary hearing, and the record of that hearing fully supports the court's determination following the hearing" (*Matter of Humberstone v Wheaton*, 21 AD3d 1416,

1418; *see Matter of Darryl B.W. v Sharon M.W.*, 49 AD3d 1246).

We likewise affirm the order in appeal No. 2, because the record of the custody hearing establishes that the court's decision concerning visitation to the mother was based entirely on evidence presented at the custody hearing, at which the mother appeared with counsel and participated. When the mother failed to appear at the "mediated conference" scheduled by the court in appeal No. 2 to enable the parties to mediate the mother's visitation schedule, the court did not hear or consider any new evidence and instead based its visitation decision on the record of the prior custody hearing in appeal No. 1. In any event, we note that the mother's motion in appeal No. 2 purportedly was based on CPLR 5015, yet the mother failed to offer a reasonable excuse for her default in appearing at the "mediated conference." Thus, it cannot be said that the court abused its discretion in denying the mother's motion in appeal No. 2 (*cf. Matter of Troy D.B. v Jefferson County Dept. of Social Servs.*, 42 AD3d 964).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1155

CAF 11-00883

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

IN THE MATTER OF SHARON THURSTON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KEITH C. SKELLINGTON, JR., RESPONDENT,
AND OSWEGO COUNTY DEPARTMENT OF SOCIAL
SERVICES, RESPONDENT-APPELLANT.

CARACCIOLI & NELSON, PLLC, MEXICO (ALLISON J. NELSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered August 4, 2010 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, awarded petitioner sole legal and physical custody of the subject child.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is denied, and the matter is remitted to Family Court, Oswego County, for further proceedings in accordance with the following Memorandum: Respondent Oswego County Department of Social Services (DSS) appeals from an order that, inter alia, granted the maternal grandmother's petition seeking sole legal and physical custody of the minor child. We note at the outset that the only issue raised by DSS concerns the propriety of the order with respect to custody, and thus we deem abandoned any other issues concerning the order that may have been raised by DSS (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

We agree with DSS that Family Court's determination with respect to custody lacks a sound and substantial basis in the record (*see Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449). While there is no question that the grandmother loves the child and wishes to care for him, those facts alone are insufficient to warrant a determination that the child's best interests will be served by an award of custody to the grandmother, particularly in light of the substantial and largely unrefuted evidence of DSS and the Attorney for the Child that the grandmother, while perhaps able to meet minimal standards of fitness, lacks the capacity to provide for the child's emotional and intellectual development (*see Matter of Matthew E. v Erie County Dept. of Social Servs.*, 41 AD3d 1240, 1242; *see generally Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946; *Eschbach v Eschbach*, 56 NY2d 167, 172-173). The record reflects that the grandmother has a lengthy

history of indicated child protective services reports spanning from 1979 until 2008, which involve allegations of, inter alia, medical neglect, failure to maintain a clean home, inadequate provision of food, and failure to ensure that her children attend school. Indeed, all four of the grandmother's children were removed from her care for significant periods of time during their childhoods. Further, the record establishes that the grandmother is unemployed and is entirely reliant upon governmental financial assistance, suffers from various health problems, is unable to drive, and has a limited education. Those circumstances are particularly problematic given the substantial evidence that the child has been diagnosed with multiple behavioral and learning disabilities including, inter alia, attention deficit hyperactivity disorder, disruptive disorder, and reactive attachment disorder. At the custody hearing, the child's foster mother testified that he requires "constant one-on-one attention," and his first-grade teacher likewise testified that the child needed structure and consistency and required more attention than the average child. Two DSS caseworkers, a clinical psychologist who evaluated the grandmother and the child, and a psychiatric social worker all expressed concern that the grandmother would be unable to handle the child's special needs, particularly as he became older. Importantly, the child's foster mother, his principal, his social worker, and the DSS witnesses all testified that the child's behavior deteriorated upon increased visitation with the grandmother.

We thus conclude that, "while continued placement in foster care is not ideal, it is not in the best interests of the[] child[] to have custody awarded to [the grandmother]" (*Matter of Susan FF. v MaryAnn FF.*, 11 AD3d 757, 758). We therefore reverse the order insofar as appealed from and deny the grandmother's petition. In view of the fact that the order on appeal also concerns visitation with the father and other issues that were not addressed on appeal, we therefore deem it appropriate in view of our determination to afford Family Court the opportunity to address any such issues that are affected by our determination. We therefore remit the matter to Family Court for that purpose.

Entered: November 18, 2011 Patricia L. Morgan
Clerk of the Court

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

1159

CAF 10-01613

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

IN THE MATTER OF TRACY WARD,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JON WARD, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PETITIONER-APPELLANT.

NANCY J. BIZUB, ATTORNEY FOR THE CHILD, BUFFALO, FOR SAMANTHA W.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, A.J.), entered July 21, 2010 in a proceeding pursuant to Family Court Act article 6. The order denied petitioner's motion to reopen and reschedule a "mediated conference."

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

Same Memorandum as in *Matter of Ward v Ward* ([appeal No. 1] ___ AD3d ___ [Nov. 18, 2011]).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1160

CA 11-01106

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

ROSS T. RUNFOLA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SIEGEL, KELLEHER & KAHN, HERBERT M. SIEGEL, AND DENNIS A. KAHN, DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (CHRISTOPHER L. HAYES OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 26, 2010. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, defendants' motion is granted in its entirety and the complaint is dismissed.

Memorandum: Plaintiff, a former partner in defendant Siegel, Kelleher & Kahn (SKK), commenced this action against that law firm and defendants Herbert M. Siegel and Dennis A. Kahn alleging, inter alia, breach of contract, fraud, and promissory estoppel. In 1992, Siegel and Kahn, the law firm's managing partners, purchased a group long-term disability insurance policy for the benefit of the firm's partners. An internal letter circulated in the law firm announced the existence of the disability policy and outlined the coverage provisions. Over the next several years, plaintiff suffered several physical and medical ailments and, although he continued to work, his ability to practice law was impaired. In December 1997, the group disability policy lapsed based on the nonpayment of premiums. According to plaintiff, he was not notified when the policy was allowed to lapse, nor did he learn that the policy had been cancelled until a few years thereafter, when he was inquiring about the coverage. Plaintiff continued working at SKK until May 2001 and thereafter commenced this action.

Supreme Court properly granted those parts of defendants' motion for summary judgment dismissing the first through third causes of action, but should have granted the motion for summary judgment dismissing the complaint in its entirety. The causes of action left intact by the court are preempted by the Employee Retirement Income

Security Act of 1974 ([ERISA] 29 USC § 1001 *et seq*.). Specifically, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA (29 USC § 1144 [a]). In accordance with that expansive preemption provision (*see e.g. California Div. of Labor Stds. Enforcement v Dillingham Constr., N.A., Inc.*, 519 US 316, 324; *Ingersoll-Rand Co. v McClendon*, 498 US 133, 138; *Shaw v Delta Air Lines, Inc.*, 463 US 85, 98; *see also Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 394), ERISA provides that "[a] law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan" (*Shaw*, 463 US at 96-97). ERISA also imposes, inter alia, notice and disclosure requirements in relation to employee benefit plans (*see* 29 USC §§ 1021-1024; *see also Peralta v Hispanic Business, Inc.*, 419 F3d 1064, 1070; *see generally Veilleux v Atochem N. Am., Inc.*, 929 F2d 74, 75-76). Thus, ERISA mandates dismissal of plaintiff's remaining causes of action. In light of our determination, we do not reach defendants' remaining contentions.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1163

CA 11-00979

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

SEAN LETTS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GLOBE METALLURGICAL, INC., DEFENDANT-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (JOHN WALLACE OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 8, 2011 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion with respect to the Labor Law § 241 (6) claim in its entirety and dismissing that claim and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when a 2,400-pound steel plate that he had welded into place fell on him, pinning him to the floor. Defendant owns the plant where the accident occurred, and the complaint alleges common-law negligence and the violation of Labor Law §§ 200 and 241 (6). Supreme Court granted defendant's motion for summary judgment dismissing the complaint only with respect to part of the Labor Law § 241 (6) claim. We conclude that the court erred in failing to grant defendant's motion with respect to the section 241 (6) claim in its entirety but otherwise properly denied the motion. We therefore modify the order accordingly.

We agree with defendant that neither of the two Industrial Code regulations on which plaintiff relies to support the remainder of his Labor Law § 241 (6) claim are applicable to this case (*see Smith v Le Frois Dev., LLC*, 28 AD3d 1133, 1133-1134). In support of its motion, defendant established that the work in which plaintiff was engaged at the time of his injury did not involve the placing of a load "on open web steel joists" (12 NYCRR 23-2.3 [a] [3]), nor did it involve the "[h]oling or cutting of structural steel members" (12 NYCRR 23-2.3 [b]). Defendant also established that the steel plate plaintiff had

welded was neither a “structural member[]” (12 NYCRR 23-2.3 [a]) nor a “[l]oad-bearing structural steel member[]” (12 NYCRR 23-2.3 [b]). In response, plaintiff failed to raise a triable issue of fact regarding the applicability of those regulations. In light of our determination with respect to the inapplicability of those two regulations, we need not address defendant’s further contention that plaintiff was not engaged in conduct protected by Labor Law § 241 (6) at the time of his injury.

Contrary to defendant’s further contention, the court properly denied those parts of its motion with respect to the common-law negligence and Labor Law § 200 claims. Indeed, the evidence offered by defendant in support of its motion raised an issue of fact whether defendant, through one of its agents, had input into the method used by plaintiff in carrying out the injury-producing work, and thus defendant failed to meet its initial burden with respect to those two claims (*see Comes v New York State Elec. & Gas*, 82 NY2d 876, 877). Given that defendant failed to meet its initial burden, we do not address defendant’s contention that the expert affidavit submitted by plaintiff was insufficient to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: November 18, 2011 Patricia L. Morgan
Clerk of the Court

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

1164

CA 10-00954

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

IN THE MATTER OF MICHAEL MELENDEZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, BRIAN FISCHER, COMMISSIONER, AND NORMAN R. BEZIO, DIRECTOR, S.H.U./INMATE DISCIPLINARY PROGRAMS, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,
RESPONDENTS-RESPONDENTS.

MICHAEL MELENDEZ, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (M. William Boller, A.J.), entered February 18, 2010 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III disciplinary hearing, that he violated inmate rule 113.13 (7 NYCRR 270.2 [B] [14] [iii] [making or possessing an alcoholic beverage]). We reject petitioner's contention that the determination should be annulled on the ground that he received inadequate assistance from the employee assistant assigned to his case pursuant to 7 NYCRR 251-4.1. "[I]n order to succeed on his claim that the assistance was inadequate, petitioner must establish that prejudice resulted from the employee assistant's failure to comply with [7 NYCRR 251-4.2]" (*Matter of Serrano v Coughlin*, 152 AD2d 790; *see Matter of Rodriguez v Herbert*, 270 AD2d 889, 889-890). Pursuant thereto, the assistant may, inter alia, "assist the inmate in obtaining documentary evidence or written statements which may be necessary." Even assuming, arguendo, that the assistant could and should have obtained the documents requested by petitioner, we conclude that petitioner was not prejudiced thereby. At the hearing, the Hearing Officer provided petitioner with "all of the documents he requested, save those that did not exist or were irrelevant to the charged misbehavior" (*Matter of Parkinson v Selsky*,

49 AD3d 985, 986). Although petitioner asserts that he could have shown that the signature on one of the documents was forged if it had been provided to him sooner, there is no evidence to support his allegation of forgery. Finally, we reject petitioner's remaining contention that he was not provided with advance notice of the charges against him and that he was thus denied a fair hearing on that basis. The record establishes that petitioner knew well before the hearing that he was alleged to have possessed alcohol, and he had ample opportunity to prepare his defense.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1165

CA 11-00070

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

KURT A. WIEDENHAUPT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PAUL F. HOGAN, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HEATH J. SZYMCZAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 16, 2010. The order granted plaintiff's motion for summary judgment in lieu of complaint.

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

Same Memorandum as in *Wiedenhaupt v Hogan* ([appeal No. 2] ___ AD3d ___ [Nov. 18, 2011]).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1166

CA 11-00071

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

KURT A. WIEDENHAUPT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PAUL F. HOGAN, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HEATH J. SZYMCZAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 1, 2010. The judgment awarded plaintiff the sum of $391,855 against defendant.

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

Memorandum: In appeal No. 1, defendant appeals from an order granting plaintiff's motion for summary judgment in lieu of complaint based upon an instrument for the payment of money only (*see* CPLR 3213), and in appeal No. 2 he appeals from the judgment entered thereon. In appeal No. 3, he appeals from an order entered following the entry of the judgment in appeal No. 2 that granted his motion for leave to reargue and, upon reargument, adhered to the prior decision granting plaintiff's motion for summary judgment in lieu of complaint. We note at the outset that appeal No. 1 must be dismissed inasmuch as the order granting plaintiff's motion for summary judgment in lieu of complaint is subsumed in the final judgment in appeal No. 2 (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988). Likewise, appeal No. 3 must be dismissed inasmuch as it is taken from the subsequent order granting defendant's motion for leave to reargue and, upon reargument, adhering to Supreme Court's original decision. Thus, the order in appeal No. 3 is also subsumed in the final judgment in appeal No. 2 (*see Huther v Sickler*, 21 AD3d 1303).

We reject defendant's contention that the court erred in granting plaintiff's motion. Plaintiff met his initial burden by submitting the demand note along with evidence of defendant's default (*see Counsel Fin. Servs., LLC v David McQuade Leibowitz, P.C.*, 67 AD3d 1483, 1484; *LaMar v Vasile* [appeal No. 4], 49 AD3d 1218). In opposition to plaintiff's motion, defendant failed to " 'prove the

existence of a triable issue of fact in the form of a bona fide defense against the note to defeat [the] motion' " (*Ring v Jones*, 13 AD3d 1078, 1078). Contrary to defendant's contention, summary judgment on the note was not precluded by a separate consulting agreement that contained a broad arbitration provision (*see generally Haselnuss v Delta Testing Labs.*, 249 AD2d 509, 510, *lv denied* 92 NY2d 815). Indeed, any disputes concerning the propriety of payments made to plaintiff pursuant to the consulting agreement are properly subject to arbitration, pursuant to that consulting agreement.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1167

CA 11-00072

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

KURT A. WIEDENHAUPT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PAUL F. HOGAN, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HEATH J. SZYMCZAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered December 22, 2010. The order, among other things, granted defendant's motion for leave to reargue, and upon reargument, adhered to the prior order entered August 16, 2010.

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

Same Memorandum as in *Wiedenhaupt v Hogan* ([appeal No. 2] ___ AD3d ___ [Nov. 18, 2011]).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1172

KA 10-00082

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLARENCE MOSS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered January 7, 2010. The judgment convicted defendant, upon a jury verdict, of attempted burglary in the third degree and possession of burglar's tools.

