



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

DECISIONS FILED

FEBRUARY 18, 2011

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. JEROME C. GORSKI

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

1624

CA 10-01004

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

IN THE MATTER OF STATE UNIVERSITY OF NEW YORK,
PETITIONER/PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF AMHERST, SATISH MOHAN, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS SUPERVISOR OF
TOWN OF AMHERST, TOWN BOARD OF TOWN OF AMHERST,
ZONING BOARD OF APPEALS OF TOWN OF AMHERST,
GMH COMMUNITIES, LP, COLLEGE PARK INVESTMENTS,
LLC, DAVID LADE, NANCY LADE, WILLIAM S. SCHLEGEL,
JOSE OLIVERA, MICHELE OLIVERA, LESTER C.
BUSDIECKER, MATTHEW MAROTTA, PAMELA MAROTTA,
MARK R. KELLAM, PAUL CUMMINS, PAMELA CUMMINS,
ETTORE INFANTI, MARTIN KEITZ, KIMBERLY MAST,
JEFFREY BROOKS, BARBARA BROOKS, DANIEL P. HULL,
THOMAS KETCHUM, IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF TOWN OF AMHERST BUILDING DEPARTMENT,
RESPONDENTS/DEFENDANTS-RESPONDENTS,
AND EUGENE TENNEY,
RESPONDENT/DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL),
FOR PETITIONER/PLAINTIFF-APPELLANT-RESPONDENT.

E. THOMAS JONES, TOWN ATTORNEY, WILLIAMSVILLE (ALAN P. MCCrackEN OF
COUNSEL), FOR RESPONDENTS/DEFENDANTS-RESPONDENTS TOWN OF AMHERST,
SATISH MOHAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERVISOR
OF TOWN OF AMHERST, TOWN BOARD OF TOWN OF AMHERST, ZONING BOARD OF
APPEALS OF TOWN OF AMHERST AND THOMAS KETCHUM, IN HIS OFFICIAL
CAPACITY AS DIRECTOR OF TOWN OF AMHERST BUILDING DEPARTMENT.

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (EUGENE C. TENNEY OF
COUNSEL), FOR RESPONDENT/DEFENDANT-RESPONDENT-APPELLANT.

HOPKINS & SORGI, PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR
RESPONDENTS/DEFENDANTS-RESPONDENTS GMH COMMUNITIES, LP, COLLEGE PARK
INVESTMENTS, LLC, DAVID LADE, NANCY LADE, WILLIAM S. SCHLEGEL, JOSE
OLIVERA, MICHELE OLIVERA, LESTER C. BUSDIECKER, MATTHEW MAROTTA,
PAMELA MAROTTA, MARK R. KELLAM, PAUL CUMMINS, PAMELA CUMMINS, ETORE
INFANTI, MARTIN KEITZ, KIMBERLY MAST, JEFFREY BROOKS, BARBARA BROOKS
AND DANIEL P. HULL.

Appeal and cross appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered January 12, 2010 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment granted the motions of respondents/defendants to dismiss the petition/complaint.

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

Memorandum: Petitioner/plaintiff (petitioner) contends in each appeal that Supreme Court erred in granting the motions of respondents/defendants (respondents) to dismiss the hybrid CPLR article 78 proceeding/declaratory judgment action concerning rezoning. According to respondents, petitioner lacked the capacity and authority to sue inasmuch as petitioner's Board of Trustees had neither authorized the commencement of these lawsuits nor ratified them after they were commenced. We reject petitioner's contention. "Capacity to sue is a threshold question involving the authority of a litigant to present a grievance for judicial review. The issue of capacity often arises when a governmental entity seeks to bring suit" (*Matter of Town of Riverbed v New York State Bd. of Real Prop. Serve.*, 5 NY3d 36, 41; see *Matter of Grazing v County of Albany*, 3 NY3d 475, 478-479). " 'Being artificial creatures of statute, such entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate' " (*Town of Riverbed*, 5 NY3d at 41-42, quoting *Community Bd. 7 of Borough of Manhattan v Schaefer*, 84 NY2d 148, 155-156). Pursuant to Education Law §§ 352 and 353 and petitioner's bylaws, all of petitioner's corporate powers are to be exercised by the Board of Trustees. As a result, a lawsuit brought in petitioner's name must be authorized by the Board of Trustees or another entity or individual designated by the Board of Trustees and given the express authority to authorize the lawsuit. After petitioner has been authorized by the Board of Trustees to commence litigation, it must then notify the Attorney General so that he or she may participate or join (see Executive Law § 63 [1]). The record contains no evidence that the Board of Trustees either approved or ratified these lawsuits or delegated its authority to do so to another entity or individual. Contrary to petitioner's further contention, there is nothing about the procedure for the Board of Trustee's authorization of lawsuits that would serve to undermine the Attorney General's duties and authority under the Executive Law (see generally § 63).

Finally, we reject the contention of respondent/defendant Eugene Tenney in each cross appeal that the court erred in denying his request for attorney's fees.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1625

CA 10-01407

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

IN THE MATTER OF STATE UNIVERSITY OF NEW YORK,
PETITIONER/PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF AMHERST, SATISH MOHAN, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS SUPERVISOR OF
TOWN OF AMHERST, TOWN BOARD OF TOWN OF AMHERST,
ZONING BOARD OF APPEALS OF TOWN OF AMHERST,
GMH COMMUNITIES, LP, COLLEGE PARK INVESTMENTS,
LLC, DAVID LADE, NANCY LADE, WILLIAM S. SCHLEGEL,
JOSE OLIVERA, MICHELE OLIVERA, LESTER C.
BUSDIECKER, MATTHEW MAROTTA, PAMELA MAROTTA,
MARK R. KELLAM, PAUL CUMMINS, PAMELA CUMMINS,
ETTORE INFANTI, MARTIN KEITZ, KIMBERLY MAST,
JEFFREY BROOKS, BARBARA BROOKS, DANIEL P. HULL,
THOMAS KETCHUM, IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF TOWN OF AMHERST BUILDING DEPARTMENT,
RESPONDENTS/DEFENDANTS-RESPONDENTS,
AND EUGENE TENNEY,
RESPONDENT/DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL),
FOR PETITIONER/PLAINTIFF-APPELLANT-RESPONDENT.

E. THOMAS JONES, TOWN ATTORNEY, WILLIAMSVILLE (ALAN P. MCCrackEN OF
COUNSEL), FOR RESPONDENTS/DEFENDANTS-RESPONDENTS TOWN OF AMHERST,
SATISH MOHAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERVISOR
OF TOWN OF AMHERST, TOWN BOARD OF TOWN OF AMHERST, ZONING BOARD OF
APPEALS OF TOWN OF AMHERST AND THOMAS KETCHUM, IN HIS OFFICIAL
CAPACITY AS DIRECTOR OF TOWN OF AMHERST BUILDING DEPARTMENT.

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (EUGENE C. TENNEY OF
COUNSEL), FOR RESPONDENT/DEFENDANT-RESPONDENT-APPELLANT.

HOPKINS & SORGI, PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR
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INVESTMENTS, LLC, DAVID LADE, NANCY LADE, WILLIAM S. SCHLEGEL, JOSE
OLIVERA, MICHELE OLIVERA, LESTER C. BUSDIECKER, MATTHEW MAROTTA,
PAMELA MAROTTA, MARK R. KELLAM, PAUL CUMMINS, PAMELA CUMMINS, ETORE
INFANTI, MARTIN KEITZ, KIMBERLY MAST, JEFFREY BROOKS, BARBARA BROOKS
AND DANIEL P. HULL.

Appeal and cross appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered June 9, 2010 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment granted the motions of respondents/defendants to dismiss the petition/complaint.

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

Same Memorandum as in *Matter of State Univ. of N.Y. v Town of Amherst* ([appeal No. 1] ___ AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

1626

CA 10-01408

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

IN THE MATTER OF STATE UNIVERSITY OF NEW YORK,
PETITIONER/PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

TOWN OF AMHERST, SATISH MOHAN, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS SUPERVISOR OF
TOWN OF AMHERST, TOWN BOARD OF TOWN OF AMHERST,
ZONING BOARD OF APPEALS OF TOWN OF AMHERST,
GMH COMMUNITIES, LP, COLLEGE PARK INVESTMENTS,
LLC, DAVID LADE, NANCY LADE, WILLIAM S. SCHLEGEL,
JOSE OLIVERA, MICHELE OLIVERA, LESTER C.
BUSDIECKER, MATTHEW MAROTTA, PAMELA MAROTTA,
MARK R. KELLAM, PAUL CUMMINS, PAMELA CUMMINS,
ETTORE INFANTI, MARTIN KEITZ, KIMBERLY MAST,
JEFFREY BROOKS, BARBARA BROOKS, DANIEL P. HULL,
THOMAS KETCHUM, IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF TOWN OF AMHERST BUILDING DEPARTMENT,
RESPONDENTS/DEFENDANTS-RESPONDENTS,
AND EUGENE TENNEY,
RESPONDENT/DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL),
FOR PETITIONER/PLAINTIFF-APPELLANT-RESPONDENT.

E. THOMAS JONES, TOWN ATTORNEY, WILLIAMSVILLE (ALAN P. MCCrackEN OF
COUNSEL), FOR RESPONDENTS/DEFENDANTS-RESPONDENTS TOWN OF AMHERST,
SATISH MOHAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERVISOR
OF TOWN OF AMHERST, TOWN BOARD OF TOWN OF AMHERST, ZONING BOARD OF
APPEALS OF TOWN OF AMHERST AND THOMAS KETCHUM, IN HIS OFFICIAL
CAPACITY AS DIRECTOR OF TOWN OF AMHERST BUILDING DEPARTMENT.

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (EUGENE C. TENNEY OF
COUNSEL), FOR RESPONDENT/DEFENDANT-RESPONDENT-APPELLANT.

HOPKINS & SORGI, PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR
RESPONDENTS/DEFENDANTS-RESPONDENTS GMH COMMUNITIES, LP, COLLEGE PARK
INVESTMENTS, LLC, DAVID LADE, NANCY LADE, WILLIAM S. SCHLEGEL, JOSE
OLIVERA, MICHELE OLIVERA, LESTER C. BUSDIECKER, MATTHEW MAROTTA,
PAMELA MAROTTA, MARK R. KELLAM, PAUL CUMMINS, PAMELA CUMMINS, ETORE
INFANTI, MARTIN KEITZ, KIMBERLY MAST, JEFFREY BROOKS, BARBARA BROOKS
AND DANIEL P. HULL.

