SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 19, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

ELECTION LAW CASES

Counsel for any party interested in pursuing an appeal to the Court of Appeals should contact the Court of Appeals immediately upon receipt of this Court's decision.

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

619/14

CA 13-00593

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

CARING ENTERPRISES, INC., DOING BUSINESS AS
HEALTH FORCE, PLAINTIFF-RESPONDENT,

V ORDER

QBE SPECIALTY INSURANCE COMPANY,
DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (STEVEN E. PEIPER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered January 3, 2013. The judgment, rendered upon a nonjury trial, declared that defendant is obligated to defend and indemnify plaintiff in an underlying action.

Now, upon reading and filing the stipulation of withdrawal of appeal signed by the attorneys for the parties on July 9, 2015,

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

Entered: August 19, 2015

Frances E. Cafarell
Clerk of the Court

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

1061/14

CA 14-00481

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

IN THE MATTER OF WOMEN'S CENTER FOR
BREAST HEALTH, PETITIONER-RESPONDENT,

V ORDER

ASSESSOR, TOWN OF AMHERST, ET AL., RESPONDENTS.

AMHERST CENTRAL SCHOOL DISTRICT,
INTERVENOR-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR INTERVENOR-APPELLANT.

WOLFGANG & WEINMANN, LLP, BUFFALO (PETER ALLEN WEINMANN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 3, 2013 in a proceeding pursuant to RPTL article 7. The order, inter alia, denied the motion of the Amherst Central School District to dismiss the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 15, 2015,

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

Entered: August 19, 2015

Frances E. Cafarell
Clerk of the Court

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

643

KA 13-02191

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. BRADBERRY, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered September 8, 2011. The judgment convicted defendant, upon a nonjury verdict, of course of sexual conduct against a child in the first degree (two counts) and incest in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of two counts of course of sexual conduct against a child in the first degree (Penal Law § 130.75) as a lesser included offense of predatory sexual assault against a child (§ 130.96) and one count of incest in the second degree (§ 255.26). We reject defendant's contention that Supreme Court erred in refusing to dismiss the indictment based on its lack of specificity with respect to the time frames alleged in the two counts of predatory sexual assault against a child. It is well settled that the crime of predatory sexual assault against a child "is a continuing offense to which 'the usual requirements of specificity with respect to time do not apply' " (*People v Muhina*, 66 AD3d 1397, 1398, *lv denied* 13 NY3d 909; *see People v Colf*, 286 AD2d 888, 888-889, *lv denied* 97 NY2d 655). Here, the time periods of 7.5 months and one year alleged in the indictment were "sufficient to give defendant adequate notice of the charges to enable him to prepare a defense, to ensure that the crimes for which he was tried were in fact the crimes with which he was charged, and 'to protect [his] right not to be twice placed in jeopardy for the same conduct' " (*People v McLoud*, 291 AD2d 867, 868, *lv denied* 98 NY2d 678).

We reject defendant's further contention that the court erred in refusing to suppress statements that he made during a police-monitored telephone conversation with the victim. There is no merit to his

contention that the statements were admitted in violation of CPLR 4506 (1). It is well established that one of the parties to a telephone conversation may consent to the wiretapping or recording of the conversation (*see People v Phillips*, 55 AD2d 661, 661, *lv denied* 41 NY2d 868, citing *United States v White*, 401 US 745, *reh denied* 402 US 990; *cf. Pica v Pica*, 70 AD2d 931, 931-932), and here the victim gave her consent. Defendant failed to preserve for our review his contention that the victim, as a minor, could not consent to the recording of her own conversations (*see generally People v Furlong*, 4 AD3d 839, 840, *lv denied* 2 NY3d 739). We note in any event that the victim's mother consented to the recording, and we conclude that the "vicarious consent" exemption applies under the circumstances presented such that the admission of the subject recording was not barred by CPLR 4506 (*see People v Badalamenti*, 124 AD3d 672, 674, *lv granted* 25 NY3d 949; *People v Hills*, 176 AD2d 375, 375; *People v Bastian*, 125 AD2d 909, 909-910, *lv denied* 69 NY2d 824). Also contrary to defendant's contention, his statements in the controlled telephone call were not inadmissible pursuant to CPL 60.45. Even assuming, arguendo, that the victim was acting as an agent of the police when she telephoned defendant, the calls were recorded with the victim's consent (*see People v Taplin*, 1 AD3d 1044, 1045, *lv denied* 1 NY3d 635), and "the victim did not make a threat that would create a substantial risk that defendant might falsely incriminate himself" (*People v Stroman*, 286 AD2d 974, 975, *lv denied* 97 NY2d 688; *see Taplin*, 1 AD3d at 1045). We reject defendant's further contention that the controlled telephone call constituted an unconstitutionally deceptive police tactic. "Deceptive police stratagems in securing a statement 'need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession' " (*People v Dishaw*, 30 AD3d 689, 690, *lv denied* 7 NY3d 787, quoting *People v Tarsia*, 50 NY2d 1, 11), and there was no such showing here.

