



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

DECISIONS FILED
DECEMBER 30, 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

FRANCES E. CAFARELL, CLERK

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

DECISIONS FILED DECEMBER 30, 2011

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_____	404/10	KA 08 00850	PEOPLE V RAYMOND CLYDE
_____	461/10	KA 09 01460	PEOPLE V NADIRAH BROWN
_____	936	CAF 10 00834	Mtr of BRIDGET K.Y.
_____	937	CAF 10 02368	PAUL S. V RITA S.
_____	1088	KA 08 01131	PEOPLE V JONATHAN J. MEEK
_____	1120	CA 10 00292	PAUL MARINACCIO, SR. V TOWN OF CLARENCE
_____	1120.1	CA 11 01638	PAUL MARINACCIO, SR. V TOWN OF CLARENCE
_____	1146	CA 11 00343	JOSEPH F. GAGNON, JR. V ST. JOSEPH'S HOSPITAL
_____	1233	CA 11 01073	JOSEPH KUEBLER V CHARLES R. KUEBLER
_____	1270	CAF 10 02105	Mtr of NICHOLAS W.
_____	1274	CA 10 02514	AJAY GLASS & MIRROR CO., INC. V AASHA G.C., INC.
_____	1275	CA 11 00086	TIMOTHY A. ROULAN V COUNTY OF ONONDAGA
_____	1276	CA 10 02483	CAROLYN FLATTERY V KAILASH C. LALL, M.D.
_____	1281	CA 11 00276	CHRISTINA G. CAGNINA V ONONDAGA COUNTY
_____	1286	KA 09 01499	PEOPLE V MYRON LUMPKIN
_____	1291	CA 11 01332	THERESA OVERHOFF V BAUER SERVICE, INC.
_____	1292	CA 11 01333	THERESA OVERHOFF V BAUER SERVICE, INC.
_____	1295	CA 11 00701	RICHARD N. AMES V ROBERT JAMES SHUTE
_____	1296	CA 11 01428	A.J. BAYNES FREIGHT CONTRACTORS, LT V NORMAN L. POLANSKI, JR.
_____	1302	CA 11 01204	PRESBYTERIAN HOME FOR CENTRAL NY V COMMISSIONER OF HEALTH OF STATE
_____	1309	KA 08 01364	PEOPLE V CORI D. BUCKMAN
_____	1310	KA 10 00803	PEOPLE V RASHEED MILTON
_____	1315	CA 11 01355	ROBIN PUTNAM-CORDOVANO V CSX CORPORATION
_____	1318	CA 11 01170	NEW YORK CENTRAL MUTUAL FIRE INS. V

GLIDER OIL COMPANY, INC.

_____	1324	CA 11 00778	PETER S. DUCHMANN V TOWN OF HAMBURG
_____	1325	CA 11 00240	NORTHERN TRUST, NA V PATRICIA A. DELLEY
_____	1331	KA 09 01810	PEOPLE V LEROY TUFF, JR.
_____	1335	KA 10 00123	PEOPLE V RAYMOND E. JOSEPH, III
_____	1338	CA 11 00500	LUCIA C. WRONSKI V JUDITH EINACH
_____	1339	CA 11 00501	LUCIA C. WRONSKI V JUDITH EINACH
_____	1340	CA 11 00503	LUCIA C. WRONSKI V JUDITH EINACH
_____	1342	CA 11 00541	JOSEPH BYRD V FREDERICK E. RONEKER, JR.
_____	1343	CA 11 00542	JOSEPH BYRD V FREDERICK E. RONEKER, JR.
_____	1347	CA 11 01372	ERIC ROTHFUSS V ERIE AND NIAGARA INSURANCE ASSN.
_____	1359	KA 10 01601	PEOPLE V BRIAN BORDEN
_____	1363	CAF 10 02113	JAMES P. CANFIELD V LEE A. MCCREE
_____	1364	CAF 11 01027	Mtr of SHIRLEY A.S.
_____	1365	CA 11 00587	TRACY GURNETT V TOWN OF WHEATFIELD
_____	1368	CA 11 00651	BRIAN HAESSIG V OSWEGO CITY SCHOOL DISTRICT
_____	1369	CA 11 00457	JEFFREY DIPALMA V STATE OF NEW YORK
_____	1371	CA 11 01067	UTILITY SERVICES CONTRACTING, INC. V MONROE COUNTY WATER AUTHORITY
_____	1372	CA 11 01068	UTILITY SERVICES CONTRACTING, INC. V MONROE COUNTY WATER AUTHORITY
_____	1375	KA 10 01035	PEOPLE V ELIUD BENNETT
_____	1376	KA 10 01963	PEOPLE V RALIK BAILEY
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_____	1380	KA 08 02005	PEOPLE V LUIS A. GONZALEZ
_____	1381	KA 10 01039	PEOPLE V DAVID BURGOS
_____	1385	CAF 11 00903	KRISTINE GROSSO V ROCCO GROSSO
_____	1386	CA 10 01557	WENDY A. COOK V OSWEGO COUNTY
_____	1387	CA 10 01558	WENDY A. COOK V OSWEGO COUNTY
_____	1391	CA 11 01194	TAMMY FINNEGAN V THE PETER, SR. & MARY L. LIBERATO
_____	1396	KA 10 01036	PEOPLE V MARK R. HOLT
_____	1401	KA 10 00810	PEOPLE V MICHAEL PRATCHETT

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_____	1411	CA 11 01403	ANTHONY MCCLOUD V BETTCHER INDUSTRIES, INC.
_____	1414	KA 11 01329	PEOPLE V MAXWELL S. COAPMAN
_____	1423	CA 11 01408	JOHN T. BAKER V CITY OF BUFFALO
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_____	1425	CA 11 00657	DOMINICK CALHOUN V ILION CENTRAL SCHOOL DISTRICT
_____	1429	CA 11 00730	PMA MANAGEMENT CORP. V ROBERT WHITE
_____	1430	CA 11 00731	PMA MANAGEMENT CORP. V ROBERT WHITE
_____	1441	KA 10 01434	PEOPLE V JOHN F. KAMINSKI
_____	1442	KA 08 02188	PEOPLE V LORETTA JACKSON
_____	1444	KAH 11 00139	DERRICK HAMILTON V HAROLD D. GRAHAM
_____	1446	CAF 10 01248	JOHN C. MARINO V SHERRY L. MARINO
_____	1448	CA 11 00838	ROBERT PETHICK V ELIZABETH PETHICK
_____	1449	CA 11 00732	TORREY J. STOUGHTENGER V HANNIBAL CENTRAL SCHOOL D
_____	1452	CA 11 01179	ANTONIO MERCONE V MONROE COUNTY DEPUTY SHERIFFS' A
_____	1453	CA 11 01152	VIA HEALTH OF WAYNE V DAWN VANPATTEN
_____	1454	CA 11 01296	JOYCE SAUTER V PETER A. CALABRETTA
_____	1455	TP 11 01317	WENDI ROWE V NEW YORK STATE OFFICE OF CHILDREN
_____	1456	CA 11 00948	BONICA LESSENSKI V MICHAEL J. WILLIAMS
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AJAY GLASS & MIRROR CO., INC., v AASHA G.C., INC.,	1274	CA 10-02514	11/28/2011	12/30/2011	(05-2962)
AMES, RICHARD N. v SHUTE, ROBERT JAMES	1295	CA 11-00701	11/29/2011	12/30/2011	(2006-6772)
BAILEY, RALIK, PEOPLE v	1376	KA 10-01963	12/05/2011	12/30/2011	(I6218)
BAKER, JOHN T. v CITY OF BUFFALO,	1423	CA 11-01408	12/07/2011	12/30/2011	(2007-4661)
BELLO, LEYDY S. v NEW YORK STATE OFFICE OF TEMPORARY,	1458	TP 11-00046	12/08/2011	12/30/2011	(139760)
BENNETT, ELIUD, PEOPLE v	1375	KA 10-01035	12/05/2011	12/30/2011	(I2005-0462)
BORDEN, BRIAN, PEOPLE v	1359	KA 10-01601	12/02/2011	12/30/2011	(I2009-143)
BROWN, NADIRAH, PEOPLE v	461	KA 09-01460	04/05/2010	12/30/2011	(I2007-2646)
BUCKMAN, CORI D., PEOPLE v	1309	KA 08-01364	11/30/2011	12/30/2011	(I2007-0797)
BURGOS, DAVID, PEOPLE v	1381	KA 10-01039	12/05/2011	12/30/2011	(I2008-0536-1)
BYRD, JOSEPH v RONEKER, JR., FREDERICK E.	1343	CA 11-00542	12/01/2011	12/30/2011	(I2008-010362)
BYRD, JOSEPH v RONEKER, JR., FREDERICK E.	1342	CA 11-00541	12/01/2011	12/30/2011	(I2008-010362)
CAGNINA, CHRISTINA G. v ONONDAGA COUNTY,	1281	CA 11-00276	11/28/2011	12/30/2011	(09-7938)
CALHOUN, DOMINICK v ILION CENTRAL SCHOOL DISTRICT,	1424	CA 11-00656	12/07/2011	12/30/2011	(00090936)
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COAPMAN, MAXWELL S., PEOPLE v	1414	KA 11-01329	12/07/2011	12/30/2011	(2009-160)
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DIPALMA, JEFFREY v STATE OF NEW YORK,	1369	CA 11-00457	12/02/2011	12/30/2011	(111910)
DUCHMANN, PETER S. v TOWN OF HAMBURG,	1324	CA 11-00778	11/30/2011	12/30/2011	(I 2010-4679)
FINNEGAN, TAMMY v THE PETER, SR. & MARY L. LIBERATORE,	1391	CA 11-01194	12/05/2011	12/30/2011	(2006-1442)
FLATTERY, CAROLYN v LALL, M.D., KAILASH C.	1276	CA 10-02483	11/28/2011	12/30/2011	(07/8035)
GAGNON, JR., JOSEPH F. v ST. JOSEPH'S HOSPITAL,	1146	CA 11-00343	10/20/2011	12/30/2011	(CA2009-001842)
GONZALEZ, LUIS A., PEOPLE v	1380	KA 08-02005	12/05/2011	12/30/2011	(I06-01-018)
GROSSO, KRISTINE v GROSSO, ROCCO	1385	CAF 11-00903	12/05/2011	12/30/2011	(F-9963-08/08A&B)
GURNETT, TRACY v TOWN OF WHEATFIELD,	1365	CA 11-00587	12/02/2011	12/30/2011	(141810)
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LESCENSKI, BONICA v WILLIAMS, MICHAEL J.	1456	CA 11-00948	12/08/2011	12/30/2011	(06-0920)
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MARINACCIO, SR., PAUL v TOWN OF CLARENCE,	1120	CA 10-00292	10/19/2011	12/30/2011	(I2006-006978)
MARINACCIO, SR., PAUL v TOWN OF CLARENCE,	1120.1	CA 11-01638	10/19/2011	12/30/2011	(I2006-006978)
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MEEK, JONATHAN J., PEOPLE v	1088	KA 08-01131	10/18/2011	12/30/2011	(I2007-0341)
MERCONE, ANTONIO v MONROE COUNTY DEPUTY SHERIFFS' ASSN,	1452	CA 11-01179	12/08/2011	12/30/2011	(2005/8826)
MILTON, RASHEED, PEOPLE v	1310	KA 10-00803	11/30/2011	12/30/2011	(I2009-0599X)
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OVERHOFF, THERESA v BAUER SERVICE, INC.,	1292	CA 11-01333	11/29/2011	12/30/2011	(I 2007-011068)
PETHICK, ROBERT v PETHICK, ELIZABETH	1448	CA 11-00838	12/08/2011	12/30/2011	(91-011341)
PMA MANAGEMENT CORP., v WHITE, ROBERT	1430	CA 11-00731	12/07/2011	12/30/2011	(2010-4076)
PMA MANAGEMENT CORP., v WHITE, ROBERT	1429	CA 11-00730	12/07/2011	12/30/2011	(2010-4076)
PRATCHETT, MICHAEL, PEOPLE v	1401	KA 10-00810	12/06/2011	12/30/2011	(I2008-2348)
PRESBYTERIAN HOME FOR CENTRAL NY, v COMMISSIONER OF HEALTH OF STATE,	1302	CA 11-01204	11/29/2011	12/30/2011	(CA2002-507)
PUTNAM-CORDOVANO, ROBIN v CSX CORPORATION,	1315	CA 11-01355	11/30/2011	12/30/2011	(2010-141476)
ROTHFUSS, ERIC v ERIE AND NIAGARA INSURANCE ASSN.,	1347	CA 11-01372	12/01/2011	12/30/2011	(2005-14406)
ROULAN, TIMOTHY A. v COUNTY OF ONONDAGA,	1275	CA 11-00086	11/28/2011	12/30/2011	(2008-2382)
ROWE, WENDI v NEW YORK STATE OFFICE OF CHILDREN,	1455	TP 11-01317	12/08/2011	12/30/2011	(K1-2010-1006)
S., PAUL v S., RITA	937	CAF 10-02368	09/09/2011	12/30/2011	(V-2235-08)
S., SHIRLEY A., MTR. OF	1364	CAF 11-01027	12/02/2011	12/30/2011	(B-10878-07)
SAUTER, JOYCE v CALABRETTA, PETER A.	1454	CA 11-01296	12/08/2011	12/30/2011	(2008-8718)
STOUGHTENGER, TORREY J. v HANNIBAL CENTRAL SCHOOL DISTRICT,	1449	CA 11-00732	12/08/2011	12/30/2011	(07-0212)
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UTILITY SERVICES CONTRACTING, INC., v MONROE COUNTY WATER AUTHORITY,	1371	CA 11-01067	12/02/2011	12/30/2011	(2009/00724)
VIA HEALTH OF WAYNE, v VANPATTEN, DAWN	1453	CA 11-01152	12/08/2011	12/30/2011	(68748)
W., NICHOLAS, MTR. OF	1270	CAF 10-02105	11/28/2011	12/30/2011	(NN-01409-11411-09)

Case Name	Cal No	Docket No	Term Date	Decided	Lower Court Number
WATSON, RANDOLPH, PEOPLE v	1377	KA 09-00863	12/05/2011	12/30/2011	(I2008-0811-1)
WRONSKI, LUCIA C. v EINACH, JUDITH	1338	CA 11-00500	12/01/2011	12/30/2011	(136288) (137459)
WRONSKI, LUCIA C. v EINACH, JUDITH	1339	CA 11-00501	12/01/2011	12/30/2011	(136288) (137459)
WRONSKI, LUCIA C. v EINACH, JUDITH	1340	CA 11-00503	12/01/2011	12/30/2011	(136288) (137459)
Y., BRIDGET K., MTR. OF	936	CAF 10-00834	09/09/2011	12/30/2011	(N-2612 to 2619-08)

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Case Name

Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
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CLYDE, RAYMOND, PEOPLE v				
404	KA 08-00850	03/03/2010	12/30/2011	(I2007-021)
COAPMAN, MAXWELL S., PEOPLE v				
1414	KA 11-01329	12/07/2011	12/30/2011	(2009-160)
HAMILTON, DERRICK v GRAHAM, HAROLD D.				
1444	KAH 11-00139	12/08/2011	12/30/2011	(2010-0699)

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CHAUTAUQUA COUNTY *****

ROWE, WENDI v NEW YORK STATE OFFICE OF CHILDREN,				
1455	TP 11-01317	12/08/2011	12/30/2011	(K1-2010-1006)
S., PAUL v S., RITA				
937	CAF 10-02368	09/09/2011	12/30/2011	(V-2235-08)
Y., BRIDGET K., MTR. OF				
936	CAF 10-00834	09/09/2011	12/30/2011	(N-2612 to 2619-08)

Total Cases Listed for this county = 3

ERIE COUNTY *****

A.J. BAYNES FREIGHT CONTRACTORS, LT, v POLANSKI, JR., NORMAN L.				
1296	CA 11-01428	11/29/2011	12/30/2011	(2009/11129)
BAKER, JOHN T. v CITY OF BUFFALO,				
1423	CA 11-01408	12/07/2011	12/30/2011	(2007-4661)
BROWN, NADIRAH, PEOPLE v				
461	KA 09-01460	04/05/2010	12/30/2011	(I2007-2646)
BYRD, JOSEPH v RONEKER, JR., FREDERICK E.				
1343	CA 11-00542	12/01/2011	12/30/2011	(I2008-010362)
BYRD, JOSEPH v RONEKER, JR., FREDERICK E.				
1342	CA 11-00541	12/01/2011	12/30/2011	(I2008-010362)
DIPALMA, JEFFREY v STATE OF NEW YORK,				
1369	CA 11-00457	12/02/2011	12/30/2011	(111910)
DUCHMANN, PETER S. v TOWN OF HAMBURG,				
1324	CA 11-00778	11/30/2011	12/30/2011	(I 2010-4679)
FINNEGAN, TAMMY v THE PETER, SR. & MARY L. LIBERATORE,				
1391	CA 11-01194	12/05/2011	12/30/2011	(2006-1442)
FLATTERY, CAROLYN v LALL, M.D., KAILASH C.				
1276	CA 10-02483	11/28/2011	12/30/2011	(07/8035)
KUEBLER, JOSEPH v KUEBLER, CHARLES R.				
1233	CA 11-01073	10/26/2011	12/30/2011	(2010-433)
MARINACCIO, SR., PAUL v TOWN OF CLARENCE,				
1120	CA 10-00292	10/19/2011	12/30/2011	(I2006-006978)
MARINACCIO, SR., PAUL v TOWN OF CLARENCE,				
1120.1	CA 11-01638	10/19/2011	12/30/2011	(I2006-006978)
MCCLOUD, ANTHONY v BETTCHER INDUSTRIES, INC.,				
1411	CA 11-01403	12/06/2011	12/30/2011	(11246/2007)
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1310	KA 10-00803	11/30/2011	12/30/2011	(I2009-0599X)
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1292	CA 11-01333	11/29/2011	12/30/2011	(I 2007-011068)
OVERHOFF, THERESA v BAUER SERVICE, INC.,				
1291	CA 11-01332	11/29/2011	12/30/2011	(I 2007-011068)
PRATCHETT, MICHAEL, PEOPLE v				
1401	KA 10-00810	12/06/2011	12/30/2011	(I2008-2348)
S., SHIRLEY A., MTR. OF				
1364	CAF 11-01027	12/02/2011	12/30/2011	(B-10878-07)

Total Cases Listed for this county = 18

GENESEE COUNTY *****

JOSEPH, III, RAYMOND E., PEOPLE v				
1335	KA 10-00123	12/01/2011	12/30/2011	(I5017)

Total Cases Listed for this county = 1

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HERKIMER COUNTY *****

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1424	CA 11-00656	12/07/2011	12/30/2011	(00090936)
CALHOUN, DOMINICK v ILION CENTRAL SCHOOL DISTRICT,				
1425	CA 11-00657	12/07/2011	12/30/2011	(00090936)

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JEFFERSON COUNTY *****

CANFIELD, JAMES P. v MCCREE, LEE A.				
1363	CAF 10-02113	12/02/2011	12/30/2011	(V-1060-08/08A)

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MONROE COUNTY *****

AJAY GLASS & MIRROR CO., INC., v AASHA G.C., INC.,				
1274	CA 10-02514	11/28/2011	12/30/2011	(05-2962)
BENNETT, ELIUD, PEOPLE v				
1375	KA 10-01035	12/05/2011	12/30/2011	(I2005-0462)
BUCKMAN, CORI D., PEOPLE v				
1309	KA 08-01364	11/30/2011	12/30/2011	(I2007-0797)
HOLT, MARK R., PEOPLE v				
1396	KA 10-01036	12/06/2011	12/30/2011	(I2006-0732)
MEEK, JONATHAN J., PEOPLE v				
1088	KA 08-01131	10/18/2011	12/30/2011	(I2007-0341)
MERCONE, ANTONIO v MONROE COUNTY DEPUTY SHERIFFS' ASSN,				
1452	CA 11-01179	12/08/2011	12/30/2011	(2005/8826)
NORTHERN TRUST, NA, v DELLEY, PATRICIA A.				
1325	CA 11-00240	11/30/2011	12/30/2011	(2007/02083)
PETHICK, ROBERT v PETHICK, ELIZABETH				
1448	CA 11-00838	12/08/2011	12/30/2011	(91-011341)
ROTHFUSS, ERIC v ERIE AND NIAGARA INSURANCE ASSN.,				
1347	CA 11-01372	12/01/2011	12/30/2011	(2005-14406)
UTILITY SERVICES CONTRACTING, INC., v MONROE COUNTY WATER AUTHORITY,				
1372	CA 11-01068	12/02/2011	12/30/2011	(2009/00724)
UTILITY SERVICES CONTRACTING, INC., v MONROE COUNTY WATER AUTHORITY,				
1371	CA 11-01067	12/02/2011	12/30/2011	(2009/00724)

Total Cases Listed for this county = 11

NIAGARA COUNTY *****

BELLO, LEYDY S. v NEW YORK STATE OFFICE OF TEMPORARY,				
1458	TP 11-00046	12/08/2011	12/30/2011	(139760)
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1359	KA 10-01601	12/02/2011	12/30/2011	(I2009-143)
GURNETT, TRACY v TOWN OF WHEATFIELD,				
1365	CA 11-00587	12/02/2011	12/30/2011	(141810)
PUTNAM-CORDOVANO, ROBIN v CSX CORPORATION,				
1315	CA 11-01355	11/30/2011	12/30/2011	(2010-141476)
WRONSKI, LUCIA C. v EINACH, JUDITH				
1338	CA 11-00500	12/01/2011	12/30/2011	(136288) (137459)
WRONSKI, LUCIA C. v EINACH, JUDITH				
1339	CA 11-00501	12/01/2011	12/30/2011	(136288) (137459)
WRONSKI, LUCIA C. v EINACH, JUDITH				
1340	CA 11-00503	12/01/2011	12/30/2011	(136288) (137459)

Total Cases Listed for this county = 7

ONEIDA COUNTY *****

GAGNON, JR., JOSEPH F. v ST. JOSEPH'S HOSPITAL,

COMBINED CIVIL/CRIMINAL DECISION INDEX FOR DECEMBER 30, 2011 TERM

Case Name

Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
1146	CA 11-00343	10/20/2011	12/30/2011	(CA2009-001842)
KAMINSKI, JOHN F., PEOPLE v				
1441	KA 10-01434	12/08/2011	12/30/2011	(II08-168)
PRESBYTERIAN HOME FOR CENTRAL NY, v COMMISSIONER OF HEALTH OF STATE,				
1302	CA 11-01204	11/29/2011	12/30/2011	(CA2002-507)
TUFF, JR., LEROY, PEOPLE v				
1331	KA 09-01810	12/01/2011	12/30/2011	(II09-052)

Total Cases Listed for this county = 4

ONONDAGA COUNTY *****

AMES, RICHARD N. v SHUTE, ROBERT JAMES				
1295	CA 11-00701	11/29/2011	12/30/2011	(2006-6772)
BURGOS, DAVID, PEOPLE v				
1381	KA 10-01039	12/05/2011	12/30/2011	(I2008-0536-1)
CAGNINA, CHRISTINA G. v ONONDAGA COUNTY,				
1281	CA 11-00276	11/28/2011	12/30/2011	(09-7938)
GROSSO, KRISTINE v GROSSO, ROCCO				
1385	CAF 11-00903	12/05/2011	12/30/2011	(F-9963-08/08A&B)
H., ALEXIS, MTR. OF				
1406	CAF 10-02304	12/06/2011	12/30/2011	(NN-873-875-10)
JACKSON, LORETTA, PEOPLE v				
1442	KA 08-02188	12/08/2011	12/30/2011	(I2008-0359-1)
NEW YORK CENTRAL MUTUAL FIRE INS., v GLIDER OIL COMPANY, INC.,				
1318	CA 11-01170	11/30/2011	12/30/2011	(2008-5012)
PMA MANAGEMENT CORP., v WHITE, ROBERT				
1430	CA 11-00731	12/07/2011	12/30/2011	(2010-4076)
PMA MANAGEMENT CORP., v WHITE, ROBERT				
1429	CA 11-00730	12/07/2011	12/30/2011	(2010-4076)
ROULAN, TIMOTHY A. v COUNTY OF ONONDAGA,				
1275	CA 11-00086	11/28/2011	12/30/2011	(2008-2382)
SAUTER, JOYCE v CALABRETTA, PETER A.				
1454	CA 11-01296	12/08/2011	12/30/2011	(2008-8718)
WATSON, RANDOLPH, PEOPLE v				
1377	KA 09-00863	12/05/2011	12/30/2011	(I2008-0811-1)

Total Cases Listed for this county = 12

ONTARIO COUNTY *****

GONZALEZ, LUIS A., PEOPLE v				
1380	KA 08-02005	12/05/2011	12/30/2011	(I06-01-018)
MARINO, JOHN C. v MARINO, SHERRY L.				
1446	CAF 10-01248	12/08/2011	12/30/2011	(V-01533-07/07A)
W., NICHOLAS, MTR. OF				
1270	CAF 10-02105	11/28/2011	12/30/2011	(NN-01409-11411-09)

Total Cases Listed for this county = 3

OSWEGO COUNTY *****

COOK, WENDY A. v OSWEGO COUNTY,				
1387	CA 10-01558	12/05/2011	12/30/2011	(2004-1726)
COOK, WENDY A. v OSWEGO COUNTY,				
1386	CA 10-01557	12/05/2011	12/30/2011	(2004-1726)
HAESSIG, BRIAN v OSWEGO CITY SCHOOL DISTRICT,				
1368	CA 11-00651	12/02/2011	12/30/2011	(10-1876)
LESCENSKI, BONICA v WILLIAMS, MICHAEL J.				
1456	CA 11-00948	12/08/2011	12/30/2011	(06-0920)
STOUGHTENGER, TORREY J. v HANNIBAL CENTRAL SCHOOL DISTRICT,				
1449	CA 11-00732	12/08/2011	12/30/2011	(07-0212)

Total Cases Listed for this county = 5

WAYNE COUNTY *****

LUMPKIN, MYRON, PEOPLE v				
1286	KA 09-01499	11/29/2011	12/30/2011	(I08-136A)

COMBINED CIVIL/CRIMINAL DECISION INDEX FOR DECEMBER 30, 2011 TERM

Case Name

Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
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VIA HEALTH OF WAYNE, v VANPATTEN, DAWN 1453	CA 11-01152	12/08/2011	12/30/2011	(68748)
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Total Cases Listed for this county = 2

WYOMING COUNTY *****

BAILEY, RALIK, PEOPLE v 1376	KA 10-01963	12/05/2011	12/30/2011	(I6218)
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Total Cases Listed for this county = 1

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

404/10

KA 08-00850

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYMOND CLYDE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Robert B. Wiggins, A.J.), rendered March 24, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts), unlawful imprisonment in the first degree and promoting prison contraband in the first degree. The judgment was reversed by order of this Court entered April 30, 2010 in a memorandum decision (72 AD3d 1538), and the People on June 3, 2010 were granted leave to appeal to the Court of Appeals from the order of this Court, and the Court of Appeals on November 22, 2011 reversed the order and remitted the case to this Court for consideration of facts and issues raised but not determined on the appeal to this Court (___ NY3d ___ [Nov. 22, 2011]).

Now, upon remittitur from the Court of Appeals and having considered the facts and issues raised but not determined on appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: In one of two prior appeals involving the instant defendant, we reversed the judgment convicting defendant following a jury trial of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [7]), and we granted defendant a new trial based upon our conclusion that "County Court erred in failing to articulate a reasonable basis on the record for its determination to restrain defendant in shackles during the trial" (*People v Clyde* [appeal No. 1], 72 AD3d 1538, 1538-1539). In the second of the two appeals, the People appealed from an order insofar as it granted that part of defendant's motion for a trial order of dismissal with respect to count one of the indictment, charging defendant with attempted rape in the first degree (§§ 110.00, 130.35 [1]). The court had reserved decision on the motion but ultimately granted it pursuant to CPL 290.10 (1), and we concluded that the court properly granted that part

of defendant's motion. The Court of Appeals reversed our orders in both appeals and remitted the matter to this Court to consider defendant's contentions raised but not addressed in the first appeal (*People v Clyde*, ___ NY3d ___ [Nov. 22, 2011]). With respect to the second appeal, the Court of Appeals remitted the matter to County Court for sentencing on the conviction of attempted rape. We thus now address only defendant's remaining contentions in the first appeal.

Defendant, while he was an inmate at Auburn Correctional Facility, attacked a civilian employee as she was walking in a corridor of the correctional facility. Defendant assaulted another civilian employee who ran to the scene after hearing the woman's cries for help.

Contrary to defendant's contention in his main and pro se supplemental briefs, the court did not violate his constitutional rights by permitting him to represent himself at trial. In his pro se supplemental brief, defendant contends that he was required to represent himself because he was told by his attorney that his attorney was not prepared for trial, and the court denied defendant's request for an adjournment. Defense counsel, however, denied that he told defendant that he was not prepared for trial. Notably, in requesting an adjournment, defendant asserted that the District Attorney's term of office would expire in a few weeks and that the current District Attorney therefore would not try the case at an adjourned date. Where, as here, the defendant's request for an adjournment sought a tactical advantage, the court properly denied the request (*see generally People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789). The record establishes that the court conducted an exceedingly thorough and searching inquiry to ensure that defendant's waiver of the right to be represented by counsel was knowing, voluntary and intelligent (*see People v Providence*, 2 NY3d 579, 582).

Contrary to defendant's further contention in his main brief, the court did not err in sentencing him as a persistent violent felony offender (*see Penal Law* § 70.08 [1] [a]). Defendant, who has been imprisoned since 1996, thus tolling the 10-year limitation period (*see* § 70.04 [1] [b] [iv], [v]), challenged only one of the two prior violent felony convictions alleged by the People to be predicate violent felony offenses, i.e., the conviction of robbery in the second degree. We conclude that the People proved beyond a reasonable doubt that defendant was convicted upon his plea of guilty of robbery in the second degree, a violent felony offense (*see* § 70.02 [1] [b]), on June 4, 1991 (*see People v Williams*, 30 AD3d 980, 983, *lv denied* 7 NY3d 852). In addition to the certificate of conviction, which is presumptive evidence of the facts stated therein (*see CPL* 60.60 [1]), the People presented a certified fingerprint comparison establishing that defendant's fingerprints records and defendant's fingerprints taken in connection with the arrest for that offense were identical. The sentence is not unduly harsh or severe. We have reviewed

defendant's remaining contention in his pro se supplemental brief and conclude that it is without merit.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

461/10

KA 09-01460

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NADIRAH BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 6, 2008. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree and endangering the welfare of a child. The judgment was affirmed by order of this Court entered April 30, 2010 in a memorandum decision (72 AD3d 1558), and defendant on September 10, 2010 was granted leave to appeal to the Court of Appeals from the order of this Court (15 NY3d 850), and the Court of Appeals on October 13, 2011 modified the order and remitted the case to this Court for further proceedings in accordance with the memorandum (17 NY3d 863).

Now, upon remittitur from the Court of Appeals and having considered the issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: In *People v Brown* (72 AD3d 1558), we previously affirmed the judgment convicting defendant following a bench trial of, inter alia, assault in the second degree (Penal Law § 120.05 [4]), i.e., reckless assault. We rejected defendant's contention that the evidence was legally insufficient to establish that she acted recklessly (*Brown*, 72 AD3d 1558), but the Court of Appeals determined that the evidence was legally insufficient with respect thereto and thus modified our order by reducing the assault conviction to assault in the third degree (§ 120.00 [3]), i.e., criminally negligent assault. The Court of Appeals remitted the case to this Court for consideration of defendant's further contention that the verdict with respect to the assault count was against the weight of the evidence (*Brown*, 17 NY3d 863, 865-866).

Upon remittitur, and viewing the evidence in light of the

elements of the crime in this bench trial (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to assault, as modified by the Court of Appeals, is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). The evidence includes the testimony of the victim and his sister, who testified that defendant had placed a pot of water on the stove to "boil some eggs." They also testified that defendant later took the pot of water off the stove and poured it onto the victim, causing steam to rise from his shirt and scalding one of his arms, and his chest and back. The medical expert testimony establishes that the victim suffered first and second degree burns over approximately 15% of his body. Although defendant gave a slightly different version of the facts and thus "an acquittal would not have been unreasonable" (*Danielson*, 9 NY3d at 348), we conclude that, "[b]ased on the weight of the credible evidence," defendant is guilty of criminally negligent assault beyond a reasonable doubt (*id.*; see *People v Romero*, 7 NY3d 633, 642-644).

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

936

CAF 10-00834

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

IN THE MATTER OF BRIDGET Y., KELLY Y.,
COLLEEN Y., AND MICHAELA Y.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, OPINION AND ORDER
PETITIONER-RESPONDENT;

KENNETH M.Y. AND RITA S., RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

LAW OFFICE OF ROBERT D. ARENSTEIN, NEW YORK CITY (RICHARD T. SULLIVAN
OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

ANDREW T. RADACK, ATTORNEY FOR THE CHILDREN, SILVER CREEK, FOR KELLY
Y. AND COLLEEN Y.

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILDREN, FREDONIA, FOR BRIDGET
Y. AND MICHAELA Y.

Appeal from an order of the Family Court, Chautauqua County
(Judith S. Claire, J.), entered March 5, 2010 in a proceeding pursuant
to Family Court Act article 10. The order, among other things,
determined the subject children to be neglected.

It is hereby ORDERED that said appeal insofar as it concerns
Colleen Y. and Kelly Y. is dismissed and the order is affirmed without
costs.

Opinion by PERADOTTO, J.: The primary issue raised in these
appeals is whether Family Court properly exercised temporary emergency
jurisdiction over the subject children pursuant to Domestic Relations
Law § 76-c (3). Kenneth M.Y. and Rita S., the parents of the subject
children (hereafter, parents), are the respondents in appeal No. 1 and
two of the four respondents in appeal No. 2. In appeal No. 1, the
parents appeal from an order of fact-finding and disposition
determining, following a fact-finding hearing, that their children are
neglected and placing the children in the custody of petitioner
Chautauqua County Department of Social Services (DSS), the petitioner
in appeal No. 1 and one of the four petitioners in appeal No. 2. In
appeal No. 2, the parents appeal from a corrected order that, inter
alia, denied their motion to vacate the order of fact-finding and
disposition in appeal No. 1. The parents contend in both appeals that
Family Court, Chautauqua County (hereafter, Family Court), lacked

subject matter jurisdiction because New Mexico is the home state of the children, the neglect took place in New Mexico, and the parents are neither domiciliaries of nor otherwise significantly connected to New York State. Under the unique circumstances of this case, we conclude that the court properly exercised temporary emergency jurisdiction pursuant to section 76-c (3) inasmuch as the children are in imminent risk of harm, and we therefore conclude that both orders should be affirmed.

Factual Background and Procedural History

This matter involves multiple proceedings commenced in New York and New Mexico by various and overlapping parties, substantial motion practice, and numerous orders entered in New York and New Mexico. Although the appeals are limited to the neglect proceeding commenced by DSS in New York, an overview of the factual background and procedural history is necessary in order to assess the propriety of Family Court's assertion of temporary emergency jurisdiction pursuant to Domestic Relations Law § 76-c (3).

Respondent Kenneth M.Y. (hereafter, father), the biological father of the children, married respondent Rita S. (hereafter, stepmother), after the children's biological mother died in September 2001. The stepmother subsequently adopted the children. At some time between February 2007 and November 2007, the parents moved with the children from Pennsylvania to New Mexico.

On August 7, 2008, the parents were arrested and were each charged with seven counts of child abuse with respect to the children. The charges stemmed from allegations that the parents left Kelly and Colleen, then 15 years old, and Michaela, then 12 years old, unsupervised in a bug-infested trailer miles away from the family residence, with limited supplies and inadequate food for a period of six to eight weeks. It was further alleged that the parents, as a form of discipline, had confined each of the children to their bedrooms or to the garage for days, weeks, or months at a time. While confined to the garage, the children received only water, bread, peanut butter and a sleeping bag, and they were permitted to use the bathroom once or twice a day.

As a result of the criminal charges, a Magistrate Court in New Mexico ordered the parents to avoid all contact with the children. In light of the no-contact order, on August 11, 2008 the parents placed the children in the care of their "maternal step-aunt and uncle" (hereafter, aunt and uncle), Robin S. and Paul S., who are respondents in appeal No. 2. Robin S. signed a "safety contract" with the New Mexico Children, Youth and Families Department (CYFD), which states that the parents voluntarily placed the children in the care of the aunt and uncle and that the parents were "still legally responsible for the [children's] well-being." Robin S. agreed to prohibit any contact between the parents and the children and to advise the Dona Ana County District Attorney's Office in the event that the parents attempted to remove the children from her care or otherwise to contact the children in any way. Robin S. transported the children to her

home in Chautauqua County, New York.

By letter dated September 22, 2008, CYFD notified the parents that it had closed its file concerning the children. The letter further stated that

"[t]he Department believes that the voluntary placement of the children with Robin S[.] was in the best interests of the children. However, [the parents] are free to make changes in that voluntary placement if they choose to as they remain the legal custodians of their children. The Department has no legal authority with respect to the children at this time. The safety contract between the Department and Robin S[.] was for placement purposes and does not prevent [the parents] from making changes to the children's placement."

According to the parents, they provided a copy of that letter to the aunt and uncle and notified them of their "intent to revoke the temporary placement of the minor children in their care and place the minor children with an appropriate guardian." The aunt and uncle refused to return the children, however, and instead filed a petition in Family Court seeking custody of the children.

On October 1, 2008, the parents were indicted in New Mexico on six counts each of felony abuse of a child in violation of New Mexico Statutes Annotated § 30-6-1 (D). Pursuant to the statute, "[a]buse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be: (1) placed in a situation that may endanger the child's life or health; (2) tortured, cruelly confined or cruelly punished; or (3) exposed to the inclemency of the weather."