Appeal and cross appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered June 9, 2010 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment granted the motions of respondents/defendants to dismiss the petition/complaint.

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

Same Memorandum as in *Matter of State Univ. of N.Y. v Town of Amherst* ([appeal No. 1] ___ AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

22

CA 10-01784

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

SMALL BUSINESS LOAN SOURCE, LLC,
PLAINTIFF-APPELLANT,

V

ORDER

4 DOGS OF SYRACUSE, LLC, ET AL., DEFENDANTS.

JOSEPH A. KESSLER, NONPARTY RESPONDENT.

DEILY, MOONEY & GLASTETTER, LLP, ALBANY (JOHN D. RODGERS OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

HINMAN HOWARD & KATTELL, LLP, BINGHAMTON (LINDA JOHNSON OF COUNSEL),
FOR NONPARTY RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered November 3, 2009 in a foreclosure action. The order, among other things, denied plaintiff's motion for leave to pursue a deficiency judgment against nonparty guarantor Joseph A. Kessler.

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

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

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CAF 10-00241

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

IN THE MATTER OF HOLDEN W.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KELLY W., RESPONDENT-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, FOR RESPONDENT-APPELLANT.

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

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILD, FREDONIA, FOR HOLDEN W.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered January 8, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights pursuant to Social Services Law § 384-b on the ground of permanent neglect and transferring guardianship and custody of the child in question to petitioner. Contrary to the mother's contention, petitioner established by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the mother's relationship with the child (*see Matter of Sheila G.*, 61 NY2d 368, 373). The record establishes that, *inter alia*, petitioner referred the mother to treatment programs for substance abuse and mental health, both of which she failed to complete, and assisted her with transportation. Petitioner also intervened on the mother's behalf to prevent the termination of her Medicaid benefits.

We further conclude that Family Court properly determined that the mother failed to plan for the child's future (*see Matter of Rachael N.*, 70 AD3d 1374, *lv denied* 15 NY3d 708; *Matter of Lilian I.*, 60 AD3d 1491, 1492). During the 18 months between the placement of the child in foster care and the permanent neglect hearing, the mother failed to complete her treatment programs, continued to associate with the child's abusive father and appeared for at least two supervised visits with the child while under the influence of alcohol. At one of those visits, a breathalyzer test indicated that the mother had a

blood alcohol content of .10%. Finally, based on the conduct of the mother and considering the supportive and loving environment provided by the proposed adoptive parents, we conclude that the court did not abuse its discretion in denying the mother's request for a suspended judgment (*see Matter of Tiara B.*, 70 AD3d 1307, *lv denied* 14 NY3d 709; *Matter of Emmeran M.*, 66 AD3d 1490; *Matter of Jose R.*, 32 AD3d 1284, 1285, *lv denied* 7 NY3d 718).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

44

CA 10-01207

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

LAURIE LONG, AS ADMINISTRATRIX OF THE
ESTATE OF JEREMY HENDERSON, DECEASED,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.,
AND DARON T. CODY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KRISTIN A. TISCI OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

DAVID M. GREGORY, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Paula M. Ferroletto, J.), entered April 13, 2010 in a wrongful death action. The judgment granted defendants a judgment of no cause of action upon a jury verdict.

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

Memorandum: Plaintiff, as administratrix of the estate of her adult son (decedent), contends that Supreme Court erred in denying her motion to set aside the jury verdict of no cause of action as against the weight of the evidence. We affirm. Decedent was killed when he was struck by a bus while attempting to cross the street. The bus was owned by defendant Niagara Frontier Transportation Authority (NFTA), and operated by defendant DaRon T. Cody, who was employed by NFTA. In support of her motion to set aside the verdict finding that defendants were not negligent, plaintiff contended that the evidence at trial clearly established that Cody was speeding, in violation of Vehicle and Traffic Law § 1180, and that he failed to sound his horn in a timely manner, in violation of Vehicle and Traffic Law § 1146. Although plaintiff is correct that an unexcused violation of the Vehicle and Traffic Law, if proven, constitutes negligence per se (see *Stalikas v United Materials*, 306 AD2d 810, 811, *affd* 100 NY2d 626), we cannot agree with plaintiff that the evidence, when viewed in the light most favorable to defendants (see *Greene v Frontier Cent. School Dist.*, 214 AD2d 947, 948), establishes that Cody violated the Vehicle and Traffic Law.

With respect to the alleged violation of section 1180, plaintiff presented no evidence that the bus driver was speeding. Indeed, the only witness to testify regarding the speed of the bus was a certified accident reconstructionist who testified for defendants on direct examination that the bus was traveling at approximately 27 miles per hour when it struck decedent. The parties agree that the speed limit on the street in question was 30 miles per hour. The speed estimate of defendants' expert was based, *inter alia*, on a time and distance calculation derived from videotapes taken from cameras that were on the bus. The estimate of the expert concerning the length of time, *i.e.*, 1.5 seconds, in which decedent was in the street before being hit by the bus is supported not only by the videos, which were played for the jury, but also by the average pedestrian walking speed, as explained by the expert at trial. We note that plaintiff is correct that defendants' expert testified on cross-examination that, based upon the location of the bus as depicted on the accident survey prepared by a land surveyor retained by plaintiff, the bus must have been traveling at approximately 40 miles per hour when it struck decedent. We conclude, however, that such testimony created an issue of fact for the jury to resolve and did not render the expert's testimony on direct examination incredible as a matter of law. In light of the expert's conflicting testimony regarding the speed of the bus, it cannot be said that the evidence so preponderated in favor of plaintiff that the jury's verdict " 'could not have been reached on any fair interpretation of the evidence' " (*Lifson v City of Syracuse* [appeal No. 2], 72 AD3d 1523, 1524).

We similarly reject plaintiff's contention with respect to Cody's alleged violation of Vehicle and Traffic Law § 1146, which provides in relevant part that "every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary" (§ 1146 [a]). Cody admittedly did not sound the horn on the bus until he saw decedent at or about the time of impact. As noted, however, defendants' expert testified that decedent was in the street for only 1.5 seconds before impact. Considering the totality of the circumstances, including the fact that decedent was not in a crosswalk and did not have the right-of-way, as well as the fact that Cody testified that he had his eyes on the road and the oncoming traffic, we conclude the jury's determination that Cody was not negligent is supported by a fair interpretation of the evidence (*see Lifson*, 72 AD3d at 1524).

Finally, we reject plaintiff's contention that the court erred in giving an emergency instruction, as requested by defendants. "A party requesting the emergency instruction is entitled to have the jury so charged if some evidence of a qualifying emergency is presented. If, under some reasonable view of the evidence, an actor was confronted by a sudden and unforeseen occurrence not of the actor's own making, then the reasonableness of the conduct in the face of the emergency is for the jury, which should be appropriately instructed" (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, *rearg denied* 77 NY2d 990). Here, there is a reasonable view of the evidence that Cody was presented with an emergency situation, inasmuch as decedent suddenly walked into

the street, without looking for oncoming traffic. Additionally, the issues whether Cody was negligent in allegedly speeding or in failing to sound the horn of the bus in a timely manner were for the jury to resolve, and they did not preclude the court's emergency instruction (see *id.* at 328; *Feaster v New York City Tr. Auth.*, 172 AD2d 284, 284-285).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

45

CA 10-01208

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

LAURIE LONG, AS ADMINISTRATRIX OF THE
ESTATE OF JEREMY HENDERSON, DECEASED,
PLAINTIFF-APPELLANT,

V

ORDER

NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.,
AND DARON T. CODY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KRISTIN A. TISCI OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

DAVID M. GREGORY, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula M. Feroletto, J.), entered April 15, 2010 in a wrongful death action. The order denied the motion of plaintiff to set aside a jury verdict as against the weight of the evidence.

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

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

52

KA 09-02058

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LAKEEM WRIGHT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 15, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Genesee County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted rape in the second degree (Penal Law §§ 110.00, 130.30 [1]). Defendant failed to seek youthful offender status at the time of the plea proceeding or at sentencing and thus failed to preserve for our review his contention that he should have been adjudicated a youthful offender (*see People v Ficchi*, 64 AD3d 1195, *lv denied* 13 NY3d 859; *People v Capps*, 63 AD3d 1632, *lv denied* 13 NY3d 795), 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 further conclude that the sentence is not unduly harsh or severe.

We agree with defendant, however, that the order of protection must be amended. Although the order required in general terms that defendant stay away from the family of the victim, it did not comply with CPL 530.13 (1) (b) inasmuch as that statute requires that "such members of the family or household of [the] victim[] . . . shall be specifically named by the court in such order" (CPL 530.13 [1] [b]). Although defendant raises that issue for the first time on appeal and thus has failed to preserve it for our review (*see generally People v Nieves*, 2 NY3d 310, 315-317; *People v Adams*, 66 AD3d 1355, 1356, *lv denied* 13 NY3d 858), we nonetheless exercise our power to review it as

a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We therefore modify the judgment by amending the order of protection to render it in compliance with CPL 530.13 (1) (b), thus remitting the matter to County Court to specify the names of the victim's family members to whom the order of protection applies.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

57

KA 09-00818

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KAREEM GUILLORY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROBERT TUCKER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 13, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), and in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (§ 120.05 [6]) and intimidating a victim or witness in the third degree (§ 215.15 [1]). Defendant contends in each appeal that County Court abused its discretion in denying his motion to withdraw his respective pleas at the time of sentencing because, according to defendant, he entered the guilty pleas under the mistaken belief that, if he pleaded guilty, charges pending against his wife would be dismissed. We reject that contention. "Where a sentencing court keeps the promises it made at the time it accepted a plea of guilty, a defendant should not be permitted to withdraw his plea on the sole ground that he misinterpreted the agreement. Compliance with a plea bargain is to be tested against an objective reading of the bargain, and not against a defendant's subjective interpretation thereof" (*People v Cataldo*, 39 NY2d 578, 580). The further challenge by defendant in appeal No. 2 to the factual sufficiency of the plea allocutions with respect to the counts of assault in the second degree and intimidating a victim or witness in the third degree is unreserved for our review because defendant did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665; *People v Howell*, 60 AD3d 1347, 1347-1348). In any event, his

challenge is without merit. We reject defendant's further contention with respect to both appeals that the concurrent sentences imposed are unduly harsh and severe. We have considered defendant's remaining contentions and conclude that none requires reversal.