We reject defendant's further contention that the court erred in permitting the prosecutor to elicit testimony concerning the fact that defendant was incarcerated at a particular point in time. Such evidence was inextricably interwoven with and provided a relevant temporal reference for one of the crimes charged in the indictment (*see People v Vails*, 43 NY2d 364, 368; *People v Gantz*, 104 AD2d 692, 692-693).

Contrary to defendant's contention, we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495; *People v Lashway*, 112 AD3d 1222, 1224-1225). We reject defendant's further contention that his conviction of incest was in violation of Penal Law § 130.75 (2), which provides that "[a] person may not be subsequently prosecuted for any other sexual offense involving the same victim unless the other charged offense occurred outside the time period charged under this section." The statute prohibits only a "subsequent" prosecution and not, as here, a simultaneous prosecution (*see People v Vanlare*, 77 AD3d 1313, 1313-1314, *lv denied* 15 NY3d 956; *see also People v Harris*,

32 Misc 3d 479, 489-490, *affd* 98 AD3d 420).

Finally, contrary to defendant's contention, the court properly allowed the People's expert to testify regarding child sexual abuse accommodation syndrome and delayed disclosure of sexual abuse (*see People v Williams*, 20 NY3d 579, 583-584; *People v Black*, 124 AD3d 1365, 1366-1367).

Entered: August 19, 2015

Frances E. Cafarell
Clerk of the Court

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

675

CA 14-01918

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, SCONIERS, AND WHALEN, JJ.

LIBERTY INSURANCE UNDERWRITERS, INC.,
PLAINTIFF-APPELLANT,

V ORDER

CALLI, CALLI & CULLY, CALLI & CALLI, WILLIAM S. CALLI, JR., AS ADMINISTRATOR CTA OF THE ESTATE OF WILLIAM S. CALLI, DECEASED, ROBERT R. CALLI, WILLIAM S. CALLI, JR., HERBERT J. CULLY, JASON J. CENTONELLA AND GARY DISCHIAVI, DEFENDANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, BUFFALO (PATRICK B. OMILIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KERNAN AND KERNAN, P.C., UTICA (LEIGHTON R. BURNS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CALLI, CALLI & CULLY, CALLI & CALLI, WILLIAM S. CALLI, JR., AS ADMINISTRATOR CTA OF THE ESTATE OF WILLIAM S. CALLI, DECEASED, ROBERT R. CALLI, WILLIAM S. CALLI, JR., HERBERT J. CULLY, AND JASON J. CENTONELLA.

LUIBRAND LAW FIRM, PLLC, LATHAM (KEVIN A. LUIBRAND OF COUNSEL), FOR DEFENDANT-RESPONDENT GARY DISCHIAVI.

Appeal from an order of the Supreme Court, Oneida County (James P. McClusky, J.), entered April 24, 2014. The order denied the motion of plaintiff for partial summary judgment and granted the cross motion of defendants Calli, Calli & Cully, Calli & Calli, William S. Calli, Jr., as Administrator CTA of the Estate of William S. Calli, deceased, Robert R. Calli, William S. Calli, Jr., Herbert J. Cully and Jason J. Centonella, for partial summary judgment dismissing the cause of action for rescission.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 11, 2015,

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

Entered: August 19, 2015

Frances E. Cafarell
Clerk of the Court

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

757

CA 14-02297

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

LARRY J. LOMAGLIO,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CARMEN M. LOMAGLIO,
DEFENDANT-APPELLANT-RESPONDENT.

RICHARD S. LEVIN, WEBSTER, FOR DEFENDANT-APPELLANT-RESPONDENT.