On November 5, 2008, the parents filed a "Petition to Determine Custody Pursuant to the [Uniform Child Custody Jurisdiction and Enforcement Act]" (hereafter, UCCJEA) in District Court in New Mexico (hereafter, New Mexico court) against the aunt and uncle. The petition alleged, inter alia, that the parents have resided in New Mexico since February 2007, that New Mexico is the home state of the children, and that the parents had placed the children with the aunt and uncle on a temporary basis "until a more suitable placement could be made or until [the parents'] conditions of release were modified or disposed of so that the children could be reunited with them." By their petition, the parents sought to place the children in the care and custody of a different temporary guardian. The parents thus sought an order confirming that they are the legal guardians of the children, and appointing a temporary guardian for the minor children until the criminal charges against them were resolved or their conditions of release were modified.

Two days later, Family Court issued a temporary order of custody asserting temporary emergency jurisdiction pursuant to Domestic

Relations Law § 76-c and granting temporary custody of the children to the aunt and uncle. DSS thereafter commenced the instant neglect proceeding in Family Court by petition filed November 13, 2008, alleging that the parents had neglected each of the children. At a Family Court appearance on November 24, 2008, an attorney for the parents appeared for the limited purpose of contesting jurisdiction, asserting that the parents are residents of New Mexico, that the alleged neglect took place in New Mexico, and that the children remain residents of New Mexico. Family Court continued to assert temporary emergency jurisdiction over the matter.

On December 10, 2008, the New Mexico court issued an "Order Assuming Jurisdiction." The New Mexico court determined that it had jurisdiction over the parties and the subject matter, i.e., the children, noting that the children had resided with the parents in New Mexico since February 2007 and expressly stating that New Mexico is the home state of the children. With respect to the merits, the New Mexico court ruled that the parents "remain the sole legal custodians of the minor children, which includes the right to decide the temporary placement of the minor children with an appropriate guardian of their choosing." According to the New Mexico court, the parents wished to nominate Jim L. and Angela L., residents of Ohio (hereafter, Ohio guardians), as temporary guardians of the children. To that end, the New Mexico court ordered the parents to arrange for a home study of the Ohio guardians, and to pay for the cost of the home study. Finally, the New Mexico court ruled that "[t]he issue of permanent custody is hereby reserved pending resolution of the criminal charges. Following resolution of the criminal proceeding, the Court may appoint a guardian ad litem herein and may conduct in camera interviews of the minor children." The parents sought to register the above New Mexico order in Family Court. At a December 15, 2008 appearance, Family Court indicated that it had some concerns relative to relinquishing jurisdiction to the New Mexico court. Specifically, the Family Court judge indicated that

"[w]hat concerns me is, apparently, there is no neglect proceeding in the State of New Mexico. There are criminal proceedings against these parents, but for whatever reason, there was no neglect proceeding . . . [W]ith criminal charges pending, and the children being the ones who would be put in the position of testifying, should there be a criminal trial, . . . the children are left with no legal remedies. There hasn't even been a law guardian appointed . . . for these children in the State of New Mexico. And the parents are given full authority to do whatever, and place these children wherever they so choose."

By order entered January 9, 2009, the New Mexico court approved the home study and ordered the immediate transfer of the children to the Ohio guardians. The New Mexico court reiterated that the parents "are the sole legal guardians of the minor children and maintain their constitutional right to management and control of their minor

children," and approved "[t]he parents' selection of placement guardian for their minor children." In light of that order, the parents requested that Family Court issue an order (1) registering and enforcing the New Mexico order assuming jurisdiction; (2) dismissing the New York custody proceeding; (3) dismissing the New York neglect proceeding; (4) vacating the temporary order of custody; and (5) enforcing the New Mexico transfer order.

DSS thereafter sought an award of temporary custody of the children. In support thereof, DSS submitted an affidavit of a psychologist who had counseled each of the children. The psychologist averred that the children "have related very credible stories of child abuse and neglect," and that the parents demonstrated a "disturbing pattern of isolating these children from each other, from children their age, and from their mother's relatives." With respect to the proposed move to Ohio, the psychologist averred that

"[a]ny change in placement for the [children] that is instigated by their father or adoptive mother carries the implicit message to these girls that they are still under the control of their father, and therefore still at risk for abuse and maltreatment . . . Removing them from an emotionally secure family environment, the friends they have recently established, and a school environment which has been affirming for them, must be considered a further emotional deprivation for these girls, and a demonstration to the girls that they remain at risk of capricious, abusive and insensitive treatment by their father. Accordingly, by generating a constant state of anxiety and uncertainty for them, such a move would result in a perpetuation of the emotional abuse and deprivation that these children suffered under the care of their father and adoptive mother."

Family Court granted temporary custody of the children to DSS, concluding that the basis for asserting emergency jurisdiction continued to exist. Family Court explained that, "[w]hen there is a placement out of state in a situation where parents are facing criminal charges, and there is no underlying custody order, and no law guardian appointed for the children, . . . then the children are left without protection, plain and simple."

At the fact-finding hearing on the neglect petition, DSS introduced testimony from each of the children as well as from the maternal step-aunt, Robin S., and the children's psychologist, and Family Court received in evidence records from the New Mexico Police Department and financial records relative to the father. Of note, the financial records reflect that the father, an orthopedic surgeon, had an annual income in excess of \$280,000. The parents failed to appear at the hearing and subsequently moved to dismiss the neglect proceeding for lack of personal and subject matter jurisdiction.

By the order in appeal No. 1, Family Court implicitly denied the parents' motion to dismiss the neglect proceeding by issuing an order of fact-finding and disposition, which determined that the parents neglected each of the four children, ordered that the children be placed in the custody of DSS, and adopted the permanency plan proposed by DSS. By the corrected order in appeal No. 2, Family Court, *inter alia*, denied the parents' motion to vacate the order of fact-finding and disposition.

Discussion

We note at the outset that the two older children have attained the age of 18 during the pendency of these appeals, and we therefore dismiss as moot the appeals insofar as they concern those two children (*see Matter of Anthony M.*, 56 AD3d 1124, *lv denied* 12 NY3d 702).

Initially, we agree with the parents that, absent the exercise of temporary emergency jurisdiction, Family Court would lack subject matter jurisdiction over the neglect proceeding. Pursuant to New York's version of the UCCJEA (Domestic Relations Law art 5-A), Domestic Relations Law § 76 (1) "is the exclusive jurisdictional basis for making a child custody determination by a court of this state" (§ 76 [2]). A "[c]hild custody determination" is defined as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order" (§ 75-a [3]).

Domestic Relations Law § 76 (1) provides in relevant part that,

"[e]xcept as otherwise provided in section [76-c] of this title [pertaining to temporary emergency jurisdiction], a court of this state has jurisdiction to make an initial child custody determination only if: (a) this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state"

A child's "[h]ome state" is "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding" (§ 75-a [7]). The UCCJEA broadly defines "[c]hild custody proceeding" as "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue," including "a proceeding for divorce, separation, *neglect*, *abuse*, dependency, *guardianship*, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear" (§ 75-a [4] [emphasis added]).

Here, the neglect proceeding commenced by DSS falls within the

UCCJEA's expansive definition of a child custody proceeding (see Domestic Relations Law § 75-a [4]). Further, there is no question that New Mexico, not New York, was the home state of the children at the time of commencement of the neglect proceeding. When the neglect proceeding was commenced in November 2008, the children had been living in New York for only three months. Prior to that time, the children lived with the parents in New Mexico for at least 10 consecutive months, i.e., from November 2007 until August 2008. Thus, New Mexico remained the home state of the children when the neglect proceeding was commenced in New York, and Family Court lacked jurisdiction to make an initial child custody determination (see § 76 [1] [a], [2]; see also *Matter of Gharachorloo v Akhavan*, 67 AD3d 1013).

In addition, Domestic Relations Law § 76-e states that, "[e]xcept as otherwise provided in section [76-c] of this title[, i.e., temporary emergency jurisdiction], a court of this state may not exercise its jurisdiction under this title if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child[ren] has been commenced in a court of another state having jurisdiction substantially in conformity with this article" Here, at the time of commencement of the neglect proceeding in New York, the parents had already commenced a custody proceeding in New Mexico. Thus, inasmuch as a custody proceeding was pending in the children's home state when the neglect petition was filed, New York was precluded from exercising jurisdiction except in an emergency (see § 76-e [1]; see generally *Sobie*, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law § 76-e).

We conclude, however, that Family Court properly exercised temporary emergency jurisdiction pursuant to Domestic Relations Law § 76-c. In the absence of subject matter jurisdiction pursuant to section 76 (1), section 76-c provides that a New York court has "temporary emergency jurisdiction if the child[ren are] present in this state and the child[ren] ha[ve] been abandoned or it is necessary in an emergency to protect the child[ren], a sibling or parent of the child[ren]" (§ 76-c [1]; see *Matter of Hearne v Hearne*, 61 AD3d 758, 759). There is no question that the children were present in New York at all relevant times in which Family Court exercised temporary emergency jurisdiction. We are of course mindful that "the mere physical presence of the child[ren] in this [s]tate is not a sufficient basis per se for the exercise of jurisdiction . . . There must, in addition, be an emergency that is real and immediate, and of such a nature as to require [s]tate intervention to protect the child[ren] from imminent physical or emotional danger" (*Matter of Severio P. v Donald Y.*, 128 Misc 2d 539, 542; see generally *Matter of Vanessa E.*, 190 AD2d 134, 137; *Matter of Michael P. v Diana G.*, 156 AD2d 59, 66, lv denied 75 NY2d 1003; *De Passe v De Passe*, 70 AD2d 473, 474-475).

The duration of an order rendered pursuant to temporary emergency jurisdiction depends upon whether there is an enforceable child custody determination or a child custody proceeding pending in a court with jurisdiction (see *Matter of Callahan v Smith*, 23 AD3d 957, 958 n

2; compare Domestic Relations Law § 76-c [2], with [3]). Here, a child custody proceeding had been commenced in New Mexico when Family Court first asserted temporary emergency jurisdiction. Thus, Family Court's exercise of temporary emergency jurisdiction is governed by section 76-c (3), which provides that

"any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under sections [76] through [76-b] of this title. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires, provided, however, that where the child who is the subject of a child custody determination under this section is in imminent risk of harm, any order issued under this section shall remain in effect until a court of a state having jurisdiction under sections [76] through [76-b] of this title has taken steps to assure the protection of the child."

In this case, Family Court first exercised temporary emergency jurisdiction on November 7, 2008, when it issued a temporary order of custody in the proceeding commenced by the aunt and uncle. In our view, there is no question that an emergency existed at that point in time. On September 22, 2008, CYFD notified the parents' attorney that it had closed its file concerning the children and that the parents, as the "legal custodians of their children," were "free to make changes in th[eir] voluntary placement." Shortly thereafter, the parents sent the stepmother's father, who lived with them, to New York in an attempt to take the children to an undisclosed address in New Mexico. On November 5, 2008, the parents commenced a custody proceeding in New Mexico seeking, inter alia, to place the children in the care and custody of yet another temporary guardian. According to the aunt and uncle, the parents also made "a threat . . . immediately before the [New Mexico] Grand Jury Proceedings where the children were told that they would be taken to an unknown location." The parents initially sought to appoint the father's office manager as temporary guardian for the children. They then nominated the Ohio guardians, allegedly "long time and close friends of the family," as the temporary guardians of the children. The children told their attorneys and Family Court that they had never met the Ohio guardians. We thus conclude that Family Court properly acted to protect the children from imminent danger, i.e., the likelihood of returning the children to the home at which the abuse and neglect occurred or to another guardian under the control of the parents. At that point in time, no New Mexico court had issued an order protecting the children, and CYFD - the New Mexico equivalent of DSS - had determined that it had "no legal authority with respect to the children."

The orders challenged on appeal, however, were issued after the

parents had obtained two orders in New Mexico: (1) the December 10, 2008 order assuming jurisdiction, and (2) the January 9, 2009 order approving the home study and ordering the immediate transfer of the children. The propriety of Family Court's orders thus depends upon whether this case falls within the narrow exception set forth in Domestic Relations Law § 76-c (3), which provides that, "where the child[ren] who [are] the subject of a child custody determination under this section [are] in imminent risk of harm, any order issued under this section shall remain in effect until a court [of the home state] has taken steps to assure the protection of the child[ren]." The Practice Commentaries caution that courts "should invoke the exception only rarely and in the most compelling circumstances" (Sobie, Practice Commentaries, § 76-c, at 517), and that "[t]he authority granted by the exception is best . . . reserved for the most egregious, unusual case" (*id.* at 519). We conclude that this case falls within that category.

Here, the parents have each been indicted for six counts of felony child abuse in New Mexico as a result of their conduct in, *inter alia*, locking the children in a garage for days or weeks at a time and abandoning three of the four children in a trailer miles from the family residence for six to eight weeks in the summer of 2008. The police report filed in New Mexico states that the trailer was "not suitable for teenagers to be living in" and contained only a single chair and no beds. The father locked the trailer door from the outside so that the children had to climb out of a window to exit the trailer. When the police arrived at the scene, there was no food in the refrigerator or the pantry, and there was a single jar of peanut butter on the counter.

Confining the children to the trailer was the culmination of what appears to have been years of escalating abuse and neglect following the father's marriage to the stepmother in 2003. Colleen testified at the fact-finding hearing that, before their mother's death, the children were enrolled in public school, regularly attended church, and engaged in activities such as sports, ballet and Girl Scouts. Upon the father's remarriage, the activities ceased and the children were enrolled in parochial schools. After frequently changing schools for no reason apparent on the record before us, the children were removed from school and were home-schooled by the stepmother. During their time in New Mexico, the children had no friends and did not participate in any sports or other extracurricular activities outside the home.

The children were routinely punished by being confined to their bedrooms and/or the garage. The garage contained a table, a lamp, and a "bean bag" chair. While so confined, the children were fed only water, peanut butter, and bread, and they were permitted to leave only once or twice a day when their father arrived to take them to the bathroom. On one occasion, Michaela was confined to the garage for "about three months" because she failed to complete her home-school work assignment. Michaela testified that, if she could not wait to use the bathroom, she used a "dog pen" on the side of the house. Kelly testified that her father left her in an unoccupied townhouse

for "a couple of weeks." The townhouse was unfurnished, and Kelly slept on the carpet. The father only allowed her to bring some clothes, peanut butter and bread, and a piece of cloth that she used as both a blanket and a towel. When the father brought Kelly back to the house, he placed her in the garage for another two weeks.

At some point, the parents informed Colleen, Kelly and Michaela that they were going back to school, but that they would have to wear "uniforms," i.e., "a pair of sweatpants and a T-shirt" in colors that their father had selected. The three girls then began taking money out of their stepmother's purse to purchase school clothes. When the parents discovered what the girls were doing, they called the police and the girls were arrested. About a week later, the father moved Colleen, Kelly and Michaela into the trailer in the middle of the night. The father brought peanut butter, bread, flour, and a bag of dried pinto beans as food for the children, and gave them a cellular telephone that was programmed to call only the parents. When the bread ran out, the children mixed flour and water to make "flat bread." The children testified that the trailer had broken windows and was infested with cockroaches, ants, beetles, and spiders, and that its only furnishings were one or two sleeping bags, two blankets, and a single chair. According to Family Court, photographs of the trailer depicted "a very bleak looking trailer, broken tiles, exposed nails, no furniture, and [a] mostly empty refrigerator, and totally empty freezer above, in sharp contrast to the house."

After the parents were arrested, CYFD completed an intake report concerning the children, which lists emotional and physical neglect, inadequate food, and close confinement. CYFD, however, apparently closed its file on the children without taking any further action after the aunt and uncle assumed physical custody of the children pursuant to the August 2008 "safety contract." Indeed, the aunt testified at the neglect hearing that she never heard from CYFD after the children moved to New York.

With respect to the first of the two New Mexico orders issued before the orders challenged on appeal, we note that, despite the criminal charges, the substantial evidence of abuse and neglect, and the no-contact order, the New Mexico court allowed the parents to select new guardians for the children and ruled that it would not address the issue of permanent custody until after the criminal charges had been resolved. The order provided that the New Mexico court "may appoint a guardian ad litem herein and may conduct in camera interviews of the minor children" following resolution of the criminal proceeding (emphasis added). The order further provided that the parents "shall not in any manner communicate with the minor children or cause any third party or their agent to communicate in any manner with the minor children *regarding this matter or the criminal matter*" (emphasis added). The New Mexico court thus left open the possibility of communication or contact between the parents and the children on other subjects. Although the New Mexico court ordered the parents to "continue to abide by the no[-]contact order or any further order" issued in the criminal proceeding, the court noted that "[t]here is no other order limiting [their] parental rights to the

minor children." With respect to the second of the two New Mexico orders, the New Mexico court, after reviewing a home study arranged and paid for by the parents, reiterated that the parents "maintain their constitutional right to management and control of their minor children," approved the parents' "selection of placement guardian[s] for their minor children," and ordered the immediate transfer of the children to the Ohio guardians. Thus, without any input from CYFD or any other agency charged with the protection of children, an attorney for the children, or the children themselves, the New Mexico court ordered that the children be transferred from family members to non-relatives who were strangers to them and who resided in a state with which they had no connection, all at the behest of the parents who had abused them.

We find it particularly troubling that CYFD failed to commence an abuse or neglect proceeding against the parents and that the New Mexico court failed to appoint an attorney for the children to advocate on their behalf pursuant to New Mexico law. The Children's Code of the New Mexico statutes provides that its overriding purpose is to "provide for the care, protection and wholesome mental and physical development of children coming within [its] provisions," and specifies that "[a] child's health and safety shall be the paramount concern" (NM Stat Ann § 32A-1-3 [A]). The Children's Code further articulates as one of its purposes "the cooperation and coordination of the civil and criminal systems for investigation, intervention, and disposition of cases, to minimize interagency conflicts and to enhance the coordinated response of all agencies to achieve the best interests of a child victim" (§ 32A-1-3 [F] [emphasis added]). As relevant to this case, New Mexico Statutes Annotated § 32A-4-4 (A) provides that abuse and neglect complaints shall be referred to CYFD, which "shall conduct an investigation and determine the best interests of the child[ren] with regard to any action to be taken." Upon completion of its investigation, CYFD is required either to "recommend or refuse to recommend the filing of [an abuse and/or neglect] petition" (§ 32A-4-4 [C]). The Children's Code further provides that, "[a]t the inception of an abuse and neglect proceeding, the court shall appoint a guardian ad litem for a child under fourteen years of age. If the child is fourteen years of age or older, the court shall appoint an attorney for the child" (§ 32A-4-10 [C] [emphasis added]). The New Mexico Court of Appeals has stated that, "[a]s a general rule, the court, upon being apprised that a minor is unrepresented by counsel, has a duty to appoint a guardian ad litem or an attorney to protect the interests of such child" (*State of New Mexico ex rel. Children, Youth & Families Dept. v Lilli L.*, 121 NM 376, 378, 911 P2d 884, 886), and that "a failure to appoint either counsel or a guardian ad litem to protect the interests of a minor may constitute a denial of due process, thereby invalidating such proceedings" (121 NM at 379, 911 P2d at 887).

Here, as noted above, CYFD apparently failed to conduct the statutorily mandated investigation into the abuse and neglect allegations against the parents (see NM Stat Ann § 32A-4-4 [A]), and the agency also failed either to recommend or to refuse to recommend the filing of an abuse or neglect petition against them (see § 32A-4-4

[C]). Instead, CYFD simply transferred the children to New York and closed its file, leaving the children's fate to the wishes of their alleged abusers. In addition, upon asserting jurisdiction over the case, the New Mexico court failed to appoint a guardian ad litem or attorney for the children to "represent and protect the best interests of the child[ren] in [the] court proceeding" (§ 32A-1-4 [J]; see § 32A-4-10). The New Mexico court then proceeded to change the children's placement at the request of the parents without enabling the children to have a voice in the courtroom and without any consideration, let alone determination, of the children's best interests.

As previously noted herein, the children's psychologist averred in an affidavit presented to Family Court that the parents displayed a "disturbing pattern of isolating these children from each other, from children their age, and from their mother's relatives," and he opined that moving the children to Ohio at the behest of the parents "would result in a perpetuation of the emotional abuse and deprivation that the[] children suffered under the care of their father and adoptive mother".

Notably, the Ohio guardians were the parents' second choice, and thus both their first and second choices for guardians were non-relatives, the first being the father's office manager. As the Attorney for the Children argued in Family Court, the parents' actions in attempting to remove the children from their New York placement constituted "a continuing pattern of abuse to isolate [the children] from family members," and she and the psychologist similarly concluded that the parents' actions communicated to the children that they remain under the control of their abusers.

In light of the above-described circumstances, including the absence of a neglect proceeding in New Mexico and the refusal of the New Mexico court to act to protect the children pending the resolution of the criminal charges against the parents, we conclude that Family Court properly continued to exercise temporary emergency jurisdiction of the children after the issuance of the two New Mexico orders. In our view, the children remained "in imminent risk of harm," namely, emotional abuse inflicted by the parents, and it appears from the record before us that New Mexico has not acted to "assure the protection of the child[ren]" (Domestic Relations Law § 76-c [3]; see generally *Matter of Maureen S. v Margaret S.*, 184 AD2d 159, 165; *Matter of Janie C.*, 31 Misc 3d 1235[A], 2011 NY Slip Op 51007[U], *2-3; *Severio P.*, 128 Misc 2d at 545).

The parents further contend that, even if Family Court properly exercised temporary emergency jurisdiction in the neglect proceeding, such jurisdiction did not permit Family Court to enter an order of disposition. We reject that contention. Domestic Relations Law § 76-c (2), which applies when a child custody proceeding has not been commenced in the home state, expressly contemplates that an order entered pursuant to the exercise of temporary emergency jurisdiction may become a final child custody determination. Pursuant to section 76-c (2), "[i]f a child custody proceeding has not been or is not

commenced in a court of a state having jurisdiction under . . . this title, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child." Domestic Relations Law § 76-c (3), however, which is previously quoted herein and governs the instant case in light of the custody proceedings in New Mexico, contains no such provision. Thus, orders issued pursuant to section 76-c (3) are required to expire at a date certain unless the "imminent risk of harm" exception applies, in which case the order applies "until [the home state] has taken steps to assure the protection of the child."

The parents contend that the absence of language pertaining to a final determination in Domestic Relations Law § 76-c (3) implies that a court exercising temporary emergency jurisdiction pursuant to that section is unable to issue final determinations. Even assuming, *arguendo*, that the parents are correct, we conclude that Family Court is not thereby precluded from issuing the order of disposition in appeal No. 1. Although an order of fact-finding and disposition is a final order for purposes of appellate review (*see Ocasio v Ocasio*, 49 AD2d 801; *see generally Matter of Gabriella UU.*, 83 AD3d 1306; *Matter of Mitchell WW.*, 74 AD3d 1409, 1411-1412), it is not a final or permanent "child custody determination" (§ 76-c [2], [3] [emphasis added]). Rather, the order in appeal No. 1 here simply placed the children in the custody of DSS, scheduled a permanency hearing, and approved a proposed plan for the children. Indeed, a placement with DSS is never intended to be a final or permanent custodial relationship. In cases such as this in which a child is placed with DSS pursuant to Family Court Act § 1055, the court retains continuous jurisdiction over the case (*see* § 1088), and the child's placement is reviewed at permanency hearings conducted every six months (*see* § 1089 [a] [2], [3]). Such jurisdiction continues until the child is "discharged from placement" (§ 1088), *i.e.*, until permanency is achieved (*see* Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1086, at 193). As the Practice Commentaries explain, Family Court "maintains complete continuing jurisdiction whenever a child has been placed outside his [or her] home. Accordingly, the case remains on the Court's calendar - *there is no final disposition until permanency has been ordered* - and the Court may hear the matter upon motion at any time. There is no need or requirement to wait until the next scheduled hearing date" (Sobie, Practice Commentaries, Family Ct Act § 1088, at 199-200 [emphasis added]). The parents therefore may at any time petition for the return of their children and/or move to vacate or terminate the children's placement with DSS (*see* Sobie, Practice Commentaries, Family Ct Act § 1086; *see generally* § 1088).

Thus, the order of fact-finding and disposition in appeal No. 1, which concerns placement rather than custody of the children, does not conflict with New Mexico's order, which provides that the "issue of permanent custody is hereby reserved pending resolution of the criminal charges" against the parents. Upon resolution of the criminal charges or when the emergency abates, *i.e.*, when the New Mexico court ensures that the children are not "in imminent risk of harm" (Domestic Relations Law § 76-c [3]), the children's placement

with DSS may be revisited and the issue of permanent custody addressed. Until then, the order of fact-finding and disposition simply maintains the status quo - placement in the custody of DSS - with periodic judicial review to assess any changed circumstances. Inasmuch as the order of fact-finding and disposition does not constitute a final custody determination, it cannot be said that Family Court exceeded the scope of its temporary emergency jurisdiction in issuing the order in appeal No. 1.

Conclusion

We have reviewed the parents' remaining contentions and conclude that they are without merit. Accordingly, we conclude that both orders should be affirmed.

FAHEY and SCONIERS, JJ., concur with PERADOTTO, J.; SMITH, J.P., dissents in part and votes to reverse in accordance with the following Opinion, in which LINDLEY, J., concurs: We respectfully dissent in part because we cannot agree with the majority that Family Court properly exercised temporary emergency jurisdiction over the subject children. Initially, we agree with the majority that the appeal must be dismissed with respect to the two older children because they are no longer under the age of 18, and thus that is the basis for our dissenting only in part. We also agree with the majority that this proceeding falls within the expansive definition of a child custody proceeding set forth in the Uniform Child Custody Jurisdiction and Enforcement Act ([UCCJEA]; see Domestic Relations Law § 75-a [4]), and that there is no question that New Mexico, not New York, was the home state of the children at the time of commencement of the neglect proceeding at issue in this appeal. In addition, we agree with the majority's further conclusion that, "inasmuch as a custody proceeding was pending in the children's home state when the neglect petition was filed, New York was precluded from exercising jurisdiction except in an emergency," as defined in section 76-c. We cannot agree, however, that such an emergency existed here.

We begin with the proposition that "section 76 of the Domestic Relations Law forms the foundation of the UCCJEA and governs virtually every custody proceeding. It is designed to eliminate jurisdictional competition between courts in matters of child custody" (*Matter of Michael McC. v Manuela A.*, 48 AD3d 91, 95, *lv dismissed* 10 NY3d 836; see *Matter of Felty v Felty*, 66 AD3d 64, 69-70). Even under the UCCJEA's predecessor statute, jurisdiction could be established by demonstrating that the state at issue was the children's home state, but the "UCCJEA elevates the 'home state' to paramount importance in both initial custody determinations and modifications of custody orders" (*Michael McC.*, 48 AD3d at 95). Under the pertinent section of the UCCJEA, a New York court "has temporary emergency jurisdiction if the child is present in this state and . . . it is necessary in an emergency to protect the child, a sibling or parent of the child" (§ 76-c [1]; see *Matter of Santiago v Riley*, 79 AD3d 1045). Thus, we may uphold the orders on appeal only if the children require protection as the result of a qualifying emergency.

Although there is scant case law under the UCCJEA, the case law with respect to the predecessor statute to the UCCJEA provides that "New York can exercise jurisdiction [only] in an emergency situation 'vitaly and directly' affecting the health, welfare, and safety of the subject child" (*Matter of D'Addio v Marx*, 288 AD2d 218, 219, quoting *Martin v Martin*, 45 NY2d 739, 742, *rearg denied* 45 NY2d 839). New York enacted the UCCJEA, revising the preexisting statute, to promote uniformity concerning child custody disputes regarding children who move from one state to another (see *Felty*, 66 AD3d at 69-70; *Stocker v Sheehan*, 13 AD3d 1, 4), and thus a finding of emergency jurisdiction under the UCCJEA requires a similar showing as that required under the predecessor statute. Indeed, the majority also relies upon cases decided under the predecessor statute, and it therefore appears that we are in agreement with the majority that those cases are still controlling with respect to the definition of an emergency for jurisdictional purposes.

Pursuant to that case law, it is settled that, although "the word 'emergency' may, arguably, be construed in a flexible manner so as to furnish a predicate for jurisdiction, in practice an emergency situation is extremely difficult to demonstrate. Thus, in order to establish an emergency, there must, in effect, be evidence of imminent and substantial danger to the child[ren] in question" (*Matter of Michael P. v Diana G.*, 156 AD2d 59, 66, *lv denied* 75 NY2d 1003; see *Matter of Hernandez v Collura*, 113 AD2d 750, 752). Therefore, New York courts may assert temporary emergency jurisdiction only "if the immediate physical and mental welfare of children require[s], vitaly and directly," that they do so (*Martin*, 45 NY2d at 742; see *Matter of Vanessa E.*, 190 AD2d 134, 137). Furthermore, the UCCJEA Practice Commentaries continue to caution that courts "should invoke the exception only rarely and in the most compelling circumstances" (Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law § 76-c, at 517). "The authority granted by the exception is best left unused, or at least reserved for the most egregious, unusual case" (*id.* at 519).

In general, a risk of imminent harm arises when the children are to be returned to the custody of a person who abused them, raising a strong possibility that the abuse would recur (see *e.g. Matter of Woods v Woods*, 56 AD3d 789; *Matter of Callahan v Smith*, 23 AD3d 957; *Vanessa E.*, 190 AD2d at 137-138). If this were such a case, then the majority's decision would be proper. As the majority points out, the children's parents are charged with bizarre and dangerous acts of abuse, and any action that would require that the children be returned to them would place the children in imminent risk of harm. The reality of this situation, however, is that there is no imminent danger that the children will be returned to the parents or placed under their control.

As the majority correctly notes, prior to the issuance of the orders on appeal by the New York Family Court, the New Mexico court issued several orders, including one that assumed jurisdiction over custody of the children and another that transferred custody of them to a family in Ohio. The majority fails to note, however, that the

latter order contained an order of protection prohibiting the parents from communicating with the children in any manner, including through third parties, regarding the custody case or the criminal proceedings. The New Mexico court also ordered the parents to attend a court-approved Parent Education Workshop, approved a home study of the Ohio family by a licensed social worker and, most importantly, ordered that the children shall not be removed from the care of that family, or from a 100-mile radius of the Ohio family's residence without the prior approval of the New Mexico court. Consequently, there is no imminent risk that the parents will continue their alleged abuse of the children, and the majority's conclusion that the New Mexico court acted "without any consideration, let alone determination, of the children's best interests" is simply incorrect.

Similarly, the other risk upon which the majority relies in determining that Family Court properly exercised emergency jurisdiction, i.e., its conclusion that there is an imminent risk that the children will suffer further emotional abuse inflicted by the parents, does not "vitaly and directly" impact the immediate physical or mental welfare of the children (*Martin*, 45 NY2d at 742). That conclusion is based upon the testimony of psychological experts that the children will suffer stress from having to move to a state with which they are not familiar and from living with people that they do not know, thus causing them to feel that they are under the control of their abusive parents. Although the move to Ohio may be stressful for the children, permitting Family Court to exercise temporary emergency jurisdiction under these circumstances would eviscerate the statute because any interstate jurisdiction question necessarily involves the likelihood of an interstate relocation. Inasmuch as there is no imminent danger that the children will be under the control of their parents, and in view of the fact that the New Mexico court retains control over any possible future contact that the parents will have with the children, we conclude that there is no imminent danger of abuse within the meaning of the statute.

Finally, we conclude that Family Court has issued an order that is in conflict with an order of the children's home state, and which has no provision for the eventual transfer of jurisdiction to the home state. Family Court has thereby created a jurisdictional competition rather than eliminating such a competition, the latter of which is required by the UCCJEA. "The best interest[s] of the children is, of course, the prime concern . . . That the children's best interest[s] must come first, however, does not mean that the courts of this State should disregard the prior [New Mexico order] and determine, as if writing on a clean slate, who would make a better [custodian] . . . If their [parents are] unfit parent[s], that is a matter for the [New Mexico] courts to decide . . . A different case would be presented if the immediate physical and mental welfare of [the] children required, vitaly and directly, that the children be retained in this jurisdiction and that the courts in this State determine who shall have custody of them. Factors raising those difficult issues are not present in this case. It is the courts of [New Mexico] that should adjudicate the ultimate custody dispute if 'priority . . . be accorded to the judgment of the court of greatest concern with the welfare of

the children' . . . There is nothing presented in this case which suggests that the courts of the sister State are not competent or ready to do justice between the parties and for the children" (*Martin*, 45 NY2d at 741-742). Accordingly, we would reverse the orders on appeal insofar as they apply to the children under the age of 18 and grant the parents' motion to dismiss the proceeding with respect to them for lack of jurisdiction.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

937

CAF 10-02368

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

IN THE MATTER OF PAUL S. AND ROBIN S., AS
PERSONS HAVING PLACEMENT OF COLLEEN Y.,
KELLY Y., MICHAELA Y., AND BRIDGET Y.,
PETITIONERS-RESPONDENTS,

V

OPINION AND ORDER

RITA S. AND KEN Y., RESPONDENTS-APPELLANTS.

IN THE MATTER OF KATHERINE E.Y.,
PETITIONER-RESPONDENT,

V

ROBIN S., RESPONDENT,
RITA S., KEN Y., RESPONDENTS-APPELLANTS,
AND PAUL S., RESPONDENT.

IN THE MATTER OF COLLEEN Y., KELLY Y.,
MICHAELA Y., AND BRIDGET Y.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

KENNETH Y. AND RITA S., RESPONDENTS-APPELLANTS.

IN THE MATTER OF BRIDGET K.Y., COLLEEN A.Y.,
KELLY T.Y., AND MICHAELA M.Y.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

KENNETH Y. AND RITA S., RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

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JANE E. LOVE, MAYVILLE, FOR PETITIONER-RESPONDENT CHAUTAUQUA COUNTY
DEPARTMENT OF SOCIAL SERVICES.

ANDREW T. RADACK, ATTORNEY FOR THE CHILDREN, SILVER CREEK, FOR KELLY
Y. AND COLLEEN Y.

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILDREN, FREDONIA, FOR BRIDGET Y. AND MICHAELA Y.

Appeal from a corrected order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered August 12, 2010 in a proceeding pursuant to Family Court Act article 10. The corrected order, inter alia, denied the motion of Rita S. and Kenneth Y. to vacate the order of fact-finding and disposition entered March 5, 2010.

It is hereby ORDERED that said appeal insofar as it concerns Colleen Y. and Kelly Y. is dismissed and the corrected order is affirmed without costs.

Same Opinion by PERADOTTO, J., as in *Matter of Bridget Y.* ([appeal No. 1] ___ AD3d ___ [Dec. 30, 2011]).

FAHEY and SCONIERS, JJ., concur with PERADOTTO, J.; SMITH, J.P., dissents in part and votes to reverse in accordance with the same dissenting Opinion as in *Matter of Bridget Y.* ([appeal No. 1] ___ AD3d ___ [Dec. 30, 2011]), in which LINDLEY, J., concurs.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1088

KA 08-01131

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JONATHAN J. MEEK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 25, 2008. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and sodomy in the first degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for resentencing.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [former (a)]) and three counts of sodomy in the first degree (former § 130.50 [3]). Defendant contends that Supreme Court erred in denying his motions to sever the counts charging possessing a sexual performance by a child from the other counts of the indictment. We conclude that any such error is harmless inasmuch as the evidence of defendant's guilt was overwhelming and there was no significant probability that defendant would have been acquitted of the counts in question but for the alleged error (see *People v Serrano*, 74 AD3d 1104, 1107, lv denied 15 NY3d 895; *People v Newton*, 298 AD2d 896, lv denied 99 NY2d 562; see generally *People v Crimmins*, 36 NY2d 230, 241-242). The court dismissed several counts charging defendant with possessing a sexual performance by a child (§ 263.16), and the jury acquitted defendant of the remainder of the counts charging him with that crime, as well as two counts of sodomy in the first degree (former § 130.50 [1], [4]; see *People v Jones*, 301 AD2d 678, 680, lv denied 99 NY2d 616; see generally *People v Rodriguez*, 68 AD3d 1351, 1353, lv denied 14 NY3d 804).

We reject defendant's further contention that the imposition of

consecutive sentences on each of the three sodomy counts was illegal, inasmuch as each of those counts charged a separate act involving the same victim (see *People v Ramirez*, 89 NY2d 444, 451; *People v Laureano*, 87 NY2d 640, 643; see also *People v Lanfair*, 18 AD3d 1032, 1033-1034, *lv denied* 5 NY3d 790). As the People correctly concede, however, the court erred in imposing determinate sentences on the four counts of which defendant was convicted inasmuch as indeterminate sentences should have been imposed pursuant to Penal Law § 70.02 (former [3] [a], [4]). We therefore modify the judgment by vacating the sentence imposed, and we remit the matter to Supreme Court for resentencing.

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

1120.1

CA 11-01638

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

PAUL MARINACCIO, SR., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF CLARENCE, DEFENDANT,
AND KIEFFER ENTERPRISES, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, BUFFALO, PHILLIPS LYTLE LLP (MICHAEL B. POWERS
OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOSEPH J. MANNA OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered April 28, 2011. The order settled the record for an appeal from a judgment entered November 24, 2009.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the opposing papers and reply papers with respect to plaintiff's motion in limine seeking to preclude the testimony of an appraisal expert for defendant Town of Clarence and the order determining that motion shall be included in the record on appeal in appeal No. 1 and as modified the order is affirmed without costs.

Same Memorandum as in *Marinaccio v Town of Clarence* ([appeal No. 1] ___ AD3d ___ [Dec. 30, 2011]).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1120

CA 10-00292

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

PAUL MARINACCIO, SR., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF CLARENCE, DEFENDANT,
AND KIEFFER ENTERPRISES, INC.,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, BUFFALO, PHILLIPS LYTTLE LLP (MICHAEL B. POWERS
OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOSEPH J. MANNA OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County
(Frederick J. Marshall, J.), entered November 24, 2009. The judgment
awarded plaintiff money damages against defendant Kieffer Enterprises,
Inc. upon a jury verdict.