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

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KA 09-00819

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KAREEM GUILLORY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROBERT TUCKER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 13, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree and intimidating a victim or witness in the third degree.

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

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

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

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CAF 09-01165

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

IN THE MATTER OF BETH M.,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

SUSAN T., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

VICTORIA L. KING, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

ROBERT L. GOSPER, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR BRIANNA T.

Appeal from an order of the Family Court, Ontario County (Craig J. Doran, J.), entered May 5, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner guardianship of the subject child.

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

Memorandum: The subject child's mother, the respondent in appeal No. 1 and the petitioner in appeal No. 2, contends in appeal No. 1 that Family Court erred in granting the stepmother's petition under Family Court Act article 6 seeking guardianship of the child and in denying the mother's petition in appeal No. 2, also under Family Court Act article 6, seeking custody of the child. In both appeals, the mother contends that Family Court erred in admitting in evidence transcripts from 2004 proceedings concerning custody and visitation relative to the subject child. We agree with the mother that the court erred in admitting in evidence the transcripts of testimony from witnesses at the prior proceedings without first determining whether those witnesses were presently unavailable (see CPLR 4517; Family Ct Act § 165; *Matter of Dillon S.*, 249 AD2d 984; *Matter of Christina A.*, 216 AD2d 928). Nevertheless, we conclude under the circumstances of this case that the error is harmless and thus that reversal is not required inasmuch as "a substantial right of a party was not prejudiced" by that error (*Christina A.*, 216 AD2d at 928; *cf. Dillon S.*, 249 AD2d 984). The record reflects that the court primarily relied upon evidence and testimony that was presented at the fact-finding hearing on the instant petitions in making its findings of fact and conclusions of law (see *Christina A.*, 216 AD2d at 928; *cf. Dillon S.*, 249 AD2d 984; *Matter of Raymond J.*, 224 AD2d 337, 338). Thus, any reliance on the testimony of a witness at those prior proceedings was not essential to the court's conclusion herein (see

Christina A., 216 AD2d at 928). In any event, the only testimony from the 2004 proceedings to which the court referred in its findings of fact and conclusions of law was the testimony of a child sexual abuse counselor concerning her validation of the allegations of sexual abuse against the mother. Notably, however, the court's prior determination that the mother sexually abused the child is also referenced in the 2004 order and the court's findings of fact underlying that order, and on appeal the mother does not challenge the admission of that order in evidence. Thus, the admission in evidence of the transcripts from the prior proceedings is harmless for that reason as well.

Contrary to the further contention of the mother, we conclude that the stepmother met her burden of establishing the existence of extraordinary circumstances sufficient to warrant an inquiry into whether the best interests of the child would be served by awarding guardianship of the child to her, a nonparent (see generally *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544; *Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981). The evidence at the fact-finding hearing established, inter alia, that the mother had been convicted of driving while intoxicated three times, that she was on probation for the third conviction at the time of the hearing, and that she violated the terms of her probation. The evidence further established that the mother has a history of alcohol abuse, that she suffers from ongoing mental health issues, and that she has been unemployed and unable to support herself since June 2007. As discussed above, the record also contains a prior finding that the mother sexually abused the child, and the mother failed to submit any proof that she obtained a sex offender evaluation or a psychological evaluation in accordance with the terms of the 2004 order. The record thus supports the court's conclusion that, at the present time, the mother is unable to assume responsibility for the child (see *Matter of Loren B. v Heather A.*, 13 AD3d 998, 1000-1001, lv denied 4 NY3d 710; *Matter of Parliament v Harris*, 266 AD2d 217; *Matter of Carosi v Bloom*, 225 AD2d 692). Moreover, with respect to the issue of the best interests of the child, the record reflects that the child has lived with the stepmother for over four years, that the stepmother has been the child's primary caregiver during that time period, and that the stepmother has provided for the child's emotional and financial needs (see generally *Loren B.*, 13 AD3d at 1001; *Parliament*, 266 AD2d 217).

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

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CAF 09-01167

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

IN THE MATTER OF SUSAN T.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

BETH M., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

VICTORIA L. KING, CANANDAIGUA, FOR PETITIONER-APPELLANT.

ROBERT L. GOSPER, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR BRIANNA T.

Appeal from an order of the Family Court, Ontario County (Craig J. Doran, J.), entered May 5, 2009 in a proceeding pursuant to Family Court Act article 6. The order denied the petition seeking custody of the subject child.

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

Same Memorandum as in *Matter of Beth M. v Susan T.* (___ AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

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CAF 10-00256

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

IN THE MATTER OF ELIZABETH VASQUEZ,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

SHAUN BARFIELD, RESPONDENT-RESPONDENT.

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

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

KELLY M. CORBETT, ATTORNEY FOR THE CHILD, FAYETTEVILLE, FOR SHAUN
I.B., JR.

Appeal from an order of the Family Court, Onondaga County (David J. Roman, J.H.O.), entered January 4, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the petition for modification of visitation and granted the cross petition in part by awarding the parties joint custody.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the cross petition seeking joint custody of the parties' child and as modified the order is affirmed without costs.

Memorandum: In this proceeding under Family Court Act article 6, petitioner mother appeals from an order that, inter alia, denied her petition seeking to modify a prior order of custody and visitation by ordering supervised visitation with respondent father and granted that part of the father's cross petition seeking, inter alia, to modify the prior order pursuant to which the mother had sole custody of the child by awarding the parties joint custody. Contrary to the mother's contention, Family Court did not abuse its discretion in determining that supervision of the father's visitation was not warranted. "The determination of whether visitation should be supervised is a matter 'left to Family Court's sound discretion and it will not be disturbed as long as there is a sound and substantial basis in the record to support it' " (*Matter of Taylor v Fry*, 47 AD3d 1130, 1131). Here, the mother failed to establish that supervised visitation is in the child's best interests inasmuch as the allegations against the father in her petition were entirely unsubstantiated (*cf. id.*). Insofar as the mother challenges that portion of the order altering the father's visitation schedule, we conclude that such alteration was properly

ordered " 'upon a showing of a change in circumstances which reflect[ed] a real need for change to ensure the best interest[s] of the child' " (*Matter of Amy L.M. v Kevin M.M.*, 31 AD3d 1224, 1225). The record establishes that a change in the father's work schedule prevented him from exercising his visitation rights as set forth in the prior custody and visitation order (*see id.*; *see also Matter of Benjamin v Benjamin*, 48 AD3d 912).

We agree with the mother, however, that the court erred in granting that part of the father's cross petition seeking joint custody of the parties' child, and we therefore modify the order accordingly. "Joint custody should not be imposed on embattled and embittered parents who appear unable to put aside their differences for the benefit of the child" (*Matter of Lance C. v Buffy E.*, 227 AD2d 903, 904; *see Braiman v Braiman*, 44 NY2d 584, 589-590). Here, joint custody is not appropriate in view of the parties' acrimonious relationship and failure to cooperate with each other (*see Wideman v Wideman*, 38 AD3d 1318, 1319).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

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KA 10-01020

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES BOUTIN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROBERT E. MORAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered May 10, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and reckless endangerment in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of assault in the first degree (Penal Law § 120.10 [3]) to assault in the third degree (§ 120.00 [2]), reducing the conviction of reckless endangerment in the first degree to reckless endangerment in the second degree and vacating the sentence, and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for sentencing.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [3]) and reckless endangerment in the first degree (§ 120.25), both of which require a showing that they were committed under circumstances "evinced a depraved indifference to human life" (§ 120.10 [3]; § 120.25). We agree with defendant that the evidence is legally insufficient to establish that he acted with depraved indifference (*see generally People v Bleakley*, 69 NY2d 490, 495). The evidence at trial established that the incident in question occurred outside a bar just after it had closed. The intoxicated victim had been carried out of the bar by bouncers, where he was left lying on the ground. Defendant, a patron at the bar, lifted the victim up to his feet and, according to witnesses, "kneed" the victim in the face, causing him to fall backwards and strike his head on the ground. The resulting injuries included facial fractures and a closed head injury that required emergency surgery. " 'The Court of Appeals has taught that, except in rare and extraordinary circumstances, not present here, one person's attack on another, no matter how violent or how great the risk of harm it creates, does not rise to the level of depravity and

indifference to life contemplated by the statutes defining crimes committed under circumstances evincing a depraved indifference to human life' " (*People v Pomie*, 55 AD3d 630, 632, lv denied 11 NY3d 899; see *People v Russell*, 34 AD3d 850, 851, lv denied 8 NY3d 884). "[W]here a defendant's conduct endangers only a single person, to sustain a charge of depraved indifference there must be proof of 'wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target of the perpetrator's inexcusable acts' " (*People v Coon*, 34 AD3d 869, 870, quoting *People v Suarez*, 6 NY3d 202, 213). Although defendant's conduct was reprehensible, "there is no valid line of reasoning that could support [the] jury's conclusion that defendant possessed the mental culpability required for depraved indifference [assault or reckless endangerment]" (*People v Smothers*, 41 AD3d 1271, 1272, lv denied 9 NY3d 964 [internal quotation marks omitted]).

We conclude, however, that the evidence is legally sufficient to support the lesser included offenses of assault in the third degree (Penal Law § 120.00 [2]) and reckless endangerment in the second degree (§ 120.20), inasmuch as the evidence established that defendant recklessly caused injury to the victim. We therefore modify the judgment by reducing the conviction of assault in the first degree to assault in the third degree, reducing the conviction of reckless endangerment in the first degree to reckless endangerment in the second degree and vacating the sentence (see CPL 470.15 [2] [a]), and we remit the matter to County Court for sentencing. We have reviewed defendant's remaining contentions and conclude that they are without merit.