THE ODORISI LAW FIRM, EAST ROCHESTER (TERRENCE C. BROWN-STEINER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered June 10, 2014. The order, among other things, denied that part of defendant's motion seeking to hold plaintiff in contempt.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second and fourth ordering paragraphs and granting defendant's motion to the extent that plaintiff is directed to pay the costs associated with a Medicare Advantage plan for defendant, as agreed upon by the parties, until the death of either party except during such time as defendant obtains employment with health benefits or until such time as she remarries, and as modified the order is affirmed without costs.

Memorandum: In this post-divorce action, defendant moved for an order seeking, inter alia, to hold plaintiff in contempt for failing to provide medical insurance coverage that was previously ordered by this Court (*LoMaglio v LoMaglio*, 104 AD3d 1182, 1183-1184; *Lo Maglio v Lo Maglio*, 273 AD2d 823, 824, *appeal dismissed* 95 NY2d 926). After a hearing upon our remittal for, inter alia, a determination of the level of health insurance coverage the parties had during the marriage, Supreme Court denied defendant's motion except to the extent that it directed plaintiff to pay some of defendant's counsel fees and costs. Defendant appeals and plaintiff cross-appeals.

Contrary to defendant's contention, we agree with plaintiff that the court properly determined that he should not be held in contempt because defendant failed to prove by " 'clear and convincing evidence' " that plaintiff " 'violated a clear and unequivocal mandate of the [C]ourt' " to provide medical insurance coverage at the same level that he provided during the marriage because defendant failed to

establish what that specific level of medical insurance coverage was (*Belkhir v Amrane-Belkhir*, 128 AD3d 1382, 1382). We also agree with plaintiff that the court properly determined that defendant failed to prove by a "preponderance of the evidence," as required by the terms of the stipulation made by the parties prior to the hearing, the extent and nature of the unreimbursed medical expenses incurred by her after 2008. We likewise reject defendant's further contention that the trial court, " 'upon . . . remittitur, . . . [erred in failing] to obey the mandate of the higher court, and render judgment in conformity therewith' " (*Wiener v Wiener*, 10 AD3d 362, 363). The record establishes that the court, in its written decision following the hearing, properly acknowledged its obligation to direct plaintiff to pay for medical insurance coverage as we directed upon remittal, but further explained that it lacked the evidence to direct plaintiff to pay a specific amount. Indeed, we recognize that, as a result of defendant's failure to prove the level of health insurance coverage that the parties had during the marriage, the court was unable to implement our prior order.

Nevertheless, our prior decision remains the law of the case, and we decline to disturb that decision (*see generally Cluff v Day*, 141 NY 580, 582-583). Plaintiff correctly contends that, because defendant is receiving Medicare, he is not obligated pursuant to our prior order to provide defendant with "double coverage," i.e., a medical insurance policy. Rather, plaintiff must pay the costs necessary to supplement defendant's Medicare coverage. We therefore modify the order by directing plaintiff to pay the costs associated with a Medicare Advantage plan as agreed upon by the parties. Inasmuch as we required plaintiff to provide medical insurance coverage because of the permanent nature of defendant's medical condition (*LoMaglio*, 273 AD2d at 824), we further conclude that plaintiff's obligation shall continue until the death of either party, except during any period in which defendant has employment with health insurance benefits, or until such time as she remarries. We therefore further modify the order accordingly.

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

Entered: August 19, 2015

Frances E. Cafarell
Clerk of the Court

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

883

CAE 15-01318

PRESENT: SCUDDER, P.J., LINDLEY, SCONIERS, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF DEAN E. LAPP, II,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PETER SMOLINSKI, RESPONDENT-APPELLANT,
LORA ALLEN AND JENNIFER FRONCZAK, AS COMMISSIONERS
CONSTITUTING NIAGARA COUNTY BOARD OF ELECTIONS,
RESPONDENTS-RESPONDENTS.

JOSEPH F. TOWNSEND, LOCKPORT, JEROME D. SCHAD, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

LAW OFFICE OF HENRY F. WOJTASZEK, NIAGARA FALLS (HENRY F. WOJTASZEK OF COUNSEL), FOR PETITIONER-RESPONDENT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT (JOSEPH BURNS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 6, 2015 in a proceeding pursuant to the Election Law. The order granted the petition in part and directed the Niagara County Board of Elections to strike respondent Peter Smolinski's name from the official ballots for the 2015 Republican Party and Democratic Party primary elections for the North Tonawanda Alderman-at-Large, four-year term.

