SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 6, 2012

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. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

29

KA 11-01908

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD C. FILER, DEFENDANT-APPELLANT.

DAVID R. ADDELMAN P.C., BUFFALO (DAVID R. ADDELMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Richard C. Kloch, Sr., A.J.), rendered August 7, 2008. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, criminal sexual act in the first degree, predatory sexual assault against a child, and sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal sexual act in the first degree under count two of the indictment and dismissing that count of the indictment without prejudice to the People to re-present any appropriate charges under that count of the indictment to another grand jury and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), criminal sexual act in the first degree (§ 130.50 [3]), predatory sexual assault against a child (§ 130.96), and sexual abuse in the first degree (§ 130.65 [3]).

Defendant failed to preserve for our review his contention that he was deprived of his right to a public trial when County Court ordered his friend to leave the courtroom (*see People v Hamilton*, 45 AD3d 1396, *lv denied* 10 NY3d 765). In any event, that contention is without merit inasmuch as the record establishes that the court acted within its discretion in order to "preserve order and decorum in the courtroom" (*People v Colon*, 71 NY2d 410, 416, *cert denied* 487 US 1239).

Defendant also failed to preserve for our review his contention that counts one, four and five of the indictment are facially

duplicitous (*see People v Becoats*, 71 AD3d 1578, 1579, *affd* 17 NY3d 643, *cert denied* ___ US ___ [Apr. 23, 2012]; *People v Sponburgh*, 61 AD3d 1415, 1416, *lv denied* 12 NY3d 929). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Although count two is not duplicitous on its face inasmuch as it alleges a single act (*see* CPL 200.50 [3] - [7]; *People v Keindl*, 68 NY2d 410, 417-418), we agree with defendant that it was rendered duplicitous by the testimony of the victim tending to establish the commission of multiple criminal acts during the period of time specified therein (*see People v McNab*, 167 AD2d 858). "Because defendant's right to be tried and convicted of only those crimes charged in the indictment is fundamental and nonwaivable," defendant's contention regarding count two does not require preservation (*id.*). We therefore modify the judgment by reversing that part convicting defendant of criminal sexual act in the first degree under count two of the indictment and dismissing that count without prejudice to the People to re-present any appropriate charges under that count to another grand jury (*see People v Bracewell*, 34 AD3d 1197, 1198-1199).

Contrary to defendant's contention, he was not entitled to his own copy of the videotape of the victim's testimony presented to the grand jury, which defense counsel had an opportunity to view (*see People v Smith*, 289 AD2d 1056, 1058, *lv denied* 98 NY2d 641). We reject defendant's further contention that the court erred in allowing the People to present the testimony of an expert witness concerning child sexual abuse accommodation syndrome (CSAAS). Expert testimony concerning CSAAS is admissible to assist the jury in understanding the unusual conduct of victims of child sexual abuse where, as here, the testimony is general in nature and does "not attempt to impermissibly prove that the charged crimes occurred" (*People v Carroll*, 95 NY2d 375, 387; *see People v Bassett*, 55 AD3d 1434, 1436-1437, *lv denied* 11 NY3d 922; *see also People v Gillard*, 7 AD3d 540, 541, *lv denied* 3 NY3d 659). We also reject defendant's contention that the court erred in permitting the People's forensic pediatrician to testify that the absence of physical injuries was not inconsistent with sexual abuse of a child (*see generally People v Shelton*, 307 AD2d 370, 371, *affd* 1 NY3d 614).

Defendant failed to preserve for our review his contentions that he was denied his rights to due process and equal protection when the People prosecuted him for predatory sexual assault against a child rather than criminal sexual act in the first degree, and that the People also thereby violated the separation of powers clause of the United States Constitution (*see generally People v Jackson*, 71 AD3d 1457, 1458, *lv denied* 14 NY3d 888; *People v Schaurer*, 32 AD3d 1241). In any event, those contentions are without merit (*see People v Lawrence*, 81 AD3d 1326, 1326-1327, *lv denied* 17 NY3d 797). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

222

KA 09-00307

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEFAN E. LEWIS, DEFENDANT-APPELLANT.

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

STEFAN E. LEWIS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered August 27, 2008. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [3] [felony murder]). Contrary to the People's contention, defendant did not forfeit his right to appeal by pleading guilty after County Court issued an oral suppression ruling but before a written order thereon had been issued; "an appeal does lie from an oral 'order' " (*People v Elmer*, ___ NY3d ___, ___ [June 27, 2012]). Defendant contended at the suppression hearing that the showup identification procedure was unduly suggestive because the store clerk who made the identification did not see the robbers' faces, which were covered. Thus, defendant failed to preserve for our review his present contentions that the court erred in failing to suppress the showup identification on the grounds that the People failed to demonstrate that the showup identification procedure was conducted in temporal proximity to the crime and that the showup identification procedure was unnecessary because the police already had probable cause to arrest him in connection with an earlier robbery (*see* CPL 470.05 [2]).

In any event, we conclude that defendant's present contentions lack merit. Although showup identification procedures are generally disfavored (*see People v Ortiz*, 90 NY2d 533, 537), such procedures are permitted "where [they are] reasonable under the circumstances—that

is, when conducted in close geographic and temporal proximity to the crime—and the procedure used was not unduly suggestive" (*People v Brisco*, 99 NY2d 596, 597; *see Ortiz*, 90 NY2d at 537; *People v Jackson*, 78 AD3d 1685, 1685-1686, *lv denied* 16 NY3d 743). Here, the showup identification procedure was reasonable because it was conducted at the scene of the crime, within 95 minutes of the commission of the crime and in the course of a "continuous, ongoing investigation" (*Brisco*, 99 NY2d at 597; *see People v Santiago*, 83 AD3d 1471, *lv denied* 17 NY3d 800; *People v Boyd*, 272 AD2d 898, 899, *lv denied* 95 NY2d 850). Further, a showup identification procedure is not improper "merely because the police already have probable cause to detain a suspect" (*People v Davis*, 232 AD2d 154, 154, *lv denied* 89 NY2d 941, *rearg denied* 89 NY2d 1091). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

In his pro se supplemental brief, defendant contends that he was denied effective assistance of counsel because his attorney also represented defendant's two accomplices and thus had an inherent conflict of interest. We reject that contention. The successive or joint representation of multiple defendants is "not per se violative of one's constitutional right to the effective assistance of counsel" (*People v Macerola*, 47 NY2d 257, 262; *see People v Gonzalez*, 30 NY2d 28, 34, *cert denied* 409 US 859). While we agree with defendant that both defense counsel and the prosecutor had a duty to recognize a potential conflict of interest, defendant was required to show "that the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on defense counsel's representation" (*People v Weeks*, 15 AD3d 845, 847, *lv denied* 4 NY3d 892 [internal quotation marks omitted]). Here, defendant failed to make such a showing in his pro se supplemental brief, and we therefore conclude that he has not met his burden of demonstrating that he was denied the right to effective assistance of counsel under the Federal or State Constitutions (*see People v Harris*, 99 NY2d 202, 210; *Weeks*, 15 AD3d at 847-848; *cf. People v Ortiz*, 76 NY2d 652, 657-658). Finally, we note that this case involved successive representations of codefendants, not multiple simultaneous representations of codefendants, and we thus reject defendant's further contention in his pro se supplemental brief that the court was required to conduct a *Gomberg* inquiry (*see People v Jordan*, 83 NY2d 785, 787-788; *People v Gomberg*, 38 NY2d 307, 313-314).

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

411

KA 11-00150

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

SCOTT F. DOLL, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA, LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 2, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Opinion by SMITH, J.: This appeal requires, inter alia, that we determine whether County Court properly denied defendant's motion to suppress statements that he made, including those he made to law enforcement agents when they questioned him in the absence of *Miranda* warnings and after he invoked the right to counsel. Under the unique circumstances presented, we conclude that the Genesee County Sheriff's Deputies (hereafter, deputies) did not violate defendant's rights by detaining and questioning him until they discovered the victim's body.

I

After a Genesee County grand jury issued an indictment charging defendant with murder in the second degree (Penal Law § 125.25 [1] [intentional murder]), he moved, inter alia, to suppress statements he made to the deputies and others prior to his arrest, as well as certain tangible evidence. The evidence at the suppression hearing establishes that, at approximately 8:51 in the evening of February 16, 2009, Genesee County Sheriff's Deputy James Diehl responded to a 911 telephone call regarding a suspicious person. The caller indicated that the person was wearing a one-piece camouflage suit and a white hood, and that he was walking near a certain intersection. Diehl stopped his patrol vehicle when he observed defendant, who fit the description, walking a short distance from that intersection. As defendant approached Diehl's patrol vehicle, he dropped a metal object that Diehl later discovered to be a car jack. Diehl nodded toward a

cylindrical object in defendant's pocket, and defendant displayed the object, which was a lug wrench.

Diehl observed what appeared to be wet blood stains on the knees and thighs of defendant's camouflage suit, and on defendant's sneakers and hands. At that point, Diehl requested identification, and defendant complied. When Diehl asked defendant what he was doing, defendant responded that he was walking in order to lower his cholesterol because he had a doctor's appointment the next morning. Defendant also said that he was going to a friend's house nearby, that he had dropped a car off at a local auction house and decided to stop and walk on the way back home, and that he lived in Corfu. In addition to the internal inconsistences in defendant's statements, Diehl knew that defendant's description of the location of the friend's house was inconsistent with the streets at issue.

While Diehl was assessing the situation, defendant asked for a ride back to his van. Diehl agreed and allowed defendant to sit in the back of the patrol vehicle. Before Diehl began driving, however, the witness who originally made the 911 telephone call approached Diehl's patrol car and told Diehl that he had seen defendant at a garage at the described intersection. The witness also told Diehl that defendant first turned away as the witness drove by, and then crouched down between two cars. Diehl told defendant that he was going to detain defendant until he could sort out the situation. Diehl then removed defendant from the patrol vehicle, frisked and handcuffed him, and returned him to the back seat. Diehl asked defendant about the blood on his clothing, and defendant replied that it was cold out so he put on the coveralls that he wore when he butchered deer.

Diehl drove to the location where defendant parked his van. Diehl observed blood in several places on both the inside and outside of the van, and on the ground next to the van. He also observed a pair of gloves, which appeared to be blood-soaked, on top of a car near the van. Other deputies arrived and noticed several additional blood spots on defendant's face, and questioned him about the blood. Defendant initially told Deputy Patrick Reeves that the blood was old, but Reeves observed that it was fresh. Reeves removed defendant from the patrol vehicle and showed him the blood on and near the van, and Reeves also pointed out that defendant's sneakers were leaving bloody footprints in the snow. Reeves and other deputies asked defendant whether the blood was human or deer blood, and indicated that they would let him go if he could show them the deer. Defendant repeatedly stated, however, that he could not take the deputies to a deer nor could he explain the source of the blood. Although defendant invoked his right to counsel, the deputies thought that there had been an accident or assault that resulted in injuries, and that "somebody may be in need." They therefore continued to ask defendant whether someone was in need of medical attention, and about the source of the blood on his clothing and at the scene. Defendant continued to indicate that he could not answer their questions. The People concede that the deputies did not administer *Miranda* warnings to defendant.

In addition to questioning defendant about the source of the blood, the deputies also took steps to locate the possible victim or victims. Deputies contacted or visited all of defendant's friends and relatives whose locations they could ascertain, to check on their welfare, and the deputies asked police officers in Akron, New York, to check on defendant's ex-wife. In addition, deputies contacted the owner of the business where the van was located, and attempted to contact others who might have information concerning the situation confronting them. Deputies walked on both sides of the road between the location where the van was parked and where defendant was found, searching for any injured person. When deputies went to the home of defendant's business partner, they found his body lying on the ground in the driveway.

After the victim's body was located, defendant's girlfriend arrived at the Sheriff's office with another woman. The other woman was defendant's friend, and they had previously worked together as correctional officers at a state correctional facility. Defendant's friend repeatedly asked the deputies if she could speak with defendant, and eventually Sheriff's Investigator Kristopher Kautz agreed to permit her to do so, but told her that any conversation was not at Kautz' request. Kautz also indicated that he was going to remain in the room while defendant spoke with his friend and that, although Kautz would not take part in their conversation, he would take notes regarding it. During the ensuing conversation, defendant told his friend that the situation did not involve an animal, that he had been "present" but did not do anything, that it was an open and shut case, that he was going to be in jail somewhere, and that he guessed that he would get what he deserved. Defendant's friend specifically asked defendant to tell her that there was not a dead body, and defendant replied, "I can't do that." Kautz stayed in the room during the conversation, standing a few feet from defendant and his friend, within defendant's view.

Before finding the victim's body, deputies took photographs of defendant and his clothing, obtained a buccal swab from defendant for DNA testing, and towed his van to a Sheriff's facility to preserve the blood evidence. Although the record indicates that the deputies seized defendant's clothing, it does not clearly establish whether that seizure occurred before or after the victim's body was found. Pursuant to several search warrants, the deputies later seized the records from the business of defendant and the victim, bank records relating to that business, and other evidence.

Defendant moved, inter alia, to suppress the statements that he made to the deputies and to his friend, and also sought suppression of his clothing, the van, the buccal swab, another swab taken from the blood found on defendant's face, the evidence seized pursuant to the warrants, and all other evidence derived from that evidence. After conducting a hearing, the court suppressed the buccal swab and the results of any testing performed upon it, but denied the remainder of defendant's suppression motion. In an order entered upon defendant's consent, the court later directed that defendant provide a sample of his DNA.

At trial, in addition to the evidence adduced at the suppression hearing, the People introduced evidence establishing that the victim's DNA was consistent with the DNA in the blood found on defendant's clothing, the van, and the gloves. The DNA in the swab taken from defendant's face was consistent with being a mixture of his DNA and the victim's DNA. A jury convicted defendant of murder in the second degree, and he appeals.

II

Contrary to defendant's contention, the court properly denied his motion to suppress the statements that he made to the police and to his friend while in police custody. Although defendant is correct that the police continued to question him in the absence of *Miranda* warnings and after he requested an attorney, we conclude that the continued questioning was permitted pursuant to the emergency doctrine in these circumstances.

Initially, we reject the contention of the People that defendant was not in custody and that *Miranda* warnings therefore were not required. The evidence establishes that the deputies informed defendant that he would not be released until they were able to ascertain the source of the blood. In addition, defendant was frisked and kept in handcuffs while the deputies attempted to locate the injured person. A reasonable person under those circumstances would not have felt free to leave, and thus the court properly concluded that defendant was in custody for *Miranda* purposes (*see People v Mejia*, 64 AD3d 1144, 1145-1146, *lv denied* 13 NY3d 861; *People v Rhodes*, 49 AD3d 668, 668-669, *lv denied* 10 NY3d 938; *see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851).

We agree, however, with the People's further contention that the deputies did not violate defendant's right to counsel or his *Miranda* rights under the unique circumstances of this case. The amount of blood present on defendant's face, hands, clothing and van, and on the ground, along with the bloody gloves on top of a nearby car, indicated that one or more persons had been grievously injured, and that defendant had been in close contact with that person or persons. Defendant's initial explanation, that he had just put on clothing in which he sometimes butchered deer, was inconsistent with the fresh, wet blood on his clothing, as well as with the blood on his hands and face. Defendant added to the suspicious nature of the circumstances by refusing to show the deputies any deer or deer meat that could be the source of the blood, and by refusing to answer their questions concerning whether a person was involved. Based upon the circumstances confronting the deputies, they were justified in concluding that one or more persons had been injured and were in need of assistance or rescue.

The need to gain information about a possibly injured victim or victims permitted the deputies to continue questioning defendant, despite his request for an attorney, under the doctrine that is variously known as the rescue, emergency, or public safety doctrine. "Under New York's emergency exception, police officers can continue to

question a defendant even after the defendant has requested an attorney if an individual's life or safety is at stake" (*People v Kimes*, 37 AD3d 1, 16, *lv denied* 8 NY3d 881, *rearg denied* 9 NY3d 846). In a case involving police questioning of a suspect concerning the whereabouts of a kidnapping victim, the Court of Appeals wrote:

> "It would not be reasonable or realistic to expect the police to refrain from pursuing the most obvious, and perhaps the only source of information by questioning the kidnapper, simply because the kidnapper asserted the right to counsel after being taken into custody. To hold that the special restrictions of the State right to counsel rule extend into this area of police activity would . . . dangerously limit the power of the police to find and possibly rescue the victim . . . We therefore hold that the police did not violate the defendant's right to counsel under the State Constitution by questioning him concerning the victim's whereabouts" (*People v Krom*, 61 NY2d 187, 200).

Although police officers "do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception" (*Michigan v Fisher*, ___ US ___, ___, 130 S Ct 546, 549), such ironclad proof existed here. The deputies possessed specific information establishing that one or more persons had been injured to the point where he, she or they had lost a significant amount of blood. Consequently, the deputies did not violate defendant's right to counsel by continuing to question him despite his request for an attorney.

We respectfully disagree with the dissent's conclusion that the exception does not apply because the deputies lacked knowledge that there was a victim, such as the kidnapped victim in *Kimes* (37 AD3d 1). The deputies did not know the name of the victim or victims, but they possessed enough information about his/her/their condition to justify the continued questioning of defendant despite his request for an attorney. Based on defendant's responses to their questions regarding deer, the deputies were justified in concluding that the blood came from a person rather than from an animal. Therefore, they knew that there was at least one victim, who had lost a significant amount of blood. The amount of blood located on defendant's clothing, sneakers, face, hands, and the inside and outside of his van, along with the blood on the snow and the gloves, established the existence of a victim or victims who had been seriously injured. In addition, the deputies knew from the blood on defendant that he had been very close to the victim or victims. Furthermore, his refusal to answer questions and his patently false statements were evidence that defendant was withholding essential information and knowledge concerning the victim's or victims' whereabouts. Thus, contrary to the conclusion of the dissent, the deputies knew that there was a victim, to wit, at least one person who had been seriously injured and needed assistance.

Similarly, "[g]iven the legitimate concern of the police for the safety of [any] victim, the questioning of the defendant regarding [any] victim's identity and whereabouts, without first advising him of his *Miranda* rights . . . , was lawful" (*People v Boyd*, 3 AD3d 535, 536, *lv denied* 2 NY3d 737; *see People v Molina*, 248 AD2d 489, 490, *lv denied* 92 NY2d 902). It is well settled that law enforcement agents may question a suspect without administering *Miranda* warnings in order to ensure the safety of people who might, in the future, be injured by a handgun that the suspect had abandoned in a public place (*see New York v Quarles*, 467 US 649, 651; *People v Chestnut*, 51 NY2d 14, 22-23, *cert denied* 449 US 1018; *People v Oquendo*, 252 AD2d 312, 314-315, *lv denied* 93 NY2d 901). In analogizing the exigent circumstances exception to the Fifth Amendment to the similar exception to the Fourth Amendment's protection against unreasonable searches, the United States Supreme Court wrote that a factual scenario in which a suspect known to have discarded a handgun shortly before his apprehension "present[ed] a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in [*Miranda*]" (*Quarles*, 467 US at 653). The Supreme Court concluded that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination" (*id.* at 657). Given the far more immediate and heightened concern arising from this situation, in which the evidence established that one or more persons had sustained severe injuries, the same rule applies. The deputies, rightfully concerned that a life might hang in the balance, did not violate defendant's rights by continuing to question him without administering *Miranda* warnings (*see People v Zalevsky*, 82 AD3d 1136, 1138).

Contrary to defendant's further contention, suppression of his statements was not required because the deputies who questioned him were also attempting to obtain evidence in order to convict him of a crime. "Applicability of the 'public safety' exception does not depend on the officers' motivations. As long as there is an objective need to ask the questions in order to protect the public, it does not matter that the officers may also have desired to obtain incriminating evidence" (*Oquendo*, 252 AD2d at 315; *see Quarles*, 467 US at 655-656). Here, it is clear that the deputies were pursuing every possible avenue in their attempts to locate the victim or victims. In addition to questioning defendant, the deputies went to the homes of his family and friends, both to seek information and to check on the condition of those people. As noted, the deputies also searched the roadside near where defendant was apprehended, and they searched the surrounding countryside. A deputy contacted the police in the Town of Akron, where defendant's ex-wife resided, and asked officers there to check on her condition, to ensure that she was not the person who had been injured. Inasmuch as the evidence at the suppression hearing established that an objective need to rescue a member of the public existed and that the deputies were doing everything possible to aid that person or persons, the emergency exception applied notwithstanding the deputies' additional intent to obtain incriminating evidence.

III

We also reject defendant's further contention that the court erred in refusing to suppress the statements he made to his friend after the victim's body was discovered. Defendant is correct that, "[o]nce the [deputies] found the victim's body . . . and ascertained that []he was dead, and after that information was communicated to the [deputies] questioning the defendant, the emergency no longer existed" (*Zalevsky*, 82 AD3d at 1138). With respect to the statements made by defendant to his friend, however, we conclude that defendant's right to counsel was not implicated.

> "Central to the scope of the right of counsel is the involvement of the State in eliciting that evidence. The right to counsel does not clothe an accused with absolute immunity as to all incriminating statements made outside the presence of a lawyer. While the right to counsel guarantees that an accused will have a competent advocate in confronting the power of the State, that protection does not extend to encounters with private citizens absent collusion of the State . . . [Thus,] statements induced by nongovernmental entities, acting privately, do not fall within the ambit of this exclusionary rule" (*People v Velasquez*, 68 NY2d 533, 537).

Defendant's contention that his friend was acting on behalf of or in collusion with law enforcement agents is without merit. In determining whether a private actor is acting on behalf of or in collusion with law enforcement agents such as the police officers or deputy sheriffs involved here, a court must examine numerous factors, including whether the circumstances establish "a clear connection between the police and the private investigation . . . ; completion of the private act at the instigation of the police . . . ; close supervision of the private conduct by the police . . . ; and a private act undertaken on behalf of the police to further a police objective" (*People v Ray*, 65 NY2d 282, 286). A review of those factors establishes that, "according to the evidence at the suppression hearing, defendant's [friend] was not acting as an agent of the [deputies], and [his] statements were not otherwise induced by governmental entities" (*People v Carvalho*, 60 AD3d 1394, 1395, *lv denied* 13 NY3d 742). Consequently, the court properly refused to suppress those statements (*see People v Jean*, 13 AD3d 466, 467, *lv denied* 5 NY3d 764, 807; *People v Ross*, 122 AD2d 538, 539, *lv denied* 68 NY2d 816; *cf. People v Grainger*, 114 AD2d 285, 289). In any event, any error in admitting the statements that defendant made to his friend is harmless because he made similar statements to the deputies, which we have determined were properly admitted, and, "in light of the totality of the evidence, there is no reasonable possibility that the error affected the jury's verdict" (*People v Douglas*, 4 NY3d 777, 779; *see People v Lopez*, 16 NY3d 375, 386-387).

IV

Contrary to defendant's further contention that he was de facto arrested without probable cause, we conclude that the deputies' actions were at all times in compliance with the four-tier analysis set forth in *People v De Bour* (40 NY2d 210, 223; *see People v Moore*, 6 NY3d 496, 498-499; *People v Hollman*, 79 NY2d 181, 184-185). The evidence at the suppression hearing establishes that Diehl stopped his vehicle and defendant walked to the vehicle of his own accord, at which time the deputy nodded toward the cylindrical object protruding from defendant's pocket and asked defendant what he was doing. These were merely non-threatening questions not indicative of criminality, and thus were justified as a level one inquiry (*see Hollman*, 79 NY2d at 185). The observation of fresh blood stains on defendant's hands and clothing gave the deputy a "founded suspicion that criminal activity [was] afoot" (*De Bour*, 40 NY2d at 223), which justified a more pointed inquiry into his activities as a level two intrusion.

We reject defendant's contention that his detention in handcuffs was a de facto arrest requiring probable cause; rather, we conclude that the detention was a level three intrusion, requiring reasonable suspicion. "Reasonable suspicion represents that 'quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand' " (*People v Martinez*, 80 NY2d 444, 448, quoting *People v Cantor*, 36 NY2d 106, 112-113). Here, Diehl was informed by a citizen that defendant had been attempting to conceal himself, and defendant provided varying and incredible explanations of his conduct in response to Diehl's inquiries. Diehl also observed blood on defendant's clothing and person, and defendant's explanation for the presence of the blood was patently false. Consequently, the deputy properly concluded that defendant had committed a felony or a misdemeanor, which provided reasonable suspicion to detain him (*see Moore*, 6 NY3d at 498-499). We further reject defendant's contention that he was de facto placed under arrest when the deputies seized his clothing. Although the record does not clearly establish the exact time of that seizure, the record does establish that it occurred after he was handcuffed. Therefore, the deputies had reasonable suspicion that criminal activity was afoot at that time, justifying the level three continuing temporary detention of defendant while they attempted to locate the victim or victims.

Defendant's contention that the deputies were only permitted to detain him briefly while they searched the immediate area for a victim is without merit. An emergency that unquestionably threatened the life of a victim or victims existed, as discussed above, and defendant provided the deputies with the best avenue of attempting to provide assistance to such victim or victims. In this contention, defendant relies upon his Fourth Amendment rights. The emergency doctrine provides an exception to those rights when the law enforcement agents involved are confronted with an immediate need to provide aid or assistance to a possibly injured individual (*see People v Molnar*, 288 AD2d 911, 911-912, *affd* 98 NY2d 328; *People v Mitchell*, 39 NY2d 173, 177-178, *cert denied* 426 US 953). Although it is not yet settled

whether, under the New York State Constitution, the rule in *Mitchell* will yield to the rule in *Brigham City, Utah v Stuart* (547 US 398; *see People v Dallas*, 8 NY3d 890, 891), the uncertainty is of no moment because the facts presented herein qualify as an emergency under either rule (*see People v Desmarat*, 38 AD3d 913, 914-915). Thus, we deem the protection provided by the "Fourth Amendment inapplicable [because] the exigencies of the situation make the needs of law enforcement so compelling that the [detention] is objectively reasonable under the Fourth Amendment" (*Quarles*, 467 US at 653 n 3 [internal quotation marks omitted]; *see Mincey v Arizona*, 437 US 385, 393-394).

V

We reject defendant's contention that the deputies seized his van without probable cause to believe that he committed a crime. " 'If the police possess probable cause to believe the vehicle is the instrumentality of a crime and exigent circumstances exist, they may seize the [vehicle] without a warrant,' and both of those factors exist here" (*People v White*, 70 AD3d 1316, 1317, *lv denied* 14 NY3d 845; *see People v Sweezey*, 215 AD2d 910, 914, *lv denied* 85 NY2d 980). The blood on the interior and exterior of the vehicle, by itself, provided reasonable cause to believe that the van was the instrumentality of a crime. Furthermore, the fragile nature of the blood on the exterior of the van, which could be destroyed by mere rainfall or splashing water from ice and snow that melted, provided the exigent circumstances.

VI

"A defendant seeking suppression of evidence has the burden of establishing standing by demonstrating a legitimate expectation of privacy in the premises or object searched" (*People v Ramirez-Portoreal*, 88 NY2d 99, 108), and defendant failed to establish such an expectation with respect to the seizure of the vehicles, as well as the business records of the corporation that he shared with the victim. We have considered defendant's remaining contentions with respect to the basis for the search warrants and the issuance of the warrants themselves, and conclude that they are without merit.

VII

Defendant's contention that the court abused its discretion in its *Molineux* and *Ventimiglia* rulings is without merit. At trial, the court permitted the People to introduce evidence that defendant had used a vehicle owned by the victim as security for a loan that was made to the business. The court also permitted the People to present evidence establishing that defendant used a vehicle that the business had sold as security for another loan, and later borrowed that vehicle from the owner to defraud the lender into believing that the business still owned the vehicle. "Here, evidence regarding defendant's prior [business] activities not only provided necessary background information and explained the relationship between defendant and the victim, but also . . . [helped to] establish[ ] defendant's motive for

killing the victim" (*People v Burnell*, 89 AD3d 1118, 1120-1121, *lv denied* 18 NY3d 922).

Defendant made only a general motion for a trial order of dismissal, and he therefore failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19; *see also People v Martinez*, 73 AD3d 1432, 1432-1433, *lv denied* 15 NY3d 807). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Finally, defendant failed to preserve for our review his contention that the prosecutor's summation shifted the burden of proof to the defense and thereby deprived him of a fair trial (*see People v Anzalone*, 70 AD3d 1486, 1487, *lv denied* 14 NY3d 885; *see generally People v Romero*, 7 NY3d 911, 912). In any event, that contention lacks merit inasmuch as the allegedly improper comments by the prosecutor were fair comment on the evidence (*see People v Anderson*, 52 AD3d 1320, 1321, *lv denied* 11 NY3d 733; *People v Coleman*, 32 AD3d 1239, 1240, *lv denied* 8 NY3d 844). Furthermore, even assuming, arguendo, that any of the comments were improper, we conclude that they did not deprive defendant of a fair trial inasmuch as "the court clearly and unequivocally instructed the jury that the burden of proof on all issues [with respect to the crime charged] remained with the prosecution" (*People v Pepe*, 259 AD2d 949, 950, *lv denied* 93 NY2d 1024; *see People v Matthews*, 27 AD3d 1115, 1116).

VIII

We have considered defendant's remaining contentions, and conclude that they are without merit. Accordingly, we conclude that the judgment should be affirmed.

SCUDDER, P.J., and PERADOTTO, J., concur with SMITH, J.; CENTRA, J., dissents and votes to reverse in accordance with the following Opinion in which FAHEY, J., concurs: We respectfully dissent, inasmuch as we disagree with the majority that the emergency exception applies in this case. We therefore conclude that the judgment should be reversed, defendant's statements that he made to the police should be suppressed, and a new trial should be granted.