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

Memorandum: Plaintiff commenced this action asserting causes of
action for, inter alia, trespass and private nuisance and seeking
damages for flooding on his property allegedly caused by the
intentional flow of water onto his property. The water originated
from a subdivision (hereafter, subdivision) developed by defendant
Kieffer Enterprises, Inc. (KEI) on land adjacent to plaintiff's
property located in defendant Town of Clarence (Town). Following a
trial, the jury returned a verdict in favor of plaintiff on liability.
The jury awarded plaintiff a total of \$1,642,000 in compensatory
damages, as well as punitive damages of \$250,000 against KEI. In
appeal No. 1, KEI appeals, as limited by its main brief, from that
part of the judgment awarding plaintiff punitive damages against it.
In appeal No. 2, KEI appeals from the order settling the record in
appeal No. 1.

Addressing first the order in appeal No. 2, we agree with KEI
that Supreme Court erred by excluding from the record the opposing
papers and reply papers with respect to plaintiff's motion in limine
seeking to preclude the testimony of an appraisal expert for the Town,
as well as the order determining that motion (see CPLR 5526; 22 NYCRR
1000.4 [a] [2]). We thus modify the order in appeal No. 2

accordingly. Contrary to KEI's contention, however, we conclude under the circumstances of this case that the court properly excluded certain superseded pleadings from the record in appeal No. 1 (see *Aikens Constr. of Rome v Simons*, 284 AD2d 946, 947; *Millard v Delaware, Lackawanna & W. R.R. Co.*, 204 App Div 80, 82).

Turning back to appeal No. 1, we view the points in KEI's main brief that the court "erred in refusing to dismiss the punitive damages claim where no evidence was offered to prove that [KEI acted] intentionally, maliciously, or with near criminal intent" and that "the evidence offered by plaintiff [did not meet] the 'strict' standard of proving that [KEI] acted maliciously, willfully and with near criminal intent" as constituting a contention that the award of punitive damages is not supported by legally sufficient evidence. " '[T]o recover punitive damages for trespass on real property, [a plaintiff has] the burden of proving that the trespasser acted with actual malice involving an intentional wrongdoing, or that such conduct amounted to a wanton, willful or reckless disregard of plaintiff['s] rights' " (*Western N.Y. Land Conservancy, Inc. v Cullen*, 66 AD3d 1461, 1463, appeal dismissed 13 NY3d 904, lv denied 14 NY3d 705, rearg denied 15 NY3d 746; see *West v Hogan*, 88 AD3d 1247, 1249-1250). To establish its entitlement to relief on its legal insufficiency contention, KEI "had to [demonstrate] . . . 'that there [was] simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial' " (*Winiarski v Harris* [appeal No. 2], 78 AD3d 1556, 1557, quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499).

Here, there is a valid line of reasoning supporting the jury's conclusion that KEI's conduct was sufficiently egregious to warrant an award of punitive damages. The evidence presented at trial establishes that, in conjunction with the approval process for the third phase of the subdivision (hereafter, Phase III), KEI's sole owner, Bernard G. Kieffer (Kieffer), retained an engineering firm to prepare plans for that part of the subdivision. Those plans included drainage calculations, which were intended to estimate the amount of water that would flow from the subdivision's roads to storm sewers, and from there to a mitigation pond and into a shallow furrow that traversed plaintiff's property.

Prior to the development of Phase III, however, there were drainage problems at the subdivision. By June 9, 2000, the Town became cognizant of those drainage issues, and recognized that its ability to extend and maintain ditches to a road that formed the northern boundary of plaintiff's property was essential to resolving those problems. Moreover, the Town and Kieffer knew that, as a result of the additional construction in the subdivision, "there [would] be more water dumping onto adjoining properties to the north and west," i.e., in the area of plaintiff's property, and the Town noted that it would "contact [plaintiff] regarding an easement along his west property line." KEI also hired a contractor to clean the furrow both by backhoe and by hand as a condition of proceeding with Phase III.

The parties do not dispute that the Town and Kieffer did not obtain plaintiff's permission to allow water to flow onto his property, and Phase III was approved, subject to several conditions designed to facilitate drainage in the area, on June 21, 2000. During Phase III construction, KEI built a pond next to plaintiff's property, which was fed by storm sewers and drained by two 12-inch pipes that, according to Kieffer, were intended to release water into the furrow on plaintiff's property. Plaintiff testified at trial that the outflow pipes were installed approximately one foot inside his property line. According to the trial testimony of plaintiff's expert engineer, KEI routed more water from Phase III to plaintiff's property than was called for by its drainage plans.

After the construction of Phase III, the nature of plaintiff's property changed. Plaintiff's wetlands consultant testified at trial that he estimated that there were only six acres of wetland on plaintiff's property in 2001, and that the wetland subsequently expanded to the point that plaintiff's property contained 19.5 acres of wetland in 2006; 24.94 acres of wetland in 2008; and 30.23 acres of wetland by 2009. Moreover, plaintiff's wetlands consultant observed a berm on part of plaintiff's property in 2006, which plaintiff had discovered in 2000 or 2001 and characterized as about 500 or 600 feet long. Plaintiff's wetlands consultant believed that the berm was the result of "ditch maintenance" several years earlier, at which point spoils from the furrow were placed on the east side of the furrow, i.e., on the side of the furrow opposite the subdivision. He concluded that migrating water on plaintiff's property was blocked by the berm, and that the growth of the wetland on plaintiff's property was due in part to the berm and in part to the presence of more water on the site. We conclude that the foregoing evidence is legally sufficient to allow the jury to conclude that KEI knowingly and intentionally disregarded plaintiff's property rights in a manner that was either "wanton, willful or reckless" (*Cullen*, 66 AD3d at 1463; see *Vacca v Valerino*, 16 AD3d 1159, 1160; *Fareway Hgts. v Hillock*, 300 AD2d 1023, 1025; see generally *Winiarski*, 78 AD3d at 1557). For the same reasons, we conclude that the court properly denied KEI's motion to dismiss the punitive damages claim at trial (see generally *Golonka v Plaza at Latham*, 270 AD2d 667, 670-671).

Likewise, we reject KEI's contention that the court erred in concluding that KEI's failure to plead a drainage easement as an affirmative defense constituted a waiver thereof (see *Cronk v Tait*, 279 AD2d 857, 859; see generally *Griffith Energy, Inc. v Evans*, 85 AD3d 1564, 1566). The easement in question permitted the Town to maintain a drainage ditch on plaintiff's property "for the disposal and dispersal of surface waters from the adjoining premises," but was considered for the first time on the first day of trial. Moreover, based on a land survey prepared by the Town in 1994 upon which plaintiff relied in purchasing his property in 1995, the easement was shown to be on the east side of plaintiff's property, i.e., the opposite side of the property where KEI drained water onto that land, and thus the easement is irrelevant to this case. Therefore, even assuming, arguendo, that KEI's further contentions with respect to the

easement are properly before us (see *Murdoch v Niagara Falls Bridge Commn.*, 81 AD3d 1456, 1457, *lv denied* 17 NY3d 702; see generally CPLR 5501 [a] [3]), we also conclude that those contentions lack merit.

KEI failed to preserve for our review its additional challenge to the court's jury instruction to disregard evidence that KEI acted reasonably in reliance on engineers and good engineering practices (see CPLR 4110-b; *Howlett Farms, Inc. v Fessner*, 78 AD3d 1681, 1682, *lv denied* 17 NY3d 710), as well as its challenge to the verdict sheet (see *MacKillop v City of Syracuse*, 48 AD3d 1197, 1198). We decline KEI's request to review those challenges and other unpreserved issues that it raises on appeal in seeking a new trial. First, that request is raised for the first time in KEI's reply brief and thus is not properly before us (see *Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1730). Second, "[a] court should grant a new trial in the interest of justice 'only if there is evidence that substantial justice has not been done . . . as would occur, for example, where the trial court erred in ruling on the admissibility of evidence, there is newly discovered evidence, or there has been misconduct on the part of the attorneys or jurors' " (*Butler v County of Chautauqua*, 277 AD2d 964, 964), and none of those circumstances is present here.

Finally, we have considered KEI's remaining contentions, which include challenges to the admission of testimony as to the value of plaintiff's property, to that part of the jury charge with respect to causation, to the alleged inconsistency of the verdict, and to the preclusion of the testimony of the Town's damages expert. To the extent that those challenges are properly before us (see CPLR 5501 [a] [3]; *Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734; *Howlett Farms, Inc.*, 78 AD3d at 1682-1683; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985), we conclude that they are without merit. We further note only that none of KEI's remaining contentions is relevant to the ultimate issue before us on appeal, i.e., the propriety of the punitive damages award (*cf. Nickerson v Te Winkle*, 161 AD2d 1123, 1123-1124).

All concur except SCUDDER, P.J., and PERADOTTO, J., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part and would modify the judgment in appeal No. 1 by vacating the award of punitive damages. In our view, this is not an "exceptional" case where punitive damages are warranted (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489; see *Smith v Fitzsimmons*, 180 AD2d 177, 181).

The facts are ably set forth by the majority, and we shall not repeat them here. We note at the outset that there is no question that plaintiff established his cause of action for trespass by demonstrating that defendant Kieffer Enterprises, Inc. (KEI) "intentionally [discharged water] onto the land belonging to the plaintiff[] without justification or permission" (*Carlson v Zimmerman*, 63 AD3d 772, 773; see generally PJI 3:8). However, "[s]omething more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such

as spite or malice, or a fraudulent or evil motive on the part of the defendant[s], or such a conscious and deliberate disregard of the interests of others that the conduct may be called [willful] or wanton" (*Prozeralik v Capital Cities Communications*, 82 NY2d 466, 479 [internal quotation marks omitted]). Specifically, "[p]unitive damages are permitted [only] when the defendant[s'] wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations . . . [P]unitive damages may be sought when the wrongdoing was deliberate and has the character of outrage frequently associated with crime" (*Ross*, 8 NY3d at 489 [internal quotation marks omitted]).

Although there is no question that KEI discharged water into the furrow and that it did so with knowledge and intent, we conclude that there is insufficient evidence in this record that KEI was motivated by maliciousness or vindictiveness or that KEI engaged in such " 'outrageous or oppressive intentional misconduct' " to warrant a punitive damages award (*id.*; *cf. West v Hogan*, 88 AD3d 1247, 1249-1250; *Doin v Champlain Bluffs Dev. Corp.*, 68 AD3d 1605, 1613-1614, *lv dismissed* 14 NY3d 832; *Western N.Y. Land Conservancy, Inc. v Cullen*, 66 AD3d 1461, 1463, *appeal dismissed* 13 NY3d 904, *lv denied* 14 NY3d 705, *rearg denied* 15 NY3d 746; *Ligo v Gerould*, 244 AD2d 852, 853). The record reflects that part of the furrow was located on land belonging to KEI, while other parts of the furrow traversed plaintiff's property. At least some of the water from the undeveloped property that ultimately became the subdivision naturally flowed into that furrow. Prior to developing the third phase of the project (hereafter, Phase III), KEI's sole owner, Bernard G. Kieffer, retained an engineering firm to prepare, inter alia, a drainage plan. The plan included drainage calculations, which were intended to estimate the amount of water that would flow from the subdivision's roads to storm sewers, and from there to a retention pond and into the furrow. Kieffer relied on the expertise of his engineers to prepare an appropriate drainage plan, and that plan was submitted to, and approved by, the Engineering Department of defendant Town of Clarence (Town) and the Town Board. Indeed, the record reflects that KEI developed Phase III in accordance with all of the Town's requirements. With respect to the easement, the Town advised Kieffer that it would obtain an easement from plaintiff for the increased water flow onto his property. While Kieffer may have been negligent in failing to ensure that the Town followed through with its expressed intention, we cannot conclude that such failing warrants an award of punitive damages. At trial, Kieffer testified that it was not his intent to interfere with the use of plaintiff's property, and our review of the record discloses no evidence to the contrary.

In sum, "punitive damages are awarded not for the unintended result of an intentional act, but for the conscious disregard of the rights of others or for conduct so reckless as to amount to such disregard" (*Hartford Acc. & Indemn. Co. v Village of Hempstead*, 48 NY2d 218, 227-228). We conclude that punitive damages are not justified on this record because the harm in this case—the flooding of plaintiff's property—was not intended by KEI (*see id.*; *cf. West*, 88

AD3d at 1249-1250; *Fareway Hgts. v Hillock*, 300 AD2d 1023, 1025). Rather, the flooding was an unintended result of KEI's intentional conduct, i.e., discharging water into the furrow and, thus, does not warrant an award of punitive damages (see *Hartford Acc. & Indemn. Co.*, 48 NY2d at 227-228).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1146

CA 11-00343

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

JOSEPH F. GAGNON, JR. AND SHARON GAGNON,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

ST. JOSEPH'S HOSPITAL, THROUGH ITS OFFICERS,
AGENTS AND/OR EMPLOYEES, RICHARD KELLEY, M.D.,
INDIVIDUALLY AND AS AN OFFICER, AGENT AND/OR
EMPLOYEE OF ST. JOSEPH'S HOSPITAL, DAVID
ENG, M.D., INDIVIDUALLY AND AS AN OFFICER,
AGENT AND/OR EMPLOYEE OF ST. JOSEPH'S HOSPITAL,
AND CRAIG MONTGOMERY, M.D., INDIVIDUALLY AND AS
AN OFFICER, AGENT AND/OR EMPLOYEE OF ST.
JOSEPH'S HOSPITAL, DEFENDANTS-RESPONDENTS.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JAMES D. LANTIER OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS DAVID ENG, M.D., INDIVIDUALLY AND
AS AN OFFICER, AGENT AND/OR EMPLOYEE OF ST. JOSEPH'S HOSPITAL, AND
CRAIG MONTGOMERY, M.D., INDIVIDUALLY AND AS AN OFFICER, AGENT AND/OR
EMPLOYEE OF ST. JOSEPH'S HOSPITAL.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JOSHUA M. GILLETTE OF COUNSEL), FOR
DEFENDANT-RESPONDENT RICHARD KELLEY, M.D., INDIVIDUALLY AND AS AN
OFFICER, AGENT AND/OR EMPLOYEE OF ST. JOSEPH'S HOSPITAL.

Appeal from an order and judgment (one paper) of the Supreme
Court, Oneida County (Samuel D. Hester, J.), entered November 30, 2010
in a medical malpractice action. The order and judgment granted the
motions of defendants Richard Kelley, M.D., individually and as an
officer, agent and/or employee of St. Joseph's Hospital, David Eng,
M.D., individually and as an officer, agent and/or employee of St.
Joseph's Hospital, and Craig Montgomery, M.D., individually and as an
officer, agent and/or employee of St. Joseph's Hospital, for summary
judgment dismissing the complaint against them.

It is hereby ORDERED that the order and judgment so appealed from
is reversed on the law without costs, the motions are denied and the
complaint against defendants Richard Kelley, M.D., David Eng, M.D.,
and Craig Montgomery, M.D., individually and as officers, agents
and/or employees of St. Joseph's Hospital, is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for

injuries allegedly sustained by Joseph F. Gagnon, Jr. (plaintiff) as a result of defendants' medical malpractice. We agree with plaintiffs that Supreme Court erred in granting the motion of defendants David Eng, M.D. and Craig Montgomery, M.D. (Montgomery defendants) and the motion of defendant Richard Kelley, M.D., seeking summary judgment dismissing the complaint against them. On a motion for summary judgment, defendants in a medical malpractice case have "the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Williams v Sahay*, 12 AD3d 366, 368; see *Humphrey v Gardner*, 81 AD3d 1257, 1258). In support of their motion, the Montgomery defendants submitted an expert's affidavit that "fail[ed] to address each of the specific factual claims of negligence raised in plaintiff's bill of particulars, [and thus] that affidavit is insufficient to support a motion for summary judgment as a matter of law" (*Larsen v Banwar*, 70 AD3d 1337, 1338).

The Montgomery defendants also failed to establish as a matter of law that their alleged negligence was not a proximate cause of plaintiff's injury (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Padilla v Verczky-Porter*, 66 AD3d 1481, 1483). The expert asserted that the Montgomery defendants could not have damaged plaintiff's left phrenic nerve during surgery on his cervical spine because the surgical site was on the right side of the cervical spine and the damaged nerve was on the left side thereof. The expert also asserted that the removal of an osteophyte on the left side at C4-5 could not have damaged the left phrenic nerve because that nerve is located at C3. Dr. Eng's operative notes, however, indicate that the Montgomery defendants also removed an osteophyte from the left side at C3-4 and used screws to attach a plate to the cervical spine, and the expert did not state whether the left phrenic nerve could have been damaged during those procedures. The Montgomery defendants' failure to make a prima facie showing of entitlement to summary judgment "requires denial of the motion, regardless of the sufficiency of [plaintiffs'] opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

We also conclude that Dr. Kelley failed to meet his initial burden on his motion for summary judgment dismissing the complaint against him. Dr. Kelley submitted his own affidavit in support of the motion and contended therein that he was entitled to summary judgment because he complied with the accepted standard of care and did not cause an injury to plaintiff's left phrenic nerve. According to Dr. Kelley, his instruments remained on the right side of plaintiff's spine and did not cross the midline of the anterior cervical spine. In his operative notes, however, Dr. Kelley stated that he performed tasks "on either side of the midline." The operative notes also indicate that Dr. Kelley used retractors to hold back structures in plaintiff's neck, but the affidavit of Dr. Kelley did not establish as a matter of law that the use of retractors could not have caused an injury to the left phrenic nerve. Because Dr. Kelley failed to make a prima facie showing of entitlement to summary judgment, we need not consider the adequacy of plaintiff's opposing papers (see generally

Winegrad, 64 NY2d at 853).

We decline the request of plaintiffs to search the record and grant summary judgment on liability with respect to the cause of action against the Montgomery defendants and Dr. Kelley on the theory of *res ipsa loquitur* pursuant to CPLR 3212 (b). "[O]nly in the rarest of *res ipsa loquitur* cases may . . . plaintiff[s] win summary judgment . . . That would happen only when the plaintiff[s'] circumstantial proof is so convincing and the defendant[s'] response so weak that the inference of defendant[s'] negligence is inescapable" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209), and that is not the case here (see *Dengler v Posnick*, 83 AD3d 1385, 1386). Contrary to the contention of plaintiffs, the court acted within its discretion when it rejected the submission of the curriculum vitae of their expert as untimely. "While a court can in its discretion accept late papers, CPLR 2214 and [CPLR] 2004 mandate that the delinquent part[ies] offer a valid excuse for the delay" (*Mallards Dairy, LLC v E&M Engrs. & Surveyors, P.C.*, 71 AD3d 1415, 1416 [internal quotation marks omitted]) and, here, plaintiffs offered no excuse for the delay.

In light of our determination, we do not address plaintiffs' remaining contention.

All concur except CARNI, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent inasmuch as I disagree with my colleagues that Supreme Court erred in granting the motion of defendants David Eng, M.D. and Craig Montgomery, M.D. (collectively, Montgomery defendants) and the motion of defendant Richard Kelley, M.D. for summary judgment dismissing the complaint against them. I therefore would affirm the order and judgment.

On February 9, 2007, Joseph F. Gagnon, Jr. (plaintiff) underwent an anterior cervical discectomy at the C3-4 and C4-5 levels. The surgical approach and incision were made anteriorly on the right side of plaintiff's neck by Dr. Kelley, a board certified otolaryngologist. After performing the surgical approach, Dr. Kelley was excused from the operating room. The discectomy was then performed by Dr. Eng, a board certified neurosurgeon, who was assisted by Dr. Montgomery, also a board certified neurosurgeon. Plaintiff was discharged from the hospital later that day and instructed to wear a cervical collar. There is no dispute that, upon discharge from the hospital following the surgery, plaintiff did not experience any symptoms or present any complaints consistent with a surgically-related left phrenic nerve injury.

On February 22, 2007, plaintiff was seen by Dr. Eng in his office and was without any complaints or symptoms consistent with a trauma or surgically-related injury to the left phrenic nerve. At that visit, plaintiff was given permission to stop wearing the cervical collar part time. Shortly thereafter, plaintiff began to experience symptoms of a left phrenic nerve injury. Plaintiffs commenced this medical malpractice action alleging that, during the surgery, plaintiff sustained an injury to the left phrenic nerve as a result of the negligence of one or more of the defendants. Supreme Court granted

the motions of the Montgomery defendants and Dr. Kelley for summary judgment dismissing the complaint against them.

I disagree with the conclusion of my colleagues that the Montgomery defendants failed to submit an expert affidavit addressing each of the specific factual claims of negligence raised in plaintiffs' bill of particulars. The majority does not identify any " 'specific factual claim[] of negligence' " raised by plaintiffs and not addressed by the Montgomery defendants in their moving papers. Indeed, the only specific factual claim of negligence in plaintiffs' bill of particulars is that the Montgomery defendants "failed to recognize, . . . identify, isolate and prevent injury to the phrenic nerve in the course [of] operating on the plaintiff" In specifically addressing that claim, the Montgomery defendants' expert stated that plaintiff's left phrenic nerve injury "could not have been caused by the cervical dis[c]ectomy performed by Drs. Eng, Montgomery and Kelley on February 9, 2007. [Plaintiff's] dis[c]ectomy began with an anterior, right-side approach through the soft tissue structures on the right to the osteophytes located on his cervical spine. Anatomically, the left phrenic nerve is located lateral to the left carotid artery, left jugular vein and left scalene musculature. In order to reach the left phrenic nerve from the right-side approach used in [the] procedure, the physician would have had to pierce through [plaintiff's] left scalene musculature **along with** at least one of several vital structures[,] including the bon[ely] spine, trachea, esophagus, carotid sheath, carotid artery, and/or jugular vein. It would therefore be anatomically impossible to cause injury to the left phrenic nerve during an anterior cervical dis[c]ectomy with right-side approach . . . without having seriously damaged one or more of those vital structures **and** traversing the left scalene musculature." The expert further concluded, upon reviewing the medical records, that no such injury occurred. Comparing that expert's opinion to the specific factual claim of negligence in plaintiffs' bill of particulars, I conclude that the Montgomery defendants sufficiently established their entitlement to summary judgment and shifted the burden to plaintiffs to raise a triable issue of fact (*see Horth v Mansur*, 243 AD2d 1041, 1042-1043), which they failed to do.

The majority also concludes that the Montgomery defendants failed to establish that "their alleged negligence was not a proximate cause of plaintiff's injury" Initially, inasmuch as defendants established in the first instance that they were not negligent in recognizing, identifying, isolating and preventing injury to the left phrenic nerve in the course of operating on plaintiff, they did not have any such burden. Thus, it was "beside the point to establish that" the alleged negligence was not a proximate cause of the injury (*Cassano v Hagstrom*, 5 NY2d 643, 645, *rearg denied* 6 NY2d 882). Further, the Montgomery defendants' expert opined that it would be "impossible" to cause injury to the left phrenic nerve without causing injury to one or more vital structures, which undisputedly did not occur during the surgery. Therefore, even if the Montgomery defendants had the burden to establish that their "alleged negligence was not a proximate cause of plaintiff's injury," they more than adequately did so by submitting evidence that it was "impossible" for

the injury to have occurred during the right-side surgical approach (see *Horth*, 243 AD2d at 1042-1043).

The majority criticizes the Montgomery defendants' "failure to make a prima facie showing of entitlement to summary judgment" because Dr. Eng's operative notes indicate that an osteophyte was removed from the left side at C3-4 and screws were used to attach a plate to the cervical spine. Importantly, those " 'specific factual claims of negligence' " are neither contained in plaintiffs' bill of particulars nor raised by their medical expert in opposition to the Montgomery defendants' motion. They are raised for the first time by the majority.

Advancing its own reading and interpretation of Dr. Kelley's operative notes, the majority further concludes that Dr. Kelley failed to meet his initial burden on the motion because he submitted evidence establishing that he "performed tasks 'on either side of the midline.' " Again, that specific allegation of negligence is first raised by the majority and is neither contained in plaintiffs' bill of particulars nor raised by their medical expert in opposition to Dr. Kelley's motion. Inasmuch as plaintiffs' medical expert has not interpreted Dr. Kelley's operative notes in that manner, I respectfully submit that this Court should refrain from interpreting, on its own and unaided by medical expert testimony, the operative notes from sophisticated surgical procedures in order to find a claim of negligence independent of any specific factual claim of negligence made by plaintiffs. Here, Dr. Kelley's operative notes contain the following reference to the performance of tasks on either side of the midline: "The bipolar cautery was used along the longus muscle on either side of the midline." The majority interprets the use of the term "midline" to mean the midline of the cervical spine. In the operative report, however, the term "midline" is used in reference to the longus muscle, which is situated on the anterior spine and also has a midline. In any event, in his affidavit in support of the motion, Dr. Kelley describes the involvement of the midline of the longus colli muscle as follows: "The approach concluded with identification of the midline and border of the longus colli muscles." In other words, the reference to the term "midline" in the operative report is to the midline of the *longus colli muscle on the right side* and not, as the majority concludes, the midline of the cervical spine. Thus, without any medical opinion from plaintiffs' expert or any specific claim of negligence in their bill of particulars, and contrary to Dr. Kelley's unchallenged explanation, the majority takes it upon itself to interpret operative notes from a complex neurosurgical procedure in order to identify a claim of negligence not advanced by plaintiffs. I cannot agree with that interpretation.

With respect to the conclusion of the majority that "the affidavit of Dr. Kelley did not establish as a matter of law that the use of retractors could not have caused an injury to the left phrenic nerve," I note that neither the term "retractor" nor any of its derivatives appear anywhere in the complaint or bill of particulars. Thus, the majority inappropriately criticizes Dr. Kelley's affidavit for failing to address a specific claim of negligence that was not

raised by plaintiffs in the first instance. The first reference to "retraction" as an alleged cause of the left phrenic nerve injury appears in the opposition affidavit of plaintiffs' expert, which states that it is the expert's "opinion that during the procedure the retraction damaged the phrenic nerve" I note that "retraction" per se of a nerve during a surgical procedure is not in and of itself a deviation from accepted surgical procedure (see *Schoch v Dougherty*, 122 AD2d 467, 468, *lv denied* 69 NY2d 605; *Welsh v State of New York*, 51 AD2d 602). Dr. Kelley averred in his affidavit that the left phrenic nerve was not exposed or retracted during the right-side approach. In addition, according to that affidavit, "dissection would need to continue and go beyond and behind the entire laryngopharyngeal complex and esophagus, the left carotid artery, vagus nerve and left internal jugular vein before the left phrenic [nerve] is reached. It is not possible to retract or transect [those] structures to reach the left phrenic nerve with an anterior right side incision/approach without transecting, removing or severely injuring [those] structures and therefore the patient." Critically, plaintiffs' expert and the majority assume that the left phrenic nerve was retracted. In doing so, however, they ignore the undisputed evidence that no instrument or retractor used by Dr. Kelley came near the left phrenic nerve (see *Cassano*, 5 NY2d at 645). "In drawing or attempting to draw the inference that the nerve[was damaged by Dr. Kelley, plaintiffs' expert] was applying the fallacy of 'post hoc ergo propter hoc' " (*id.* at 645). "In other words, [the expert] attempted to [aver] in the form of an opinion [with respect] to a supposed fact of which [that expert] could have no knowledge, that is, that the [left phrenic nerve injury] was caused by [the] surgical [procedure]" (*id.* at 645-646). There simply is no evidentiary basis, direct or circumstantial, that any surgical instruments were ever located near the left phrenic nerve during the operation, nor is there any evidentiary basis to support the assumptions of plaintiffs' expert that the left phrenic nerve was retracted during the procedure (see *Lowery v Lamaute*, 40 AD3d 822, *lv denied* 9 NY3d 810). Moreover, setting aside the undisputed evidence that no retraction of the left phrenic nerve occurred during the procedure, plaintiffs' expert failed to distinguish between retraction per se and excessive retraction, either in degree or duration, and that expert did not set forth the standard of care with respect to the left phrenic nerve retraction that the expert asserts, in a conclusory fashion, occurred (see generally *DiMitri v Monsouri*, 302 AD2d 420).

Inasmuch as I conclude that the court properly granted the motions of the Montgomery defendants and Dr. Kelley, there is no remaining negligence cause of action to which the doctrine of *res ipsa loquitur* may be applied. I therefore find no basis upon which to consider plaintiffs' request that we search the record and grant them summary judgment on liability pursuant to CPLR 3212 (b) (see generally *Abbott v Page Airways*, 23 NY2d 502, 512).

Lastly, I agree with the majority that the court did not abuse its discretion when it rejected the untimely submission of the curriculum vitae of plaintiffs' medical expert.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1233

CA 11-01073

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

JOSEPH KUEBLER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CHARLES R. KUEBLER, DEFENDANT-APPELLANT.

KENNY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE HIGGINS KANE LAW GROUP, P.C., BUFFALO (TERRENCE P. HIGGINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 8, 2010 in a personal injury action. The order granted the motion of plaintiff for partial summary judgment and denied the cross motion of defendant for partial summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by denying that part of plaintiff's motion for partial summary judgment on the issue of comparative fault and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle in which he was a passenger left the roadway and struck a tree. The vehicle was operated by defendant, plaintiff's son, and plaintiff was aware that defendant had only a learner's permit. Within five minutes of leaving the parties' residence at approximately 6:40 A.M., defendant fell asleep at the wheel. According to plaintiff, defendant's negligence in operating the vehicle was the sole proximate cause of the injuries sustained by plaintiff. Defendant raised plaintiff's alleged comparative fault as an affirmative defense pursuant to CPLR article 14-A.

As limited by his brief, defendant appeals from the order insofar as it granted that part of plaintiff's motion for partial summary judgment on the issue of comparative fault and denied defendant's cross motion for partial summary judgment on that issue. We conclude that Supreme Court erred in granting that part of the motion with respect to the issue of comparative fault, and we therefore modify the order accordingly.

A licensed driver supervising an unlicensed driver with a learner's permit owes a duty to use reasonable care as an instructor (*see Michalek v Martyna*, 48 AD2d 1005), and he or she also owes a duty

to take necessary measures to prevent negligence on the part of the driver with the learner's permit (see generally *Lazofsky v City of New York*, 22 AD2d 858). Even assuming, arguendo, that plaintiff established his entitlement to judgment as a matter of law on the issue of comparative fault, we conclude that defendant raised triable issues of fact by submitting evidence that, prior to the accident, plaintiff was preoccupied with reviewing a list on a piece of paper. In addition, plaintiff testified at his deposition that he did not realize that the vehicle was leaving the roadway until he "felt the right tire go off the shoulder," and he was unable to estimate the speed at which defendant was operating the vehicle. Based upon that evidence, a jury could conclude that plaintiff had breached his duty of care in supervising defendant's operation of the vehicle and that such culpable conduct diminished plaintiff's recoverable damages (see *Pierson v Dayton*, 168 AD2d 173, 176; *Savone v Donges*, 122 AD2d 34).

We further conclude that defendant raised a triable issue of fact whether plaintiff failed to use reasonable care in his capacity as a passenger. Plaintiff's "knowledge of the competency, ability, skill and condition of [defendant] and [defendant's] apparent awareness of potential dangers" are all factors to be considered by the jury in determining whether plaintiff used reasonable care or was comparatively negligent (PJI 2:87). Here, defendant admitted that he fell asleep at the wheel. We note that a passenger may be "negligent in riding with an obviously sleepy driver" (*Purchase v Jeffrey*, 33 AD2d 620), and we have rejected the notion that "sleep sometimes presses down without warning" (*Kilburn v Bush*, 223 AD2d 110, 115 [internal quotation marks omitted]).

All concur except CARNI and LINDLEY, JJ., who concur in the result in the following Memorandum: Although we concur in the result reached by the majority, we write separately to address defendant's contention, with which we agree, that the culpable conduct of plaintiff includes conduct that is properly characterized as implied assumption of risk (see *Arbegast v Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 170). It is well settled that "a plaintiff who has been licensed by the State of New York to operate a motor vehicle and who voluntarily accompanies a defendant, who has just received a learner's permit, in defendant's car for the purpose of teaching the defendant to drive, assumes the risk of the defendant's inexperience" (*Le Fleur v Vergilia*, 280 App Div 1035, 1035; see *St. Denis v Skidmore*, 14 AD2d 981, *affd* 12 NY2d 901; *Spellman v Spellman*, 309 NY 663, 665). Although CPLR 1411, entitled "Damages recoverable when contributory negligence or assumption of risk is established" (emphasis added), eliminated implied assumption of risk as a complete bar to recovery, the doctrine remains available to a defendant seeking to diminish the damages recoverable by a plaintiff as a result of the plaintiff's own culpable conduct. Section 1411 makes it clear that, insofar as relevant herein, there are two forms of culpable conduct that may reduce a plaintiff's recovery, i.e., contributory negligence and assumption of risk (see *Arbegast*, 65 NY2d at 167). Thus, the addition of article 14-A to the CPLR did not eliminate the implied assumption of risk doctrine that the courts of this State have long recognized and that defendant advances herein. CPLR article 14-A

simply ameliorated the harsh rule that a plaintiff's implied assumption of risk served as a complete bar to recovery.

We write to further clarify that, under the circumstances presented here and assuming a sufficient quantum and quality of proof at trial, the jury should be instructed to consider plaintiff's culpable conduct in the form of both contributory negligence (see PJI 2:87) and implied assumption of risk (see PJI 2:55). The jury should be further instructed to consider collectively plaintiff's acts as a passenger and as a supervising driver "in order to fix the relationship of each party's conduct to the injury sustained" (*Arbegast*, 65 NY2d at 168).

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

1270

CAF 10-02105

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

IN THE MATTER OF NICHOLAS W., TYLER W.,
AND ETHAN W.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES
CHILD PROTECTIVE UNIT, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RAYMOND W., RESPONDENT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-APPELLANT.

JOHN W. PARK, COUNTY ATTORNEY, CANANDAIGUA (HOLLY A. ADAMS OF
COUNSEL), FOR PETITIONER-RESPONDENT.

CHARLES R. PETERS, ATTORNEY FOR THE CHILD, IONIA, FOR NICHOLAS W.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered September 22, 2010 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged the child Nicholas W. to be a neglected child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, petitioner's motion is denied and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following Memorandum: Petitioner commenced this proceeding pursuant to Family Court Act article 10 alleging that respondent father neglected his oldest son and derivatively neglected two other children because he struck his oldest son in the face. In a criminal proceeding before the same judge who presided over the proceeding in Family Court, the father pleaded guilty to assault in the third degree (Penal Law § 120.00 [2] [reckless assault]), arising from the incident in which he struck his oldest son. There was no allocution concerning the conduct underlying the conviction and, when the proceeding on the petition resumed in Family Court, petitioner moved for summary judgment on the petition based upon the plea and certificate of conviction in the criminal matter. The father moved "to dismiss" petitioner's motion and requested a fact-finding hearing on the petition. The court denied the father's request and granted the motion with respect to the oldest child. Petitioner subsequently withdrew its allegations of derivative neglect with respect to the other children. The court thereafter denied the father's motion to reargue his opposition to the motion for summary judgment with respect to the oldest child and entered an order of fact-finding and disposition adjudicating the oldest son to be a neglected child.

We conclude that petitioner failed to meet its burden of establishing that the acts underlying the conviction of reckless assault constituted neglect as a matter of law and thus that the issues in the neglect proceeding were resolved by the father's guilty plea (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although one incident of excessive corporal punishment may be sufficient to establish neglect (*see Matter of Steven L.*, 28 AD3d 1093, *lv denied* 7 NY3d 706), under the circumstances of this case, we conclude that petitioner failed to establish that the father intended to hurt his son or that his conduct was a pattern of excessive corporal punishment (*see Matter of Christian O.*, 51 AD3d 402). We therefore reverse the order, deny petitioner's motion and remit the matter to Family Court for further proceedings on the petition before a different judge.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1274

CA 10-02514

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

AJAY GLASS & MIRROR CO., INC.,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

AASHA G.C., INC., BARRY HALBRITTER,
DEFENDANTS-APPELLANTS,
AND HUNT CONSTRUCTION GROUP, INC.,
DEFENDANT-RESPONDENT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (ROBERT G. BENNETT OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

PILLSBURY WINTHROP SHAW PITTMAN LLP, WASHINGTON, D.C. (MICHAEL S.
MCNAMARA, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF
COUNSEL), AND HANCOCK ESTABROOK, LLP, SYRACUSE, FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), dated November 17, 2010. The order, among other things, granted the motion of plaintiff and defendant Hunt Construction Group, Inc. to vacate an order entered January 8, 2010 and a partial judgment entered January 21, 2010.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion of plaintiff and defendant Hunt Construction Group, Inc. seeking to vacate the "statement for partial judgment" insofar as it awarded defendant AASHA G.C., Inc. damages in the amount of \$51,508.69, plus applicable interest, costs and disbursements, for the set aside amount to which that defendant is entitled, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover funds allegedly owed to it for work performed on the Turning Stone Casino & Resort (hereafter, project), owned by the Oneida Indian Nation (OIN). In order to comply with the OIN's requirement that a certain amount of work on the project be subcontracted to firms owned by its members, defendant Hunt Construction Group, Inc. (Hunt) subcontracted work to defendant AASHA G.C., Inc. (AASHA), which in turn sub-subcontracted that same work to plaintiff. AASHA asserted

two cross claims against Hunt. The first cross claim sought to recover the set aside amounts to which AASHA was entitled based upon plaintiff's payment requisition Nos. 16 and 17, and the second cross claim sought to recover the amount that AASHA was obligated to pay plaintiff for those same requisitions. In a prior order, Supreme Court denied Hunt's motion for summary judgment dismissing the complaint and cross claims against it and, upon the request of plaintiff, the court searched the record and awarded "AASHA/[plaintiff]" partial summary judgment. A "statement for partial judgment" (hereafter, partial judgment) subsequently entered in favor of AASHA included damages in the amount of \$643,858.65 owed to plaintiff under the sub-subcontract for work associated with requisition Nos. 16 and 17, as well as \$51,508.69, representing the 8% set aside to which AASHA was entitled on those damages.