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

Memorandum: Petitioner commenced this proceeding seeking, as relevant on appeal, an order invalidating designating petitions filed on July 8, 2015, pursuant to which Peter Smolinski (respondent) sought to be placed on the primary election ballots for the Republican Party and Democratic Party as a candidate for one of two offices, with different terms, for Alderman-at-Large on the North Tonawanda Common Council. We conclude that Supreme Court properly granted the petition in part. As a preliminary matter, we note that, pursuant to Election Law § 16-102 (2), petitioner was required to commence this proceeding "within fourteen days after the last day to file the [designating] petition[s]." Here, the last day on which to file the designating petitions was July 9, 2015 and, thus, the statutory limitations period expired on July 23, 2015. Contrary to respondent's contention, the proceeding was timely commenced because the order to

show cause and petition were properly served on respondent in accordance with the court's order (*see* § 16-116), i.e., affixed to the door of respondent's residence and mailed via United States Postal Service Express Mail on July 22, 2015, the day before the last day of the statutory limitations. That method of service was "reasonably calculated to give notice" to respondent within the statutory limitations period (*Matter of Contessa v McCarthy*, 40 NY2d 890, 891; *cf. Matter of Buhlmann v LeFever*, 83 AD2d 895, 896, *affd for reasons stated* 54 NY2d 775). With respect to the merits, Election Law § 6-134 (1) provides in relevant part that, "[i]f two or more offices having the same title are to be filled for different terms, the terms of office shall be included as part of the title of the office." Here, the court properly determined that the designating petitions were " 'fatally defective' " inasmuch as they omitted the terms of office for which respondent sought to run (*Matter of Williams v Westchester County Bd. of Elections*, 65 AD3d 653, 654).

Entered: August 19, 2015

Frances E. Cafarell
Clerk of the Court

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

886

CAE 15-01339

PRESENT: SCUDDER, P.J., LINDLEY, SCONIERS, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF DAVID G. BONIELLO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA COUNTY BOARD OF ELECTIONS, LORA ALLEN
AND JENNIFER FRONCZAK, AS COMMISSIONERS
OF NIAGARA COUNTY BOARD OF ELECTIONS, AND
MATTHEW MARRA, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

JAMES OSTROWSKI, BUFFALO, FOR PETITIONER-APPELLANT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT, FOR RESPONDENTS-RESPONDENTS NIAGARA COUNTY BOARD OF ELECTIONS, AND LORA ALLEN AND JENNIFER FRONCZAK, AS COMMISSIONERS OF NIAGARA COUNTY BOARD OF ELECTIONS.

MICHAEL J. SULLIVAN, FREDONIA, FOR RESPONDENT-RESPONDENT MATTHEW MARRA.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered August 14, 2015 in a proceeding pursuant to Election Law article 16. The order, insofar as appealed from, denied and dismissed the petition and directed that the name of petitioner shall not be placed on the Working Families Party primary ballot for the office of Niagara Falls City Court Judge.

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

Memorandum: Petitioner commenced the proceeding in appeal No. 1 seeking to validate his designating petition for the position of Niagara Falls City Court Judge on the Working Families Party primary ballot, and he commenced the proceeding in appeal No. 2 seeking to validate his designating petition for that same position on the Republican Party primary ballot. In each proceeding, Supreme Court denied the petition, and petitioner appeals.

In appeal No. 1, petitioner contends that the court erred in determining that the failure of a notary to date the jurat of authentification on one page of signatures on petitioner's designating petition was fatal to the validity of those signatures. The page contained nine signatures, and the only writing on the date line was

the numeral "9." Contrary to petitioner's contention, we conclude that the court "correctly held that [his failure] to date [the] jurat[] of authentication placed on his designating petition[] was fatal to the validity of [that] petition[]" (*Matter of Sortino v Chiavaroli*, 59 AD2d 644, 644, *affd* 42 NY2d 982; *see Matter of Stevens v Collins*, 120 AD3d 696, 697-698; *see also Matter of Quinn v Erie County Bd. of Elections*, 120 AD3d 992, 992-993, *lv denied* 23 NY3d 908; *cf. Matter of Berney v Bosworth*, 87 AD3d 948, 949). The date of authentication by a notary, like the date of a signed statement by a subscribing witness, is a matter of statutorily-prescribed content for which " 'strict compliance is required' " (*Quinn*, 120 AD3d at 993; *see* Election Law § 6-132 [2], [3]; *Matter of Alamo v Black*, 51 NY2d 716, 717; *Stevens*, 120 AD3d at 697).