The evidence at the suppression hearing established that a sheriff's deputy approached defendant at around 8:45 p.m. as he was walking along a road wearing camouflage clothing; defendant matched the description of a "suspicious" person who had been seen crouching between parked vehicles. Defendant had blood on his clothing, the presence of which he explained by stating that he butchers deer. After the citizen informants identified defendant as the suspicious person they had seen, the deputy handcuffed defendant and placed him in the back of the police vehicle. Not satisfied with defendant's

answers to his questions, the deputy informed defendant that he was being detained until the deputy could figure out what happened, and he was interrogated for the next several hours by several sheriff's deputies without *Miranda* warnings and despite his request for counsel. At around 1:30 a.m., a body was found and defendant was formally arrested. Thereafter, defendant's friend was allowed to speak with defendant in the presence of the police, and defendant made additional incriminating statements to her. County Court denied that part of defendant's motion seeking to suppress his statements to the police, concluding that the emergency exception applied to justify the police interrogation of defendant without counsel or *Miranda* warnings. The court further denied that part of defendant's motion seeking to suppress his statements to his friend because she was not an agent of the police.

In *People v Krom* (61 NY2d 187, 198-200), the Court of Appeals established the emergency exception that allows the police to question a suspect in custody despite the suspect's request for an attorney. In that case, the police were searching for a victim who had been kidnapped and questioned the defendant, the suspected kidnapper (*id.* at 192-195). The Court held that it was permissible for the police to question the defendant in the absence of counsel because they were attempting to locate the victim (*id.* at 199-200; *see People v Kimes*, 37 AD3d 1, 16, *lv denied* 8 NY3d 881, *rearg denied* 9 NY3d 846 [permissible to question the defendant even after she requested an attorney because an "individual's life or safety (was) at stake"]). The facts of this case, however, are very different from *Krom* and do not warrant the application of the emergency exception. Most importantly, unlike in *Krom*, the police in this case were not aware that there was even a victim who needed police assistance. While we agree with the majority that the police did not need to know the victim's identity (*see e.g. People v Boyd*, 3 AD3d 535, 536, *lv denied* 2 NY3d 737), they at least had to know that there was a victim of a crime. The majority relies on the fact that the defendant had blood on his clothes to support the inference that there was a victim somewhere, but defendant explained that the blood on his clothes was from butchering deer, which is certainly a reasonable explanation. To allow the police to disregard a person's invocation of the right to counsel based on the mere fact that the person has blood on his or her clothing is an unwarranted expansion of the emergency exception.

We agree with the majority, however, that defendant's statements that he made to his friend in the presence of the police were admissible. Although those statements were made after the emergency had ceased, the court properly determined that the friend was not acting as an agent of the police.

Accordingly, we would reverse the judgment, grant only that part of defendant's motion seeking to suppress his statements to the police, and grant a new trial. We otherwise concur with the majority on the remaining issues.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

434

KA 10-01638

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP HOLLOWAY, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIP HOLLOWAY, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered July 20, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant's contention that the evidence is legally insufficient to support the conviction on the grounds that the testimony of an alleged accomplice was both uncorroborated and incredible as a matter of law is not preserved for our review because defendant failed to move for a trial order of dismissal on either of those grounds (*see People v Sudler*, 75 AD3d 901, 904, *lv denied* 15 NY3d 956; *People v Story*, 68 AD3d 1737, 1738, *lv denied* 14 NY3d 844). Defendant also failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction on the ground that a second alleged accomplice was actually the shooter and that defendant did not act as his accomplice (*see generally People v Molson*, 89 AD3d 1539, 1539-1540), having failed to renew his motion for a trial order of dismissal on that ground after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we reject those contentions (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that his statement to the police in which he admitted shooting the victim was not

corroborated. "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him [or her] without additional proof that the offense charged has been committed," but the corroborating proof need not establish that defendant committed the offense (CPL 60.50; *see People v Fulmore*, 91 AD2d 1184). Here, a witness testified concerning the facts and circumstances of the shooting, and the medical examiner testified that the victim's death was considered a homicide as the result of multiple gunshot wounds.

We further conclude that County Court properly refused to suppress his inculpatory statements to the police on the ground that they were elicited in violation of his right to counsel. "[D]efendant failed to meet his ultimate burden by presenting evidence establishing that he was in fact represented by counsel at the time of interrogation, as defendant contended" (*People v Hilts*, 19 AD3d 1178, 1179; *see People v Cameron*, 6 AD3d 273, 273-274, *lv denied* 3 NY3d 672). Contrary to defendant's contention, the court properly imposed consecutive sentences (*see People v Jones*, 66 AD3d 1442, 1443, *lv denied* 13 NY3d 939). The sentence is not unduly harsh or severe.

Defendant contends in his pro se supplemental brief that his right to counsel was violated when he made his inculpatory statements to the police because his indelible right to counsel had attached when the felony complaint in this matter was filed, before he made the statements (*see generally People v Samuels*, 49 NY2d 218, 221-223). Although that contention is reviewable on appeal even in the absence of preservation (*see id.* at 221), we are unable to review it because we are unable to discern from the record before us when, if ever, a felony complaint was filed (*see generally People v McLean*, 15 NY3d 117, 119). Defendant further contends in his pro se supplemental brief that he was denied the right to effective assistance of counsel based on defense counsel's failure to preserve for our review the issue concerning the alleged attachment of his right to counsel upon the filing of the felony complaint, and based on defense counsel's failure to object when the prosecutor allegedly violated the *Rosario* rule. Because that contention and the underlying contention concerning the violation of defendant's right to counsel based on the filing of the felony complaint involve matters outside the record on appeal, they are properly raised by way of a CPL article 440 motion (*see People v Johnson*, 88 AD3d 1293, 1294; *People v Ellis*, 73 AD3d 1433, 1434, *lv denied* 15 NY3d 851).

We have considered defendant's remaining contentions in his main and pro se supplemental briefs, and we conclude that they are without merit.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

436

KA 06-02623

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. ZACHER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered May 26, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the first degree (two counts) and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]) and one count of assault in the first degree (§ 120.10 [1]), arising from an incident in which he stabbed his wife and two daughters. Defendant contends that Supreme Court erred in refusing to suppress certain statements that he made in response to questioning by a police officer while he was in custody and after he had been given *Miranda* warnings because that officer continued questioning defendant after he invoked his right to remain silent. We reject that contention. "It is well settled . . . that, in order to terminate questioning, the assertion by a defendant of his right to remain silent must be unequivocal and unqualified" (*People v Morton*, 231 AD2d 927, 928, *lv denied* 89 NY2d 944; *see People v Caruso*, 34 AD3d 860, 862, *lv denied* 8 NY3d 879). Whether that request was "unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request[,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant" (*People v Glover*, 87 NY2d 838, 839). The court's determination that defendant did not unequivocally invoke his right to remain silent is "granted deference and will not be disturbed unless unsupported by the record" (*People v Kuklinski*, 24 AD3d 1036, 1036, *lv denied* 7 NY3d 758, 814; *see People v Twillie*, 28 AD3d 1236, 1237, *lv denied* 7 NY3d 795), which is not the case here.

Defendant further contends that the testimony of another police officer that defendant did not speak after the police arrived at the scene of the stabbings, placed him in handcuffs and put him in a police vehicle was improperly offered as evidence of his consciousness of guilt. We reject that contention inasmuch as such testimony was part of the officer's observations at the crime scene and was also offered as evidence of defendant's demeanor and mental state when the police encountered him (*cf. People v Von Werne*, 41 NY2d 584, 588). We agree with defendant, however, that the prosecutor's cross-examination of him regarding his silence at the crime scene and the prosecutor's later references to that silence during summation improperly characterized defendant's silence as evidence of his consciousness of guilt (*see People v Shelton*, 209 AD2d 963, 964, *lv denied* 85 NY2d 980). Nevertheless, we conclude that such misconduct is harmless. In light of the overwhelming proof of defendant's guilt, which included inculpatory statements defendant made on the telephone with the 911 operator and in response to custodial interrogation following *Miranda* warnings, we conclude that there is no reasonable possibility that the misconduct contributed to defendant's conviction (*see People v McLean*, 243 AD2d 756, 756-757, *lv denied* 91 NY2d 928; *People v Sutherland*, 219 AD2d 523, 525, *lv denied* 87 NY2d 908, 88 NY2d 886; *see generally People v Crimmins*, 36 NY2d 230, 237).

We reject defendant's contention that the court erred in refusing to suppress the statements that he made in response to questions asked during the intake process at the police station prior to receiving his *Miranda* warnings. While some of the questions that defendant was asked, such as whether anyone was at his home that evening, were not routine booking questions (*see generally People v Rodney*, 85 NY2d 289, 293), "questions asked of the defendant at the time of his [or her] arrest, although prior to the requisite warnings, [are] nevertheless permissible [when] they [are] asked to clarify a volatile situation rather than to elicit evidence of a crime" (*People v Johnson*, 59 NY2d 1014, 1016).

Defendant further contends that he was denied a fair trial because he was unable to assist in his defense in an adequate manner as a result of dissociative amnesia with respect to the events surrounding the stabbings. We reject that contention. The court appropriately compensated for defendant's amnesia by, inter alia, granting expanded pretrial disclosure, and the court conducted the requisite post-trial inquiry to assess whether defendant's amnesia impaired his defense. After conducting that post-trial assessment, the court properly concluded that defendant was competent to stand trial and that he had received a fair trial and effective assistance of counsel (*see generally People v Phillips*, 16 NY3d 510, 515 n 2; *People v Francabandera*, 33 NY2d 429, 436 n 4; *Wilson v United States*, 391 F2d 460, 463-464). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

454

CA 09-00404

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

IN THE MATTER OF THE ARBITRATION BETWEEN
ADAM BOBAK, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

AIG CLAIMS SERVICES, INC., NEW HAMPSHIRE
INSURANCE COMPANY AND AMERICAN INTERNATIONAL
GROUP, INC., RESPONDENTS-APPELLANTS.

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

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered December 22, 2008 in a proceeding pursuant to CPLR article 75. The appeal was held by this Court by order entered April 30, 2010, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (72 AD3d 1651). The proceedings were held and completed (Paula L. Feroleto, J.).

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the petition seeking to confirm the arbitration award is dismissed and the arbitration award is vacated.

Memorandum: Respondents appeal from a judgment confirming an arbitration award. We previously held this case, reserved decision and remitted the matter to Supreme Court for a determination, after a framed-issue hearing, whether the third-party vehicle at issue was covered by any other insurance that would negate the supplemental uninsured/underinsured motorist (SUM) coverage afforded by the policy issued by respondent New Hampshire Insurance Company (NHIC) (*Matter of Bobak [AIG Claims Servs., Inc.]*, 72 AD3d 1651). We also reversed the order in a related appeal that denied NHIC's petition seeking a permanent stay of arbitration, and we remitted the matter to Supreme Court for, inter alia, a new determination on that petition (*Matter of New Hampshire Ins. Co. [Bobak]*, 72 AD3d 1647, 1649-1650). Upon remittal in each case, the court conducted the framed-issue hearing based only on submitted documents and oral arguments. The court concluded that NHIC's SUM coverage was not implicated because Travelers Insurance Company (Travelers) had issued an excess policy that would provide $1,000,000 of coverage to petitioner. The court

also, inter alia, granted a temporary stay of arbitration that would become permanent upon payment to petitioner of the benefits afforded by the Travelers policy.

Initially, we note that the order entered by the court upon remittal applies only to the order reversed in *Matter of New Hampshire*, and we further note that no appeal has been taken from that order entered upon remittal. Consequently, the contentions of the parties with respect to the stay of arbitration granted therein are not before us. Nevertheless, we conclude that the evidence presented at the framed-issue hearing and the court's factual findings in that order are applicable to the issue that is before us after remittal in *Matter of Bobak*. Thus, in the interest of judicial economy, we deem the factual findings made by the court in the order entered upon remittal in *Matter of New Hampshire* to be applicable to the appeal from the judgment before us.

We conclude that petitioner's contention that the court erred in failing to join Travelers and the Ohio Insurance Guaranty Association (OIGA) as necessary parties is raised for the first time on appeal and thus is not properly before us (*see Levi v Levi*, 46 AD3d 519, 520; *cf. Matter of Dioguardi v Donohue*, 207 AD2d 922, 922).

We agree with NHIC that the court erred in confirming the arbitration award. In a case such as this "[w]here arbitration is compulsory, our decisional law imposes closer judicial scrutiny of the arbitrator's determination under CPLR 7511 (b) . . . To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious" (*Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223; *see Matter of Mangano v United States Fire Ins. Co.*, 55 AD3d 916, 917). Here, we conclude that there is no evidentiary support for the arbitrator's conclusion that petitioner was entitled to collect SUM benefits from NHIC. The SUM policy provisions state that it affords coverage where, inter alia, a person covered by the policy is involved in an accident with a motor vehicle that is uninsured, which includes a situation in which the other vehicle's insurer disclaims coverage or becomes insolvent. Although the evidence before us establishes that the other vehicle's primary insurer is insolvent and that no benefits will be afforded to petitioner by the OIGA, which assumed the liabilities of that insolvent company, the evidence also establishes that there is an excess policy issued by Travelers, and that Travelers did not disclaim coverage. We therefore reverse the judgment, dismiss the petition seeking to confirm the arbitration award and vacate the arbitration award.

All concur except CARNI, J., who dissents and votes to affirm in the following Memorandum: I concur with the conclusion of my colleagues that the interest of judicial economy is served by deeming the factual findings made by Supreme Court in the order entered upon remittal in *Matter of New Hampshire Ins. Co. (Bobak)* (72 AD3d 1647) to be applicable to this appeal. I further concur with the conclusion of my colleagues that petitioner's contention that the court erred in failing to join Travelers Insurance Company (Travelers) and Ohio

Insurance Guaranty Association as necessary parties is not properly before us.

I disagree, however, with the conclusion of my colleagues that petitioner is not entitled to collect supplementary uninsured/underinsured motorist (SUM) benefits from respondent New Hampshire Insurance Company (NHIC). Inasmuch as I conclude that the court properly confirmed the arbitration award, I respectfully dissent.

Petitioner was seriously injured when a truck that he was driving for his employer was struck by rolls or coils of aluminum that fell off of a truck owned by B-Right Trucking Company (B-Right) and operated by Eugene Hughes, now deceased (Hughes). Hughes and B-Right (collectively, tortfeasors) were insured under a motor vehicle liability policy issued by Reliance Insurance Company (Reliance) insuring the B-Right truck. In addition, B-Right was insured under a "Form Excess Liability Policy," also entitled a "Commercial General Liability" policy, issued by Travelers and having a coverage limit in the amount of $1 million (Travelers excess policy). Petitioner is a covered person under the SUM endorsement issued by NHIC to petitioner's employer, which has a coverage limit in the amount of $1 million (SUM endorsement).

Petitioner and his wife commenced a personal injury action against the tortfeasors, among others, and a jury awarded petitioner personal injury damages against Hughes in the sum of $3,315,000. Petitioner sought arbitration of his SUM claim and the arbitrator concluded that the value of petitioner's injuries exceeded the limits of NHIC's SUM coverage and awarded petitioner the SUM coverage limit of $1 million. Ultimately, this Court directed a framed-issue hearing on the question of "insurance coverage" (*New Hampshire Ins. Co.*, 72 AD3d at 1650).

I agree with the majority that the evidence at the hearing establishes that Reliance is insolvent. Thus, the court properly identified the threshold issue to be whether the B-Right truck was an "uninsured motor vehicle" under the SUM endorsement and the parties have extensively addressed that issue both before the court and on appeal.

Section I (c) (3) (iii) of the SUM endorsement defines an "uninsured motor vehicle" as "a motor vehicle . . . for which . . . [t]here is a bodily injury liability insurance coverage or bond applicable to such motor vehicle at the time of the accident, but . . . [t]he insurer writing such insurance coverage or bond denies coverage, or . . . becomes insolvent." Inasmuch as there is no dispute that the tortfeasors' insurer, Reliance, is insolvent, there is no question that petitioner's SUM coverage is "triggered" by that section (*see Matter of Metropolitan Prop. & Cas. Ins. Co. v Carpentier*, 7 AD3d 627, 628; *American Mfrs. Mut. Ins. Co. v Morgan*, 296 AD2d 491, 494; *see also* Insurance Department Regulations [11 NYCRR] § 60-2.3 [f] [I] [c] [3] [iii]). NHIC contends that, regardless of Reliance's insolvency, the Travelers excess policy

constitutes a "bodily injury liability insurance coverage or bond applicable" to the tortfeasors that prevents the "triggering" of SUM coverage because the combined Reliance and Travelers policy limits exceed the SUM coverage available to petitioner. In other words, NHIC effectively seeks to combine the coverage limits of the Reliance motor vehicle liability policy with the coverage limits of the Travelers excess policy for purposes of determining whether the B-Right truck was an "uninsured motor vehicle" under the SUM endorsement.

The court concluded and the majority agrees that, notwithstanding Reliance's insolvency, the B-Right truck did not constitute an "uninsured motor vehicle" under the SUM endorsement because B-Right had $1 million in coverage under the Travelers excess policy, and that consequently NHIC's SUM coverage was not implicated. Thus, the majority concludes that there was no evidentiary support for the arbitrator's conclusion that petitioner was entitled to collect SUM benefits from NHIC. I disagree.

Section I (c) (1) of the SUM endorsement also defines an "uninsured motor vehicle" as a vehicle for which "[n]o bodily injury liability insurance policy or bond applies." In my view, the only way the majority can determine that the B-Right truck is not an "uninsured motor vehicle" is to conclude that an excess policy is a "bodily injury liability insurance policy" under the SUM endorsement, the Insurance Law, the Vehicle and Traffic Law and the Insurance Department Regulations. Thus, the issue presented is whether the term "uninsured motor vehicle" includes a vehicle that is covered under a motor vehicle liability policy issued by an insolvent insurance company when the vehicle is also covered under a commercial general liability excess policy.

I conclude that where, as here, a vehicle is insured by a motor vehicle liability policy issued by an insolvent insurance company and is thus an "uninsured motor vehicle," the existence of an excess insurance policy does not change its status as such. In other words, an excess or umbrella policy does not constitute a "bodily injury liability insurance policy" for purposes of determining whether a motor vehicle is "an uninsured motor vehicle" triggering SUM coverage. I further conclude that the amount of a tortfeasor's coverage under a motor vehicle liability policy may not be combined with the amount of his or her coverage under a commercial general liability excess policy in determining whether SUM coverage is implicated.

Those conclusions are supported by an analysis of article 7 of the Vehicle and Traffic Law, entitled the Motor Vehicle Safety Responsibility Act, which requires motor vehicle owners and operators to obtain a specific type of insurance, namely, a "motor vehicle liability policy" (Vehicle and Traffic Law § 330 *et seq*.). Vehicle and Traffic Law § 345 (a) defines a "motor vehicle liability policy" as "an owner's or an operator's policy of liability insurance certified as provided in [section 343] . . . as proof of financial responsibility, and issued . . . by an insurance carrier . . . to or for the benefit of the person named therein as insured." Vehicle and Traffic Law § 343 provides that "[p]roof of financial responsibility

may be made by filing with the commissioner [of motor vehicles] the written certificate of any insurance carrier duly authorized to do business in this state, certifying that there is in effect a *motor vehicle liability policy* for the benefit of the person required to furnish proof of financial responsibility. Such certificate shall give the effective date of such *motor vehicle liability policy* . . . " (emphasis added). Thus, it is clear from the Vehicle and Traffic Law and the regulatory scheme that owners and operators of motor vehicles are required to obtain "motor vehicle liability policies."

Although obvious, I further note that excess policies exist only if there is an underlying policy. Therefore, there must be an underlying "motor vehicle liability policy" before there can be excess insurance coverage. Likewise, in order for an owner or operator of a motor vehicle to be in compliance with the Motor Vehicle Safety Responsibility Act and be financially secure or "insured" under that Act, the owner or operator must have a "motor vehicle liability policy" (Vehicle and Traffic Law §§ 343, 345). Thus, one cannot meet the financial security requirements of article 7 of the Vehicle and Traffic Law through excess insurance alone. Here, the insurance company issuing the tortfeasors' "motor vehicle liability policy," Reliance, is insolvent and the Travelers excess policy provides that it does not "drop down" in the event of the insolvency of the insurance company issuing any underlying policy. Consequently, as a practical matter, the B-Right truck does not have a primary "motor vehicle liability policy" in place. Even if the Reliance policy were still in effect, NHIC could not combine the coverage limits of that policy with the coverage limits of the Travelers excess policy in order to avoid triggering SUM coverage.

Although not directly on point, analogous case law of the Second Department supports that proposition. Specifically, the Second Department has rejected attempts by SUM claimants to trigger SUM coverage by combining the liability coverage limits from a motor vehicle liability policy and an umbrella policy in order to establish that the tortfeasor's bodily injury liability limits were less than those of the claimant (*see Matter of State Farm Mut. Auto. Ins. Co. v Roth*, 206 AD2d 376, *lv denied* 84 NY2d 812; *see also Matter of Federal Ins. Co. v Reingold*, 181 AD2d 769, 770-771, *lv denied* 80 NY2d 755). In *Matter of Astuto v State Farm Mut. Auto. Ins. Co.* (198 AD2d 503, 504), the Second Department held that "[t]he petitioner's attempt to base his claim on a consideration of the existence of an umbrella policy issued by a different insurer by which he was also covered is precluded by the pertinent provision of the policy on which he has made his claim." Thus, if under the existing decisional law a claimant cannot combine coverage limits from different types of policies in order to trigger SUM coverage, it logically follows that insurers are precluded from combining coverage limits from different types of policies to prevent a SUM trigger.

NHIC further contends that the "all bodily injury liability bonds and insurance policies" language of Insurance Law § 3420 (f) (2) (A) includes excess policies. Simultaneously, NHIC contends that the arbitration should have been stayed because petitioner has not

exhausted the limits of the excess policy. Likewise, in the framed-issue hearing, the court concluded that petitioner was required to exhaust all applicable policy limits, including the Travelers excess policy, as a condition precedent to obtaining SUM benefits or proceeding to arbitration. A comparison of NHIC's contentions, however, reveals the fatal flaw in its analysis.

Condition 9 of the SUM endorsement, entitled "Exhaustion Required," states that NHIC "will pay under this SUM coverage only after the limits of liability have been used up under all *motor vehicle bodily injury liability* insurance policies" (emphasis added). An excess policy, however, is not a "motor vehicle liability policy" (Vehicle and Traffic Law § 345). Therefore, it is logically inconsistent to posit that a vehicle is not an "uninsured motor vehicle" because the owner or operator is covered under an excess policy when that policy is clearly not subject to the exhaustion requirement because it is not a "motor vehicle liability policy."

Insurance Law § 3420 (f) (2) (A) provides that, "[a]s a condition precedent to the obligation of the insurer to pay under the [SUM] insurance coverage, the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident shall be exhausted by payment of judgments or settlements." I conclude that the phrase "all bodily injury liability . . . insurance policies" contained in that section does not encompass excess policies (*see Matter of Matarasso [Continental Cas. Co.]*, 82 AD2d 861, 862, *affd* 56 NY2d 264; *Mass v U.S. Fidelity and Guar. Co.*, 222 Conn 631, 639-643, 610 A2d 1185, 1190-1192). Insurance Department Regulation 35-D, "implements" section 3420 (f) (2) of the Insurance Law and "establish[es] a standard form for SUM coverage [the prescribed SUM endorsement], in order to eliminate ambiguity, minimize confusion and maximize its utility" (11 NYCRR 60-2.0 [a], [c]; *see* 60-2.3 [f]). The purpose of Regulation 35-D "is to interpret section 3420 (f) (2) of the Insurance Law, in light of ensuing judicial rulings and experience" (11 NYCRR 60-2.0 [c]). Condition 9 of the prescribed SUM endorsement is identical to Condition 9 of the NHIC SUM endorsement, and provides in pertinent part that the insurer "will pay under this SUM coverage only after the limits of liability have been used up under all *motor vehicle bodily injury liability insurance policies* or bonds applicable at the time of the accident" (11 NYCRR 60-2.3 [f] [emphasis added]). Thus, Regulation 35-D confirms that the exhaustion requirement of Insurance Law § 3420 (f) (2) (A) relates to "motor vehicle bodily injury liability" policies—not excess policies. Therefore, because the excess policy is not a "motor vehicle bodily injury liability insurance polic[y]" (11 NYCRR 60-2.3 [f]), I conclude that petitioner has no obligation to "exhaust" the Travelers excess policy in order to obtain SUM benefits under the SUM endorsement.

The next question concerns what effect, if any, the excess policy has on NHIC's obligation to pay (as opposed to the question of coverage) its SUM coverage limits to petitioner. This issue raises the specter of "offsets" and duplication of benefits. Clearly, petitioner has a fixed and quantified SUM claim because his damages exceed $3 million dollars. NHIC contends that, because the Travelers

excess policy and the SUM endorsement provide the same coverage limits, Condition 6 of the SUM endorsement, entitled "Maximum SUM Payments," precludes payment under the SUM endorsement because those policies, in effect, cancel each other out. Thus, the question of "offsets" is clearly raised on appeal. Condition 6 of the SUM endorsement, setting forth the terms mandated under Regulation 35-D, provides that "the maximum payment under this SUM endorsement shall be the difference between (a) the SUM limit; and (b) the *motor vehicle bodily injury liability insurance* or bond payments received" from any negligent party involved in the accident (emphasis added) (*see* 11 NYCRR 60-2.3 [a] [2]). Thus, because the excess policy is not a "motor vehicle bodily injury liability insurance" policy, payments made thereunder cannot serve as an "offset" to the SUM coverage limit (*see* 11 NYCRR 60-2.1 [c]).

Therefore, we must look to the "Non-Duplication" condition of the SUM endorsement in order to determine whether the Travelers excess policy affects NHIC's obligation to pay SUM benefits. Condition 11 (e) of the SUM endorsement states, "[t]his SUM coverage shall not duplicate . . . [a]ny amounts *recovered as bodily injury damages from sources other than motor vehicle bodily injury liability insurance policies or bonds*" (emphasis added). Thus, the language of that condition suggests that it does not preclude duplication of insurance coverage but, rather, it precludes duplication of recovery by a SUM claimant. The "sources" for purposes of non-duplication of recovery could include any personal assets of the tortfeasor applied towards the money judgment or, as in this case, excess or umbrella insurance payments from non-motor vehicle policies. Therefore, I conclude that, pursuant to Condition 11 (e), NHIC is not required to pay any amounts for bodily injury damages that duplicate the amounts *recovered* by petitioner (*see* 11 NYCRR 60-2.3 [f]). I emphasize that in interpreting Condition 11 (e), there is a significant distinction between "covered" by and is "recovered" from excess or umbrella policies (*see Matter of CGU Ins. Co. v Nardelli*, 188 Misc 2d 560, 568). In other words, that condition is intended to prevent a double *recovery* for the same damages and to thereby prevent the injured party from receiving a windfall (*see Matter of Fazio v Allstate Ins. Co.*, 276 AD2d 696, 697; *see also CNA Global Resource Mgrs. v Berry*, 10 Misc 3d 1074[A], 2006 NY Slip Op 50069[U], *7). Petitioner simply cannot get paid or recover twice for the same damages. Under the facts presented here, if Travelers and NHIC both pay the full limits of their policies, there still can be no double recovery of damages by petitioner. The value of petitioner's injuries exceeds $3 million and there is only $2 million in available SUM and excess insurance coverage. Under the best case scenario, at least with respect to the SUM and excess insurance limits, petitioner is not going to recover his damages twice. In fact, he would not recover them once.

Thus, I would affirm the judgment confirming the arbitration award.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

629

KA 10-01596

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY HARRIS, DEFENDANT-APPELLANT.

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered July 6, 2010. The judgment convicted defendant, upon a nonjury verdict, of burglary in the second degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of burglary in the second degree (Penal Law § 140.25 [1] [d]) and robbery in the second degree (§ 160.10 [2] [b]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant further contends that County Court erred in considering, and in ultimately convicting him of, robbery in the second degree (§ 160.10 [2] [b]) as a lesser included offense of robbery in the first degree (§ 160.15 [2]), and burglary in the second degree (§ 140.25 [1] [d]) as a lesser included offense of burglary in the first degree (§ 140.30 [1]). Pursuant to CPL 300.50 (1), "[a]ny error respecting such [consideration by the court] . . . is waived by the defendant unless he [or she] objects thereto" in a timely manner, and defendant failed to do so here (*see People v Ford*, 62 NY2d 275, 282-283; *People v Smith*, 13 AD3d 1121, 1122-1123, *lv denied* 4 NY3d 803).

Defendant failed to preserve for our review his contention that the robbery count of the indictment is facially duplicitous (*see People v Becoats*, 71 AD3d 1578, 1579, *affd* 17 NY3d 643, *cert denied* ___ US ___ [Apr. 23, 2012]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's further contention that he was denied effective assistance of counsel based

upon defense counsel's failure to move to dismiss the robbery count of the indictment. "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). In addition, we reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to object to the court's consideration of lesser included offenses or to request that the court consider other lesser included offenses (*see generally People v Turner*, 5 NY3d 476, 483-485; *People v Calderon*, 66 AD3d 314, 320, *lv denied* 13 NY3d 858). Unlike the failure to raise a statute of limitations defense, defense counsel's failure to object to, or to request, the court's consideration of lesser included offenses is not the type of "clear-cut and completely dispositive" error that rises to the level of ineffective assistance of counsel (*Turner*, 5 NY3d at 481).