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 attempted burglary in the third degree (Penal Law §§ 110.00, 140.20) and possession of burglar's tools (§ 140.35), defendant contends that Supreme Court erred in refusing to suppress his statement to the police and the items discovered on his person. We reject that contention. The police officers had reasonable suspicion to stop and detain defendant "based on the totality of the circumstances, including 'a radio transmission providing a general description of the perpetrator[] of [the] crime . . .[,] the . . . proximity of the defendant to the site of the crime, the brief period of time between the crime and the discovery of the defendant near the location of the crime, and the [officer's] observation of the defendant, who matched the radio-transmitted description' " (*People v Casillas*, 289 AD2d 1063, 1064, *lv denied* 97 NY2d 752; *see People v Clinkscales*, 83 AD3d 1109, *lv denied* 17 NY3d 815; *People v Ramos*, 74 AD3d 991, 992, *lv denied* 15 NY3d 808). Even assuming, arguendo, that the 911 call to which the officers were responding was made by an anonymous caller, we conclude that the information provided by the caller was sufficiently corroborated to provide reasonable suspicion (*see People v Jeffery*, 2 AD3d 1271). Indeed, the call was "based on the contemporaneous observation of conduct that was not concealed," i.e., an African-American male breaking into a vacant house (*id.* at 1272). With respect to defendant's statement to the police that he was stealing cable, we conclude that the record of the suppression

hearing "supports the court's determination that defendant spontaneously made that statement [inasmuch as] it was not the product of express questioning or its functional equivalent" (*People v Cheatom*, 57 AD3d 1447, 1447, *lv denied* 12 NY3d 782 [internal quotation marks omitted]). Thus, *Miranda* warnings were not required with respect to that statement.

We reject defendant's further contention that the CPL 710.30 notice did not provide him with adequate notice of his oral statement that the People intended to introduce at trial. According to the CPL 710.30 notice, defendant stated that he "was just going to steal some cable from the house . . . ." At trial, a police officer testified that defendant stated that he "went into the house to steal cable." Defendant objected to that testimony and subsequently moved for a mistrial. "[T]he People were not required to 'give a verbatim report of the complete oral statement[s] in their CPL 710.30 notice' " (*People v Simpson*, 35 AD3d 1182, 1182, *lv denied* 8 NY3d 990).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Lane*, 7 NY3d 888, 889; *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Woodard*, 83 AD3d 1440, 1441, *lv denied* 17 NY3d 803). In any event, that contention is without merit (*see People v Gaines*, 26 AD3d 742, *lv denied* 6 NY3d 847; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, "[i]n light of defendant's lengthy criminal history, the sentence is [not] unduly harsh [or] severe" (*People v Spiers*, 300 AD2d 1033, 1034, *lv denied* 99 NY2d 620).

Entered: November 18, 2011 Patricia L. Morgan
Clerk of the Court

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

1181

CAF 11-00435

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

IN THE MATTER OF LATANYA H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT.

CHARLES D. HALVORSEN, ATTORNEY FOR THE CHILD, APPELLANT.

MEMORANDUM AND ORDER

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered January 26, 2011 in a proceeding pursuant to Family Court Act article 10-A. The order, among other things, ordered that the permanency goal for the subject child is placement for adoption.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part approving the permanency goal of placement for adoption and modifying the permanency goal to placement in an alternative planned permanent living arrangement, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10-A, the Attorney for the Child appeals from an order determining that continuing the permanency goal of placement for adoption is in the child's best interests. We note at the outset that the appeal is moot "inasmuch as [a] superseding permanency order[has] since been entered" (*Matter of Alexander M.*, 83 AD3d 1400, 1401, *lv denied* 17 NY3d 704). We conclude, however, that the exception to the mootness doctrine applies herein because the issue is likely to recur, typically evades review and raises a significant question not previously determined (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). We agree with the Attorney for the Child that the determination of Family Court, which adopted the recommendation of the Referee, lacks a sound and substantial basis in the record (*see Matter of Jose T.*, 87 AD3d 1335; *Matter of Sean S.*, 85 AD3d 1575). We therefore modify the order by vacating that part approving the permanency goal of placement for adoption and modifying the permanency goal to placement in an alternative planned permanent living arrangement (APPLA).

Petitioner met its burden of establishing by a preponderance of

the evidence that modifying the permanency goal from placement for adoption to APPLA was in the child's best interests (*see Jose T.*, 87 AD3d 1335; *Sean S.*, 85 AD3d at 1576). The child was 16 years old at the time of the permanency hearing. Petitioner submitted uncontroverted evidence that the child wished to remain in her current foster placement and would not consent to adoption, despite petitioner's diligent efforts to counsel her regarding adoption and to find adoptive resources for her (*see generally* Domestic Relations Law § 111 [1] [a]). Further, petitioner submitted evidence indicating that the child had previously been adopted by another foster parent who later surrendered her parental rights with respect to the child. The evidence at the permanency hearing establishes that the child suffers ongoing emotional distress from that failed adoption and that, although she was beginning to address those issues through counseling, the child becomes further mentally traumatized by the thought of being forced into another adoption. Consequently, petitioner established the requisite "compelling reason for determining that it would not be in the best interests of the child to . . . be . . . placed for adoption" (Family Ct Act § 1089 [d] [2] [i] [E]).

In addition, the record establishes that the child has "a significant connection to an adult willing to be a permanency resource for [her]," as required for an APPLA placement (*id.*), inasmuch as the child's foster parent agreed to be a resource for her until she reaches 21 years of age. Furthermore, in determining that a permanency goal of placement for adoption was in the best interests of the child, the Referee relied on, inter alia, petitioner's failure to call the caseworker and indirect service coordinator who had worked with the child as witnesses at the permanency hearing. "We conclude that, under the circumstances of this case, the absence of [those witnesses] from the hearing was not a rational basis for rejecting the permanency goal of APPLA where the Referee had sufficient information to determine the best interests of the child[]" (*Sean S.*, 85 AD3d at 1576).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1182

CAF 10-01425

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

IN THE MATTER OF BRIAN P., JR., DAVID H., III,
AND DYLAN C.

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

APRIL C., RESPONDENT-APPELLANT,
AND JOHN J., RESPONDENT.

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

LAURA A. WAGNER, LOCKPORT, FOR PETITIONER-RESPONDENT.

DEBORAH J. SCINTA, ATTORNEY FOR THE CHILDREN, KENMORE, FOR BRIAN P., JR., DAVID H., III, AND DYLAN C.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered June 7, 2010 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent April C. had neglected the subject children.

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

Memorandum: Respondent mother appeals from an order determining that she neglected her youngest son and that she derivatively neglected her two older sons. We affirm. We reject the mother's contention that the evidence of neglect was legally insufficient and that the fact that she diligently sought medical care for her youngest son negated a finding of neglect. Pursuant to Family Court Act § 1012 (f) (i) (B), a neglected child is one "whose physical, mental or emotional condition . . . is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . by unreasonably inflicting or allowing to be inflicted harm . . . ." In determining whether a parent exercised the minimum degree of care, the court must consider what "a reasonable and prudent parent [would have done] . . . under the circumstances then and there existing" (*Nicholson v Scoppetta*, 3 NY3d 357, 370). A child may be found to be neglected when the parent knew or should have known of circumstances requiring action to avoid harm or the risk of harm to the child and failed to act accordingly (*see Matter of Jessica P.*, 46 AD3d 1142, 1143; *Matter of Sarah C.*, 245 AD2d 1111; *Matter of Lynelle W.*, 177 AD2d 1008). Although the mother took her youngest son to the doctor on multiple occasions and to the hospital when directed,

Family Court's finding that she knew or should have known that the child was being physically abused by her live-in boyfriend, who is also a respondent in this proceeding, and that she failed to take steps to avoid the risk of harm to the child when she continued to live with the boyfriend and allowed him to babysit is supported by the requisite preponderance of the evidence (*see* § 1046 [b] [i]).

Contrary to the mother's further contention, the court was permitted to draw a negative inference against the mother based on her failure to testify at the fact-finding hearing (*see Matter of Raymond D.*, 45 AD3d 1415). Finally, the mother failed to preserve for our review her contention that the court was biased against her, as evidenced by certain statements made by the court in denying her motion to dismiss the petition at the close of petitioner's case (*see generally Matter of Angel L.H.*, 85 AD3d 1637). In any event, that contention is without merit (*see Matter of Warrior v Beatman*, 79 AD3d 1770, *lv dismissed* 16 NY3d 819; *Matter of Roystar T.*, 72 AD3d 1569, *lv denied* 15 NY3d 707; *Matter of Murdock v Murdock*, 183 AD2d 769).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1189

CA 11-01055

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

K.J.D.E. CORP., DOING BUSINESS AS K.J. ELECTRIC, AND THE RITA JACOBS TRUST, BY KENNETH JACOBS, TRUSTEE, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THE HARTFORD FIRE INSURANCE COMPANY, DEFENDANT-APPELLANT, ET AL., DEFENDANT. (APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, BUFFALO (DANIEL W. GERBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD P. PLOCHOCKI, SYRACUSE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered July 16, 2010. The judgment, inter alia, granted the cross motion of plaintiffs for partial summary judgment.

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

Memorandum: In appeal No. 1, The Hartford Fire Insurance Company (defendant) appeals from a judgment granting plaintiffs' cross motion for partial summary judgment on the fourth cause of action, for breach of the insurance policy in question, and the fifth cause of action, seeking a declaration that plaintiffs' losses are covered losses under the insurance policy in question. In appeal No. 2, defendant appeals from an order that, inter alia, denied those parts of its motion for summary judgment dismissing the fourth and fifth causes of action. We note that, although defendant purports to appeal "from each and every part" of the order in appeal No. 2, it is not aggrieved by those parts of the order granting its motion in part and thus may not appeal therefrom (*see* CPLR 5511). We reverse the judgment in appeal No. 1 and the order insofar as appealed from in appeal No. 2.

Plaintiffs K.J.D.E Corp., doing business as K.J. Electric, and the Rita Jacobs Trust, by Kenneth Jacobs, Trustee, were the lessee and owner, respectively, of a parcel of property located in Binghamton, New York. During a storm in 2006, almost seven inches of rain fell in Binghamton, and the property flooded. Shortly after the storm,

plaintiffs submitted a claim to defendant for damages caused by the flooding. Defendant investigated the claim and concluded that the flooding was caused by a creek that overflowed as the result of heavy rains and road culverts that were blocked by a build up of debris. Defendant sent plaintiffs a letter disclaiming coverage because the damage to the property was caused by a flood and thus the damage fell within the flood exclusion clause of the policy.

Plaintiffs commenced this action seeking, inter alia, damages based on defendant's alleged breach of the insurance policy and a declaration that their losses were covered under the policy. Addressing first appeal No. 2, we conclude that defendant met its initial burden on the motion by establishing that the damage to plaintiffs' property was caused by flooding (*see B&W Heat Treating Co., Inc. v Hartford Fire Ins. Co.*, 23 AD3d 1102; *Casey v General Acc. Ins. Co.*, 178 AD2d 1001, 1002). "Flood" is defined in the policy, in relevant part, as "[s]urface water . . . or overflow of any natural or man[-]made body of water from its boundaries . . . ." Here, plaintiffs' assertion that the source of the water that caused the flooding was a clogged culvert "does not raise the requisite issue of fact to defeat the . . . motion" (*B&W Heat Treating Co., Inc.*, 23 AD3d at 1103). We reject plaintiffs' contention that the terms of the flood exclusion clause contained in the policy are ambiguous (*see generally Rhinebeck Bicycle Shop v Sterling Ins. Co.*, 151 AD2d 122, 126). We also reject plaintiffs' contention that defendant failed to submit proof in admissible form to support its motion. Even assuming, arguendo, that the documents submitted by defendant in support of the motion did not qualify as business records pursuant to CPLR 4518 (a), we conclude that the record contains sufficient evidence establishing that the cause of the flooding was heavy rain over a two-day period in the Binghamton area and that the property was damaged by the overflow of surface water.

In light of our determination with respect to appeal No. 2, we conclude in appeal No. 1 that Supreme Court erred in granting plaintiffs' cross motion for partial summary judgment on the fourth and fifth causes of action and in declaring that plaintiffs' losses are covered losses under the insurance policy.

Entered: November 18, 2011 Patricia L. Morgan
Clerk of the Court

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

1190

CA 11-01105

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

K.J.D.E. CORP., DOING BUSINESS AS K.J. ELECTRIC, AND THE RITA JACOBS TRUST, BY KENNETH JACOBS, TRUSTEE, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THE HARTFORD FIRE INSURANCE COMPANY, DEFENDANT-APPELLANT, ET AL., DEFENDANT. (APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, BUFFALO (DANIEL W. GERBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD P. PLOCHOCKI, SYRACUSE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered August 11, 2010. The order, insofar as appealed from, denied those parts of the motion of defendant The Hartford Fire Insurance Company for summary judgment dismissing plaintiffs' fourth and fifth causes of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and judgment is granted in favor of The Hartford Fire Insurance Company as follows:

> It is ADJUDGED and DECLARED that plaintiffs' losses are not covered by the insurance policy at issue.

Same Memorandum as in *K.J.D.E. Corp. v Hartford Fire Ins. Co.* ([appeal No. 1] ___ AD3d ___ [Nov. 18, 2011]).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1198

KA 11-01004

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

STEPHEN DEPROSPERO, DEFENDANT-APPELLANT.

FRANK POLICELLI, 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 February 14, 2011. The judgment convicted defendant, upon his plea of guilty, of predatory sexual assault against a child.

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

Opinion by PERADOTTO, J.: The novel issue raised on this appeal from a judgment convicting defendant upon a plea of guilty of predatory sexual assault against a child (Penal Law § 130.96) is whether County Court erred in refusing to suppress evidence uncovered as a result of a January 2010 search of property that had been seized from defendant pursuant to a May 2009 warrant. For the reasons that follow, we conclude that the court properly refused to suppress that evidence.

Factual and Procedural Background

In 2008 and early 2009, an undercover State Police investigator worked to identify individuals sharing child pornography on the internet over peer-to-peer file sharing networks. A certain IP address was a download candidate for suspected child pornography files over 40 times between February 18, 2009 and March 3, 2009, and the investigator confirmed that three specific images associated with that address contained child pornography. The IP address was traced to defendant's home. Based on that investigation, the investigator applied for and obtained a warrant authorizing the search of defendant's home and the seizure of his computers therefrom, including "peripheral equipment such as keyboards, printers, modems, scanners, or digital cameras and their internal or external storage media." When the warrant was executed on May 5, 2009, a "limited preview" of defendant's computer revealed an image of an unknown female child

performing oral sex on a male adult. Defendant was arrested, and the police seized various items of electronic equipment belonging to him, including a computer and two digital cameras.

Shortly after his arrest, defendant's employer contacted the District Attorney's Office and indicated that defendant had worked with children in the course of his employment, that he had displayed a particular interest in one child, and that other children had reported that defendant may have photographed them. Unbeknownst to the Assistant District Attorney (ADA) assigned to defendant's case, the property seized from defendant in May 2009 was not promptly subjected to a full forensic examination by the State Police Crime Laboratory. Thus, mistakenly believing that the evidence against defendant was limited to the single image of child pornography discovered during execution of the search warrant, and apparently concerned about speedy trial issues, the ADA offered defendant a sentence promise of six months in jail and 10 years of probation in exchange for a plea of guilty to possessing a sexual performance by a child (*see* Penal Law § 263.16). Defendant accepted the offer, pleaded guilty to a superior court information on September 17, 2009, and was sentenced as promised on November 2, 2009.