Petitioner further contends in each appeal that the manner in which respondent Niagara County Board of Elections (Board) invalidated his designating petitions violated the Open Meetings Law and his due process rights to notice and a hearing. In a proceeding to validate a designating petition, however, "the burden of proof is on the candidate to establish that the petition is valid," and not merely to establish that the Board committed a procedural error (*Matter of Goldstein v Carlsen*, 59 AD2d 642, 643, *affd* 42 NY2d 993; *see Matter of Schneeberg v New York State Bd. of Elections*, 51 NY2d 814, 815). In view of our rejection of petitioner's sole basis for contending that his designating petition was valid in appeal No. 1, as well as his failure to set forth any basis for contending that his designating petition was valid in appeal No. 2, we conclude that he "failed to meet his burden of establishing the validity of his designating petition[]" in either proceeding irrespective of the alleged violations of the Open Meetings Law and his due process rights (*Matter of Adamczyk v Mohr*, 87 AD3d 833, 835, *lv denied* 17 NY3d 706; *see Schneeberg*, 51 NY2d at 815; *Matter of Mansfield v Epstein*, 5 NY2d 70, 74). In any event, "[p]etitioner was not entitled to any greater due process than that provided by the statutory process for judicial review of [the Board's] determination pursuant to Election Law § 16-102 (1) . . . , and petitioner took advantage of that process" (*Matter of Iocovozzi v Herkimer County Bd. of Elections*, 76 AD3d 797, 798; *see Matter of Meader v Barasch*, 133 AD2d 925, 926-927, *lv denied* 70 NY2d 611).

Entered: August 19, 2015

Frances E. Cafarell
Clerk of the Court

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

887

CAE 15-01340

PRESENT: SCUDDER, P.J., LINDLEY, SCONIERS, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF DAVID G. BONIELLO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA COUNTY BOARD OF ELECTIONS, LORA ALLEN
AND JENNIFER FRONCZAK, AS COMMISSIONERS OF
NIAGARA COUNTY BOARD OF ELECTIONS, AND
MICHAEL S. GAWEL, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

JAMES OSTROWSKI, BUFFALO, FOR PETITIONER-APPELLANT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT, FOR RESPONDENTS-RESPONDENTS NIAGARA COUNTY BOARD OF ELECTIONS, AND LORA ALLEN AND JENNIFER FRONCZAK, AS COMMISSIONERS OF NIAGARA COUNTY BOARD OF ELECTIONS.

MICHAEL J. SULLIVAN, FREDONIA, FOR RESPONDENT-RESPONDENT MICHAEL S. GAWEL.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered August 14, 2015 in a proceeding pursuant to Election Law article 16. The order, insofar as appealed from, denied and dismissed the petition and directed that the name of petitioner shall not be placed on the Republican Party primary ballot for the office of Niagara Falls City Court Judge.

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

Same memorandum as in *Matter of Boniello v Niagara County Bd. of Elections* ([appeal No. 1] ___ AD3d ___ [Aug. 19, 2015]).

Entered: August 19, 2015

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 19, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

ELECTION LAW CASES

Counsel for any party interested in pursuing an appeal to the Court of Appeals should contact the Court of Appeals immediately upon receipt of this Court's decision.

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

884

CAE 15-01319

PRESENT: SCUDDER, P.J., LINDLEY, SCONIERS, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF FRANCES J. ANGLETTI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS MORREALE, RESPONDENT-APPELLANT,
LORA ALLEN AND JENNIFER FRONCZAK, AS COMMISSIONERS
CONSTITUTING NIAGARA COUNTY BOARD OF ELECTIONS,
RESPONDENTS-RESPONDENTS.

JOSEPH F. TOWNSEND, LOCKPORT, JEROME D. SCHAD, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

LAW OFFICE OF SHAWN P. NICKERSON, NORTH TONAWANDA (SHAWN P. NICKERSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT (JOSEPH BURNS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 6, 2015 in a proceeding pursuant to Election Law article 16. The order granted the petition and directed the Niagara County Board of Elections to strike respondent Marcus Morreale's name from the ballot for the 2015 primary and general elections as a Democratic Party candidate for the office of Niagara County Legislator, Eighth District.