Defendant failed to preserve for our review his contention that his trial should have been severed from that of his codefendants (*see People v Cruz*, 272 AD2d 922, 923, *affd* 96 NY2d 857; *People v Crutchfield*, 134 AD2d 508, 509, *lv denied* 71 NY2d 894). In any event, that contention lacks merit. There was no evidence that the "core of each defense [was] in irreconcilable conflict with the other" (*People v Mahboubian*, 74 NY2d 174, 184; *see Cruz*, 272 AD2d at 923). There is thus no merit to defendant's further contention that he received ineffective assistance of counsel based on defense counsel's failure to move to sever his trial from that of his codefendants (*see People v Williams*, 281 AD2d 933, 934, *lv denied* 96 NY2d 869).

Inasmuch as defendant withdrew his motion for a *Huntley* hearing concerning the statement that he made to the police, defendant waived his present contention that the court should have conducted a *Huntley* hearing to determine the admissibility of that statement (*see generally People v Jones*, 79 AD3d 1665, 1665). Further, defendant has not shown that such a motion, if not withdrawn, would have been successful, and we conclude that he was not denied effective assistance of counsel on that ground (*see generally People v Pace*, 70 AD3d 1364, 1366, *lv denied* 14 NY3d 891; *People v Borcyk*, 60 AD3d 1489, *lv denied* 12 NY3d 923).

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

644

CA 12-00313

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

NEW YORKERS FOR CONSTITUTIONAL FREEDOMS, JASON J. MCGUIRE, DUANE R. MOTLEY AND NATHANIEL S. LEITER, PLAINTIFFS-RESPONDENTS,

V OPINION AND ORDER

NEW YORK STATE SENATE, NEW YORK STATE DEPARTMENT OF HEALTH, DEFENDANTS-APPELLANTS, AND ERIC T. SCHNEIDERMAN, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, DEFENDANT.

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

LIBERTY COUNSEL, LYNCHBURG, VIRGINIA (RENA M. LINDEVALDSEN OF COUNSEL), AND JOSEPH P. MILLER, CUBA, FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered November 18, 2011. The judgment, insofar as appealed from, denied that part of the motion of defendants to dismiss plaintiffs' first cause of action against defendants New York State Senate and New York State Department of Health.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, and judgment is granted in favor of defendants-appellants as follows:

> It is ADJUDGED and DECLARED that defendant New York State Senate did not violate the Open Meetings Law (Public Officers Law art 7) in enacting the Marriage Equality Act (L 2011, ch 95, § 3) and that marriages performed thereunder are valid.

Opinion by FAHEY, J.: This appeal arises from the passage of the Marriage Equality Act ([MEA] L 2011, ch 95, § 3), which permits same-sex couples to marry in this state (*see* Domestic Relations Law § 10-a). Plaintiffs unsuccessfully opposed the MEA, and thereafter commenced this action to challenge the process by which it was enacted. Defendants, New York State Senate, New York State Department of Health and Eric T. Schneiderman, Attorney General, State of New York, made a pre-answer motion to dismiss the verified complaint pursuant to CPLR 3211 (a) (1) and (7), and Supreme Court granted the

motion in its entirety with respect to defendant Attorney General. The court, however, granted the motion only in part with respect to the two remaining defendants (collectively, defendants). The verified complaint's first cause of action, alleging a violation of the Open Meetings Law ([OML] Public Officers Law art 7) requiring nullification of the MEA, is the sole cause of action to have survived motion practice. In that cause of action, plaintiffs seek a declaration that the New York State Senate violated the OML in enacting the MEA and voiding any marriages performed pursuant to that act.

Defendants appeal, and in doing so bring before us none of the policy considerations relative to the MEA that lurk beneath the verified complaint in this action. Rather, our primary task on this appeal is to interpret the exemption to the OML embodied in Public Officers Law § 108 (2) (hereafter, exemption). We cannot agree with the court that the part of the exemption providing that political caucuses may invite guests to participate in their deliberations without violating the OML should be read to limit eligible guests to members of the same political party of the political caucus that issued the invitation. We thus conclude that the judgment insofar as appealed from should be reversed and that judgment should be entered declaring that the New York State Senate did not violate the OML in enacting the MEA and that marriages performed thereunder are not invalid.

We note at the outset that a motion to dismiss the complaint is not the proper procedural vehicle for the relief sought by defendants in this declaratory judgment action (*see generally Morgan v Town of W. Bloomfield*, 295 AD2d 902, 904). Inasmuch as "this is a declaratory judgment action, we treat [defendants'] motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7) as a motion for a declaration in [their] favor" (*Fekishazy v Thomson*, 204 AD2d 959, 962 n 2; *see generally* CPLR 2001).

I

As noted, this appeal arises from the passage of the MEA and the legalization of gender-neutral marriage in New York State. Legislation proposing to legalize such marriage failed in 2009, but in 2011 four Republican State Senators joined Democratic State Senators in voting for the MEA, which was signed into law by Governor Andrew Cuomo on June 24, 2011. At the time the MEA was enacted, 32 of the 62 members of the State Senate were Republicans.

Our review begins with the verified complaint, which sets forth what is characterized as the series of events that precipitated the passage of the MEA. In mid-May 2011, New York City Mayor Michael Bloomberg, a registered Independent, accompanied by New York City Council Speaker Christine Quinn, a registered Democrat, met individually with Republican State Senators to lobby on behalf of Assembly Bill A8354-2011, which provided the foundation for what ultimately became the MEA. According to the verified complaint, Mayor Bloomberg's lobbying efforts with respect to the assembly bill were not limited to May 2011. Indeed, plaintiffs allege that Mayor

Bloomberg met with the entire Republican Conference of the Senate, i.e., 32 of the 62 Senators, in a closed meeting at the New York Capitol Building on June 16, 2011 (hereafter, Bloomberg meeting). At that meeting, Mayor Bloomberg spoke to the Republican Conference and pledged financial support for the campaigns of Republican Senators who voted in favor of the MEA. In contrast to the access granted Mayor Bloomberg, neither plaintiff Duane R. Motley, the Senior Lobbyist with plaintiff New Yorkers for Constitutional Freedoms, nor plaintiff Nathaniel S. Leiter, the Executive Director of Torah Jews for Decency, was permitted to address the Republican Conference that day.

Similarly to Mayor Bloomberg, Governor Cuomo, a registered Democrat, lobbied on behalf of the MEA. According to the verified complaint, Governor Cuomo met privately with Republican Senators at the Governor's mansion to advocate for the MEA (hereafter, Cuomo meeting), and that meeting was not open to the public. The verified complaint alleges, upon information and belief, that a quorum of the State Senate was present for the Cuomo meeting, but it is unclear whether the term "quorum" refers to all of the Republican Senators, as opposed to a mix of Republican and Democratic Senators. For purposes of this appeal, however, we assume that plaintiffs have alleged that all of the Republican Senators were present for the Cuomo meeting.

Plaintiffs do not specify a date on which the Cuomo meeting occurred, but one of the exhibits to the verified complaint suggests that it may have been held on June 20, 2011. In the event that the Cuomo meeting was indeed held on June 20, 2011, it occurred subsequent to the Assembly's passage of the MEA on June 15, 2011, which was facilitated by a message of necessity from Governor Cuomo dispensing with the constitutionally-mandated waiting period of three days for the passage of bills (*see* NY Const, art III, § 14).

Once passed by the Assembly, the MEA was delivered to the Senate, and during the week of June 20, 2011 there was what Motley describes as an "unprecedented" denial of public access to the Republican Senators. Plaintiffs allege that, on Tuesday, June 21, 2011, lobbyists and activists were locked out of the Senate lobby and that, on June 22 and 23, 2011, the Senate lobby was only partially reopened to legislative staff and lobbyists. On Friday, June 24, 2011, the lockout resumed, thereby preventing the public from accessing the Senate lobby and the Republican side of the Senate chamber. Moreover, the Republican Senators allegedly turned off their cell phones on June 24, 2011 and met for five hours on that date without providing for access to staff or the public.

The MEA was amended on June 24, 2011 (hereafter, Bill) to include limited protections for certain religious entities (*see* L 2011, ch 95, § 3), and Governor Cuomo issued messages of necessity to the Assembly and the Senate with respect to the Bill on that date, again dispensing with one of the constitutional requirements for enacting a bill into law. The Bill, now identified as A8520-2011, passed the Assembly, and thereafter was passed by the Senate in a regular session by a vote of 33 to 29. Governor Cuomo signed the Bill into law on June 24, 2011 at 11:15 p.m.

II

Plaintiffs commenced this action approximately one month after the MEA was enacted. In addition to providing the basis for the foregoing factual summary, the verified complaint asserted three causes of action against defendants and defendant Attorney General. Our concern rests with the first cause of action, which alleges the violation of the OML arising from the purported conduct of business of a public body in a closed session and seeks a declaration nullifying the MEA pursuant to Public Officers Law § 107 and voiding any marriages that were performed pursuant to that act. The second cause of action challenges Governor Cuomo's issuance of the subject messages of necessity as ultra vires, while the third cause of action alleges that defendants deprived plaintiffs of their constitutional right to freedom of speech.

As noted, in lieu of an answer defendants moved to dismiss the verified complaint pursuant to CPLR 3211 (a) (1) and (7). The court granted the motion in its entirety with respect to defendant Attorney General and, with respect to defendants, the court dismissed only the second and third causes of action, reasoning that there is a justiciable issue whether the OML was violated, as alleged in the first cause of action.

III

Before turning to the primary issue on appeal, we briefly consider two preliminary points of far less significance. First, "although defendant[s] purport[ ] to appeal 'from each and every part' of the [judgment], [they are] not aggrieved by those parts . . . granting [their] motion in part and thus may not appeal therefrom" (*K.J.D.E. Corp. v Hartford Fire Ins. Co.*, 89 AD3d 1531, 1532; *see Viscosi v Preferred Mut. Ins. Co.*, 87 AD3d 1307, 1307, *lv denied* 18 NY3d 802). Put differently, defendants may appeal from the judgment only to the extent that it denied their motion (*see* CPLR 5511).

Second, defendants contend in their main brief that plaintiffs may not prosecute this case without running afoul of the Speech or Debate Clause of the State Constitution (*see* NY Const, art III, § 11). That contention, however, was not properly before the court inasmuch as it was raised for the first time in defendants' reply papers (*see Watts v Champion Home Bldrs. Co.*, 15 AD3d 850, 851). Moreover, contrary to defendants' contention, the Speech or Debate Clause defense may be waived (*see Pataki v New York State Assembly*, 4 NY3d 75, 88), and it was waived here based on defendants' failure to raise that defense in a timely manner (*see Litvinov v Hodson*, 34 AD3d 1332, 1332-1333). The further contention raised in defendants' reply brief on appeal that the Speech or Debate Clause defense is properly before us because it was asserted in defendants' answer is of no moment, inasmuch as the answer is outside the record on appeal (*see e.g. Palermo v Taccone*, 79 AD3d 1616, 1620).

IV

A.

We now turn to the primary issue on appeal, i.e., the interpretation of the exemption.

"The purpose of the [OML] is to prevent public bodies from debating and deciding in private matters that they are required to debate and decide in public, i.e., 'deliberations and decisions that go into the making of public policy' " (*Matter of Zehner v Board of Educ. of Jordan-Elbridge Cent. School Dist.*, 91 AD3d 1349, 1350; *see Matter of Gordon v Village of Monticello*, 87 NY2d 124, 126-127). Pursuant to Public Officers Law § 103 (a), "[e]very meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section [105.]" The OML defines a "meeting" as "the official convening of a public body for the purpose of conducting public business" (§ 102 [1]). A "public body," in turn, is defined as "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state . . . or committee or subcommittee or other similar body of such public body" (§ 102 [2]). Inasmuch as the Republican Conference was the majority conference of the State Senate at all times relevant to this action, a meeting of that conference constituted a quorum of the State Senate.

"[T]he provisions of the [OML] are to be liberally construed in accordance with the statute's purposes" (*Gordon*, 87 NY2d at 127), and here we are called upon to construe the "guest" exemption, which is contained in Public Officers Law § 108 (2).[1] "The primary

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[1] Public Officers Law § 108 is entitled "Exemptions," and subdivision (2) of that section provides:

> "Nothing contained in [the OML] shall be construed as extending the provisions hereof to:
>
> . . .
>
> "2. a. deliberations of political committees, conferences and caucuses.
>
> b. for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political

consideration of courts in interpreting a statute is to 'ascertain and give effect to the intention of the Legislature' " (*Riley v County of Broome*, 95 NY2d 455, 463, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a], at 177; *see Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660), and " 'we turn first to the plain language of the statute[] as the best evidence of legislative intent' " (*Matter of Stateway Plaza Shopping Ctr. v Assessor of City of Watertown*, 87 AD3d 1359, 1361, quoting *Matter of Malta Town Ctr. I, Ltd. v Town of Malta Bd. of Assessment Review*, 3 NY3d 563, 568). Our concern in determining whether the exemption applies to the Bloomberg and Cuomo meetings lies in section 108 (2) (b), and we turn to what we characterize as the "first part" of that subdivision, which provides that, for purposes of section 108,

> "the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, *who are members or adherents of the same political party*" (emphasis added).

The inclusion of the emphasized language in the preceding quote qualifies the political committees, conferences and caucuses (collectively, caucuses) that are exempt from the provisions of the OML, and limits the exempt caucuses to those comprised of members of the same political party. Put differently and by way of example, under section 108 (2) (b), the Puerto Rican/Latino Caucus of the State Senate would not be entitled to the benefit of the exemption to the extent that the Caucus is comprised of members of different political parties, nor would the Legislative Women's Caucus of New York State qualify for the exemption were it comprised of members of varying political parties from one house of the Legislature. Rather, the only caucuses to which the exemption applies are those comprised of members of the same political party, and that limitation arises from the Legislature's inclusion of language restricting eligible caucuses to only those private meetings of "members . . . of the same political party."

What we characterize as the "second part" of section 108 (2) (b)

> party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations."

enhances the exemption articulated in the "first part" of that statute. In the second part of section 108 (2) (b), the Legislature noted that the exemption applies

> "without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations."

We now turn to clause (iii) of the foregoing excerpt, i.e., the provision that the exemption applies without regard to whether the caucuses invite staff or guests to participate in their deliberations. The term "guests" brings us to the critical juncture of this issue: whether plaintiffs are correct that the definition of "guests" in the exemption must be limited to people of the same political party as those of the political caucus seeking the exemption, and thus whether the attendance of Mayor Bloomberg and Governor Cuomo, respectively, at the Bloomberg and Cuomo meetings removed those meetings from the protection of the exemption because neither Mayor Bloomberg nor Governor Cuomo is a registered Republican.

We conclude that the plain language of the statute does not support plaintiffs' position. " 'The language of a statute is generally construed according to its natural and most obvious sense . . . in accordance with its ordinary and accepted meaning, unless the Legislature by definition or from the rest of the context of the statute provides a special meaning' " (*Samiento v World Yacht Inc.*, 10 NY3d 70, 78, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 94, at 191-194 [1971 ed]). A "guest" as defined by both legal and non-legal dictionaries is "[a] person who is entertained or to whom hospitality is extended" (Black's Law Dictionary 776 [9th ed 2009]; *see* New Oxford American Dictionary 772 [3d ed 2010] [defining "guest" as "a person who is invited to . . . take part in a function organized by another"]).

Had the Legislature intended to constrict the meaning of "guest" as plaintiffs suggest, it could have done so through the same means by which it limited the definition of caucuses eligible for the exemption. Eligible caucuses include only those comprised of "adherents of the same political party" (Public Officers Law § 108 [2] [b]), and there is no such limitation on the scope of eligible guests. In view of the fact that the Legislature qualified those caucuses eligible for the exemption, the absence of qualification of "guests" eligible to participate in an eligible caucus is telling of the Legislature's intent as to the scope of the term "guests." To conclude otherwise would impermissibly amend the "statute by adding words that are not there" (*American Tr. Ins. Co. v Sartor*, 3 NY3d 71, 76).

The only case that we could locate on this issue is *Warren v Giambra* (12 Misc 3d 650 [Sup Ct, Erie County 2006]). There, Supreme

Court concluded that a private assembly of the Democratic majority of the County Legislature was not an exempt political caucus within the meaning of section 108 (2) (b) given the presence of the Republican Erie County Executive at that meeting (*Warren*, 12 Misc 3d at 654). For the reasons set forth above, we do not agree with that interpretation of the exemption.

Indeed, notwithstanding the absence of controlling authority on this issue, the broad construction of "guests" that we perceive the Legislature as having employed is eminently practical. Plaintiffs contend that "guests more properly would apply to topical or strategic experts from whom the caucus seeks input in order to decide how to act on public business." There is, however, no basis in the statute for reading that subtlety into the definition of "guests," and that artificial distinction drawn by plaintiffs exposes certain issues arising from their proposed construction of the exemption. For example, in the event that we were to adopt plaintiffs' limited definition of "guests," it would be impossible for a Democratic member of a Governor's office, such as a budget director, to speak to a majority Republican caucus. Moreover, assuming that the limitations plaintiffs seek to impose on "guests" under section 108 (2) (b) would apply equally to "staff" under that statute, we question whether all Senators in the majority conference would be entitled to have their staff members attend a caucus. By way of example, if a Republican Senator employs a chief of staff who is a registered Conservative, or if a Democratic Assembly Member employs a chief of staff who is a registered Independent, those chiefs of staff could no longer attend a majority conference.

We next turn to the legislative history of section 108 (2) (b), which also does not support plaintiffs' suggested interpretation of "guests" within the meaning of the subject exemption.

> "Despite the primary importance of literal construction, we [have] recognize[d] that '[t]he courts may in a proper case indulge in a departure from literal construction and . . . sustain the legislative intention although it is contrary to the literal letter of the statute' (Statutes § 111). Thus, 'the legislative history of an enactment may also be relevant and "is not to be ignored, even if words be clear" ' " (*Feher Rubbish Removal, Inc. v New York State Dept. of Labor, Bur. of Pub. Works*, 28 AD3d 1, 5, *lv denied* 6 NY3d 711; *see Matter of Tompkins County Support Collection Unit v Chamberlin*, 99 NY2d 328, 335).

The Legislative Declaration (Declaration) accompanying the 1985 amendments to the Public Officers Law that added subdivision (b) to Public Officers Law § 108 (2) (*see* L 1985, ch 136, § 1) does not cause us to retreat from our conclusion that the Legislature did not intend that the definition of "guests" in the exemption be limited to people of the same political party as that of the political caucus seeking

the exemption.[2] Although the Declaration refers to discussions "among members of each political party," read as a whole the Declaration speaks to discussions *within public bodies*. Indeed, nothing therein suggests that members of a political caucus cannot entertain a guest from a different political party provided that the guest is not a member of the public body from which the caucus is formed.

Finally, at least with respect to the issue whether the Bloomberg and Cuomo meetings violated the OML, we reject what we interpret as plaintiffs' contention that the OML was violated insofar as the Republican Senate majority conducted public business during private conferences at which "Republican Senators were pressured to change

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[2] The Declaration provides, in relevant part:

> "The legislature hereby reaffirms that the public business of public bodies of the state of New York should generally be conducted at open and public meetings . . . When enacting the [OML], the legislature intended and provided that the 'deliberations of political committees, conferences, and caucuses' should be exempt from the coverage of such law. Such exemption was enacted in furtherance of the legislature's recognition that the public interest is well served by the political party system in legislative bodies because such parties serve as mediating institutions between disparate interest groups and government and promote continuity, stability and orderliness in government. The performance of this function requires the private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before the legislative bodies. Recent judicial decisions have, however, eroded this exemption by holding that it applied only to discussions of political business. Accordingly, the legislature hereby declares its adherence to the original intent of the legislature, that the provisions of the [OML] are not applicable to the deliberations of political committees, conferences and caucuses of legislative bodies regardless of (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations" (L 1985, ch 136, § 1).

their vote." Public Officers Law § 108 (2) (b) protects the *discussion* of public business at a political caucus, but not the *conduct* of public business at such a meeting (*see Matter of Humphrey v Posluszny*, 175 AD2d 587, 588, *appeal dismissed* 78 NY2d 1072). As we read the verified complaint, however, plaintiffs challenge the *lobbying* of the MEA at the Bloomberg and Cuomo meetings. Nowhere does the verified complaint allege that the Republican Conference agreed to pass the MEA at those meetings, nor does the verified complaint allege that the Republican Conference essentially arranged for a close vote on the MEA by issuing four of its Senators a "pass" to support that legislation.

B.

Even assuming, arguendo, that the Bloomberg and Cuomo meetings violated the OML, we would not invalidate the MEA and the marriages performed thereunder.

Public Officers Law § 107 (1) provides in relevant part that, when a court determines that a public body failed to comply with the OML, "the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated [the OML] and/or declare the action taken in relation to such violation void, in whole or in part . . . ." The burden of showing good cause warranting judicial relief based on an OML violation rests with the challenger (*see Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 686), and here plaintiffs have not made the requisite showing of good cause for the relief they seek. Plaintiffs' contentions on this point distill to claims of prejudice arising from the mere fact of the OML violations, and from the changes in the law that followed the passage of the MEA. Plaintiffs do not, however, contend that the alleged OML violations were the catalyst for the passage of the MEA. In fact, the various news articles attached as exhibits to the verified complaint detail the intense lobbying of *individual* Senators with respect to the MEA, and note that both proponents and opponents of the Bill took a similar approach of targeting potential swing votes on the issue. There is no allegation that the lobbying of individual Senators violated the OML and, given their failure to link the alleged OML violations to the enactment of the MEA, which was approved at a regular session of the Senate that was open to the public, we conclude that plaintiffs failed to show good cause why we should exercise our discretion to nullify the MEA (*see Matter of Malone Parachute Club v Town of Malone*, 197 AD2d 120, 124; *cf. Matter of Goetschius v Board of Educ. of the Greenburgh Eleven Union Free School Dist.*, 244 AD2d 552, 553-554; *see also Matter of Griswald v Village of Penn Yan*, 244 AD2d 950, 951; *Town of Moriah v Cole-Layer-Trumble Co.*, 200 AD2d 879, 881).

V

Accordingly, we conclude that the judgment should be reversed insofar as appealed from, and judgment should be entered in favor of defendants declaring that defendant New York State Senate did not violate the OML in enacting the MEA and that marriages performed

thereunder are valid.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

647

CA 11-01813

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

EMPIRE STATE CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., COUNTY OF ERIE, CHRIS COLLINS, BUFFALO NIAGARA PARTNERSHIP INC., INNOVATIVE MECHANICAL SYSTEMS, INC., M.G.M. INSULATION, INC., ALLEGHANY INDUSTRIAL INSULATION CO., DANIEL J. BRINSKY AND DOUG BYERLY, PLAINTIFFS-APPELLANTS,

V OPINION AND ORDER

M. PATRICIA SMITH, IN HER OFFICIAL CAPACITY AS COMMISSIONER, NEW YORK STATE DEPARTMENT OF LABOR, AND THOMAS P. DINAPOLI, IN HIS OFFICIAL CAPACITY AS COMPTROLLER, STATE OF NEW YORK, DEFENDANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (TIMOTHY W. HOOVER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 19, 2010. The judgment granted the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the judgment so appealed from is modified on the law by denying defendants' motion to the extent that it sought dismissal of the complaint, reinstating the complaint insofar as declaratory relief was sought, and granting judgment in favor of defendants as follows:

> It is ADJUDGED AND DECLARED that the 2008 amendments to the Wicks Law are valid and constitutional

and as modified the judgment is affirmed without costs.

Opinion by SCONIERS, J.: For the past 100 years, certain publicly-funded construction projects in this State having a cost that exceeds a specific monetary threshold (qualifying projects) have been subject to legislation generally known as the "Wicks Law." The Wicks Law is comprised of a collection of statutes found, inter alia, in the General Municipal Law, State Finance Law, Public Authorities Law, Public Housing Law and Education Law. The Wicks Law requires a

governmental entity contracting for a qualifying project to prepare separate bid specifications and award separate contracts for three categories of work, i.e., plumbing and gas fitting; heating, ventilating and air conditioning; and electric wiring and light fixtures (*see* General Municipal Law § 101 [1] [a] - [c]; [2]; State Finance Law § 135; Public Authorities Law §§ 1045-i [2-a]; 1048-i [2-a]; 3303 [10] [c-1]; 3402 [9] [c-1]; 3603 [9] [c-1]; 3628 [11] [c-1]; Public Housing Law § 151-a [2-a]; Education Law § 458 [2-a]). Upon enactment of the Wicks Law in 1912, the initial monetary threshold for publicly-funded projects subject to such separate bidding requirements was $1,000 (*see* L 1912, ch 514). The threshold increased various times until it reached $50,000 in 1961 for projects funded by the State (*see* L 1961, ch 292) and in 1964 for projects funded by political subdivisions of the State (*see* L 1964, ch 572).

The $50,000 threshold remained uniform for all governmental entities until 2008, when the Legislature enacted comprehensive reforms to the Wicks Law (*see* L 2008, ch 57, Part MM). The 2008 amendments, which went into effect on July 1, 2008 (*see* L 2008, ch 57, Part MM, § 20), increased the monetary threshold to $3 million for the five counties comprising New York City, $1.5 million for the downstate suburban counties of Nassau, Suffolk and Westchester, and $500,000 for all other counties (*see e.g.* L 2008, ch 57, Part MM, § 1). In addition to creating that three-tiered monetary threshold, the 2008 amendments altered the Wicks Law framework by providing a means for governmental entities to opt out of the Wicks Law's separate bidding requirements altogether. Recently-enacted Labor Law § 222, entitled "Project labor agreements," exempts qualifying projects from those requirements provided that a project labor agreement complying with the terms of that section is in place (*see* Labor Law § 222 [2] [b]).

Plaintiffs commenced this action alleging 21 causes of action challenging the 2008 amendments to the Wicks Law on the ground that those amendments violate several provisions of the New York State and Federal Constitutions, and seeking, inter alia, judgment declaring the 2008 amendments to be unconstitutional and enjoining their enforcement. Plaintiffs are: Empire State Chapter of Associated Builders and Contractors, Inc. and Buffalo Niagara Partnership Inc., professional organizations whose members are subject to the Wicks Law; Alleghany Industrial Insulation Co., a Pennsylvania construction corporation that performs work on public projects in New York, its President Daniel J. Brinsky and construction foreman Doug Byerly; M.G.M. Insulation, Inc., a minority-owned business; Innovative Mechanical Systems, Inc., a women-owned business; and the County of Erie and Chris Collins, its former County Executive. Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (3) and (7) on the grounds that plaintiffs lack standing with respect to certain causes of action and the complaint fails to state a cause of action. Supreme Court granted the motion and dismissed the complaint (*Empire State Ch. of Associated Bldrs. & Contrs., Inc. v Smith*, 30 Misc 3d 455). Because plaintiffs seek declaratory relief, however, we conclude that "the proper course is not to dismiss the complaint but rather to issue a declaration in favor of the defendants" (*Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954; *see Matter of Penfield Tax Protest Group v*

Yancey, 210 AD2d 901, *appeal dismissed* 85 NY2d 903, *lv denied in part and dismissed in part* 96 NY2d 760). We therefore conclude that the judgment should be modified by reinstating the complaint insofar as declaratory relief was sought, and for the reasons that follow, we conclude that judgment should be granted in favor of defendants declaring that the 2008 amendments to the Wicks Law, to the extent that they are challenged by plaintiffs, are valid and constitutional.

I. Home Rule

Plaintiffs' first cause of action alleges that the 2008 amendments, insofar as they establish different monetary thresholds for the cost of public construction projects subject to the separate bidding requirements of the Wicks Law, were enacted in violation of the home rule provisions of the New York State Constitution (hereafter, Constitution) (*see* NY Const, art IX, § 2 [b]). The court concluded that plaintiffs lack standing to invoke that provision, but that, in any event, the three-tiered monetary threshold does not violate the home rule article. We agree with plaintiffs at least insofar as they contend that the County of Erie has standing to challenge the 2008 amendments under the home rule provisions of the Constitution, but we nevertheless conclude that the 2008 amendments survive that challenge.

Article IX of the Constitution grants to local governments certain "rights, powers, privileges and immunities" with respect to local matters (NY Const, art IX, § 1; *see Matter of Kelley v McGee*, 57 NY2d 522, 537; *see also City of New York v Patrolmen's Benevolent Assn. of City of N.Y. [PBA I]*, 89 NY2d 380, 387). While a local government may not, as a general rule, challenge the constitutionality of an act of the Legislature affecting its powers, that general rule does not apply here (*see Town of Black Brook v State of New York*, 41 NY2d 486, 488). "Undiscriminating application of the general rule to the instant case[]would undermine the home rule protection afforded local governments in article IX of the Constitution, by subverting the very purpose of giving the local governments powers which the State Legislature is forbidden by the Constitution to impair or annul except as provided in the Constitution" (*id*.). We conclude, therefore, that the County of Erie possesses standing to challenge the 2008 amendments as an allegedly unconstitutional impairment of its home rule powers protected under article IX.

Plaintiffs contend that the three-tiered monetary threshold created by the 2008 amendments constitutes a special law that was enacted in violation of constitutional home rule mandates. Pursuant to article IX, section 2 of the Constitution, the Legislature possesses authority to enact general laws and special laws affecting local governments (*see Patrolmen's Benevolent Assn. of City of N.Y. v City of New York [PBA II]*, 97 NY2d 378, 385). A "[g]eneral law" is defined in relevant part as a "law which in terms and in effect applies alike to all counties . . . all cities, all towns or all villages" (NY Const, art IX, § 3 [d] [1]). A "[s]pecial law," on the other hand, is defined in relevant part as a "law which in terms and in effect applies to one or more, but not all, counties, . . . cities,

towns or villages" (NY Const, art IX, § 3 [d] [4]). In contrast with a general law, a special law that relates to the property, affairs or government of a local government may not be enacted without a "home rule message" (*PBA II,* 97 NY2d at 385), i.e., a "request of two-thirds of the total membership of [the municipality's] legislative body or [a] request of its chief executive officer concurred in by a majority of such membership" (NY Const, art IX, § [2] [b] [2]).