After sentencing, defendant's attorney contacted the ADA and requested the return of defendant's property seized pursuant to the May 2009 warrant. Prior to releasing the property, however, the ADA instructed the State Police to examine it to ensure that no contraband was returned to defendant. In January 2010, a State Police investigator found hundreds of pornographic images and videos of children on defendant's computer, as well as a "deleted video clip" on one of defendant's cameras. The investigator recovered 353 still-frame images from the deleted video clip, depicting the penis of an adult male in the mouth of an autistic male child who appeared to be less than 12 years old and resided in a group home where defendant worked (hereafter, victim). The external hard drive of defendant's computer contained other images, both pornographic and otherwise, of defendant and the victim. A physical examination of defendant in March 2010 confirmed that defendant had a birthmark on his penis matching that of the adult male in the images recovered from the deleted video clip. State and federal prosecutions ensued.

On August 5, 2010, defendant was indicted on one count of predatory sexual assault against a child (Penal Law § 130.96) and four counts of criminal sexual act in the first degree (§ 130.50 [4]). The acts underlying the predatory sexual assault count and the first criminal sexual act count were alleged to have occurred "on or about and between September 25, 2006 through and including December 25, 2007." The acts underlying the remaining criminal sexual act counts were alleged to have occurred between September 15, 2005 and December 25, 2007. By way of omnibus motion, defendant sought, inter alia, dismissal of the indictment based upon CPL 40.40. Defendant also sought to suppress the evidence seized from his computer and camera on the grounds that the May 2009 search warrant was not supported by probable cause, and that the police lacked jurisdiction to search his computer and camera once the 2009 criminal proceeding terminated.

Following a suppression hearing, the court denied those parts of defendant's omnibus motion seeking dismissal of the indictment pursuant to CPL 40.40 and suppression of the evidence recovered from defendant's camera and computer. With respect to that part of the motion seeking suppression, the court first determined that the May 2009 search warrant was supported by probable cause. After noting that this "may be a case of first impression concerning the delayed analysis of property that has been lawfully seized," the court concluded that there was "nothing inherently wrong or improper about a delayed analysis or inspection of property that [has been] lawfully seized," that defendant did not have a legitimate expectation of privacy in the items searched by the State Police in January 2010, and that the May 2009 warrant continued to provide probable cause for that subsequent search. The court therefore determined "that the police did not need a second search warrant to do a complete forensic analysis of the seized property prior to returning said property to the defendant."

Defendant thereafter pleaded guilty to predatory sexual assault against a child, admitting that, at some point between September 25, 2006 and December 25, 2007, he engaged in oral sexual contact with a child less than 13 years of age. Defendant was sentenced to an indeterminate term of 18 years to life, and he now appeals.

Discussion

Addressing first defendant's contention pursuant to CPL 40.40, we note that defendant forfeited such contention by his plea of guilty (*see People v Prescott*, 66 NY2d 216, 218, *cert denied* 475 US 1150; *People v Farnsworth*, 24 AD3d 1206, *lv denied* 6 NY3d 847). In any event, we conclude that the court properly determined that there was no statutory double jeopardy violation. "CPL 40.40 prohibits a separate prosecution of joinable offenses that arise out of the same transaction and involve different and distinct elements under circumstances wherein no violation of the double jeopardy principle can validly be maintained but the equities nevertheless seem to preclude separate prosecutions" (*People v Tabor*, 87 AD3d 829, 831 [internal quotation marks omitted]). The statute applies only to offenses that are joinable on the ground that they arise from a single criminal transaction (*see* CPL 40.40, 200.20 [2] [a]; *see generally People v Dallas*, 46 AD3d 489, 490, *lv denied* 10 NY3d 809, 933).

Here, the 2009 and 2010 offenses arose from separate criminal transactions. A criminal transaction is comprised of two or more acts "either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture" (CPL 40.10 [2]). In this case, the 2009 and 2010 offenses have different elements, and were committed in different places, at different times, and against different victims (*see People v Rossi*, 222 AD2d 717, 718, *lv denied* 88 NY2d 884; *see also People v Haddock*, 80 AD3d 885, 886, *lv denied* 16 NY3d 831; *cf.* CPL 40.10 [2] [a]). As the court properly concluded, the mere fact that evidence of both

offenses was collected pursuant to the same search warrant does not link them to a single criminal transaction (*see generally People v Batista*, 282 AD2d 825, 826, *lv denied* 96 NY2d 825, 829). Further, defendant's possession of a pornographic image of an unknown female child is plainly not an integral part of the same "criminal venture" as his act of engaging in oral sexual conduct with a male child with whom he was acquainted (CPL 40.10 [2] [b]; *see Matter of Martinucci v Becker*, 50 AD3d 1293, 1293-1294, *lv denied* 10 NY3d 709; *People v Harris*, 267 AD2d 1008, 1009-1010; *see generally People v Van Nostrand*, 217 AD2d 800, 801, *lv denied* 87 NY2d 851). Thus, because the two prosecutions of defendant were based on separate criminal transactions, the instant prosecution is not barred by CPL 40.40 (*see People v Mono*, 197 AD2d 909, *lv denied* 82 NY2d 900).

We likewise reject defendant's further contention that the May 2009 search warrant authorizing seizure of his computer and related items was not based upon probable cause. Probable cause for the issuance of a search warrant is established when a warrant application provides a reviewing magistrate with information sufficient to support a reasonable belief that evidence of a crime will be found at the place to be searched (*see People v Edwards*, 69 NY2d 814, 815-816; *People v Bigelow*, 66 NY2d 417, 423; *People v Martinez*, 298 AD2d 897, 898, *lv denied* 98 NY2d 769, *cert denied* 538 US 963, *reh denied* 539 US 911). Approval by a reviewing magistrate cloaks a search warrant with "a presumption of validity" (*People v Castillo*, 80 NY2d 578, 585, *cert denied* 507 US 1033; *see People v Welch*, 2 AD3d 1354, 1357, *lv denied* 2 NY3d 747). Here, the sworn warrant application of the State Police investigator provided probable cause for the issuance of the search warrant. The application included a thorough overview of the affiant's experience in investigating the distribution of child pornography on the internet, and set forth the basis for his belief that defendant possessed child pornography (*see generally People v Darling*, 263 AD2d 61, 65, *affd* 95 NY2d 530; *People v Tambe*, 71 NY2d 492, 501). Specifically, the investigator noticed that a certain IP address was a download candidate for suspected pornography files over 40 times in a period of approximately two weeks, compared three specific files associated with that IP address to files recovered in previous investigations to verify that they depicted child pornography, and traced the IP address to defendant's home. Those facts thus provided the reviewing magistrate with information to support a reasonable belief that defendant possessed child pornography (*see generally Edwards*, 69 NY2d at 816). Defendant failed to preserve for our review his further contention that the warrant was overbroad (*see generally People v King*, 284 AD2d 941, *lv denied* 96 NY2d 920) and, in any event, that contention is without merit.

Turning to the novel issue on appeal, we conclude that the court properly refused to suppress evidence uncovered in the January 2010 search of property seized pursuant to the May 2009 warrant. While it is indeed the case that the examination at issue of defendant's property occurred after sentencing on another charge and followed defendant's request for the return of such property, we conclude that the police conduct in this case did not violate defendant's Fourth Amendment rights for a number of reasons. First, defendant provides

no support for his contention that the authority to search his property pursuant to the May 2009 warrant terminated at the conclusion of the 2009 prosecution, and we reject that contention. The search warrant directed the police to seize, inter alia, defendant's computers, external drives, storage media, and cameras, and "authorize[d] the police agency to retain said property for the purpose of further analysis and examination." There was no deadline in the warrant for completion of the forensic examination and analysis, "nor [does] the Fourth Amendment provide[] for a specific time limit in which a computer may undergo a government forensic examination after it has been seized pursuant to a search warrant" (*United States v Hernandez*, 183 F Supp 2d 468, 480; *see United States v Syphers*, 426 F3d 461, 469, *cert denied* 547 US 1158; *United States v Gorrell*, 360 F Supp 2d 48, 55 n 5 ["The warrant did not limit the amount of time in which the government was required to complete its off-site forensic analysis of the seized items and the courts have not imposed such a prophylactic constraint on law enforcement"]; *United States v Triumph Capital Group, Inc.*, 211 FRD 31, 66 [the Fourth Amendment does not "impose any time limitation on the government's forensic examination of the evidence seized"]). Indeed, "[t]he Fourth Amendment itself 'contains no requirements about *when* the search or seizure is to occur or the *duration*' " (*Syphers*, 426 F3d at 469, quoting *United States v Gerber*, 994 F2d 1556, 1559-1560). Rather, "[t]he Fourth Amendment only requires that the subsequent search of the computer be made within a reasonable time" (*United States v Mutschelknaus*, 564 F Supp 2d 1072, 1076, *affd* 592 F3d 826).

Here, we conclude that the search of defendant's property was conducted within a reasonable period of time (*see id*. at 1076-1077; *see also United States v Brewer*, 588 F3d 1165, 1173; *United States v Burgess*, 576 F3d 1078, 1097, *cert denied* ___ US ___, 130 S Ct 1028). We note that there is no evidence that the ADA or the police acted in bad faith, or that defendant was prejudiced by the delay in searching his property (*see Brewer*, 588 F3d at 1173; *Burgess*, 576 F3d at 1097; *United States v Cameron*, 652 F Supp 2d 74, 81-82). At the suppression hearing, the ADA testified that defendant's arrest and the seizure of his property was part of a large-scale operation targeting child pornography, and that it was his understanding that the State Police Crime Laboratory would be analyzing all property uncovered in the investigation. It was not until defendant requested the return of his property that the ADA spoke to the State Police and realized that not all the property had been tested by that time. A senior investigator at the State Police Crime Laboratory testified that evidence sent there is analyzed on a "triage" basis, with priority given to certain cases, such as those involving a live victim, cases going to trial, or cases in which no arrest has been made. Here, because the limited preview of defendant's computer by the police during execution of the search warrant yielded a single image of child pornography and defendant pleaded guilty to possessing a sexual performance by a child (Penal Law § 263.16), the property had not yet been examined by the State Police Crime Laboratory when defendant requested its return in November 2009. Under those circumstances, the delay in searching defendant's property was not unreasonable (*see Mutschelknaus*, 564 F Supp 2d at 1076-1077; *see also Brewer*, 588 F3d at 1173 [several

months' delay in forensic analysis of computer media did not violate the Fourth Amendment]; *Burgess*, 576 F3d at 1097 [suppression of evidence not required based upon delay in searching computer and hard drives where probable cause was unaffected by the delay, the government acted in good faith, and the defendant did not identify any prejudice from the delay with the exception that he was temporarily denied access to his property]).

Although defendant contends that he was entitled to the immediate return of his property upon his demand for that property after sentencing on his 2009 conviction, we agree with the People that the police had an obligation to search defendant's property for contraband before returning it to him (*see generally United States v Jeffers*, 342 US 48, 54; *United States v LaFatch*, 565 F2d 81, 83, *cert denied* 435 US 971; *Matter of Sea Lar Trading Co. v Michael*, 94 AD2d 309, 315-316, *appeal dismissed* 60 NY2d 860). Indeed, returning contraband, i.e., child pornography, to a defendant would constitute a crime (*see* Penal Law § 263.00 [5]; §§ 263.10, 263.11, 263.15, 263.16).

Finally, we reject defendant's further contention that the police were required to obtain a new search warrant before searching the property seized pursuant to the May 2009 warrant. "Once a person or his [or her] effects have been reduced to custodial control in the law enforcement system his [or her] privacy has been intruded upon" (*People v Perel*, 34 NY2d 462, 465). The subsequent search of the property lawfully seized "is then but a lesser-related intrusion incident to the [seizure] already effected" (*People v Greenwald*, 90 AD2d 668, 668; *see Perel*, 34 NY2d at 465; *People v Payne*, 233 AD2d 787, 787 ["Once a person has been placed in custody, his [or her] privacy has been compromised and the subsequent examination and testing of items seized at the time of arrest is permissible as a lesser-related intrusion incident to the arrest already effected"]). Once defendant's property had been lawfully seized pursuant to the May 2009 warrant, he lacked a legitimate expectation of privacy in that property, notwithstanding the passage of time (*see People v Natal*, 75 NY2d 379, 384, *cert denied* 498 US 862; *People v Nordahl*, 46 AD3d 579, 580, *lv denied* 10 NY3d 842, 843; *People v King*, 232 AD2d 111, 117-118, *lv denied* 91 NY2d 875).

Conclusion

Accordingly, we conclude that the judgment should be affirmed.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1210

CA 11-00673

PRESENT: CENTRA, J.P., FAHEY, GREEN, AND GORSKI, JJ.

JAMES SQUARE ASSOCIATES LP, MOHAWK GLEN ASSOCIATES, LLC, PIONEER FULTON SHOPPING CENTER, LLC, PIONEER MANAGEMENT GROUP, LLC, AND WATERFRONT ASSOCIATES, LLC, PLAINTIFFS-RESPONDENTS,

V ORDER

DENNIS MULLEN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, AND JAMIE WOODWARD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered June 22, 2010. The order and judgment granted the motion of plaintiffs for summary judgment, denied the cross motion of defendants for summary judgment, declared that Section 3 of the 2009 Amendments to the Empire Zones Program is prospective only and declared that the June 29, 2009 decertification of plaintiffs, to the extent it was applied retroactively to January 1, 2008, is null and void.

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: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1211

CA 11-00675

PRESENT: CENTRA, J.P., FAHEY, GREEN, AND GORSKI, JJ.

JAMES SQUARE ASSOCIATES LP, MOHAWK GLEN ASSOCIATES, LLC, PIONEER FULTON SHOPPING CENTER, LLC, PIONEER MANAGEMENT GROUP, LLC, AND WATERFRONT ASSOCIATES, LLC, PLAINTIFFS-RESPONDENTS,

V OPINION AND ORDER

DENNIS MULLEN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT, AND JAMIE WOODWARD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered February 9, 2011. The order and judgment granted the motion of defendants for leave to renew and, upon renewal, adhered to the court's order and judgment entered June 22, 2010, and further declared that the August 11, 2010 "clarification" of the 2009 amendments to the Empire Zones Program is, as applied to plaintiffs, an unconstitutional taking of plaintiffs' property.

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

Opinion by GREEN, J.: Plaintiffs are business enterprises that at one time were certified as eligible to receive benefits pursuant to the New York State Empire Zones Act ([Empire Zones Act] General Municipal Law § 955 *et seq.*). In April 2009, as part of the 2009-2010 budget legislation, the Governor signed into law amendments to the Empire Zones Act that altered certain eligibility criteria for business enterprises and directed defendant Commissioner of the New York State Department of Economic Development (DED Commissioner) to conduct a review of all business enterprises receiving benefits (*see* § 959 [a] [5], [6]; [w]). As the result of that review, the DED Commissioner revoked the certification of each plaintiff, effective

January 1, 2008. We agree with defendants that the Legislature intended that the pertinent 2009 amendments to the Empire Zones Act would apply retroactively to January 1, 2008. We agree with plaintiffs and Supreme Court, however, that such retroactive application unconstitutionally deprived plaintiffs of their property interests without due process.