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

Memorandum: Marcus Morreale (respondent) appeals from an order granting the petition and directing respondent Commissioners of the Niagara County Board of Elections (Board) to strike respondent from the Ballot for the 2015 primary and general elections as a Democratic Party candidate for the office of Niagara County Legislator, Eighth District (County Legislator office). We affirm.

On July 8, 2015, a designating petition was filed with the Board purporting to designate respondent as a Democratic Party candidate for the County Legislator office. Respondent declined the designation, but the committee to fill vacancies subsequently designated respondent—apparently with his consent—as the substitute candidate for the vacancy he himself had created by initially declining the designation (*see generally* Election Law § 6-148 [1]).

Petitioner filed a formal objection to the substitution with the Board, but the Board rejected the objection. Petitioner then commenced the instant proceeding pursuant to Election Law § 16-102, seeking to invalidate the certificate of substitution. The petition was verified by petitioner's attorney, who admittedly has offices in Niagara County, where petitioner resides. Supreme Court subsequently granted the petition, holding that the Election Law did not permit a committee to fill vacancies to designate a substitute candidate whose own declination caused the vacancy at issue.

The petition filed in the County Clerk's Office was verified by petitioner's attorney, whose office was in Niagara County (*see* CPLR 3020 [d] [3]). As a preliminary matter, we reject respondent's contention that the verification of the petition by petitioner's attorney constitutes a jurisdictional defect (*see Matter of Miller v Board of Assessors*, 91 NY2d 82, 86; *People ex rel. New York City Omnibus Corp. v Miller*, 282 NY 5, 9). We note that respondent did not waive that contention by failing to exercise his right to treat the petition as a nullity (*see* CPLR 3022). Respondent could not have objected to the alleged improper verification by returning the petition to petitioner's attorney with due diligence and with notification of his reason for doing so inasmuch as the petition served on respondent was verified by petitioner himself (*cf. Lepkowski v State of New York*, 1 NY3d 201, 210). Even assuming, arguendo, that the verification of petitioner's attorney was improper because petitioner was in "the county where the attorney has his office" (CPLR 3020 [d] [3]), we conclude that "any defect in the verification of the petition 'should be ignored inasmuch as [respondent] failed to demonstrate that [he] was substantially prejudiced by the alleged defect' " (*Matter of Perez v Perez*, 71 AD3d 1496, 1496, *lv denied* 14 NY3d 714).

We reject respondent's further contention that the petition was not timely served. In the order to show cause accompanying the petition, the court authorized service by any of 10 enumerated methods, including, as relevant to this appeal, "by affixing the [commencement papers] to the outer or inner door of [his] residence . . . AND by enclosing the same in a securely sealed and duly prepaid wrapper, addressed to [respondent] at the address set forth in [the] designating petition, and depositing the same with a depository of the United States Postal Service [USPS] via Express Mail on or before the **23rd day of July, 2015**." It is undisputed that July 23, 2015 was the last day on which to commence the proceeding. The record establishes that the commencement papers were affixed, i.e., "nailed," to the door of respondent's residence on July 22, 2015, and the commencement papers were mailed to respondent's residence by USPS "Express Mail" on July 23, 2015.

In a proceeding under article 16 of the Election Law, the petitioner must satisfy two distinct service requirements. First, the petitioner must provide "such notice to [the respondent or respondents] as the court or justice shall direct" (§ 16-116). Here, there is no dispute that petitioner " 'strictly complied with' " the

court's service directions (*Matter of Grimaldi v Board of Elections of the State of N.Y.*, 95 AD3d 1644, 1646; *see Matter of O'Daniel v Hayduk*, 59 AD2d 706, 707, *affd for reasons stated* 42 NY2d 1062). As noted above, the commencement papers were affixed to the door of respondent's residence on July 22, 2015, and they were mailed to respondent's residence by USPS Express Mail on July 23, 2015. Thus, both the mailing and the "nailing" occurred "on or before the 23rd day of July, 2015" as directed by the court.

Second, the petitioner must effectuate " 'actual delivery of the instrument of notice not later than the last day on which the proceeding may be commenced' " (*Matter of Yellico v Ringer*, 185 AD2d 965, 966; *see Matter of Riley v Democratic Party of Owasco*, 21 AD3d 708, 709, *lv denied* 5 NY3d 707). In other words, the respondents must "receive delivery" of the order to show cause and the verified petition "within the [statute of limitations] period" (*Matter of Thompson v New York State Bd. of Elections*, 40 NY2d 814, 815). That requirement operates irrespective of the court's specific service directions under section 16-116 (*see Matter of Rotanelli v Westchester County Bd. of Elections*, 41 Misc 3d 254, 261, *affd* 109 AD3d 562; *Matter of Davis v McIntyre*, 43 AD3d 636, 636-637).