The 2008 amendments to the Wicks Law relate to the "property, affairs or government" of the County of Erie (*id.*). We agree with plaintiffs, moreover, that the three-tiered monetary threshold created by the 2008 amendments constitutes a special law inasmuch as the new monetary thresholds apply differently "in terms and in effect" to the counties classified within each tier (NY Const, art IX, § 3 [d] [4]). Additionally, a special law ordinarily triggers the procedural requirement of a home rule message, and none accompanied the enactment of the 2008 amendments (*see PBA I*, 89 NY2d at 389).

Our conclusion that the provisions at issue constitute a special law, however, does not end our inquiry regarding the constitutionality of those provisions under the home rule article (*see PBA II,* 97 NY2d at 387-388; *Matter of Kelley*, 57 NY2d at 537). As the Court of Appeals explained in *PBA II*:

> "A recognized exception to the home rule message requirement exists when a special law serves a substantial State concern. To overcome the infirmity of enacting a special law without complying with home rule requirements, the enactment must have a reasonable relationship to an accompanying substantial State concern. Thus, a special law that relates to the property, affairs or government of a locality is constitutional only if enacted upon a home rule message or the provision bears a direct and reasonable relationship to a *'substantial* State concern' " (97 NY2d at 386 [internal citations omitted]; *see City of New York v State of New York*, 94 NY2d 577, 591-592; *Matter of Town of Islip v Cuomo*, 64 NY2d 50, 56).

We conclude that the subject matter of the 2008 amendments bears a direct and reasonable relationship to a substantial State concern, and thus the Legislature acted by virtue of the powers reserved to it under article IX of the Constitution in enacting those amendments (*see generally Matter of Kelley*, 57 NY2d at 537-539). The separate bidding requirements codified, inter alia, in the General Municipal Law, State Finance Law, Public Authorities Law, Public Housing Law and Education Law were enacted to further the State's substantial concern of "assur[ing] the prudent and economical use of public moneys for the benefit of all the inhabitants of the state and . . . facilitat[ing] the acquisition of facilities and commodities of maximum quality at the lowest possible cost" (General Municipal Law § 100-a). The statutes regulating public works projects, including the Wicks Law,

"have been described as evincing 'a strong public policy of fostering honest competition in order to obtain the best work or supplies at the lowest possible price. In addition, the obvious purpose of such statutes is to guard against favoritism, improvidence, extravagance, fraud and corruption' " (*Matter of New York State Assn. of Plumbing-Heating-Cooling Contrs. v Egan*, 86 AD2d 100, 102, *affd* 60 NY2d 882, quoting *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 192-193). More specifically, the Wicks Law, which provides

> "for individual bids in three separate subdivisions of work to be performed[,] exists to insure some form of expertise in these areas of construction, rather than having all bids made by general contractors who would subcontract these various classes of work in their own discretion and at a potential hazard to the State, and by this process eliminate many competent specialty contractors and bidders in these separate categories from direct participation in the examination of specifications and the ultimate performance of the work. The State, and thus the people, would incur any ultimate loss. The reasons for this statutory provision are sound and in the best interest of the State" (*Matter of Nager Elec. Co. v Office of Gen. Serv. of State of N.Y.*, 56 Misc 2d 975, 977, *affd* 30 AD2d 626, *lv denied* 22 NY2d 645).

Although plaintiffs question the wisdom of the different monetary thresholds generally, they do not attack the overall Wicks Law scheme (*see generally Building Contrs. Assn. v State of New York*, 218 AD2d 722, 723). Rather, plaintiffs seek primarily to challenge the 2008 amendments' classification of counties within the three-tiered monetary threshold structure as arbitrary and unrelated to the State's concern. The court properly rejected that challenge. "Once a statute is found to involve an appropriate level of State interest, the fact that it effects a classification among the local governments it regulates does not render the enactment invalid, so long as that classification is reasonable and related to the State's purpose" (*Kelley*, 57 NY2d at 540; *see Matter of Radich v Council of City of Lackawanna*, 93 AD2d 559, 564, *affd* 61 NY2d 652; *Uniformed Firefighters Assn. v City of New York*, 50 NY2d 85, 90). Our review of the three-tiered classification created by the 2008 amendments must be guided by the presumption that the Legislature acted within constitutional limits and investigated and found facts supporting that classification (*see Farrington v Pinckney*, 1 NY2d 74, 88; *see also Hotel Dorset Co. v Trust for Cultural Resources of City of N.Y.*, 46 NY2d 358, 370), and "[w]e need only find some *reasonable* and *possible* basis for the classification created" (*Farrington*, 1 NY2d at 89).

Here, certain documents issued by the Governor's Office related to the amendments to the Wicks Law indicate that the 2008 amendments reflect the Legislature's judgment that the monetary threshold in place since the 1960s had become out-of-date, and that raising that

threshold would ease the burden that the Wicks Law imposes on local governments by eliminating smaller projects from the Wicks Law mandates. Those documents also support defendants' position that the three-tiered monetary threshold was devised to take into consideration geographically-based differences in the costs of construction. The record therefore establishes that the classification created by the 2008 amendments, distinguishing between the counties comprising New York City, its immediate suburbs, and the remainder of the State, bears a reasonable relationship to the purpose of those amendments (*see generally PBA II*, 97 NY2d at 387-388; *Kelley*, 57 NY2d at 540; *Uniformed Firefighters Assn.*, 50 NY2d at 90-91; *Farrington*, 1 NY2d at 94).

Having concluded that the 2008 amendments to the Wicks Law address matters of substantial State concern and that the three-tiered classification is reasonable and related to that concern, our inquiry concerning the alleged violation of the home rule article is at an end. We are guided by the requirement that courts must "exercise a large measure of restraint when considering" the bases for the Legislature's choices concerning the counties placed in each tier of the classification and the specific monetary thresholds for each tier (*Hotel Dorset Co.*, 46 NY2d at 369). This Court "must operate on the rule that it may not substitute its judgment for that of the body which made the decision" (*id.* at 370). Indeed, we must be mindful that the Legislature " 'has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is *not subject to courtroom fact[-]finding*' " (*Port Jefferson Health Care Facility v Wing*, 94 NY2d 284, 291, *cert denied* 530 US 1276). Further, as the Court of Appeals recently observed:

> "It is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality and we will upset the balance struck by the Legislature and declare the . . . plan unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld" (*Cohen v Cuomo*, 19 NY3d 196, 201-202 [internal quotation marks omitted]).

The Legislature acted within its province in determining, as a matter of statewide concern, that it was necessary to provide relief to all of the counties of the State by easing the fiscal and administrative burdens of Wicks Law compliance. The Legislature further determined that differences in the costs of construction should be considered in providing such relief, and it created the three-tiered classification accordingly. Nothing in the home rule provisions of article IX of the Constitution requires the Legislature to create a classification that would extend the benefits of the 2008 amendments equally. All that "is required is that the classification be defined by conditions common to the class and related to the

subject of the statute" (*Uniformed Firefighters Assn.*, 50 NY2d at 90). That requirement is met here, and neither the wisdom behind the creation of the classification nor the amount of the specific monetary thresholds chosen by the Legislature is an appropriate subject of judicial fact-finding (*see generally Paterson v University of State of N.Y.*, 14 NY2d 432, 438; *Farrington*, 1 NY2d at 94).

II. Labor Law § 222

Nearly all of the remaining causes of action turn on plaintiffs' interpretation of recently-enacted Labor Law § 222. That section, which as previously noted is entitled "Project labor agreements," is an integral part of the comprehensive Wicks Law reforms enacted in 2008. It defines a "[p]roject labor agreement" (PLA) and sets forth the conditions for the use of PLAs in publicly-funded construction projects. A PLA is defined as:

> "a pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on a public work project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform project work" (§ 222 [1]).

Section 222 (2) (e) states in pertinent part that, "[w]ith respect to *any* contract for construction" meeting the Wicks Law monetary thresholds, the contracting governmental entity "shall . . . require that each contractor and subcontractor shall participate in apprentice training programs . . . that have been approved by the [D]epartment [of Labor]" (emphasis added). Plaintiffs contend that the apprentice training requirement of that section applies to all Wicks Law contracts, and thereby disqualifies out-of-state contractors from large public construction projects in violation of the Privileges and Immunities Clause (US Const, art IV, § 2 [1]) and the "dormant" Commerce Clause (US Const, art I, § 8 [3]). Plaintiffs further contend that the statute inhibits a disproportionate number of minority-owned and women-owned businesses from qualifying to work on such projects in violation of the rights of those businesses to equal protection of the laws under the New York State and Federal Constitutions (NY Const, art I, § 11; US Const, 14th Amend, § 1) and pursuant to 42 USC § 1983. Defendants respond that, contrary to plaintiffs' interpretation of Labor Law § 222 (2) (e), the apprenticeship training program requirement does not apply to all contracts subject to the Wicks Law, but applies only to those contracts where the government entity has elected to utilize a PLA and thereby to opt out of the separate bidding mandate.

We agree with defendants' interpretation of Labor Law § 222 (2) (e). At the outset, we note that a statute is presumptively constitutional and should be construed in such a manner that its

constitutionality may be upheld (*see Eaton v New York City Conciliation & Appeals Bd.*, 56 NY2d 340, 346). "Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results" (*Matter of Jacob*, 86 NY2d 651, 667 [internal quotation marks omitted]; *see Rogoff v Anderson*, 34 AD2d 154, 157, *affd* 28 NY2d 880, *appeal dismissed* 404 US 805). While plaintiffs' reading of the statute would render it discriminatory and unconstitutional, it was incumbent upon the court " 'to avoid interpreting [the] statute in a way that would render it unconstitutional if such a construction can be avoided and to uphold the legislation if any uncertainty about its validity exists' " (*Astoria Fed. Sav. & Loan Assn. v State of New York*, 222 AD2d 36, 45, *appeal dismissed* 88 NY2d 1064, *lv denied* 89 NY2d 807, *cert denied* 522 US 808, quoting *Alliance of Am. Insurers v Chu*, 77 NY2d 573, 585).

Here, while Labor Law § 222 (2) (e) states that it applies to "any contract for construction," the court properly concluded that the quoted language does not refer to any contract subject to the Wicks Law but, rather, it refers to any contract subject to a PLA. That interpretation follows from the language of subdivision (2) (e), which refers to "[a]ny contract . . . with respect to each project undertaken pursuant to this section," i.e., pursuant to Labor Law § 222, "Project labor agreements." While that section's heading "cannot trump the clear language of the statute," it may be used in resolving an ambiguity in the meaning of the statute (*Matter of Suffolk Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd.*, 11 NY3d 559, 571; *see Maloney v Stone*, 195 AD2d 1065, 1067). Here, the heading of section 222 resolves the ambiguity created by the language "any contract" used therein in favor of the interpretation advocated by defendants.

Plaintiffs further contend that the requirement that contractors and subcontractors "participate in apprentice training programs" to be eligible for work on public projects has the effect of barring out-of-state contractors and severely disadvantaging minority-owned and women-owned businesses from qualifying for work on those projects (Labor Law § 222 [2] [e]). That contention, however, hinges on the assumption that section 222 (2) (e) requires a contractor or subcontractor to maintain an apprentice training program of its own. Neither the language nor the purpose of the statute supports that interpretation. The Department of Labor, which is charged with the enforcement of the Wicks Law, including the PLA provisions enacted in 2008 (*see* Labor Law §§ 2 [2]; 224 [1]), has concluded that, if a contractor or subcontractor enters into a PLA that meets the requirements of section 222, those contractors and subcontractors who perform work under the PLA are deemed to be participating in apprenticeship programs within the meaning of that section. The Department of Labor's interpretation, viewed in the light of the language and purpose of the statute, is reasonable (*see generally Suffolk Regional Off-Track Betting Corp.*, 11 NY3d at 571).

Consequently, we conclude that the court properly dismissed the 2nd through 5th and 7th through 21st causes of action to the extent

that they rest upon plaintiffs' erroneous interpretation of Labor Law § 222 (2) (e).

III. State Finance Law § 123-b

The court also properly dismissed the sixth cause of action, a citizen taxpayer cause of action brought pursuant to State Finance Law § 123-b (1). Plaintiffs allege that the 2008 amendments waste taxpayer funds by excluding out-of-state contractors and minority-owned and women-owned businesses from qualifying to obtain work on public construction projects, and by inflating the cost of those projects. Plaintiffs' allegations, however, amount to no more than "a claim that state funds are not being spent wisely[, which] is patently insufficient to satisfy the minimum threshold for standing" under the statute (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 813, *cert denied* 540 US 1017; *see Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 589). Plaintiffs, moreover, fail to allege "some specific threat of an imminent expenditure," and thus lack standing to bring a citizen taxpayer action on that ground as well (*Godfrey v Spano*, 13 NY3d 358, 374).

IV. Equal Protection

In the 16th through 18th causes of action, plaintiffs allege, inter alia, that the 2008 amendments to the Wicks Law constitute a violation of the State and Federal guarantees of equal protection of the laws inasmuch as those classifications favor downstate counties over upstate counties and union contractors over non-union contractors. Contrary to plaintiffs' contention, the 2008 amendments neither interfere with the exercise of a fundamental right nor involve a suspect class, and thus our review is governed by the rational basis standard. Under that standard, plaintiffs bore the burden " 'to negative every conceivable basis which might support [the 2008 amendments], *whether or not the basis has a foundation in the record*' " (*Affronti v Crosson*, 95 NY2d 713, 719, *cert denied* 534 US 826, quoting *Heller v Doe*, 509 US 312, 320-321). Plaintiffs have not alleged facts sufficient to meet that burden. As discussed above, the three-tiered monetary threshold meets the more exacting standard of the home rule article in that it bears "a reasonable relationship to an accompanying substantial State concern" (*PBA II*, 97 NY2d at 386; *see PBA I*, 89 NY2d at 389). Further, plaintiffs fail to establish that those sections of the Labor Law sanctioning the use of PLAs unconstitutionally favor union contractors over non-union contractors (*see Matter of New York State Ch., Inc., Associated Gen. Contrs. of Am. v New York State Thruway Auth.*, 88 NY2d 56, 76).

V. Conclusion

Accordingly, we conclude that the judgment should be modified by reinstating the complaint to the extent that declaratory relief was sought and by declaring that the 2008 amendments to the Wicks Law, insofar as they are challenged by plaintiffs, are valid and constitutional.

FAHEY and CARNI, JJ., concur with SCONIERS, J.; PERADOTTO, J., dissents and votes to modify in accordance with the following Opinion in which CENTRA, J.P., concurs: We respectfully dissent because, in our view, the three-tiered classification established by the 2008 amendments to the Wicks Law is arbitrary and not reasonably related to the State purpose underlying the law or the amendments. We would therefore reinstate the complaint and declare that the three-tiered classification is unconstitutional under the home rule provisions of the New York State Constitution (*see* NY Const, art IX, § 2 [b]).

This appeal concerns the validity of the 2008 amendments to a series of statutes collectively referred to as the "Wicks Law" (*see e.g. Matter of Diamond Asphalt Corp. v Sander*, 92 NY2d 244, 260, *rearg denied* 92 NY2d 921). As noted by the majority, the Wicks Law requires New York State and its political subdivisions to award separate contracts for three categories of work, i.e., electrical; plumbing; and heating, ventilation, and air conditioning, for public construction projects exceeding a specified monetary threshold (*see* General Municipal Law §§ 101 [1] [a] - [c]; [2]; 103; State Finance Law § 135; Labor Law § 222 [2] [e]; Public Housing Law § 151-a [1] [a] - [c]; [2]). When the Wicks Law was first enacted in 1912, the initial monetary threshold for projects subject to such separate bidding requirements was $1,000 (*see* L 1912, ch 514). The threshold was increased to $50,000 in 1961 for State projects (*see* L 1964, ch 292) and in 1964 for local government projects (*see* L 1964, ch 572).

The threshold remained at $50,000 until 2008, when the Legislature enacted various reforms to the Wicks Law (*see* L 2008, ch 57, Part MM). The 2008 amendments, which went into effect on July 1, 2008 (*see* L 2008, ch 57, Part MM, § 20), increased the monetary threshold to $3 million for the five counties comprising New York City, $1.5 million for the downstate suburban counties of Nassau, Suffolk, and Westchester, and $500,000 for all other counties (*see* L 2008, ch 57, Part MM, § 1). In addition to creating the three-tiered classification among counties, the 2008 amendments established a means for governmental entities to opt out of the Wicks Law requirements by entering into a "Project labor agreement" (*see* Labor Law § 222 [2] [b]).

Plaintiffs commenced this action challenging the constitutionality of the 2008 amendments and seeking, inter alia, judgment declaring that the amendments are unconstitutional and enjoining their enforcement. In 21 causes of action, plaintiffs allege that the 2008 amendments violate various provisions of the New York State and United States Constitutions, including the home rule provisions of the New York State Constitution (*see* NY Const, art IX, § 2 [b]) and the equal protection clauses of the State and Federal constitutions (*see* US Const, 14th Amend, § 1; NY Const, art I, § 11). With respect to the home rule provisions, plaintiffs allege in their first cause of action that the different monetary thresholds established by the 2008 amendments constitute "an invalidly-enacted special law" that "bears no reasonable relationship to any substantial concern of New York State." Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (3) and (7) on the grounds that plaintiffs

lacked standing with respect to certain causes of action and that the complaint failed to state a cause of action. Supreme Court granted the motion and dismissed the complaint.

At the outset, we agree with the majority that plaintiffs have standing to challenge the constitutionality of the 2008 amendments under the home rule provisions of article IX of the New York State Constitution. We also agree with the majority that, although the three-tiered classification system created by the 2008 amendments constitutes a "special law," i.e., a "law which in terms and in effect applies to one or more, but not all, counties" (NY Const, art IX, § 3 [d] [4]), a home rule message was not required inasmuch as the substance of the 2008 amendments bears a direct and reasonable relationship to a substantial State concern (*see Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 97 NY2d 378, 386). The declared purpose of the Wicks Law is "to assure the prudent and economical use of public moneys for the benefit of all the inhabitants of the state and to facilitate the acquisition of facilities and commodities of maximum quality at the lowest possible cost" (General Municipal Law § 100-a). With respect to the 2008 amendments, the legislative history reflects that the Wicks Law monetary thresholds were increased in order to reduce the financial burden on local governments (*see generally* Assembly Mem in Support, Bill Jacket, L 2008, ch 57). According to documents included in the record before us, the Governor's Program Bill from a proposed 2007 bill that was substantially similar to the 2008 amendments stated that, since the monetary thresholds were last increased in 1964, "the costs of real estate, labor and materials for public works projects have risen dramatically, subjecting an ever-increasing number of public works contracts to the separate specifications requirements." The purpose of the bill was to "recalibrate" the thresholds in order to allow smaller public works projects to "proceed without separate specifications."

We agree with the majority that raising the monetary thresholds set in 1964 to reflect the increased cost of public construction is reasonably related to both the original purpose of the Wicks Law and the purpose of the 2008 amendments, i.e., to provide local governments with much-needed relief from the financial and administrative burdens imposed by the Wicks Law. We cannot agree with the majority's further conclusion, however, that the three-tiered classification is rational and reasonably related to those State concerns. "Once a statute is found to involve an appropriate level of State interest, the fact that it effects a classification among the local governments it regulates does not render the enactment invalid, *so long as that classification is reasonable and related to the State's purpose*" (*Matter of Kelley v McGee*, 57 NY2d 522, 540 [emphasis added]; *see Farrington v Pinckney*, 1 NY2d 74, 89). Contrary to the conclusion of the majority, we conclude that the monetary thresholds underlying the three-tiered classification are arbitrary, and that the classification is not reasonably related to the State interests of: (1) protecting the public fisc by requiring local governments to award multiple contracts for public construction projects; and (2) reducing the burden of the Wicks Law mandate on local governments by exempting smaller projects

from its ambit (*cf. Farrington*, 1 NY2d at 91-92).

Notably, the Bill Jacket for the 2008 amendments lacks any discussion of the rationale underlying the three-tiered classification system or the justification for the different monetary threshold amounts (*see* Bill Jacket, L 2008, ch 57). The amendments were passed as part of the 2008-2009 budget bill, and the only portion of the Bill Jacket specifically addressing Wicks Law reform states that the amendments "advance[] increases in Wicks [L]aw thresholds that help reduce property taxes by lowering local construction costs. These thresholds would rise from $50,000 to $3 million in New York City, $1.5 million in Nassau, Suffolk, and Westchester counties, and $500,000 in all other counties." The majority relies on various documents in the record concerning the legislative history for the 2008 amendments as well as documentation in the record that appears to have been generated during the debate on a similar 2007 bill that did not pass the Legislature. Former New York Governor Elliot Spitzer originally proposed a two-tiered classification consisting of New York City and the rest of the State, and then amended his proposal to suggest a three-tiered classification. An October 2007 press release from the Governor's Office asserted that the proposed changes to the Wicks Law would "exempt more than 70 percent of public works projects from Wicks requirements and provide real savings for schools, local governments and other public entities."

The majority concludes that certain documents issued by the Governor's Office related to the amendments to the Wicks Law support defendants' contention that the three-tiered classification was devised to reflect geographically-based differences in construction costs. In support of that contention, defendants cite three documents in the record: (1) a January 2008 State of the State Address "Fact Sheet," which notes only that proposed amendments to the Wicks Law include "[a] three-tiered threshold system to take into consideration the geographic differences in the cost of construction"; (2) the statement of Assemblyman Joseph D. Morelle during debate over the 2007 proposed bill that "there are differentials and costs that relate from region to region"; and (3) a June 2007 Legislative Gazette article stating that the different thresholds "reflect the geographic difference in construction costs."

Notably absent from the record is any discussion of the basis for the monetary thresholds underlying the three-tiered classification. While it is common knowledge that it likely costs more to construct a building in New York City than in municipalities outside metropolitan New York, we conclude that the threshold monetary amounts selected by the Legislature must have some factual or evidentiary support beyond the general proposition that the cost of construction is higher in downstate counties than in their upstate counterparts. In other words, the monetary thresholds must be tied to some economic or other objective indicator. Here, the legislative history contains no reference to the basis for the monetary thresholds selected by the Legislature. Indeed, the only facts in the record concerning geographic disparities in construction costs appear in documents from the Department of Education detailing regional cost factors for 2006-

2009, which were submitted in support of defendants' motion to dismiss the complaint. Those documents list composite labor rates for each county in New York, i.e., the average hourly labor rate plus supplemental benefits for carpenters, plumbers and electricians. In 2008-2009, the composite labor rate in New York City was $80.57, while the labor rates in the three downstate suburbs were $71.33 for Nassau and Suffolk and $69.58 for Westchester. The composite labor rate in upstate counties during 2008-2009 ranged from a low of $39.59 in Jefferson, Lewis, and St. Lawrence Counties to a high of $69.58 in Dutchess County. The composite labor rates in Erie, Monroe, and Onondaga Counties during that time frame were $46.23, $43.79, and $41.30, respectively. While the above data reflects that the labor costs in New York City may be as much as double or nearly double the labor costs in certain upstate counties, it clearly does not support the six-fold difference in the $3 million threshold applicable to New York City and the $500,000 threshold applicable to the 54 counties north of Westchester County, or the three-fold difference in the $1.5 million threshold applicable to Long Island and Westchester County compared to the $500,000 threshold applicable to upstate counties.

As Assemblyman Morelle stated during the 2007 debate over the monetary thresholds:

> "I recognize, as I think most people around the State do, that there are differentials and costs that relate from region to region. There may be differences in cost, and it seems to me an appropriate place for indexing, [but] . . . I have a hard time imagining that construction costs between the City of New York and the City of Rochester are a differential [of] six-to-one."

Indeed, Morelle asserted that the costs of concrete, fuel, and other raw materials are roughly the same around the State. Assemblyman Clifford Crouch, of Binghamton, likewise recognized cost differences around the State, but not to the extent reflected in the three-tiered classification. Of further note, Assemblywoman Ellen Jaffee of Rockland County pointed out that labor costs in her district are nearly equivalent to those in Westchester County, which is across the Hudson River from Rockland County. Yet Westchester County enjoys a $1.5 million threshold for purposes of the Wicks Law while Rockland County is subject to the $500,000 threshold.

A review of the legislative record clearly indicates that a key purpose of the 2008 amendments was to relieve New York City from much of the burden imposed by the Wicks Law, with the remainder of the State being somewhat of an afterthought. According to the 2007 Governor's Program Bill in the record, the changes would "sav[e] New York City over $136 million in the first year alone." An April 2008 press release from the Governor's Office also included in the record touted that the reforms will "reduce [New York] City's long term capital construction costs by more than $200 million in its upcoming City Fiscal Year (CFY) 2009 Capital Plan, and will carry annual debt service savings of $14 million by CFY 2012," and further noted that

"[l]ocalities across the State will also realize millions of dollars more in savings."

Defendants contend that the three-tiered classification was designed to exempt approximately 70% of all public construction projects from the requirements of the Wicks Law. That figure, which appears several times in the record on appeal, is apparently based upon New York City Mayor Michael R. Bloomberg's testimony before the Assembly Ways and Means and Senate Finance Committees that the proposed amendments to the Wicks Law "would cover more than *70% of City capital projects*, permitting construction to proceed more quickly, efficiently, and at considerably less cost" (emphasis added). There is nothing in the record to indicate that the $500,000 threshold applicable to the 54 upstate counties will cover 70% or even 50% of the capital projects in those communities. Indeed, the record includes an editorial from the Daily Freeman newspaper, covering the mid-Hudson region, which states that "[y]ou'd have a hard time building a couple of wheelchair ramps at some public buildings for less than $500,000, meaning the reformed limits mean little for the vast majority of potential municipal projects." The Binghamton City School District's director of facilities and operations was quoted in a Press & Sun-Bulletin article, also included in the record, as stating that, "[i]n today's dollars, $500,000 doesn't get you a lot of work." Similarly, an April 2008 Watertown Daily Times editorial asserted that the 2008 amendments "will have very limited impact in Northern New York," pointing to "all the school construction or other public building projects that far exceed the $500,000 threshold." Indeed, Assemblyman Marcus Molinaro of Dutchess County stated that "$500,000 couldn't even barely build a home in [his] community."

We thus conclude that the three-tiered classification established by the 2008 amendments is arbitrary and not reasonably related to the stated purpose of the amendments, i.e., to "provide fiscal relief and increased flexibility for local governments" while at the same time maintaining the Wicks Law goal of fostering the "prudent and economical use of public moneys for the benefit of all the inhabitants of the [S]tate" (General Municipal Law § 100-a). In reaching this conclusion, we are cognizant of the general presumption, cited by the majority, that "the Legislature has investigated and found facts necessary to support the legislation" (*Hotel Dorset Co. v Trust for Cultural Resources of City of N.Y.*, 46 NY2d 358, 370). In this case, however, the record belies that presumption. Although a tiered classification system based on geographic disparities in construction costs may be reasonable and appropriate, the specific monetary thresholds in this case are arbitrary and unsupported by the legislative record. Accordingly, we would modify the judgment by reinstating the complaint, and we would declare that those parts of the 2008 amendments to the Wicks Law establishing the three-tiered classification are unconstitutional and enjoin defendants from enforcing the disparate thresholds.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

683

CAF 11-00771

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

IN THE MATTER OF PAUL D. MARQUARDT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

URSULA M. MARQUARDT, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 14, 2011 in a proceeding pursuant to Family Court Act article 8. The order, insofar as appealed from, found that respondent had committed a family offense.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs and the amended petition is dismissed.

Memorandum: Respondent wife appeals from an "Order of Fact-Finding and Disposition" in which Family Court concluded that she committed acts constituting the family offense of harassment in the first or second degree against petitioner husband (Family Ct Act § 812 [1]; Penal Law §§ 240.25, 240.26 [3]). Initially, we note that the order of protection issued in conjunction with the order on appeal has expired, and we thus generally would dismiss the appeal as moot (*see Matter of Kristine Z. v Anthony C.*, 43 AD3d 1284, 1284-1285, *lv denied* 10 NY3d 705). Here, however, respondent challenges only Family Court's finding that she committed a family offense and, " 'in light of enduring consequences which may potentially flow from an adjudication that a party has committed a family offense,' the appeal from so much of the order . . . as made that adjudication is not academic" (*Matter of Hunt v Hunt*, 51 AD3d 924, 925).

With respect to the merits, the court concluded that respondent committed a family offense by engaging in acts that would constitute either first or second degree harassment "by cutting open [her] pills on the counter, knowing that the Petitioner has allergies" to medications. We agree with respondent that the evidence is not legally sufficient to establish that she committed a family offense. "A petitioner bears the burden of proving by a preponderance of the evidence that respondent committed a family offense" (*Matter of Chadwick F. v Hilda G.*, 77 AD3d 1093, 1093-1094, *lv denied* 16 NY3d 703). Although harassment in the first or second degree is a family offense (*see* Family Ct Act § 812 [1]), and we afford great deference

to the court's determination of credibility (*see Matter of Gray v Gray*, 55 AD3d 909, 909; *Matter of Wallace v Wallace*, 45 AD3d 599), we conclude that petitioner failed to establish by a preponderance of the evidence that respondent engaged in acts constituting either offense. Thus, the court erred in failing to dismiss the amended petition (*see generally Matter of Woodruff v Rogers*, 50 AD3d 1571, 1571-1572, *lv denied* 10 NY3d 717).