I

In 1986 the Legislature enacted the Empire Zones Act "to stimulate private investment, private business development and job creation" in economically impoverished areas (General Municipal Law § 956). Toward that end, the State offered certain incentives to encourage the development of new businesses and the expansion of existing businesses in such economically impoverished areas, designated as Empire zones (*see id.*; § 957 [d]). Those incentives include various tax credits for investment and job creation (*see e.g.* Tax Law § 606 [j], [j-1], [k], [*l*]; § 1456 [d], [o], [p]), which are available to business enterprises that the DED Commissioner has certified as eligible to receive such benefits (*see* General Municipal Law § 959 [a]). Prior to the 2009 amendments, the DED Commissioner was authorized to revoke the certification of participating business enterprises on various grounds, and the effective date of such decertification was "the date determined to be the earliest event constituting grounds for revoking certification" (*id*.).

In an effort to ensure that those business enterprises benefitting from the Empire Zones Program were meeting the investment and employment goals of the program, the Legislature amended General Municipal Law § 959 (a) in April 2009 to revise the eligibility criteria for businesses receiving Empire zones' benefits. Pursuant to section 959 (a) (v) (5) of the amended statute, the DED Commissioner is authorized to revoke the certification of a business enterprise upon a finding, inter alia, that

> "the business enterprise . . . caused individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York state to similar employment with the certified business enterprise or if the enterprise acquired, purchased, leased or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization . . ."

That provision was intended to curb a practice colloquially known as "shirt-changing," which creates the illusion that a business enterprise is creating jobs and making investments when it does not in fact provide tangible economic benefits to the Empire zone where the business is operating. The amended statute also added a cost-benefit criterion and permitted the DED Commissioner to revoke a certification upon finding that:

> "the business enterprise has failed to provide

> economic returns to the state in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value to the tax benefits the business enterprise used and had refunded to it" (General Municipal Law § 959 [a] [v] [6]).

The same legislation added a new subdivision (w) to section 959, which directed the DED Commissioner to conduct a review during 2009 of all certified business enterprises to determine whether they should be decertified pursuant to the "shirt-changing" provision or the cost-benefit criterion. If decertification was not warranted, the DED Commissioner was to issue an Empire zones' retention certificate. On the other hand, if the DED Commissioner determined that the business enterprise should be decertified pursuant to the "shirt-changing" provision or the cost-benefit criterion, i.e., subparagraph (5) or (6) of section 959 (a), the certification of the business enterprise would be revoked.

At the same time that it amended article 18-B of the General Municipal Law, the Legislature also amended several Tax Law provisions applicable to carryovers of Empire zones' tax credits (*see* L 2009, ch 57, part S-1, §§ 11-22). Each of the pertinent Tax Law amendments provided in essence that "[a]ny carry over of a credit from prior taxable years will not be allowed if an [E]mpire zone retention certificate is not issued pursuant to [General Municipal Law § 959 (w)] to the [E]mpire zone enterprise which is the basis of the credit" (*id*. at § 11).

The legislation further provided that the pertinent amendments to General Municipal Law § 959 would "take effect immediately" (*id.* at § 44) but specified that the Tax Law amendments applicable to carryover tax credits were to "apply to taxable years beginning on or after January 1, 2008" (*id.* at § 44 [a]). The Governor signed the legislation on April 7, 2009, and on April 15, 2009 the Department of Taxation and Finance issued a memorandum advising businesses that they must obtain an Empire zones' retention certificate and attach that certificate to their tax returns in order to receive credits for tax years beginning on or after January 1, 2008. The DED Commissioner contemporaneously promulgated a regulation providing that "[t]he effective date of decertification [pursuant to the pertinent statutory amendments] shall be January 1, 2008" (5 NYCRR 11.9 [c] [2]).

II

Upon the reviews conducted by the DED Commissioner, the certifications of plaintiffs Pioneer Fulton Shopping Center, LLC and Pioneer Management Group, LLC were revoked based upon the "shirt-changing" provision, those of plaintiffs James Square Associates LP (James Square) and Waterfront Associates, LLC were revoked based upon the cost-benefit criterion, and the certification of plaintiff Mohawk Glen Associates, LLC was revoked based upon both the "shirt-changing" provision and the cost-benefit criterion. The DED Commissioner notified each plaintiff that the effective date of the revocations was

January 1, 2008. With the exception of James Square, all of the plaintiffs took administrative appeals to the empire zones designation board (EZDB) from the determinations revoking their certifications (*see* General Municipal Law § 960 [a]). The EZDB upheld each of the determinations, including the one revoking the certification of James Square despite the absence of an administrative appeal.

III

Plaintiffs commenced the instant action during the pendency of the administrative appeals. Plaintiffs do not contend that they meet the revised eligibility criteria set forth in the amended statute or that their certification of eligibility to receive Empire zones' benefits was improperly revoked. Rather, plaintiffs challenge the effective date of those revocations and the retroactive application of the revised criteria to January 1, 2008. Plaintiffs thus sought, inter alia, judgment declaring that the amendments to the statute set forth in paragraphs (5) and (6) of General Municipal Law § 959 (a) (v) may be applied prospectively only, and not retroactively to January 1, 2008.

Plaintiffs moved and defendants cross-moved for summary judgment. In support of their motion, plaintiffs submitted a portion of the 2009-2010 budget bill proposed by the Governor that expressly provided that the decertification of a business enterprise pursuant to the review conducted by the DED Commissioner under General Municipal Law § 959 (w) would be effective for the taxable year beginning January 1, 2008. Plaintiffs contended that, inasmuch as the Legislature declined to enact that portion of the proposed bill, it intended that decertification would be prospective. Plaintiffs also submitted affidavits from their officers or members asserting that they had closed their books on 2008 prior to receiving notice in mid-2009 that their certifications had been revoked, and that they were thereafter assessed additional taxes that they had not anticipated.

In support of their cross motion, defendants submitted an affidavit from the Director of the Empire Zones Program who asserted that, both before and after the 2009 amendments, General Municipal Law § 959 (a) provided that the effective date of decertification was the " 'date determined to be the earliest event constituting grounds for revoking certification,' " and that the pertinent amendments to the Tax Law in the 2009-2010 budget bill applied to tax years beginning in 2008. The Director further asserted that, at the time the certifications were revoked, the most current date available was contained in plaintiffs' 2007 business annual reports, and thus the earliest date that the DED Commissioner had grounds for revoking plaintiffs' eligibility was January 1, 2008. Defendants also submitted an excerpt from the Governor's "2009-10 Enacted Budget Financial Plan," which projected that the legislation amending the eligibility criteria for business enterprises receiving Empire zones' benefits would provide the State with savings of $90 million in 2009-2010.

IV

The court granted plaintiffs' motion and denied defendants' cross motion. Based upon the language of the amended statute, the legislative history, and the rule of statutory construction that statutes are generally presumed to apply prospectively (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 51 [c]), the court concluded that "[t]he Legislature could not have intended that . . . the amendments would apply retroactively . . . [and that] the only logical date when §§ 959 (a) (v) (5) and 959 (a) (v) (6) should have taken effect[] was immediately upon the signing of the amendments into law," i.e., April 7, 2009. The court therefore granted the relief sought by plaintiffs, declaring that the amendments at issue apply prospectively only and that the decertification of plaintiffs, to the extent that it was applied by defendants retroactively to January 1, 2008, was null and void.

The order and judgment was entered June 22, 2010, and the Legislature responded swiftly by enacting legislation on August 11, 2010 addressing the effective date of decertifications made pursuant to the 2009 amendments. That legislation provides in pertinent part:

> "It is the intent of the legislature to clarify and confirm that the amendments made to the [G]eneral [M]unicipal [L]aw by chapter 57 of the laws of 2009 that require the revocation of certification of certain business entities previously certified under the [E]mpire [Z]ones [P]rogram are intended to be effective for the taxable year in which the revocation of certification occurs and for all subsequent taxable years . . . and that such revocations of certification that occur in 2009 are deemed to be in effect for the taxable year commencing on or after January 1, 2008 and before January 1, 2009" (L 2010, ch 57, part R, § 1).

The Legislature also added the following language to General Municipal Law § 959 (a):

> "[W]ith respect to any business . . . whose certification has been revoked pursuant to subparagraph five or six of this paragraph, that revocation (I) will be effective for a taxable year beginning on or after January first, two thousand eight and before January first, two thousand nine and for subsequent taxable years . . . and (II) thereafter will be effective for the taxable year during which the commissioner makes his or her determination (prior to any appeal) to revoke the certification of a business . . . and for subsequent taxable years" (L 2010, ch 57, part R, § 2).

Based upon the 2010 legislation, defendants moved for leave to renew. The court granted defendants' motion, and upon renewal, concluded that the 2010 legislation, as applied to plaintiffs, results in an unconstitutional taking of plaintiffs' property. The court therefore declared a second time that the 2009 amendments at issue may be applied prospectively only, and further declared that the decertifications of plaintiffs, to the extent that they were made retroactive to January 1, 2008, were unconstitutional, and thus null and void.

V

Contrary to the contention of plaintiffs and the conclusion of the court, we agree with defendants that the record establishes the intention of the Legislature that the revocation of plaintiffs' certifications pursuant to the 2009 amendments would be effective for the taxable year commencing January 1, 2008. In reaching that conclusion, we are mindful that, in interpreting a statute, our role is to effectuate the intent of the Legislature, and that the clearest indicator of the legislative intent is the language of the statute (*see Patrolmen's Benevolent Assn. v City of N.Y.*, 41 NY2d 205, 208). Here, the Legislature provided that the amendments at issue were to "take effect immediately." When a statute is to take effect and whether that statute applies retroactively, however, are distinct issues. As the Court of Appeals noted in *Majewski v Broadalbin-Perth Cent. School Dist*. (91 NY2d 577, 583 [internal quotation marks omitted]), "[w]hile the fact that a statute is to take effect immediately evinces a sense of urgency, the meaning of the phrase is equivocal in an analysis of retroactivity." Indeed, both parties rely on the phrase to support their respective positions on retroactivity and, "[u]nder the circumstances, the proviso that the subject provisions were to 'take effect immediately' contributes little to our understanding of whether retroactive application was intended on the issue presented" (*id*. at 583-584).

When the court ruled on the original motion and cross motion, the Legislature had not expressly stated when the revocation of a business enterprise's certification was to be effective. The court's decision, however, seemingly prompted the Legislature "to clarify and confirm" its intent in no uncertain terms that the decertification of Empire zones' businesses that occurred during 2009 were "deemed to be in effect for the taxable year commencing on or after January 1, 2008 and before January 1, 2009" (L 2010, ch 57, part R, § 2). While "[t]he Legislature has no power to declare, retroactively, that an existing statute shall receive a given construction when such construction is contrary to that which the statute would ordinarily have received" (*Matter of Roosevelt Raceway v Monaghan*, 9 NY2d 293, 304, *appeal dismissed* 368 US 12; *see Matter of Bright Homes v Weaver*, 7 AD2d 352, 358, *affd* 6 NY2d 973), here the Legislature's retroactive construction is entirely consistent with the 2009 amendments. The legislative history of the amendments at issue suggests that they were intended, at least in part, to generate revenue during 2009-2010, revenue that would not be generated if those amendments were to be applied prospectively. In addition, each of the amendments to the Tax Law

affecting Empire zones' carryover tax credits refers to the retention certificate issued to business enterprises that satisfied the new eligibility criteria set forth in General Municipal Law § 959 (a) (v) (5) and (6), and those amendments to the Tax Law were expressly effective retroactive to January 1, 2008 (*see* L 2009, ch 57, part S-1, §§ 11-22, 44 [a]).

Further, "[o]ne crucial legislative function is to clarify the meaning and purpose of the Legislature's enactments; it is the essence of the judicial function to honor legislative intent" (*Phillips v City of New York*, 66 AD3d 170, 188). As noted, the Legislature acted swiftly to clarify the effective date of the 2009 amendments in response to the court's initial decision and, "when the Legislature does tell us what it meant by a previous act, its subsequent statement of earlier intent is entitled to great weight" (*Matter of Chatlos v McGoldrick*, 302 NY 380, 388; *see RKO-Keith-Orpheum Theatres, Inc. v City of New York*, 308 NY 493, 501-502).

VI

While we thus agree with defendants on the issue of legislative intent, we further conclude that the retroactive application intended by the Legislature violates plaintiffs' due process rights. Here, "[i]nasmuch as the transactions were complete and reimbursement was owed prior to the . . . effective date of the . . . [s]tatute, which 'altered the substantive law governing [plaintiffs'] conduct[,]' . . . application of that statute to [plaintiffs'] claims would render it 'retroactive' in the true sense of that term" (*Matter of County of St. Lawrence v Daines*, 81 AD3d 212, 216, *lv denied* 17 NY3d 703). The 2009 amendments at issue are not, strictly speaking, retroactive tax laws, i.e., they do not retroactively impose a new tax or increase an existing tax. The amendments, however, alter plaintiffs' eligibility for tax credits, and the cases addressing the retroactive application of tax statutes are therefore instructive. In *Matter of Replan Dev. v Department of Hous. Preserv. & Dev. of City of N.Y.* (70 NY2d 451, 456, *appeal dismissed* 485 US 950), the Court of Appeals explained that determining whether the retroactive application of a tax law offends constitutional limitations requires a balancing of the equities:

> "In reaching the appropriate balance, several factors may be considered. First, and perhaps predominant, is the taxpayer's forewarning of a change in the legislation and the reasonableness of his reliance on the old law . . . This inquiry focuses on whether the taxpayer's reliance has been justified under all the circumstances of the case and whether his [or her] expectations as to taxation [have been] *unreasonably* disappointed . . . The strength of the taxpayers' claim to the benefit may be significant if he [or she] has obtained a sufficiently certain right to the money prior to the enactment of the new legislation . . . Additionally, the length of the retroactive

> period often has been a crucial factor, and excessive periods have been held to unconstitutionally deprive taxpayers of a reasonable expectation that they will secure repose from the taxation of transactions which have, in all probability, been long forgotten . . . Finally, the public purpose for retroactive application is important because of the taxing authority's legitimate concern that evasive measures taken after introduction of a bill but before enactment might frustrate the purpose of the legislation" (internal quotation marks and citations omitted).

Those factors militate in plaintiffs' favor. The time period at issue, measured from the enactment of the 2009 amendments, is approximately 16 months. Whether that period is excessive, in our view, cannot be resolved in the abstract, but only in light of the other factors, i.e., notice and reliance. "The constitutionality of [the retroactive decertification] turns primarily on whether [plaintiffs] could have reasonably foreseen the enactment and, if [they] could have anticipated [decertification], whether [plaintiffs] would have altered [their] behavior" (*Wittenberg v City of New York*, 135 AD2d 132, 137, *affd* 73 NY2d 753). There is no indication in the record that plaintiffs had any warning that the criteria for certification of Empire zones' businesses were going to change, prospectively or retroactively, prior to April 2009. Further, and most significantly, it is undisputed that plaintiffs maintained their eligibility for Empire zones' tax credits throughout the tax year beginning January 1, 2008 pursuant to the criteria then in effect. As the court observed, here plaintiffs did not merely rely on the continuing benefit of a tax statute (*cf. Matter of Varrington Corp. v City of N.Y. Dept. of Fin.*, 85 NY2d 28, 32-33), but they were induced to conduct their businesses in a particular way in specified disadvantaged areas in reliance upon the availability of Empire zones' tax credits. Under the circumstances, those tax credits "have induced action in reliance thereon [and thus] . . . may not be invalidated by subsequent legislation" (*People v Brooklyn Garden Apts.*, 283 NY 373, 380).