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

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CA 10-00923

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

JUDITH A. ROST, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL A. STOLZMAN, MICHAEL OLIVER,
SUSAN OLIVER, DEFENDANTS-RESPONDENTS,
JENNIFER D. MARTINO AND GINA L. AVINO,
DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (SARAH P. RERA OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF
COUNSEL), FOR DEFENDANT-RESPONDENT MICHAEL A. STOLZMAN.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS MICHAEL OLIVER AND SUSAN OLIVER.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 8, 2009 in a personal injury action. The order denied the motion of defendants Jennifer D. Martino and Gina L. Avino for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained in an automobile accident. Defendant Michael A. Stolzman backed his automobile, in which plaintiff was a passenger, out of the driveway of the home of defendants Michael Oliver and Susan Oliver and into the path of an oncoming automobile operated by defendant Jennifer D. Martino. Martino was operating the automobile with the permission of the owner, defendant Gina L. Avino. In a prior appeal, we concluded that Supreme Court properly denied, *inter alia*, that part of the Olivers' motion seeking to dismiss the negligence cause of action against them inasmuch as there was a triable issue of fact whether the Olivers were negligent with respect to that accident (*Martino v Stolzman*, 74 AD3d 1764, 1766-1767, *appeal dismissed* 15 NY3d 890, *lv granted* 79 AD3d 1832). We conclude on this appeal that Supreme Court properly denied the motion of Martino and Avino for summary judgment dismissing the amended complaint against them

inasmuch as there is a triable issue of fact whether Martino was negligent in the operation of the automobile owned by Avino.

Defendants contend that the court erred in denying their motion because there is no admissible evidence indicating that Martino was negligent. We reject that contention. " '[A]n operator [of an automobile] who has the right[-]of[-]way is entitled to anticipate that other [automobiles] will obey the traffic laws that require them to yield' " (*Barile v Carroll*, 280 AD2d 988, 988; see *Hillman v Eick*, 8 AD3d 989, 991). Consequently, although " '[n]egligence cases . . . do not usually lend themselves to summary judgment' " (*Hyatt v Messana*, 67 AD3d 1400, 1401, quoting *Ugarriza v Schmieder*, 46 NY2d 471, 474), an operator of an automobile involved in an accident similar to that at issue may establish entitlement to summary judgment, i.e., that he or she was free from negligence, by demonstrating that the other automobile "suddenly entered the lane where [that driver] was operating [his or her automobile] in a lawful and prudent manner and that there was nothing [that driver] could have done to avoid the collision" (*Bulls v Massara*, 71 AD3d 1408, 1409 [internal quotation marks omitted]; see *Fratangelo v Benson*, 294 AD2d 880). Here, defendants met their initial burden on the motion by demonstrating that the accident occurred after the automobile operated by Stolzman entered the path of the oncoming automobile operated by Martino (see e.g. *DeLuca v Cerda*, 60 AD3d 721; *Yasinovsky v Lenio*, 28 AD3d 652).

We further conclude, however, that plaintiff and the remaining defendants raised a triable issue of fact in opposition to the motion (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). All drivers have a general " 'duty to see that which through the proper use of [their] senses [they] should have seen' " (*Huff v Rodriguez*, 45 AD3d 1430, 1431; see *Hyatt*, 67 AD3d at 1402). Here, the papers submitted in opposition to the motion included evidence that Martino could not remember whether she was using her windshield wipers on the rainy night of the accident, that Martino had four or five drinks on that night and that Martino was prescribed the medications Zoloft and Xanax at the time of the accident. Further, although Martino testified at her deposition that she did not feel impaired by alcohol at the time of the accident, she told police at the accident scene that she had not consumed alcohol on the night of the accident and, according to Avino, Martino tried to switch seats with Avino after the impact. Moreover, Martino could not recall where she was looking prior to the accident and did not attempt to avoid colliding with the automobile operated by Stolzman. That evidence, when viewed in its entirety, raises a triable issue of fact sufficient to defeat the motion (see *Harris v Jackson*, 30 AD3d 1027, 1028; see generally *Zuckerman*, 49 NY2d at 562).

We note that, in reaching our determination, we have disregarded the affidavit of the accident reconstruction expert submitted in support of the motion inasmuch as the conclusions asserted therein "are speculative or unsupported by any evidentiary foundation" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544; see *Ciccarelli v Cotira*,

Inc., 24 AD3d 1276). Even assuming, arguendo, that the affidavit was supported by an evidentiary foundation, we conclude that the court properly denied the motion because there is a triable issue of fact whether Martino drove in a lawful and prudent manner immediately before the accident (see *Bulls*, 71 AD3d at 1409; *Fratangelo*, 294 AD2d 880; see generally *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, rearg denied 52 NY2d 784, 829).

Martino and Avino further contend that the court erred in denying their motion because Martino acted reasonably in response to the intrusion of the automobile operated by Stolzman into her lane of travel. We reject that contention. "As a general rule, 'whether a party acted prudently is a question for the trier of fact' " (*Heye v Smith*, 30 AD3d 991, 992), and " '[a] driver confronted with an emergency situation may still be found to be at fault for the resulting accident where his or her reaction is found to be unreasonable or where the prior tortious conduct of the driver contributed to bringing about the emergency' " (*Sossin v Lewis*, 9 AD3d 849, 851, amended on rearg 11 AD3d 1045; see *Greenwell v Moody*, 295 AD2d 954, 955). Here, there are triable issues of fact whether Martino's reaction to the automobile operated by Stolzman was reasonable and whether any negligence on the part of Martino was a proximate cause of the accident (see *Sossin*, 9 AD3d at 851; *Greenwell*, 295 AD2d at 955; cf. *Lucksinger v M.T. Unloading Servs.*, 280 AD2d 741, 742).

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

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CA 10-01993

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

IN THE MATTER OF ROBERT P. MEEGAN, JR.,
INDIVIDUALLY AND AS PRESIDENT OF BUFFALO
POLICE BENEVOLENT ASSOCIATION, AND BUFFALO
POLICE BENEVOLENT ASSOCIATION,
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

BYRON W. BROWN, AS MAYOR OF CITY OF BUFFALO,
H. MCCARTHY GIPSON, AS COMMISSIONER OF POLICE,
AND CITY OF BUFFALO, RESPONDENTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MATTHEW C. VAN VESSEM OF COUNSEL), FOR
RESPONDENTS-APPELLANTS.

LAW OFFICES OF W. JAMES SCHWAN, BUFFALO (W. JAMES SCHWAN OF COUNSEL),
FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered February 22, 2010 in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, denied the motion of respondents for a stay of arbitration and directed respondent H. McCarthy Gipson, as Commissioner of Police promptly to conduct a Step 3 grievance hearing and issue a Step 3 response in accordance with the contract.

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

Memorandum: Respondents appeal from an order denying their motion seeking, inter alia, to stay arbitration of a grievance filed by petitioners with respect to respondents' refusal to pay certain collective bargaining agreement (CBA) benefits to police officers receiving General Municipal Law § 207-c benefits. Respondents had notified petitioners that respondents were unilaterally discontinuing payment of "[a]ny contractual benefits [that] are not expressly provided by the [CBA]" to individuals receiving section 207-c benefits. Supreme Court denied petitioners' application for a preliminary injunction prohibiting respondents from discontinuing the benefits at issue until the arbitrator rendered a decision with respect to the grievance, and the court also denied respondents' motion. We affirm.

We reject respondents' contention that the court erred in denying

that part of their motion seeking to stay the arbitration of petitioners' grievance. It is well settled that the benefits provided to a police officer pursuant to General Municipal Law § 207-c are exclusive, and a CBA will not be construed as impliedly expanding such benefits (*see generally Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d 686, 694-695). There is, however, no prohibition against a CBA that provides for the extension of the benefits set forth therein to police officers (*see generally id.*). Here, respondents conceded at oral argument on the application and the motion that respondent City of Buffalo (City) had been paying CBA benefits to police officers receiving General Municipal Law § 207-c benefits for over 40 years. "[A] past practice concerning [fringe] benefits for current employees, even where unrelated to any specific contractual provision, cannot be unilaterally modified by the public employer" (*Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d 326, 332). The public employer has "a duty to negotiate with the bargaining representative of current employees regarding any change in past practice affecting [such] benefits" (*id.*).

In addition, the CBA contains a "Maintenance of Benefits" clause pursuant to which "[a]ll conditions or provisions beneficial to employees now in effect [that] are not specifically provided for in [the CBA] or [that] have not been replaced by provisions of [the CBA] shall remain in effect for the duration of [the CBA], unless mutually agreed otherwise between the City and [petitioner Buffalo Police Benevolent Association]." Thus, respondents also had a contractual duty to negotiate a change in the past practice and lacked the authority to discontinue unilaterally the payment of the benefits at issue to police officers receiving General Municipal Law § 207-c benefits. Questions with respect to the scope and intent of the "Maintenance of Benefits" clause and the past practice are the proper subjects of arbitration, and past practice may be relied upon by the arbitrator in rendering a decision (*see generally Matter of Board of Educ. of Norwood-Norfolk Cent. School Dist. [Hess]*, 49 NY2d 145, 153; *Matter of Village of Spring Val. v Policemen's Benevolent Assn. of Vil. of Spring Val.*, 271 AD2d 615, lv denied 95 NY2d 760; *Matter of Board of Educ. of N. Babylon Union Free School Dist. v North Babylon Teachers' Org.*, 155 AD2d 599).

We reject respondents' further contention that petitioners are improperly seeking to arbitrate issues with respect to respondents' obligation to pay General Municipal Law § 207-c benefits. Petitioners' grievance arises out of the CBA and respondents' unilateral discontinuance of a past practice spanning 40 years. The result of arbitration with respect to that grievance will have no impact upon respondents' obligation to pay section 207-c benefits.

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

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KA 09-01381

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ALAN TIDD, SR., ALSO KNOWN AS ALAN D. TIDD, SR.,
ALSO KNOWN AS ALAN D. TIDD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MARY ANN BLIZNIK, CLARENCE, 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 April 9, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the second degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed (*see People v Haywood*, 203 AD2d 966, *lv denied* 83 NY2d 967) and the judgment is otherwise affirmed.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

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KA 10-00324

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALAN TIDD, SR., ALSO KNOWN AS ALAN D. TIDD, SR.,
ALSO KNOWN AS ALAN D. TIDD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MARY ANN BLIZNIK, CLARENCE, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentencing of the Genesee County Court (Robert C. Noonan, J.), rendered September 14, 2009. Defendant was resentenced upon his conviction of criminal sexual act in the second degree.