To establish that respondent committed acts constituting harassment in the second degree, petitioner was required to establish that respondent engaged in conduct that was intended to harass, annoy or alarm petitioner, that petitioner was alarmed or seriously annoyed by the conduct, and that the conduct served no legitimate purpose (*see* Penal Law § 240.26 [3]; *Matter of Ebony J. v Clarence D.*, 46 AD3d 309; *Matter of Cavanaugh v Madden*, 298 AD2d 390, 392). Even assuming, arguendo, that petitioner was alarmed or seriously annoyed by the conduct of respondent in opening her medicine to eat it with pudding based on her inability to swallow the pills, and further assuming, arguendo, that respondent thereby intended to harass, annoy or alarm him, we conclude that petitioner failed to establish that the conduct served no legitimate purpose (*see generally Chadwick F.*, 77 AD3d at 1094; *Matter of Charles E. v Frank E.*, 72 AD3d 1439, 1441; *Matter of Eck v Eck*, 44 AD3d 1168, 1169, *lv denied* 9 NY3d 818). Indeed, petitioner testified that respondent took the medication as prescribed to prevent acid reflux, and that respondent opened the pills and ate the medication with food because she was unable to swallow the pills. With respect to petitioner's allegation that he was allergic to certain medications, he failed to establish that he was allergic to the particular medication taken by respondent, or to introduce any expert evidence in support of his testimony that the medication was "a poison, a toxic poison that causes death."

Similarly, petitioner failed to establish that respondent's acts constituted harassment in the first degree. That statute requires, inter alia, that the perpetrator commit "acts which place[another person] in reasonable fear of physical injury" (Penal Law § 240.25). Even assuming, arguendo, that petitioner was in fear of physical injury when respondent opened her medication, we conclude for the reasons set forth above that he failed to establish that his fear was reasonable.

All concur except MARTOCHE, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent, and would affirm the order insofar as appealed from. In my view, petitioner husband established by a preponderance of the evidence that respondent wife committed a family offense, and I agree with the majority that Family Court's finding that she did so is not academic despite the fact that the underlying order of protection has expired (*see Matter of Hunt v Hunt*, 51 AD3d 924, 925). Preliminarily, I note that, in this proceeding, respondent filed an amended petition in which she accused petitioner of engaging in acts against her that constituted disorderly conduct, harassment, aggravated harassment and attempted assault. The relevant acts included one incident in which petitioner screamed at respondent and ripped apart her rosary beads, and a second incident

when, while calling respondent names, petitioner struck respondent with a door upon opening it and then tried to rip the door off its hinges. Petitioner in turn filed an amended family offense petition against respondent, alleging that she committed the family offenses of reckless endangerment, harassment and menacing. Specifically, petitioner alleged that on several occasions respondent opened capsules of controlled substances in his presence on eating surfaces in the kitchen even though he had informed her that he was allergic to the controlled substances. Petitioner further alleged that, despite his repeated protests, respondent continued to open the capsules in his presence. The court considered both amended petitions at the fact-finding hearing. The only witnesses were the parties and their relatives. The court granted stay away orders of protection against each party, which expired in March 2012. The court found that respondent "engaged in conduct constituting harassment in that she with the intent to harass or to alarm or annoy the petitioner did after being asked to refrain from doing so cut open medications on a kitchen counter where food is prepared with knowledge that . . . the petitioner has allergies to certain medications and would be annoyed and alarmed by the respondent continuing to engage in such conduct." The court also found that petitioner committed the family offense of disorderly conduct, when he slammed the basement door with sufficient force to damage the door frame "in such a manner to frighten and alarm the [respondent]," and that petitioner committed another family offense of disorderly conduct, when he admittedly destroyed respondent's rosary beads without justification. The court stated in its decision that "ninety percent of the testimony" at the hearing was "utter nonsense" and warned the parties that it would "not waste another entire day listening to what [it] consider[ed] to be inane blather" if either party violated the orders of protection. In a previous appeal by petitioner, this Court affirmed the order determining, inter alia, that he committed a family offense against respondent (*Matter of Marquardt v Marquardt*, 94 AD3d 1436).

In my view, the court's "assessment of the credibility of the witnesses is entitled to great weight" (*Matter of Scroger v Scroger*, 68 AD3d 1777, 1778, *lv denied* 14 NY3d 705). This case in particular is appropriate for application of our general rule deferring to the findings made by Family Court after the court has made credibility determinations. Here, the parties chose to avail themselves of the judicial system for acts that otherwise did not warrant police intervention. The majority concludes that petitioner failed to establish that respondent's conduct served no legitimate purpose with respect to harassment in the second degree. I cannot agree with that conclusion. Petitioner testified that, while respondent may have needed to take her medication, she did not need to take her medication on eating surfaces in the kitchen and did so despite his objections to her conduct. The majority further concludes that petitioner failed to establish that he was allergic to the particular medication taken by respondent, but his testimony that he had allergies to the medications was credited by the court and I see no reason to disturb that factual determination. Similarly, the majority concludes that, with respect to harassment in the first degree, petitioner failed to establish that his fear of physical injury from respondent opening her medication was

reasonable. The testimony of petitioner established, however, that he was allergic to many medicines and that he was fearful of ingesting respondent's medications.

Finally, in my view, the court disposed of both amended petitions together, as evidenced by the fact that it issued mutual orders of protection. The parties obviously were antagonistic toward each other, and the court made findings with respect to the actions of each party against the other. Further, the court warned the parties that it regarded the family offense petitions as relatively minor. I agree with the court's admonition to the parties that they should not use the judicial system to resolve domestic disputes that are not of a serious nature. Certainly, the "crimes" committed by both parties were minor and did not require police intervention. I see no reason to disturb the court's credibility determinations with respect to petitioner's amended petition, just as we determined in petitioner's prior appeal that "[t]he court's 'assessment of the credibility of the witnesses is entitled to great weight' " (*Marquardt*, 94 AD3d 1436).

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

695

CA 11-02579

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

REGENT FINANCIAL GROUP, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROSALEE BEDIAN, DEFENDANT-APPELLANT.

ADAIR LAW FIRM, LLP, ROCHESTER (DONALD R. ADAIR OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHETERSON & PHETERSON, ROCHESTER (IRVING PHETERSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered March 16, 2011. The judgment awarded plaintiff the sum of $78,460.34 against defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the order entered March 7, 2011 insofar as appealed from is reversed on the law, that part of plaintiff's motion for summary judgment on the first cause of action is denied and that part of defendant's cross motion for leave to amend her answer to assert a counterclaim for misrepresentation is granted, and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from a judgment that brings up for review the underlying order that, inter alia, granted those parts of plaintiff's motion to dismiss the counterclaims and for summary judgment on the first cause of action in this breach of contract action, and denied that part of defendant's cross motion for leave to amend her answer. As limited by her brief, defendant contends that Supreme Court erred in granting that part of plaintiff's motion for summary judgment on the first cause of action, and in denying that part of her cross motion seeking leave to amend her answer to assert a counterclaim alleging misrepresentation. We agree with defendant.

The record establishes that defendant worked for a period of time as a representative of plaintiff, a financial services company. Pursuant to an agreement that was never executed, plaintiff initially paid defendant $130,000 per year in monthly installments in anticipation that defendant would earn commissions from her work that would meet and even exceed what she was paid. After a series of events that included the reduction by plaintiff of defendant's monthly draws and the imposition of a condition barring defendant from

engaging in outside employment, defendant eventually ended her employment with plaintiff. Plaintiff thereafter commenced this action seeking to recover unearned commissions that had been paid to defendant, totaling $64,099.98.

We agree with defendant that the court erred in granting that part of plaintiff's motion for summary judgment on the first cause of action, upon determining that there was an enforceable "special agreement" that obligated defendant to repay unearned commissions to plaintiff. The court properly concluded that enforcement of the unsigned agreement in its entirety was barred by the statute of frauds (*see* General Obligations Law § 5-701 [a] [1]). Moreover, the court properly recognized that "no recovery can be had for the excess of advances over commissions in the absence of an agreement, express or implied, by the agent or employee to repay such excess" (*Nationwide Mut. Ins. Co. v Timon*, 9 AD2d 1018; *see Kleinfeld v Roburn Agencies, Inc.*, 270 App Div 509, 511). The court erred, however, in determining that defendant had entered into a separate binding "special agreement" that obligated her to repay unearned commissions. According to the court's reasoning, the one-term "special agreement" was enforceable based on defendant's acknowledgment of that term, despite the applicability of the statute of frauds to the agreement as a whole as well as the fact that plaintiff relied on the statute of frauds to avoid all other terms of the parties' unsigned agreement with the exception of that same term, obligating defendant to repay unearned commissions. Although a party's "admission of the existence and essential terms of [an] oral agreement [would be] sufficient to take the agreement outside the scope of the statute of frauds" (*Binkowski v Hartford Acc. & Indem. Co.*, 60 AD3d 1473, 1474 [internal quotation marks omitted]), here plaintiff sought to enforce only one term of the oral agreement, while refusing to acknowledge all of its "essential terms" (*Concordia Gen. Contr. v Peltz*, 11 AD3d 502, 503). Because there was no special agreement independent of the other elements of the parties' otherwise unenforceable oral agreement, the court erred in granting that part of plaintiff's motion for summary judgment on its first cause of action, seeking repayment of unearned commissions. In any event, even assuming, arguendo, that plaintiff established the existence of an enforceable "special agreement," we conclude that defendant raised an issue of fact with respect to whether she was liable for the repayment of unearned commissions (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude that the court erred in denying that part of defendant's motion for leave to amend her answer to assert a counterclaim alleging misrepresentation by plaintiff. To the extent that plaintiff alleges the existence of an enforceable "special agreement" obligating defendant to repay unearned commissions, we conclude that defendant is entitled to assert as a counterclaim that she was induced to enter into that agreement as the result of misrepresentations made by plaintiff's principal (*see generally Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956).

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

698

CA 11-01716

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

FREDERICK J. PLATEK AND MARY E. PLATEK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF HAMBURG, ET AL., DEFENDANTS,
AND ALLSTATE INDEMNITY COMPANY,
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ALAN J. DEPETERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PATRICK J. MACKEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Ralph A. Boniello, III, J.), entered May 12, 2011 in a breach of contract action. The order granted the motion of plaintiffs for summary judgment, declared that plaintiffs' loss is covered by the subject insurance policy, directed defendant Allstate Indemnity Company to pay plaintiffs' claim and denied the cross motion of defendant Allstate Indemnity Company for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by vacating the declaration and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action for, inter alia, breach of contract, alleging that defendant Allstate Indemnity Company (Allstate) breached its insurance contract with plaintiffs by failing to provide coverage for water damage to the basement of their home after an abutting water main ruptured and water flooded their property. Allstate disclaimed coverage pursuant to an exclusion in the insurance policy, denominated "item 4," which states that Allstate does not cover losses caused by "[w]ater . . . on or below the surface of the ground, regardless of its source . . . [,] includ[ing] water . . . which exerts pressure on, or flows, seeps or leaks through any part of the residence premises." Plaintiffs moved for summary judgment, seeking a declaration that the insurance policy covered their claimed loss and directing Allstate to pay their claim. Plaintiffs relied upon a provision in the insurance policy setting forth an exception to the exclusion relied upon by Allstate, which provides that Allstate covers "sudden and accidental direct physical loss caused by fire, explosion or theft resulting from item[] . . . 4

. . . .” Plaintiffs averred that the exception applies because their claimed loss was caused by an “explosion” of the water main. Allstate cross-moved for summary judgment dismissing the complaint against it on the ground that the insurance policy does not cover plaintiffs’ loss.

Supreme Court granted the motion and denied the cross motion, declaring that plaintiffs’ loss is covered under the insurance policy and directing Allstate to pay plaintiffs’ claim in accordance with the policy provisions. Although we conclude that the court properly granted summary judgment to plaintiffs on the issue of liability, we further conclude that the court erred in “declaring” that plaintiffs’ claimed loss is covered under the policy, inasmuch as the action against Allstate is for breach of contract and not a declaratory judgment (*see Gravino v Allstate Ins. Co.*, 73 AD3d 1447, 1448, *lv denied* 15 NY3d 705). We therefore modify the order by vacating the declaration.

The parties disagree with respect to whether the exception to item 4 under the policy exclusions applies, and they offer conflicting interpretations of that exception. Allstate characterizes the exception as an “ensuing loss” provision, and it thus interprets the exception to provide that any initial loss to the insured’s property caused by the conditions set forth in item 4, i.e., “[w]ater . . . on or below the surface of the ground,” is not covered under the policy but that, in the event that there is an “explosion . . . resulting from” that initial loss, any secondary or ensuing loss caused by the explosion is covered. Plaintiffs disagree that there must be a secondary or ensuing loss, and they assert that the exception applies because there was an “explosion [of the water main] resulting from” the conditions set forth in item 4, i.e., “[w]ater . . . below the surface of the ground,” and causing “sudden and accidental direct physical loss” to their property.

In our view, both interpretations are “reasonable” (*Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 308), and we therefore conclude that the exception “is ambiguous and thus should be construed in favor of plaintiffs, the insureds” (*Trupo v Preferred Mut. Ins. Co.*, 59 AD3d 1044, 1045; *see generally White v Continental Cas. Co.*, 9 NY3d 264, 267; *Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383). Contrary to Allstate’s contention, the relevant language of the insurance policy does not specify that the exception applies only to a secondary or ensuing loss or that the explosion must result from *a loss* to the insured’s property caused by the conditions set forth in item 4. Rather, the policy states that the exception applies where the loss to the insured’s property was “caused by [an] explosion . . . resulting from item[] . . . 4 . . . .”

We further conclude that plaintiffs established their entitlement to summary judgment by demonstrating that the exception at issue applies to their claimed loss (*see generally Topor v Erie Ins. Co.*, 28 AD3d 1199, 1200). The term “explosion” is not defined in the insurance policy, and we thus “afford that term its ‘plain and

ordinary meaning' " (*Gallo v Travelers Prop. Cas.*, 21 AD3d 1379, 1380). Webster's Third New International Dictionary defines "explosion" as "an act of exploding" (Webster's Third New International Dictionary 802 [2002]), and to "explode" is "to burst violently as a result of pressure from within" (*id.* at 801). Here, plaintiffs submitted evidence, i.e., the affidavits of plaintiff Frederick J. Platek and an expert engineer, sufficient to establish as a matter of law that there was an "explosion" of the water main abutting their property caused by the build up of pressure therein; that the pressure in the water main "result[ed] from" the conditions set forth in item 4, i.e., "[w]ater . . . below the surface of the ground"; and that the explosion of the water main caused "sudden and accidental direct physical loss" to plaintiffs' property. Plaintiffs thus met their initial burden on the motion, and Allstate failed to raise a triable issue of fact in opposition inasmuch as it did not oppose plaintiffs' factual showing (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

All concur except PERADOTTO and MARTOCHE, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent because, in our view, the homeowners insurance policy at issue specifically excludes plaintiffs' loss and the exception to the exclusion relied upon by plaintiffs does not apply. We would therefore reverse the order, deny plaintiffs' motion for summary judgment, and grant the cross motion of defendant Allstate Indemnity Company (Allstate) for summary judgment dismissing the complaint against it. We note at the outset that we agree with the majority that Supreme Court erred in "declaring" that the claimed loss is covered under the policy because this is a breach of contract action and not a declaratory judgment action (*see Gravino v Allstate Ins. Co.*, 73 AD3d 1447, 1448, *lv denied* 15 NY3d 705). We therefore also would vacate the declaration.

Plaintiffs are the owners of certain residential real property in defendant Town of Hamburg, which property was insured under a policy of insurance issued by Allstate (policy). The policy provides, in relevant part, that Allstate does not cover "loss to the property . . . consisting of or caused by: 1. Flood, including, but not limited to, surface water . . . [;] 2. Water . . . that backs up through sewers or drains[;] 3. Water . . . that overflows from a sump pump, sump pump well or other system designed for the removal of subsurface water . . . [; or] 4. Water . . . on or below the surface of the ground, regardless of its source . . . [,] includ[ing] water . . . which exerts pressure on, or flows, seeps or leaks through any part of the residence premises" (water loss exclusion). In September 2010, plaintiffs' property was damaged when an abutting water main ruptured and water flooded their property, causing water damage to the basement of their home. Allstate disclaimed coverage under "item 4" of the water loss exclusion.

Plaintiffs commenced this action alleging that Allstate breached its insurance contract with plaintiffs by failing to provide coverage for the water damage to their home. Plaintiffs relied upon an exception to the water loss exclusion (exception), which provides that

Allstate covers "sudden and accidental direct physical loss caused by fire, explosion or theft resulting from items 1 through 4," i.e., the four categories of water incursion set forth in the water loss exclusion. Specifically, plaintiffs averred that the exception applies because their claimed loss was caused by an "explosion" of the water main. As noted by the majority, plaintiffs moved for summary judgment seeking a declaration that their loss is covered by the policy and directing Allstate to pay their claim. Allstate cross-moved for summary judgment dismissing the complaint against it on the ground that the policy does not cover plaintiffs' loss. The court granted the motion, denied the cross motion, declared that plaintiffs' loss is covered under the policy and directed Allstate to pay plaintiffs' claim in accordance with the policy provisions. We would reverse, deny plaintiffs' motion, thus vacating the improper declaration, and grant the cross motion of Allstate for summary judgment dismissing the complaint against it.

It is undisputed that the loss occurred when a water main ruptured outside plaintiffs' residence, causing water to enter the basement of their home. It is therefore further undisputed that the loss falls within item 4 of the water loss exclusion precluding coverage for "loss to the property . . . consisting of or caused by . . . [w]ater . . . on or below the surface of the ground, regardless of its source . . . [,] includ[ing] water . . . which exerts pressure on, or flows, seeps or leaks through any part of the residence premises." "[B]ecause the existence of coverage depends entirely on the applicability of [an] exception to the [water loss] exclusion," plaintiffs bear the burden of demonstrating the applicability of the exception (*Borg-Warner Corp. v Insurance Co. of N. Am.*, 174 AD2d 24, 31, *lv denied* 80 NY2d 753; *see Hritz v Saco*, 18 AD3d 377, 378; *Redding-Hunter, Inc. v Aetna Cas. & Sur. Co.*, 206 AD2d 805, 807, *lv denied* 86 NY2d 709).

In construing an insurance contract, the "parties' intent is to be ascertained by examining the policy as a whole, and by giving effect and meaning to every term of the policy" (*Oot v Home Ins. Co. of Ind.*, 244 AD2d 62, 66 [internal quotation marks omitted]; *see Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222 ["We construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (internal quotation marks omitted)]). "[W]ords and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense" (*Oot*, 244 AD2d at 66). "Where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement" (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [internal quotation marks omitted]).

Unlike the majority, we conclude that, when viewing the policy as a whole, the claimed loss is not covered under the clear and unambiguous language of the policy. Plaintiffs did not purchase, and Allstate did not provide, what may generally be characterized as flood insurance. The water loss exclusion broadly exempts from coverage

losses consisting of or caused by the entry of water into the insured premises "regardless of its source." The exception to that exclusion covers "sudden and accidental direct physical loss caused by fire, explosion or theft *resulting from items 1 through 4 listed above*" (emphasis added), i.e., the four types of excluded water events. In our view, the exception should not be construed as intending to create coverage for water intrusion inasmuch as such a reading of the exception would supplant the water loss exclusion (*see generally Narob Dev. Corp. v Insurance Co. of N. Am.*, 219 AD2d 454, *lv denied* 87 NY2d 804). Rather, we agree with Allstate that the exception is properly characterized as an "ensuing loss provision," excluding from coverage any initial loss to the insured's property caused by "[w]ater . . . on or below the surface of the ground," but covering secondary or ensuing loss caused by fire, explosion or theft that occurs as the result of an excluded water event (*see id.* ["Where a property insurance policy contains an exclusion with an exception for ensuing loss, courts have sought to assure that the exception does not supersede the exclusion by disallowing coverage for ensuing loss directly related to the original excluded risk"]).

As noted above, the exception provides that Allstate covers "sudden and accidental direct physical loss caused by fire, explosion or theft resulting from" the entry of water into the residence as described in items 1 through 4 of the water loss exclusion. The phrase "resulting from" in the exception does not mean "caused by," nor should it be interpreted in that manner. Indeed, interpreting the exception to cover a loss where an explosion is caused by water outside the residence, as plaintiffs urge, contravenes the purpose of the water loss exclusion, which is to preclude coverage for losses caused by water entry into the residence (*see ITT Indus. v Factory Mut. Ins. Co.*, 303 AD2d 177, 177 [rejecting plaintiff's "untenable interpretation that the policy provided coverage for a resulting loss of an excluded risk"]). Rather, the language "resulting from" is properly interpreted as referring to an "ensuing loss," i.e., a loss that follows or takes place after an excluded event (*Goldner v Otsego Mut. Fire Ins. Co.*, 39 AD2d 440, 442; *see Narob Dev. Corp.*, 219 AD2d at 454). In other words, the exception refers to a separate occurrence—fire, explosion or theft—that results from the water damage to the residence, and does not refer to the water damage itself. For example, a fire or explosion triggered by water damage to a circuit breaker or appliance, or a theft that occurs in an empty house rendered uninhabitable by water damage would constitute an ensuing loss. Our interpretation of the phrase "resulting from" is consistent with the dictionary definition of "resulting" ("[t]o come about as a consequence," "synonym[]" to follow), or "resultant" ("[i]ssuing or following as a consequence or result") (The American Heritage Dictionary 1487 [4th ed 2000]). Thus, in our view, the only reasonable interpretation of the exception is that it covers losses caused by fire, explosion or theft *that follows* one of the excluded water events set forth in items 1 through 4 of the water loss exclusion.

Given the nature of the water loss exclusion, we discern no other plausible way to read the exception. The water loss exclusion is for

loss “consisting of or caused by” water intrusion; the coverage in the exception is for loss “direct[ly] . . . caused by” fire, explosion, or theft that “result[s] from” water intrusion. In order to adopt plaintiffs’ interpretation, we would have to read the exception to cover a loss caused by an explosion that in turn is caused by water. The difficulty with that interpretation is exposed when the same interpretation is applied to a loss from “theft,” also a part of the exception. Under plaintiffs’ interpretation, the exception covers a loss caused by a theft that is caused by water—an illogical, if not absurd, reading. The weakness of plaintiffs’ proposed interpretation is further exposed in reviewing the exception that covers “sudden and accidental direct physical loss caused by . . . theft . . . resulting from earth movement.” Theft cannot be “caused” by earth movement, although theft might logically follow an earthquake if, for example, the door to the residence is damaged, the windows are shattered, or the house is rendered uninhabitable by the earthquake.

Because, in our view, plaintiffs’ interpretation of the exception is unreasonable, we would reverse the order, deny plaintiffs’ motion for summary judgment, thus vacating the improper declaration, and grant Allstate’s cross motion for summary judgment dismissing the complaint against it.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

706.1

KA 12-00770

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT TORRES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Onondaga County Court (William D. Walsh, J.), rendered July 6, 2011. Defendant was resentenced upon his conviction of burglary in the second degree.

It is hereby ORDERED that the resentence so appealed from is vacated.

Same Memorandum as in *People v Torres* ([appeal No. 1] ___ AD3d ___ [July 6, 2012]).

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

706

KA 11-01388

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT TORRES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered July 5, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, attempted sodomy in the first degree, sodomy in the first degree (two counts) and sexual abuse in the first degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of burglary in the second degree is dismissed, the judgment is reversed on the law and a new trial is granted on counts two through five and seven of the superseding indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]), sexual abuse in the first degree (§ 130.65 [1]), and two counts of sodomy in the first degree (former § 130.50 [1]). In appeal No. 2, defendant appeals from a resentence with respect to the conviction of burglary in the second degree.

With respect to appeal No. 1, we agree with defendant that reversal is required based on County Court's error in closing the courtroom. We note at the outset that, although we agree with the People that a defendant is required to preserve that contention for our review (*see People v Borukhova*, 89 AD3d 194, 225, *lv denied* 18 NY3d 881, *rearg denied* 18 NY3d 955; *People v Varela*, 22 AD3d 264, 264-265, *lv denied* 6 NY3d 781), we disagree with the People that defendant failed to make the appropriate objection. Although defendant's objection was made off the record, the parties and the court agreed during argument on defendant's post-trial motion to set aside the verdict that defendant had indeed objected to the court's procedure. It is well settled that a post-trial motion pursuant to

CPL 330.30 cannot preserve a contention for review that is raised for the first time in the motion (*see People v McFadden*, 94 AD3d 1150, 1150; *People v Jones*, 85 AD3d 1667, 1668), but as noted that is not what occurred here inasmuch as defendant made an objection before jury selection. The objection merely was not placed on the record at that time. Here, the record establishes that "the trial judge was made aware, before he ruled on the issue, that the defense wanted him to rule otherwise, [and thus] preservation was adequate" (*People v Caban*, 14 NY3d 369, 373).

We agree with defendant that the court erred in closing the courtroom to defendant's wife at the start of jury selection on the ground that there "wasn't any room" in the courtroom for her (*see People v Martin*, 16 NY3d 607, 611-612). As the Court of Appeals held in *Martin*, "[a] violation of the right to an open trial is not subject to harmless error analysis and a per se rule of reversal irrespective of prejudice is the only realistic means to implement this important constitutional guarantee" (*id.* at 613 [internal quotation marks omitted]). We reject the contention of the People that the closure of the courtroom was so trivial that it did not violate defendant's right to a public trial (*see id.*). Even assuming, arguendo, that there is a "triviality" exception to the per se rule of reversal set forth in *Martin* (*see Gibbons v Savage*, 555 F3d 112, 119-121, *cert denied* ___ US ___, 130 S Ct 61), we conclude that neither the duration of the courtroom closure in this case nor the substance of the proceedings taking place during the closure may be characterized as "trivial" (*cf. id.* at 121).

Both defense counsel and defendant's wife submitted affidavits in which they averred that the wife was excluded from proceedings on the first morning of jury selection. According to the wife, she was excluded from the courtroom for approximately 1½ to 2 hours. During that period of time, the court read its preliminary instructions to the prospective jurors and asked the first panel of 21 prospective jurors to approach the podium individually to respond to four questions: (1) whether the prospective juror heard or read anything about the case; (2) whether the prospective juror or a close friend or relative had been the victim of a crime; (3) whether the prospective juror or a close friend or relative had been arrested or charged with a crime; and (4) whether the prospective juror could be fair and whether there was a compelling reason why he or she could not serve on the jury. Two prospective jurors were excused upon consent of the prosecutor and defense counsel.

The court then asked the remaining members of the panel whether they knew the prosecutor, the defense attorney, or defendant, whether they had any friends or relatives who were lawyers or worked in law enforcement, and whether they had previously served on a jury. After the prosecutor and defense counsel questioned the prospective jurors, the court held a sidebar with the attorneys to hear challenges to the panel members. The prosecutor exercised nine peremptory challenges, defense counsel exercised seven peremptory challenges, and five prospective jurors were seated and sworn. Thus here, as in *Martin* (16 NY3d at 613), it cannot be said that "nothing of significance

happened" while defendant's wife was excluded from the courtroom (*Gibbons*, 555 F3d at 121).

We reject the contention of the People that the courtroom was only closed to defendant's wife until the first prospective juror was excused. The People rely on the fact that, at the start of jury selection, the court advised defense counsel that, "as soon as we start excusing [prospective jurors], there [would] be room" in the courtroom for defendant's wife. It is well settled that a courtroom is closed only by an affirmative act of the court (*see People v Peterson*, 81 NY2d 824, 825; *see also Martin*, 16 NY3d at 613). Here, defendant's wife averred that the court "addressed [her] directly and told [her] that [she] would need to wait outside the courtroom, but that a court attendant would come get [her] as soon as some [prospective] jurors were excused." While the wife was waiting in the hallway, she observed several prospective jurors leave the courtroom at one point, but "no one came to tell [her] that [she] should come in and [she] did not believe [she] should enter without being told to do so." Approximately 1½ to 2 hours later, a court officer finally came out into the hallway and told the wife that she could enter the courtroom. Under the circumstances of this case, in which the court specifically excluded the wife from the courtroom and it is undisputed that she did not reenter the courtroom before the court officer retrieved her, we conclude that the burden was on the court, not the excluded individual or the parties, to reopen the courtroom. Thus, the courtroom was closed to defendant's wife until such time as the court officer told her she had permission to reenter.

Contrary to defendant's further contention, we conclude that his statutory right to a speedy trial was not violated. Even assuming, arguendo, that the People's announcement of readiness for trial after defendant was arraigned on the initial indictment was "illusory and invalid" (*People v Weaver*, 34 AD3d 1047, 1049, *lv denied* 8 NY3d 928), we conclude that there was a period in excess of seven days that was excludable based on defendant's pretrial motion to dismiss the indictment (*see* CPL 30.30 [4] [a]; *People v Flowers*, 240 AD2d 894, 895, *lv denied* 90 NY2d 1011). With the exclusion of that time period, we conclude that the People's announcement of readiness for trial after the filing of the superseding indictment was timely (*see generally People v Sinistaj*, 67 NY2d 236, 237). In light of our determination that reversal is required based upon the denial of defendant's right to a public trial, we need not address defendant's remaining contentions in appeal No. 1 or appeal No. 2.

All concur except SCUDDER, P.J., and CENTRA, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. Like the majority, we would dismiss the appeal from the judgment in appeal No. 1 insofar as it imposed sentence on the conviction of burglary in the second degree, but we otherwise would affirm the judgment in appeal No. 1 and the resentence in appeal No. 2. With respect to appeal No. 1, we disagree with the majority that reversal is required based on County Court's error in closing the courtroom. We agree with the majority that defendant preserved his contention for

our review and that the court erred in closing the courtroom to defendant's wife at the start of jury selection on the ground that there "wasn't any room at all" in the courtroom for her (*see People v Martin*, 16 NY3d 607, 611-612). Although we recognize that harmless error analysis is not appropriate based on the erroneous closing of a courtroom (*see id.* at 613), we agree with the People that the closing of the courtroom in this case "was so inconsequential that it [was] trivial" (*id.*), such that the court "did not violate defendant's right to a public trial" (*People v Peterson*, 81 NY2d 824, 825).