Finally, we conclude that defendants have failed to explain what legitimate public purpose is served by retroactive application of the 2009 amendments. This is not a situation in which "evasive measures taken after introduction of a bill but before enactment might frustrate the purpose of the legislation" (*Matter of Neuner v Weyant*, 63 AD2d 290, 302, *appeal dismissed* 48 NY2d 975; *see Replan Dev.*, 70 NY2d at 456). Plaintiffs were powerless to alter the conduct of their businesses for the tax year that ended before the 2009 amendments were introduced, and defendants offer no justification for retroactive application of the 2009 amendments apart from the additional revenue that the State would realize by retroactively eliminating tax credits for certain participants in the Empire Zones Program. That justification by defendants, balanced against the inequity to plaintiffs, is insufficient. We are compelled to conclude that "the

apparent absence of a persuasive reason for retroactivity, with its potentially harsh effects, offends constitutional limits, especially when the tax [credit eliminated] is one which might exert significant influence on . . . business transactions" (*Holly S. Clarendon Trust v State Tax Commn.*, 43 NY2d 933, 935, *cert denied* 439 US 831). The court therefore properly declared that the amendments at issue apply prospectively only, and that the revocations of plaintiffs' certifications, to the extent they were made retroactive to January 1, 2008, are null and void.

VII

Accordingly, the order and judgment should be affirmed.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1212

CA 11-00499

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, GREEN, AND GORSKI, JJ.

DANA MESLER AND CYNTHIA MESLER,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

PODD LLC, DEVELOPERS DIVERSIFIED REALTY CORPORATION, BG BCF, LLC, ET AL., DEFENDANTS, JJK MANAGEMENT, INC., WEIGHT WATCHERS INTERNATIONAL, INC., AND WEIGHT WATCHERS NORTH AMERICA, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

DEVELOPERS DIVERSIFIED REALTY CORPORATION AND BG BCF, LLC, THIRD-PARTY PLAINTIFFS,

V

JJK MANAGEMENT, INC., THIRD-PARTY DEFENDANT.
(APPEAL NO. 1.)

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT JJK MANAGEMENT, INC.

FELDMAN KIEFFER, LLP, BUFFALO (STEPHEN M. SORRELS OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS WEIGHT WATCHERS INTERNATIONAL, INC., AND WEIGHT WATCHERS NORTH AMERICA, INC.

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

Appeals and cross appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered May 26, 2010 in a personal injury action. The order, inter alia, denied the motion of defendants Weight Watchers International, Inc. and Weight Watchers North America, Inc. for summary judgment and denied the cross motion of plaintiffs for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants Weight Watchers International, Inc. and Weight Watchers North America, Inc. for summary judgment and dismissing the amended complaint against them and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for

injuries allegedly sustained by Dana Mesler (plaintiff) when he slipped and fell on an icy sidewalk in front of a Weight Watchers location in a shopping center owned by defendant-third-party plaintiff BG BCF, LLC and managed by defendant-third-party plaintiff Developers Diversified Realty Corporation (collectively, DDRC defendants). We first address appeal No. 2, wherein the DDRC defendants moved for a conditional order of indemnification against defendant-third-party defendant, JJK Management, Inc. (JJK), and sought additional relief in the alternative. Also in appeal No. 2, JJK cross-moved for summary judgment dismissing the amended complaint in the main action against it. We agree with JJK that the court erred in granting that part of the DDRC defendants' motion for a conditional order of indemnification and in denying JJK's cross motion. We note at the outset that JJK's notice of appeal recites that it is from the order in appeal No. 2 insofar as it denied JJK's cross motion, but it does not reference the order insofar as it granted in part the motion of the DDRC defendants. We note, however, that the brief of the DDRC defendants on appeal addresses their motion despite the omission of a reference to it in JJK's notice of appeal. Thus, "there is no indication on this record that [the DDRC defendants are] prejudiced by that omission, [and] we exercise our discretion to reach beyond the scope of [the] notice of . . . appeal and address the merits of [this] issue[]" (*Camperlino v Town of Manlius Mun. Corp.*, 78 AD3d 1674, 1675, *lv dismissed* 17 NY3d 734 [internal quotation marks omitted]).

The Service/Materials Agreement (agreement), whereby defendant-third-party plaintiff Developers Diversified Realty Corporation, on behalf of defendant-third-party plaintiff BG BCF, LLC, contracted with JJK for snow removal and salting services, requires that JJK indemnify the DDRC defendants for liabilities and costs that are "caused in whole or in part by the negligent or intentional act or omission" of JJK employees. Thus, "the contract for snow removal services required [JJK] to indemnify [the DDRC defendants] only in the event that [JJK] was negligent in the performance of the contract and, contrary to [the DDRC defendants'] contention, there are triable issues of fact with respect thereto" (*Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188). The DDRC defendants were also required to establish that they were free from negligence (*see generally* General Obligations Law § 5-322.1; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808), and they failed to establish as a matter of law that they did not "cause[or] allow[ ] a dangerous condition to exist," as alleged in the amended complaint. The conditional order of indemnification therefore is premature for that reason as well (*see Bellefleur*, 66 AD3d at 808-809). Because the court did not reach the alternative argument in the DDRC defendants' motion that they are entitled to damages based on JJK's failure to procure liability insurance required by the agreement, we remit the matter to Supreme Court to decide that part of the motion.

With respect to JJK's cross motion for summary judgment dismissing the amended complaint in the main action against it, we note the general rule that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138). An

exception to that general rule as alleged in the amended complaint and plaintiffs' bills of particulars is "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launche[s] a force or instrument of harm' " (*id.* at 140; *see Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 213-214). Here, even assuming, arguendo, that JJK was negligent in failing to salt the sidewalk, we conclude that such negligence would "amount[] to a finding that [JJK] may have merely failed to become 'an instrument for good,' which is insufficient to impose a duty of care upon a party not in privity of contract with the injured party" (*Bauerlein v Salvation Army*, 74 AD3d 851, 856; *see Church v Callanan Indus.*, 99 NY2d 104, 111-112).

In appeal No. 1, Weight Watchers International, Inc. and Weight Watchers North America, Inc. (collectively, Weight Watchers defendants) appeal and plaintiffs cross-appeal from an order denying the Weight Watchers defendants' motion for summary judgment dismissing the amended complaint against them and denying plaintiffs' cross motion for partial summary judgment on the issue of notice of a hazardous condition or the affirmative creation of that condition. We agree with the Weight Watchers defendants that the court erred in denying their motion. Although a 1992 lease agreement imposed on the Weight Watchers defendants a duty "to cause the sidewalks adjacent to [the leased p]remises to be kept free of snow, ice, rubbish and merchandise," that provision was modified in writing prior to plaintiff's fall by "deleting the words 'snow' and 'ice' " (*cf. Figueroa v Tso*, 251 AD2d 959; *see generally Gauthier v Super Hair*, 306 AD2d 850, 851). We reject plaintiffs' contention that the occasional snow removal measures taken by employees of the Weight Watchers defendants are sufficient to establish control over the sidewalk (*see Figueroa*, 251 AD2d 959). In light of our conclusions in appeal Nos. 1 and 2 that the Weight Watchers defendants and JJK are entitled to summary judgment dismissing the amended complaint against them, we see no need to address the remaining contentions in appeal No. 1.

Finally, with respect to the cross appeal, we conclude that the court properly denied plaintiffs' cross motion for partial summary judgment. Contrary to plaintiffs' contention, the legal argument made by counsel for the DDRC defendants, i.e., that "the [deposition] testimony supports the conclusion, as a matter of law, that the subject walkway was not salted on the day of the accident," is not a statement of fact "made with sufficient formality [or] conclusiveness" to constitute a judicial admission (*State of New York ex rel. H. v P.*, 90 AD2d 434, 439 n 4; *cf. Catanese v Lipschitz*, 44 AD2d 579). Further, although the deposition testimony of a regional property manager for defendant-third-party plaintiff Developers Diversified Realty Corporation supports the conclusion that the corporation was aware that precipitation would run off the curved roof of the shopping plaza and collect in the grooves on the handicap ramp in the sidewalk where plaintiff fell, plaintiffs failed to establish as a matter of law that the ice on which plaintiff fell was in fact caused by that runoff (*see generally Carpenter v J. Giardino, LLC*, 81 AD3d 1231,

1233-1234, *lv denied* 17 NY3d 710).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1213.1

CA 11-01193

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, GREEN, AND GORSKI, JJ.

SENECA NATION OF INDIANS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THOMAS H. MATTOX, ACTING COMMISSIONER, DEPARTMENT OF TAXATION AND FINANCE, AND ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, DEFENDANTS-RESPONDENTS.

HARTER SECREST & EMERY LLP, BUFFALO (CAROL E. HECKMAN OF COUNSEL), AND KANJI & KATZEN, PLLC, ANN ARBOR, MICHIGAN, FOR PLAINTIFF-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ANDREW D. BING OF COUNSEL), DEFENDANT-RESPONDENT PRO SE AND FOR DEFENDANTS-RESPONDENTS.

PHILLIPS NIZER LLP, NEW YORK CITY (THOMAS G. JACKSON OF COUNSEL), FOR NEW YORK STATE ASSOCIATION OF TOBACCO AND CANDY DISTRIBUTORS, INC., AMICUS CURIAE IN SUPPORT OF DEFENDANTS-RESPONDENTS.

MARGARET A. MURPHY, HAMBURG, AND HOBBS STRAUS DEAN & WALKER, LLP, WASHINGTON, D.C., FOR ST. REGIS MOHAWK TRIBE, AMICUS CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 9, 2011. The judgment denied the motion of plaintiff for summary judgment, granted the cross motion of defendants for summary judgment, denied as moot the motion of plaintiff for a preliminary injunction and vacated a temporary restraining order.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting judgment in favor of defendants as follows:

> "It is ADJUDGED AND DECLARED that 20 NYCRR 74.6 is valid and enforceable, and that defendant New York State Department of Taxation and Finance substantially complied with State Administrative Procedure Act §§ 201-a, 202-a and 202-b in promulgating that rule"

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, individual declarations that 20 NYCRR 74.6 (hereafter, the rule),

concerning taxes imposed on cigarettes on qualified Indian reservations, is null, void and unenforceable based on the failure of defendant New York State Department of Taxation and Finance (Department) to comply with sections 201-a, 202-a, and 202-b of the State Administrative Procedure Act. The Department promulgated the rule in accordance with the statutory mandate governing the sale of tax-exempt cigarettes on qualified reservations to members of an Indian nation or tribe, as well as the collection of the excise tax on cigarette sales to non-members of the nation or tribe (*see generally* Tax Law §§ 471, 471-e). Plaintiff appeals from a judgment that, inter alia, denied its motion for summary judgment seeking declaratory and injunctive relief and granted defendants' cross motion for summary judgment. We agree with plaintiff that, because "[i]nterpretation of the State Administrative Procedure Act is not dependent on an understanding of technical data or underlying operational practices . . ., the courts [should] use their own competence to decide issues of law raised" (*Matter of Industrial Liaison Comm. of Niagara Falls Area Chamber of Commerce v Williams*, 72 NY2d 137, 144). Nevertheless, we agree with Supreme Court that our standard of review is whether there has been substantial compliance with the State Administrative Procedure Act in promulgating the rule (*see* § 202 [8]; *Industrial Liaison Comm. of Niagara Falls Area Chamber of Commerce*, 72 NY2d at 144), and we conclude that there was substantial compliance.

Plaintiff contends that, because the quota system detailed in the rule will have a substantial adverse impact on the approximately 3,000 individuals employed in the Seneca tobacco economy, the Department was required to issue a Job Impact Statement (*see* State Administrative Procedure Act § 201-a [2] [b]). Plaintiff similarly contends that the Regulatory Impact Statement required by section 202-a and the Regulatory Flexibility Analysis required by section 202-b were deficient based on the Department's failure to discuss the adverse impact of the rule on Indian nations, members, and small businesses such as reservation cigarette sellers. We reject those contentions, inasmuch as the adverse impact of which plaintiff complains, i.e., the negative economic effect of a limited supply of tax-exempt cigarettes available for sale, is a direct result of the relevant statutes, not the rule itself (*see e.g.* Tax Law § 471 [5] [b]; § 471-e [2] [b]). In its amicus brief, St. Regis Mohawk Tribe argues that the rule contains no mechanism requiring the Department, when approving a sale of tax-exempt cigarettes by New York state licensed cigarette stamping agents or wholesalers, to ensure that the limited quantities of such cigarettes are fairly allocated to retailers on qualified reservations (*see* § 471 [5] [b]; 20 NYCRR 74.6 [b] [3]). We reject the contention that the Department violated the State Administrative Procedure Act by failing to address the speculative possibility of monopolistic behavior that may result from the absence of such a mechanism (*see Matter of Binghamton-Johnson City Joint Sewage Bd. v New York State Dept. of Envtl. Conservation*, 159 AD2d 887, 889; *see also Oneida Nation of N.Y. v Cuomo*, 645 F3d 154, 173). Rather, we conclude that the Department substantially complied with the requirements of State Administrative Procedure Act §§ 201-a, 202-a, and 202-b.

Finally, although the court properly determined the merits of the

issues raised in the motion and cross motion before it, the court failed to make the requisite declarations in favor of defendants (*see Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881; *Schlossin v Town of Marilla*, 48 AD3d 1118, 1119). We therefore modify the judgment accordingly.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1213

CA 11-01030

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, GREEN, AND GORSKI, JJ.

DANA MESLER AND CYNTHIA MESLER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PODD LLC, DEVELOPERS DIVERSIFIED REALTY
CORPORATION, BG BCF, LLC, ET AL., DEFENDANTS,
AND JJK MANAGEMENT, INC., DEFENDANT-APPELLANT.

DEVELOPERS DIVERSIFIED REALTY CORPORATION AND
BG BCF, LLC, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

JJK MANAGEMENT, INC., THIRD-PARTY
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NELSON E. SCHULE, JR., OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

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

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered May 26, 2010 in a personal injury action. The order granted the motion of defendants-third-party plaintiffs for a conditional order of indemnification against defendant-third-party defendant and denied the cross motion of defendant JJK Management, Inc. for summary judgment dismissing plaintiffs' amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion of defendant JJK Management, Inc. for summary judgment dismissing the amended complaint against it is granted, that part of the motion of defendants-third-party plaintiffs Developers Diversified Realty Corporation and BG BCF, LLC seeking a conditional order of indemnification in the alternative is denied, and the matter is remitted to Supreme Court, Erie County, to decide that part of the motion seeking compensatory damages in the alternative.

Same Memorandum as in *Mesler v Podd LLC* ([appeal No. 1] ___ AD3d ___ [Nov. 18, 2011]).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1215

KA 10-01757

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRIUS S. MOLSON, DEFENDANT-APPELLANT.