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

Memorandum: Defendant appeals from a resentencing pursuant to which County Court sentenced him to a revised term of incarceration, with an unmodified order of protection, based on his conviction of criminal sexual act in the second degree (Penal Law § 130.45 [1]). The court resentenced defendant with respect to the period of incarceration because the sentence of incarceration originally imposed was illegal. Defendant contends that the court erred in setting the expiration date of the order of protection based upon the version of CPL 530.13 in effect at the date of the initial sentencing rather than the version that was in effect when defendant committed the crime. We note at the outset that defendant failed to preserve that contention for our review inasmuch as he never challenged the duration of the order of protection (*see* CPL 470.05 [2]; *see generally* *People v Harris*, 50 AD3d 1608, 1609, *lv denied* 10 NY3d 959). We further note that preservation is required because an order of protection is not a part of the sentence and thus is not subject to the illegal sentence exception to the preservation requirement (*see* *People v Nieves*, 2 NY3d 310, 315-317). In any event, contrary to defendant's contention, the court properly applied the version of CPL 530.13 that was in effect when the judgment was rendered, i.e., at the time of defendant's initial sentencing (*see* *Harris*, 50 AD3d at 1609; *People v Vega*, 49

AD3d 1185, 1186, *lv denied* 10 NY3d 965; *People v Stone*, 49 AD3d 1314, 1315, *lv denied* 10 NY3d 965).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

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KA 09-00158

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KAREN MCLELLAN, ALSO KNOWN AS KAREN E. MCLELLAN,
ALSO KNOWN AS KAREN SUMERISKI-MCLELLAN, ALSO
KNOWN AS KAREN H. MCLELLAN, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, 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 December 9, 2008. The judgment convicted defendant, upon her plea of guilty, of aggravated driving while intoxicated.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [a]; § 1193 [1] [c] [former (i)]), defendant contends that County Court erred in delegating to its court attorney the responsibility of the court under Penal Law § 60.27 to determine the amount of restitution that defendant was obligated to pay. We reject that contention. Although defendant is correct that a court attorney is not authorized to conduct a restitution hearing (see *People v Brusie*, 70 AD3d 1395; *People v Weber* [appeal No. 2], 64 AD3d 1185), here there was no hearing because defendant entered into a stipulation with the prosecution concerning the amount of restitution owed, and the court attorney merely placed the stipulation on the record. The court thereafter properly ordered defendant to pay restitution in accordance with the terms of the stipulation. We have examined defendant's remaining contentions and conclude that they lack merit.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

111

CAF 09-01266

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

IN THE MATTER OF DARLA WILCE,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

STEPHEN SCALISE, RESPONDENT-APPELLANT.

IN THE MATTER OF STEPHEN SCALISE,
PETITIONER-APPELLANT,

V

DARLA WILCE, RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered May 6, 2009 in proceedings pursuant to Family Court Act article 6. The order, among other things, found that respondent father willfully violated an order of custody and visitation.

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

Memorandum: Respondent father appeals from an order finding him in civil contempt for violating the visitation provisions of a custody order and imposing a fine of \$500 as a sanction, to be applied against the amount of child support arrears owed to the father by petitioner mother. We agree with the father that the order fails to set forth the required findings that his conduct was calculated to, or actually did, impair, impede or prejudice the mother's rights or remedies (see *Biggio v Biggio*, 41 AD3d 753; *Oppenheimer v Oscar Shoes*, 111 AD2d 28, 29). In addition, although the record contains testimony from the mother that, if credited, could support a finding that the father violated the visitation provisions of the custody order, the court also failed to specify the testimony that it found to be credible to support the finding of civil contempt. Thus, we cannot merely modify the order by adding the requisite language (*cf. Biggio*, 41 AD3d at

754). Under the circumstances of this case, we reverse the order and dismiss the petition.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

115

CA 10-01291

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

IN THE MATTER OF JAMES F. GALLAGHER, AS
PRESIDENT OF PROFESSIONAL, CLERICAL, TECHNICAL
EMPLOYEES ASSOCIATION, ON BEHALF OF HIMSELF
AND ALL MEMBERS OF PROFESSIONAL, CLERICAL,
TECHNICAL EMPLOYEES ASSOCIATION AND LARAE HENS,
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

BOARD OF EDUCATION FOR BUFFALO CITY SCHOOL
DISTRICT, JAMES A. WILLIAMS, AS SUPERINTENDENT
OF CITY OF BUFFALO SCHOOL DISTRICT, CITY OF
BUFFALO DEPARTMENT OF HUMAN RESOURCES AND
OLIVIA LICATA, AS ADMINISTRATIVE DIRECTOR OF
DEPARTMENT OF HUMAN RESOURCES, CIVIL SERVICE
DIVISION, RESPONDENTS-APPELLANTS.

DAVID RODRIGUEZ, ACTING CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF
COUNSEL), FOR RESPONDENTS-APPELLANTS.

BARTLO, HETTLER & WEISS, KENMORE (PAUL D. WEISS OF COUNSEL), FOR
PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court,
Erie County (John F. O'Donnell, J.), entered February 5, 2010 in a
proceeding pursuant to CPLR article 78. The judgment, inter alia,
granted the petition and annulled the abolition of the positions of
Director of Emergency Planning for the Buffalo City School District
and Stenographic Secretary to the Superintendent.

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

Memorandum: Petitioners commenced this CPLR article 78
proceeding alleging, inter alia, that respondents acted in bad faith
in abolishing the positions of Director of Emergency Planning for the
Buffalo City School District and Stenographic Secretary to the
Superintendent and in replacing them with nearly identical civil-
service exempt confidential positions and seeking to annul the
determination abolishing those positions. Supreme Court properly
granted the petition.

We reject at the outset respondents' contention that petitioners
do not have standing to contest the elimination of the position of

Director of Emergency Planning. Petitioners presented evidence that union members who were qualified for that position were harmed because respondents unlawfully eliminated the position and did not schedule a competitive examination for it (see *Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d 326, 331; *Matter of Dental Socy. of State of N.Y. v Carey*, 61 NY2d 330, 333-334). It is not necessary to examine the individual circumstances of each union member in order to determine whether standing exists (see *Westchester County Dept. of Pub. Safety Police Benevolent Assn., Inc. v Westchester County*, 35 AD3d 592, 594; cf. *Civil Serv. Empls. Assn. v County of Nassau*, 264 AD2d 798, 799-800, lv denied 94 NY2d 759).

Respondents' further contention that they were entitled to abolish the position of Director of Emergency Planning because they are entitled to abolish a position at any time is without merit. "A public employer may in good faith abolish a civil service position for reasons of economy or efficiency . . . , but a position may not be abolished as a subterfuge to avoid the statutory protection afforded to civil servants" (*Matter of Hartman v Erie 1 BOCES Bd. of Educ.*, 204 AD2d 1037, 1037; see *Matter of Bianco v Pitts*, 200 AD2d 741). Here, the record establishes that the position of Director of Emergency Planning was abolished in favor of a re-created civil-service exempt position entitled Homeland Security Coordinator. Respondents, however, presented no evidence justifying the need for that position to be re-created for reasons of economy or efficiency, nor did they justify the need for that position to be classified as civil-service exempt. The primary duty of both positions was the responsibility for emergency preparedness, including the implementation of safety plans and the organization of training programs. In addition, both positions required a thorough knowledge of local emergency management practices, as well as a comprehensive understanding of emergency management.

We reject respondents' contention that the claim regarding the abolition of the Stenographic Secretary position is barred by the statute of limitations. The relief sought by petitioners is in the nature of mandamus to compel (see *Matter of Weir v Canestrari*, 130 AD2d 906, 906-907; *Matter of Curtis v Board of Educ. of Lafayette Cent. School Dist.*, 107 AD2d 445, 447-448), and thus the four-month limitations period imposed by CPLR 217 (1) runs from the date upon which respondents refused to comply with petitioners' demand for reinstatement of the position (see *Weir*, 130 AD2d at 907; *Curtis*, 107 AD2d at 447). Petitioners demanded reinstatement on March 10, 2008 and commenced this proceeding on May 30, 2008, well within the four-month limitations period.

Contrary to respondents' contention, the record establishes that the Stenographic Secretary position was abolished in bad faith, for the same reasons as those set forth with respect to the position of Director of Emergency Planning. Respondents presented no evidence justifying the need to replace the Stenographic Secretary position with the newly created Confidential Secretary position for reasons of economy or efficiency, nor did they justify the need for that position

to be classified as civil-service exempt (see generally *Hartman*, 204 AD2d 1037). Furthermore, the duties of the Confidential Secretary were substantially similar to those of the Stenographic Secretary.

Also contrary to respondents' contention, the claims regarding the position of Stenographic Secretary are not barred by the doctrine of res judicata (see generally *Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193, rearg denied 55 NY2d 878; *Troy v Goord*, 300 AD2d 1086). The settlement agreement terminating the 2006 action upon which respondents rely for their contention with respect to res judicata was limited to the issue of respondents' having abolished the Stenographic Secretary position. Indeed, the settlement agreement did not address the creation of the civil-service exempt position of Confidential Secretary, nor did it address respondents' refusal to appoint the former employee of the Stenographic Secretary position to this newly-created position, in accordance with the terms of the settlement agreement.

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

116

CA 10-01330

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

MARY ANN ACEE, CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 114896.)

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR
CLAIMANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensì Minarik, J.), entered October 19, 2009 in a personal injury action. The order granted the motion of defendant to dismiss the claim and denied as moot the cross motion of claimant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the claim is reinstated and the matter is remitted to the Court of Claims for further proceedings in accordance with the following Memorandum: In this personal injury action, claimant appeals from an order that, inter alia, granted defendant's motion to dismiss the claim as jurisdictionally defective based on claimant's alleged failure to satisfy the notice requirements of Court of Claims Act § 11 (b). Pursuant to section 11 (b), a notice of intention to file a claim (hereafter, notice of intent) must set forth, inter alia, "the time when and place where such claim arose." While the statute does not require " 'absolute exactness' " (*Triani v State of New York*, 44 AD3d 1032, 1032), the notice of intent must set forth the time and place where the claim arose with " 'sufficient definiteness to enable the State to be able to investigate the claim promptly and to ascertain its liability under the circumstances' " (*Grumet v State of New York*, 256 AD2d 441, 442; see *Triani*, 44 AD3d at 1032).