Following entry of the partial judgment, Hunt and plaintiff entered into a stipulated settlement agreement resolving plaintiff's claims against Hunt for nonpayment. AASHA and its president, defendant Barry Halbritter (collectively, AASHA defendants), appeal from an order granting the joint motion of plaintiff and Hunt seeking, inter alia, to vacate the prior order and partial judgment in favor of AASHA based upon that stipulated settlement, as well as to dismiss AASHA's second cross claim against Hunt. We agree with the AASHA defendants that the court abused its discretion in vacating the partial judgment in its entirety (*see generally* CPLR 5015 [a]; *Matter of County of Ontario [Middlebrook]*, 59 AD3d 1065). Although AASHA previously assigned to plaintiff its rights under the subcontract with Hunt with respect to amounts allegedly owed to plaintiff, that agreement between AASHA and plaintiff explicitly states that "[n]othing in [the] agreement shall prevent AASHA from recovering from Hunt any and all payments owed to AASHA by Hunt under the [OIN] set aside program for work performed pursuant to [plaintiff's] sub-subcontract" AASHA thereby expressly retained its claims against Hunt for the set aside amounts associated with plaintiff's work. Thus, we conclude that the court abused its discretion by vacating the partial judgment in its entirety inasmuch as there is no basis upon which to disturb the award of \$51,508.69, plus applicable interest, costs and disbursements, in favor of AASHA. We therefore modify the order by denying that part of the motion of plaintiff and Hunt seeking to vacate the partial judgment insofar as it awarded those damages in favor of AASHA.

We further agree with the AASHA defendants that, insofar as the statement in the order that the only "remaining claim to be tried [is] the first [c]ross[c]laim" may be interpreted as a dismissal of the AASHA defendants' counterclaim, the court erred in doing so. The counterclaim was not a "subject" of Hunt's motion for summary judgment or plaintiff's request that the court search the record with respect to the payment requisitions (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 430).

Finally, we reject the AASHA defendants' contention that the court abused its discretion in granting Hunt's motion to consolidate this action with an action commenced by the OIN in Onondaga County

related to the project (*see generally* *Dias v Berman*, 188 AD2d 331;
Zimmerman v Mansell, 184 AD2d 1084).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1275

CA 11-00086

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

TIMOTHY A. ROULAN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

COUNTY OF ONONDAGA AND THE ASSIGNED COUNSEL
PROGRAM, INC., DEFENDANTS-RESPONDENTS.

JEFFREY R. PARRY, SYRACUSE, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 5, 2010. The order, among other things, granted plaintiff's motion for leave to renew and, upon renewal, adhered to its prior order denying plaintiff's motion for partial summary judgment on the declaratory judgment cause of action and granting defendants' cross motion seeking partial summary judgment dismissing the declaratory judgment cause of action.

It is hereby ORDERED that the order so appealed from is modified on the law by denying defendants' cross motion for partial summary judgment dismissing the declaratory judgment cause of action, reinstating that cause of action and granting judgment in favor of defendants as follows:

It is ADJUDGED and DECLARED that the assigned counsel plan established by defendant Onondaga County Bar Association Assigned Counsel Program, Inc., incorrectly sued as The Assigned Counsel Program, Inc., is valid with the exception of section D (2) under the "Assignment by Court and Client Eligibility" heading,

by granting plaintiff's motion for partial summary judgment on the declaratory judgment cause of action in part and granting judgment in favor of plaintiff as follows:

It is ADJUDGED and DECLARED that section D (2) under the "Assignment by Court and Client Eligibility" heading of the assigned counsel plan is invalid,

and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia,

a declaration that various sections of the assigned counsel plan in defendant County of Onondaga (County) were invalid. Defendant Onondaga County Bar Association Assigned Counsel Program, Inc., incorrectly sued as The Assigned Counsel Program, Inc. (ACP), established that plan (hereafter, ACP Plan) pursuant to County Law article 18-B through a contract with the Onondaga County Bar Association (OCBA).

Plaintiff moved for partial summary judgment seeking a declaration that the contract and handbook containing the ACP Plan were "illegal, ultra vires and/or a nullity, and that they [were], as written, unconstitutional." Defendants then cross-moved for partial summary judgment dismissing the declaratory judgment cause of action. Thereafter, plaintiff cross-moved for partial summary judgment on the breach of contract cause of action. Supreme Court, inter alia, denied plaintiff's motion and cross motion and granted defendants' cross motion. Following additional discovery, plaintiff moved for leave to renew his prior motion and cross motion, as well as his opposition to defendants' cross motion. Defendants cross-moved for summary judgment dismissing the remaining causes of action. Although the court purportedly denied plaintiff's motion for leave to renew, improperly denominated in the order as a "motion to renew and reargue," it is clear from the decision that the court actually granted the motion and, upon renewal, adhered to its original decision. The court also granted defendants' cross motion.

We note at the outset that the court erred in dismissing the declaratory judgment cause of action rather than declaring the rights of the parties with respect thereto (*see Pless v Town of Royalton*, 185 AD2d 659, 660, *affd* 81 NY2d 1047). We conclude, however, that one section of the ACP Plan is invalid. We therefore modify the order by denying defendants' cross motion for partial summary judgment dismissing the declaratory judgment cause of action, reinstating that cause of action and declaring that the ACP Plan is valid with the exception of section D (2) under the "Assignment by Court and Client Eligibility" heading. We further modify the order by granting plaintiff's motion for partial summary judgment on the declaratory judgment cause of action in part and declaring that section D (2) under the "Assignment by Court and Client Eligibility" heading of the ACP Plan is invalid.

As a matter of background, we note that County Law article 18-B was enacted in 1965 as a means to compensate attorneys who were assigned to represent certain indigent litigants. Before article 18-B was enacted, attorneys admitted to practice law in the State of New York were required, by virtue of their admission to the bar, to represent indigent litigants without any compensation (*see Matter of Smiley*, 36 NY2d 433, 438; *Matter of Stream v Beisheim*, 34 AD2d 329, 333; *Mitchell v Fishbein*, 377 F3d 157, 168). Courts had the inherent power and a constitutional obligation to appoint counsel for indigent criminal defendants (*see Mitchell*, 377 F3d at 168; *see also Smiley*, 36 NY2d at 437-438), and "such service, however onerous, created no legal liability against the county in favor of the person rendering the same" (*Stream*, 34 AD2d at 333 [internal quotation marks omitted]).

Following the decisions of the United States Supreme Court in *Gideon v Wainwright* (372 US 335) and the Court of Appeals in *People v Witek* (15 NY2d 392), both of which established that indigent criminal defendants had a constitutional right to counsel, it became apparent "that the private [b]ar could not carry the burden of uncompensated representation for the large numbers of defendants involved. Consequently, legislation was enacted to provide systematic representation of defendants by assigned counsel and for their compensation" (*Smiley*, 36 NY2d at 438; see Rep of NY State Bar Assn Comm on State Legislation, Bill Jacket, L 1965, ch 878, at 16).

Pursuant to County Law § 722, a governing body of a county shall put in operation a plan (hereafter, 18-B plan) to provide counsel to, inter alia, persons charged with a crime who are financially unable to obtain counsel. The statute provides four options for such a plan, and the 18-B plan enacted in the County was a bar association plan whereby "the services of private counsel are rotated and coordinated by an administrator" (§ 722 [3] [a] [i]). Compensation of attorneys assigned pursuant to such a plan, other than for representation on appeal, "shall be fixed by the trial court judge" (§ 722-b [3]) in accordance with certain statutory rates (see § 722-b [2]). In the event that an attorney has not been assigned pursuant to an 18-B plan, the court lacks the power to order that the attorney be compensated because the Legislature, which controls the public purse, has provided that only those attorneys appointed pursuant to an 18-B plan may be compensated from public funds (see *Mitchell*, 377 F3d at 168-169; *Matter of Goodman v Ball*, 45 AD2d 16, lv denied 34 NY2d 519; cf. *People v Ward*, 199 AD2d 683, 684). Regardless of any limits on the compensation of assigned attorneys, nothing in County Law article 18-B or the ACP Plan limits the inherent power of the court to assign counsel to an indigent criminal defendant.

With that background, we address the issues relevant to this appeal, some of which are similar to issues we addressed in *Matter of Parry v County of Onondaga* (51 AD3d 1385). In that case, the petitioner, who is plaintiff's attorney in this action, commenced an original proceeding pursuant to CPLR article 78 seeking relief in the nature of prohibition and mandamus. We concluded that the petitioner failed to establish " 'a clear legal right to the relief sought' " and dismissed the petition (*id.* at 1387). We noted, however, that the petition also must be dismissed to the extent that it sought a declaration and that such relief must be sought in a declaratory judgment action (see *id.*). Aside from the plaintiff in this case, the petitioner in *Parry* is representing another attorney in a declaratory judgment action (see *Cagnina v Onondaga County*, ___ AD3d ___ [Dec. 30, 2011]). The two actions seek similar declarations, inasmuch as each plaintiff challenges the validity of various sections of the ACP Plan. Contrary to defendants' contention, our decision in *Parry*, addressing the issue whether the ACP Plan violated County Law § 722 or infringed upon the court's inherent power to assign counsel, does not preclude our review of issues raised in this action because they are separate and distinct from those addressed in *Parry*. We also reject defendants' contention that the declaratory judgment cause of action is not the proper procedural vehicle to challenge the ACP Plan.

Plaintiff's challenges involve constitutional questions, as well as the meaning of various sections of County Law article 18-B (see *Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 150, cert denied 464 US 993; *Dun & Bradstreet, Inc. v City of New York*, 276 NY 198, 206).

Plaintiff contends that the ACP Plan is invalid because it conflicts with both the federal and state constitutions by depriving criminal defendants of their right to counsel and it violates County Law article 18-B in several different respects. To the extent that plaintiff asserts the claims of criminal defendants concerning deprivation of the right to counsel under *Gideon* (372 US 335), plaintiff has no standing to assert those claims (see generally *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773; cf. *New York County Lawyers' Assn. v State of New York*, 294 AD2d 69, 74-76). In any event, there is a class action pending on behalf of all indigent criminal defendants in the County addressing the same issues raised by plaintiff herein, and thus we see no need to entertain plaintiff's indirect claims on behalf of those same criminal defendants (*Hurrell-Harring v State of New York*, 15 NY3d 8).

With respect to plaintiff's contentions concerning the ACP Plan as a whole, we have previously concluded that the ACP Plan is a statutorily authorized plan of a bar association pursuant to County Law § 722 (3) (*Parry*, 51 AD3d at 1386), and plaintiff has failed to establish that the ACP Plan has not been properly approved as it exists. He submitted no evidence that the ACP Plan has been amended since April 2006, when it was approved by the chief administrative judge of the State of New York, and defendants submitted sworn statements establishing that, although administrative approval has been sought for amendments, no such amendments have been made.

Plaintiff's reliance on *Goehler v Cortland County* (70 AD3d 57) to challenge the ACP Plan as a whole is misplaced. There, Cortland County had enacted a local law that created the office of conflict attorney and set forth a procedure for assigning counsel to indigent criminal defendants when the public defender had a conflict of interest (*id.* at 58-59). The Third Department concluded that the local law was invalid because it did "not conform to any of the four exclusive methods authorized by [County Law §] 722 for the provision of counsel to indigent litigants" (*id.* at 60). In addition, the local law violated Municipal Home Rule Law § 11 (1) (e) because it superseded a state statute and "[a]pplie[d] to or affect[ed] the courts" (see *Goehler*, 70 AD3d at 60). The decision in *Goehler* is relevant only because it established that courts "have the authority to review challenges related to the court's power to assign and compensate counsel pursuant to a plan or statute" (*id.* at 61).

With respect to the merits of plaintiff's challenges to specific provisions of the ACP Plan, we agree with plaintiff that section D (2) under the "Assignment by Court and Client Eligibility" heading should be declared invalid. That section prohibits attorneys from representing nonincarcerated criminal defendants until there has been a determination of their eligibility, and thus it requires attorneys to violate the indelible right to counsel that attaches at arraignment

(see *Hurrell-Harring*, 15 NY3d at 20-22; *People v Grimaldi*, 52 NY2d 611, 616). Further, that section violates one of the purposes of County Law article 18-B, which is to provide indigent criminal defendants with legal representation "from the time that [they] first appear[] in court to be arraigned on the charge[s]" (Atty Gen Mem in Support, Bill Jacket, L 1965, ch 878, at 6). Finally, that section requires attorneys to violate rule 1.3 of the Rules of Professional Conduct (22 NYCRR 1200.0), which mandates that an attorney act with diligence at all points in time during the representation.

Plaintiff further contends that the ACP Plan effectively denies representation to indigent criminal defendants under age 21 by conditioning their eligibility for assigned counsel on an assessment of their parents' finances. We reject that contention. Parents of unemancipated children under age 21 are responsible and chargeable for the support of those children (see Family Ct Act §§ 413, 416), including the payment of their legal fees (see *Matter of Plovnick v Klinger*, 10 AD3d 84, 90). We therefore conclude that the ACP may consider the resources of the parents of an unemancipated criminal defendant under age 21 when considering that defendant's eligibility for assigned counsel. We further conclude that the ACP can recover from the parents of such a defendant any sums expended for his or her legal services in accordance with County Law § 722-d (see *People v Kearns*, 189 Misc 2d 283, 286-290; 1989 Atty Gen [Inf Ops] 89-44).

Plaintiff contends that the ACP Plan usurps the trial court's authority to determine the compensation for assigned counsel by granting the ACP the power to review vouchers, to refuse to pay "disallowed" charges and to reduce the amount of compensation sought in the voucher. According to plaintiff, the ACP's refusal to pay charges for disallowed services or expenses, when combined with delays in processing vouchers being reviewed for allegedly inappropriate charges, encourages attorneys assigned pursuant to the ACP Plan to undercharge for services in order to avoid delays in payment. County Law § 722-b establishes the rates of compensation for attorneys assigned pursuant to article 18-B, and section 722-b (3) explicitly directs that "compensation and reimbursement shall be fixed by the trial court judge." We therefore agree with plaintiff that County Law § 722-b grants courts the authority to determine the amount of compensation. The ACP Plan, however, contains extensive rules for voucher billing by assigned counsel, and plaintiff contends that those rules impermissibly interfere with the power of the court to determine compensation. That contention lacks merit. The power to determine compensation is vested in the trial court judges in order to "shield[that] important function from extrajudicial influences and considerations" (*People v Brisman*, 173 Misc 2d 573, 586; see also *Matter of Director of Assigned Counsel Plan of City of N.Y. [Bodek]*, 87 NY2d 191, 194). Thus, although the ACP cannot refuse to process vouchers even in the event that those vouchers contain charges that are disallowed by the ACP Plan, we conclude that there is nothing in section 722-b that prohibits the ACP from making recommendations concerning the propriety of specific items in the vouchers. Any challenge to the trial court's final determination with respect to the amount of compensation must be raised "by application . . . to the

appropriate [a]dministrative [j]udges and even to the [a]dministrative [b]oard of the court system" (*Matter of Werfel v Agresta*, 36 NY2d 624, 627).

Plaintiff further contends that the ACP Plan violates County Law article 18-B and the Rules of Professional Conduct by requiring assigned counsel to divulge the client's confidential financial information and by permitting the ACP access to a client's case file for information relevant to the payment of a voucher. That contention lacks merit. First, nothing in article 18-B prohibits such disclosure. Second, although rule 1.6 (a) of the Rules of Professional Conduct prohibits attorneys from knowingly revealing confidential information, section (a) (1) of that rule permits disclosure where, as here, the client gives informed consent to such disclosure (see 22 NYCRR 1200.0). Pursuant to the ACP Plan, those individuals seeking assigned counsel complete an application in which they specifically authorize the disclosure of such information to the ACP.

We also reject plaintiff's contention that the ACP illegally dictates when a case may be billed, thereby improperly delaying payment to assigned counsel. County Law § 722-b (1) specifically states that assigned counsel is to be paid "at the conclusion of the representation" The statute, however, permits an attorney to seek interim compensation where "extraordinary circumstances" exist (§ 711-b [3]). Thus, so long as the ACP does not refuse to process requests for interim compensation, there is no violation of article 18-B. We conclude that the ACP's directive that assigned counsel submit vouchers within 90 days of completion of the subject case falls within coordination of the services of assigned counsel (see § 722 [3] [a]), and it does not directly contravene any provision of article 18-B. We note, however, that the ultimate determination concerning payment must lie with the trial court judge.

Plaintiff further contends that the ACP's rules concerning eligibility of attorneys for participation on the ACP panels usurps the trial court judge's authority to assign counsel. We reject that contention. County Law article 18-B merely provides a means to compensate those assigned attorneys. As noted above, nothing in the ACP Plan impedes the inherent authority and constitutional obligation of the court to assign counsel to indigent criminal defendants (see generally *Gideon*, 372 US 335; *Witenski*, 15 NY2d 392). Further, the power to authorize the expenditure of public funds comes from the Legislature (see *Smiley*, 36 NY2d at 439; *Mitchell*, 377 F3d at 168-169), and the Legislature has limited compensation to counsel who are assigned pursuant to an 18-B plan (see § 722-b). County Law § 722 (3) (a) (i) provides that the services of counsel will be "rotated and coordinated by an administrator," and we conclude that establishing criteria for participation in the ACP Plan is an integral part of the coordination thereof. Certainly, a court is free to appoint an attorney who is not on an 18-B panel to represent an indigent defendant, but that attorney will not be entitled to publicly funded compensation.

Plaintiff further contends, based on the decision in *Ward* (199 AD2d 683), that the ACP Plan unlawfully prohibits the compensation of attorneys who have represented to the court that they were retained or who have previously accepted a fee in relation to the matter pending before the court. In *Ward*, the defendant retained an attorney but, by the time of jury selection, the defendant had become indigent. The court then assigned the previously retained attorney to continue to represent the indigent defendant, subject to a post-trial inquiry into the defendant's indigency (*id.* at 684). Following the defendant's acquittal, the attorney submitted a request for fees pursuant to County Law § 722-b (*id.*). The court approved the request, but the county refused to approve the expenditure (*id.*). The court then issued an order directing payment and denied the county's subsequent motion to vacate that order. The Third Department dismissed the appeal on the ground that it "lack[ed] jurisdiction to entertain appeals involving the 'assignment and compensation of counsel in criminal matters' " (*id.*, quoting *Werfel*, 36 NY2d at 626). Despite its holding, however, the Third Department "[p]arenthetically" addressed the merits (*id.*), and it concluded that the court had the power to assign counsel and that the county did not have the power to review or deny payment (*see id.* at 684-685). The record on appeal in *Ward* establishes that the attorney in question was not a part of that county's bar association plan for assigned counsel, and we thus conclude that the dicta in *Ward* should not be followed. As noted above, courts lack the authority to order compensation for attorneys who have not been assigned pursuant to one of the plans set forth in section 722.

In *Goodman* (45 AD2d 16), we recognized the inherent power of the court to appoint an attorney regardless of whether that attorney was assigned pursuant to the county's 18-B plan, but we stated that "[a]rticle 18-B of the County Law does not authorize the court to pay for the legal services and disbursements of retained counsel" (*id.* at 17). It should be noted that the attorney in *Goodman* was not part of the county's 18-B plan, and thus the court could not have ordered any payment to him pursuant to County Law § 722-b. The fact that he had been previously retained was not necessarily decisive.

We therefore conclude that neither *Ward* nor *Goodman* is controlling with respect to the issue whether an attorney who is a member of the ACP Plan may submit a voucher for payment pursuant to County Law § 722-b when that attorney has previously accepted a fee for the matter or has, at any time, represented to the court that he or she has been retained on the matter. We conclude that section C (4) under the "Assignment by Court and Client Eligibility" heading of the ACP Plan, which prohibits such compensation, is not invalid. Article 18-B "was not intended to provide a basis for public compensation of privately retained counsel" (*People v Smith*, 114 Misc 2d 258, 261), and it "is not a form of fee insurance guaranteeing payment to counsel for failure or inability of a retained client to completely honor a fee arrangement" (*People v Berkowitz*, 97 Misc 2d 277, 281; *see Smith*, 114 Misc 2d at 262). To conclude otherwise would allow 18-B plan attorneys to "unfairly compete with private practitioners" inasmuch as they could accept lower-paying clients and

later seek compensation from the county (Rep of NY State Bar Assn Comm on State Legislation, Bill Jacket, L 1965, ch 878, at 16). As a matter of public policy, previously retained attorneys should not be able to seek compensation in the event that their clients run out of money.

The County has chosen to utilize a bar association plan as its method for providing indigent criminal defendants with representation. The ACP, in coordinating the ACP Plan, is authorized to establish certain criteria for attorneys who desire to be assigned pursuant thereto. We can find no statutory prohibition, no contractual limitation and no constitutional impediment that would preclude a provision in a bar association plan prohibiting payment to attorneys who have previously been retained or previously accepted a fee.

We have considered plaintiff's remaining contentions and conclude that they are without merit.

All concur except GREEN and MARTOCHE, JJ., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part. We agree with the majority except insofar as the majority concludes that section C (4) under the "Assignment by Court and Client Eligibility" heading of the assigned counsel plan established by defendant Onondaga County Bar Association Assigned Counsel Program, Inc., incorrectly sued as The Assigned Counsel Program, Inc. (hereafter, ACP Plan) is valid. Pursuant to that section, an attorney may not present a voucher for payment if that attorney has been previously retained as counsel or has accepted any remuneration for representation on the particular matter for which the voucher is submitted. We do not dispute the majority's conclusion that nothing in County Law article 18-B or the ACP Plan limits the inherent power of the court to assign an attorney to indigent criminal defendants. We conclude, however, that restricting the authority of the court to assign an attorney who is otherwise eligible for assignment simply because that attorney was previously retained by the defendant, who has since become indigent and thus eligible for assigned counsel, circumvents article 18-B and unduly restricts the inherent power of the court to assign an attorney to indigent defendants (*see generally People v Ward*, 199 AD2d 683). The concerns of the majority with respect to article 18-B attorneys competing with private practitioners can and should be addressed by the trial court, which has the authority to assign and compensate counsel.

We therefore would further modify the order by declaring that section C (4) under the "Assignment by Court and Client Eligibility" heading of the ACP Plan is invalid.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1276

CA 10-02483

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

CAROLYN FLATTERY, INDIVIDUALLY AND AS
ATTORNEY-IN-FACT OF KEVIN FLATTERY,
PLAINTIFF-APPELLANT,

V

ORDER

KAILASH C. LALL, M.D., JOHN N. BRACH, M.D.,
CATHOLIC HEALTH SYSTEM, DOING BUSINESS AS
MERCY HOSPITAL OF BUFFALO, AND SOUTHTOWNS
RADIOLOGY ASSOCIATES, LLC,
DEFENDANTS-RESPONDENTS.

HAMSHER & VALENTINE, BUFFALO (RICHARD P. VALENTINE OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR
DEFENDANT-RESPONDENT KAILASH C. LALL, M.D.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (SALLY J. BROAD OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS JOHN N. BRACH, M.D. AND SOUTHTOWNS
RADIOLOGY ASSOCIATES, LLC.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR
DEFENDANT-RESPONDENT CATHOLIC HEALTH SYSTEM, DOING BUSINESS AS MERCY
HOSPITAL OF BUFFALO.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 7, 2010 in a medical malpractice action. The order granted defendants' motions for summary judgment.

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

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1281

CA 11-00276

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

CHRISTINA G. CAGNINA, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ONONDAGA COUNTY, THE ASSIGNED COUNSEL
PROGRAM, INC., ONONDAGA COUNTY BAR
ASSOCIATION, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

JEFFREY R. PARRY, SYRACUSE, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered September 28, 2010. The order granted the motion of defendants Onondaga County, The Assigned Counsel Program, Inc., and the Onondaga County Bar Association for partial summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by denying that part of defendants' motion for partial summary judgment dismissing the declaratory judgment cause of action, vacating the third ordering paragraph, reinstating that cause of action and granting judgment in favor of defendants as follows:

It is ADJUDGED and DECLARED that the assigned counsel plan established by defendant Onondaga County Bar Association Assigned Counsel Program, Inc., incorrectly sued as The Assigned Counsel Program, Inc., is valid with the exception of section D (2) under the "Assignment by Court and Client Eligibility" heading,

and by granting judgment in favor of plaintiff as follows:

It is ADJUDGED and DECLARED that section D (2) under the "Assignment by Court and Client Eligibility" heading of the assigned counsel plan is invalid,

and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that various sections of the assigned counsel plan in defendant Onondaga County (County) were invalid. Defendant Onondaga

County Bar Association Assigned Counsel Program, Inc., incorrectly sued as The Assigned Counsel Program, Inc. (ACP), established the assigned counsel plan (hereafter, ACP Plan) pursuant to County Law article 18-B through a contract with defendant Onondaga County Bar Association (OCBA). Defendants moved for partial summary judgment dismissing the complaint against OCBA and three causes of action, including one seeking a declaratory judgment, against the remaining defendants.

For the reasons set forth in *Roulan v County of Onondaga* (___ AD3d ___ [Dec. 30, 2011]), we conclude that Supreme Court erred in granting the motion in its entirety. As we concluded in *Roulan*, section D (2) under the "Assignment by Court and Client Eligibility" heading of the ACP Plan should be declared invalid. Although plaintiff did not cross-move for summary judgment on the declaratory judgment cause of action, CPLR 3212 (b) permits us to search the record and to grant summary judgment to a nonmoving party where, as here, it appears that a nonmoving party is entitled to such relief. We therefore modify the order by denying that part of defendants' motion for partial summary judgment dismissing the declaratory judgment cause of action, vacating the third ordering paragraph, reinstating that cause of action and declaring that the ACP Plan is valid with the exception of section D (2) under the "Assignment by Court and Client Eligibility" heading. We further modify the order by granting judgment in favor of plaintiff and declaring that section D (2) under the "Assignment by Court and Client Eligibility" heading of the ACP Plan is invalid.

All concur except GREEN and MARTOCHE, JJ., who dissent in part and vote to modify in accordance with the following Memorandum: We respectfully dissent in part. We agree with the majority except insofar as the majority concludes that section C (4) under the "Assignment by Court and Client Eligibility" heading of the assigned counsel plan established by defendant Onondaga County Bar Association Assigned Counsel Program, Inc., incorrectly sued as The Assigned Counsel Program, Inc. (hereafter, ACP Plan), is valid (see *Roulan v County of Onondaga*, ___ AD3d ___ [Dec. 30, 2011, Green, J. and Martoche, J., dissenting]). We therefore would further modify the order by declaring that section C (4) under the "Assignment by Court and Client Eligibility" heading of the ACP Plan is invalid.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1286

KA 09-01499

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MYRON LUMPKIN, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (MELVIN BRESSLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Stephen R. Sirkin, J.), rendered June 9, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and gang assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]) and gang assault in the second degree (§ 120.06), defendant contends that the evidence is legally insufficient to support the conviction. Defendant failed to preserve his contention for our review both because his motion for a trial order of dismissal was not specifically directed at the alleged deficiencies identified on appeal (*see People v Gray*, 86 NY2d 10, 19; *People v Adair*, 84 AD3d 1752, 1753, *lv denied* 17 NY3d 812), and because he failed to renew his motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's further contention, County Court properly denied, without conducting a hearing, his motion pursuant to CPL 330.30 (1) to set aside the verdict (*see generally People v Carter*, 63 NY2d 530, 536; *People v Morgan*, 77 AD3d 1419, 1420, *lv denied* 15 NY3d 922). We also reject defendant's contention that he received ineffective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). Rather, we conclude that the "cumulative effect of defense counsel's alleged deficiencies, viewed in totality and as of the time of the representation, did not deprive defendant of effective assistance of counsel" (*People v Marcial*, 41 AD3d 1308, 1309, *lv*

denied 9 NY3d 878). Finally, the sentence is not unduly harsh or severe.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1291

CA 11-01332

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

THERESA OVERHOFF, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BAUER SERVICE, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (ELIZABETH A. KRAENGEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (RYAN J. MILLS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered December 9, 2010 in a personal injury action. The judgment, entered upon a jury verdict in favor of defendant and against plaintiff, awarded defendant costs and disbursements.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she fell upon stepping in a gap in the concrete at a service station owned and operated by defendant. The jury returned a verdict of no cause of action, and Supreme Court denied plaintiff's post-trial motion to set aside the verdict as against the weight of the evidence and for a new trial. Contrary to plaintiff's contention, the verdict is not against the weight of the evidence, i.e., it cannot be said that "the preponderance of the evidence in favor of [plaintiff] is so great that the verdict could not have been reached upon any fair interpretation of the evidence" (*Dannick v County of Onondaga*, 191 AD2d 963, 964; see generally *Lolik v Big V Supermarkets*, 86 NY2d 744, 746).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1292

CA 11-01333

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

THERESA OVERHOFF, PLAINTIFF-APPELLANT,

V

ORDER

BAUER SERVICE, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (ELIZABETH A. KRAENGEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (RYAN J. MILLS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered December 21, 2010 in a personal injury action. The order denied plaintiff's motion to set aside the jury verdict and for a new trial.

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

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1295

CA 11-00701

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

RICHARD N. AMES, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT JAMES SHUTE, DEFENDANT-APPELLANT.

WOODRUFF LEE CARROLL, SYRACUSE, FOR DEFENDANT-APPELLANT.

RICHARD N. AMES, FAYETTEVILLE, PLAINTIFF-RESPONDENT PRO SE.

Appeal from a judgment of the Supreme Court, Onondaga County (Anthony J. Paris, J.), rendered June 8, 2010. The judgment, inter alia, confirmed the report of the Referee and ordered a foreclosure and sale.

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

Memorandum: On appeal from a judgment of foreclosure and sale, defendant contends for the first time on appeal that, inter alia, the mortgage loan documents should be construed together with a joint venture agreement between plaintiff, defendant and a nonparty. Inasmuch as defendant failed to raise that contention at Supreme Court, it is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, we have considered the merits of defendant's contentions that are raised for the first time on appeal and conclude that they are without merit.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1296

CA 11-01428

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

A.J. BAYNES FREIGHT CONTRACTORS, LTD., AJAC
TRUCKING, LLC, AND LENNON WILLIAMS,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

NORMAN L. POLANSKI, JR., AS MAYOR OF CITY OF
LACKAWANNA, CITY COUNCIL OF CITY OF LACKAWANNA,
JAMES L. MICHEL, AS CHIEF OF CITY OF LACKAWANNA
POLICE DEPARTMENT AND CITY OF LACKAWANNA,
DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

PHILLIPS LYTTLE LLP, BUFFALO (ALISA A. LUKASIEWICZ OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 5, 2010 in a declaratory judgment action. The judgment, among other things, declared City of Lackawanna Municipal Code § 215.53, as amended effective March 3, 2009, unconstitutional and invalid.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part of the third decretal paragraph declaring that defendant City of Lackawanna Municipal Code § 215.53 is unconstitutional and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking a declaration that section 215.53 of the City of Lackawanna Municipal Code, as amended on March 3, 2009 (hereafter, 2009 ordinance), is invalid and unconstitutional. The 2009 ordinance established a truck route system that prohibits heavy trucks, i.e, those having a gross weight in excess of 10,000 pounds, from traveling on all but two specified routes within defendant City of Lackawanna (City). The 2009 ordinance also contained an exception for local deliveries that the parties agree is not relevant to this appeal. Prior to the 2009 amendment, the ordinance allowed heavy trucks to travel on a third route as well, namely, South Park Avenue, but the 2009 ordinance prohibited such trucks from traveling on that route. The 2009 ordinance allegedly caused a hardship for plaintiffs, all of whom are involved in the delivery of milk to the Sorrento cheese manufacturing

plant in the City of Buffalo, just north of the Lackawanna border. Because their trucks could no longer travel on South Park Avenue, plaintiffs had to take a longer and more circuitous route to reach the Sorrento plant.

We agree with plaintiffs that Supreme Court properly determined that the 2009 ordinance is invalid under Vehicle and Traffic Law § 1640 (a) (10) to the extent that it prohibits heavy trucks to travel on South Park Avenue, and thus properly issued a declaration that the ordinance in question is invalid. Section 1640 (a) (10) provides that any system of truck routes established by a city or village "shall provide suitable connection with all [S]tate routes entering or leaving such city or village." The purpose of the statute is to ensure that State thoroughfares "enable vehicles passing through to proceed . . . to and from their destinations" (*People v Grant*, 306 NY 258, 266). Although the court erred in determining that South Park Avenue is a State route within the City, there is no dispute that, south of the City's limits, it becomes U.S. Route 62 and is maintained by the State. Thus, South Park Avenue is a State route as it "enter[s] or leav[es]" the City within the meaning of section 1640 (a) (10), and the truck route system established by the 2009 ordinance fails to provide any connection between U.S. Route 62 as it enters the City and the City's truck route system. Contrary to defendants' contention, the fact that the trucks may travel on other State routes within the City to reach the Sorrento plant does not satisfy the "suitable connection" requirement with respect to U.S. Route 62 (*id.*). Indeed, the statute provides that the truck route system of a city or village "shall provide suitable connection with *all* [S]tate routes" (*id.* [emphasis added]), rather than merely *some* State routes.

We also reject defendants' contention that the 2009 ordinance is authorized by Vehicle and Traffic Law § 1640 (a) (5), which provides that a city or village may exclude trucks from its highways regardless of weight, and/or by subdivision (a) (20) of section 1640, which allows a city or village to exclude trucks "in excess of any designated weight," length, or height, or eight feet in width, from its highways. Although neither of those statutory subdivisions contains a "suitable connection" requirement for State routes, we agree with plaintiffs that, because the three provisions are in *pari materia*, they must be read together and harmonized. To interpret paragraphs (5) and (20) of section 1640 (a) as defendants suggest would effectively remove the "suitable connection" requirement of paragraph (10) from the statute entirely. That interpretation would not only defeat the purpose of the "suitable connection" requirement, but it would also be contrary to the rule of interpretation directing that "[e]very part of a statute must be given meaning and effect . . . , and the various parts of a statute must be construed so as to harmonize with one another" (*Heard v Cuomo*, 80 NY2d 684, 689). In sum, because the truck route system established by the 2009 ordinance provides no suitable connection whatsoever for heavy trucks entering the City on U.S. Route 62, we conclude that it is invalid under section 1640 (a) (10).

We further conclude in any event that the 2009 ordinance also is

invalid under the "access highway" regulations of the Department of Transportation (DOT) to the extent that it prohibits heavy truck traffic on Ridge Road and South Park Avenue south of Ridge Road (see 17 NYCRR 8000.7 [a] [2]; 8114.00 [q], [ae]). Pursuant to Vehicle and Traffic Law § 100-a, an access highway "provid[es] access between a qualifying highway" and, inter alia, terminals and facilities for food, fuel and repairs. Pursuant to Vehicle and Traffic Law § 134-a, qualifying highways generally are those that, inter alia, make up the interstate highway system, and DOT has mandated that heavy truck traffic is generally allowed on access highways (see 17 NYCRR 8000.7 [a]). Contrary to defendants' contention, the authority granted to cities and villages under Vehicle and Traffic Law § 1640 does not trump the authority of DOT over access highways. In fact, the Legislature has specifically delegated to DOT the authority to "designate public highways within the [S]tate as access highways" (§ 1627 [b]). We conclude that the statutory scheme reflects the intent of the Legislature that DOT's authority to designate access highways acts as a limitation on the authority of municipalities to regulate truck traffic.

We reject defendants' further contention that DOT may only designate highways that are part of the State highway system - which would necessarily exclude Ridge Road and South Park Avenue within the City - as access highways. Vehicle and Traffic Law § 1627 (b) authorizes DOT to designate any "public highway[]" as an access highway. While it is true that DOT's own regulations refer to access highways as "State highways" (17 NYCRR 8000.4), DOT has not interpreted that reference to be a limitation on the authority granted to it by section 1627 (b) to designate any "public highway[]" as an access highway. Rather, it has consistently interpreted its own regulation as allowing any public highway to be designated as an access highway (see e.g. 17 NYCRR 8114.00, 8126.00), and does not limit such designation to those roads that make up the State highway system (see generally Highway Law § 341). "[T]he interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Fairport Baptist Homes v Daines*, 60 AD3d 1356, 1357, lv denied 12 NY3d 714, quoting *Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549), and, particularly in light of the broad authority delegated to DOT under Vehicle and Traffic Law § 1627 (b), we conclude that DOT's interpretation is neither irrational nor unreasonable.

We agree with defendants, however, that the court erred in declaring that the 2009 ordinance is unconstitutional, and we therefore modify the judgment accordingly. "Courts should not decide constitutional questions when a case can be disposed of on a nonconstitutional ground" (*Matter of Beach v Shanley*, 62 NY2d 241, 254). Because the court properly declared the 2009 ordinance invalid on statutory grounds, the court should not have addressed plaintiffs' constitutional challenge to the 2009 ordinance.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1302

CA 11-01204

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

IN THE MATTER OF PRESBYTERIAN HOME FOR
CENTRAL NEW YORK, INC., PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

COMMISSIONER OF HEALTH OF THE STATE OF NEW
YORK AND DIRECTOR OF BUDGET OF THE STATE OF
NEW YORK, RESPONDENTS-RESPONDENTS.

RUFFO, TABORA, MAINELLO & MCKAY, P.C., ALBANY (JOHN F. DARLING OF
COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered October 25, 2010 in a proceeding pursuant to CPLR article 78. The judgment, among other things, denied petitioner's motion for partial summary judgment.

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

Memorandum: Petitioner owns and operates a nursing home in Oneida County that receives reimbursement of its capital and operating costs from the State of New York through the Medicaid program. We note at the outset that petitioner purported to commence a declaratory judgment action when in fact the relief it sought was the adjustment of its Medicaid reimbursement rates from the State of New York. Moreover, petitioner does not challenge the constitutionality of any statutes or regulations, and we thus conclude that the parties and Supreme Court have acted properly in ultimately treating this as a CPLR article 78 proceeding (*see generally Matter of Custom Topsoil, Inc. v City of Buffalo*, 63 AD3d 1511).