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

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 29, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that the evidence is legally insufficient to establish his liability as an accessory. We reject that contention. "Accessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime, intentionally aid another in the conduct constituting the offense" (*People v Chapman*, 30 AD3d 1000, 1001, *lv denied* 7 NY3d 811 [internal quotation marks omitted]; *see* § 20.00). Here, we conclude that there was evidence from which the jury could have reasonably inferred that defendant and his accomplice shared "a common purpose and a collective objective" (*People v Cabey*, 85 NY2d 417, 422), and that "defendant either shot the victim or shared in the intention of the [accomplice] to do so" (*People v Morris*, 229 AD2d 451, *lv denied* 88 NY2d 990). Immediately prior to the shooting, the victim was located on the porch of a house with one of the witnesses. That witness testified that, before she fled into the house, she observed defendant approach the porch with a gun raised toward the victim (*see People v Irizarry*, 233 AD2d 209, 209-210, *lv denied* 89 NY2d 924, 943, 988). The People also presented evidence establishing that, just before the shooting, defendant overheard the accomplice state that he was going to "f[xxx] [the victim] up," and the People further established that defendant arrived at and left the scene with that accomplice (*see People v*

Carter, 293 AD2d 484, *lv denied* 99 NY2d 626). Moreover, shortly after his arrest, defendant told a jail officer that he had "just committed murder."

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). We conclude that "an acquittal would not have been unreasonable" inasmuch as the jury could have concluded that defendant's accomplice fired all of the shots and that the identification made by the witness who observed defendant approach the porch was mistaken (*Danielson*, 9 NY3d at 348). We further conclude, however, that the jury was justified in finding defendant guilty beyond a reasonable doubt in light of the evidence of accessorial liability set forth above (*see id.*).

Defendant contends that County Court erred in refusing to suppress an identification of defendant from the second photo array shown to the witness who observed defendant approach the porch because that identification procedure was unduly suggestive. We reject that contention. The mere fact that the police show a witness multiple photo arrays does not render the second photo array suggestive where, as here, the police mitigated any potential suggestiveness by using a markedly different photograph of the defendant in the second photo array and placing it in a different location than in the first photo array (*see People v Daniels*, 202 AD2d 987). Further, the second photo array was not rendered unduly suggestive by the fact that defendant was the only individual depicted in both photo arrays (*see id.*), or by the fact that the witness failed to identify defendant in the first photo array (*see People v Brennan*, 261 AD2d 914, *lv denied* 94 NY2d 820). We conclude that the composition and appearance of the second photo array was not unduly suggestive. The individuals depicted therein were generally similar in appearance to defendant, inasmuch as they all were black males who appeared to be of similar age and skin tone, and the photographs were similarly cropped (*see generally People v McBride*, 14 NY3d 440, 448, *cert denied* ___ US ___, 131 S Ct 327).

Contrary to defendant's further contention, the statement of his accomplice that he wanted to "f[xxx] [the victim] up" was not hearsay, and the court therefore properly admitted that statement in evidence. Defendant was present when his accomplice made that statement, and the People sought to admit the statement in evidence to provide circumstantial evidence of defendant's state of mind, i.e., that defendant went to the crime scene with the accomplice knowing that violence was likely to result, not to prove the truth of the matter asserted by the accomplice (*see People v Davis*, 58 NY2d 1102, 1103; *People v Daniels*, 265 AD2d 909, 910, *lv denied* 94 NY2d 878).

We agree with defendant that the court erred in admitting in evidence his statement to another individual that he was asked to leave a bar shortly before the shooting because the bar's manager "said he had a gun." That statement, although made by defendant, constituted double hearsay and involved nothing more than defendant's

repetition of a statement made by the manager. Thus, despite the general rule that an out-of-court statement by a criminal defendant is admissible against that defendant (*see People v Chico*, 90 NY2d 585, 589; *People v O'Connor*, 21 AD3d 1364, 1366, *lv denied* 6 NY3d 757), defendant simply recounted the statement of another, and thus the statement in question was inadmissible (*see People v Smith*, 172 NY 210, 236). We nevertheless conclude that such error is harmless. The evidence of defendant's guilt was overwhelming, and there was no significant probability that defendant would have been acquitted had his statement been excluded (*see People v Kello*, 96 NY2d 740, 744; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Indeed, there was other evidence at trial, including the testimony of the witness who observed defendant approach the porch, that placed him at the scene of the shooting with a gun. In addition, another witness testified that he saw two men fleeing the area of the shooting and that one of the individuals had a gun. According to that witness, the individual with the gun was wearing clothing that matched the description of defendant's clothing on the night of the murder provided by the witness who observed him on the porch.

Finally, the sentence is not unduly harsh or severe.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1216

KA 10-00119

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGEL M. VALENTIN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered December 23, 2009. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant's sole contention is that County Court erred in failing to determine that he was entitled to a downward departure to a level one risk. Inasmuch as defendant failed to request such a departure before or during the SORA hearing, however, he failed to preserve that contention for our review (*see People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1220

KA 08-00549

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL DUGGER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), 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 (William D. Walsh, J.), rendered January 2, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of attempted arson in the third degree (Penal Law §§ 110.00, 150.10 [1]) and imposing a sentence of imprisonment based upon his admission that he violated the terms and conditions of his probation. Because the sentence of imprisonment for the violation of probation was imposed more than 30 days after the original sentence and defendant had not previously filed a notice of appeal from the original judgment of conviction, defendant may appeal only from the sentence of imprisonment (*see* CPL 450.30 [3]; *People v Johnson*, 77 AD3d 1441; *see also People v Coble*, 17 AD3d 1165, *lv denied* 5 NY3d 787). Thus, the contentions of defendant with respect to the original judgment of conviction, i.e., that County Court erred in delegating the calculation of restitution to the Probation Department and in denying him due process by refusing to conduct a restitution hearing, are not properly before us. The sentence of imprisonment is not unduly harsh or severe.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1223

KA 10-01966

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT KORBER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), 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 June 15, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and rape 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 [3]) and rape in the first degree (§ 130.35 [1]). Contrary to defendant's contention, he knowingly, intelligently and voluntarily waived his right to appeal as a condition of the plea (*see generally People v Lopez*, 6 NY3d 248, 256). "County Court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v James*, 71 AD3d 1465, 1465 [internal quotation marks omitted]), and the record establishes that he "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256).

Defendant's further contention "that his plea was not knowing, intelligent and voluntary 'because he did not recite the underlying facts of the crime[s] but simply replied to [the c]ourt's questions with monosyllabic responses is actually a challenge to the factual sufficiency of the plea allocution,' which is encompassed by the valid waiver of the right to appeal" (*People v Simcoe*, 74 AD3d 1858, 1859, *lv denied* 15 NY3d 778; *see People v Brown*, 66 AD3d 1385, *lv denied* 14 NY3d 839). Moreover, defendant failed to preserve that contention for our review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Jamison*, 71 AD3d 1435, *lv denied* 14 NY3d 888; *People v Lacey*, 49 AD3d 1259, 1259-1260, *lv*

denied 10 NY3d 936).

Defendant's constitutional challenge to the persistent felony offender statute is unpreserved for our review (*see People v Besser*, 96 NY2d 136, 148; *People v Watkins*, 17 AD3d 1083, 1084, *lv denied* 5 NY3d 771), and " 'there is no indication in the record that the Attorney General was given the requisite notice of that challenge' " (*People v Bastian*, 83 AD3d 1468, 1469-1470, *lv denied* 17 NY3d 813). In any event, defendant's challenge is without merit (*see People v Battles*, 16 NY3d 54, 59, *cert denied* ___ US ___ [Oct. 3, 2011]; *People v Rawlins*, 10 NY3d 136, 158, *cert denied sub nom. Meekins v New York*, ___ US ___, 129 S Ct 2856; *Bastian*, 83 AD3d at 1470). Defendant's contention that the court erred in failing to conduct a hearing before sentencing him as a persistent felony offender is encompassed by his valid waiver of the right to appeal (*see People v Taylor*, 73 AD3d 1285, 1286, *lv denied* 15 NY3d 810). Moreover, defendant failed to preserve that contention for our review (*see generally People v Proctor*, 79 NY2d 992, 994).

Finally, defendant's challenge to the severity of the sentence is encompassed by the valid waiver of the right to appeal (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 18, 2011 Patricia L. Morgan
Clerk of the Court

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

1225

CAF 10-01769

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

IN THE MATTER OF KENNEDIE M. AND KODIE M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KIMBERLY M., RESPONDENT,
AND DOUGLAS M., RESPONDENT-APPELLANT.

CHARLES D. HALVORSEN, ESQ., ATTORNEY FOR
THE CHILDREN, APPELLANT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), APPELLANT PRO SE.

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

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

Appeals from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 29, 2010 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent Douglas M. neglected the subject children.

It is hereby ORDERED that the appeal by Charles D. Halvorsen, Esq., Attorney for the Children, is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Respondent father and the Attorney for the Children appeal from an order of fact-finding and disposition that, upon a finding that the father neglected his two children, placed the father and the children under the supervision of petitioner for a period of one year. Contrary to the father's contention, "the finding of neglect is supported by a preponderance of the evidence" (*Matter of Merrick T.*, 55 AD3d 1318, 1318). Petitioner presented one witness, and Family Court found that witness credible. It is well established that "the court's credibility determinations are . . . entitled to great deference" (*Matter of Syira W.*, 78 AD3d 1552, 1553; *see Merrick T.*, 55 AD3d 1318). Moreover, the court properly drew "the strongest possible negative inference" against the father after he failed to testify at the fact-finding hearing (*Matter of Jasmine A.*, 18 AD3d 546, 548; *see Matter of Jenny N.*, 262 AD2d 951).

The father's adult stepdaughter was the sole witness for

petitioner, and she testified that the father sexually abused her for a period of years beginning when she was 15. That testimony "supports the finding of derivative neglect with respect to [the subject children inasmuch as] the impaired level of parental judgment . . . shown by [the father's] behavior created a substantial risk to [those children]" (*Matter of Peter C.*, 278 AD2d 911, 911 [internal quotation marks omitted]; *see Matter of Devre S.*, 74 AD3d 1848; *Matter of Jovon J.*, 51 AD3d 1395). Contrary to the father's contention, the court may make a finding of derivative neglect even if the child who was sexually abused is not a subject of the neglect petition (*see Matter of Kole HH.*, 61 AD3d 1049, 1052-1053, *lv dismissed* 12 NY3d 898).

In any event, we further conclude that the finding of neglect is supported by the stepdaughter's testimony that the father engaged in acts of domestic violence and that such acts occasionally occurred in the presence of the subject children (*see Matter of Aliyah B.*, 87 AD3d 943; *Matter of Christiana C.*, 86 AD3d 606, 607; *Syira W.*, 78 AD3d 1552). We see no need to address the father's remaining challenge to the sufficiency of the evidence.

The father failed to preserve for our review his further contention that the court erred in permitting the stepdaughter's attorney to participate in the fact-finding hearing (*see generally* Family Ct Act § 164; CPLR 5501 [a] [3]; *Matter of Diamond K.*, 31 AD3d 553). The father also failed to preserve for our review his contention that the court erred in taking judicial notice of a family offense petition filed against the father (*see Matter of Damian M.*, 41 AD3d 600). We reject the father's further contention that the court erred in admitting in evidence his substance abuse treatment records. The court providently exercised its discretion in ordering the disclosure of those records inasmuch "as those records were clearly relevant to its determination [on the issue of neglect]. The . . . [c]ourt's finding of good cause is supported by the record" (*Matter of Marlene D.*, 285 AD2d 462, 463, *lv denied* 97 NY2d 605; *see* 42 USC § 290dd-2 [b] [2] [C]; 42 CFR 2.64 [d]).

The Attorney for the Children contends only that the court should have ordered the father to obtain sexual offender treatment. Inasmuch as that contention involves a challenge to the dispositional part of the order and the order has expired by its terms, we conclude that the appeal by the Attorney for the Children must be dismissed as moot (*see Matter of Myisha B.*, 73 AD3d 625; *Matter of Chelsea M.*, 61 AD3d 1030, 1032).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1227

CAF 11-00116

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

IN THE MATTER OF CRYSTAL LYNN MOORE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL W. KAZACOS, RESPONDENT-APPELLANT.

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

JAMES E. CORL, JR., ATTORNEY FOR THE CHILD, CICERO, FOR KAIDEN M.M.

Appeal from an order of the Family Court, Onondaga County (Gina M. Glover, R.), entered December 13, 2010 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner sole custody of the parties' child.

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

Memorandum: In this child custody proceeding, respondent father appeals from an order granting the petition of the mother seeking sole custody of the parties' infant son. We reject the father's contention that the Referee erred in failing to consider the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) before awarding custody to the mother, who moved from Syracuse to North Carolina shortly after she commenced this proceeding. Inasmuch "[a]s this is an initial custody determination, it is not necessary to adhere to a strict application of the relevant factors to be considered in a potential relocation as enunciated in *Matter of Tropea v Tropea*" (*Matter of Lynch v Gillogly*, 82 AD3d 1529, 1530; *see Matter of Baker v Spurgeon*, 85 AD3d 1494, 1496, *lv dismissed* ___ NY3d ___ [Oct. 25, 2011]; *Matter of Schneider v Lascher*, 72 AD3d 1417, *lv denied* 15 NY3d 708).

In addition, although the Referee should have made an explicit finding that awarding custody to the mother was in the child's best interests, the record is "sufficiently complete" for this Court to make its own findings (*Matter of Ammann v Ammann*, 209 AD2d 1032, 1032-1033), and we conclude that the Referee's custody award is in the child's best interests. We note that there is no dispute that, as of the hearing date, the father had never seen the child, and the father did not avail himself of opportunities to visit the child during the pendency of the proceeding. Indeed, the father failed to appear at

his own house for a scheduled home visit with the Attorney for the Child, who sought to arrange visits for him with the child. Finally, we reject the father's contention that the case should be remitted for the Referee to fashion a more specific visitation schedule. If the father is unable to obtain "open and reasonable parenting time . . . as the parties may agree" pursuant to the order, he may file a petition seeking to enforce or modify the order.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1228

CAF 10-01945

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

IN THE MATTER OF HOWARD G. MESSIMORE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STACY M. MESSIMORE, RESPONDENT-RESPONDENT.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (KRYSTAL A. RUPERT OF COUNSEL), FOR PETITIONER-APPELLANT.

TYSON BLUE, CANANDAIGUA, FOR RESPONDENT-RESPONDENT.

SUSAN A. SOVIE, ATTORNEY FOR THE CHILD, WATERTOWN, FOR NATALEIGH M.M.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered September 9, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, ordered that respondent is to have primary physical custody of the subject child.