Here, we agree with claimant that her notice of intent satisfies the requirements of section 11 (b) inasmuch as it states that claimant "fell at Groveland Correctional Facility in its parking lot by reason of broken pavement," and that "[t]he incident occurred on August 5, 2007 between 8:30AM and 9:00AM near the gate to the entrance of the facility." Although it was later determined that claimant did not fall in the parking lot but instead fell on Perimeter Road, which encircles the correctional facility, that road is adjacent to the

parking lot where claimant parked her vehicle, in an area in which handicapped parking is permitted. Moreover, the parking lot is contiguous to the road, with no delineation between the two. Indeed, one cannot easily discern from the photographs included in the record where the parking lot ends and the road begins. Given that the notice of intent accurately states that the accident occurred "near the gate to the entrance of the facility," and that it implicitly sets forth that the accident occurred between the correctional facility and claimant's parked vehicle, we conclude that the notice of intent is in compliance with the notice requirements of the statute.

Defendant's reliance on the decision of this Court in *Wilson v State* (61 AD3d 1367) is misplaced. In *Wilson* (61 AD3d at 1368), we determined that the notice of intent was jurisdictionally defective because it failed "to state both a year in which the injury allegedly occurred and a particular road or place on such road where claimant allegedly fell, thereby failing to 'state the time when and place where such claim arose' " in accordance with the statutory requirements. Here, in contrast, the notice of intent sets forth the exact date of the accident, and in our view it describes the location where the claim arose with more specificity than did the notice of intent in *Wilson*.

We note in addition that the court denied as moot claimant's motion for summary judgment or, in the alternative, for leave to amend the claim. In view of our determination reinstating the claim, we remit the matter to the Court of Claims to determine claimant's motion.

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

117

CA 10-00092

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

JOSEPH MONTESANO, INDIVIDUALLY AND AS
PRESIDENT OF ROCHESTER FIREFIGHTERS, INC.,
LOCAL 1071, IAFF, AFL-CIO, AS TRUSTEE OF
ROCHESTER FIREFIGHTERS ASSOCIATION MUTUAL AID
FUND, AND ON BEHALF OF ALL OTHER INDIVIDUALS
PROVIDING FIRE PROTECTION TO CITY OF ROCHESTER,
SIMILARLY SITUATED, FREDERICK DINOTO, GARY
DINOTO, KEVIN BILLS AND MICHAEL SULLI,
INDIVIDUALLY AS ROCHESTER FIREFIGHTERS AND AS
TRUSTEES OF ROCHESTER FIREFIGHTERS ASSOCIATION
MUTUAL AID FUND, AND ROCHESTER FIREFIGHTERS
ASSOCIATION MUTUAL AID FUND,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

FLOYD A. MADISON, AS CHIEF OF FIRE DEPARTMENT
OF CITY OF ROCHESTER AND AS ADMINISTRATOR OF
FIREFIGHTERS' INSURANCE FUND OF CITY OF
ROCHESTER, WILLIAM A. JOHNSON, JR., AS MAYOR
OF CITY OF ROCHESTER, VINCENT J. CARFAGNA, AS
DIRECTOR OF THE CITY OF ROCHESTER'S FINANCE
DEPARTMENT, CHARLES A. BENINCASA, AS TREASURER
OF CITY OF ROCHESTER AND AS TRUSTEE OF THE
FIREFIGHTERS' INSURANCE FUND OF CITY OF
ROCHESTER, CITY OF ROCHESTER, FIRE DEPARTMENT
OF CITY OF ROCHESTER, FIREFIGHTERS' INSURANCE
FUND OF CITY OF ROCHESTER, AND ROCHESTER
FIREFIGHTERS BENEVOLENT ASSOCIATION,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO
OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO
OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William
P. Polito, J.), entered November 10, 2009. The order directed
defendants to restore certain funds to the Firefighters' Insurance
Fund.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs.

Memorandum: On a prior appeal in this case (*Montesano v Madison*, 45 AD3d 1352, lv denied 10 NY3d 782), we previously affirmed a judgment that, inter alia, directed the City of Rochester (City), a defendant in the instant three appeals, to provide an accounting with respect to its use of the 2% fund, i.e., the proceeds of a tax imposed on premiums collected by certain foreign and alien insurers doing business in New York (see Insurance Law §§ 9104, 9105). Supreme Court thereafter appointed a referee to conduct a hearing and to determine the amount of the 2% fund received by the City and the manner in which the City expended that sum. By the order in appeal No. 1, the court "accept[ed]" the report of the Referee and directed the City to restore to the Firemen's Fund account funds improperly taken from the 2% fund. The court further directed the City to pay the entire amount of the Referee's fee. By the order in appeal No. 2, the court, inter alia, granted in part plaintiffs' motion seeking an order of contempt and awarded to plaintiffs a portion of their legal fees as a sanction against defendants. By the order in appeal No. 3, the court awarded interest, as calculated by the Referee, on the sums that the court directed the City to restore to the Firemen's Fund account.

We note at the outset that the City's cross appeal from the judgment before us on the prior appeal was dismissed based upon the failure of the City to perfect its cross appeal (see 22 NYCRR 1000.12 [b]). To the extent that the City now raises issues that could have been raised in the cross appeal that was dismissed, we decline to exercise our discretion to address those issues (see *Williams v Williams*, 52 AD3d 1271; *Alfieri v Empire Beef Co., Inc.*, 41 AD3d 1313).

With respect to the order in appeal No. 1, we conclude that the court properly accepted the report of the Referee inasmuch as the findings therein are "substantially supported" by the record (*Kaplan v Einy*, 209 AD2d 248, 251). We further conclude that the court acted within its discretion in directing the City to pay the entire fee of the Referee, particularly in light of the fact that the Referee's appointment was necessitated by the failure of the City to comply with the court's previous directive to provide an accounting (see CPLR 4321 [1]; see generally *Kolomick v Kolomick*, 133 AD2d 69, 70). With respect to the order in appeal No. 2, the court also properly exercised its discretion in directing the City to pay a portion of the attorneys' fees incurred by plaintiffs based upon the City's conduct in unreasonably delaying and prolonging the resolution of this litigation (see 22 NYCRR 130-1.1 [c] [2]). Finally, with respect to the order in appeal No. 3, defendants in their appellate brief do not challenge the amount or method of calculating interest on the sums that the court directed the City to restore to the Firemen's Fund account, and thus defendants have abandoned any challenge to that order (see *Ciesinski v Town of Aurora*, 202 AD2d 984).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

118

CA 10-00956

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

JOSEPH MONTESANO, INDIVIDUALLY AND AS
PRESIDENT OF ROCHESTER FIREFIGHTERS, INC.,
LOCAL 1071, IAFF, AFL-CIO, AS TRUSTEE OF
ROCHESTER FIREFIGHTERS ASSOCIATION MUTUAL AID
FUND, AND ON BEHALF OF ALL OTHER INDIVIDUALS
PROVIDING FIRE PROTECTION TO CITY OF ROCHESTER,
SIMILARLY SITUATED, FREDERICK DINOTO, GARY
DINOTO, KEVIN BILLS AND MICHAEL SULLI,
INDIVIDUALLY AS ROCHESTER FIREFIGHTERS AND AS
TRUSTEES OF ROCHESTER FIREFIGHTERS ASSOCIATION
MUTUAL AID FUND, AND ROCHESTER FIREFIGHTERS
ASSOCIATION MUTUAL AID FUND,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

FLOYD A. MADISON, AS CHIEF OF FIRE DEPARTMENT
OF CITY OF ROCHESTER AND AS ADMINISTRATOR OF
FIREFIGHTERS' INSURANCE FUND OF CITY OF
ROCHESTER, WILLIAM A. JOHNSON, JR., AS MAYOR
OF CITY OF ROCHESTER, VINCENT J. CARFAGNA, AS
DIRECTOR OF THE CITY OF ROCHESTER'S FINANCE
DEPARTMENT, CHARLES A. BENINCASA, AS TREASURER
OF CITY OF ROCHESTER AND AS TRUSTEE OF THE
FIREFIGHTERS' INSURANCE FUND OF CITY OF
ROCHESTER, CITY OF ROCHESTER, FIRE DEPARTMENT
OF CITY OF ROCHESTER, FIREFIGHTERS' INSURANCE
FUND OF CITY OF ROCHESTER, AND ROCHESTER
FIREFIGHTERS BENEVOLENT ASSOCIATION,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO
OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO
OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William
P. Polito, J.), entered April 26, 2010. The order awarded plaintiffs
judgment in the amount of \$3,635,321.80, including investment interest
income of \$428,446.83.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs.

Same Memorandum as in *Montesano v Madison* ([appeal No. 1] ___
AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

119

CA 10-00957

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

JOSEPH MONTESANO, INDIVIDUALLY AND AS
PRESIDENT OF ROCHESTER FIREFIGHTERS, INC.,
LOCAL 1071, IAFF, AFL-CIO, AS TRUSTEE OF
ROCHESTER FIREFIGHTERS ASSOCIATION MUTUAL AID
FUND, AND ON BEHALF OF ALL OTHER INDIVIDUALS
PROVIDING FIRE PROTECTION TO CITY OF ROCHESTER,
SIMILARLY SITUATED, FREDERICK DINOTO, GARY
DINOTO, KEVIN BILLS AND MICHAEL SULLI,
INDIVIDUALLY AS ROCHESTER FIREFIGHTERS AND AS
TRUSTEES OF ROCHESTER FIREFIGHTERS ASSOCIATION
MUTUAL AID FUND, AND ROCHESTER FIREFIGHTERS
ASSOCIATION MUTUAL AID FUND,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

FLOYD A. MADISON, AS CHIEF OF FIRE DEPARTMENT
OF CITY OF ROCHESTER, AND AS ADMINISTRATOR OF
FIREFIGHTERS' INSURANCE FUND OF CITY OF
ROCHESTER, WILLIAM A. JOHNSON, JR., AS MAYOR
OF CITY OF ROCHESTER, VINCENT J. CARFAGNA, AS
DIRECTOR OF THE CITY OF ROCHESTER'S FINANCE
DEPARTMENT, CHARLES A. BENINCASA, AS TREASURER
OF CITY OF ROCHESTER AND AS TRUSTEE OF THE
FIREFIGHTERS' INSURANCE FUND OF CITY OF
ROCHESTER, CITY OF ROCHESTER, FIRE DEPARTMENT
OF CITY OF ROCHESTER, FIREFIGHTERS' INSURANCE
FUND OF CITY OF ROCHESTER, AND ROCHESTER
FIREFIGHTERS BENEVOLENT ASSOCIATION,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO
OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO
OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William
P. Polito, J.), entered April 26, 2010. The order granted in part the
motion of plaintiffs for contempt and sanctions and awarded plaintiffs
legal fees in the amount of \$17,541.85.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs.