Contrary to the view of our dissenting colleagues, we conclude that petitioner effectuated "actual delivery" of the commencement papers when they were affixed to respondent's front door. It is well established that because "the [commencement] papers were timely affixed to the front door, the fact that the papers mailed were not received on [or before the statute of limitations date] was not a jurisdictional defect" (*Matter of O'Connor v Power*, 30 AD2d 926, 926, *affd* 22 NY2d 889; *see Matter of Weill v Erickson*, 49 AD2d 895, 897, *affd* 37 NY2d 851; *Matter of Serri v Heffernan*, 298 NY 629, 629-631; *Matter of Marcoccia v Garfinkle*, 307 AD2d 1010, 1010-1011, *lv denied* 100 NY2d 509). In fact, respondent's argument to the contrary is indistinguishable from the dissent at the Court of Appeals in *Serri*, which, citing *Matter of King v Cohen* (293 NY 435)—a 1944 case predating New York's commencement-by-filing system and thus of dubious precedential value—argued that service was untimely when both the nailing and the mailing were not completed within the statute of limitations period (298 NY at 631 [Conway and Dye, JJ., dissenting]).

Although respondent concedes that *O'Connor* and similar cases are directly on point, he contends that *O'Connor* was overruled by *Matter of Buhlmann v Le Fever* (54 NY2d 775, *affg for reasons stated* 83 AD2d 895). We reject that contention. The issue in *O'Connor* was whether a last-day "nailing" satisfied the *King* requirement even if the corresponding mailing could not have arrived within the statute of limitations period, and the Court determined that it did. The Court in *Buhlmann*, on the other hand, never considered that issue, presumably because the commencement papers in that case were nailed to the "outside wall" of the respondent's residence (83 AD2d at 896), not to the "door" as directed by CPLR 308 (4). *Buhlmann* thus considered only whether a last-day mailing could, by itself, satisfy the *King* requirement, and the Court held that it could not. *Buhlmann* is

therefore distinguishable from *O'Connor*, as well as from the facts of this case.

Contrary to respondent's assertion, neither *Matter of Ehle v Wallace* (195 AD2d 1086, 1086, *lv denied* 82 NY2d 653), nor *Davis* (43 AD3d at 637), supports reversal. Unlike respondent here, the respondents in those cases did not receive the commencement papers on or before the expiration of the statute of limitations period.

Finally, turning to the merits, we conclude that the court properly determined that the committee to fill vacancies was properly barred from designating respondent to fill a vacancy created by his own declination. "The Election Law plainly contemplates that the candidate designated to fill a vacancy shall be a person other than the person originally named" (*Matter of Nestler v Cohen*, 242 App Div 726, 726). It therefore necessarily follows that a person who creates a vacancy by his or her own declination cannot thereafter be designated by the committee to fill vacancies as the substitute designee for the very same position (*see Matter of Garfinkel v Power*, 208 Misc 719, 720, *affd* 286 App Div 957, *affd* 309 NY 779; *see generally Curtin v Mahoney*, 52 AD2d 716, 716-717).

All concur except SCUDDER, P.J., and VALENTINO, J., who dissent and vote to reverse in accordance with the following memorandum: We agree with the majority that the verification of the petition by petitioner's attorney does not constitute a jurisdictional defect (*see Matter of Miller v Board of Assessors*, 91 NY2d 82, 86; *People ex rel. New York City Omnibus Corp. v Miller*, 282 NY 5, 9), and that Supreme Court properly determined that the committee to fill vacancies could not designate Marcus Morreale (respondent) to fill a vacancy created by his own declination (*see Matter of Garfinkel v Power*, 208 Misc 719, 720, *affd* 286 App Div 957, *affd* 309 NY 770; *see generally Curtin v Mahoney*, 52 AD2d 716, 716-717). We respectfully disagree, however, with the majority's conclusion that respondent was timely served with the order to show cause and petition. We would reverse the order and dismiss the petition, and we therefore dissent.