Petitioner alleged in its fifth cause of action that respondents did not fully reimburse petitioner for the conversion of 80 health-related facility (HRF) beds to skilled nursing facility (SNF) status in 1990 when the distinction between HRF and SNF beds was eliminated pursuant to the Omnibus Budget Reconciliation Act of 1987 ([OBRA] Pub L 100-203, 101 US Stat 1330; *see generally Matter of Grand Manor Nursing Home Health Related Facility, Inc. v Novello*, 39 AD3d 1062, 1063, *lv denied* 9 NY3d 812). As a result of OBRA, the New York State Department of Health (DOH) changed its regulations with respect to

Medicaid reimbursement rates. One of the newly adopted regulations included subdivision (s) of 10 NYCRR 86-2.10, which provides that each facility's new reimbursement rate would be calculated based on a weighted average of its SNF to HRF beds. That regulation also included subdivision (t), which allows for an adjustment of a facility's base year costs if its proportion of SNF to HRF beds changed since the beginning of the base year, i.e., January 1, 1983.

In moving for partial summary judgment, petitioner contended that it was entitled to a bed conversion adjustment pursuant to 10 NYCRR 86-2.10 (t) for 40 SNF beds that had been added in July 1983. According to petitioner, in adjusting its base year costs due to the 40 SNF beds in question, respondents gave petitioner credit for having added only 21 SNF beds, 19 short of what petitioner claimed should have been added. As the court determined, however, that contention was not raised in petitioner's administrative appeals. We thus conclude that the court properly denied the motion and granted in part the cross motion on the ground that petitioner failed to exhaust its administrative remedies with respect to the bed conversion adjustment issue raised in the motion (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57; *Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375-376; *Matter of Nelson v Coughlin*, 188 AD2d 1071, appeal dismissed 81 NY2d 834). Without a final administrative decision on an issue, in which the agency develops the factual record, judicial review is not available (*see Matter of Saint Mary's Hosp. of Troy*, 108 AD2d 1068, 1069). Indeed, "[i]t is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Watergate II Apts.*, 46 NY2d at 57).

In its initial administrative appeal, petitioner in relevant part raised only the issue of the "transition of 80 o[f] our existing beds from HRF to SNF [beds] in the early 1990s." No mention was made of the 40 SNF beds added in July 1983, nor was there a reference to 10 NYCRR 86-2.10 (t). Nor did petitioner raise that particular issue in its second-stage administrative appeal. The issue whether respondents properly adjusted petitioner's rates based on the mandatory conversion of beds pursuant 10 NYCRR 86-2.10 (s) is separate and distinct from the issue whether respondents properly adjusted petitioner's rates pursuant to 10 NYCRR 86-2.10 (t) based on the SNF beds added after January 1, 1983. We thus conclude that petitioner's "failure to obtain prompt administrative review on the basis of the objection which it now seeks to assert . . . precludes petitioner from seeking judicial review" (*Saint Mary's Hosp. of Troy*, 108 AD2d at 1069). Moreover, the court had "no discretionary power to reach" the unexhausted issue (*Nelson*, 188 AD2d at 1071), and it is therefore irrelevant that respondents did not raise the defense of exhaustion of administrative remedies in their answer. In any event, we note that the amended "complaint" did not allege that petitioner was improperly reimbursed for the 40 SNF beds added in July 1983; that issue was raised for the first time in petitioner's motion for partial summary judgment, and thus there was no basis for respondents to have raised the failure to exhaust administrative remedies as a defense with

respect to that issue (*see generally Held v Kaufman*, 91 NY2d 425, 430).

Because the court properly denied the motion based on petitioner's failure to exhaust its administrative remedies, we do not address the merits of petitioner's underlying contention.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1309

KA 08-01364

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CORI D. BUCKMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered June 4, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject defendant's contention that his waiver of the right to appeal was invalid (see generally *People v Lopez*, 6 NY3d 248, 256). Although defendant's further contention that his plea was not knowingly, voluntarily and intelligently entered survives his valid waiver of the right to appeal, defendant failed to preserve that contention for our review (see *People v VanDeViver*, 56 AD3d 1118, lv denied 11 NY3d 931, 12 NY3d 788). Defendant also failed to preserve for our review his contention that the second violent felony offender statement filed by the People did not comply with CPL 400.15 (2). In any event, we conclude that there was substantial compliance with that statute in this case (see *People v Myers*, 52 AD3d 1229), inasmuch as defendant "received adequate notice and an opportunity to be heard with respect to the prior conviction[s]" (*People v Ruffin*, 42 AD3d 582, lv denied 9 NY3d 881). As the People correctly concede, however, County Court erred in failing to impose a sentence for each count of which defendant was convicted (see CPL 380.20). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing (see *People v Sturgis*, 69 NY2d 816, 817-818; *People v*

Bradley, 52 AD3d 1261, *lv denied* 11 NY3d 734).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1310

KA 10-00803

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RASHEED MILTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered March 24, 2010. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault (two counts), criminal possession of a weapon in the third degree, and unlawful imprisonment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of predatory sexual assault (Penal Law § 130.95 [1] [b]; [3]). Defendant contends that the People committed a *Brady* violation inasmuch as they failed to inform him that one of the investigating police officers who testified at trial had a second job as a private investigator for an agency that is periodically retained by the law firm representing the victim in a personal injury action arising out of the incident underlying the conviction. We reject that contention. Even assuming, arguendo, that such information constituted *Brady* material on the ground that it could be used to impeach the officer's testimony, we conclude that there was no "reasonable possibility that the outcome of the trial would have differed had [that information] been [disclosed]" (*People v Scott*, 88 NY2d 888, 891; see *People v Vilardi*, 76 NY2d 67, 77).

Defendant's further contention that he was deprived of a fair trial based on prosecutorial misconduct is not preserved for our review (see CPL 470.05 [2]) and, in any event, that contention is without merit. "Reversal on the ground[] of prosecutorial misconduct 'is mandated only when the conduct has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law' " (*People v Rubin*, 101 AD2d 71, 77, lv denied 63 NY2d 711), and that is not the case here. We reject defendant's 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 without merit.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1315

CA 11-01355

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

ROBIN PUTNAM-CORDOVANO, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF ZACHARY P.
NYDAHL, DECEASED, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CSX CORPORATION, CSX TRANSPORTATION, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (ROBERT M. ANSPACH OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (AMY C. MARTOCHE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County
(Richard C. Kloch, Sr., A.J.), entered February 1, 2011 in a wrongful
death action. The order denied the motion of defendants CSX
Corporation and CSX Transportation, Inc. for a change of venue.

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

Memorandum: CSX Corporation and CSX Transportation, Inc.
(collectively, defendants) contend on appeal that Supreme Court should
have granted their motion for a change of venue from Niagara County to
Chautauqua County. We reject that contention. "A motion for a change
of venue is addressed to the sound discretion of the court and, absent
an improvident exercise of discretion, the court's determination will
not be disturbed on appeal" (*County of Onondaga v Home Ins. Cos.*, 265
AD2d 896, 896; *see 1093 Group, LLC v Canale*, 72 AD3d 1561, 1562-1563).
In addition, general allegations of inconvenience or difficulty are
insufficient to justify a change of venue (*see Mroz v Ace Auto Body &
Towing*, 307 AD2d 403). Based on the record before us, it cannot be
said that the court improvidently exercised its discretion in denying
defendants' motion (*see 1093 Group, LLC*, 72 AD3d at 1562-1563;
Stratton v Dueppengiesser, 281 AD2d 991; *see also CPLR 510 [3]*).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1318

CA 11-01170

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

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
AS SUBROGEE OF RICHARD FREAR AND BARBARA FREAR,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

GLIDER OIL COMPANY, INC.,
DEFENDANT-RESPONDENT-APPELLANT,
AND STEWART BROCKETT, DOING BUSINESS AS ANOTHER
CONSTRUCTION COMPANY, DEFENDANT-RESPONDENT.

MITCHELL GORIS STOKES & O'SULLIVAN, LLC, CAZENOVIA (PATRICK J.
O'SULLIVAN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (GABRIELLE M. HOPE OF
COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

PETRONE & PETRONE, P.C., UTICA (JAMES H. COSGRIFF, III, OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered August 25, 2010. The order, granted the motion of defendant Stewart Brockett, doing business as Another Construction Company, for summary judgment and granted in part the motion of defendant Glider Oil Company, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendant Glider Oil Company, Inc. for summary judgment dismissing the first and fourth causes of action against it and reinstating those causes of action against that defendant and by denying defendant Stewart Brockett, doing business as Another Construction Company, summary judgment dismissing the cross claim against him and reinstating that cross claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, as subrogee of the owners of the property in question, Richard Frear and Barbara Frear, commenced this action on June 17, 2008 seeking to recover sums that it paid to the Frears for property damage sustained as a result of a liquid propane (LP) gas explosion. The Frears entered into a contract with defendant Stewart Brockett, doing business as Another Construction Company, for the construction of a home that was to include an LP gas system. The

Frears entered into a separate contract with defendant Glider Oil Company, Inc. (Glider) for the installation of an LP gas tank and supply system and for the provision of all future LP gas required. Brockett completed construction of the home in September 2001, and Glider installed and connected the LP gas tank and supply system in October 2001. Glider returned to the home on October 31, 2006 to service the LP gas tank, and it last supplied LP gas to the home on November 6, 2006. The home was destroyed by an LP gas explosion on March 20, 2007.

Plaintiff alleged four causes of action against defendants for negligence, breach of warranty, breach of contract and strict products liability, and each defendant cross-claimed against the other for contribution. Brockett moved for summary judgment dismissing the complaint against him, and Glider also moved for summary judgment dismissing the complaint against it. Supreme Court granted Brockett's motion in its entirety and granted those parts of the motion of Glider with respect to the first cause of action, for negligence, the second cause of action, for breach of warranty, and the fourth cause of action, for strict products liability.

We reject the contention of plaintiff on its appeal that the court erred in granting that part of Brockett's motion for summary judgment dismissing the breach of contract cause of action against him as time-barred. The statute of limitations for a breach of contract cause of action is six years (see CPLR 213 [2]). In an action "against a general contractor and architect for defective construction and design, the cause of action generally accrues upon the completion of construction, meaning completion of the actual physical work" (*State of New York v Lundin*, 60 NY2d 987, 989; see *Phillips Constr. Co. v City of New York*, 61 NY2d 949, 951, rearg denied 62 NY2d 646; *Caleb v Severson Env'tl. Servs., Inc.*, 19 AD3d 1090, 1091), i.e., "when the contract in question was substantially completed" (*Town of Poughkeepsie v Espie*, 41 AD3d 701, 706, lv dismissed 9 NY3d 1003, lv denied 15 NY3d 715). Brockett established his entitlement to judgment as a matter of law with respect to the breach of contract cause of action inasmuch as he established that the home was substantially completed in September 2001, more than six years before commencement of this action (see *Lundin*, 60 NY2d at 989; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Although there is evidence in the record that Brockett returned to the home in either the fall of 2001 or 2002 to complete work, that evidence is insufficient to raise a triable issue of fact concerning the date when the home was substantially completed (see generally *Zuckerman*, 49 NY2d at 562). Indeed, the work in question was described as incidental and cosmetic, and it was performed in a few hours on one day (see *Lundin*, 60 NY2d at 989-990; *Tom L. LaMere & Assoc., Inc. v City of Syracuse Bd. of Educ.*, 48 AD3d 1050, 1051-1052). "[C]onstruction may be complete even though incidental matters relating to the project remain open" (*Lundin*, 60 NY2d at 989; see *Phillips Constr. Co.*, 61 NY2d at 951; *Tom L. LaMere & Assoc., Inc.*, 48 AD3d at 1052). We note that plaintiff failed to raise any issues in its brief with respect to those parts of the order granting Brockett's motion for summary judgment dismissing the first,

second and fourth causes of action against him, and we therefore deem any such issues abandoned (see *Ciesinski v Town of Aurora*, 202 AD2d 984).

We reject plaintiff's further contention that the court erred in granting that part of Glider's motion for summary judgment dismissing the breach of warranty cause of action against it as time-barred. The statute of limitations for a breach of warranty cause of action is four years (see UCC 2-725 [1]), and such a cause of action "against a manufacturer or distributor 'accrues on the date the party charged tenders delivery of the product' " (*Rissew v Yamaha Motor Co.*, 129 AD2d 94, 99, quoting *Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407, 411; see UCC 2-725 [2]). It is undisputed that Glider installed and connected the LP gas tank and supply system on or about October 22, 2001, and this action was commenced more than four years after that cause of action accrued (see UCC 2-725 [2]; *Heller*, 64 NY2d at 411).

We agree with plaintiff, however, that the court erred in granting those parts of Glider's motion for summary judgment dismissing the negligence and strict products liability causes of action against it, and we therefore modify the order accordingly. This case "falls in the borderland between tort and contract, an area [that] has long perplexed courts" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 550). "[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated . . . [That] legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389; see *Sommer*, 79 NY2d at 551-552; *Gallup v Summerset Homes, LLC*, 82 AD3d 1658, 1660). "[M]erely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort" (*Gallup*, 82 AD3d at 1660, quoting *Sommer*, 79 NY2d at 551). "In considering whether plaintiff[] has] viable tort causes of action, we must also consider 'the nature of the injury, the manner in which the injury occurred and the resulting harm' " (*id.*, quoting *Sommer*, 79 NY2d at 552).

Here, plaintiff demonstrated that Glider owed a legal duty independent of its contractual obligations, thus precluding summary judgment dismissing the negligence and strict products liability causes of action (see *Sommer*, 79 NY2d at 551-553; *cf.* *Clark-Fitzpatrick, Inc.*, 70 NY2d at 389-390; *Gallup*, 82 AD3d at 1660).

"A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. [For example, p]rofessionals[] and] common carriers . . . may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties" (*Sommer*, 79 NY2d at 551). "A gas company is required to use reasonable care in the handling and distribution of gas. In view of the dangerous and explosive character of gas and its tendency to escape, a gas company has the duty to use that degree of caution which is reasonably necessary to prevent the escape or explosion of gas from its pipes and equipment" (PJI 2:185; see

generally *Schmeer v Gas Light Co. of Syracuse*, 147 NY 529, 538; *Jackson v Gas Co.*, 2 AD3d 1104, 1105; *Lockwood v Berardi*, 135 AD2d 881, 882). Thus, Glider's duty to act with reasonable care is not only a function of its contract with the Frears "but also stems from the nature of its services" (*Sommer*, 79 NY2d at 552).

In addition, "the manner in which the injury arose . . . and the resulting harm[are] both typical of tort claims" (*id.* at 553). The gas explosion was an " 'abrupt, cataclysmic occurrence' " (*id.*; see *Syracuse Cablesystems v Niagara Mohawk Power Corp.*, 173 AD2d 138, 140-142; cf. *Bellevue S. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 293-294, rearg denied 78 NY2d 1008). Further, plaintiff "is not seeking the benefit of [the] contractual bargain," inasmuch as the Frears suffered more than economic damages (*Sommer*, 79 NY2d at 553; see *Village of Palmyra v Hub Langie Paving, Inc.*, 81 AD3d 1352, 1353-1354; *Syracuse Cablesystems*, 173 AD2d at 142).

We agree with Glider on its cross appeal that the court erred in granting Brockett summary judgment dismissing the cross claim against him inasmuch as Brockett did not request that relief in his motion papers (see *Franklin Credit Mgt. Corp. v Wik*, 75 AD3d 1145, 1146; *Berle v Buckley*, 57 AD3d 1276, 1277; *Lyon v Lyon*, 259 AD2d 525). We therefore further modify the order accordingly. We reject the further contention of Glider on its cross appeal, however, that the court erred in denying that part of its motion for summary judgment dismissing the breach of contract cause of action against it as time-barred. Glider had recurring obligations under its contract with the Frears, i.e., to supply all LP gas required by the Frears and to maintain the LP gas supply system. " 'The general rule applicable to contract actions is that a six-year [s]tatute of [l]imitations begins to run when a contract is breached or when one party omits the performance of a contractual obligation' " (*Stalis v Sugar Cr. Stores*, 295 AD2d 939, 940). Where, as here, a contract provides for a recurring obligation, a claim for damages accrues each time the contract is allegedly breached (see *Bulova Watch Co. v Celotex Corp.*, 46 NY2d 606, 611; *Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 435; *Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 80-81). Plaintiff alleged that Glider breached the contract by defectively servicing and supplying the LP gas system, and the record establishes that Glider last serviced the LP gas system in October 2006 and last supplied LP gas in November 2006.

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

1324

CA 11-00778

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

IN THE MATTER PETER S. DUCHMANN AND DUKE
DISTRIBUTING COMPANY, INC., DOING BUSINESS
AS ADVANCED AUTO ELECTRONICS,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN OF HAMBURG, TOWN OF HAMBURG TOWN BOARD,
TOWN OF HAMBURG BOARD OF ZONING APPEALS,
KURT ALLEN, ENFORCEMENT OFFICER BUILDINGS
INSPECTIONS AND CODE ENFORCEMENT, RESPONDENTS,
LAMAR ADVERTISING OF PENN, LLC,
TLC PROPERTIES, INC., LAMAR COMPANY, LLC,
AND LAMAR TEXAS LIMITED PARTNERSHIP,
RESPONDENTS-RESPONDENTS.

HARTER SECREST & EMERY LLP, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL),
FOR PETITIONERS-APPELLANTS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HOWARD S. ROSENHOCH OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the
Supreme Court, Erie County (John A. Michalek, J.), entered December
30, 2010 in a proceeding pursuant to CPLR article 78. The judgment,
inter alia, dismissed the petition against respondents Lamar
Advertising of Penn, LLC, TLC Properties, Inc., Lamar Company, LLC and
Lamar Texas Limited Partnership.

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

Memorandum: Petitioners appeal from a judgment in this CPLR
article 78 proceeding that, inter alia, dismissed the petition against
respondents Lamar Advertising of Penn, LLC, TLC Properties, Inc.,
Lamar Company, LLC and Lamar Texas Limited Partnership (collectively,
Lamar respondents). In 2004, the Lamar respondents entered into a
lease agreement with petitioners that allowed the Lamar respondents to
place a billboard on petitioners' property. On the same day in 2004,
respondent Town of Hamburg (Town) issued the Lamar respondents a
permit for the construction of the billboard (hereafter, 2004 permit).
After an eminent domain taking, the Lamar respondents and petitioners
entered into a new lease agreement that allowed for the relocation of
the billboard to other property owned by petitioners, and the Town

issued a building permit for that relocation in 2007 (hereafter, 2007 permit).

Petitioners thereafter granted the Lamar respondents a perpetual easement that included "the right to service, maintain, improve or replace any outdoor advertising structure on the property [in question]." The Lamar respondents subsequently applied to the Town for a permit to convert part of the billboard to a digital display screen. Petitioners objected to the issuance of the permit because, as the owners of the property, they did not consent to the modification. Although that permit was revoked for other reasons, the Lamar respondents again applied for a permit to convert the billboard to an electronic format, and petitioners objected on the same ground. After the Town issued the permit (hereafter, 2010 permit), petitioners appealed to respondent Town of Hamburg Board of Zoning Appeals (BZA), which denied the appeal. Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the BZA's determination. Supreme Court granted the cross motion of the Lamar respondents for summary judgment dismissing the petition against them. We affirm.

Petitioners contend that the 2010 permit is unlawful because they objected to the issuance thereof and the Lamar respondents did not obtain their written consent. Our review of an administrative determination "is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis" (*Matter of Concetta T. Cerame Irrevocable Family Trust v Town of Perinton Zoning Bd. of Appeals*, 6 AD3d 1091, 1092). The BZA is " 'vested with great discretion' . . . , [and its] determinations are entitled to 'great deference' " (*id.*).

Pursuant to the Code of the Town of Hamburg (Town Code), "[p]rior to the issuance of any sign permit for the erection, alteration, construction, relocation or enlargement of a sign, application for such permit shall be made" (Town Code § 280-250 [A]), and the application must contain "[t]he written consent of the owner[s] of the . . . property" (§ 280-250 [A] [2]). We conclude that it was not arbitrary and capricious for the BZA to conclude that the language of the easement provided the necessary written consent. Whether the change in format for the billboard is viewed as an improvement or a replacement, further consent from petitioners was not required.

Petitioners' contention that both the 2004 and 2007 permits are unlawful because they violate the dimension requirements set forth in the Town Code is time-barred. An appeal of a permit issuance "shall be taken within [60] sixty days" (Town Law § 267-a [5] [b]). "A challenge to 'the issuance . . . of a building permit accrues when the permit is issued . . . and does not constitute a continuing wrong' " (*Matter of Letourneau v Town of Berne*, 56 AD3d 880, 881). Here, petitioners did not appeal to the BZA with respect to either the 2004 or 2007 permit. In any event, we conclude that petitioners' contention lacks merit. Although billboards are prohibited under the Town Code (*see* § 280-252), a 2004 federal court order and settlement between the Town and the Lamar respondents permitted them to place up to two billboards that measured 14 feet by 48 feet on the property.

Because "[s]tipulations of settlement are judicially favored and may not be lightly set aside" (*IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 213), we conclude that the federal court order and settlement are controlling with respect to whether the billboard at issue could be erected and what its dimensions could be.

Petitioners further contend that the determination of the BZA was improper because it failed to make findings of fact. We reject that contention and conclude that it may be ascertained from a review of the record that the BZA's determination had a rational basis (see generally *Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Council of City of N.Y.*, 214 AD2d 335, 337, lv denied 87 NY2d 802).

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

1325

CA 11-00240

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

NORTHERN TRUST, NA, AS ADMINISTRATOR OF THE
ESTATE OF RICHARD SARKIS, DECEASED,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PATRICIA A. DELLEY, DEFENDANT-APPELLANT.

MICHAEL J. CROSBY, HONEOYE FALLS, FOR DEFENDANT-APPELLANT.

RICHARD G. VOGT, P.C., ROCHESTER (LINDA J. VOGT OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered September 13, 2010. The order and judgment, among other things, adjudged that plaintiff is entitled to receive all the proceeds from the sale of 3900 East Avenue in the City of Rochester.

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

Memorandum: Defendant appeals from an order and judgment entered following a nonjury trial that, inter alia, awarded plaintiff, as administrator of the estate of Richard Sarkis (decedent), the proceeds from the sale of 3900 East Avenue in Rochester (hereafter, property). When decedent and defendant became engaged, he gave her a diamond ring and amended the contract that he had executed to purchase the property by adding defendant as an additional purchaser. The deed to the property listed decedent and defendant as "joint tenants with right of survivorship." Decedent subsequently ended the engagement and commenced this action pursuant to Civil Rights Law § 80-b for the return of the ring and to have defendant's name removed from the deed.

Defendant contends that Supreme Court erred in permitting plaintiff to continue the instant action because the property became solely hers when decedent died. We reject that contention. The court properly concluded that an action pursuant to Civil Rights Law § 80-b raises issues regarding the title and ownership interest in real property that survive the death of a party (*see generally Von Bing v Mangione*, 309 AD2d 1038, 1041; *Clapper v Kohls*, 169 AD2d 860; *Pass v Spirt*, 35 AD2d 858, *lv denied* 27 NY2d 490). Unlike a pending partition action (*see generally Goetz v Slobey*, 76 AD3d 954) or a pending divorce action (*see generally Kahn v Kahn*, 43 NY2d 203, 207),

a section 80-b action for the return of real property is not extinguished upon the death of the party who commenced the action, even where, as here, the subject property is held as joint tenants with right of survivorship.

We reject defendant's further contention that the court erred in awarding the proceeds from the sale of the property to plaintiff. "On a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Claridge Gardens v Menotti*, 160 AD2d 544, 544-545; see *Thoreson v Penthouse Intl.*, 80 NY2d 490, 495, *rearg denied* 81 NY2d 835; *Treat v Wegmans Food Mkts., Inc.*, 46 AD3d 1403, 1404). In order to recover property pursuant to Civil Rights Law § 80-b, a plaintiff must demonstrate that he or she gave the property as a gift in "sole consideration . . . [of] a contemplated marriage which has not occurred" The Court of Appeals has interpreted " 'consideration' " to mean "motive or reason" (*Gaden v Gaden*, 29 NY2d 80, 86). Here, the court's conclusion that the property was given solely in consideration of marriage is supported by the record and is based on a " 'fair interpretation of the evidence' " (*Treat*, 46 AD3d at 1404).

We have reviewed defendant's remaining contentions and conclude that they are without merit.

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

1331

KA 09-01810

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LEROY TUFF, JR., DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (MARK C. CURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEROY TUFF, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalby, J.), rendered August 7, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree, criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree (two counts), criminally using drug paraphernalia in the second degree (two counts), unlawful possession of marihuana and intimidating a victim or witness in the third degree.

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of various drug-related crimes as well as the crime of intimidating a victim or witness in the third degree (Penal Law § 215.15 [1]), defendant contends, inter alia, that the People failed to provide full disclosure of the confidential informant's motivation for becoming a confidential informant and testifying at trial. That contention is not preserved for our review because defendant did not object to any of the informant's direct testimony regarding his motivation for becoming a confidential informant (see CPL 470.05 [2]). In any event, the record establishes that defense counsel both cross-examined and re-cross-examined the informant with respect to that contention at trial. Contrary to defendant's further contentions, County Court did not err in consolidating the indictments for trial (see *People v Rogers*, 245 AD2d 1041), nor did the court violate defendant's right to be present at sidebar conferences inasmuch as his absence at the sidebar conferences did not affect his ability to defend himself (see *People v Antommarchi*, 80 NY2d 247, 250, rearg denied 81 NY2d 759; *People v Velasco*, 77 NY2d 469, 472). We reject

defendant's contention that the sentence is illegal (*see generally* Penal Law § 70.25 [2]). Finally, defendant failed to preserve for our review his contention that the court erred in preventing him from calling a witness who had been granted use immunity, and he likewise failed to preserve his remaining contentions for our review (*see* CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1335

KA 10-00123

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAYMOND E. JOSEPH, III, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), dated November 30, 2009. The order directed defendant to pay restitution.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount of restitution ordered and as modified the order is affirmed, and the matter is remitted to Genesee County Court for a new hearing in accordance with the following Memorandum: Defendant was convicted following a jury trial of burglary in the third degree (Penal Law § 140.20) and, after being sentenced to a term of incarceration, he was ordered following a hearing to pay restitution. Although we previously affirmed the judgment of conviction (*People v Joseph*, 63 AD3d 1658), we modified the restitution order by vacating the amount ordered on the ground that County Court erred in delegating its responsibility to conduct the restitution hearing to its court attorney (*People v Joseph*, 63 AD3d 1659, *amended* 63 AD3d 1727). We remitted the matter to County Court for a new hearing to determine the amount of restitution (*id.*). Upon remittal, the matter was referred to a judicial hearing officer (JHO), who conducted a hearing and rendered a decision. The court adopted the JHO's decision and ordered defendant to pay restitution in the amount found by the JHO to be appropriate.

We agree with defendant that the court erred in again delegating its responsibility to conduct the restitution hearing. Penal Law § 60.27 (2) provides that, "[i]f the record does not contain sufficient evidence [of the amount of restitution due] or upon request by the defendant, the court *must* conduct a hearing upon the issue in accordance with the procedure set forth in [CPL 400.30]" (emphasis added). Significantly, "CPL 400.30 does not contain a provision permitting the court to delegate its responsibility to conduct the hearing to its court attorney or to *any other fact finder*" (*People v*

Bunnell, 59 AD3d 942, 943, amended on rearg 63 AD3d 1671, amended 63 AD3d 1727 [emphasis added]). We therefore modify the order by vacating the amount of restitution ordered, and we remit the matter to County Court for a new hearing to determine the amount of restitution in compliance with Penal Law § 60.27.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1338

CA 11-00500

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

LUCIA C. WRONSKI, ET AL., PLAINTIFFS,

V

ORDER

JUDITH EINACH, DEFENDANT,
NICHOLAS BORON, DEBORAH M. BORON,
DEFENDANTS-APPELLANTS,
AND ROSEMARY M. MILLER, DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

THOMAS S. WRONSKI, AS PARENT AND NATURAL GUARDIAN
OF VICTORIA WRONSKI, AN INFANT, PLAINTIFF,

V

NICHOLAS BORON, DEBORAH M. BORON,
DEFENDANTS-APPELLANTS,
AND ROSEMARY M. MILLER, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)
(APPEAL NO. 1.)

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JAMES J. DUGGAN OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), dated November 3, 2010 in a personal injury action. The order, insofar as appealed from, granted the motion of defendant Rosemary M. Miller for summary judgment dismissing the complaints against her.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on December 13, 2011,

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

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1339

CA 11-00501

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

LUCIA C. WRONSKI, ET AL., PLAINTIFFS,

V

ORDER

JUDITH EINACH, DEFENDANT-RESPONDENT,
NICHOLAS BORON, DEBORAH M. BORON,
DEFENDANTS-APPELLANTS,
AND ROSEMARY M. MILLER, DEFENDANT.
(APPEAL NO. 2.)

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (SHAUNA L. STROM OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 6, 2010 in a personal injury action. The order and judgment granted the cross motion of defendant Judith Einach for summary judgment dismissing the complaint and all cross claims against her.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on December 13, 2011,

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

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1340

CA 11-00503

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

LUCIA C. WRONSKI AND THOMAS S. WRONSKI,
PLAINTIFFS-RESPONDENTS,

V

ORDER

JUDITH EINACH, ET AL., DEFENDANTS,
NICHOLAS BORON AND DEBORAH M. BORON,
DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

THOMAS S. WRONSKI, AS PARENT AND NATURAL GUARDIAN
OF VICTORIA WRONSKI, AN INFANT,
PLAINTIFF-RESPONDENT,

V

NICHOLAS BORON, DEBORAH M. BORON,
DEFENDANTS-APPELLANTS,
AND ROSEMARY M. MILLER, DEFENDANT.
(ACTION NO. 2.)
(APPEAL NO. 3.)

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

JACKSON & BALKIN, LOCKPORT (PATRICK M. BALKIN OF COUNSEL), FOR
PLAINTIFF-RESPONDENT THOMAS S. WRONSKI, AS PARENT AND NATURAL GUARDIAN
OF VICTORIA WRONSKI, AN INFANT.

O'BRIEN BOYD, P.C., WILLIAMSVILLE (CHRISTOPHER J. O'BRIEN OF COUNSEL),
FOR PLAINTIFFS-RESPONDENTS LUCIA C. WRONSKI AND THOMAS S. WRONSKI.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered January 27, 2011 in a personal injury action. The order, insofar as appealed from, denied in part the motion of defendants Nicholas Boron and Deborah M. Boron for summary judgment.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on December 13, 2011,

It is hereby ORDERED that said appeal is unanimously dismissed

without costs upon stipulation.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1342

CA 11-00541

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

JOSEPH BYRD, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

FREDERICK E. RONEKER, JR., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NANCY A. LONG OF COUNSEL),
FOR DEFENDANT-APPELLANT.

BARRY J. DONOHUE, TONAWANDA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 25, 2010 in a personal injury action. The order denied the motion of defendant Frederick E. Roneker, Jr. for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint against defendant Frederick E. Roneker, Jr. is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for personal injuries he sustained when he fell from a ladder while cutting a tree limb at a single-family home owned by Frederick E. Roneker, Jr. (defendant). Defendant hired a contractor to repair the roof of his home, and the contractor in turn hired plaintiff as an independent contractor to cut tree branches that extended over the roof. The complaint asserts causes of action for the violation of Labor Law § 240 (1) and § 241 (6), as well as for common-law negligence. In appeal No. 1, defendant appeals from an order denying, without prejudice to renew following additional discovery, his motion for summary judgment dismissing the complaint against him. In appeal No. 2, defendant appeals from an order denying his motion seeking to settle the record on appeal by excluding plaintiff's memorandum of law therefrom.

Addressing first the order in appeal No. 2, we conclude that plaintiff's memorandum of law was properly included in the record on appeal, but only for the limited purpose of determining whether certain of plaintiff's contentions are preserved for our review (see *Matter of Lloyd v Town of Greece Zoning Bd. of Appeals* [appeal No. 1], 292 AD2d 818, 818-819, lv dismissed in part and denied in part 98 NY2d

691, *rearg denied* 98 NY2d 765). The memorandum of law otherwise is not properly before us, however, inasmuch as it is well settled that "[u]nsworn allegations of fact in [a] memorandum of law are without probative value" (*Zawatski v Cheektowaga-Maryvale Union Free School Dist.*, 261 AD2d 860, *lv denied* 94 NY2d 754). We therefore modify the order in appeal No. 2 accordingly.

With respect to the order in appeal No. 1, we conclude that Supreme Court erred in denying defendant's motion. Labor Law § 240 (1) and § 241 (6) both exempt from liability "owners of one[-] and two-family dwellings who contract for but do not direct or control the work" (*see Pfaffenbach v Nemec*, 78 AD3d 1488). In support of his motion, defendant established as a matter of law that he did not direct or control plaintiff's work, and in response plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). " 'Whether an owner's conduct amounts to directing or controlling depends upon the degree of supervision exercised over the method and manner in which the work is performed' " (*Gambee v Dunford*, 270 AD2d 809, 810; *see Affri v Basch*, 13 NY3d 592, 596; *Burnett v Waterford Custom Homes, Inc.*, 41 AD3d 1216, 1217). "There is no direction or control if the owner informs the worker what work should be performed, but there is direction and control if the owner specifies *how* that work should be performed" (*Gambee*, 270 AD2d at 810 [emphasis added]).

Here, although defendant instructed plaintiff to cut down the tree limb in question and told him to cut the limb at its base, there is no evidence that defendant told plaintiff how to perform that task, nor did defendant provide plaintiff with any tools or equipment (*see generally Affri*, 13 NY3d at 596). In fact, it is undisputed that defendant was inside the house when plaintiff fell. The mere fact that defendant told plaintiff that he wanted the limb cut at its base, rather than where plaintiff initially had begun to cut the limb, does not subject him to liability under Labor Law § 240 (1) or § 241 (6) (*see Affri*, 13 NY3d at 596). Indeed, we conclude that this case is analogous to *Schultz v Noeller* (11 AD3d 964, 965), wherein we held that the homeowner's directive concerning where to install electrical outlets and switches, but not how to install them, did not constitute the requisite direction or control over the manner or method of the injured plaintiff's work to render the homeowner liable under sections 240 (1) or 241 (6).

We further reject plaintiff's contention that there is an issue of fact whether defendant was having the work done at his house for commercial purposes, which would also render the homeowner exemption inapplicable (*see generally Dineen v Rechichi*, 70 AD3d 81, *lv denied* 14 NY3d 703). Although plaintiff submitted evidence that defendant was having his roof repaired upon the advice of a realtor who intended to list the property for sale, defendant was residing in the house at the time of the accident, and thus the house remained his "dwelling" within the meaning of Labor Law § 240 (1) and § 241 (6) (*cf. Truppi v Busciglio*, 74 AD3d 1624; *Lenda v Breeze Concrete Corp.*, 73 AD3d 987, 989). Where, as here, the work "directly relates to the residential

use of the home, even if the work also serves a commercial purpose, [the] owner is shielded by the homeowner exemption from the absolute liability" of sections 240 (1) and 241 (6) (*Bartoo v Buell*, 87 NY2d 362, 368; see *Cansdale v Conn*, 63 AD3d 1622).

With respect to the common-law negligence cause of action, which both parties construe as also asserting a violation of Labor Law § 200, we conclude that the court should have also granted that part of defendant's motion for summary judgment dismissing that cause of action. Defendant established as a matter of law that he did not exercise supervisory control over plaintiff's work and that he neither created nor had actual or constructive notice of the allegedly dangerous condition that caused the accident, and plaintiff failed to raise an issue of fact (see *Karcz v Klewin Bldg. Co., Inc.*, 85 AD3d 1649, 1651-1652; *Talbot v Jetview Props., LLC*, 51 AD3d 1396, 1397).

Finally, we note that, although the court denied defendant's motion without prejudice to renew following completion of discovery, depositions had in fact been completed, and the only items of discovery still outstanding were the written contract between defendant and the contractor, and the listing agreement between defendant and his realtor. Because there is no indication on the record before us that either document would be relevant to the dispositive issues of whether defendant is liable under the Labor Law or for common-law negligence, we conclude that neither document would reveal "facts essential to justify opposition" to the motion (CPLR 3212 [f]). Thus, the court should have granted defendant's motion even though defendant had not yet produced the requested documents.

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

1343

CA 11-00542

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

JOSEPH BYRD, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

FREDERICK E. RONEKER, JR., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NANCY A. LONG OF COUNSEL),
FOR DEFENDANT-APPELLANT.

BARRY J. DONOHUE, TONAWANDA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 8, 2011 in a personal injury action. The order settled the record on appeal from an order entered October 25, 2010.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendant Frederick E. Roneker, Jr. to settle the record on appeal and including plaintiff's memorandum of law therein for the sole purpose of determining whether certain of plaintiff's contentions are preserved for our review and as modified the order is affirmed without costs.

Same Memorandum as in *Byrd v Roneker* ([appeal No. 1] ___ AD3d ___ [Dec. 30, 2011]).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1347

CA 11-01372

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

ERIC ROTHFUSS AND LORA ANN ROTHFUSS,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

ORDER

ERIE AND NIAGARA INSURANCE ASSOCIATION,
DEFENDANT-APPELLANT-RESPONDENT.

ERNEST D. SANTORO, ESQ., P.C., ROCHESTER (ERNEST D. SANTORO OF
COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (CHRISTINA F. DEJOSEPH OF
COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered November 1, 2010. The judgment, among other things, adjudged that plaintiffs suffered a loss covered under the terms of the policy of insurance issued by defendant.

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

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1359

KA 10-01601

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRIAN BORDEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered July 14, 2010. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree (three counts), predatory sexual assault (two counts), attempted rape in the first degree and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, *inter alia*, three counts of criminal sexual act in the first degree (Penal Law § 130.50 [1]), arising from his sexual assault of a woman whom he grabbed off the street and dragged into an alley. We reject defendant's contention that County Court erred in denying his motion for a mistrial based on the testimony of a police detective at trial that defendant asked for an attorney when questioned by the police. Although that testimony was improper, it is clear from the record that it was not intentionally elicited by the prosecutor (*cf. People v Morrice*, 61 AD3d 1390, 1391). In addition, the court promptly sustained defense counsel's objections and gave appropriate curative instructions. Under the circumstances of this case, we conclude that the court's curative instructions were sufficient to alleviate any prejudice to defendant as a result of the detective's unsolicited testimony (*see People v Pierre*, 37 AD3d 1172, *lv denied* 8 NY3d 989; *see also People v Nicholas*, 286 AD2d 861, 862, *affd* 98 NY2d 749; *People v Clark*, 281 AD2d 947, *lv denied* 96 NY2d 860).