Same Memorandum as in *Montesano v Madison* ([appeal No. 1] ___
AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

121

CA 10-01935

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

MARIA R. KING AND JEANERO J. KING,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

SAM'S EAST, INC., DEFENDANT-RESPONDENT.

HOGAN WILLIG, AMHERST (AMANDA L. LOWE OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

BROWN & HUTCHINSON, ROCHESTER (KIMBERLY J. CAMPBELL OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 18, 2009 in a personal injury action. The order granted defendant's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint insofar as it alleges that defendant had constructive notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Maria R. King (plaintiff) and her husband commenced this action seeking damages for injuries plaintiff allegedly sustained when she slipped and fell on an accumulation of water that had formed a puddle on the floor of defendant's store. We conclude that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint to the extent that the complaint alleges that defendant had constructive notice of the allegedly dangerous condition where plaintiff fell (*see Brinson v Geneva Hous. Auth.*, 45 AD3d 1397), and we therefore modify the order accordingly.

"In seeking summary judgment dismissing the complaint, defendant had the initial burden of establishing that it did not create the alleged dangerous condition and did not have actual or constructive notice of it" (*Pelow v Tri-Main Dev.*, 303 AD2d 940, 940-941). Contrary to plaintiffs' contention, defendant met its initial burden on the issues whether defendant created or had actual notice of the allegedly dangerous condition, and plaintiffs failed to raise a triable issue of fact with respect thereto inasmuch as their submissions in opposition were merely speculative (*see Cerkowski v Price Chopper Operating Co.*, 68 AD3d 1382, 1384-1385; *Baia v Allright*

Parking Buffalo, Inc., 27 AD3d 1153, 1154).

We agree with plaintiffs, however, that defendant failed to meet its initial burden of establishing that it lacked constructive notice of the condition in question. It is well established that, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). In support of its motion, defendant submitted, inter alia, the deposition testimony of plaintiff in which she stated that, although she did not observe the water on the floor prior to her fall, after the fall her right pant leg was saturated with liquid and she observed a "dinner plate size of water" on the floor. Defendant also submitted the deposition testimony of one of its employees in which the employee stated that, while helping plaintiff after her fall, he observed a "small puddle" of water that "wasn't readily noticeable." He also testified, however, that "you could see [the water] once you looked for it." In addition, although defendant submitted the deposition testimony of the produce manager in which she testified that, on the morning in question, she performed an inspection of the area and observed no water and that store employees conducted safety sweeps, there is no evidence of the timing of the safety sweeps or that her inspection occurred before plaintiff's fall (*cf. Cochetti v Wal-Mart Stores, Inc.*, 24 AD3d 852, 853). Thus, by its own submissions, defendant raised an issue of fact whether the allegedly dangerous condition was visible and apparent and existed for a sufficient length of time prior to plaintiff's fall to permit its employees to discover and remedy it (*see generally Russo v YMCA of Greater Buffalo*, 12 AD3d 1089, *lv dismissed* 5 NY3d 746).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

123

KA 09-02381

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES SLATTERY, DEFENDANT-APPELLANT.

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

JAMES SLATTERY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 23, 2009. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony, aggravated unlicensed operation of a motor vehicle in the first degree and unauthorized use of a vehicle in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [3]; § 1193 [1] [c] [ii]), aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]) and unauthorized use of a vehicle in the third degree (Penal Law § 165.05 [1]). As defendant contends and the People correctly concede, County Court misapprehended its discretion in determining that the sentences for those offenses had to run consecutively to a prior undischarged term of parole. That contention survives defendant's valid waiver of the right to appeal (*see People v Hager*, 213 AD2d 1008). Pursuant to Penal Law § 70.25 (1), the court had the discretion to impose concurrent sentences (*see People v Woodard*, 201 AD2d 896), and "[t]he failure of the court to apprehend the extent of its discretion deprived defendant of the right to be sentenced as provided by law" (*Hager*, 213 AD2d at 1008). We therefore modify the

judgment by vacating the sentence, and we remit the matter to County Court for resentencing.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

132

CA 10-01274

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

IN THE MATTER OF BROCKPORT SWEDEN PROPERTY OWNERS ASSOCIATION, BY ITS TREASURER, NORMAN GIANCURSIO, PETITIONER-PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

VILLAGE OF BROCKPORT,
RESPONDENT-DEFENDANT-RESPONDENT.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR
PETITIONER-PLAINTIFF-APPELLANT.

HARRIS, CHESWORTH, O'BRIEN, JOHNSTONE, WELCH & LEONE, LLP, ROCHESTER
(MICHAEL P. LEONE OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 9, 2009 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, dismissed the petition-complaint.

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

It is ORDERED, ADJUDGED and DECREED that Village of Brockport Local Law No. 8 of 2008 is constitutional and is not preempted by or inconsistent with state law

and as modified the judgment is affirmed without costs.

Memorandum: Petitioner-plaintiff (petitioner), an association of landlords in the Village of Brockport and the Town of Sweden, commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking to annul the determination enacting Local Law No. 8 of 2008 (hereafter, Local Law No. 8), which added chapter 36 to the Brockport Village Code. Petitioner also sought a declaration that Local Law No. 8 is preempted by and inconsistent with state law and that it is unconstitutional.

We reject petitioner's contention that the Village Board of respondent-defendant (respondent) failed to comply with article 8 of the Environmental Conservation Law (State Environmental Quality Review Act [SEQRA]) in enacting Local Law No. 8. It is axiomatic that the role of the court in reviewing SEQRA determinations is limited to

determining "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]; see *Matter of Dunk v City of Watertown*, 11 AD3d 1024, 1024-1025; *Matter of Forman v Trustees of State Univ. of N.Y.*, 303 AD2d 1019, 1020). Contrary to petitioner's contention, Supreme Court properly concluded that the determination of the Village Board that the enactment of Local Law No. 8 constituted a Type II action pursuant to SEQRA was not arbitrary and capricious (see CPLR 7803 [3]), inasmuch as such action constitutes "routine or continuing agency administration and management [that does] not include[] new programs or major reordering of priorities that may affect the environment" (6 NYCRR 617.5 [c] [20]). We reject petitioner's contention that those parts of Local Law No. 8 requiring, inter alia, that owners of residential rental properties register their properties with the Village Code Enforcement Officer (Code Enforcement Officer) (see Brockport Village Code § 36-4) and that certificates of occupancy be issued upon the transfer of title of those properties (see § 36-5) constitute "new programs or major reordering of priorities that may affect the environment" (6 NYCRR 617.5 [c] [20]). Thus, we conclude that the court properly dismissed the petition.

Contrary to petitioner's further contention, that part of Local Law No. 8 permitting the Code Enforcement Officer to apply for an administrative warrant to inspect rental properties does not violate the probable cause requirement of the Fourth Amendment. "The challenged [local law], like all legislative enactments, enjoys an 'exceedingly strong presumption of constitutionality' " (*Arrowsmith v City of Rochester*, 309 AD2d 1201, 1201, quoting *Lighthouse Shores v Town of Islip*, 41 NY2d 7, 11), and we conclude that, "on its face, [Local Law No. 8] does not unconstitutionally penalize a property owner for refusing to consent" to an inspection of his or her rental property (*McLean v City of Kingston*, 57 AD3d 1269, 1271, appeal dismissed 12 NY3d 848; see *Pashcow v Town of Babylon*, 53 NY2d 687; cf. *Camara v Municipal Ct. of City & County of San Francisco*, 387 US 523, 527-531; *Sokolov v Village of Freeport*, 52 NY2d 341, 346). Furthermore, we conclude that Local Law No. 8 "bears a reasonable relationship to [respondent's] legitimate goals of promoting public health and safety and maintaining property values" (*Arrowsmith*, 309 AD2d at 1202).

We conclude that petitioner's contention regarding that part of Local Law No. 8 limiting respondent's liability with respect to the inspection of rental properties is not ripe for review. "The only exception to [the] general prohibition [against such liability] is when a special relationship exists between the municipality and the [property owner]," and none is alleged here (*Okie v Village of Hamburg*, 196 AD2d 228, 231-232). Petitioner's further contention that Local Law No. 8 may abrogate nonconforming uses also is not ripe for review inasmuch as there is no actual controversy that is " 'real and present or imminent' " but, rather, that claim is abstract and hypothetical (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 518, cert denied 479 US 985; see generally *Matter of Town of Riverhead*

v Central Pine Barrens Joint Planning & Policy Commn., 71 AD3d 679, 681). Finally, we reject petitioner's contention that Local Law No. 8 is preempted by the Uniform Fire Prevention and Building Code (see generally Executive Law § 379 [3]).

We conclude, however, that the court erred in dismissing the complaint rather than declaring the rights of the parties (see *Pless v Town of Royalton*, 185 AD2d 659, 660, *affd* 81 NY2d 1047), and we therefore modify the judgment by declaring that Village of Brockport Local Law No. 8 of 2008 is constitutional and is not preempted by or inconsistent with state law.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

137

CA 10-01273

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

DELIRIS DIAZ, INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF THE INFANT, JOSE
MARQUEZ-DIAZ, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

LITTLE REMEDIES CO., INC., MEDTECH
HOLDINGS, INC., MEDTECH PRODUCTS, INC.,
PRESTIGE BRANDS, INC., AND PRESTIGE BRANDS
HOLDINGS, INC., DEFENDANTS-RESPONDENTS.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (F. PAUL GREENE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered March 22, 2010. The order and judgment dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint except to the extent that it asserts claims for damages for emotional injuries sustained by plaintiff and claims for damages to her reputation that are not related to pecuniary loss, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action, individually and on behalf of her two-year-old son, seeking damages related to injuries sustained by him after plaintiff treated him with a child's laxative (hereafter, product) allegedly manufactured and marketed by defendants. Plaintiff alleged that, when she administered the product to her son and it thereafter mixed with his stool, her son developed contact dermatitis, chemical burns and sloughing of the skin on his buttocks and genital area. When plaintiff sought medical treatment for her son, medical professionals did not accept her explanation for the cause of her son's injuries and instead suspected that plaintiff's son had been burned by scalding water. Plaintiff was arrested on various child abuse charges, a neglect proceeding was commenced in Family Court, and an order of protection was issued on behalf of plaintiff's children. The charges were dismissed several months later based upon the opinion of a medical expert that the burns sustained by plaintiff's son were consistent with exposure to senna, a botanical

ingredient contained in defendants' product. Supreme Court granted that part of defendants' motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (5) and (7) and dismissed the complaint in its entirety.