At the start of jury selection, the court indicated to defendant that his wife could be present in the courtroom as soon as a prospective juror was excused. Jury selection then began with the court's introductory remarks and precharge. As noted by the majority, the court asked the prospective jurors to approach the podium one by one to give their responses to the following four questions: (1) whether they heard or read anything about the case; (2) whether they or a close friend or family member had been the victim of a crime; (3) whether they or a close friend or family member had been arrested or charged with a crime; and (4) whether they could be fair to both sides, and if there was a compelling reason they could not serve on the jury. It does not appear that these brief conferences could be heard by anyone in the courtroom other than the parties and the court. During those conferences, two prospective jurors were excused upon consent of both parties. At that point, according to the court's explicit instructions, defendant's wife could have come into the courtroom; the courtroom was no longer "closed." Thus, unlike in *Martin*, there was no "extensive questioning of prospective jurors" while the courtroom was closed (*Martin*, 16 NY3d at 613).

We disagree with the majority that the courtroom remained closed until a court officer told defendant's wife that she could reenter the courtroom. First, we note that there was no discussion held on the record between the court and defendant's wife. As noted earlier, the only remark by the court at the beginning of jury selection was that, "as soon as we start excusing people, there is going to be room," to which defense counsel responded, "All right." In support of his motion to set aside the verdict, defendant submitted an affidavit of his wife setting forth her recollection of a conversation with the court and the circumstances that occurred thereafter. During oral argument of the motion, the court reiterated its recollection that it told defense counsel that defendant's wife could come back in the courtroom as soon as a juror was excused, and the prosecutor noted that no one knew at what point defendant's wife actually returned to the courtroom.

In any event, we disagree with the majority that, under the circumstances of this case, the burden was on the court to reopen the courtroom. In our view, once the two prospective jurors were excused after the conferences at the podium, defendant should have either requested a brief recess to allow his wife to reenter the courtroom, or objected to the continued closing of the courtroom. Defendant did neither, and we therefore conclude that reversal based on the closed courtroom is not required. We note, however, that we agree with the

majority that defendant's statutory speedy trial rights were not violated, and thus that reversal on that ground also is not required.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

715

CA 11-02521

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

JEFFREY CONSTANTINE, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STELLA MARIS INSURANCE COMPANY, LTD.,
DEFENDANT-APPELLANT,
MARY SERIO, NICHOLAS SERIO, AS PARENTS AND
NATURAL GUARDIANS OF NICOLE SERIO, A MINOR,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

PHILLIPS LYTLE, LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN & TARANTINO, LLC, BUFFALO (TAMSIN J. HAGER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 10, 2011 in a declaratory judgment action. The order, among other things, denied the motion of defendant Stella Maris Insurance Company, Ltd. to dismiss the complaint for lack of personal jurisdiction.

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

Memorandum: As limited by its brief, defendant-appellant, Stella Maris Insurance Company, Ltd. (SMI), appeals from an order denying its motion pursuant to CPLR 3211 (a) (8) seeking to dismiss the complaint in this declaratory judgment action on the ground that New York lacks personal jurisdiction over it. SMI is a single-parent captive insurance company doing business in the Cayman Islands. Its sole shareholder, Catholic Health East (CHE), a not-for-profit Pennsylvania corporation that is authorized to do business in New York, has a joint operating agreement with Catholic Health System, which is the sole member of Sisters of Charity Hospital (Sisters Hospital) in Buffalo. CHE and its affiliates, including Catholic Health System and, in turn, Sisters Hospital, are named as “covered persons” in the professional liability policy issued by SMI to CHE. In the underlying medical malpractice action, defendant Nicholas Serio alleges medical malpractice by, inter alia, plaintiff in connection with the birth of

his daughter at Sisters Hospital. Plaintiff commenced this action seeking a declaration that SMI is obligated to indemnify him in connection with the underlying medical malpractice action, but the sole issue before us is whether Supreme Court properly denied SMI's motion to dismiss the complaint for lack of personal jurisdiction.

CPLR 302 (a) provides in relevant part that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent: (1) *transacts* any business within the state *or contracts* anywhere to supply goods or services in the state" (emphasis added). "While the ultimate burden of proof rests with the party asserting jurisdiction, . . . in opposition to a motion to dismiss pursuant to CPLR 3211 (a) (8), [plaintiff] need only make a prima facie showing that the defendant [,here, SMI,] was subject to the personal jurisdiction of the Supreme Court" (*Cornely v Dynamic HVAC Supply, LLC*, 44 AD3d 986, 986). We conclude that plaintiff sustained that burden here, and we therefore affirm.

As a preliminary matter, we agree with SMI that plaintiff failed to make a prima facie showing that SMI transacts business within New York State. Insurance Law § 1101 (b) (1) governs acts in this state that constitute "doing an insurance business" for purposes of long-arm jurisdiction. The record establishes that SMI and CHE negotiated the insurance contract in the Cayman Islands; that the policy was issued in the Cayman Islands, where it was delivered to CHE; and that CHE retains the policy in Pennsylvania (*see* § 1101 [b] [1] [A]). Further, CHE pays premiums to SMI; SMI does not collect premiums from CHE's New York affiliates (*see* § 1101 [b] [1] [C]). Thus, plaintiff failed to present prima facie evidence that any of the enumerated activities were conducted in this state, as required by Insurance Law § 1101 (b) (1) (A) and (C) (*cf. Caronia v American Reliable Ins. Co.*, 999 F Supp 299, 303 [ED NY]). We note that, in any event, under the facts presented here, Insurance Law § 1101 (b) (2), which enumerates activities that "shall not constitute doing an insurance business in this state," would apply inasmuch as the policy was "negotiated, issued and delivered without this state in a jurisdiction in which [SMI] is authorized to do an insurance business," i.e., the Cayman Islands (§ 1101 [b] [2] [E]). We therefore conclude that plaintiff failed to make a prima facie showing that SMI transacts business in New York State (*see* CPLR 302 [a] [1]).

We nevertheless conclude that plaintiff made a prima facie showing that SMI contracted in the Cayman Islands to provide services in New York (*see* CPLR 302 [a] [1]), and thus that the exercise of long-arm jurisdiction is appropriate (*see Insurance Co. of N. Am. v Pyramid Ins. Co. of Bermuda Ltd.*, 1994 WL 88754, *2 [SD NY]; *see generally Armada Supply Inc. v Wright*, 858 F2d 842, 849 [2d Cir 1988]; *Twin City Fire Ins. Co. v Harel Ins. Co. Ltd.*, 2011 WL 3480948, *2 [SD NY]; *Caronia*, 999 F Supp at 300-301). Although, by its nature, a single-parent captive insurance company insures only its parent and, indeed, CHE is named as the insured in the policy, here, the policy itself states that the "persons insured" are the covered persons, i.e., CHE and its named affiliates, which include Catholic Health

System, the sole member of Sisters Hospital, as well as the employees and contract physicians of the covered persons (*see generally Hudson Ins. Co. v Oppenheim*, 35 AD3d 168). Further, plaintiff provided the deposition testimony of CHE's vice-president who also serves as SMI's president and CEO, who testified that the list of physicians who contract with Sisters Hospital is provided to SMI's broker and actuary, and that SMI issues a certificate of insurance to him for CHE and Catholic Health System. We therefore conclude that plaintiff made a prima facie showing that SMI contracted with CHE to insure professional liability risks in New York, and thus that it is subject to the exercise of long-arm jurisdiction (*see Armada Supply Inc.*, 858 F2d at 849; *see generally Hudson Ins. Co.*, 35 AD3d at 168).

We further conclude that "the exercise of jurisdiction comports with due process" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214; *see Andrew Greenburg, Inc. v Sirtech Can., Ltd.*, 79 AD3d 1419, 1420), i.e., that SMI has the requisite minimum contacts with New York (*see LaMarca*, 95 NY2d at 216), and that the "prospect of defending [this action] . . . comport[s] with traditional notions of fair play and substantial justice" (*id.* at 217 [internal quotation marks omitted]). Although SMI itself has no direct contacts with New York, we conclude that, based on its policy language that the contract physicians of Sisters Hospital, a "covered person," are "insured," the minimum contacts requirement has been met (*see generally Hudson Ins. Co.*, 35 AD3d at 168-169). We further conclude that permitting the action to proceed in New York comports with notions of fair play and substantial justice inasmuch as the remaining defendants, as well as plaintiff, either are residents of New York or are authorized to do business in New York, and the alleged basis for liability occurred in New York (*see generally Armada Supply Inc.*, 858 F2d at 849). Furthermore, we note that, in connection with a declaratory judgment action that SMI commenced against plaintiff in Federal District Court in Pennsylvania, SMI requested as alternative relief that the matter be transferred to Federal District Court in New York.

Finally, we agree with SMI that plaintiff failed to make a prima facie showing that jurisdiction exists on the alternative theories that it is a "mere department" of CHE, or that CHE is SMI's agent, and thus that CHE's actions may be attributed to SMI. Although CHE is the sole shareholder of SMI, and the two corporations share certain executive personnel and one board member, those are "factors [that] are intrinsic to the parent-subsidiary relationship and, by themselves, [are] not determinative" (*Porter v LSB Indus.*, 192 AD2d 205, 214). Here, the record establishes that SMI and CHE maintain corporate formalities inasmuch as the policy was negotiated between CHE and the management company with which SMI contracts to run its day to day operations; that CHE does not have access to SMI's bank accounts; that there is no commingling of funds or investments; and that SMI's board, although appointed by CHE, owes a fiduciary duty to SMI. We therefore conclude that plaintiff has failed to make a prima facie showing that CHE's "control over [SMI's] activities '[are] so complete that [SMI] is, in fact, merely a department of [CHE]' " (*id.* at 213). Further, we reject plaintiff's contention that CHE, the parent corporation, acted as an agent of its wholly owned subsidiary

SMI with respect to doing business in New York in connection with Catholic Health System and Sisters Hospital (*see generally Frummer v Hilton Hotels Intl.*, 19 NY2d 533, 537-538, *rearg denied* 20 NY2d 758, *remittitur amended* 20 NY2d 737, 759, *cert denied* 389 US 923; *Jazini v Nissan Motor Co., Ltd.*, 148 F3d 181, 184-185).

All concur except PERADOTTO, J., who concurs in the result in the following Memorandum: I respectfully concur in the result reached by the majority, namely, the affirmance of the order denying the motion of defendant-appellant, Stella Maris Insurance Company, Ltd. (SMI), to dismiss the complaint on the ground that New York lacks personal jurisdiction over it. I agree with the majority that plaintiff made a prima facie showing that SMI contracted in the Cayman Islands to provide services in New York State within the meaning of CPLR 302 (a) (1), and thus that the exercise of long-arm jurisdiction is appropriate. I write separately, however, because I further conclude that plaintiff also made a prima facie showing that SMI transacts business within New York pursuant to CPLR 302 (a) (1) and Insurance Law § 1101 (b) (1).

As set forth by the majority, SMI is a single-parent captive insurance company domiciled in the Cayman Islands. SMI issued a professional liability insurance policy to its sole shareholder, Catholic Health East (CHE), a not-for-profit Pennsylvania corporation authorized to do business in New York. CHE has a joint operating agreement with Catholic Health System, which is the sole member of Sisters of Charity Hospital (Sisters Hospital) in Buffalo. Both Catholic Health System and Sisters Hospital are "covered persons" under the SMI policy issued to CHE. Plaintiff commenced this action seeking a declaration that SMI is obligated to indemnify him in connection with the underlying medical malpractice action. The underlying action arises from plaintiff's provision of obstetrical services at Sisters Hospital. As noted by the majority, the sole issue before us is whether Supreme Court properly denied SMI's motion to dismiss the complaint for lack of personal jurisdiction.

Although it is well established that "the burden of proving jurisdiction is on the party asserting it" (*Roldan v Dexter Folder Co.*, 178 AD2d 589, 590), a plaintiff opposing a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (8) for lack of jurisdiction "need only make a prima facie showing that personal jurisdiction exists" (*Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 243). As relevant here, CPLR 302 (a) (1) provides that a New York court may exercise personal jurisdiction over a non-domiciliary who, in person or through an agent, "transacts any business within the state." With respect to foreign insurance companies, Insurance Law § 1101 (b) (1) expressly provides in pertinent part that "any of the following acts in this state, effected by mail from outside this state or otherwise, . . . shall constitute doing business in the state within the meaning of [CPLR 302]: (A) making, or proposing to make, as insurer, any insurance contract, including either issuance or delivery of a policy or contract of insurance to a resident of this state or to any firm, association, or corporation authorized to do business herein . . . ; [or] (C) collecting any premium . . . for any policy or contract of

insurance."

Contrary to the conclusion of the majority, I conclude that SMI is subject to long-arm jurisdiction pursuant to Insurance Law § 1101 (b) (1) (A) because it "ma[d]e . . . an[] insurance contract" covering a New York risk. Insurance Law § 1101 (a) (1) broadly defines "insurance contract" as "any agreement or other transaction whereby one party, the 'insurer,' is obligated to confer benefit of pecuniary value upon another party, the 'insured' or 'beneficiary,' dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event." Here, it is undisputed that Catholic Health System and Sisters Hospital, as well as their New York employees, are "covered persons" under the SMI insurance policy and, thus, they are insureds or beneficiaries within the meaning of Insurance Law § 1101 (a) (1).

The majority concludes that Insurance Law § 1101 (b) (1) (A) is inapplicable under the circumstances of this case because the record establishes that the SMI policy was negotiated and delivered to CHE in the Cayman Islands and was thereafter retained in Pennsylvania. I disagree. There is no question that, had SMI mailed the insurance policy to Catholic Health System or Sisters Hospital in New York or to CHE, which is authorized to do business in New York, section 1101 (b) (1) (A) would apply. The statutory language does not, however, limit its application to policies physically delivered into New York. The statute provides that "any of the following acts in this state, *effected by mail from outside this state* *or otherwise* . . . shall constitute doing business in the state" for purposes of long-arm jurisdiction, including "making . . . any insurance contract" (§ 1101 [b] [1] [A] [emphases added]). In my view, the "or otherwise" language broadens the statute's applicability to any manner of making a contract in this state, not simply to "mail order" insurance arrangements. Inasmuch as one of the primary purposes of Insurance Law § 1101 is to protect New York insureds from foreign insurance companies not licensed in New York, I conclude that the statute can reasonably be interpreted as "any of the following acts in this state, effected by mail from outside this state *or [in any other manner from outside this state]*" (§ 1101 [b] [1] [emphasis added]). Thus, where an insurance company makes an insurance contract covering a New York risk, the applicability of Insurance Law § 1101 should not turn on whether the insurance company mails the contract to the insured in New York or delivers the contract to the New York insured in some other manner. Here, SMI issued a policy covering a New York risk, i.e., malpractice claims stemming from medical incidents at Sisters Hospital and other New York health care facilities. It is therefore, in my view, subject to jurisdiction pursuant to Insurance Law § 1101 (b) (1) (A).

The fact that CHE retained the policy in Pennsylvania and did not send a copy of the policy to the covered persons in New York should not alter the jurisdictional analysis. "It has long been recognized that, '[I]t is the intention of the parties and not the manual

possession of a policy which determines whether there has been a delivery thereof. There must be an intention to part with the control of the instrument and to place it in the power of the insured or some person acting for [it]. Manual delivery to the insured in person is not necessary' " (*Ecstasy Limousine Inc. v Lancer Ins.*, 8 Misc 3d 1025[A], 2005 NY Slip Op 51285[U], *4-5). "Delivery . . . primarily concerns an insurer's intent; if an insurer has put the policy outside of its legal control, even if not outside its actual possession, delivery has occurred" (6 Thomas, New Appleman on Insurance Law Library Edition § 61.04 [7] [a], at 61-59 [2011]). Here, it is undisputed that the SMI policy covers Sisters Hospital and its employees in New York and, in my view, once SMI turned the policy over to CHE, the policy was no longer within SMI's legal control (*see generally Wanshura v State Farm Life Ins. Co.*, 275 NW2d 559, 564 [Minn]).

Unlike the majority, I further conclude that SMI collected premiums from Catholic Health System and/or Sisters Hospital in New York within the meaning of Insurance Law § 1101 (b) (1) (C). The record establishes that CHE collected funds from the "covered persons," including Catholic Health System and Sisters Hospital, to pay the premiums due to SMI under the policy. Catholic Health System received a bill for premiums due under the policy and remitted payment to CHE. CHE then paid SMI for the premiums owed under the policy. Although it appears that CHE collected premiums on behalf of SMI, that arrangement does not alter the fact that premiums collected from Catholic Health System and Sisters Hospital were paid to SMI for the policy. Moreover, the terms of the policy specifically provide that SMI has the right to assess additional premiums against all "covered persons," thereby including Catholic Health System and Sisters Hospital, and SMI directly issued certificates of insurance to Catholic Health System. I thus conclude that plaintiff made a prima facie showing that SMI "collect[ed] a[] premium . . . or other consideration [from the New York entities] for [the] policy or contract of insurance" issued to CHE (§ 1101 [b] [1] [C]).

I disagree with the majority's alternative conclusion that Insurance Law § 1101 (b) (2), the statutory exception to Insurance Law § 1101 (b) (1), applies to this case. Insurance Law § 1101 (b) (2) (E) provides that, "[n]otwithstanding the foregoing, the following acts or transactions, if effected by mail from outside this state by an unauthorized foreign or alien insurer duly licensed to transact the business of insurance in and by the laws of its domicile, shall not constitute doing an insurance business in this state, *but section [1213] of this chapter shall nevertheless be applicable to such insurers*: . . . (E) transactions with respect to policies of insurance on risks located or resident within or without this state . . . , which policies are principally negotiated, issued and delivered without this state in a jurisdiction in which the insurer is authorized to do an insurance business" (emphasis added). Insurance Law § 1213, entitled "Service of process on superintendent as attorney for unauthorized insurers," provides that its purpose is "to subject certain insurers to the jurisdiction of the courts of this state in suits by or on behalf of insureds or beneficiaries under certain

insurance contracts. The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies. In furtherance of such state interest, the legislature herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this section, what constitutes doing business in this state" (§ 1213 [a]).

The statute goes on to provide that "*[a]ny of the following acts in this state, effected by mail or otherwise*, by an unauthorized foreign or alien insurer . . . is equivalent to and constitutes its appointment of the superintendent . . . to be its true and lawful attorney upon whom may be served all lawful process in any proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of insurance, and shall signify its agreement that such service of process is of the same legal force and validity as personal service of process in this state upon such insurer" (§ 1213 [b] [1] [emphasis added]). The acts include, in language closely mirroring Insurance Law § 1101 (b) (1), "the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein," "the collection of premiums, membership fees, assessments or other considerations for such contracts," or "any other transaction of business" (§ 1213 [b] [1] [A], [C], [D]).

As an initial matter, I question whether the exception set forth in Insurance Law § 1101 (b) (2) is even triggered inasmuch as it is limited by its terms to acts or transactions "effected by mail from outside this state," which did not occur here. In any event, I conclude that the exception applies only to shield foreign insurance companies from the licensing requirements set forth in Insurance Law § 1102, and does not limit the exercise of long-arm jurisdiction pursuant to CPLR 302. That conclusion is supported by the difference in the meaning and usage of the phrases "doing business in the state" and "doing an insurance business in this state" (*see e.g.* Insurance Law § 1101 [b] [1]; § 1102 [a]; § 1213 [a]). As used in the Insurance Law, the phrase "doing business in the state" relates to the predicate for the exercise of long-arm jurisdiction pursuant to CPLR 302 (a) (1) (*see* Insurance Law § 1101 [b] [1] ["(A)ny of the following acts in this state . . . shall constitute doing an insurance business in this state *and* shall constitute *doing business in the state within the meaning of (CPLR 302)*" (emphasis added)]; Insurance Law § 1213 [a] [defining "what constitutes *doing business in this state*" for the purpose of "subject(ing) certain insurers to the jurisdiction of the courts of this state" (emphasis added)]; *see generally* CPLR 302 [a] [1] [court may exercise personal jurisdiction over any non-domiciliary who "transacts any business within the state"]). By contrast, "doing an insurance business" refers to state licensing requirements (*see* Insurance Law § 1102 [a] ["No person, firm, association, corporation or joint-stock company shall *do an insurance business in this state*

unless authorized by a license in force pursuant to the provisions of this chapter" (emphasis added)]). I thus conclude that the exception set forth in Insurance Law § 1101 (b) (2) (E), which provides that certain acts "shall not constitute *doing an insurance business*" does not exempt SMI from personal jurisdiction (emphasis added). Any other interpretation of the statute would render meaningless the language in the exception that "section [1213] of this chapter shall nevertheless be applicable to such insurers," i.e., unauthorized foreign insurers licensed to transact insurance business in their place of domicile (§ 1101 [b] [2]). In my view, the quoted language means that, even though foreign insurers transacting business in New York may be exempt from the licensing requirements of New York Law, they are nevertheless subject to jurisdiction in New York courts. Indeed, the language in Insurance Law § 1213 is the equivalent of consent to personal jurisdiction.

In sum, I conclude that plaintiff made a prima facie showing not only that SMI contracted in the Cayman Islands to provide services in New York State within the meaning of CPLR 302 (a) (1), but also that it transacted business in this state pursuant to CPLR 302 (a) (1) and Insurance Law § 1101 (b) (1).

Finally, contrary to the conclusion of the majority, I conclude that plaintiff made a prima facie showing that jurisdiction exists on the alternative theories that SMI is a "mere department" of CHE, or that CHE is SMI's agent, and thus that CHE's actions may be attributed to SMI (*see generally Porter v LSB Indus.*, 192 AD2d 205, 212-213; *Turbon Intl., Inc. v Hewlett-Packard Co.*, 769 F Supp 2d 259, 260-261). As noted by the majority, CHE is the sole shareholder of SMI, and the two corporations share certain executive personnel as well as one board member. Furthermore, the record establishes that SMI's sole function is to provide insurance to CHE and its affiliates, that SMI is financially dependent on premiums paid by CHE and its affiliates, and that CHE controls many of the insurance-related activities of SMI (*see generally Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 431-432, *rearg denied* 30 NY2d 694; *Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.*, 751 F2d 117, 120-122; *National Union Fire Ins. Co. of Pittsburgh v Ideal Mut. Ins. Co.*, 122 AD2d 630, 631-633; *Dorfman v Marriott Intl. Hotels, Inc.*, 2002 WL 14363, *7-8). Among other things, plaintiff submitted evidence that CHE and/or its agents: (1) drafted the insurance policy at issue and reviewed the policy; (2) determined the risks to be covered; (3) collected premiums from its affiliates for the professional liability coverage; (4) provided Catholic Health System and/or Sisters Hospital with any information regarding the professional liability coverage; (5) established the policy for making claims; and (6) received all notices of claims under the policy. Thus, given the foregoing interrelationship between SMI and CHE, I further conclude that there is at least an issue of fact whether SMI is subject to long-arm jurisdiction pursuant to an agency or "mere department" theory.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

730

KA 08-01434

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GABRIEL TAYLOR, DEFENDANT-APPELLANT.

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

GABRIEL TAYLOR, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY RAE SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 23, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), attempted murder in the first degree (three counts), assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [1], [2]) and three counts of attempted murder in the first degree (§§ 110.00, 125.27 [1] [a] [vii]; [b]). We reject defendant's contention that Supreme Court erred in refusing to suppress tangible evidence seized from his residence and any statements that he allegedly made during the search of that residence as the fruit of an unlawful search. In seeking suppression, defendant contended that police officers "illegally and improperly bypassed the requirement of obtaining a valid search warrant by masking the visit of the defendant's residence and search of his room as a parole visit." We conclude, however, that the search was "rationally and reasonably related to the performance of [the parole officer's] duty as a parole officer" (*People v Huntley*, 43 NY2d 175, 179; *see People v Nappi*, 83 AD3d 1592, 1593-1594, *lv denied* 17 NY3d 820; *People v Van Buren*, 198 AD2d 533, 534, *lv denied* 83 NY2d 811).

While investigating the robbery, police officers began to suspect that defendant, a parolee, was involved. At approximately 11:00 p.m. on the night of the robbery, the police officers contacted the parole officer whose duty it was to locate parolees, in order to obtain

defendant's most recent address. The police officers did not inform the parole officer of their reason for needing that information. After obtaining the requested information for the police officers, the parole officer informed the police officers that he was going to go to the residence "to verify if [defendant] was home" because defendant had a curfew of 10:00 p.m. Inasmuch as it was the policy of the Division of Parole to have at least two officers present for any home visit made after 10:00 p.m., the parole officer asked the police officers if they would accompany him. We thus conclude that the parole officer was "pursuing parole-related objectives" in going to defendant's residence (*People v Peterson*, 6 AD3d 363, 364, *lv denied* 3 NY3d 710; *see People v Vann*, 92 AD3d 702, 702-703, *lv denied* ___ NY3d ___ [May 4, 2012]; *People v Felder*, 272 AD2d 884, *lv denied* 95 NY2d 905; *People v Smith*, 234 AD2d 1002, *lv denied* 89 NY2d 988; *cf. People v Mackie*, 77 AD2d 778, 779).

When the parole officer and police officers arrived at defendant's residence, they were informed by a woman who identified herself as defendant's aunt that defendant was not home. At that point it was apparent that defendant was in violation of his parole, and "the parole officer's conduct in searching the [residence] for a possible explanation of [defendant's] otherwise unexplained failure to [be present] was permissible" (*Huntley*, 43 NY2d at 182). While the parole officer and police officers were present at the residence, a person who identified himself as defendant telephoned the residence and was overheard making certain statements. Inasmuch as the search of the residence was lawful, there is no basis to suppress those statements.

We agree with defendant, however, that the court erred in admitting in evidence an inoperable handgun that was found during that search. It is undisputed that the gun, which was seized from the living room couch upon which defendant slept, was not the same gun that was used in the robbery. Although we concluded herein that the tangible evidence seized from defendant's residence, which evidence included the gun, was not subject to suppression as the fruit of an unlawful search, we nevertheless conclude that the gun was not admissible under any *Molineux* exception. While the People contend that the gun was admissible to explain the statements made by defendant on the phone to his aunt, we reject that contention and conclude that the gun could not "logically be linked to [any] specific material issue in the case" (*People v Hudy*, 73 NY2d 40, 54). We thus conclude that the probative force of that evidence did not outweigh its potential for prejudice (*see People v Pittman*, 49 AD3d 1166, 1167; *People v Carter*, 31 AD3d 1167, 1168; *see generally People v Ventimiglia*, 52 NY2d 350, 359-360). We conclude, however, that the error is harmless. The evidence of defendant's guilt is overwhelming, and "there [is] no significant probability that the jury would have acquitted [defendant] had the proscribed evidence not been introduced" (*People v Kello*, 96 NY2d 740, 744; *see People v Arafet*, 13 NY3d 460, 466-467; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Defendant was positively identified by an eyewitness to the incident. Defendant and the eyewitness were acquaintances, and the eyewitness had conversed with defendant outside the convenience store just

minutes before the robbery. Although the eyewitness was an "[e]x crack head" who had a criminal history, his version of events was corroborated by the surveillance video from the convenience store where the robbery occurred, and by three employees of the store and a security guard from a neighboring business. In addition, defendant made numerous incriminating statements when he was ultimately arrested, one of which included details about the crime that only the perpetrator or an eyewitness to the crime could have known. We further conclude that, based on the nature of the crimes and defendant's criminal history, the sentence is not unduly harsh or severe.

Defendant further contends in his pro se supplemental brief that the court erred in denying his CPL 330.30 motion to set aside the verdict. We reject that contention. Defendant based his motion in part on the fact that the court improperly permitted the jury to view a CPL 710.30 document that had not been admitted in evidence. After learning of the error, the court alerted defense counsel to the issue, noting that "no harm" had resulted from the error because the contents of the document were duplicative of testimony offered during the course of the trial. Defense counsel raised no objection to the manner in which the court handled the error, and thus the court had no authority to grant the motion to set aside the verdict based on a contention raised for the first time in the motion (*see* CPL 330.30 [1]; *People v Benton*, 78 AD3d 1545, 1546, *lv denied* 16 NY3d 828; *see generally People v Carter*, 63 NY2d 530, 536). Finally, we reject defendant's contention that the court should have granted his CPL 330.30 motion insofar as it alleged that defense counsel was ineffective for failing to seek a mistrial based on the error relating to the CPL 710.30 document. "It is well settled that defense counsel cannot be deemed ineffective for failing to 'make a motion or argument that has little or no chance of success' " (*People v Noguel*, 93 AD3d 1319, 1320, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). We agree with the court that the jury's inadvertent viewing of the CPL 710.30 document was harmless inasmuch as it was duplicative of testimony admitted at trial and that, in any event, defendant failed to demonstrate the absence of strategic reasons for defense counsel's failure to move for a mistrial (*see People v Denis*, 91 AD3d 1301, 1302).

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

771

KA 09-00281

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LANCE J. REED, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HARRIS BEACH PLLC (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered December 9, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and robbery in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) and two counts of robbery in the first degree (§ 160.15 [1], [2]). Defendant contends that the evidence is legally insufficient to establish an essential element of the robbery counts, i.e., that he or one of his accomplices stole property, and thus it is legally insufficient with respect to those counts. He further contends that the felony murder conviction must also be reversed due to the legal insufficiency of the evidence with respect to the robbery counts. We reject those contentions.

"A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime . . . [c]auses serious physical injury to any person who is not a participant in the crime; or . . . [i]s armed with a deadly weapon" (Penal Law § 160.15 [1], [2]). Insofar as relevant here, felony murder is committed when defendant, "[a]cting either alone or with one or more other persons, . . . commits or attempts to commit robbery . . . , and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants" (§ 125.25 [3]). Contrary to defendant's contentions, the evidence is legally sufficient to support the conviction of

robbery and murder.