Defendant's further contention that he was denied a fair trial based on the prosecutor's comment during summation regarding the failure of defendant to testify is not preserved for our review, inasmuch as defense counsel requested either a mistrial or a curative instruction with respect to that comment and made no further objection

when the requested instruction was given. "Under [those] circumstances, the curative instruction[] must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944).

Finally, we reject defendant's contention that the court erred in failing to conduct a *Frye* hearing concerning the admissibility of the DNA results obtained through the "AmpFISTR MiniFiler PCR Amplification Kit for DNA Analysis" (hereafter, MiniFiler test). Prior to trial, the court held a hearing at which a DNA expert called by the People testified without contradiction that the MiniFiler test is simply a more advanced form of traditional polymerase chain reaction/short tandem repeat testing, which this Court and others have long recognized as having gained general acceptance in the scientific community (see *People v Fontanez*, 278 AD2d 933, 935, lv denied 96 NY2d 862; *People v Hall*, 266 AD2d 160, lv denied 94 NY2d 901, 948; *People v Hamilton*, 255 AD2d 693, 694, lv denied 92 NY2d 1032). In addition, the court properly determined that defendant's challenges to the results of the MiniFiler test went to the weight of that evidence, not its admissibility (see generally *People v Wesley*, 83 NY2d 417, 429; *People v Hayes*, 33 AD3d 403, 404, lv denied 7 NY3d 902).

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

1363

CAF 10-02113

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

IN THE MATTER OF JAMES P. CANFIELD,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

LEE A. MCCREE, RESPONDENT-APPELLANT.

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

JOHN M. MURPHY, JR., ATTORNEY FOR THE CHILD, PHOENIX, FOR MACKENZIE B.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered September 13, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner increased visitation with the subject child.

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

Memorandum: Respondent mother appeals from an order granting petitioner father's petition seeking to modify a prior order of custody and visitation entered upon the father's default by awarding him increased visitation with the parties' child. We affirm. The mother's contention that Family Court improperly shifted the burden of proof by requiring her to establish that the father was not entitled to "standard" visitation is unpreserved for our review. The mother did not object to the court's multiple statements concerning the burden of proof and, indeed, the mother's attorney agreed with the statement of the court that the mother bore the burden of proof (see *Matter of Smith v Smith*, 308 AD2d 592; see generally CPLR 5501 [a]). The mother also failed to preserve for our review her contention that the father failed to establish a change of circumstances warranting review of the prior order (see *Matter of Deegan v Deegan*, 35 AD3d 736). Notably, the mother did not move to dismiss the father's petition at the close of his proof or at the conclusion of the hearing on that ground. In any event, the mother's contentions are without merit.

We reject the mother's further contention that the court erred in precluding testimony relevant to the determination with respect to the child's best interests. Contrary to the contention of the mother, the court did not preclude her testimony concerning the father's alleged attempted suicide in 2004 on the ground that it was too remote.

Rather, the court specifically permitted such testimony over the father's objection, but it advised the mother that such testimony was not relevant to the best interests of the child in the absence of evidence concerning the father's recent mental health issues. The court also permitted the mother to testify, again over the father's objection, that the father struck her in 2001, although the court advised the mother that it was "more interested in the . . . five or six years" prior to the hearing in 2010. With respect to the mother's testimony concerning various verbal altercations between the parties, we conclude that the court did not abuse its discretion in limiting such testimony inasmuch as the court was well aware of the parties' acrimonious relationship, which was evident during the two years of proceedings prior to the hearing (*see generally Matter of Cool v Malone*, 66 AD3d 1171, 1173). Any further testimony concerning the parties' acrimonious relationship would have been cumulative (*see Matter of Kubista v Kubista*, 11 AD3d 743, 745).

Finally, the mother failed to preserve for our review her further contention that the court erred in failing to order a psychological or social evaluation of the father inasmuch as she did not request such an evaluation, and there is no indication in the record that the court should have sua sponte ordered such an evaluation (*see Matter of Henry v Caye*, 9 AD3d 878; *see generally Matter of Tracy v Tracy*, 309 AD2d 1252; *Matter of Nunnery v Nunnery*, 275 AD2d 986, 987).

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

1364

CAF 11-01027

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

IN THE MATTER OF SHIRLEY A.S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAVID A.S., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 25, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred custody and guardianship of the subject child to petitioner.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to his child on the ground of permanent neglect and transferring custody and guardianship of the child to petitioner. The father failed to preserve for our review his contention that the admission in evidence of his records from a drug treatment facility violated 42 USC § 290dd-2, inasmuch as the father failed to object on that ground. In any event, "absent evidence that [the father] was treated by a facility 'conducted, regulated, or directly or indirectly assisted by any department or agency of the United States,' the federal statute does not apply" (*L.T. v Teva Pharms. USA, Inc.*, 71 AD3d 1400, 1401), and the father presented no such evidence. In addition, such records are subject to disclosure in neglect proceedings where, as here, there is " 'good cause' " for the disclosure (*Matter of Kennedie M.*, 89 AD3d 1544), which clearly exists in this case.

We reject the father's further contention that his drug treatment records were inadmissible because they were not properly certified pursuant to Family Court Act § 1046. That statute does not apply to proceedings to terminate parental rights pursuant to Social Services

Law § 384-b (see *Matter of Department of Social Servs. v Waleska M.*, 195 AD2d 507, 510, *lv denied* 82 NY2d 660). In any event, the records were properly certified pursuant to CPLR 4518 (see generally *Matter of Leon RR*, 48 NY2d 117, 122-123). We also conclude that Family Court properly admitted in evidence the family services progress notes relating to the father and the child's mother, whose parental rights with respect to the child were also terminated. Petitioner properly laid a foundation for the admission in evidence of those notes through the testimony of its caseworker. Finally, contrary to the father's contention, we conclude that petitioner established "by clear and convincing evidence that it . . . fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family" (*Matter of Sheila G.*, 61 NY2d 368, 373).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1365

CA 11-00587

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

TRACY GURNETT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TOWN OF WHEATFIELD, ROBERT CLIFFE, LARRY HELWIG,
ARTHUR GERBEC, GILBERT DOUCET, KENNETH RETZLAFF
AND ROBERT O'TOOLE, DEFENDANTS-RESPONDENTS.

SPADAFORA & VERRASTRO, LLP, BUFFALO (JOSEPH C. TODORO OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

PETRONE & PETRONE, P.C., WILLIAMSVILLE (JAMES H. COSGRIFF, III, OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County
(Richard C. Kloch, Sr., A.J.), entered December 13, 2010. The order
denied the application of plaintiff for leave to serve a late and
amended notice of claim.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs and the application is
granted upon condition that the proposed amended notice of claim is
served within 20 days of the date of entry of the order of this Court.

Memorandum: Plaintiff, an employee of defendant Town of
Wheatfield, initially served a notice of claim alleging that she had
been subjected to, inter alia, harassment, retaliation and a hostile
work environment beginning on "December 4, 2009 and continuing
thereafter." Following the hearing conducted pursuant to General
Municipal Law § 50-h, plaintiff sought leave to amend the notice of
claim to reflect that the conduct complained of began on May 29, 2009,
and she also sought leave to serve the amended notice of claim as a
late notice of claim. Supreme Court denied plaintiff's application
based upon her failure to offer a reasonable excuse for failing to
serve a timely notice of claim with respect to the incidents beginning
on May 29, 2009.

"Although courts are vested with broad discretion in determining
whether to grant an application for leave to serve a late notice of
claim," we conclude that the court abused its discretion in denying
plaintiff's application (*Hale v Webster Cent. School Dist.*, 12 AD3d
1052, 1052). Plaintiff established that defendants received actual
notice of the first incidents upon which the claim is based in a
timely manner in June 2009, and "defendants have made no

particularized or persuasive showing that the delay caused them substantial prejudice" (*Wetzel Servs. Corp. v Town of Amherst*, 207 AD2d 965; see *Matter of Hall v Madison-Oneida County Bd. of Coop. Educ. Servs.*, 66 AD3d 1434). Thus, plaintiff's failure to offer a reasonable excuse for the delay in filing a notice of claim with respect to the incidents commencing May 29, 2009 " 'is not fatal where, as here, actual notice was had and there is no compelling showing of prejudice to' [defendants]" (*Matter of Henderson v Town of Van Buren*, 281 AD2d 872, 873). We therefore reverse the order and grant plaintiff's application upon condition that the proposed amended notice of claim is served within 20 days of the date of entry of the order of this Court.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1368

CA 11-00651

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

IN THE MATTER OF THE ARBITRATION BETWEEN
BRIAN HAESSIG, PRESIDENT, OSWEGO CLASSROOM
TEACHERS ASSOCIATION, PETITIONER-RESPONDENT,

AND

MEMORANDUM AND ORDER

OSWEGO CITY SCHOOL DISTRICT,
RESPONDENT-APPELLANT.

FERRARA FIORENZA LARRISON BARRETT & REITZ, P.C., EAST SYRACUSE (ERIC
J. WILSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

RICHARD E. CASAGRANDE, LATHAM (PAUL D. CLAYTON OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered December 16, 2010 in a proceeding pursuant to CPLR article 75. The order and judgment, among other things, granted the petition to compel arbitration.

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

Memorandum: Respondent appeals from an order and judgment granting the petition pursuant to CPLR article 75 to compel arbitration and denying respondent's cross motion to stay arbitration, relief also sought in a counterclaim. Petitioner is the president of the Oswego Classroom Teachers Association (hereafter, Association), the collective bargaining agent for teachers and certain other employees of respondent. The Association filed a grievance when respondent assigned an additional instructional class to teachers for the 2010-2011 school year, and it subsequently demanded arbitration. Respondent sought a stay of arbitration on the ground that the grievance was not arbitrable. In the alternative, respondent sought a determination that any arbitration would be advisory in nature. Contrary to respondent's contention, Supreme Court properly granted the petition and denied the cross motion.

Where, as here, the collective bargaining agreement (CBA) contains a broad arbitration clause, our determination of arbitrability is limited to "whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA" (*Matter of Board of Educ. of Watertown City*

School Dist. [Watertown Educ. Assn.], 93 NY2d 132, 143; see *Matter of Niagara Frontier Transp. Auth. v Niagara Frontier Transp. Auth. Superior Officers Assn.*, 71 AD3d 1389, 1390, lv denied 14 NY3d 712). The CBA defines a "[g]rievance" as "any claimed violation, misinterpretation or inequitable application of [the CBA] or existing Board [of Education] policies relating to salaries, hours and working conditions of the teachers" Pursuant to the CBA, a grievance may be submitted to arbitration if it remains unresolved after the third stage of the grievance procedure. The Association alleged that respondent's assignment of an additional instructional class violated Article VIII, sections A and D of the CBA, which govern, inter alia, teaching load and class sizes. Indeed, disputes concerning the CBA provisions at issue are specifically listed as arbitrable matters under the fourth stage of the grievance procedure.

Respondent contends, however, that other provisions of the CBA specifically exclude the instant grievance from arbitration. We reject that contention. Pursuant to the grievance procedure set forth in the CBA, "the term 'grievance' shall not apply to any matter as to which (1) the method of review is prescribed by law, or rules or regulation having the force or effect of law or (2) the Board [of Education] is without authority to act." Contrary to respondent's contention, the fact that the Commissioner of Education has promulgated regulations pertaining to teacher class loads (see 8 NYCRR 100.2 [i]) does not exclude that subject from the scope of arbitration under the CBA (see *Board of Educ. of City of N.Y. v Glaubman*, 53 NY2d 781, 782-783; *Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO*, 26 AD3d 843, mod on other grounds 8 NY3d 513). Further, although Education Law § 310 permits any aggrieved party to appeal by petition to the Commissioner of Education, that statute does not mandate a particular method of review and does not preclude submission of disputes concerning teacher class loads to arbitration (see *Glaubman*, 53 NY2d at 783; see generally *Matter of Board of Educ., Commack Union Free School Dist. v Ambach*, 70 NY2d 501, 508-509, cert denied 485 US 1034).

Respondent also contends that the grievance is not arbitrable based on a provision of the CBA pursuant to which an "arbitrator shall have no power to add to, subtract from, or change any of the provisions of [the CBA]; nor to render any decision [that] conflicts with a law, regulation, directive, or other obligation upon [respondent]; nor to imply any obligation upon [respondent that] is not specifically set forth in [the CBA]." It is well established, however, that such language does not "circumscribe the otherwise broad contractual definition of arbitrable grievances" in the CBA but, rather, it is "intended only as a set of instructions to the arbitrator to guide him [or her] as to the types of remedies he [or she] is permitted to formulate once he [or she] has interpreted and applied the substantive provisions of the agreement" (*Board of Educ. of Lakeland Cent. School Dist. of Shrub Oak v Barni*, 49 NY2d 311, 315). Inasmuch as "it cannot be assumed in advance of arbitration that the arbitrator will exceed his [or her] powers as delimited in the [CBA], the restrictive language in the arbitration clause cannot be cited as a ground for staying arbitration" (*id.*; see *Matter of*

Board of Educ. of Gowanda Cent. School Dist. [Gowanda Cent. School Non-Teaching Personnel Assn.], 202 AD2d 1048; *Matter of Marcellus Cent. School Dist. [Marcellus School Off. Personnel Assn.]*, 177 AD2d 935).

Contrary to the further contention of respondent, the court properly denied its cross motion seeking a determination that any arbitration would be advisory in nature. It is for the arbitrator, not the court, to interpret the substantive aspects of the CBA, including whether an arbitration award is binding or advisory (see generally *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 82-83; *Board of Educ. of Watertown City School Dist.*, 93 NY2d at 142).

Finally, petitioner did not abandon its right to arbitrate the grievance by filing a notice of claim with the Public Employment Relations Board concerning an improper practice charge (see generally *Matter of County of Suffolk v Novo*, 96 AD2d 902).

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

1369

CA 11-00457

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

JEFFREY DIPALMA, CLAIMANT-RESPONDENT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 111910.)

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

CANTOR, LUKASIK, DOLCE & PANEPINTO, P.C., BUFFALO (STEPHEN C. HALPERN OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Jeremiah J. Moriarty, III, J.), dated November 26, 2010 in a personal injury action. The judgment determined defendant to be 100% liable pursuant to Labor Law § 240 (1) and § 241 (6).

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

Memorandum: Claimant commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when a large "skid box" containing concrete debris slid off of a forklift and struck him. Following the liability portion of a bifurcated trial, the Court of Claims determined that defendant, the property owner, was liable for claimant's injuries pursuant to Labor Law § 240 (1) and § 241 (6). Defendant contends that the court should have applied the falsus in uno doctrine and discredited claimant's trial testimony concerning the way in which the accident occurred because that testimony differed in some respects from claimant's deposition testimony. We reject that contention. The falsus in uno doctrine permits a factfinder to disregard entirely the testimony of a witness who has willfully testified falsely with respect to any material fact. The doctrine, however, is "not mandatory," and the court is free to credit any part of a witness's testimony that it deems true and disregard what it deems false (*People v Johnson*, 225 AD2d 464, 464; see *Accardi v City of New York*, 121 AD2d 489, 490-491). The inconsistencies identified by defendant are not so significant as to render claimant's trial testimony incredible as a matter of law, and the court's determination to credit that testimony, at least in part, is entitled to deference (see *Ring v State of New York*, 8 AD3d 1057, lv denied 3 NY3d 608; *Goncalves v State of New York*, 1 AD3d 914; see generally *Northern Westchester Professional Park Assoc. v Town of*

Bedford, 60 NY2d 492, 499). We note that claimant's trial testimony was consistent with that of the other witnesses who were present when the accident occurred.

Defendant further contends that Labor Law § 240 (1) is inapplicable because there was no significant height differential between the skid box and the platform onto which it fell, where claimant was working at the time of the accident. We reject that contention. The "core premise" of our Labor Law § 240 (1) jurisprudence is "that a defendant's failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability" (*Wilinski v 334 East 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 4). Here, similar to the plaintiff in *Wilinski*, claimant "suffered harm that 'flow[ed] directly from the application of the force of gravity' " to the object that struck him (*id.*). Moreover, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603), and the experts who testified on behalf of both parties agreed that the failure to use a protective device to secure the skid box to the forklift was improper. Although the skid box fell only one or two feet before it struck claimant, in light of the weight of the skid box and its contents, as well as the potential harm that it could cause, it cannot be said that the elevation differential was de minimis (see *id.* at 605).

We also reject defendant's contention that the court erred in determining that it was liable under Labor Law § 241 (6). The section 241 (6) cause of action was based on an alleged violation of 12 NYCRR 23-2.1 (b), pursuant to which "[d]ebris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area." We have previously held that 12 NYCRR 23-2.1 (b) is sufficiently specific to support liability under section 241 (6) (see *Coleman v ISG Lackawanna Servs., LLC*, 74 AD3d 1825; *Kvandal v Westminster Presbyt. Socy. of Buffalo*, 254 AD2d 818). It is undisputed that claimant was injured while in the process of removing debris and, contrary to defendant's contention, it is not necessary for claimant to have been struck by debris for the regulation to apply (see *Coleman*, 74 AD3d 1825). In any event, the record contains evidence that claimant was in fact struck by debris that fell out of the skid box, in addition to the skid box itself.

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

1371

CA 11-01067

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

UTILITY SERVICES CONTRACTING, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

MONROE COUNTY WATER AUTHORITY,
DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 1.)

HARTER SECREST & EMERY LLP, ROCHESTER (F. PAUL GREENE OF COUNSEL), FOR
DEFENDANT-APPELLANT-RESPONDENT.

MURA & STORM, PLLC, BUFFALO (ERIC T. BORON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 4, 2010 in a breach of contract action. The order denied in part the motion of defendant for summary judgment and denied plaintiff's cross motion for summary judgment.

It is hereby ORDERED that said appeal from the order insofar as it denied that part of defendant's motion for summary judgment dismissing the first cause of action to the extent that it sought consequential damages is unanimously dismissed and the order is modified on the law by granting those parts of defendant's motion for summary judgment dismissing the first cause of action except to the extent that it sought consequential damages and for summary judgment on the counterclaim in the amount of \$108,000 plus prejudgment interest and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages resulting from defendant's alleged breach of a contract for a water main installation project. By the order in appeal No. 1, Supreme Court granted those parts of defendant's motion for summary judgment dismissing the second through fourth causes of action, denied those parts of defendant's motion for summary judgment dismissing the first cause of action, for breach of the implied covenant of good faith and fair dealing, and for summary judgment on the counterclaim, for liquidated damages and attorneys' fees, and denied plaintiff's cross motion for summary judgment on the amended complaint. We note that, although the court did not address that part of the motion for summary judgment on the issue of consequential damages, the failure to rule on that part of the motion is deemed a denial thereof (*see Brown v U.S.*

Vanadium Corp., 198 AD2d 863, 864). In appeal No. 2, defendant moved for leave to reargue only that part of its motion for summary judgment determining that plaintiff was contractually precluded from seeking consequential damages. The court granted the motion for leave to reargue and, upon reargument, the court noted that only that part of its prior order concerning the first cause of action was at issue, and it concluded that defendant was not entitled to summary judgment on the issue of consequential damages. We note at the outset that defendant's appeal from the order in appeal No. 1 must be dismissed with respect to the issue of consequential damages inasmuch as it was superseded by the order in appeal No. 2 (see *Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

We agree with defendant in each appeal that the first cause of action, for breach of the implied covenant of good faith and fair dealing, must be dismissed. We therefore modify the order in each appeal accordingly. We conclude that the first and second causes of action are duplicative inasmuch as they both allege that defendant breached the contract in question by interfering with subcontractors and refusing to grant appropriate extensions, thus preventing plaintiff from completing the contract in a timely manner (see *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319-320; *Hassett v New York Cent. Mut. Fire Ins. Co.*, 302 AD2d 886; see generally *Bass v Sevits*, 78 AD2d 926, 927). We note that the allegations underlying the first cause of action occurred prior to a written amendment to the contract whereby defendant granted plaintiff an extension. With respect to defendant's interference and failure to grant an additional extension following that amendment, as alleged in the second cause of action, defendant met its initial burden on the motion and plaintiff failed to submit evidence sufficient to raise a triable issue of fact whether an additional extension was requested in writing as required by the contract (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Further, the parties' prior conduct in requesting and granting an extension to the contractual time limit in writing belie the contention of plaintiff that the contract's requirements with respect thereto were waived (see *Phoenix Corp. v U.W. Marx, Inc.*, 64 AD3d 967, 969-970; *Charles T. Driscoll Masonry Restoration Co., Inc. v County of Ulster*, 40 AD3d 1289, 1291-1292). In light of our conclusion that defendant is entitled to summary judgment dismissing the amended complaint in its entirety, the issue whether plaintiff is entitled to consequential damages is moot.

Contrary to plaintiff's contention on its cross appeal in appeal No. 1, the court properly granted those parts of defendant's motion for summary judgment dismissing the third cause of action, for promissory estoppel, and the fourth cause of action, for unjust enrichment. We further conclude that plaintiff failed to establish that facts essential to justify opposition to the motion were in the exclusive possession of defendant (see *Santangelo v Fluor Constructors Intl.*, 266 AD2d 893).

We also agree with defendant in appeal No. 1 that the court erred in denying that part of its motion for summary judgment on the

counterclaim. There is no triable issue of fact with respect to defendant's entitlement to liquidated damages calculated from the original contractual completion date of August 1, 2002, inasmuch as the contractual amendment expressly reserved defendant's right to those damages. Further, although defendant entered into a release agreement pursuant to which plaintiff's surety would assess only \$75,000 in liquidated damages against the performance bond issued by it, defendant expressly reserved its right to seek the remainder of liquidated damages from plaintiff. We therefore further modify the order in appeal No. 1 by granting that part of defendant's motion for summary judgment on the counterclaim in the amount of \$108,000 plus prejudgment interest, constituting the remainder of liquidated damages owed following the surety's payment of \$75,000 (*see generally* CPLR 5001 [a]). The remaining contentions of defendant in appeal No. 1 are moot.

Finally, we note that plaintiff abandoned any challenge to the order in appeal No. 2 inasmuch as it failed to raise any contentions with respect to the only part of the order by which plaintiff is aggrieved (*see* CPLR 5511), i.e., that part denying its request for costs and attorneys' fees associated with the motion (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1372

CA 11-01068

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

UTILITY SERVICES CONTRACTING, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

MONROE COUNTY WATER AUTHORITY,
DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 2.)

HARTER SECREST & EMERY LLP, ROCHESTER (F. PAUL GREENE OF COUNSEL), FOR
DEFENDANT-APPELLANT-RESPONDENT.

MURA & STORM, PLLC, BUFFALO (ERIC T. BORON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered January 4, 2011 in a breach of contract action. The order, among other things, granted the motion of defendant for leave to reargue and upon reargument adhered to its prior ruling on defendant's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendant's motion for summary judgment dismissing the first cause of action to the extent that it sought consequential damages and as modified the order is affirmed without costs.

Same Memorandum as in *Utility Servs. Contr. v Monroe County Water Auth.* ([appeal No. 1] ___ AD3d ___ [Dec. 30, 2011]).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1375

KA 10-01035

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ELIUD BENNETT, 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 Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered March 19, 2010. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level (*see People v Clark*, 66 AD3d 1366, *lv denied* 13 NY3d 713; *People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708). In any event, we reject that contention inasmuch as "defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" (*People v Regan*, 46 AD3d 1434, 1435).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1376

KA 10-01963

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RALIK BAILEY, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered July 29, 2010. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of two counts of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that he was deprived of his right to testify before the grand jury (see CPL 190.50). We reject that contention. Approximately three months after defendant was involved in an altercation with correction officers at Attica Correctional Facility and before any criminal charges were filed against him, defendant was visited at another correctional facility by a police investigator who attempted to interview him about the altercation at Attica. Defendant told the investigator, "I have nothing to say at this time. Also at this time I request an attorney and to be present at any criminal proceedings or hearings if any take place." An indictment was later filed against defendant, charging him with various crimes arising from the incident at Attica, including the two counts of felony assault of which he was later convicted. It is undisputed that defendant was not advised of the grand jury presentation and thus did not testify before the grand jury.

CPL 190.50 (5) (a) provides a defendant with the right to testify before the grand jury "if, prior to the filing of any indictment . . . in the matter, he serves upon the district attorney of the county a written notice making such request. . . ." "In order to preserve his or her statutory pretrial rights, including the right to testify before the [g]rand [j]ury, a defendant must assert them 'at the time and in the manner that the Legislature prescribes' " (*People v Green*,

187 AD2d 528, *lv denied* 81 NY2d 840, quoting *People v Lawrence*, 64 NY2d 200, 207). The requirements of CPL 190.50 are to be "strictly enforced" (*People v Madsen*, 254 AD2d 152, 153, *lv denied* 92 NY2d 1035; see *People v Yon*, 300 AD2d 1127, *lv denied* 99 NY2d 621). Here, we conclude that defendant's statement to the police investigator was not sufficient to invoke his right to testify before the grand jury under CPL 190.50. The statement was not in writing, it was not served upon the District Attorney, and defendant merely asserted that he wished to be present at any proceedings but did not expressly request to testify before the grand jury. In addition, because defendant was not arraigned "in a local criminal court upon a currently undisposed of felony complaint" (CPL 190.50 [5] [a]), the People had no obligation to inform defendant of the grand jury presentation (see *People v Mathis*, 278 AD2d 803, *lv denied* 96 NY2d 785).

We also reject defendant's contention that the verdict is against the weight of the evidence based on inconsistencies in the testimony of the various correction officers who testified against him at trial. Viewing the evidence in light of the elements of the crimes in this nonjury trial (see *People v Danielson*, 9 NY3d 342, 349), and affording appropriate deference to the court's credibility determinations (see *People v Hill*, 74 AD3d 1782, *lv denied* 15 NY3d 805), we conclude that those inconsistencies are not so substantial as to render the verdict against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Finally, although the appeal by defendant from the judgment convicting him of the predicate conviction upon which his adjudication as a second felony offender is based remains pending, we nevertheless reject his contention that the court could not use that conviction as the basis for that adjudication. In the event that the judgment is reversed on appeal, defendant may then move to set aside his sentence herein pursuant to CPL 440.20 (see *People v Main*, 213 AD2d 981, *lv denied* 85 NY2d 976).

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

1377

KA 09-00863

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RANDOLPH WATSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered January 12, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]) and assault in the second degree (§ 120.05 [2]), defendant contends that his statements to the police to the effect of "I'll show you the gun," made after he had invoked his right to counsel, were not spontaneous and should have been suppressed. We reject that contention. Although defendant did not specifically contend before Supreme Court that it had applied the incorrect legal standard in concluding that his statements were spontaneous and thus that his right to counsel was not thereby violated, we note that "the violation of the right to counsel may be raised for the first time on appeal" (*People v Whetstone*, 281 AD2d 904, *lv denied* 96 NY2d 909; see *People v Sierra*, 85 AD3d 1659, 1660). Nevertheless, "we conclude that the statements were spontaneous inasmuch as 'they were in no way the product of an interrogation environment [or] the result of express questioning or its functional equivalent' " (*Sierra*, 85 AD3d at 1660, quoting *People v Harris*, 57 NY2d 335, 342, *cert denied* 460 US 1047 [internal quotation marks omitted]; see *People v Rivers*, 56 NY2d 476, 479-480, *rearg denied* 57 NY2d 775). Thus, the court properly refused to suppress defendant's statements based on the alleged violation of his right to counsel (see *People v Cascio*, 79 AD3d 1809, 1811, *lv denied* 16 NY3d 893).

Defendant further contends that his consent to the search that

yielded the gun and ammunition was invalid because it was provided in the absence of counsel, and thus that the search was unlawful. Even assuming, arguendo, that we agree with defendant, we nevertheless conclude that the error is harmless. Indeed, there is no reasonable possibility that the constitutional error in failing to suppress the gun and the ammunition might have contributed to the conviction, and thus the error is harmless beyond a reasonable doubt (see *People v Crimmins*, 36 NY2d 230, 237). In view of our determination, we do not reach defendant's further related contention that the doctrine of inevitable discovery is inapplicable.

Defendant failed to preserve for our review his contentions that the police lacked probable cause to arrest him and that his statements, the gun, and the ammunition should have been suppressed as the product of an unlawful arrest (see *People v Johnson*, 60 AD3d 695, lv denied 12 NY3d 916; *People v Johnson*, 52 AD3d 1286, 1287, lv denied 11 NY3d 738; *People v Hyla*, 291 AD2d 928, lv denied 98 NY2d 652). Defendant also failed to preserve for our review his contention that the suppression hearing testimony of the police officers was patently tailored to nullify constitutional objections and was incredible as a matter of law (see CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

To the extent that defendant contends that defense counsel was ineffective for failing to raise the issues of probable cause for his arrest and the credibility of the police officers' testimony at the suppression hearing, we reject that contention because "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, rearg denied 3 NY3d 702; see *People v McGee*, 87 AD3d 1400, 1403; *People v Biro*, 85 AD3d 1570, 1572).

Contrary to defendant's contention, his sentence of a determinate term of imprisonment of six years with five years of postrelease supervision for his conviction of criminal possession of a weapon in the second degree is not unduly harsh or severe. Finally, we reject defendant's contention that the imposition of a \$5,000 fine was unduly harsh and severe or an abuse of discretion. "Supreme Court did not abuse its discretion in imposing a fine to impress upon defendant the severity of his conduct" (*People v McKenzie*, 28 AD3d 942, 943, lv denied 7 NY3d 759). Further, it appears from the record before us that defendant has the resources to pay a substantial portion of the fine, despite the appointment of assigned counsel to represent him (cf. *People v Gemboys*, 270 AD2d 847, 848; *People v Helm*, 260 AD2d 803).

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

1380

KA 08-02005

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LUIS A. GONZALEZ, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered September 22, 2006. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated and driving while ability impaired by drugs and, upon a nonjury verdict, of aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of driving while intoxicated ([DWI] Vehicle and Traffic Law § 1192 [3]) and driving while ability impaired by drugs ([DWAI] § 1192 [4]), and convicting him, pursuant to a "stipulation," of aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a]). According to the evidence presented at trial, two police officers in separate patrol cars observed defendant operating a motor vehicle while talking on his cellular telephone. They further observed that he was not wearing his seatbelt, and was improperly driving down the middle of the roadway. When the officers stopped defendant's vehicle, defendant pulled into a private driveway and, in the process of doing so, he struck the curb, drove onto the lawn, and failed to use his turn signal. Defendant then exited the vehicle but was ordered back into the vehicle. He had trouble re-entering the vehicle, and stated that he was in a lot of pain. The officers detected the odor of alcohol and noticed that defendant's eyes were bloodshot and glassy and that his speech was slurred. Defendant admitted that, approximately one hour prior to the traffic stop, he drank one beer and took two Vicodin, which were prescribed to him for pain. Defendant submitted to several field sobriety tests, which led the officers to conclude that he was intoxicated by alcohol or impaired by drugs. Defendant was arrested and refused to submit to a breathalyzer test or a blood test.

Defendant contends on appeal that the evidence at trial established only that he was allegedly impaired by the *combined* effects of alcohol and Vicodin, and that the convictions of DWI and DWAI must be reversed because the People failed to present the requisite evidence of impairment by each of the substances separately. We reject that contention, inasmuch as the evidence presented at trial is sufficient to establish that he was separately impaired by alcohol and by drugs.

A conviction of DWI under Vehicle and Traffic Law § 1192 (3) may be based upon "evidence that [a defendant] failed all his field sobriety tests, smelled of alcohol, had glassy eyes and slurred his speech" (*People v Scroger*, 35 AD3d 1218, *lv denied* 8 NY3d 950). Here, the officers found that defendant exhibited all of those traits when he was pulled over. We thus conclude that the evidence is legally sufficient to support the DWI conviction, exclusive of the evidence presented in support of the DWAI conviction (*see generally People v Bleakley*, 69 NY2d 490, 495).

With respect to the DWAI conviction, the jury had to find that defendant ingested a drug listed in Public Health Law § 3306, that defendant operated a motor vehicle, and that his ability to operate the motor vehicle was impaired by the drug (*see Vehicle and Traffic Law §§ 114-a, 1192 [4]*). Here, defendant admitted to the officers during the traffic stop and he testified at trial that, approximately one hour prior to the traffic stop, he ingested two Vicodin. A pharmacist testified for the People that Vicodin is also known as hydrocodone, and we note that hydrocodone is a drug listed in Public Health Law § 3306 (Schedule II [b] [1] [10]). The pharmacist further explained that Vicodin, "or hydrocodone," is a central nervous system depressant. We thus conclude that the evidence, *i.e.*, the testimony of the arresting officers regarding defendant's actions during the traffic stop, defendant's admission that he took the Vicodin, and the testimony of the pharmacist, is legally sufficient to support the DWAI conviction, exclusive of the evidence presented in support of the DWI conviction (*see generally Bleakley*, 69 NY2d at 495).

Finally, defendant's challenge to the severity of the sentence is equally without merit, particularly in view of his prior DWI convictions.

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

1381

KA 10-01039

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID BURGOS, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered December 22, 2009. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and endangering the welfare of a child (§ 260.10 [1]). By its verdict, the jury found that defendant sexually abused his former girlfriend's daughter from the time the child was 8 years old until she was almost 13 years old. We reject defendant's contention that he was denied effective assistance of counsel based upon, inter alia, defense counsel's failure to call a medical expert to testify regarding the absence of physical evidence of sexual abuse. It is well established that, "[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's failure to" call such a witness (*People v Rivera*, 71 NY2d 705, 709), and he failed to do so here. Indeed, given the delay between the last act of abuse and the victim's disclosure, i.e., a period in excess of one year, and given the fact that there was never any vaginal penetration, it was not likely that there would be physical evidence of abuse. We note in any event that defendant relies on *Gersten v Senkowski* (426 F3d 588, cert denied 547 US 1191) in support of his contention, but we conclude that his reliance thereon is misplaced. In that case, the petition for a writ of habeas corpus was granted based, in part, upon the failure of petitioner's trial attorney to obtain a medical expert to challenge the testimony of the People's expert that a physical examination of

the victim showed signs of sexual abuse. Here, unlike in *Gersten*, the People offered no such expert testimony regarding signs of abuse. We have examined the remaining allegations of ineffective assistance of counsel raised by defendant and conclude that they lack merit (see generally *People v Baldi*, 54 NY2d 137, 147).

We also reject defendant's contention that the People failed in the indictment and superseding indictment to specify the time, date and place of the alleged offenses in an adequate manner. " 'The text and legislative history of [the crime of course of sexual conduct against a child] make clear that it is a continuing crime to which the usual requirements of specificity with respect to time do not pertain' " (*People v McLoud*, 291 AD2d 867, 868, *lv denied* 98 NY2d 678). That principle applies equally to the crime of endangering the welfare of a child (see *People v Keindl*, 68 NY2d 410, 421-422, *rearg denied* 69 NY2d 823). We conclude that the period of time set forth in the superseding indictment "was sufficient to give defendant adequate notice of the charges to enable him to prepare a defense, to ensure that the crimes for which he was tried were in fact the crimes with which he was charged, and 'to protect [his] right not to be twice placed in jeopardy for the same conduct' " (*McLoud*, 291 AD2d at 868; see *Keindl*, 68 NY2d at 416-417).

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). Although as noted the victim failed to disclose the sexual abuse for over a year, and even assuming that she had a motive to fabricate the charges, her credibility was an issue for the jurors to determine, and we perceive no basis for disturbing their credibility determination (see *People v Massey*, 61 AD3d 1433, *lv denied* 13 NY3d 746). We also reject defendant's contention that the People misled him concerning a Valentine's Day card sent by him to the victim because their bill of particulars indicated that they did not intend to offer at trial any statements made by defendant. The People's duty to disclose statements by a defendant extends only to statements made "to a public servant engaged in law enforcement activity or to a person then acting under [the public servant's] direction or in cooperation with him [or her]" (CPL 240.20 [1] [a]). Statements made by a defendant to persons not acting "in any law enforcement capacity" are not discoverable (*People v Swart*, 273 AD2d 503, 504, *lv denied* 95 NY2d 908).

Contrary to defendant's contention, Supreme Court did not err in admitting evidence regarding the victim's disclosure of the abuse to third parties. The record establishes both that the evidence was not admitted for its truth, and that the court gave an appropriate limiting instruction to that effect (see *People v Tosca*, 98 NY2d 660; *People v Shivers*, 301 AD2d 473, 473-474, *lv denied* 99 NY2d 658). We further conclude that the court properly admitted evidence that the victim was in counseling at the time she disclosed the abuse, inasmuch as it provided background information as to how the abuse was ultimately disclosed (see generally *People v Bassett*, 55 AD3d 1434,

1436, *lv denied* 11 NY3d 922).

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

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1385

CAF 11-00903

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF KRISTINE GROSSO,
PETITIONER-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

ROCCO GROSSO, RESPONDENT-APPELLANT-RESPONDENT.

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

FINOCCHIO & ENGLISH, SYRACUSE (MARK J. ENGLISH OF COUNSEL), FOR
PETITIONER-RESPONDENT-APPELLANT.

KAREN J. DOCTER, ATTORNEY FOR THE CHILDREN, FAYETTEVILLE, FOR JOANNA
G. AND JACLYN G.

Appeal and cross appeal from an order of the Family Court,
Onondaga County (Martha E. Mulroy, J.), entered July 20, 2010 in a
proceeding pursuant to Family Court Act article 4. The order, among
other things, denied the parties' objections to an order modifying
support issued by the Support Magistrate.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs and the matter is
remitted to Family Court, Onondaga County, for further proceedings to
recalculate the father's income and child support obligation in
accordance with the following Memorandum: Petitioner mother commenced
this proceeding seeking, inter alia, an upward modification of the
child support obligation of respondent father. The Support Magistrate
increased the father's support obligation, and Family Court
thereafter, inter alia, denied the father's objections to the order of
the Support Magistrate. The father contends that the Support
Magistrate's finding with respect to his income is inconsistent with
the definition of income in the Child Support Standards Act ([CSSA]
Family Ct Act § 413). We agree with the father that his total income,
and thus his child support obligation, must be recalculated in
compliance with Family Court Act § 413.