As the majority explains, the record establishes that the papers were affixed to the door of respondent's residence on July 22, 2015, and that on July 23, 2015, the last day of the 14-day period to commence the proceeding, they were mailed by USPS Express Mail, in accordance with the service authorized by the order to show cause, i.e., "as the court or justice shall direct" (Election Law § 16-116). Although the service complied with the court's directive, in our view, it is not sufficient that respondent may have received notice by "nailing" alone within the statutory period.

We recognize that the Court of Appeals affirmed the order in *Matter of O'Connor v Power* (30 AD2d 926, *affd* 22 NY2d 889), wherein our colleagues in the Second Department determined that, "[i]n [their] opinion, since the orders and the supporting papers were timely affixed to the front door, the fact that the papers mailed were not received on [or before the statute of limitations date] was not a jurisdictional defect" (*id.* at 926). We disagree with the majority

however, that the determination of the Court of Appeals in *Matter of King v Cohen* (293 NY 435, 439), i.e., that mailing the papers on the last day of the statutory period was not sufficient, is of "dubious precedential value." The Court of Appeals determined in *King* that the requirement of Election Law § 16-116 (formerly § 335) that "[t]he parties against whom a proceeding of this kind is brought are entitled to such notice thereof as the court, justice or judge shall direct . . . calls for delivery of the instrument of notice not later than on the last day on which the proceeding may be commenced . . . Consequently[,] the attempted service by mail [on the last day] was ineffectual . . . [inasmuch as] the use of registered mail is likely to result in a failure of timely delivery of notice of the proceeding" (*King*, 293 NY at 439 [internal quotation marks omitted]). As we explained in *Matter of Ehle v Wallace* (195 AD2d 1086, 1086, *lv denied* 82 NY2d 653), the requirement in Election Law § 16-116 "calls for *delivery* of the instrument of notice not later than on the last day on which the proceeding may be commenced". Here, the "instrument of notice" is the nailing *and* mailing of the papers (*Ehle*, 195 AD2d at 1086) and, indeed, both nailing and mailing are required by CPLR 308 (4) for service (*see Hopkins v Tinghino*, 248 AD2d 794, 795). In other words, in accordance with our precedent in *Ehle*, we interpret *King* to require delivery of the papers as directed by the court in the order to show cause, i.e., nailing and mailing, within the statutory period. Here, the mailing was not accomplished "at a time when it might reasonably have been expected that receipt would occur within the statutory period" (*Matter of Contessa v McCarthy*, 40 NY2d 890, 891). Although the order to show cause permitted mailing by USPS Express Mail on July 23, 2015, we note that the " 'provision could not and did not extend the period of limitations within which to institute the proceeding within the meaning of the Election Law' " (*Matter of Davis v McIntyre*, 43 AD3d 636, 637).

Entered: August 19, 2015

Frances E. Cafarell
Clerk of the Court

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

885

CAE 15-01320

PRESENT: SCUDDER, P.J., LINDLEY, SCONIERS, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF LARRY L. HELWIG,
PETITIONER-RESPONDENT,

V ORDER

MICHAEL ASKLAR, RESPONDENT-APPELLANT,
LORA ALLEN AND JENNIFER FRONCZAK, AS
COMMISSIONERS OF NIAGARA COUNTY BOARD OF
ELECTIONS, RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENTS.

JOSEPH F. TOWNSEND, LOCKPORT, JEROME D. SCHAD, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

LAW OFFICE OF SHAWN P. NICKERSON, NORTH TONAWANDA (SHAWN P. NICKERSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT (JOSEPH BURNS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 6, 2015 in a proceeding pursuant to Election Law article 16. The order granted the petition in part and ordered the Niagara County Board of Elections to strike respondent Michael Asklar's name from the ballot for the 2015 primary and general elections as a Democratic Party candidate for the office of Niagara County Legislator, Seventh District.

It is hereby ORDERED that the order so appealed from is affirmed without costs for reasons stated in *Matter of Angletti v Morreale* (___ AD3d ___ [Aug. 19, 2015]).

All concur except SCUDDER, P.J., and VALENTINO, J., who dissent and vote to reverse the order insofar as appealed from and dismiss the petition in its entirety for reasons stated in the dissenting memorandum in *Matter of Angletti v Morreale* (___ AD3d ___ [Aug. 19, 2015]).

Entered: August 19, 2015

Frances E. Cafarell
Clerk of the Court