"It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678). Here, we conclude that the evidence at trial could lead a rational person to the conclusion reached by the jury (*see People v Hernandez*, 79 AD3d 1683, 1683, *lv denied* 16 NY3d 895; *see generally People v Bleakley*, 69 NY2d 490, 495). Several eyewitnesses testified that they heard the gunshots that killed the victim and observed a vehicle, which they described, drive away from the scene. Other witnesses identified defendant as the operator of that vehicle, the vehicle was found near his sister's apartment, and defendant's sister testified that he appeared disheveled when he arrived at her apartment shortly after the time at which the shooting occurred. An eyewitness to the shooting testified that the shooter bent over the victim immediately after the shooting, and several witnesses testified that the shooter then left in the vehicle with defendant. In addition, the victim's girlfriend testified that, approximately 30 minutes before the shooting, she placed $40,000 in cash in a plastic grocery bag, used a distinctive double knot to close the bag, and then gave it to the victim to buy drugs. At the police station a few days after the shooting, the victim's girlfriend identified a bag as the one that held the cash, and police officers testified that they recovered it from under the driver's armrest of the vehicle that defendant drove from the scene. The victim's girlfriend indicated that the bag still had the same distinctive double knot at the top, although the bottom had been torn open and the bag was empty. Photographs of the bag, which were received in evidence, depict the bag's distinctive double knot and torn bottom.

It has long been the law in New York that evidence establishing that a defendant possessed a wrapper or container that had held property before it was stolen is sufficient to support a conviction for stealing that property (*see People v Sasso*, 99 AD2d 558, 559; *People v Block*, 15 NYS 229, 230 [1st Dept 1891]; *see also People v Baskerville*, 60 NY2d 374, 379). Consequently, "[t]his evidence, although circumstantial, was nevertheless more than sufficient to lead a reasonable person to conclude that defendant" or one of his accomplices stole the cash from the victim (*People v Radoncic*, 239 AD2d 176, 179, *lv denied* 90 NY2d 897). The evidence also establishes that the victim was shot and killed while that cash was being taken from him, thus providing legally sufficient evidence with respect to the remaining elements of the charges of which defendant was convicted.

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 contrary to the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although an acquittal would not have been unreasonable, it cannot be

said that the jury failed to give the evidence the weight it should be accorded (*see generally Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495).

All concur except FAHEY and MARTOCHE, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent and would reverse the judgment, dismiss the indictment and remit the matter to County Court for proceedings pursuant to CPL 470.45. In our view, the evidence is legally insufficient to support the conviction, and the verdict is against the weight of the evidence.

We first turn to the issue of legal sufficiency. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Weakfall*, 87 AD3d 1353, 1353, *lv denied* 18 NY3d 862 [internal quotation marks omitted]). "[W]hen the evidence is circumstantial the jury[, as it was in this case,] should be instructed in substance that it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence" (*People v Sanchez*, 61 NY2d 1022, 1024; *see People v Brown*, 23 AD3d 1090, 1092-1093, *lv denied* 6 NY3d 810). Inasmuch as " 'the robbery was the underlying felony for [the] count of felony murder[, it] constituted a material element of that offense' " (*People v Dennis*, 91 AD3d 1277, 1280). "[T]he essential elements of the underlying felony must be proven beyond a reasonable doubt in order for a conviction of felony murder to be justified" (*People v Simon*, 119 AD2d 602, 603; *see generally People v Hubbert*, 212 AD2d 633, 634), which is consistent with the court's jury charge herein that "there must be a robbery before [defendant] can be found guilty [of murder]."

Here, the victim was shot three times at close range in broad daylight on a public street in Rochester. None of the seven eyewitnesses to the shooting saw the assailant or an accomplice of the assailant take anything from the victim at the time of the shooting. Eyewitnesses did, however, see a Lincoln automobile (hereafter, Lincoln) driving away from the scene of the shooting, and that vehicle was located and secured by the police the next day. The interior of the Lincoln was, as defense counsel aptly noted on summation, "in [a] state of disarray" at that time, and in that vehicle the police discovered various grocery items, including "one or two packages of sausage biscuits," an empty Snapple bottle, and a number of lottery tickets. Police also took from the Lincoln a plastic Tops supermarket bag, the handles of which were knotted and the bottom of which appeared to have been "ripped out." No fingerprints or bodily fluids were found on the bag, nor was any hair. Moreover, defense counsel noted on summation, without objection, that there are "thousands, tens of thousands of Tops bags in [Rochester]," some of which were even carried by jurors during the trial.

The victim's girlfriend did not mention the supermarket bag at the inception of the police investigation, but disclosed its existence when she met with the police at police headquarters the day after the shooting. She was shown the supermarket bag recovered from the Lincoln, and she stated that she believed that the bag was the same bag in which she had placed $40,000 in cash that was wrapped with "colorful rubber bands." According to the victim's girlfriend, the cash had been tied with the rubber bands in preparation for the victim's anticipated purchase of drugs, shortly before his death. The only uncommon characteristic of the supermarket bag is the manner in which it was knotted, and the testimony of the victim's girlfriend is unclear as to the manner in which it was tied. We respectfully disagree with the majority's conclusion that the subject bag was distinctively knotted. Moreover, we respectfully note that none of the "colorful rubber bands" used to wrap the cash that the majority believes to have been stolen from the victim were found in the Lincoln.

"Under the facts elicited at the trial, there was no rational basis upon which the jury could have found that there was a forcible taking of property" (*Simon*, 119 AD2d at 604). Inasmuch as the supermarket bag at issue is a common item, "it cannot be reasonably concluded that the [supermarket bag found in the Lincoln] was the same [bag] possessed by the victim [shortly before his death]" (*id.*). As noted herein, none of the seven eyewitnesses to the shooting—many of whom also saw the assailant's departure from the area of the shooting—saw the taking of property from the victim. Moreover, none of those witnesses saw anyone walk from the vicinity of the victim's body carrying anything other than a gun. Indeed, there was no evidence that anyone was seen leaving the area of the victim's body with property belonging to the victim, and we thus conclude that the evidence is legally insufficient to establish that a robbery occurred (*see id.* at 603-604; *see generally People v Bass*, 277 AD2d 488, 495, *lv denied* 96 NY2d 780). Consequently, we would reverse the judgment convicting defendant of robbery as well as felony murder, which is premised upon the commission of the robbery, given the lack of legally sufficient evidence of the underlying felony.

Even assuming, arguendo, that the evidence is legally sufficient to support the conviction, we further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is against the weight of the evidence for the reasons set forth above (*see generally People v Bleakley*, 69 NY2d 490, 495; *cf. Bass*, 277 AD2d at 496-497).

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

789

CA 12-00231

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

KIRK RUTHERFORD, PLAINTIFF-RESPONDENT,

V ORDER

SPENCER SPEEDWAY, INC., NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC., JOHN WHITE AND JOHN MULLIE, DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (MICHAEL E. APPELBAUM OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (MICHAEL P. STUERMER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered July 6, 2011 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on June 7 and 8, 2012 and filed in the Niagara County Clerk’s Office on June 25, 2012,

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

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

796

KA 11-00972

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MIGUEL A. JARAMILLO, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MIGUEL A. JARAMILLO, DEFENDANT-APPELLANT PRO SE.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 7, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, criminal possession of a weapon in the fourth degree and perjury in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]), criminal possession of a weapon in the fourth degree (§ 265.01 [2]) and perjury in the first degree (§ 210.15). By making only a general motion for a trial order of dismissal, defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish the element of serious physical injury with respect to the assault count (*see People v Gray*, 86 NY2d 10, 19). Contrary to defendant's further contention, viewing the evidence in light of that element of assault 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 with respect to that element (*see generally People v Bleakley*, 69 NY2d 490, 495). We conclude that the jury properly weighed the evidence in determining that defendant inflicted serious physical injury when he stabbed the victim, thereby lacerating muscle tissue, puncturing the victim's liver, and causing permanent scarring (*see People v Barnett*, 16 AD3d 1128, 1129, *lv denied* 4 NY3d 883).

County Court properly exercised its discretion in denying defendant's request for assignment of new counsel (*see generally*

People v Porto, 16 NY3d 93, 99-100). "[D]efendant's disagreements with counsel over trial strategy did not establish the requisite good cause for substitution of counsel" (*People v Saladeen*, 12 AD3d 1179, 1180, *lv denied* 4 NY3d 767), nor was substitution of counsel warranted based on defendant's apparent attempt to create a conflict of interest by commencing an action in federal court against the Public Defender (*see People v Walton*, 14 AD3d 419, 420, *lv denied* 5 NY3d 796; *People v Davis*, 226 AD2d 125, 126, *lv denied* 88 NY2d 1020).

The record of the suppression hearing supports the determination of the court that the police obtained defendant's consent to enter his residence (*see People v Nielsen*, 89 AD3d 1041, 1042, *lv denied* 18 NY3d 996), and properly seized a shotgun that was in plain view in his living room (*see People v Brown*, 96 NY2d 80, 88-89). We agree with defendant, however, that the record does not support the court's determination that the People met their burden of establishing that defendant consented to the seizure of a bulletproof vest from his residence (*see People v McFarlane*, 93 AD3d 467, 467-468). Nevertheless, we conclude that the court's error in refusing to suppress the vest on that ground is harmless beyond a reasonable doubt (*see generally People v Crimmins*, 36 NY2d 230, 237).

We reject defendant's contention that the court violated his right to a public trial by conducting certain proceedings in chambers. The record establishes that the proceedings at issue were distinct from trial proceedings that must be conducted in public (*see People v Olivero*, 289 AD2d 1082, 1082, *lv denied* 98 NY2d 639). Defendant failed to preserve for our review his further contentions that the prosecutor improperly shifted the burden of proof during summation (*see People v Glenn*, 72 AD3d 1567, 1568, *lv denied* 15 NY3d 805), and that the court improperly relied on the presentence report in determining the amount of restitution (*see People v Roots*, 48 AD3d 1031, 1032). 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]). Further, absent any indication that the court relied upon allegedly erroneous information in the presentence report in imposing the sentence, we decline to disturb the sentence based upon the court's failure to redact that information (*see People v Molyneaux*, 49 AD3d 1220, 1222, *lv denied* 10 NY3d 937). The sentence is not unduly harsh or severe. We have considered the contentions raised by defendant in his pro se supplemental brief and conclude that none warrants modification or reversal of the judgment.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

799

KA 10-01850

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON SLISHEVSKY, DEFENDANT-APPELLANT.

BIANCO LAW OFFICE, SYRACUSE (RANDI JUDA BIANCO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered August 11, 2010. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, course of sexual conduct against a child in the second degree (two counts), predatory sexual assault against a child, criminal sexual act in the second degree (three counts), sexual abuse in the second degree (two counts), sexual abuse in the third degree (five counts) and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, counts 3, 5, and 7 through 11 of the indictment are dismissed and a new trial is granted on counts 2, 6, and 12 through 17.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count each of predatory sexual assault against a child (Penal Law § 130.96), course of sexual conduct against a child in the first degree (§ 130.75 [1] [b]) and endangering the welfare of a child (§ 260.10 [1]), two counts each of course of sexual conduct against a child in the second degree (§ 130.80 [1] [b]) and sexual abuse in the second degree (§ 130.60 [2]), three counts of criminal sexual act in the second degree (§ 130.45 [1]), and five counts of sexual abuse in the third degree (§ 130.55). 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 contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We agree with defendant, however, that the cumulative effect of evidentiary errors made by County Court, coupled with prosecutorial misconduct, deprived him of his right to a fair trial (*see generally People v Ballerstein*, 52 AD3d 1192, 1192-1193). We note at the outset that, although

defendant failed to preserve certain evidentiary errors and instances of prosecutorial misconduct for our review (*see* CPL 470.05 [2]), we exercise our power to address them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), in view of our " 'overriding responsibility' to ensure that 'the cardinal right of a defendant to a fair trial' is respected in every instance" (*People v Wlasiuk*, 32 AD3d 674, 675, *lv dismissed* 7 NY3d 871, quoting *People v Crimmins*, 36 NY2d 230, 238).

The court erred in admitting testimony elicited by the prosecutor establishing that Child Protective Services (CPS) "indicated" a report, following an investigation of the subject victim's allegations, which demonstrated that CPS "found credible evidence that there [was] some abuse or maltreatment." Such evidence "intruded upon the function of the jury to determine whether to credit the victim's [allegations]" (*Ballerstein*, 52 AD3d at 1193; *see People v Ciaccio*, 47 NY2d 431, 439; *People v Heil*, 70 AD3d 1490, 1492). Further, we conclude that the court erred in admitting the testimony of a police detective to the effect that defendant never asked for details of the allegations against him. That testimony, which was elicited by the prosecutor, infringed upon defendant's right to remain silent. " 'Based on constitutional considerations, it has long been and continues to be the law in this State that a defendant's silence cannot be used by the People as a part of their direct case' " (*People v Maier*, 77 AD3d 681, 683; *see People v Whitley*, 78 AD3d 1084, 1085; *People v Chatman*, 14 AD3d 620, 621; *see generally People v Basora*, 75 NY2d 992, 993-994; *People v De George*, 73 NY2d 614, 618-619). Here, the evidence of defendant's choice to remain silent on the specifics of the allegations "created a prejudicial inference of consciousness of guilt" (*Whitley*, 78 AD3d at 1085). Further, the prosecutor's comment during summation that the presumption of innocence is a "notion" was patently improper (*see People v Alfaro*, 260 AD2d 495, 496; *People v Bussey*, 62 AD2d 200, 203-205).

Finally, the prosecutor's statement during her cross-examination of the victim's mother that she was not testifying honestly was manifestly improper (*see People v Bailey*, 58 NY2d 272, 277; *People v Russell*, 307 AD2d 385, 386). As the court recognized, the prosecutor was not entitled to impeach the credibility of the mother's testimony on a collateral issue (*see People v Pavao*, 59 NY2d 282, 288-289; *People v Jones*, 190 AD2d 31, 34; *see also People v McCright*, 107 AD2d 766, 767). Although defendant therefore was entitled to "a strong curative instruction" in order to dispel the prejudice occasioned by the remark (*People v Layton*, 16 AD3d 978, 980, *lv denied* 5 NY3d 765), the court failed to give one. The clear impropriety of the prosecutor's remark, in the absence of an appropriate curative instruction, contributed to the cumulative effect of evidentiary errors and prosecutorial misconduct, which deprived defendant of his right to a fair trial (*see generally Ballerstein*, 52 AD3d at 1192-1193).

We further agree with defendant that several counts of the indictment must be dismissed. Count three of the indictment charges

the same crime as count two, and thus count three should be dismissed as multiplicitous (*see People v Pruchnicki*, 74 AD3d 1820, 1822, *lv denied* 15 NY3d 855; *People v Moffitt*, 20 AD3d 687, 690-691, *lv denied* 5 NY3d 854). Those two counts charged defendant with course of sexual conduct against a child in the second degree based upon acts occurring between September 2001 and June 2003. The People contend that the two counts are not multiplicitous inasmuch as the victim spent summers living away from defendant, creating an interruption of approximately two months that was sufficient to end one course of sexual conduct and begin another. We reject that contention. A course of sexual conduct conviction may rest on as few as two incidents of sexual conduct "over a period of time *not less than three months* in duration" (Penal Law §§ 130.75 [1] [emphasis added]; 130.80). Given that the statute thus plainly contemplates the possibility of a single course of sexual conduct with interruptions significantly longer than two months, count three must be dismissed (*see Pruchnicki*, 74 AD3d at 1822; *Moffitt*, 20 AD3d at 690-691).

Under the same line of reasoning, count five of the indictment must be dismissed as multiplicitous of count six because both counts were based upon one course of conduct occurring between September 2006 and June 2008 (*see Pruchnicki*, 74 AD3d at 1822; *Moffitt*, 20 AD3d at 690-691). Furthermore, we note that count five, which charges course of sexual conduct against a child in the first degree, is a lesser included offense of count six, which charges predatory sexual assault against a child. Count five thus would be subject to dismissal on that ground as well (*see People v Beauharnois*, 64 AD3d 996, 999-1001, *lv denied* 13 NY3d 834), although the issue is unpreserved for our review (*see* CPL 470.05 [2]). We conclude that, although the contentions regarding multiplicity are not preserved for our review (*see id.*; *People v Kobza*, 66 AD3d 1387, 1388, *lv denied* 13 NY3d 939), our review is warranted in the interest of justice because defendant received consecutive sentences on all of the aforementioned counts. Nevertheless, we decline to exercise our power to review defendant's multiplicity contentions with respect to counts 12 through 16, which are also not preserved for our review.

Defendant preserved for our review his challenge to the legal sufficiency of the evidence with respect to counts 7 through 11 of the indictment, which charge three counts of criminal sexual act in the second degree and two counts of sexual abuse in the second degree. As the People correctly concede, the evidence adduced at trial is legally insufficient to support the conviction with respect to the above counts, which therefore must be dismissed (*see generally People v Oberlander*, 60 AD3d 1288, 1289-1291). Finally, defendant's constitutional challenges are raised for the first time on appeal and are therefore not preserved for our review (*see People v Miles*, 294 AD2d 930, 930-931, *lv denied* 98 NY2d 678; *see generally People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408, *rearg denied* 7 NY3d 742; *People v Peck*, 31 AD3d 1216, 1216, *lv denied* 9 NY3d 992). In any event, those challenges have no merit.

In light of our determination, we do not address defendant's

remaining contentions.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

806

CA 11-00835

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

KATHLEEN E. ANDRESS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE A. ANDRESS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LABIN & BUFFOMANTE, WILLIAMSVILLE (CLAYTON J. LENHARDT OF COUNSEL), FOR DEFENDANT-APPELLANT.

ZARCONE ASSOCIATES, PLLC, GETZVILLE (KELLY V. ZARCONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered August 30, 2010. The order, inter alia, directed defendant to pay plaintiff's counsel fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of plaintiff's motion seeking counsel fees and vacating the award of counsel fees and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, defendant appeals from an order in this post-matrimonial proceeding that, inter alia, directed him to pay plaintiff's counsel fees. Initially, we note that defendant's contentions regarding the amounts of maintenance and interest he was required to repay to plaintiff are not properly before this Court because Supreme Court decided those issues in a prior order from which defendant has not taken an appeal nor, in any event, is that order included in the record on appeal (*see* CPLR 5501 [a]; *Matter of Wahlstrom v Carlson*, 55 AD3d 1399, 1400; *Vigliotti v State of New York*, 24 AD3d 1217, 1218, *lv denied* 6 NY3d 819, 854). We agree with defendant, however, that the court abused its discretion in granting that part of plaintiff's motion seeking an award of counsel fees (*see Carnicelli v Carnicelli*, 300 AD2d 1093, 1094*; see generally McCracken v McCracken*, 12 AD3d 1201, 1201). While plaintiff asserted in support of her motion that she incurred counsel fees solely because of defendant's failure to disclose his remarriage, the record establishes that, even had he disclosed that information, the contested issues regarding maintenance would have nevertheless required litigation. Moreover, the record is silent regarding the court's rationale for awarding plaintiff counsel fees, and "thus we are unable to determine whether the court considered 'appropriate factors' in granting" that part of plaintiff's motion (*Carnicelli*, 300 AD2d at 1094; *see*

generally Vicinanzo v Vicinanzo, 193 AD2d 962, 966). We conclude on the record before us that the award is not appropriate, and we therefore modify the order in appeal No. 1 by denying that part of plaintiff's motion seeking counsel fees and vacating the award of counsel fees.

With respect to appeal No. 2, we note that defendant appeals from an amended domestic relations order (DRO) and that no appeal as of right lies from a DRO (*see Cuda v Cuda* [appeal No. 2], 19 AD3d 1114, 1114). While we may treat the notice of appeal in appeal No. 2 as an application for leave to appeal (*see id.*), we see no need to do so in light of our determination in appeal No. 1.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

807

CA 11-01934

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

KATHLEEN E. ANDRESS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE A. ANDRESS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LABIN & BUFFOMANTE, WILLIAMSVILLE (CLAYTON J. LENHARDT OF COUNSEL), FOR DEFENDANT-APPELLANT.

ZARCONE ASSOCIATES, PLLC, GETZVILLE (KELLY V. ZARCONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered May 2, 2011. The amended order distributed the vested retirement benefits of plaintiff.

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

Same Memorandum as in *Andress v Andress* ([appeal No. 1] ___ AD3d ___ [July 6, 2012]).

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

810

CA 11-02565

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

IN THE MATTER OF THE ARBITRATION BETWEEN
PHILADELPHIA INSURANCE COMPANY,
PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

UTICA NATIONAL INSURANCE GROUP, DOING BUSINESS
AS UTICA MUTUAL INS. CO., RESPONDENT-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (JOSEPH M. SCHNITTER OF COUNSEL), FOR RESPONDENT-APPELLANT.

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered March 7, 2011 in a proceeding pursuant to CPLR article 75. The order, among other things, granted the petition to vacate an arbitration award.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the petition is denied, the cross motion is granted and the arbitration award is confirmed.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR 7511 (b) seeking vacatur of the arbitration award on the ground that arbitration was not available because under Insurance Law § 5105 (a) neither of the vehicles involved in the collision was "used principally for the transportation of persons or property for hire." We conclude that Supreme Court erred in granting the petition to vacate the arbitration award and in denying the cross motion to confirm the award. Inasmuch as petitioner failed to apply for a stay of arbitration before arbitration, petitioner waived its contention that respondent's claim for reimbursement of first-party benefits is not arbitrable under Insurance Law § 5105 (*see Matter of Liberty Mut. Ins. Co. [Allstate Ins. Co.]*, 234 AD2d 901). In view of that waiver, petitioner may not thereafter seek to vacate the arbitration award on the ground that the arbitration panel exceeded its power (*see id.*; *Matter of Utica Mut. Ins. Co. v Incorporated Vil. of Floral Park*, 262 AD2d 565, 566; *see also Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 583).

Were we to reach the issue whether respondent's vehicle was used principally for the transportation of persons or property for hire

under Insurance Law § 5105, we would agree with our dissenting colleagues that the appropriate standard of review is whether the award was arbitrary and capricious (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223). However, despite acknowledging that we must apply a deferential standard of review, the dissent proceeds to conduct, with laser-like precision, a comprehensive legal analysis of the statutory phrase "vehicle used principally for the transportation of persons or property for hire" (§ 5105). In reaching a legal conclusion as to the appropriate definition to be assigned to the subject phrase, the dissent relies upon eight different definitions of or references to the phrase "vehicle for hire," which the dissent concedes arise in "other [statutory or legal] contexts." Notably, none of those definitions or references relied upon by the dissent was raised during arbitration or on appeal.

As the court recognized, petitioner has "contended from the outset that there is no legal or factual basis here for loss transfer pursuant to [Insurance Law §] 5105," and we disagree with the dissent's conclusion that "at no point during the course of the proceedings in this matter did petitioner take the position that the claim was not arbitrable." Indeed, in addition to labeling its defense as one for "lack of jurisdiction," petitioner twice asserted in the arbitration that it was "not subject to the loss transfer procedure." Thus, we have no difficulty concluding that petitioner took the position that the claim was not arbitrable. In concluding that the phrase assigned to petitioner's defense ("lack of jurisdiction") is not dispositive, our dissenting colleagues fail to offer any explanation of what was otherwise meant thereby. Moreover, the dissent's reliance on *Matter of Progressive Cas. Ins. Co. v New York State Ins. Fund* (47 AD3d 633) is misplaced because, unlike here, the petitioner in *Progressive* "at no point during the course of the proceedings . . . [took] the position that *the arbitration panel lacked jurisdiction* or that the . . . claim was not arbitrable" (*id.* at 634 [emphasis added]). Thus, that case does not support the dissent's position that petitioner, despite labeling its defense as one for "lack of jurisdiction," did not assert that the claim was not arbitrable.

Both the dissent and the court disregard controlling precedent of this Court in determining that petitioner's contention was not waived (*see Liberty Mut. Ins. Co.*, 234 AD2d 901). The doctrine of stare decisis "recognizes that legal questions, once resolved, should not be reexamined every time they are presented" (*Dufel v Green*, 198 AD2d 640, 640, *affd* 84 NY2d 795). " 'The doctrine . . . rests upon the principle that a court is an institution, not merely a collection of individuals, and that governing rules of law do not change merely because the personnel of the court changes' " (*People v Taylor*, 9 NY3d 129, 148, quoting *People v Bing*, 76 NY2d 331, 338, *rearg denied* 76 NY2d 890). Stare decisis " 'is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process' " (*id.*; *see People v Damiano*, 87 NY2d 477, 488-489 [Simons,

J., concurring]; *Baden v Staples*, 45 NY2d 889, 892).

Here, this Court has previously held that, by failing to apply for a stay before arbitration, an insurer waives the contention that the claim is not arbitrable under Insurance Law § 5105 (*Liberty Mut. Ins. Co.*, 234 AD2d 901). In the instant matter, the court acknowledged our decision in *Liberty Mut. Ins. Co.*, but concluded that it was overruled by *Motor Veh. Acc. Indem. Corp*. (89 NY2d 214). That was error. Indeed, the Court of Appeals in *Motor Veh. Acc. Indem. Corp*. did not hold that insurers are precluded from obtaining judicial review of the threshold question of whether a claim was subject to loss-transfer arbitration under section 5105. Rather, the courts of this State have long recognized that a court has the power to resolve the threshold question whether a loss-transfer arbitration should be stayed under CPLR article 75 (*see Matter of State Farm Mut. Auto Ins. Co. v Aetna Cas. & Sur. Co.*132 AD2d 930, 931, *affd* 71 NY2d 1013; *City of Syracuse v Utica Mut. Ins. Co.*, 90 AD2d 979, *affd* 61 NY2d 691; *Utica Mut. Ins. Co.*, 262 AD2d 565; *Liberty Mut. Ins. Co.,* 234 AD2d 901).

Motor Veh. Acc. Indem. Corp. (89 NY2d 214), also relied upon by the dissent as a basis for concluding that the award is arbitrary and capricious, involved an "erroneous application of the Statute of Limitations" by the arbitrator (*id*. at 224). In concluding that such an error of law was *not* arbitrary and capricious as a matter of law, the Court in *Motor Veh. Acc. Indem. Corp*. noted the varying interpretations of the limitations rule by the courts. Here, there is a paucity of decisions interpreting the phrase "for hire" in the Insurance Law § 5105 context, and our own decision on this point noted that the statute is "inartfully drafted" and does not limit the universe of vehicles embraced thereby to "taxis and buses, and livery vehicles" (*State Farm Mut. Auto. Ins. Co.*, 132 AD2d at 931). Therefore, even assuming, arguendo, that we could reach the issue, we would conclude that, under the circumstances presented, it cannot be said that the arbitration panel's award was arbitrary and capricious or was unsupported by any reasonable hypothesis (*see Motor Veh. Acc. Indem. Corp*., 89 NY2d at 224).

All concur except PERADOTTO and SCONIERS, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. Unlike the majority, we conclude that petitioner did not waive its contention that the vehicle owned by its insured and involved in the subject accident was not "used principally for the transportation of persons or property for hire" within the meaning of Insurance Law § 5105 (a). We further conclude that there is no evidentiary support or rational basis for the arbitration panel's determination that the at-issue vehicle—a minivan owned by a nonprofit community residence for developmentally disabled individuals and used by its employees to transport the six residents of the group home—is a vehicle "for hire" under that section.

Petitioner's insured, Rivershore, Inc. (Rivershore), is a private, nonprofit organization that provides residential and

community support services to individuals with developmental disabilities. Rivershore operates several state-funded community residences for people with disabilities, including a residence on 17th Street in Niagara Falls. On May 11, 2009, Rivershore employee Thomas Beckhorn, a night program manager at the 17th Street residence, was on his way to pick up one of the residents from her mother's home when he was involved in a motor vehicle accident with a vehicle owned by Mary D. Farmel and operated by Cheryl K. French. French sustained injuries in the accident. At the time of the accident, Beckhorn was operating a minivan owned by Rivershore and insured by petitioner. The Farmel vehicle was insured by respondent. After paying first-party personal injury protection (first-party) benefits to and on behalf of French, respondent filed an application for inter-company arbitration, seeking reimbursement of those benefits from petitioner pursuant to the loss-transfer provisions of Insurance Law § 5105. In a "Contentions Sheet" submitted to the arbitration panel, petitioner contended that it was "not subject to the loss[-]transfer procedure because not one of the vehicles in the accident weighed more than 6,500 lbs. and/or neither vehicle was used principally for transportation of persons or property for hire." In an amended contentions sheet, petitioner specifically contended that the minivan operated by Beckhorn weighed between 5,001 and 6,000 pounds, and that it was not used for the transportation of persons or property for hire. Rather, petitioner asserted that the minivan "was used in the course of providing general services to a disabled person, services that are regularly provided by Rivershore[ ] . . . to its developmentally disabled residents."

The arbitration panel determined that the Rivershore minivan "meet[s] the definition of a livery for this loss" and awarded respondent the full amount of the first-party benefits respondent had paid to French. Petitioner then commenced this proceeding seeking to vacate the arbitration award pursuant to CPLR 7511 (b) on the ground that the award was without evidentiary support or rational basis and thus was arbitrary and capricious insofar as the arbitration panel determined that the minivan was a vehicle for hire within the meaning of Insurance Law § 5105. Respondent cross-moved to confirm the award. Supreme Court granted the petition, denied the cross motion, and vacated the arbitration award on the ground that the arbitrators "acted irrationally and without an evidentiary basis" in concluding that the minivan was "used principally for the transportation of persons or property for hire" (§ 5105). We would affirm.