The father, who is the sole shareholder of Syracuse Haulers, a
subchapter S corporation, contends that the Support Magistrate erred
in determining that his 2008 adjusted gross income from the business
of his subchapter S corporation was \$707,510.82, including \$109,196 in
capital gains, \$5,238 in entertainment expenses, and \$562,112.66 in
imputed income based on increased depreciation.

We reject at the outset the father's contention that he is not "self-employed" within the meaning of the CSSA. Generally, a sole shareholder of a subchapter S corporation, such as the father, is considered to be self-employed because the corporation's income is in essence the sole shareholder's income (see generally *Matter of Fowler v Rivera*, 40 AD3d 1093, 1094; *Terrell v Terrell*, 299 AD2d 810, 812; *Matter of Smith v Smith*, 197 AD2d 830, 831). Capital gains from the "subchapter S corporation[] in which [the father] has an interest is income for the purpose of determining child support" (*Matter of Gianniny v Gianniny*, 256 AD2d 1079, 1081; see generally *Matter of Mitchell v Mitchell*, 264 AD2d 535, 539, lv denied 94 NY2d 754; *McFarland v McFarland*, 221 AD2d 983, 984). Here, contrary to the father's contention, the Support Magistrate properly included \$109,196 in capital gains in his 2008 income, which the Support Magistrate derived from his 2008 individual income tax return.

With respect to the Support Magistrate's addition of entertainment expenses in the father's 2008 adjusted gross income, we note that, under the CSSA, income includes self-employment deductions, less certain expenditures that encompass "unreimbursed employee business expenses except to the extent said expenses reduce personal expenditures" (Family Ct Act § 413 [1] [b] [5] [vii] [A]). For a parent who is self-employed, income is the parent's "gross income less allowable business expenses" (*Haas v Haas*, 265 AD2d 887, 887 [internal quotation marks omitted]). The court thus may include in income "entertainment and travel allowances deducted from business income to the extent said allowances reduce personal expenditures" (§ 413 [1] [b] [5] [vi] [B]).

Here, the Support Magistrate included \$5,238 in entertainment expenses in the father's income that were listed as deductions on the 2008 tax return of his subchapter S corporation. The Support Magistrate described those expenses as "items not found to be expenses properly deducted from the corporation income for political contributions, travel and entertainment, and unexplained penalties." There is, however, no testimony or other evidence in the record regarding whether those expenses were exclusively business expenses rather than personal expenses, nor is there testimony or other evidence regarding whether those expenses in fact reduced the father's personal expenses (see *Matter of Barber v Cahill*, 240 AD2d 887, 889). Because the mother failed to meet her burden of establishing that the expenses were personal in nature, or at least partially so, we conclude that the Support Magistrate abused her discretion in including the entertainment expenses in the amount of \$5,238 in the father's income.

Finally, we agree with the father that the Support Magistrate erred in imputing income to him in the amount of \$562,112.66 based on increased depreciation. As the father properly contends, on the record before us that amount was improperly imputed to his income because the Support Magistrate failed to make any calculation as to what the straight-line depreciation would have been within the meaning of Family Court Act § 413. Although the father's income for child support purposes may ultimately include imputed depreciation income,

the manner in which the Support Magistrate calculated the amount was not in accordance with Family Court Act § 413 (1) (b) (5) (vi) (A) because she did not calculate it as depreciation "greater than depreciation calculated on a straight-line basis for the purpose of determining business income." We therefore reverse the order and remit the matter to Family Court to recalculate the father's income and child support obligation in accordance with Family Court Act § 413.

We have considered the contention of the mother raised on her cross appeal and conclude that it is without merit.

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

1386

CA 10-01557

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

WENDY A. COOK, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

OSWEGO COUNTY, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

LONGSTREET & BERRY, LLP, SYRACUSE (MARTHA L. BERRY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

PETRONE & PETRONE, P.C., UTICA (DAVID BLOCK OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered September 24, 2009 in a personal injury action. The judgment dismissed the complaint against defendant Oswego County upon a verdict of no cause for action.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when a vehicle driven by defendant Steven E. Gleason, Sr. struck her while it was backing into a waste management facility owned and operated by defendant Oswego County (County). Following a trial, the jury returned a verdict of no cause for action. On appeal, plaintiff contends that Supreme Court erred in denying her motion to set aside the verdict as against the weight of the evidence, for judgment determining that Gleason was negligent as a matter of law and for a new trial pursuant to CPLR 4404 (a) on the remaining issues or, in the alternative, a new trial on all issues.

Contrary to plaintiff's contention, the verdict in favor of Gleason is not against the weight of the evidence. "A motion to set aside a jury verdict of no cause [for] action should not be granted unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence" (*Dannick v County of Onondaga*, 191 AD2d 963, 964). Here, the jury was entitled to credit Gleason's testimony that he was backing up very slowly and using his mirrors appropriately in order to see what was behind him. The mere fact that Gleason was backing up when he struck plaintiff and did not look over his shoulder does not necessitate the conclusion that he was negligent

as a matter of law. Rather, viewing the record as a whole, we conclude that "the verdict is one that reasonable persons could have rendered," and we will not substitute our judgment for that of the jury (*Ruddock v Happell*, 307 AD2d 719, 720).

We also reject plaintiff's contention that the court committed reversible error by allowing a State Trooper who investigated the incident to testify that plaintiff's version of events was inconsistent with his own investigation. As plaintiff correctly contends, the State Trooper's investigation was based in part on hearsay statements of witnesses who did not testify at trial, and we thus conclude that the court properly ruled that the Trooper's conclusions from the report were inadmissible when Gleason attempted to offer them during his direct examination of the Trooper at trial (see *Connors v Duck's Cesspool Serv.*, 144 AD2d 329, 329-330). The Trooper thereafter testified that he changed his report at plaintiff's request by adding an addendum to reflect plaintiff's version of the manner in which the accident occurred. The Trooper was then allowed, over plaintiff's objection, to testify that plaintiff's version of events were not consistent with his own findings as to the manner in which the accident occurred. Even assuming, arguendo, that the court erred in admitting that testimony of the Trooper, we conclude that the error "would not have affected the result" and that any such error therefore is harmless (*Palmer v Wright & Kremers*, 62 AD2d 1170, 1170).

Finally, we reject plaintiff's contention that the court erred in limiting her theories of liability against the County by instructing the jury that it could find the County liable only if the County failed to ensure, pursuant to its internal rules, that Gleason stopped at the transfer bay entrance and only if that failure proximately caused the accident. Upon our review of the record, we conclude that the court's charge was consistent with the only viable theory of negligence asserted at trial against the County, and thus that the court did not limit plaintiff's theories of liability against the County. Under the circumstances, the court's charge "appropriately conveyed the applicable legal principles and applied them to the facts adduced in view of the issues raised" at trial (*Espriel v New York Downtown Hosp.*, 298 AD2d 165, 166).

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

1387

CA 10-01558

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

WENDY A. COOK, PLAINTIFF-APPELLANT,

V

ORDER

OSWEGO COUNTY AND STEVEN E. GLEASON, SR.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LONGSTREET & BERRY, LLP, SYRACUSE (MARTHA L. BERRY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

PETRONE & PETRONE, P.C., UTICA (DAVID BLOCK OF COUNSEL), FOR
DEFENDANT-RESPONDENT OSWEGO COUNTY.

LAW OFFICES OF EPSTEIN & HARTFORD, NORTH SYRACUSE (SHEILA FINN
SCHWEDES OF COUNSEL), FOR DEFENDANT-RESPONDENT STEVEN E. GLEASON, SR.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered December 7, 2009 in a personal injury action. The order denied the motion of plaintiff for a new trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see CPLR 5501 [a] [2]).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1391

CA 11-01194

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

TAMMY FINNEGAN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

THE PETER, SR. & MARY L. LIBERATORE
FAMILY LIMITED PARTNERSHIP, PETER A.
LIBERATORE, PETER LIBERATORE, SR.,
LINCOLN SQUARE, LINCOLN SQUARE
APARTMENTS AND JOHN DOE, WHOSE IDENTITY
IS PRESENTLY UNKNOWN, DEFENDANTS-RESPONDENTS.

CELLINO & BARNES, P.C., BUFFALO (MICHAEL J. COOPER OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered December 10, 2010 in a personal injury action. The order denied the motion of plaintiff for judgment notwithstanding the verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell while exiting her townhouse at defendants' apartment complex. A trial was conducted, following which the jury found that defendants were negligent in their maintenance of the premises but that such negligence was not a substantial factor in bringing about plaintiff's injuries.

Contrary to plaintiff's contention, Supreme Court properly denied her motion seeking judgment notwithstanding the verdict or, in the alternative, to set aside the verdict as inconsistent and therefore against the weight of the evidence, which relief would result in a new trial (see CPLR 4404 [a]). A jury verdict finding that a defendant was negligent but that such negligence was not a proximate cause of the plaintiff's injury is not inherently inconsistent (see *Waild v Boulos* [appeal No. 2], 2 AD3d 1284, 1285, *lv denied* 2 NY3d 703; *Rubin v Pecoraro*, 141 AD2d 525, 526). Rather, it is only "where a jury's findings with regard to negligence and proximate cause are irreconcilably inconsistent [that] the judgment cannot stand" (*Pimpinella v McSwegan*, 213 AD2d 232, 233). Stated differently,

findings that a defendant was negligent but that the defendant's negligence was not a proximate cause of the plaintiff's injuries are irreconcilably inconsistent when those issues are "so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Rubin*, 141 AD2d at 527; see *Johnson v Schrader* [appeal No. 2], 299 AD2d 815, 816). Here, defendants presented evidence establishing several explanations concerning how the accident could have occurred, all of which were unrelated to the defect in the sidewalk curb that allegedly caused plaintiff to fall. We thus conclude that the evidence on the issue of causation does not so preponderate in favor of plaintiff that the verdict could not have been reached on any fair interpretation of the evidence and that the verdict therefore is not against the weight of the evidence (see *Villani v Beamer*, 11 AD3d 918, 919; *Skowronski v Mordino*, 4 AD3d 782, 782-783).

Finally, we reject plaintiff's contention that the court erred in denying her motion in limine seeking to preclude defendants from offering evidence of certain entries in a log book concerning plaintiff's report of her fall and injury. A trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an abuse of that discretion (see *United Airlines v Ogden N.Y. Servs.*, 305 AD2d 239, 240; see also *Davis v Eddy Cohoes Rehabilitation Ctr.*, 307 AD2d 637; CPLR 2004, 3126). Inasmuch as plaintiff was afforded ample opportunity to conduct discovery prior to trial, including being afforded the opportunity to depose defendants' employee who witnessed her oral report of her fall before it was reduced to writing, we cannot agree that the court abused its discretion in denying her motion in limine. Under the circumstances, we conclude that plaintiff failed to establish in support of her motion either prejudice or a willful failure to disclose the evidence in question (see *Harrington v Palmer Mobile Homes, Inc.*, 71 AD3d 1274, 1275; *Mead v Dr. Rajadhyax' Dental Group*, 34 AD3d 1139, 1140). Moreover, we note in any event that defendants did not in fact offer into evidence the log book page containing plaintiff's report of her fall.

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

1396

KA 10-01036

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARK R. HOLT, 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 March 12, 2010. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level (*see People v Clark*, 66 AD3d 1366, *lv denied* 13 NY3d 713; *People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708). In any event, that contention lacks merit "inasmuch as defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" (*People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1401

KA 10-00810

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL PRATCHETT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered November 30, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [2]). Defendant "failed to preserve for our review his contention that the People failed to present legally sufficient evidence to disprove his justification defense [inasmuch as] he did not move for a trial order of dismissal on that ground" (*People v Smalls*, 70 AD3d 1328, 1330, *lv denied* 14 NY3d 844, 15 NY3d 778; *see People v Gray*, 86 NY2d 10, 19). 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).

Defendant also failed to preserve for our review his contention that Supreme Court erred in permitting the victim to testify in his military uniform (*see CPL 470.05 [2]*). In any event, the fact that the victim was wearing a military uniform while testifying did not deprive defendant of a fair trial (*see People v Aupperlee*, 168 AD2d 561, *lv denied* 77 NY2d 958). We reject the further contention of defendant that the court erred in refusing to suppress his statement to the police. "In concluding that defendant's statement to the police was voluntarily made . . ., the suppression court was entitled to credit the testimony of [the] police witness[] that defendant was

advised of his *Miranda* rights and knowingly, voluntarily and intelligently waived those rights" (*People v Brooks*, 26 AD3d 739, 740, *lv denied* 6 NY3d 846, 7 NY3d 810).

We dismiss the appeal to the extent that defendant challenges the severity of the sentence inasmuch as he has completed serving his sentence and that part of the appeal therefore is moot (*see People v Richardson*, 85 AD3d 1556, *amended on rearg* 87 AD3d 1415; *People v Griffin*, 239 AD2d 936). We have reviewed defendant's remaining contention and conclude that it is without merit.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1406

CAF 10-02304

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

IN THE MATTER OF ALEXIS H., DAKOTA H. AND
JAYDEN H.

MEMORANDUM AND ORDER

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

JENNIFER T., RESPONDENT-APPELLANT.

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (SARA J. LANGAN OF
COUNSEL), FOR PETITIONER-RESPONDENT.

GEORGE P. ALESSIO, ATTORNEY FOR THE CHILDREN, SYRACUSE, FOR ALEXIS H.,
DAKOTA H. AND JAYDEN H.

Appeal from a corrected order of the Family Court, Onondaga
County (Michele Pirro Bailey, J.), entered November 10, 2010 in a
proceeding pursuant to Family Court Act article 10. The corrected
order adjudged that respondent had neglected the subject children.

It is hereby ORDERED that the corrected order so appealed from is
unanimously modified on the law by vacating all references to the
September 2006 alcohol abuse and related treatment and as modified the
corrected order is affirmed without costs.

Memorandum: Respondent mother appeals from a corrected order
adjudicating her three children to be neglected. We agree with the
mother that Family Court erred in including in the order references to
alcohol abuse and related treatment during September 2006. The
court's oral decision made no reference to that alcohol abuse and
treatment. Where "an order and decision conflict, the decision
controls" (*Matter of Christina M.*, 247 AD2d 867, 867, *lv denied* 91
NY2d 812). Inasmuch as "[s]uch an inconsistency may be corrected . .
. on appeal" (*Spier v Horowitz*, 16 AD3d 400, 401; *see generally* CPLR
5019 [a]), we modify the corrected order by vacating all references to
the September 2006 alcohol abuse and related treatment.

Contrary to the mother's further contention, petitioner
established by a preponderance of the evidence that the mental or
emotional condition of each child had been or was in imminent danger
of becoming impaired as a result of the mother's failure to exercise a
minimum degree of care (*see* Family Ct Act 1012 [f] [i]).

Specifically, that imminent danger resulted from the mother's failure to maintain the family residence free from unsanitary or unsafe conditions (*cf. Matter of Erik M.*, 23 AD3d 1056), her long-standing history of mental illness and noncompliance with treatment (*see Matter of Harmony S.*, 22 AD3d 972, 973), and her failure to seek treatment for substance abuse (*see Matter of Alim Lishen Laquan R.*, 63 AD3d 947). The evidence presented by petitioner, combined with the adverse inference that the court was permitted to draw based on the mother's failure to testify (*see Matter of Christine II.*, 13 AD3d 922, 923), amply supported the court's findings concerning, *inter alia*, the imminency of the potential impairment to the mental and emotional conditions of the children and the mother's inability to exercise the degree of care required to provide proper supervision (*see Nicholson v Scoppetta*, 3 NY3d 357, 368-370). Actual impairment or injury is not required but, rather, only "near or impending" injury or impairment is required (*id.* at 369; *see Matter of Markus MM.*, 17 AD3d 747, 748).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1411

CA 11-01403

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

ANTHONY MCCLOUD, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BETTCHER INDUSTRIES, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

GOLDBERG SEGALLA LLP, BUFFALO (ROBERT E. GALLAGHER, JR., OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered January 28, 2011 in a personal injury action. The order denied the motion of defendant Bettcher Industries, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the renewed motion is granted and the complaint against Bettcher Industries, Inc. is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while operating a breeder machine. Bettcher Industries, Inc. (defendant) appeals from an order denying its renewed motion for summary judgment dismissing the complaint against it. It is undisputed that the breeder machine was manufactured by Sam Stein Associates (Stein). Approximately 21 years prior to the incident, defendant purchased all of the common stock of Stein pursuant to a written stock purchase agreement. Plaintiff sought to pierce the corporate veil to hold defendant liable for his injuries as the parent corporation of Stein, its subsidiary. We agree with defendant that, as a shareholder, it cannot be held liable for the torts of its subsidiary.

It is well settled that "liability can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary. At the very least, there must be direct intervention by the parent in the management of the subsidiary to such an extent that 'the subsidiary's paraphernalia of incorporation, directors and officers' are completely ignored" (*Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163, rearg denied 52 NY2d 829, quoting *Lowendahl v Baltimore & Ohio R.R. Co.*, 247 App Div

144, 155, *affd* 272 NY 360, *rearg denied* 273 NY 584). A plaintiff "seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form," thereby perpetrating a wrong that resulted in injury to the plaintiff (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142; *see Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 145; *Lawlor v Hoffman*, 59 AD3d 499). "Factors to be considered in determining whether the [parent company] has 'abused [that] privilege . . .' include whether there was a 'failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use' " (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127, *affd* 16 NY3d 775). Here, defendant established that its conduct with respect to Stein did not constitute an abuse of the privilege of doing business in the corporate form (*see Lawlor*, 59 AD3d 499), and plaintiff failed to raise a triable issue of fact sufficient to defeat the renewed motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In light of our determination, we need not address defendant's contention regarding the alleged improper characterization of the deposition testimony of its chief executive officer.

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

1414

KA 11-01329

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MAXWELL S. COAPMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Michael F. McKeon, A.J.), rendered May 20, 2010. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree (two counts), sexual abuse in the second degree (eight counts), criminal sexual act in the second degree (seven counts), rape in the second degree (two counts) and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him after a jury trial of, inter alia, two counts of criminal sexual act in the first degree (Penal Law § 130.50 [4]) and two counts of rape in the second degree (§ 130.30 [1]), defendant contends that he was deprived of the right to fair notice of the charges against him because the dates in the indictment on which the offenses allegedly occurred were overbroad. We reject that contention. "In view of the age of the victim and the date on which she reported the crimes, we conclude that the one-month and two-month periods specified in the indictment provided defendant with adequate notice of the charges against him to enable him to prepare a defense" (*People v Franks*, 35 AD3d 1286, 1286, lv denied 8 NY3d 922; see generally *People v Morris*, 61 NY2d 290, 295-296).

We reject defendant's further contention that County Court abused its discretion in denying his request for an adjournment to secure the attendance of a defense witness. "It is incumbent on a defendant seeking an adjournment to procure a witness to show that the witness's testimony would be material, noncumulative and favorable to the defense" (*People v Softic*, 17 AD3d 1075, 1076, lv denied 5 NY3d 794; see *People v Acevedo*, 295 AD2d 141, lv denied 98 NY2d 766). While defendant established that the testimony of the proposed witness would

have been favorable to the defense, he failed to establish that the testimony was material. Furthermore, the proposed witness was not scheduled to leave the country until the third day of trial, and the court offered to permit the witness to testify out of order or by video. Because the court afforded defendant the opportunity to call the witness to testify before the witness's scheduled departure, we conclude that there has been no showing of prejudice such that it can be said that the court abused its discretion in denying defendant's request for an adjournment (see *People v Peterkin*, 81 AD3d 1358, 1360, *lv denied* 17 NY3d 799).

Contrary to defendant's contention, the court did not err in admitting in evidence a letter that defendant wrote to his adopted daughter discussing the alleged sexual abuse of the victim. There were "sufficient assurances of the identity and unchanged condition of the evidence . . . , and thus any alleged gaps in the chain of custody went to the weight of the evidence, not its admissibility" (*People v Kennedy*, 78 AD3d 1477, 1478, *lv denied* 16 NY3d 798; see *People v Hawkins*, 11 NY3d 484, 494). Defendant contends on appeal that the court erred in permitting an expert to testify with respect to child sexual abuse accommodation syndrome because the expert supervised the victim's therapist and was thus familiar with the victim's case. That contention is not preserved for our review, however, inasmuch as defendant objected to the expert's testimony on a different ground at trial (see e.g. *People v Valentine*, 48 AD3d 1268, 1268-1269, *lv denied* 10 NY3d 871; *People v Smith*, 9 AD3d 745, 746-747, *lv denied* 3 NY3d 742). In any event, we conclude that defendant's present contention lacks merit because "the expert described specific behavior that might be unusual or beyond the ken of a jury [and] did not give an opinion concerning whether the abuse actually occurred" (*People v Lawrence*, 81 AD3d 1326, 1327, *lv denied* 17 NY3d 797; see *People v Martinez*, 68 AD3d 1757, 1758, *lv denied* 14 NY3d 803).

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), and we further conclude that any deficiencies in the presentence report do not warrant reversal (see *People v Singh*, 16 AD3d 974, 977-978, *lv denied* 5 NY3d 769; see also *People v Rudduck*, 85 AD3d 1557, *lv denied* 17 NY3d 861). In addition, 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). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury . . . , and the testimony of the victim . . . was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]).

Defendant failed to preserve for our review his contention that the court "improperly penalized him for exercising his right to a jury

trial, since he did not raise the issue at the time of sentencing" (*People v Tannis*, 36 AD3d 635, lv denied 8 NY3d 927; see *People v Dorn*, 71 AD3d 1523, 1523-1524). We conclude in any event that his contention lacks merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting [his] right to trial . . ., and the record shows no retaliation or vindictiveness against the defendant for electing to proceed to trial" (*Dorn*, 71 AD3d at 1524 [internal quotation marks omitted]). Finally, we reject defendant's challenge to the severity of the sentence, and we note that the periods of postrelease supervision imposed on the consecutive terms of imprisonment "shall merge with and be satisfied by discharge of the period of post[]release supervision having the longest unexpired time to run" (Penal Law § 70.45 [5] [c]).

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

1423

CA 11-01408

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

JOHN T. BAKER, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO, BOARD OF EDUCATION OF CITY
SCHOOL DISTRICT OF CITY OF BUFFALO, ALSO
KNOWN AS BUFFALO BOARD OF EDUCATION, AND
LPCIMINELLI, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

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

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (ROBERT J. MARANTO, JR., OF
COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 15, 2011 in a personal injury action. The order granted in part and denied in part the motion of defendants for summary judgment and denied the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendants' motion seeking summary judgment dismissing the Labor Law § 241 (6) claim insofar as that claim is based upon the alleged violation of 12 NYCRR 23-1.7 (e) (1) and (2), and by denying that part of defendants' motion seeking summary judgment dismissing the Labor Law § 241 (6) claim insofar as that claim is based upon the alleged violation of 12 NYCRR 23-1.7 (f) and reinstating that claim to that extent, 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 allegedly sustained while working for a masonry subcontractor on a renovation project. Defendant LPCiminelli, Inc. (Ciminelli) was the general contractor, and the City of Buffalo defendants owned the high school undergoing the renovation. According to plaintiff, he fell and was injured when he climbed through an opening that had been cut through a wall for the purpose of, inter alia, gaining access to the room where he was working. Plaintiff's pant leg snagged on rebar, mesh or jagged concrete protruding from the ledge of the opening, causing him to jerk backward and fall to the floor.

Supreme Court properly granted that part of defendants' motion seeking summary judgment dismissing the Labor Law § 240 (1) claim and properly denied that part of plaintiff's cross motion seeking partial summary judgment on liability with respect to that claim. Defendants met their burden of establishing that, "[i]n climbing [through] the wall, plaintiff was faced with 'the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law § 240 (1),' " and plaintiff failed to raise a triable issue of fact (*Farmer v City of Niagara Falls*, 249 AD2d 922, 923, quoting *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843).

The court also properly denied those parts of defendants' motion seeking summary judgment dismissing the Labor Law § 200 claim and the common-law negligence cause of action against Ciminelli and properly denied those parts of plaintiff's cross motion seeking partial summary judgment with respect to that claim and cause of action. Although defendants established that Ciminelli did not supervise or control plaintiff's work, we agree with the court that there are triable issues of fact whether Ciminelli had actual or constructive notice of the allegedly dangerous condition on the premises that caused plaintiff's injuries (see *Kobel v Niagara Mohawk Power Corp.*, 83 AD3d 1435).

We agree with defendants, however, that the court properly denied that part of plaintiff's cross motion seeking partial summary judgment on Labor Law § 241 (6) liability but erred in denying that part of defendants' motion seeking summary judgment dismissing the Labor Law § 241 (6) claim insofar as it is based upon the alleged violation of 12 NYCRR 23-1.7 (e) (1) and (2). We therefore modify the order accordingly. Those regulations are not applicable to the accident because plaintiff's fall was not caused by a tripping hazard (see *Farrell v Blue Circle Cement, Inc.*, 13 AD3d 1178, lv denied 4 NY3d 708). The court further erred in granting that part of defendants' motion seeking summary judgment dismissing the section 241 (6) claim insofar as it is based upon the alleged violation of 12 NYCRR 23-1.7 (f). That regulation is sufficiently specific to support a claim under Labor Law § 241 (6) (see *Intelisano v Sam Greco Constr., Inc.*, 68 AD3d 1321, 1323), and defendants failed to establish as a matter of law that they did not violate that regulation or that any alleged violation was not a proximate cause of plaintiff's injuries (see *Harris v Hueber-Breuer Constr. Co., Inc.*, 67 AD3d 1351, 1353). We therefore further modify the order accordingly.

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

1424

CA 11-00656

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

DOMINICK CALHOUN, BY AND THROUGH HIS NEXT
FRIEND, THE CHILDREN'S RIGHTS INITIATIVE, INC.,
PLAINTIFF-APPELLANT,

V

ORDER

ILION CENTRAL SCHOOL DISTRICT, CHRISTINE RUFF,
PETER BUTCHKO, JOHN DOE(S) AND JANE DOE(S),
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

THE CHILDREN'S RIGHTS INITIATIVE, INC., ROME (BETH A. LOCKHART OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (J. RYAN HATCH OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County
(Michael E. Daley, J.), entered October 15, 2010. The order granted
the motion of defendants to dismiss and/or for summary judgment and
dismissed the complaint.

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

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1425

CA 11-00657

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

DOMINICK CALHOUN, BY AND THROUGH HIS NEXT
FRIEND, THE CHILDREN'S RIGHTS INITIATIVE, INC.,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ILION CENTRAL SCHOOL DISTRICT, CHRISTINE RUFF,
PETER BUTCHKO, JOHN DOE(S) AND JANE DOE(S),
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

THE CHILDREN'S RIGHTS INITIATIVE, INC., ROME (BETH A. LOCKHART OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (J. RYAN HATCH OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County
(Michael E. Daley, J.), entered October 15, 2010. The order denied
the amended motion of plaintiff for leave to serve a late notice of
claim, granted the motion of defendants to dismiss and/or for summary
judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by denying defendants' motion in part
and reinstating the 1st, 2nd, 4th, 5th, 7th, 8th, 11th and 12th causes
of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a former student at defendant Iliion
Central School District (School District), commenced this action
alleging that defendants violated the Americans with Disabilities Act
([ADA] 42 USC § 12101 *et seq.*), the Rehabilitation Act (29 USC § 701
et seq.), and the Human Rights Law (Executive Law § 290 *et seq.*) when
they discriminated against him because of his learning disability. He
also asserted a cause of action for defamation against defendant
Christine Ruff as well as causes of action for assault and battery
against defendant Peter Butchko. Both Ruff and Butchko were teachers
employed by the School District. Defendants moved to dismiss the
complaint pursuant to various subdivisions of CPLR 3211 and for
summary judgment dismissing the complaint pursuant to CPLR 3212.
Supreme Court granted the motion, which it characterized as a motion
to dismiss "and/or" for summary judgment, without further explanation
of its basis for granting the motion. Plaintiff thereafter moved, as
relevant to this appeal, for leave to serve a late notice of claim

pursuant to Education Law § 3813 (2-a) with respect to the assault and battery causes of action against Butchko, but the court denied that motion and again granted the relief granted in the earlier order.

Plaintiff appeals from each and every part of both orders, but contends only that the court erred in dismissing the causes of action based on the violations of the ADA and the Rehabilitation Act as well as the causes of action for assault and battery. We thus agree with defendants that plaintiff has abandoned any contentions with respect to the Human Rights Law and the defamation causes of action (see *Ciesinski v Town of Aurora*, 202 AD2d 984).

We agree with plaintiff that the court erred in dismissing the ADA and Rehabilitation Act causes of action, and we therefore modify the order by denying those parts of defendants' motion with respect to those causes of action and reinstating them. Defendants contend that, pursuant to the Individuals with Disabilities Education Act ([IDEA] 20 USC § 1400 *et seq.*) and Education Law § 4404 (3), plaintiff was required to commence a CPLR article 78 proceeding before commencing this action. We reject that contention. The IDEA serves to provide disabled children with a "free and appropriate public education" (§ 1400 [d] [1] [A]; see § 1401 [8]). Together with parents, the educators must develop an individualized education program, commonly known as an IEP (see § 1401 [14]; § 1414 [d]) and, if a parent has any complaints related to the IEP, the IDEA provides specific procedures to address those complaints (see § 1415 [b] [6]; [f] [1]; [h]). Furthermore, the IDEA "provides that potential plaintiffs with grievances related to the education of disabled children generally must exhaust their administrative remedies before filing suit in federal [or state] court, even if their claims are formulated under a statute other than the IDEA (such as the ADA or the Rehabilitation Act)" (*Polera v Board of Educ. of Newburgh Enlarged City School Dist.*, 288 F3d 478, 481). Pursuant to the IDEA, the parent must first file a due process complaint notice (see § 1415 [c] [2]; 8 NYCRR 200.5 [i]) and, if the complaints cannot be resolved (see 20 USC § 1415 [e], [f] [1] [B] [i]; 8 NYCRR 200.5 [j] [2]), then the matter proceeds to an impartial due process hearing (see 20 USC § 1415 [f] [1] [B] [ii]; 8 NYCRR 200.5 [j] [3]). In New York such hearings are heard by the local educational agency (see 20 USC § 1415 [f] [1] [A]; Education Law § 4404 [1]; *Cave v East Meadow Union Free School Dist.*, 514 F3d 240, 245). A parent aggrieved by the decision of the impartial hearing officer (IHO) may appeal to the State educational agency's review officer (SRO) (see 20 USC § 1415 [g]; Education Law § 4404 [1] [c]; [2]; 8 NYCRR 200.5 [k] [1]; *Cave*, 514 F3d at 245). Pursuant to the federal statute, any party aggrieved by the findings of the IHO and the SRO "shall have the right to bring a civil action with respect to the complaint presented pursuant to [20 USC § 1415] . . . in any State court of competent jurisdiction or in a district court of the United States" (§ 1415 [i] [2] [A]). "Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act . . . , or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available

under this subchapter, the procedures under subsections (f) [impartial hearing] and (g) [appeal to SRO] shall be exhausted to the same extent as would be required had the action been brought under this subchapter" (§ 1415 [1]). It is undisputed that plaintiff's mother complied with the IDEA procedures. Defendants contend, however, that the Education Law imposes an additional procedural requirement with which there has been no compliance.

Pursuant to Education Law § 4404 (3) (a), any final determination or order of an SRO may be reviewed only in a special proceeding "commenced within four months after the determination to be reviewed becomes final and binding on the parties" (see also 8 NYCRR 200.5 [k] [3]). In this action, however, plaintiff does not seek review of the SRO's decision. He is not seeking to confirm, annul or modify the SRO's determination. Rather, he is seeking damages for the alleged discrimination he suffered while he was a student in the School District. Even if it can be said that he is seeking relief that was available under the IDEA, as previously noted, there is no dispute that there was compliance with the procedural requirements of that statute. Thus, the failure to pursue a review of the SRO's determination by a special proceeding did not deprive the court of subject matter jurisdiction over the ADA and the Rehabilitation Act causes of action.

We reject defendants' further contention that this action is barred by the doctrines of res judicata and collateral estoppel. Although the doctrine of res judicata can apply "to give conclusive effect to the quasi-judicial determinations of administrative agencies" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 499), we agree with plaintiff that his federal discrimination claims, even if they sought relief similar to that available under the IDEA (see *Polera*, 288 F3d at 486-487), could not have been brought in the IDEA proceeding and thus the doctrine of res judicata does not apply (see *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349; *Lasky v City of New York*, 281 AD2d 598, 599).

With respect to the doctrine of collateral estoppel, we agree with plaintiff that the claims he raises in this action were not necessarily decided by the SRO in the administrative action inasmuch as the SRO concluded that the contentions of plaintiff's mother had been rendered moot (see *Adirondack League Club v Sierra Club*, 92 NY2d 591, 608). In any event, it lies within the discretion of the trial court whether to apply the doctrine of collateral estoppel, and the doctrine need not be applied even if all of the prerequisites to the doctrine have been met (see *Matter of Russo v Irwin*, 49 AD3d 1039, 1041-1042).

To the extent that defendants contend for the first time on appeal that plaintiff's federal causes of action sound in educational malpractice and are therefore barred, that contention is not properly before us (see *Ciesinski*, 202 AD2d at 985), and we nevertheless conclude that it lacks merit (cf. *Hoffman v Board of Educ. of City of N.Y.*, 49 NY2d 121, 125-126; *Donohue v Copiague Union Free School Dist.*, 47 NY2d 440, 444-445).

Finally, we agree with plaintiff that he was not required to file and serve a notice of claim with respect to his causes of action against Butchko, individually, inasmuch as his alleged acts were not committed "in the discharge of his duties within the scope of his employment" (Education Law § 3813 [2]). We therefore further modify the order by denying those parts of defendants' motion with respect to the 11th and 12th causes of action and reinstating those causes of action as well. Where, as here, the conduct of an employee as alleged in the complaint amounts to the commission of intentional torts, that conduct falls outside the scope of employment and dismissal of a cause of action based upon a plaintiff's failure to file a notice of claim is unwarranted (see *Rew v County of Niagara*, 73 AD3d 1463; *Grasso v Schenectady County Pub. Lib.*, 30 AD3d 814, 817-818; cf. *Hale v Scopac*, 74 AD3d 1906; *DeRise v Kreinik*, 10 AD3d 381, 381-382).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1429

CA 11-00730

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

IN THE MATTER OF PMA MANAGEMENT CORP.,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT WHITE AND HINMAN, HOWARD & KATTELL, LLP,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (PAUL T. SHEPPARD OF
COUNSEL), RESPONDENT-APPELLANT PRO SE, AND FOR ROBERT WHITE,
RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (J.P. WRIGHT OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County
(Donald A. Greenwood, J.), entered October 19, 2010. The order denied
the motion of respondents to dismiss and granted the petition.

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

Memorandum: Petitioner, a third-party administrator for the New
York Liquidation Bureau (NYLB), commenced this proceeding seeking
payment of a workers' compensation lien (see Workers' Compensation Law
§ 29). The NYLB paid workers' compensation benefits to respondent
Robert White after his original workers' compensation insurer, Legion
Insurance Company (Legion), was placed into liquidation by the
Commonwealth Court of Pennsylvania in 2003. The NYLB then retained
the Risk Management Planning Group (RMPG), and thereafter petitioner,
to administer the workers' compensation claim, including the task of
collecting from respondents the portion of the post-liquidation lien
to which NYLB is entitled, i.e., a portion of the settlement proceeds
from White's third-party personal injury action. Indeed, in March
2007, RMPG and the company representing Legion in liquidation each
separately consented to the settlement of White's third-party personal
injury action. White settled his third-party action on or about May
23, 2007 and reached an agreement with the company representing Legion
in liquidation with respect to the amount of the lien owed to Legion,
which amount has since been paid. No agreement was reached with
respect to the amount of the lien owed to NYLB, however, and thus this
proceeding ensued. In response to the petition, respondents moved,

inter alia, to dismiss the petition as time-barred. Supreme Court denied the motion and granted the relief requested in the petition. We reverse.

It is well settled that the statute of limitations applicable to workers' compensation liens created by Workers' Compensation Law § 29 is three years, and that it begins to run on the date of settlement of the third-party action (see *Matter of Nunes v National Union Fire Ins. Co.*, 272 AD2d 401, 402). The current proceeding was not commenced until July 22, 2010, however, more than three years after the settlement. We thus conclude that the court erred in denying respondents' motion to dismiss the petition as time-barred.

In denying respondents' motion, the court concluded that White's payment to Legion on October 1, 2007 to settle the lien owed to Legion constituted a partial payment on a single lien, restarting the statute of limitations. The record supports respondents' contention, however, that Legion and RMPG treated the amounts due to each of them as separate liens.

The NYLB was not "stand[ing] in the shoes of a private entity" inasmuch as the NYLB had no right to consent to the settlement of the third-party action on behalf of Legion (*Matter of Dinallo v DiNapoli*, 9 NY3d 94, 103). In fact, the NYLB did not do so inasmuch as the record establishes that, when RMPG consented to the settlement of the third-party action, it directed White's attorney to contact Legion, which was already in liquidation, for information on workers' compensation benefits paid by Legion. The record further establishes that the company representing Legion in liquidation consented to the settlement of the third-party action separately from RMPG. Indeed, there is no indication in the record that NYLB took " 'immediate possession and control of the assets and proceeds [of Legion] to a liquidation of its affairs' " (*id.*, quoting *Bohlinger v Zanger*, 306 NY 228, 234, *rearg denied* 306 NY 851), such that it would be reasonable to view the pre-liquidation lien and the post-liquidation lien as a single lien.