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

Memorandum: Petitioner father commenced this proceeding seeking to modify the existing custody provisions in the judgment of divorce, which was entered while he was deployed overseas with the United States Army, by awarding him primary physical custody of the parties' child. We agree with the father that his return from deployment constituted a change in circumstances warranting review of the existing custody arrangement (*see* Family Ct Act § 651 [f] [3]). Contrary to the father's contention, however, we conclude that Family Court did undertake such a review in light of the change in circumstances. The court held an evidentiary hearing, during which witnesses were called by both parties, conducted an in camera interview with the parties' child and thereafter made a determination based upon the best interests of the child (*cf. Matter of Hughes v Davis*, 68 AD3d 1674). Contrary to the further contention of the father, we conclude that the court's determination that the best interests of the child are served by continuing primary physical custody with respondent mother is supported by a sound and substantial basis in the record (*see Matter of McLeod v McLeod*, 59 AD3d 1011).

Entered: November 18, 2011 Patricia L. Morgan
Clerk of the Court

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

1230

CA 11-00323

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

TOWN OF ANGELICA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOEL S. SMITH, INDIVIDUALLY AND AS PRESIDENT OF AGGRESSIVE COMPANY, INC., DOING BUSINESS AS DIVERSIFIED CONTRACTING COMPANY AND AGGRESSIVE COMPANY, INC., DOING BUSINESS AS DIVERSIFIED CONTRACTING COMPANY, DEFENDANTS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (RYAN K. CUMMINGS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Allegany County (Gerald J. Whalen, J.), dated October 6, 2010. The order granted in part the motion of defendants for partial summary judgment and rejected the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendants' motion in its entirety and reinstating the first, second and third causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff, Town of Angelica (Town), is the owner of property known as the "Grange Building." In August 2001, the Town Board accepted a proposal from defendants to perform certain work related to raising the building and constructing a concrete basement underneath it and, in November 2001, the Town Supervisor accepted two proposals from defendants for significant renovation work to the interior and exterior of the building. In February 2002, however, the Town Board resolved to terminate defendants from the project. Defendants filed a lien against the property, and the Town thereafter commenced this action seeking, inter alia, rescission of the three purported agreements, vacatur of the lien and recovery of all money previously paid to defendants. Defendants asserted two counterclaims alleging that the Town had breached the agreements and that defendants' lien was valid.

Before any significant discovery was conducted, the Town moved for partial summary judgment, contending only that the agreements were

void based on violations of General Municipal Law § 103. In opposition to that motion, defendant Joel S. Smith, individually and as President of Aggressive Company, Inc., doing business as Diversified Contracting Company, submitted an affidavit averring that the competitive bidding requirements of section 103 did not apply because the work performed by defendants was specialized. When the Town did not submit a reply, Supreme Court (Himelein, J.), deemed Smith's averments to be admitted. Although the Town filed a notice of appeal from the order denying its motion, it did not perfect the appeal, and the appeal was automatically dismissed pursuant to 22 NYCRR 1000.12 (b).

Following additional discovery, defendants moved for partial summary judgment seeking dismissal of the first through fourth and eighth causes of action, as well as summary judgment on their counterclaim for damages. The Town opposed the motion and cross-moved for partial summary judgment on the first through fourth causes of action, as well as summary judgment dismissing the counterclaims. We conclude that Supreme Court (Whalen, J.) erred in granting defendants' motion in part and dismissing the first, second and third causes of action. We therefore modify the order by denying defendants' motion in its entirety and reinstating those causes of action.

Contrary to defendants' procedural contentions, we have the discretion to address the merits of defendants' motion and the cross motion. First, although the dismissal of an appeal for want of prosecution generally precludes review of any issues that were, or could have been, raised on the prior appeal (*see generally Bray v Cox*, 38 NY2d 350, 353-354; *Paul Revere Life Ins. Co. v Campagna*, 233 AD2d 954), "an appellate court has the authority to entertain a second appeal in the exercise of its discretion, even where a prior appeal on the same issue has been dismissed for failure to prosecute" (*Faricelli v TSS Seedman's*, 94 NY2d 772, 774; *see Aridas v Caserta*, 41 NY2d 1059, 1061).

Second, we may properly entertain the appeal with respect to the Town's cross motion for summary judgment despite the fact that the Town previously moved for summary judgment. It is well established that "successive summary judgment motions should be discouraged in the absence of a showing of newly discovered evidence or other sufficient cause" (*Farrell v Okeic*, 303 AD2d 957 [internal quotation marks omitted]; *see Town of Wilson v Town of Newfane*, 192 AD2d 1095). That rule, however, is discretionary. "[A] subsequent summary judgment motion may be properly entertained when 'it is substantively valid and [when] the granting of the motion will further the ends of justice while eliminating an unnecessary burden on the resources of the courts' " (*Rose v Horton Med. Ctr.*, 29 AD3d 977, 978). "In any event, '[a]s an appellate court, we are not precluded from addressing the merits of the [cross] motion' " (*Sexstone v Amato*, 8 AD3d 1116, 1117, *lv denied* 3 NY3d 609; *see Giardina v Lippes*, 77 AD3d 1290, 1291, *lv denied* 16 NY3d 702).

Third, we are not bound by the doctrine of law of the case. Defendants contend that the determination in the prior order, i.e.,

that the Town was deemed to have admitted that defendants' work was specialized, constitutes the law of the case and precludes the Town from challenging the validity of the agreements. We reject that contention. "The doctrine of . . . law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding . . . The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision . . . The doctrine may be ignored in extraordinary circumstances such as a change in law or a showing of new evidence" (*Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722). Furthermore, "this Court is not bound by the doctrine of law of the case because that doctrine 'does not prohibit appellate review of a subordinate court's order' " (*Matter of Jonathan M.*, 61 AD3d 1374, 1375; *see Martin v City of Cohoes*, 37 NY2d 162, 165, *rearg denied* 37 NY2d 817; *Hampton Val. Farms, Inc. v Flower & Medalie*, 40 AD3d 699).

We conclude that the court (Himelein, J.) erred in deeming Smith's averments to be admitted. The failure of a movant to submit a reply to opposition papers should not be deemed an admission because, at that point, the movant no longer has any burden. On a summary judgment motion, the movant has the initial burden of establishing its entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Once that initial burden has been met, the opposing party has the burden of establishing "facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *see generally Zuckerman*, 49 NY2d at 562). In the event that the opposing party fails to submit evidentiary facts to controvert the facts set forth in the movant's papers, the facts in those papers may be deemed admitted and summary judgment granted inasmuch as no triable issue of fact exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544; *see e.g. Matter of Johnsen v ACP Distrib., Inc.*, 31 AD3d 172, 179; *SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314). In the absence of a cross motion, there is no burden on the movant to submit a reply, and thus the court should not deem facts raised in opposition to a motion for summary judgment to be admitted. In any event, the Town submitted newly discovered evidence permitting reconsideration of the prior determination denying its motion (*see Farrell*, 303 AD2d 957).

Having dispensed with the procedural contentions, we agree with the Town that the court (Whalen, J.) erred in granting defendants' motion in part and dismissing the first, second and third causes of action.

With respect to the first cause of action, the Town alleged that the agreements violated Town Law § 64 (6). That statute requires that "a formal resolution be passed by the Town Board and executed by the Town Supervisor in the name of the Town before a Town can be bound by any contract" (*Verifacts Group v Town of Babylon*, 267 AD2d 379; *see Parone v Rivers*, 84 AD2d 686). The minutes from the Town Board meetings establish that the Town Board voted unanimously to approve the first agreement but that there was no formal resolution to that effect. Defendants contend that the latter two agreements were merely change orders that did not require additional authorization. We

reject that contention. Those two agreements involved substantially more extensive work and so varied from the original agreement that they could be considered new undertakings (*see Albert Elia Bldg. Co. v New York State Urban Dev. Corp.*, 54 AD2d 337, 342-343; *see generally Del Balso Constr. Corp. v City of New York*, 278 NY 154, 159-160). In any event, we conclude that there are triable issues of fact whether the Town Board ratified the latter two agreements (*see Vermeule v City of Corning*, 186 App Div 206, 208-209, *affd* 230 NY 585; *Town of N. Hempstead v Winston & Strawn, LLP*, 28 AD3d 746, 748, *lv denied* 7 NY3d 715; *see also Imburgia v City of New Rochelle*, 223 AD2d 44, 48, *lv denied* 88 NY2d 815; *cf. Seif v City of Long Beach*, 286 NY 382, 387-388, *rearg denied* 287 NY 836).

With respect to the second cause of action, the Town alleged that the agreements violated General Municipal Law § 103. We agree with the Town that there are triable issues of fact whether that statute applies to the agreements. It is undisputed that the Town did not comply with the requirements of section 103, and "[m]unicipal contracts awarded without resort to competitive bidding, other than those exempted from such requirement pursuant to General Municipal Law § 103, are void and unenforceable" (*JLJ Recycling Contrs. Corp. v Town of Babylon*, 302 AD2d 430, 431). In support of their motion, defendants submitted evidence that their services were unique and thus that the agreements were exempt from the requirements of section 103 (*see Matter of Omni Recycling of Westbury, Inc. v Town of Oyster Bay*, 11 NY3d 868, 869; *Zack Assoc., Inc. v Setauket Fire Dist.*, 12 AD3d 439; *Matter of Fawcett v City of Buffalo*, 275 AD2d 954, 955, *lv denied* 96 NY2d 701). In opposition to defendants' motion, however, the Town raised a triable issue of fact whether defendants' services were unique by submitting evidence that other construction companies could have performed the same services provided by defendants.

With respect to the third cause of action, the Town sought a declaration that the agreements were void ab initio as a matter of law. Because there are triable issues of fact concerning the validity of the agreements, we conclude that the court (Whalen, J.) also erred in granting defendants' motion concerning that cause of action.

Entered: November 18, 2011 Patricia L. Morgan
Clerk of the Court

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

1232

CA 11-01052

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

WAYNE SISTRUNK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ONONDAGA, ET AL., DEFENDANTS.

COUNTY OF ONONDAGA, THIRD-PARTY PLAINTIFF,

V

M.A. BONGIOVANNI, INC., THIRD-PARTY DEFENDANT-APPELLANT.

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

BARTON BARTON & PLOTKIN, LLP, NEW YORK CITY (THOMAS P. GUIFFRA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered August 23, 2010 in a personal injury action. The order, inter alia, granted plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while working on a construction site owned by defendant-third-party plaintiff, County of Onondaga. Third-party defendant, M.A. Bongiovanni, Inc. (Bongiovanni), appeals, as limited by its brief, from an order insofar as it granted plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim and denied Bongiovanni's cross motion for partial summary judgment dismissing that claim. Plaintiff was injured when he fell from a 40-foot extension ladder into a trench. Bongiovanni was plaintiff's employer and the excavation subcontractor at the construction site. According to Bongiovanni, plaintiff was instructed to use the extension ladder only in the event of an emergency, which did not exist at the time of the accident, and there were more appropriate safety devices located on the construction site that

plaintiff could have used to get in and out of the trench.

Addressing first the cross motion, we reject Bongiovanni's contention that Supreme Court erred in denying the cross motion inasmuch as there are triable issues of fact whether plaintiff was provided with appropriate safety devices and whether his own actions were the sole proximate cause of the accident. Where a plaintiff knowingly uses an inadequate safety device when another appropriate safety device is readily available, his use of the inadequate device is deemed the sole proximate cause of his injuries (*see Arnold v Barry S. Barone Constr. Corp.*, 46 AD3d 1390, *lv denied* 10 NY3d 707; *see also Tomlins v DiLuna*, 84 AD3d 1064; *see generally Miro v Plaza Constr. Corp.*, 38 AD3d 454, 455, *mod on other grounds* 9 NY3d 948). In his affidavit, plaintiff's supervisor indicates that he instructed plaintiff to use the stair tower to enter and exit the trench, and to use extension ladders only in the event of an emergency. The supervisor also testified to that effect at his deposition. Plaintiff testified at his deposition, however, that he never received any such instructions and that, to the contrary, his supervisor specifically told him to use the extension ladder to carry fuel down into the trench. There is also a triable issue of fact whether the other safety devices at the construction site, i.e., the stair tower and an archway staircase, could have been safely used by plaintiff to reach the area of the trench where he was working at the time of the accident.

We agree with Bongiovanni, however, that the court erred in granting plaintiff's motion for partial summary judgment, and we therefore modify the order accordingly. Even assuming, arguendo, that plaintiff met his initial burden on the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), Bongiovanni raised triable issues of fact whether plaintiff, in using the extension ladder, ignored safety instructions from his supervisor and whether plaintiff could have used the stair tower to enter and exit the trench. Plaintiff contends that the stair tower was not an "available" safety device because he was unable to walk up the gravel hill from the trench to obtain the stair tower. Bongiovanni, however, submitted evidence demonstrating that the emergency responders were able to walk up the gravel hill in question and that other employees of Bongiovanni had walked up the same hill earlier on the day of the accident.

Bongiovanni also raised a triable issue of fact whether the defective condition of the ladder was a proximate cause of plaintiff's accident. Although plaintiff testified at his deposition that the ladder twisted before he fell, he informed the police on the night of the accident that he slipped from the ladder and fell on his back. Also, it is unclear from the record whether the ladder actually fell or even slipped. "The simple fact that plaintiff fell from a ladder does not automatically establish liability on the part of [Bongiovanni]" (*Beardslee v Cornell Univ.*, 72 AD3d 1371, 1372). In the absence of any other evidence concerning the way in which the accident occurred, plaintiff's statement to the police raised a triable issue of fact whether he fell because the ladder did not

afford him proper protection or whether he simply slipped and fell off of the ladder (*see Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416; *Davis v Brunswick*, 52 AD3d 1231).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1233.1

CA 11-00893

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

NATALIE M. BARNHARD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CYBEX INTERNATIONAL, INC., DEFENDANT-APPELLANT.

CYBEX INTERNATIONAL, INC., THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT,

V

AMHERST ORTHOPEDIC PHYSICAL THERAPY, P.C., THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, WHITE PLAINS (ROBERT A. SPOLZINO OF COUNSEL), AND HURWITZ & FINE, P.C., BUFFALO, FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

BAXTER SMITH & SHAPIRO P.C., WEST SENECA (SIM R. SHAPIRO OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (KEVIN J. ENGLISH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal and cross appeal from a judgment of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 21, 2011. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the post-trial motion in part and setting aside the verdict with respect to damages for future "care for potential children" and damages for past and future pain and suffering and as modified the judgment is affirmed without costs, and a new trial is granted on damages for past and future pain and suffering only unless plaintiff, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for past pain and suffering to $3 million and for future pain and suffering to $9 million, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when an exercise machine tipped over and fell

on top of her, breaking her neck and rendering her a quadriplegic. The leg extension machine that caused plaintiff's injuries (hereafter, machine) was designed, manufactured and sold by a company that was subsequently purchased by defendant-third-party plaintiff, Cybex International, Inc. (Cybex). Plaintiff was employed as a physical therapy assistant by third-party defendant, Amherst Orthopedic Physical Therapy, P.C. (Amherst Orthopedic) and, at the time of the accident, she was with her assigned patient in the gym area. Plaintiff stood on the weight-stack side of the machine, put her hands on top of it and pulled on it in order to stretch her arms and shoulder. The machine, which weighed more than 600 pounds, was not secured to the floor and it toppled over onto her. Following a trial, the jury apportioned liability for the accident 75% to Cybex, 20% to Amherst Orthopedic and 5% to plaintiff. The jury awarded plaintiff damages for past and future medical expenses, lost earnings and benefits and pain and suffering, as well as damages for future "care for potential children." Supreme Court thereafter denied the post-trial motion of Cybex seeking to set aside the verdict.