As relevant here, Insurance Law § 5105 (a) provides that "[a]ny insurer liable for the payment of first[-]party benefits . . . which another insurer would otherwise be obligated to pay . . . but for the provisions of th[e No Fault Statute]" has a "*right to recover* [those benefits] . . . only if at least one of the motor vehicles involved . . . [weighs] more than [6,500] pounds unloaded or is . . . *used principally for the transportation of persons or property for hire*" (emphasis added). Thus, the right to recovery under that statute's loss-transfer provision is limited to accidents in which one of the involved vehicles (1) exceeds 6,500 pounds, or (2) transports persons or property "for hire." The Legislature amended section 5105 (a) in 1977 to add those alternative conditions with the intention of

"limit[ing] the right of insurance carriers to recover first-party payments" (*Matter of State Farm Mut. Auto. Ins. Co. v Aetna Cas. & Sur. Co.*, 132 AD2d 930, 931, *affd* 71 NY2d 1013; *see Matter of Progressive Northeastern Ins. Co. [New York State Ins. Fund]*, 56 AD3d 1111, 1112, *lv denied* 12 NY3d 713). Pursuant to section 5105 (b), "mandatory arbitration is the sole remedy regarding disputes between insurers over responsibility for payment of first-party benefits" (*State Farm Mut. Auto Ins. Co. v Nationwide Mut. Ins. Co.*, 150 AD2d 976, 977; *see also* NY St Ins Dept 2005 Circular Letter No. 10, *RE: PIP [No-Fault] Inter-company Loss Transfer Procedures* ["If there is a dispute with respect to a claim arising pursuant to [s]ection 5105, the sole remedy of any insurer or compensation provider is via the submission of the controversy to a mandatory arbitration program"]).

Contrary to the contention of respondent and the conclusion of the majority, we conclude that at no point during the course of the proceedings in this matter did petitioner assert that the claim was not arbitrable, i.e., that the arbitrators lacked the authority to adjudicate the claim (*see Matter of Progressive Cas. Ins. Co. v New York State Ins. Fund*, 47 AD3d 633, 634; *cf. Matter of Liberty Mut. Ins. Co. [Allstate Ins. Co.]*, 234 AD2d 901). During arbitration, petitioner did not object to proceeding in the arbitral forum or contend that the claim was not subject to arbitration, and does not so contend on appeal. Rather, petitioner asserted on the merits that respondent could not recover pursuant to the loss-transfer provisions of Insurance Law § 5105 because neither vehicle involved in the accident weighed more than 6,500 pounds or was used principally for the transportation of persons or property for hire. Thus, petitioner's "participation in the arbitration proceeding without first moving for a stay of arbitration did not constitute a waiver of its contention that the [minivan] was not [a vehicle for hire] within the meaning of . . . [section] 5105" (*Progressive Cas. Ins. Co.*, 47 AD3d at 634). The fact that petitioner's contentions sheet labeled its defense as one for "lack of jurisdiction" is not dispositive of the issue whether petitioner asserted that the claim was not arbitrable. The substance of petitioner's contention, i.e., that the minivan did not qualify as a vehicle for hire, "is a condition precedent to ultimate recovery [under section 5105], *not a condition precedent to 'access to the arbitral forum' "* (*id.*, quoting *Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 7 [emphasis added]; *see Progressive Northeastern Ins. Co.*, 56 AD3d at 1112). In light of the broad scope of the mandatory arbitration provision in Insurance Law § 5105 (b), we conclude that petitioner properly submitted the issue whether the minivan was a "vehicle . . . for hire" to the arbitration panel for determination (§ 5105 [a]; *see Progressive Cas. Ins. Co.*, 47 AD3d at 634) and, arguably, had no choice but to do so (*see* § 5105 [b]; *Paxton Natl. Ins. Co. v Merchants Mut. Ins. Co.*, 74 AD2d 715, 716, *affd* 53 NY2d 646 ["Arbitration provides the sole remedy in loss transfer between insurers and the arbitration panel is the proper forum . . . for the determination of all questions of law and fact which may arise in connection with the remedy that respondent seeks"]).

With respect to the merits, "[w]here, as here, the parties are obligated by statutory mandate to submit their dispute to arbitration (*see* Insurance Law § 5105 [b]), the arbitrator's determination is subject to 'closer judicial scrutiny' than with voluntary arbitration" (*Progressive Northeastern Ins. Co.*, 56 AD3d at 1113, quoting *Matter of Motor Veh. Acc. Indemn. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223; *see Matter of Furstenberg [Aetna Cas. & Sur. Co.-Allstate Ins. Co.]*, 49 NY2d 757, 758). "To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious" (*Motor Veh. Acc. Indemn. Corp.*, 89 NY2d at 223). Further, "article 75 review questions whether the decision was rational or had a plausible basis" (*Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 211; *see Progressive Cas. Ins. Co.*, 47 AD3d at 634).

It was respondent's burden, as the party seeking reimbursement, to establish its right to recovery under Insurance Law § 5105 (a) (*see Progressive Northeastern Ins. Co.*, 56 AD3d at 1112; *see also Matter of Hanover Ins. Co. v State Farm Mut. Auto. Ins. Co.*, 226 AD2d 533, 534). Here, we conclude not only that respondent failed to meet its burden, but we also conclude that there is no evidentiary support or rational basis for the arbitrators' determination that the minivan was principally used to transport persons "for hire," a condition precedent to respondent's entitlement to reimbursement under section 5105 (a) (*see Progressive Northeastern Ins. Co.*, 56 AD3d at 1113). As this Court held in *State Farm Mut. Auto Ins. Co.* (132 AD2d at 931), "the words 'for hire' modify the word 'vehicle' and . . . the statute covers only those vehicles hired to transport people, *such as taxis and buses, and livery vehicles hired to transport property*" (emphasis added). We agree with the court that, under the circumstances of this case, "the Rivershore minivan cannot be categorized as or even likened to a taxi or bus."

The term "vehicle for hire" is commonly understood and defined in other contexts as a vehicle held out to the public for the provision of transportation services in exchange for a fee (*see generally* Penal Law § 60.07 [2] [b] [defining " 'for-hire vehicle' " as "a vehicle designed to carry not more than five passengers for compensation and such vehicle is a taxicab, . . . a livery, . . . or a 'black car' "]; Vehicle and Traffic Law § 121-e [defining "livery" as "(e)very motor vehicle, other than a taxicab or a bus, used in the business of transporting passengers for compensation"]; Vehicle and Traffic Law § 401 [5-a] [a] [ii] [defining "motor vehicle operated for hire" as "mean(ing) and includ(ing) a taxicab, livery, coach, limousine or tow truck"]; Ops Gen Counsel NY Ins Dept No. 1-12-2001 [Jan. 2001] ["The phrase 'a motor vehicle used principally for the transportation of persons or property for hire' refers to vehicles hired to transport people and livery vehicles hired to transport property"]). Such vehicles are typically operated by drivers who are required to have a particular certification or license, and are subject to specialized licensing, insurance, safety, and other requirements (*see e.g.* Vehicle and Traffic Law § 148-a [defining a "taxicab" as "[e]very motor vehicle, other than a bus, used in the business of transporting passengers for compensation, and operated in such business under a

license or permit issued by a local authority"]; Vehicle and Traffic Law § 370 [1] [requiring filing of indemnity bond or insurance policy by every person or entity "engaged in the business of carrying or transporting passengers for hire in any motor vehicle"]; Vehicle and Traffic Law § 375 [23] ["Every motor vehicle operated for hire upon the public highways of this state shall be equipped with handles or other devices which shall permit the door or doors to the passenger compartment to be readily opened from the interior of the vehicle"]; *see generally* Vehicle and Traffic Law § 498 [governing interjurisdictional pre-arranged for-hire vehicle operations]).

The evidence before the arbitration panel in this case consisted of the deposition testimony of Beckhorn, the driver of the minivan, and material from Rivershore's Web site. Such evidence establishes that Rivershore is not in the business of transporting members of the public for compensation, and that the Rivershore minivan was not used for that purpose. Rivershore's Web site states that it supports 12 state-funded community residences for individuals with developmental disabilities, and "serves many more people in their private homes throughout Niagara County." In addition to its residential services, Rivershore "provides life planning services, clinical services, and support with employment and volunteer pursuits." Beckhorn testified that he worked at the 17th Street community residence as a nighttime program manager, and that, at the time of the accident, he was driving to pick up one of the residents from her mother's house. Beckhorn testified that he was not specifically hired to pick up the resident; rather, transporting residents of the group home was only one of his many duties as a program manager. Beckhorn did not charge a fare, and he was not paid per trip. Further, the record establishes that Beckhorn possessed a "regular" driver's license and that the minivan bore passenger plates rather than livery or commercial license plates.

In determining that the minivan constituted a vehicle for hire under Insurance Law § 5105 (a), the arbitrators relied upon Beckhorn's testimony that he "was going to pick up one of Rivershore's customers," as well as materials from Rivershore's Web site, which, according to the arbitrators, "proves that [Rivershore] offers a series of services for their customers . . . [including] transportation to appointments." Beckhorn's testimony, however, establishes that he was on his way to pick up not simply a "customer[]" of Rivershore; rather, he was picking up a resident of the 17th Street community residence in a minivan used by Rivershore staff for group home purposes. With respect to Rivershore's Web site, none of the materials submitted to the arbitration panel refer to Rivershore's provision of transportation services, let alone the transportation of customers "for hire." The portion of the Web site relied upon by the arbitrators applies to Rivershore's individualized service environment program, which is "designed for people *who live in their own apartment or house, or in a family dwelling*" (emphasis added), not for individuals who live in a community residence. In any event, even if that program was involved here, the Web site does not state that Rivershore provides transportation services to program participants. Rather, it states that "[h]ighly trained staff will visit [participants'] home[s] and provide supports to help [them]

achieve [their] goals, which are specific and individualized to [each participant]. These supports include assisting [participants] in completing all necessary daily activities, *assisting [them] with attending any needed medical appointments*, and gaining further independence, productivity and inclusion in [their] community" (emphasis added).

In sum, the record establishes that the Rivershore minivan was not held out to the community as a vehicle transporting people "for hire." To the contrary, the minivan was assigned to the 17th Street community residence for the exclusive purpose of assisting the six individuals who live there with activities of daily living, i.e., shopping, attending events, family visits, etc. The driver of the minivan was not hired for the purpose of providing transportation and did not possess a specialized license to provide transportation services; rather, he was hired to provide residential services to the residents of the group home that, from time to time, included driving them to various activities. We therefore conclude that the arbitration panel's determination that the at-issue minivan was "used principally for the transportation of persons . . . for hire" lacks evidentiary support or a rational basis, and thus that the court properly vacated the arbitration award on that ground (Insurance Law § 5105 [a]; *see generally Progressive Northeastern Ins. Co.*, 56 AD3d at 1113-1114; *Progressive Cas. Ins. Co.*, 47 AD3d at 634).

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

811

CA 12-00349

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

MEAD SQUARE COMMONS, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF VICTOR, DEFENDANT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (KARL S. ESSLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

REID A. HOLTER, VICTOR, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered November 7, 2011. The judgment denied plaintiff's motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying defendant's cross motion to the extent that it sought dismissal of the declaratory judgment causes of action, reinstating those causes of action, and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that section 170-13 of defendant's Zoning Ordinance is valid and enforceable

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking injunctive relief and a declaration that section 170-13 (C) (1) of defendant's Zoning Ordinance (Ordinance) is unlawful, invalid and unenforceable. That section prohibits the operation of a "formula fast-food restaurant" (FFFR) in defendant's "Central Business District" (§ 170-13 [C] [1] [d]; *see* Ordinance §§ 50-12, 170-3 [B]). An FFFR is defined in section 170-13 (C) (1) (b) as "[a]ny establishment, required by contract, franchise or other arrangements, to offer two or more of the following: [1] Standardized menus, ingredients, food preparation, and/or uniforms[;] [2] Prepared food in ready-to-consume state[;] [3] Food sold over the counter in disposable containers and wrappers[;] [4] Food selected from a limited menu[;] [5] Food sold for immediate consumption on or off premises[;] [6] Where customer pays before eating." The stated purpose of section 170-13 (C) (1) is "to maintain [defendant's] . . . unique village character, the vitality of [its] commercial districts, and the quality of life of [its]

residents."

Plaintiff, a limited liability company that owns real property in the Central Business District, challenges the validity of Ordinance § 170-13 because plaintiff seeks to lease commercial space for a Subway restaurant, which qualifies as an FFFR under the Ordinance. In its complaint, plaintiff alleges that section 170-13 is unconstitutional because it "is based solely upon the ownership or control of the restaurant owner and not upon the characteristics of the use itself." Plaintiff further alleges that section 170-13 should be declared invalid because it "excessively regulates the details" of plaintiff's business operation. Plaintiff moved for summary judgment, and defendant cross-moved for summary judgment dismissing the complaint. Supreme Court denied plaintiff's motion and granted defendant's cross motion.

Relying largely on *Matter of Dexter v Town Bd. of Town of Gates* (36 NY2d 102), plaintiff contends that the court erred in rejecting its allegation that Ordinance § 170-13 improperly regulates the ownership rather than the use of property within the Central Business District. We reject that contention. In *Dexter*, the Town Board resolved to rezone 12 acres of land from a residential classification to a commercial classification to permit the construction of a supermarket (*see id.* at 104). The resolution was conditioned, however, upon a specified corporation developing the land and constructing the supermarket, which suggested that the site would revert back to its former classification if that corporation did not develop the property (*see id.* at 106). The Court of Appeals held that such a condition was invalid based upon its "lack of adherence to the fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it" (*id.* at 105; *see Matter of St. Onge v Donovan*, 71 NY2d 507, 514-517). The fundamental rule referred to in *Dexter* is in essence a "prohibition against *ad hominem* zoning decisions" (*Village of Valatie v Smith*, 83 NY2d 396, 403; see *St. Onge*, 71 NY2d at 514-517).

Here, unlike in *Dexter*, the challenged Ordinance section does not single out a particular property owner for favorable or unfavorable treatment (*cf. St. Onge*, 71 NY2d at 516-517; *Dexter*, 36 NY2d at 104-106; *Matter of Kempisty v Town of Geddes*, 93 AD3d 1167, 1170-1171). Rather, all property owners in the Central Business District are treated the same under section 170-13 inasmuch as all property owners are prohibited from operating an FFFR (*see Village of Valatie*, 83 NY2d at 403). Contrary to plaintiff's related contention, we conclude that section 170-13 regulates the use, not the ownership, of the subject property. Indeed, plaintiff is not an FFFR, nor does it seek to operate an FFFR. Instead, plaintiff is a property owner that seeks to rent commercial space to an FFFR. Thus, it is plaintiff's use of the property that is being regulated, and its ownership status is irrelevant.

We further conclude that the court properly determined that Ordinance § 170-13 does not improperly regulate the manner of plaintiff's business operations *(cf. Matter of Old Country Burgers*

Co., Inc. v Town Bd. of Town of Oyster Bay, 160 AD2d 805, 806; *Matter of Schlosser v Michaelis*, 18 AD2d 940, 940-941). We note that plaintiff failed to preserve for our review any contention that there is no rational basis for distinguishing between FFFRs and non-FFFRs that meet two or more of the criteria set forth in section 170-13 because it did not advance that contention in support of its motion (*see Morgan v Town of W. Bloomfield*, 295 AD2d 902, 904).

Finally, we conclude that the court erred in granting that part of the defendant's cross motion seeking dismissal of the declaratory judgment causes of action rather than declaring the rights of the parties (*see Pless v Town of Royalton*, 185 AD2d 659, 660, *affd* 81 NY2d 1047; *Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954). We therefore modify the judgment by denying defendant's cross motion to the extent that it sought summary judgment dismissing the declaratory judgment causes of action, reinstating those causes of action, and declaring section 170-13 of the Ordinance, including the prohibition of FFFRs, is valid and enforceable.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

815

KA 09-00176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM ALLEN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 21, 2008. Defendant was resentenced upon his conviction of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and false personation.

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

Memorandum: Defendant was convicted upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and now appeals from the resentence, contending that his waiver of the right to appeal is not valid and thus does not encompass his present challenge to the severity of the sentence. Although defendant validly waived the right to appeal at the plea proceeding (*see generally People v Lopez*, 6 NY3d 248, 256), that waiver does not preclude him from challenging the sentence imposed upon resentencing (*see People v Gray*, 32 AD3d 1052, 1053, *lv denied* 7 NY3d 902; *People v Tausinger*, 21 AD3d 1181, 1183; *see generally People v Dexter*, 71 AD3d 1504, 1504-1505, *lv denied* 14 NY3d 887; *People v Rodriguez*, 259 AD2d 1040). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

820.2/11
KA 10-00823

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMBER MARACLE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 25, 2009. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the second degree and forgery in the second degree (four counts). The judgment was dismissed in part and affirmed by order of this Court entered June 10, 2011 in a memorandum decision (85 AD3d 1652), and defendant on September 23, 2011 was granted leave to appeal to the Court of Appeals from the order of this Court (17 NY3d 860), and the Court of Appeals on June 27, 2012 reversed the order and remitted the case to this Court for further proceedings consistent with the memorandum (___ NY3d ___ [June 27, 2012]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the appeal from the judgment insofar as it imposed sentence on the conviction of four counts of forgery in the second degree is unanimously dismissed and the judgment is modified as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of incarceration of 2a to 7 years and as modified the judgment is affirmed.

Memorandum: In *People v Maracle* (85 AD3d 1652, *revd* ___ NY3d ___ [June 27, 2012]), this Court previously dismissed defendant's appeal from the judgment in appeal No. 1 to the extent that it imposed sentence on the conviction of four counts of forgery in the second degree, and we otherwise affirmed the judgment convicting her upon her plea of guilty of grand larceny in the second degree (Penal Law § 155.40 [1]) and four counts of forgery in the second degree (§ 170.10 [1]). With respect to defendant's appeal from the resentence in appeal No. 2, we affirmed the resentence on the forgery counts

(*Maracle*, 85 AD3d at 1653). We concluded that defendant's waiver of the right to appeal encompassed her challenge to the severity of the sentence. In reversing our orders, the Court of Appeals concluded that the "plea colloquy fails to establish that defendant knowingly and intelligently waived her right to appeal the severity of her sentence" (*id.* at ___). The Court therefore remitted the matter to this Court "so that it may, should it so choose, exercise its interest of justice jurisdiction" (*id.* at ___).

Upon remittal, we agree with defendant with respect to the judgment in appeal No. 1 that the sentence imposed for grand larceny in the second degree is unduly harsh and severe. Thus, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), we modify the judgment by reducing the sentence to an indeterminate term of incarceration of 2a to 7 years. With respect to the resentence in appeal No. 2, we conclude that the sentence is not unduly harsh or severe.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

820.3/11
KA 10-01937

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMBER MARACLE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 28, 2010. Defendant was resentenced upon her conviction of forgery in the second degree (four counts). The resentence was affirmed by order of this Court entered June 10, 2011 in a memorandum decision (85 AD3d 1654), and defendant on September 23, 2011 was granted leave to appeal to the Court of Appeals from the order of this Court (17 NY3d 860), and the Court of Appeals on June 27, 2012 reversed the order and remitted the case to this Court for further proceedings consistent with the memorandum (___ NY3d ___ [June 27, 2012]).

Now, upon remittitur from the Court of Appeals,

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

Same Memorandum as in *People v Maracle* ([appeal No. 1] ___ AD3d ___ [July 6, 2012]).

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

827

KA 11-01063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CEDRIC COBB, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered April 13, 2011. The judgment convicted defendant, after a nonjury trial, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). We agree with defendant that County Court erred in refusing to suppress the statement that he made to the police. At the conclusion of the suppression hearing, defendant challenged the admissibility of the statement on the ground that the People failed to establish that the police officer who questioned him advised him that he had the right to remain silent. Although the court refused to suppress the statement "based on a determination that the warnings given were legally sufficient, examination of the transcript of the hearing discloses the absence of any proof that the component of the warnings specifically identified by [defendant] had been given," and thus the statement should have been suppressed (*People v Hutchinson*, 59 NY2d 923, 924-925; *see People v Gomez*, 192 AD2d 549, 550, *lv denied* 82 NY2d 806).

Nevertheless, we affirm the judgment because that error is harmless beyond a reasonable doubt (*see People v Chatman*, 38 AD3d 1282, 1283, *lv denied* 8 NY3d 983; *People v Thompson*, 295 AD2d 917, 918, *lv denied* 98 NY2d 772; *see generally People v Crimmins*, 36 NY2d

230, 237). The only statement made by defendant after the administration of the incomplete *Miranda* warnings was his admission that he lived in the apartment in which he was arrested. Defendant was arrested inside the apartment, however, by officers executing a warrant for his arrest at that location, and he was the only person present in the apartment at the time. Another officer was located by the rear of the apartment to prevent any escape attempt, and he observed someone throw a bag of crack cocaine from a bedroom window as the apprehending officers approached the bedroom from inside the apartment. Immediately thereafter, defendant was apprehended as he left that bedroom. In defendant's grand jury testimony, which was admitted in evidence at trial, he stated that he was the only person present in the apartment when the officers entered. At trial, officers testified that the amount of crack cocaine possessed was inconsistent with individual use, and that no paraphernalia for using crack cocaine was found in the apartment. The evidence at trial further established that defendant was apprehended leaving a bedroom in which a digital scale was discovered, and that such scales are commonly used to package drugs for sale. In addition, defendant spontaneously stated, "this is[] nothing, it's my first felony, I'll get probation," and he has not challenged the admissibility of that statement. Consequently, the evidence of defendant's guilt is overwhelming, and there is no reasonable possibility that the erroneous admission of the statement at issue contributed to the conviction (*see generally Crimmins*, 36 NY2d at 237; *People v Bastian*, 294 AD2d 882, 884, *lv denied* 98 NY2d 694).

The sentence is not unduly harsh or severe.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court

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

845

CAF 12-00352

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

IN THE MATTER OF AUSTIN M. AND ANNA M.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-APPELLANT; MEMORANDUM AND ORDER

DALE M., RESPONDENT-RESPONDENT.

NELSON LAW FIRM, MEXICO (ALLISON J. NELSON OF COUNSEL), FOR PETITIONER-APPELLANT.

THE FIX LAW FIRM, OSWEGO (ROBERT H. FIX OF COUNSEL), FOR RESPONDENT-RESPONDENT.

GLORIA FLORES BALDWIN, ATTORNEY FOR THE CHILDREN, BALDWINSVILLE, FOR AUSTIN M. AND ANNA M.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered February 3, 2012 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, denied that part of petitioner's application seeking to remove Anna M. from the custody of respondent, granted respondent unsupervised visitation with Austin M., and determined that petitioner did not make reasonable efforts to prevent the need for removal of the children from respondent's care but that the lack of such efforts was appropriate under the circumstances.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law and the facts without costs, that part of the application seeking removal of the child Anna M. is granted, respondent is granted supervised visitation with the children, and the matter is remitted to Family Court, Oswego County, for further proceedings in accordance with the following Memorandum: Petitioner commenced this neglect proceeding against respondent father and sought emergency removal of the children, Austin M. and Anna M. Following a hearing pursuant to Family Court Act § 1027, Family Court granted the application with respect to Austin but not Anna, and granted the father unsupervised visitation with Austin. Petitioner appeals, and we now reverse the order insofar as appealed from.

In a hearing held pursuant to Family Court Act § 1027 for the temporary immediate removal of a child from a home, "if the court finds that removal is necessary to avoid imminent risk to the child's life or health, it shall remove or continue the removal of the child" (§ 1027 [b] [i]). The statute further provides that, "[i]n

determining whether removal or continuing the removal of a child is necessary to avoid imminent risk to the child's life or health, the court shall consider and determine in its order whether continuation in the child's home would be contrary to the best interests of the child" (§ 1027 [b] [ii]). Thus, the court first must determine whether there is imminent risk to the child's life or health and, if there is, the court must then determine whether it is in the best interests of the child to be removed from the home or whether the risk to the child "can be mitigated by reasonable efforts to avoid removal" (*Nicholson v Scoppetta*, 3 NY3d 357, 378). The court "must balance th[e] risk [of serious harm to the child] against the harm removal might bring, and it must determine factually which course is in the child's best interests" (*id.*).

Initially, we note that it appears that the court applied a best interests analysis only and did not first make a determination whether the children were at imminent risk of harm, as required by the statute. The court removed Austin from the father's home upon determining that it was in Austin's best interests to allow the father time to engage in necessary anger management services. Nevertheless, the record is sufficient to enable this Court to make our own findings, without the need for remittitur (*see generally Matter of Charity A.*, 38 AD3d 1276, 1276). We agree with petitioner that there is a sound and substantial basis in the record for a determination that Austin was at imminent risk of harm (*see generally Matter of Thurston v Skellington*, 89 AD3d 1520, 1520). The evidence at the hearing was overwhelming that the father slapped Austin in the face with an open hand with such significant force that the child had marks on his face the next morning. The court's finding that it was not clear who caused the injury to Austin is not supported by the record. The medical testimony established that an adult caused the injury to the child, and thus only the father or his girlfriend could have caused the injury inasmuch as they were the only two adults who were with the child during the relevant time period. While Austin at first stated that his four-year-old sister hit him, he later stated that his father hit him and told Austin to say that his sister did it. The father initially gave various explanations for the injury, then admitted that he could have inflicted the injury when he "blacked out," and eventually admitted that he did indeed slap the child. The testimony at the hearing further established that the father often lost his temper with the children, particularly with Austin, and that Austin has had prior instances of bruising on him. Indeed, a caseworker for petitioner has seen Austin cower in the father's presence when the father became angry, and he pleaded with the father not to hit him. We therefore make the requisite determination that Austin was at imminent risk of harm (*see generally Nicholson*, 3 NY3d at 378) and, as noted, the court has made the requisite determination that it was in his best interests to be removed from the home.

With respect to the child Anna, petitioner alleged that Anna was derivatively neglected and also sought her removal. It is well settled that a finding of derivative neglect is appropriate when a parent " 'demonstrate[s] a fundamental defect in [his or her]

understanding of the duties and obligations of parenthood and create[s] an atmosphere detrimental to the physical, mental and emotional well-being of [his or her children]' " (*Matter of Derrick C.*, 52 AD3d 1325, 1326, *lv denied* 11 NY3d 705; *see Matter of Darren HH.*, 68 AD3d 1197, 1197-1198, *lv denied* 14 NY3d 703). We agree with petitioner that the record establishes that Anna was also at imminent risk of harm and that such risk could not be mitigated by reasonable efforts to avoid removal (*see Matter of Serenity S.*, 89 AD3d 737, 739; *Matter of Xavier J.*, 47 AD3d 815, 816). While the evidence at the hearing did not establish that Anna, unlike Austin, sustained any bruising, "[t]he Family Court Act does not require actual injury as a condition precedent to a finding of imminent risk" (*Matter of Erick C.*, 220 AD2d 282, 283).

We further agree with petitioner that the court erred in allowing the father to have unsupervised visitation with Austin. A parent should be granted "reasonable and regularly scheduled visitation unless the court finds that the child's life or health would be endangered thereby, but the court may order visitation under the supervision of an employee of a local social services department upon a finding that such supervised visitation is in the best interest[s] of the child" (Family Ct Act § 1030 [c]). The determination whether visitation is appropriate is within the sound discretion of the court, and its findings should not be disturbed unless they lack a sound and substantial basis in the record (*see Matter of Vasquez v Barfield*, 81 AD3d 1398, 1398; *Matter of Hobb Y.*, 56 AD3d 998, 999). Here, the court's determination granting the father unsupervised visitation with Austin lacks a sound and substantial basis in the record. It is not in Austin's best interests to have unsupervised visitation with the father because the record establishes that the father is unable to care for the child in a safe manner and there exists the threat of future harm to Austin. In light of our determination that both Austin and Anna were at imminent risk of harm in the father's supervision and care, we conclude that the father should have supervised visitation with the children.

We also agree with petitioner that the court erred in failing to find that it made reasonable efforts to maintain the children in the father's care, and in instead finding that reasonable efforts were not made, but that the lack of such efforts was appropriate under the circumstances. Family Court Act § 1027 (b) (ii) provides in relevant part that, "[i]n determining whether removal or continuing the removal of a child is necessary to avoid imminent risk to the child's life or health, the court shall consider and determine in its order . . . whether reasonable efforts were made . . . to prevent or eliminate the need for removal of the child from the home . . . ." In addition, "[i]f the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that the lack of such efforts was appropriate under the circumstances, the court shall include such a finding" (§ 1027 [b] [iii]). Here, the court's determination that the lack of such efforts was appropriate under the circumstances was based on its conclusion that, although petitioner had not provided anger management counseling for the father, petitioner's lack of reasonable efforts to do so was

appropriate because anger management services were not identified as being necessary until just prior to removal of the children. That was error, inasmuch as the evidence at the hearing established that petitioner had in fact provided the father with numerous services, including services that addressed the father's discipline of the children. Indeed, the record establishes that, with respect to the issue of discipline, petitioner provided an intensive family coordinator who met with the father for seven hours a week and a preventative caseworker who met with him several times a month. Petitioner also scheduled a mental health evaluation for the father and provided him with financial assistance, transportation assistance, emergency food vouchers, and case work counseling. We therefore conclude that petitioner made reasonable efforts to prevent or eliminate the need for removal of the children from the home.

Finally, we agree with petitioner that the court erred in failing to issue an order of protection. At an emergency removal hearing, "the court may, for good cause shown, issue a preliminary order of protection" (Family Ct Act § 1027 [c]). At the conclusion of the evidence, petitioner requested an order of protection requiring the father not to use any corporal punishment, and we agree with petitioner that there was "good cause" for issuing an order of protection in this case (*id.*). We therefore remit the matter to Family Court for the issuance of such an order.

Entered: July 6, 2012

Frances E. Cafarell
Clerk of the Court