Under the circumstances of this case, Legion had one lien and the NYLB had a separate lien. This proceeding, therefore, was required to be commenced within three years of the settlement of the third-party action (see *Nunes*, 272 AD2d at 402), and it was not.

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

1430

CA 11-00731

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

IN THE MATTER OF PMA MANAGEMENT CORP.,
PETITIONER-RESPONDENT,

V

ORDER

ROBERT WHITE AND HINMAN, HOWARD & KATTELL, LLP,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (PAUL T. SHEPPARD OF
COUNSEL), RESPONDENT-APPELLANT PRO SE, AND FOR ROBERT WHITE,
RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (J.P. WRIGHT OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County
(Donald A. Greenwood, J.), entered January 7, 2011. The order denied
the motion of respondents for leave to answer the petition, to
resettle and for reargument.

It is hereby ORDERED that said appeal from the order insofar as
it denied leave to reargue is unanimously dismissed (*see Empire Ins.
Co. v Food City*, 167 AD2d 983, 984) and insofar as it denied that part
of the motion seeking to resettle the order entered January 19, 2010
is dismissed (*see Gifaldi v Dumont Co.*, 172 AD2d 1025, 1026) and the
order is affirmed without costs.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1441

KA 10-01434

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN F. KAMINSKI, DEFENDANT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, 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 November 5, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the third degree (Penal Law § 140.20), defendant contends that County Court erred in denying his request to charge the jury that a witness was an accomplice as a matter of law. We reject that contention.

"An 'accomplice' means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in . . . [t]he offense charged[] or . . . [a]n offense based upon the same or some of the same facts or conduct [that] constitute the offense charged" (CPL 60.22 [2] [a], [b]; see *People v Berger*, 52 NY2d 214, 219). "If the undisputed evidence establishes that a witness is an accomplice, the jury must be so instructed but, if different inferences may reasonably be drawn from the proof regarding complicity, according to the statutory definition, the question should be left to the jury for its determination" (*People v Basch*, 36 NY2d 154, 157). Here, "different inferences could reasonably be drawn regarding the witness's complicity in the [burglary]" (*People v Marrero*, 272 AD2d 77, 77-78, *lv denied* 95 NY2d 855), and the court therefore properly submitted the issue to the jury (see *Basch*, 36 NY2d at 157-158; *People v Green*, 225 AD2d 1077, *lv denied* 88 NY2d 879). In any event, even assuming, arguendo, that the witness was an accomplice whose testimony required corroboration, we conclude that her testimony was sufficiently corroborated by other evidence tending to connect defendant with the commission of the crime (see generally *People v Reome*, 15 NY3d 188,

191-192; *People v Breland*, 83 NY2d 286, 292-293).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1442

KA 08-02188

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LORETTA JACKSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered May 7, 2008. The judgment convicted defendant, upon her plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]). We conclude that there is no merit to defendant's contention that her waiver of the right to appeal was invalid. "[T]he record establishes that 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 Wright*, 66 AD3d 1334, *lv denied* 13 NY3d 912 [internal quotation marks omitted]). "Although the [further] contention of defendant that [she] was coerced into pleading guilty and thus that the plea was not voluntarily entered survives the waiver of the right to appeal, defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review" (*People v Russell*, 55 AD3d 1314, 1314-1315, *lv denied* 11 NY3d 930). In any event, that contention lacks merit. "[I]t is well settled that '[a] defendant may not be induced to plead guilty by the threat of a heavier sentence if he [or she] decides to proceed to trial' " but, here, the statements and actions of the court during the pre-plea proceeding did not amount to impermissible coercion (*People v Boyde*, 71 AD3d 1442, 1443, *lv denied* 15 NY3d 747). Moreover, "defendant's fear that a harsher sentence would be imposed if defendant were convicted after trial does not constitute coercion" (*People v Newman* [appeal No. 1], 231 AD2d 875, *lv denied* 89 NY2d 944; *see Boyde*, 71 AD3d at 1443).

Defendant's contention that her plea was not knowing, intelligent

and voluntary because she did not recite the underlying facts of the crime "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 McCarthy*, 83 AD3d 1533, 1534, *lv denied* 17 NY3d 819 [internal quotation marks omitted]). Further, that challenge "is unpreserved for our review inasmuch as [she] did not move to withdraw the plea or to set aside the judgment of conviction on that ground" (*id.*; see *People v Lopez*, 71 NY2d 662, 665-666). "In any event, there is no merit to defendant's challenge because 'there is no requirement that defendant recite the underlying facts of the crime to which [she] is pleading guilty' " (*McCarthy*, 83 AD3d at 1534). " 'The record establishes that defendant admitted the essential elements of the . . . [crime,] and thus [her] factual allocution is legally sufficient' " (*People v Dorrah*, 50 AD3d 1619, *lv denied* 11 NY3d 736). We also conclude that there is no merit to the contention of defendant that the court's temporary misidentification of her accomplice amounted to an error that rendered the plea allocution meaningless, inasmuch as defendant confirmed the actual identity of her accomplice at the court's prompting.

Finally, "[t]he contention of defendant that [she] was denied effective assistance of counsel survives the plea and waiver of the right to appeal only to the extent that '[she] contends that [her] plea was infected by the allegedly ineffective assistance and that [she] entered the plea because of [defense counsel's] allegedly poor performance' . . . We conclude, however, that defendant's contention lacks merit to that extent" (*People v Jacques*, 79 AD3d 1812, 1812-1813, *lv denied* 16 NY3d 896). " 'In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel' . . . , and that is the case here" (*People v Garner*, 86 AD3d 955, 956, quoting *People v Ford*, 86 NY2d 397, 404).

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

1444

KAH 11-00139

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DERRICK HAMILTON, PETITIONER-APPELLANT,

V

ORDER

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

CHARLES A. MARANGOLA, MORAVIA, FOR PETITIONER-APPELLANT.

DERRICK HAMILTON, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARLENE O. TUCZINSKI
OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered December 17, 2010 in a habeas corpus proceeding. The judgment denied and dismissed the petition.

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

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1446

CAF 10-01248

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

IN THE MATTER OF JOHN C. MARINO,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

SHERRY L. MARINO, RESPONDENT.

SONALI R. SUVVARU, ESQ., ATTORNEY
FOR THE CHILD, APPELLANT.

SONALI R. SUVVARU, ATTORNEY FOR THE CHILD, CANANDAIGUA, APPELLANT PRO SE.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered August 18, 2009. 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: The Attorney for the Child appeals from an order that granted the petition of petitioner father seeking to modify the parties' prior custody agreement by awarding him sole custody of the parties' child. We note at the outset that, although Family Court may alter an existing custody agreement only in the event that there is "a showing of a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Carey v Windover*, 85 AD3d 1574, 1574, lv denied 17 NY3d 710 [internal quotation marks omitted]), the Attorney for the Child correctly concedes that there has been such a showing here.

Upon determining that there has been a change in circumstances, the court must consider whether the requested modification is in the best interests of the child (see generally *Eschbach v Eschbach*, 56 NY2d 167, 171; *Friederwitzer v Friederwitzer*, 55 NY2d 89, 93-95). In making that determination, the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each parent to provide for the child's emotional and intellectual development and the wishes of the child (see *Eschbach*, 56 NY2d at 172-173; *Fox v Fox*, 177 AD2d 209, 210). No one factor is determinative because the court must review the totality of the circumstances (see *Eschbach*, 56 NY2d at 174). It is well settled, however, that "[a] concerted effort by one parent

to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent' " (*Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127; see *Matter of Howden v Keeler*, 85 AD3d 1561). In addition, " 'a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744; see *Matter of Green v Bontzolakes*, 83 AD3d 1401, lv denied 17 NY3d 703).

Based on our review of the record, we conclude that the totality of the circumstances supports the award of custody to the father. There is ample evidence in the record to support the court's conclusion that respondent mother interfered with the father's visitation with the child throughout the pendency of the matter, including after she was warned several times by the court that visitation must occur according to a detailed schedule promulgated by the court. In addition, the child's treating psychologist and the court-appointed psychologist both testified that a change of custody would be warranted in the event that the parties could not abide by a strict visitation schedule. Thus, the court properly concluded that awarding custody to the father would be in the best interests of the child. Contrary to the contention of the Attorney for the Child, the "[c]ourt is, of course, not required to abide by the wishes of a child to the exclusion of other factors in the best interests analysis" (*Matter of Rivera v LaSalle*, 84 AD3d 1436, 1438; see *Fox*, 177 AD2d at 211-212), especially where the evidence supports the court's conclusion that "to follow [the child's] wishes would be tantamount to severing her relationship with her father, and [that] result would not be in [the child's] best interest[s]."

We have considered the remaining contentions of the Attorney for the Child and conclude that they are without merit.

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

1448

CA 11-00838

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

ROBERT PETHICK, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ELIZABETH PETHICK, NOW KNOWN AS ELIZABETH
CACCAMISE, DEFENDANT-RESPONDENT.

DAN M. WALTERS, PITTSFORD, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered July 6, 2010. The order, insofar as appealed from, determined that the parties' separation agreement is not an enforceable agreement with respect to college expenses.

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

Memorandum: Plaintiff's sole contention on appeal is that the parties' separation agreement, which was incorporated into the judgment of divorce, created a binding obligation on defendant to contribute to the college expenses of the parties' child and thus that Supreme Court erred in refusing to direct defendant to reimburse him for the college expenses that he incurred before he filed his motion seeking, inter alia, that relief. Plaintiff's contention is not properly before us, however, inasmuch as the Support Magistrate determined, after a hearing, that the college education provision of the separation agreement was unenforceable, and plaintiff failed to appeal from that order (*see Matter of Hammill v Mayer*, 66 AD3d 1196, 1197-1198; *Matter of Clark v Clark*, 61 AD3d 1274, lv denied 13 NY3d 702; *Matter of Regan v Zalucky*, 56 AD3d 825, 826-827). We therefore dismiss the appeal (*see generally Abasciano v Dandrea*, 83 AD3d 1542, 1542-1543).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1449

CA 11-00732

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

TORREY J. STOUGHTENGER,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

HANNIBAL CENTRAL SCHOOL DISTRICT AND BOARD OF
EDUCATION OF HANNIBAL CENTRAL SCHOOLS,
DEFENDANTS-RESPONDENTS-APPELLANTS.

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

LYNCH LAW OFFICE, SYRACUSE, CONGDON, FLAHERTY, O'CALLAGHAN, REID,
DONLON, TRAVIS & FISHLINGER, UNIONDALE (KATHLEEN D. FOLEY OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court,
Oswego County (James W. McCarthy, J.), entered June 9, 2010. The
order denied the parties' respective motions for summary judgment.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting that part of plaintiff's
motion to strike the affirmative defense of primary assumption of risk
and as modified the order is affirmed without costs.

Memorandum: Plaintiff's mother commenced this action on behalf
of plaintiff seeking damages for injuries he sustained while
participating in a wrestling unit in defendants' compulsory physical
education class. At the time of the incident, plaintiff weighed
approximately 125 pounds and was wrestling with another student in the
class weighing approximately 220 pounds. Plaintiff's mother moved for
summary judgment on liability and to strike the affirmative defense of
primary assumption of risk. Defendants subsequently moved for summary
judgment dismissing the complaint on the ground that, inter alia, the
affirmative defense of primary assumption of risk was a complete bar
to recovery. Plaintiff was thereafter substituted for his mother as
the plaintiff, and he appeals and defendants cross appeal from an
order denying the motions in their entirety.

We agree with plaintiff on appeal that Supreme Court erred in
denying that part of the motion to strike the affirmative defense of
primary assumption of risk. We therefore modify the order
accordingly. "The doctrine of primary assumption of . . . risk
generally constitutes a complete defense to an action to recover
damages for personal injuries . . . and applies to the voluntary

participation in sporting activities" (*Giugliano v County of Nassau*, 24 AD3d 504, 505; see generally *Morgan v State of New York*, 90 NY2d 471, 483-486, rearg denied 90 NY2d 936; *Turcotte v Fell*, 68 NY2d 432, 437-440). Nevertheless, there are important distinctions between voluntary participation in interscholastic sports and recreation activities and compulsory participation in physical education class (see *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658-659; *Passantino v Board of Educ. of City of N.Y.*, 52 AD2d 935, 937 [Cohalan, J., dissenting], revd on dissenting mem 41 NY2d 1022). Inasmuch as plaintiff was participating in a compulsory physical education class and his participation in the wrestling unit was mandatory, the defense of primary assumption of risk is not applicable. Thus, we reject defendants' contention on their cross appeal that the court erred in denying their motion for summary judgment dismissing the complaint based on that affirmative defense.

We reject the further contention of plaintiff on appeal, however, that the court erred in denying that part of the motion for summary judgment on liability. The court properly determined that there are triable issues of fact with respect to the negligent supervision claim and the comparative fault of plaintiff in choosing an opponent that outweighed him by approximately 100 pounds. Further, plaintiff failed to establish his entitlement to judgment as a matter of law on the issue of proximate cause. The record is devoid of any evidence that the elbow dislocation sustained by plaintiff was the result of the weight differential between the students, rather than conduct that could occur even under the most intense supervision in the ordinary course of a wrestling unit in a middle school physical education class (see generally *Odekirk v Bellmore-Merrick Cent. School Dist.*, 70 AD3d 910, 911).

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

1452

CA 11-01179

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

ANTONIO MERCONE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MONROE COUNTY DEPUTY SHERIFFS' ASSOCIATION, INC.,
DEFENDANT-RESPONDENT.

FRANK A. ALOI, ROCHESTER, FOR PLAINTIFF-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 2, 2010. The order and judgment dismissed the complaint after a nonjury trial.

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

Memorandum: Plaintiff, a former Monroe County Deputy Sheriff, was discharged from that position by letter dated December 15, 2004. Pursuant to paragraph 35.3.1 of the applicable collective bargaining agreement (CBA) between Monroe County (County), the County Sheriff and defendant, the union representing plaintiff, the parties had 10 business days from the date of plaintiff's discharge to file a grievance and demand arbitration thereof. Plaintiff testified at trial that defendant's outgoing president assured him that a grievance had been timely filed on his behalf. When a new president assumed the duties of office in February 2005, however, he discovered that no grievance had been filed. The new president and other union officers attempted to file a grievance with the County or demand arbitration on several occasions, but they were unsuccessful. Defendant subsequently filed a demand for arbitration with respect to plaintiff's discharge with the Public Employment Relations Board, and Supreme Court (Frazee, J.) granted the petition of the County and the County Sheriff seeking to stay arbitration. Plaintiff commenced this action on or about August 9, 2005 seeking to recover damages for defendant's breach of the duty of fair representation. Plaintiff appeals from an order and judgment dismissing the complaint.

We reject the contention of plaintiff that Supreme Court (Rosenbaum, J.) erred in determining that the action was time-barred. An action against a union for breach of its duty of fair

representation "shall be commenced within four months of the date the . . . former employee knew or should have known that the breach has occurred, or within four months of the date the . . . former employee suffers actual harm, whichever is later" (CPLR 217 [2] [a]). Here, "the harm complained of . . . occurred when defendant allegedly breached its duty of fair representation by refusing to file the grievance" within the time limits imposed by the CBA (*Leblanc v Security Servs. Unit Empls. of N.Y. State Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO*, 278 AD2d 732, 733). Thus, plaintiff suffered actual harm when defendant failed to file the grievance on or before December 30, 2004, which is 10 business days after he was discharged.

We reject plaintiff's further contention that the court erred in determining that he knew, or had reason to know, of defendant's failure to file a grievance more than four months prior to the commencement of the action. Plaintiff testified at trial that he did not learn of defendant's failure to file a grievance until a later date, but the court did not credit that testimony. It is well settled that, although this Court's authority in reviewing a nonjury trial is the same as that of the trial court, "[w]here the findings of fact 'rest in large measure on considerations relating to the credibility of witnesses' . . ., deference is owed to the trial court's credibility determinations" (*Sterling Inv. Servs., Inc. v 1155 NOBO Assoc., LLC*, 65 AD3d 1128, 1129, *lv denied* 13 NY3d 714; *see Storico Dev., LLC v Battle*, 9 AD3d 908, 909; *Ring v State of New York*, 8 AD3d 1057, *lv denied* 3 NY3d 608). Here, there is ample support in the record for the court's credibility determinations, and we see no basis upon which to disturb them.

Contrary to plaintiff's contention, the statute of limitations was not tolled by the continuous representation doctrine. That doctrine, "although originally derived from the continuous treatment concept in medical malpractice cases, has also been held applicable to professionals other than physicians" (*Zaref v Berk & Michaels*, 192 AD2d 346, 347). For statute of limitations purposes, the Court of Appeals has defined professionals as those whose employment qualifications "include extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards . . . Additionally, a professional relationship is one of trust and confidence, carrying with it a duty to counsel and advise clients" (*Chase Scientific Research v NIA Group*, 96 NY2d 20, 29). Even assuming, *arguendo*, that the relationship between plaintiff and defendant is one of trust and confidence with a duty to counsel and advise, we conclude that the record fails to establish that defendant's representatives held any of the other employment qualifications, and thus we decline to expand the continuous representation doctrine to include union representatives (*see generally Pike v New York Life Ins. Co.*, 72 AD3d 1043, 1048; *Eastman Kodak Co. v Prometheus Funding Corp.*, 283 AD2d 216). We have considered plaintiff's further contentions with respect to the statute of limitations and conclude that they are without merit.

Plaintiff's remaining contentions are academic in light of our determination.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1453

CA 11-01152

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

IN THE MATTER OF VIAHEALTH OF WAYNE,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DAWN VANPATTEN, ASSESSOR FOR TOWN OF SODUS,
AND TOWN OF SODUS, RESPONDENTS-APPELLANTS.

ANTHONY J. VILLANI, P.C., LYONS (ANTHONY J. VILLANI OF COUNSEL), FOR
RESPONDENTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (JAMES S. GROSSMAN OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Kenneth R. Fisher, J.), entered August 18, 2010 in proceedings pursuant to RPTL article 7 and CPLR article 78. The order, among other things, granted in part petitioner's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the petitions insofar as they seek relief pursuant to CPLR article 78 and denying those parts of petitioner's motion for summary judgment determining that petitioner is entitled to tax-exempt status for the portions of its property leased by Finger Lakes Migrant Health Care Project, Inc., Wayne County Rural Health Network and Rushville Health Center and as modified the order is affirmed without costs.

Memorandum: Petitioner, a not-for-profit corporation, commenced these consolidated proceedings pursuant to RPTL article 7 and CPLR article 78 seeking review of the tax assessments over several years on petitioner's property located in respondent Town of Sodus (Town). Respondents appeal from an order that, inter alia, granted those parts of petitioner's motion for summary judgment determining that petitioner was entitled to tax-exempt status for the portions of its property that were used for X ray and laboratory services operated by petitioner and that were leased by Wayne Medical Group, which is a division of Rochester General Hospital (RGH), Finger Lakes Migrant Health Care Project, Inc. (FLMHC), Wayne County Rural Health Network (WCRHN) and Rushville Health Center (Rushville). We note at the outset that "proceeding[s] pursuant to CPLR article 78 [are] not the proper vehicle[s] for challenging the tax assessment[s], inasmuch as 'challenges to assessments on the grounds that they are illegal, irregular, excessive, or unequal[] are to be made in a certiorari

proceeding under RPTL article 7' " (*Matter of Cayuga Grandview Beach Coop. Corp., v Town Bd. of Town of Springport*, 51 AD3d 1364, 1364, lv denied 11 NY3d 702). We therefore modify the order by dismissing the petitions insofar as they seek relief pursuant to CPLR article 78.

Pursuant to RPTL 420-a (1) (a), real property owned by a corporation organized exclusively for hospital purposes is exempt from taxation when the property is "used exclusively" for such purposes. Subdivision (2) of that statute further provides that, "[i]f any portion of such real property is not so used exclusively . . . but is leased or otherwise used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt" Petitioner had the initial burden of demonstrating that it was established exclusively for hospital purposes and that the portions of property at issue were used exclusively for those purposes (*see Matter of Genesee Hosp. v Wagner*, 47 AD2d 37, 43, *affd* 39 NY2d 863). "The issue in determining the taxable status of property is 'whether the nature of its primary activities is consistent with an exempt purpose' " (*Matter of Lackawanna Community Dev. Corp. v Krakowski*, 50 AD3d 1469, 1470, *affd* 12 NY3d 578; *see also Congregation Rabbinical Coll. of Tartikov, Inc. v Town of Ramapo*, 17 NY3d 763, 764; *Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v Department of Env'tl. Protection of City of N.Y.*, 11 NY3d 327, 335).

We reject respondents' contention that Supreme Court erred in granting those parts of petitioner's motion with respect to the portions of the property leased by RGH and used for X ray and laboratory services. Petitioner established that RGH and petitioner are not-for-profit corporations organized exclusively for hospital purposes and that they are using the property exclusively for those purposes (*see generally Genesee Hosp.*, 47 AD2d at 43-45). Where property is being used in support of a general hospital for various outpatient services and care, such as the services provided here by the physicians and staff of RGH and by petitioner's X ray units and laboratories, the property is tax exempt inasmuch as those services fulfill primary hospital purposes (*see Genesee Hosp.*, 47 AD2d at 46-47). Although there is no general hospital on the property at issue, as there was in *Matter of Genesee Hosp.*, the relevant portion of the property is used and operated as an extension clinic by RGH, which operates a not-for-profit hospital. We therefore conclude that petitioner established its entitlement to judgment as a matter of law with respect to the portions of property leased by RGH and used for X ray and laboratory services, and respondents failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We agree with respondents, however, that the court erred in granting petitioner's motion with respect to the portions of its property leased by FLMHC, WCRHN and Rushville. Petitioner failed to establish that those not-for-profit organizations were using the property exclusively for tax-exempt hospital purposes (*see Genesee Hosp.*, 47 AD2d at 43). We therefore further modify the order by denying those parts of petitioner's motion for summary judgment

determining that petitioner was entitled to tax-exempt status for those portions of its property leased by FLMHC, WCRHN and Rushville.

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1454

CA 11-01296

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

JOYCE SAUTER, FILED ON BEHALF OF CLAUDETTE V.
SAUTER, PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

PETER A. CALABRETTA,
DEFENDANT-RESPONDENT-APPELLANT.

STANLY LAW OFFICES, LLP, SYRACUSE (ARMEN J. NAZARIAN OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

MACKENZIE HUGHES LLP, SYRACUSE (JONATHAN H. BARD OF COUNSEL), FOR
DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 22, 2011 in a personal injury action. The order denied plaintiff's motion for partial summary judgment and denied defendant's cross motion for summary judgment.

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

Memorandum: Plaintiff commenced this action on behalf of her daughter seeking damages for injuries her daughter sustained when she was struck by a vehicle operated by defendant while walking on the shoulder of the road. Plaintiff appeals and defendant cross-appeals from an order denying plaintiff's motion for partial summary judgment on liability, i.e., the issues of negligence and serious injury (see generally *Ruzycki v Baker*, 301 AD2d 48, 51-52), and denying defendant's cross motion for summary judgment dismissing the complaint. We affirm.

Contrary to plaintiff's contention on appeal, we conclude that Supreme Court properly denied that part of her motion with respect to the issue of defendant's negligence, inasmuch as her own submissions raise triable issues of fact whether plaintiff's daughter was comparatively negligent and whether defendant exercised due care to avoid striking her (see *D.F. v Wedge Mascot Corp.*, 43 AD3d 1372, 1373). In support of the motion, plaintiff contended that defendant violated Vehicle and Traffic Law § 1131, pursuant to which "no motor vehicle shall be driven over, across, along, or within any shoulder or slope of any state controlled-access highway" Plaintiff, however, submitted the deposition testimony of defendant, who

testified that he did not cross into the shoulder of the street in question and that plaintiff's daughter crossed into the street immediately prior to the accident. Plaintiff also submitted the deposition testimony of her daughter's friend, who was with her daughter at the time of the accident and who testified that she did not observe defendant cross into the shoulder of the street.

In addition, plaintiff failed to make a prima facie showing that defendant violated Vehicle and Traffic Law § 1146 or a similar duty of care (see generally *Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392). Pursuant to section 1146 (a), "every driver of a vehicle shall exercise due care to avoid colliding with any . . . pedestrian . . . upon any roadway and shall give warning by sounding the horn when necessary." Further, defendant also had the "common-law duty to see that which he should have seen [as a driver] through the proper use of his senses" (*Barbieri v Vokoun*, 72 AD3d 853, 856). Although it is undisputed that defendant struck plaintiff's daughter with his vehicle, defendant testified at his deposition that the street in question has few lights, that he was driving in his lane and that he was driving at or under the speed limit. Defendant further testified that he did not have time to avoid the accident after observing plaintiff's daughter in the path of his vehicle. Contrary to plaintiff's further contention, any inconsistencies in the deposition testimony of defendant concerning when he first observed plaintiff's daughter merely present a credibility issue to be resolved at trial (see *Palmer v Horton*, 66 AD3d 1433, 1434; *Dietzen v Aldi Inc. [New York]*, 57 AD3d 1514). In light of our conclusion that plaintiff failed to meet her initial burden on the motion, we do not address her contention that the affidavit of defendant's accident reconstructionist is speculative and lacks an evidentiary foundation.

We further conclude that the court properly denied that part of plaintiff's motion with respect to the issue whether her daughter sustained a serious injury within the meaning of Insurance Law § 5102 (d). As the moving party, plaintiff bore the burden of demonstrating that her daughter sustained a serious injury as a matter of law "by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562; see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In support of the motion, plaintiff submitted her daughter's medical records, which included a report from a radiologist diagnosing plaintiff's daughter with a "[l]inear skullbase fracture" after the accident. Although there is no question that a fracture constitutes a serious injury (see § 5102 [d]), plaintiff is not entitled to summary judgment because the radiologist's report was not submitted in admissible form (see generally *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350; *Grasso v Angerami*, 79 NY2d 813, 815; *Zuckerman*, 49 NY2d at 562). The report is unsworn (see *Grasso*, 79 NY2d at 814; *Feggins v Fagard*, 52 AD3d 1221, 1223; cf. *Bojorquez v Sanchez*, 65 AD3d 1179), and it was not properly certified as a business record (see CPLR 4518 [a]; cf. *Salman v Rosario*, 87 AD3d 482, 483 n; *Mayblum v Schwarzbaum*, 253 AD2d 380).

Contrary to defendant's contention on his cross appeal, we conclude that the court properly denied his cross motion inasmuch as

he "failed to submit evidence sufficient to establish, prima facie, that the . . . alleged negligence [of plaintiff's daughter] was the sole proximate cause of the accident, that he kept a proper lookout, and that his alleged negligence, if any, did not contribute to the happening of the accident" (*Topalis v Zwolski*, 76 AD3d 524, 525; see *Ryan v Budget Rent a Car*, 37 AD3d 698).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1455

TP 11-01317

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

IN THE MATTER OF WENDI ROWE AND DOUGLAS GROOMS,
PETITIONERS,

V

MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY
SERVICES AND CHAUTAUQUA COUNTY DEPARTMENT OF
SOCIAL SERVICES, RESPONDENTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, III, OF
COUNSEL), FOR PETITIONERS.

JULIE B. HEWITT, MAYVILLE, FOR RESPONDENT CHAUTAUQUA COUNTY DEPARTMENT
OF SOCIAL SERVICES.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF
COUNSEL), FOR RESPONDENT NEW YORK STATE OFFICE OF CHILDREN AND FAMILY
SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Chautauqua County [James H. Dillon, J.], entered August 4, 2010) to review a determination of respondent New York State Office of Children and Family Services. The determination denied petitioners' request that reports maintained in the New York State Central Register of Child Abuse and Maltreatment, indicating petitioners for maltreatment, be amended to unfounded and sealed.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination of respondent New York State Office of Children and Family Services denying their request to amend an indicated report of maltreatment to provide instead that the report was unfounded (see Social Services Law § 422 [8] [a] [v]; [c] [ii]). "Upon our review of the record, we conclude that there is a rational basis for the agency's determination and that it is supported by substantial evidence" (*Matter of Draman v New York State Off. of Children & Family Servs.*, 78 AD3d 1603, 1603-1604; see *Matter of*

Theresa G. v Johnson, 26 AD3d 726).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1456

CA 11-00948

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

BONICA LESCENSKI, INDIVIDUALLY, AND BONICA
LESCENSKI, AS FIDUCIARY OF THE ESTATE OF
ROBERT A. SMITH, DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL J. WILLIAMS, DEFENDANT-RESPONDENT.

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

MACKENZIE HUGHES LLP, SYRACUSE (MARK R. SCHLEGEL OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered July 13, 2010 in a wrongful death action. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action, individually and as fiduciary of the estate of Robert A. Smith (decedent), seeking damages for the wrongful death of decedent as the result of an accident in a four-way intersection controlled by a traffic light. That accident occurred when the vehicle driven by decedent's wife and in which decedent was a passenger collided with the vehicle driven by defendant. We reject plaintiff's contention that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint. It is well settled that a driver "who has the right[-]of[-]way is entitled to anticipate that [the drivers of] other vehicles will obey the traffic laws that require them to yield" (*Namisnak v Martin*, 244 AD2d 258, 260; see *Rogers v Edelman*, 79 AD3d 1803; *Wallace v Kuhn*, 23 AD3d 1042, 1043). Defendant "met his initial burden by establishing as a matter of law 'that the sole proximate cause of the accident was [the] failure [of decedent's wife] to yield the right[-]of[-]way' to [defendant]" (*Guadagno v Norward*, 43 AD3d 1432, 1433; see *Galvin v Zacholl*, 302 AD2d 965, 967, lv denied 100 NY2d 512; *Kelsey v Degan*, 266 AD2d 843). In support of the motion, defendant established that, as decedent's wife approached the intersection, defendant was traveling at a lawful rate of speed, had the right-of-way with respect to her vehicle and did not have an opportunity to avoid the accident.

In opposition to the motion, plaintiff failed to raise a triable issue of fact whether defendant was negligent based on his speed or failure to keep a proper lookout (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiff's contention, "[t]he speculative affidavit of [her] expert containing alternative explanations concerning the manner in which the accident occurred is insufficient to defeat the motion" (*Van Ostberg v Crane*, 273 AD2d 895, 896; see *Wasson v Szafarski*, 6 AD3d 1182).

Entered: December 30, 2011

Frances E. Cafarell
Clerk of the Court

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

1458

TP 11-00046

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

IN THE MATTER OF LEYDY S. BELLO, PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY
ASSISTANCE, RESPONDENT.

LEYDY S. BELLO, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE
OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Niagara County [Richard C. Kloch, Sr., A.J.], entered October 6, 2010) to review a determination of respondent. The determination required petitioner to repay emergency assistance funds.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination following a fair hearing that required her to repay the emergency assistance funds paid to her electric and gas services providers. "[T]he role of a court reviewing an administrative determination is limited to ensuring that the determination arrived at following an adversarial hearing is supported by substantial evidence" (*Matter of Jason B. v Novello*, 12 NY3d 107, 114; see CPLR 7803 [4]; *Faber v Merrifield*, 11 AD3d 1009). "Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Matter of Johnson v Town of Amherst*, 74 AD3d 1896, 1897, lv denied 15 NY3d 712 [internal quotation marks omitted]; see *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181).

Here, respondent concluded that petitioner was required to repay the emergency assistance funds in question inasmuch as her gross monthly income exceeded the applicable public assistance standard of need (see 18 NYCRR 352.5 [e]; see generally New York State Off. of Temporary & Disability Assistance Administrative Directive 2002 ADM-02). Petitioner contends that the determination is not supported by substantial evidence because respondent erroneously characterized an "interest-free loan" as income in calculating her gross monthly

income. We reject that contention. Respondent was faced with conflicting evidence whether certain funds received by petitioner were loans rather than income. " '[I]t is for the administrative tribunal, not the courts, to weigh conflicting evidence, assess the credibility of witnesses, and determine which [evidence] to accept and which to reject' . . . This Court may not substitute its judgment for that of respondent" in rejecting petitioner's position that the funds at issue constitute loans rather than income (*Faber*, 11 AD3d at 1010; see *Matter of Padulo v Reed*, 63 AD3d 1687, 1688, lv denied 13 NY3d 716).

Contrary to petitioner's further contention, pursuant to respondent's "Energy Manual," it is not required to pay miscellaneous charges, including reconnect fees (see 18 NYCRR 352.5 [e]).



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

DECISIONS IN ATTORNEY DISCIPLINARY MATTERS

DECEMBER 30, 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

FRANCES E. CAFARELL, CLERK

Attorney	Docket No.
Armer, Karolyne N.	P-11-002
LePore, Rudolph J.	SC-11-062

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

MATTER OF KAROLYNE N. ARMER, AN ATTORNEY, RESPONDENT. GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT, PETITIONER. -- Order of suspension entered. Per Curiam Opinion: Respondent was admitted to the practice of law by this Court on March 7, 1975, and she formerly maintained an office in Penfield. The Grievance Committee filed a petition charging respondent with acts of misconduct including neglecting client matters, failing to cooperate with the investigation of the Grievance Committee and engaging in illegal conduct by failing to pay personal income taxes and to file personal income tax returns for a seven-year period. Respondent filed an answer denying material allegations of the petition, and this Court appointed a referee to conduct a hearing. At the hearing, respondent admitted all of the allegations in the petition and testified concerning matters in mitigation. The Referee filed a report, which the Grievance Committee moves to confirm. Respondent thereafter appeared before this Court and submitted matters in mitigation.

With respect to charge one, the Referee found that, on May 25, 2010, respondent was convicted upon her plea of guilty in Monroe County Court of failure to pay tax (Tax Law former § 1810), an unclassified misdemeanor. Respondent admitted that she failed to pay New York State personal income tax in a timely manner for the year 2007. The court sentenced respondent to an unconditional discharge.

With respect to charge two, the Referee found that, in addition to respondent's failure to pay New York State personal income tax for the year 2007, she failed to pay New York State personal income taxes for the years 2001 through 2006 and failed to file the related State income tax returns for the years 2001 through 2007. The Referee additionally found that respondent failed to file federal personal income tax returns and to pay the related taxes for the years 2001 through 2007.

With respect to charge three, the Referee found that, from October 2009 through June 2010, respondent failed to respond to inquiries from a client regarding a domestic relations matter and that, from June through September 2010, she failed to provide a refund in a timely manner as requested by the client.

With respect to charge four, the Referee found that, in September 2006, respondent agreed to represent the seller of certain real property and to hold in escrow funds in the amount of \$1,200 pending the resolution of a dispute between her client and the buyer regarding certain repairs to the property. The Referee further found that, although the dispute was resolved in December 2009 and the parties thereafter placed numerous telephone calls to respondent's office, respondent failed to release the funds from escrow until September 2010, after the

parties had filed a complaint with the Grievance Committee.

With respect to charge five, the Referee found that, from September 2009 through January 2010, respondent failed to respond to a client's request to resolve a fee dispute through arbitration, failed to appear at the arbitration hearing and failed to contact her client or the arbitrator regarding the matter.

With respect to charge six, the Referee found that, in 2008, respondent agreed to represent a client in a domestic relations matter and accepted a retainer fee in the amount of \$1,400. The Referee further found that, after January 2010, respondent failed to communicate with her client regarding the matter and failed to provide her client with itemized billing statements at regular intervals as required by 22 NYCRR part 1400.

With respect to charge seven, the Referee found that respondent failed to provide a timely written response to the inquiries of the Grievance Committee regarding the client complaints that gave rise to charges three through five of the petition.

We confirm the findings of fact made by the Referee and conclude that respondent has violated the following former Disciplinary Rules of the Code of Professional Responsibility and the following Rules of Professional Conduct:

DR 1-102 (a) (3) (22 NYCRR 1200.3 [a] [3]) - engaging in illegal conduct that adversely reflects on her honesty, trustworthiness or fitness as a lawyer;

DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]) and rule 8.4 (h) of the Rules of Professional Conduct (22 NYCRR 1200.0) - engaging in conduct that adversely reflects on her fitness as a lawyer;

rule 1.3 (b) of the Rules of Professional Conduct (22 NYCRR 1200.0) - neglecting a legal matter entrusted to her;

rule 1.15 (c) (4) of the Rules of Professional Conduct (22 NYCRR 1200.0) - failing to pay or deliver to a client or third person in a prompt manner as requested by the client or third person the funds, securities or other properties in her possession that the client or third person is entitled to receive; and

rule 8.4 (d) of the Rules of Professional Conduct (22 NYCRR 1200.0) - engaging in conduct that is prejudicial to the administration of justice.

Finally, we conclude that respondent has violated 22 NYCRR part 1400 by failing to provide a client in a domestic relations matter with itemized billing statements at regular intervals.

We have considered, in determining an appropriate sanction, respondent's disciplinary history, which includes two letters of admonition and three letters of caution. We have also considered, however, that respondent has filed all New York State personal income tax returns and paid the related taxes due. In addition, we have considered that respondent did not commit the misconduct with venal intent and that, during the relevant time period, she suffered from serious medical conditions, which gave

rise to mental health issues that negatively impacted her ability to meet her professional obligations. We have further considered respondent's submission that she has not accepted any new client matters since 2008, in recognition of her health limitations.

Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be suspended from the practice of law for a period of one year and until further order of the Court. We direct, however, that the period of suspension be stayed on condition that respondent, during that period, shall comply with the statutes and rules regulating attorney conduct and that she shall not be the subject of any further action, proceeding or application for discipline or sanctions in any court. Furthermore, in accordance with the terms of the order entered herewith, respondent is to submit to the Grievance Committee quarterly reports from her medical provider confirming that she is completing any recommended mental health treatment program and continues to have the capacity to practice law (see *Matter of Herzog*, 27 AD3d 947). Any failure to meet those conditions shall be reported by the Grievance Committee to this Court, whereupon the Grievance Committee may move before this Court to vacate the stay of respondent's suspension. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ. (Filed Dec. 30, 2011.)

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

MATTER OF RUDOLPH J. LE PORE, AN ATTORNEY, RESPONDENT. GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT, PETITIONER. -- Order of disbarment entered. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND GORSKI, JJ. (Filed Dec. 30, 2011.)