Contrary to the contention of Cybex on its appeal, we conclude that a fair interpretation of the evidence supports the jury's verdict that Cybex was negligent and that its negligence was a substantial factor in causing plaintiff's injuries. Thus, the court properly denied the post-trial motion of Cybex insofar as it sought to set aside those parts of the verdict. The jury was entitled to reject the position of Cybex that plaintiff was injured as the result of her unforeseeable misuse of an otherwise safe product. Although it is undisputed that plaintiff was not using the machine for its intended purpose when she was injured, the designer of the machine testified at trial that the use of exercise machines for stretching is common and thus foreseeable (*see generally Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 480). In addition, the jury was entitled to credit the testimony of plaintiff's expert that the machine was defectively designed, that it could have feasibly been made safer and that the design defect was a substantial factor in causing plaintiff's injury (*see Adams v Genie Indus., Inc.*, 14 NY3d 535, 542; *Wengenroth v Formula Equip. Leasing, Inc.*, 11 AD3d 677, 680). Moreover, the adequacy of the warnings accompanying the machine was an issue of fact for the jury (*see Morrow v Mackler Prods.*, 240 AD2d 175), and the record supports the jury's determination that the failure of Cybex to warn purchasers and users of the machine's potential tipping hazard was also a substantial factor in causing plaintiff's injuries. The jury's apportionment of 75% fault to Cybex is supported by a fair interpretation of the evidence (*see Sydnor v Home Depot U.S.A., Inc.*, 74 AD3d 1185, 1187-1188).

Contrary to the contention of Amherst Orthopedic on its cross appeal, the evidence is legally sufficient to support those parts of the jury's verdict finding that Amherst Orthopedic was negligent, its negligence was a substantial factor in causing injury to plaintiff and the percentage of fault attributable to Amherst Orthopedic was 20% (*see Williams v City of New York*, 71 AD3d 1135, 1137). We reject the further contention of Amherst Orthopedic that the court erred in discharging a juror during the trial after that juror advised the

court of his travel plans and the attorneys agreed to delay the trial one day to accommodate those travel plans. The court was not bound by the attorneys' agreement, and it properly exercised its " 'broad authority to . . . expedite the proceedings' " by replacing the juror with an alternate (*Peralta v Grenadier Realty Corp.*, 84 AD3d 486, 487).

None of the court's evidentiary rulings requires reversal. Contrary to the contention of Cybex on its appeal, the court properly permitted plaintiff to introduce evidence concerning other accidents involving exercise machines manufactured by Cybex inasmuch as those accidents were sufficiently similar to plaintiff's accident to warrant admission of that evidence (*see generally Hyde v County of Rensselaer*, 51 NY2d 927, 929). The court properly exercised its discretion in excluding the lay opinion testimony of plaintiff's patient characterizing plaintiff's conduct as "monkeying around" (*see Dombrowski v Moore*, 299 AD2d 949, 951). In addition, the court properly exercised its discretion in admitting in evidence a manual for a later model leg extension machine. The inability of Cybex and Amherst Orthopedic to locate the manual that accompanied the machine when it was delivered in 1981 or 1982 goes to the weight, not the admissibility, of the manual introduced by plaintiff (*see Altamirano v Door Automation Corp.*, 48 AD3d 308, 308-309).

Contrary to the contention of Cybex on its appeal and Amherst Orthopedic on its cross appeal, the court properly allowed the registered nurse who prepared plaintiff's life care plan to testify as an expert (*see generally Matott v Ward*, 48 NY2d 455, 459), and plaintiff's physical therapist was qualified to testify with respect to the medical necessity of certain items of equipment included in the life care plan (*see Matter of Layer v Novello*, 17 AD3d 1123, 1125). We conclude that the award of future medical expenses is supported by the evidence inasmuch as plaintiff presented "competent proof of necessary, anticipated medical costs" through those witnesses and her expert economist (*Petrilli v Federated Dept. Stores, Inc.*, 40 AD3d 1339, 1344). The evidence supports the findings of the jury with respect to plaintiff's life expectancy (*see Schifelbine v Foster Wheeler Corp.*, 4 AD3d 736, 738-739, *lv dismissed* 3 NY3d 656), as well as its award of future lost earnings, which is based in part on her life expectancy.

We agree with Cybex on its appeal and Amherst Orthopedic on its cross appeal, however, that the award of damages for future "care for potential children" is based entirely upon speculation and must be set aside (*see generally Presler v Compson Tennis Club Assoc.*, 27 AD3d 1096, 1097). We further agree with Cybex and Amherst Orthopedic that the jury's awards for past and future pain and suffering deviate materially from what would be reasonable compensation (*see* CPLR 5501 [c]). Based on the evidence presented at trial, we conclude that $3 million for past pain and suffering and $9 million for future pain and suffering are the maximum amounts the jury could have awarded (*see Bissell v Town of Amherst*, 56 AD3d 1144, 1148, *lv dismissed in part and denied in part* 12 NY3d 878; *Allison v Erie County Indus. Dev. Agency*, 35 AD3d 1159, 1160). We therefore modify the judgment

accordingly, and we grant a new trial on damages for past and future pain and suffering only unless plaintiff, within 20 days of service of a copy of the order of this Court with notice of entry, stipulates to reduce the award of damages for past pain and suffering to $3 million and for future pain and suffering to $9 million, in which event the judgment is modified accordingly.

We have examined the remaining contentions of Cybex on its appeal and Amherst Orthopedics on its cross appeal and conclude that none requires reversal or further modification of the judgment.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1233.2

CA 11-00752

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

NATALIE M. BARNHARD, PLAINTIFF-RESPONDENT,

V ORDER

CYBEX INTERNATIONAL, INC., DEFENDANT-APPELLANT.

CYBEX INTERNATIONAL, INC., THIRD-PARTY PLAINTIFF-APPELLANT,

V

AMHERST ORTHOPEDIC PHYSICAL THERAPY, P.C., THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, WHITE PLAINS (ROBERT A. SPOLZINO OF COUNSEL), AND HURWITZ & FINE, P.C., BUFFALO, FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

BAXTER SMITH & SHAPIRO P.C., WEST SENECA (SIM R. SHAPIRO OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (KEVIN J. ENGLISH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 7, 2011. The order, inter alia, denied the motion of defendant to set aside the verdict.

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

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1237

KA 10-00056

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BLAIR CHATTLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 27, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree and reckless endangerment in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [5]) and reckless endangerment in the first degree (§ 120.25), defendant contends that Supreme Court erred in failing to grant his pro se motion to withdraw his plea. There is no indication in the record, however, that the court ruled on the motion; i.e., the court neither granted nor denied it on the record before us. The Court of Appeals "has construed CPL 470.15 (1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, *or not ruled upon*, by the trial court" (*People v LaFontaine*, 92 NY2d 470, 474, *rearg denied* 93 NY2d 849 [emphasis added]; *see People v Concepcion*, 17 NY3d 192, 197-198), and thus the court's failure to rule on the motion cannot be deemed a denial thereof. We therefore hold the case, reserve decision and remit the matter to Supreme Court for a ruling on defendant's pro se motion.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1243

KA 09-02638

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS LEDDICK, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (ROBERT R. REITTINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered March 27, 2009. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (two counts), rape in the first degree, criminal sexual act in the first degree and sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that all of the sentences imposed shall run concurrently with respect to each other and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of two counts of predatory sexual assault against a child (Penal Law § 130.96), and one count each of rape in the first degree (§ 130.35 [3]), criminal sexual act in the first degree (§ 130.50 [3]) and sexual abuse in the first degree (§ 130.65 [3]). The conviction arises out of defendant's sexual assault of a seven-year-old girl with whom he had forcible sexual intercourse. According to the testimony at trial, a medical examination of the victim revealed that she had sustained a third degree laceration of the vaginal area, similar to a tear from a vaginal birth, which extended down to her anal sphincter. Defendant's contention that the evidence is legally insufficient to support the conviction is unpreserved for our review (*see People v Gray*, 86 NY2d 10, 19). 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]), other than to note that the evidence that defendant engaged in sexual intercourse with the victim is overwhelming. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that County Court erred in directing that the sentences imposed on counts one and three of the indictment, for predatory sexual assault and rape related to penis to vagina sexual contact, shall run consecutively to the sentences imposed under counts two and four of the indictment, for predatory sexual assault and criminal sexual act based on penis to anus sexual contact. The evidence established that defendant committed only one act of sexual assault, during which his penis entered the victim's vagina with such force that it tore through the vaginal wall and entered the anus. Thus, his penile contact with the victim's vagina and anus occurred as " 'part and parcel of the [same] continuous conduct' " (*People v Watkins*, 300 AD2d 1070, 1071, *lv denied* 99 NY2d 659). The court directed that the sentence imposed on count five run concurrently to the sentence imposed on count three, and we conclude that all of the sentences must run concurrently (*see People v Laster*, 78 AD3d 1479, 1481, *lv denied* 16 NY3d 798), which results in an aggregate sentence of imprisonment of 25 years to life. We therefore modify the judgment accordingly.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1245

KA 08-01501

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO NUNES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MICHAEL B. JONES, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 28, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [a]) and, in appeal No. 2, he appeals from the resentence imposed on that conviction. With respect to appeal No. 1, defendant contends that he was "overcharged" with attempted robbery in the second degree because there was no proof of any physical injury to the victim. Defendant validly waived his right to appeal, however, and that valid waiver encompasses his present contention (*see People v Jackson*, 39 AD3d 1089, 1090-1091, *lv denied* 9 NY3d 845; *see generally People v Lopez*, 6 NY3d 248, 255).

With respect to appeal No. 2, defendant contends that the resentence, which imposed a period of postrelease supervision that had been omitted from the original sentence, violated the constitutional prohibition against double jeopardy. The Double Jeopardy Clause prohibits the imposition of a period of postrelease supervision at resentencing if it "was not formally pronounced by the sentencing court pursuant to CPL 380.20 . . . [and] defendant has served the determinate term of imprisonment and has been released from confinement" by the Department of Correctional Services (*People v Williams*, 14 NY3d 198, 217, *cert denied* ___ US ___, 131 S Ct 125; *see* US Const Amend V). In this case, however, defendant had not completed serving his initial sentence at the time of the resentencing and,

because he had no "legitimate expectation of finality [until that] initial sentence ha[d] been served," the Double Jeopardy Clause did not bar County Court from resentencing him to impose the required period of postrelease supervision (*Williams*, 14 NY3d at 217; *cf. People v Rees*, 74 AD3d 1815). Finally, the valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the resentence (*see Lopez*, 6 NY3d at 256).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1246

KA 11-00474

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO NUNES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MICHAEL B. JONES, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Erie County Court (Sheila A. DiTullio, J.), rendered July 30, 2008. Defendant was resentenced upon his conviction of attempted robbery in the second degree.

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

Same Memorandum as in *People v Nunes* ([appeal No. 1] ___ AD3d ___ [Nov. 18, 2011]).

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1253

CA 11-00504

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

ALLEN J. SWETT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHERYL A. SWETT, DEFENDANT-APPELLANT.

BARTON, SMITH & BARTON, LLP, ELMIRA (CHRISTOPHER A. BARTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WELCH & ZINK, CORNING (COLLEEN G. ZINK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a second amended decree of the Supreme Court, Steuben County (Alex R. Renzi, J.), entered May 6, 2010 in a divorce action. The second amended decree, among other things, determined the equitable distribution of the marital property.

It is hereby ORDERED that the second amended decree so appealed from is unanimously modified on the law by directing in the third decretal paragraph concerning the marital residence that defendant is entitled to a credit of $13,613 before the remaining value of the marital residence is subject to equitable distribution, such that within 30 days of the date of this order defendant shall pay to plaintiff the sum of $13,343.50, representing his equity in the marital residence, in exchange for plaintiff's execution of a quitclaim deed relinquishing the marital residence to defendant, and as modified the second amended decree is affirmed without costs.

Memorandum: Defendant appeals from a second amended decree of divorce that, inter alia, equitably distributed the parties' marital property. Defendant contends that Supreme Court erred in awarding plaintiff a credit for his nonfinancial contributions to the appreciated value of a cottage that was purchased by defendant and her family prior to the marriage. Although defendant presented evidence that she sold her interest in the cottage to her father shortly after the marriage, plaintiff presented evidence that the deed was never modified and that the parties continued to use the cottage in a manner consistent with the use of property owners. "It is well established that '[e]quitable distribution presents issues of fact to be resolved by the trial court, and its judgment should be upheld absent an abuse of discretion' " (*Prasinos v Prasinos*, 283 AD2d 913). In light of the conflicting evidence presented by the parties at trial, the court did not abuse its discretion in concluding that defendant in fact maintained a property interest in the cottage after the marriage and

that plaintiff was entitled to a credit for his nonfinancial contributions to the appreciated value thereof (*see generally* Domestic Relations Law § 236 [B] [1] [d] [3]; *Hartog v Hartog*, 85 NY2d 36, 46).

We reject defendant's further contention that the court erred in concluding that certain trust accounts and stock obtained by her during the marriage were marital property subject to equitable distribution (*see generally* Domestic Relations Law § 236 [B] [1] [c]). " 'Property acquired during the marriage is presumed to be marital property and the party seeking to overcome such presumption has the burden of proving that the property in dispute was separate property' " (*Galachiuk v Galachiuk*, 262 AD2d 1026, 1027; *see Fields v Fields*, 15 NY3d 158, 162-163, *rearg denied* 15 NY3d 819). Here, defendant " 'failed to trace the source of the funds [and stock that she contended were separate property] with sufficient particularity to rebut the presumption that they were marital property' " (*Bailey v Bailey*, 48 AD3d 1123, 1124; *see Bennett v Bennett*, 13 AD3d 1080, 1082, *lv denied* 6 NY3d 708). Contrary to defendant's contention, the court did not abuse its discretion in awarding counsel fees to plaintiff in light of the "dilatory or obstructionist conduct" by defendant (*Blake v Blake* [appeal No. 1], 83 AD3d 1509; *see Johnson v Chapin*, 12 NY3d 461, 467, *rearg denied* 13 NY3d 888; *see also McBride-Head v Head*, 23 AD3d 1010, 1011).

We agree with defendant, however, that the court erred in failing to award her a credit for paying off the mortgage on the marital residence with her separate property. "It is well settled that a spouse is entitled to a credit for his or her contribution of separate property toward the purchase of the marital residence" (*Juhasz v Juhasz*, 59 AD3d 1023, 1024, *lv dismissed* 12 NY3d 848; *see Fields*, 15 NY3d at 166). Here, it is uncontested that the money used to pay off the mortgage on the marital residence shortly after the parties' marriage was defendant's separate property, and thus defendant is entitled to a credit in that amount prior to the equitable distribution of the marital residence (*see Fields*, 15 NY3d at 166; *Juhasz*, 59 AD3d at 1024; *Mirand v Mirand*, 53 AD3d 1149, 1150; *Chernoff v Chernoff*, 31 AD3d 900, 903). We therefore modify the second amended decree accordingly.

Entered: November 18, 2011

Patricia L. Morgan
Clerk of the Court