Contrary to plaintiff's contention, the court properly granted those parts of the motion to dismiss the claims for damages resulting from her emotional injuries inasmuch as they were not a direct result of a breach of defendants' duty to her but, rather, they were a consequential result of that breach (*see Kennedy v McKesson Co.*, 58 NY2d 500, 506). Furthermore, although plaintiff arguably was within the zone of danger because she was exposed to defendants' product several times when she cleaned it from her son's skin (*cf. Marcale v Curcio* [appeal No. 1], 24 AD3d 1233, 1235, *lv denied* 7 NY3d 703), she may recover under the zone of danger theory only for the emotional distress resulting from viewing the serious physical injury of a member of her family while in the zone of danger. Here, however, the emotional injuries for which she seeks damages are related to her arrest on child abuse charges and to her separation from her family, not from viewing the serious physical injury of her son while in the zone of danger (*see Bovsun v Sanperi*, 61 NY2d 219, 228-229; *Hass v Manhattan & Bronx Surface Tr. Operating Auth.*, 204 AD2d 208, *lv denied* 84 NY2d 811).

Also contrary to plaintiff's contention, the court properly determined that certain of her claims for damage to her reputation sounded in defamation, and thus the court properly granted the motion with respect to those claims on the ground that they were time-barred (*see* CPLR 215 [3]). We conclude, however, that the court erred in granting the motion with respect to plaintiff's claims for damage to her reputation based upon alleged pecuniary losses (*see Kennedy*, 58 NY2d at 504). We therefore modify the order and judgment accordingly.

The court also erred in granting that part of the motion with respect to the first cause of action, for strict products liability based on failure to warn, insofar as that cause of action seeks damages for the injuries sustained by plaintiff's son and pecuniary damages sustained by plaintiff. We therefore further modify the order and judgment accordingly. Contrary to the court's determination, that cause of action was not preempted by federal regulations concerning over-the-counter laxatives. Pursuant to 21 USC § 379r (a) (2), no State may establish a requirement "that is different from or in addition to, or that is otherwise not identical with, a requirement under . . . the Poison Prevention Packaging Act of 1970 (15 USC [§] 1471 *et seq.*) [] or the Fair Packaging and Labeling Act (15 USC [§] 1451 *et seq.*).". Pursuant to 21 USC § 379r (e), however, "[n]othing [in the statute] shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State." Thus, regardless whether the "tentative final monograph" for laxatives published in the Federal Register has the binding effect of a regulation that would trigger preemption considerations (*see generally Mills v Warner-Lambert Co.*, 581 F Supp 2d 772, 779-780), the first cause of action alleges products liability, and thus the exception to preemption contained in section

379r (e) applies.

Finally, "accept[ing] the facts as alleged in the complaint as true [and] accord[ing] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87), we conclude that the complaint asserts breach of warranty and negligence causes of action. We thus conclude that the court erred in granting the motion with respect to the second and third causes of action insofar as they seek damages for the injuries sustained by plaintiff's son and pecuniary damages sustained by plaintiff, and we therefore further modify the order and judgment accordingly.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

139

CA 10-01202

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

COUNSEL FINANCIAL SERVICES, LLC,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID MCQUADE LEIBOWITZ, P.C. AND DAVID
MCQUADE LEIBOWITZ, DEFENDANTS-APPELLANTS.

LAW OFFICE OF BRUCE S. ZEFTEL, BUFFALO (BRUCE S. ZEFTEL OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

PHILIP B. ABRAMOWITZ, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 24, 2010. The order denied defendants' motion to vacate the default order and judgment.

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

Memorandum: Defendants appeal from an order denying their motion seeking to vacate a default order and judgment entered against them following their failure to oppose plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213. On a prior appeal, we affirmed the default order and judgment that granted plaintiff's motion and ordered defendants to pay a specified amount due on a promissory note executed by defendant David McQuade Leibowitz, P.C. and personally guaranteed by defendant David McQuade Leibowitz (*Counsel Fin. Servs., LLC v David McQuade Leibowitz, P.C.*, 67 AD3d 1483). Even assuming, arguendo, that the default order and judgment may be vacated pursuant to CPLR 5015 (a) (1) despite defendants' prior appeal (*see Pergamon Press v Tietze*, 81 AD2d 831, *lv dismissed* 54 NY2d 605; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:6), we conclude that Supreme Court properly refused to do so inasmuch as defendants failed to establish a reasonable excuse for their default and a meritorious defense to the action (*see Brehm v Patton*, 55 AD3d 1362; *cf. Wilcox v U-Haul Co.*, 256 AD2d 973; *see generally* CPLR 5015 [a] [1]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

140

CA 09-02075

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

IN THE MATTER OF ROBERT SILLS AND AUDREY
ELAINE SILLS, AS CO-EXECUTORS OF THE ESTATE
OF ANGELINE V. SILLS, DECEASED,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

FLEET NATIONAL BANK, JOAN ROYSTON AND
KIRK RICHARDSON, RESPONDENTS-RESPONDENTS.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS
CO-EXECUTORS OF THE ESTATE OF ANGELINE V.
SILLS, DECEASED, PLAINTIFFS-APPELLANTS,

V

FLEET BANK AND JOAN ROYSTON,
DEFENDANTS-RESPONDENTS.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS
CO-EXECUTORS OF THE ESTATE OF ANGELINE V.
SILLS, DECEASED, PLAINTIFFS-APPELLANTS,

V

JOAN ROYSTON, DEFENDANT-RESPONDENT.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

(APPEAL NO. 1.)

GATES & ADAMS, P.C., ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR
PETITIONERS-APPELLANTS AND PLAINTIFFS-APPELLANTS.

MCDONOUGH & ARTZ, P.C., BINGHAMTON (PHILIP J. ARTZ OF COUNSEL), FOR
RESPONDENT-RESPONDENT AND DEFENDANT-RESPONDENT JOAN ROYSTON.

THE WOLFORD LAW FIRM LLP, ROCHESTER (ELIZABETH A. WOLFORD OF COUNSEL),
FOR RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (PAUL V. NUNES OF COUNSEL), FOR
RESPONDENT-RESPONDENT FLEET NATIONAL BANK AND DEFENDANT-RESPONDENT
FLEET BANK.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered February 13, 2009. The order denied petitioners' demand for the return of an escrow account of \$173,804.33 plus accrued interest held by respondent Fleet National Bank and awarded guardian ad litem fees to respondent guardian ad litem.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the award of guardian ad litem fees to respondent guardian ad litem and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Steuben County, for further proceedings in accordance with the following Memorandum: Addressing first the orders in appeal Nos. 1, and 3 through 5, petitioners contend that Supreme Court erred in granting the fee awards, including attorney's fees and costs incurred on appeal, to respondent guardian ad litem (hereafter, respondent), who served in that capacity for petitioners' decedent prior to her death. We agree with petitioners that the order in appeal No. 1 must be modified by vacating the award of guardian ad litem fees and that the orders in appeal Nos. 3 through 5 that, inter alia, awarded respondent attorney's fees must be vacated. Decedent had died before those orders were issued, and it is undisputed that a duly appointed personal representative had not been substituted as a party for decedent when those orders were entered. We therefore modify the order in appeal No. 1 accordingly, and we vacate the orders in appeal Nos. 3 through 5. We further note that the appeal from the order in appeal No. 2 must be dismissed because it necessarily was superseded by the order in appeal No. 3.

With respect to that part of the order in appeal No. 1 awarding respondent guardian ad litem fees, and the orders in appeal Nos. 3 through 5 that, inter alia, awarded respondent attorney's fees incurred on appeal, "[i]t is well settled that the death of a party divests a court of jurisdiction to conduct proceedings in an action until a proper substitution has been made pursuant to CPLR 1015 (a) . . . , and any order rendered after the death of a party and before the substitution of a legal representative is void" (*Griffin v Manning*, 36 AD3d 530, 532). Only "under 'special circumstances,' such as where there has been active participation in the litigation by the personal representative who would have been substituted for the decedent" is the rule waived (*id.*), and that was not the case here. We reject the contention of respondent that petitioners waived any jurisdictional objection by actively participating in the fee applications (*cf. Fitzpatrick v Palazzo*, 46 AD3d 1414). Indeed, the record establishes that, six days after decedent died, petitioners' attorney sent a letter to the court stating, inter alia, that decedent's death divested the court of jurisdiction to rule upon respondent's initial fee application, which was filed approximately one month before decedent died. The only other action taken by petitioners was the participation of their attorney in a conference with the court

regarding the first fee application. Following the conference, the court granted that application, and the court also granted respondent's second fee application, filed in April 2006. We conclude that the limited actions undertaken by petitioners' counsel did not rise to the level of active participation required to warrant the conclusion that petitioners waived the jurisdictional objection, as contended by respondent.

We note that, although Surrogate's Court had issued an order granting temporary letters of administration to petitioner Audrey Elaine Sills, such order conferred upon her only the power to appear in this Court with respect to an appeal that had been filed by petitioners in a related action. The order expressly provided that "said Letters shall not confer upon said fiduciary any other power or authority including the authority to collect assets or commence new litigation on behalf of the estate, without prior permission of the Court" Thus, it cannot be said that the order authorized Audrey Sills to act as a representative of the estate with respect to any of respondent's fee applications, and there is no evidence in the record before us to support respondent's contention that the parties and the court interpreted and treated the order as having granted Audrey Sills such authority.

We conclude with respect to the orders in appeal Nos. 3 through 5 that respondent is not entitled to legal fees or other compensation for costs incurred in defending the fee awards on appeal. A guardian ad litem is entitled to compensation for the time and effort expended in meeting opposition to a fee award only to the extent that the opposition is unreasonable (*see Matter of Infant X. v Children's Hosp. of Buffalo*, 197 AD2d 884, 885). Given our conclusion that the court lacked jurisdiction to entertain the fee applications, it cannot be said that petitioners' opposition to those applications was unreasonable. We thus conclude that the fees awarded to respondent must be vacated, and the matter remitted for a hearing at which petitioners may challenge respondent's fee applications.

Finally, with respect to petitioners' claims against Fleet National Bank (Fleet), we reject the contention of petitioners that the funds currently held in escrow should be returned to the estate. Rather, as the court noted in the order in appeal No. 1, such funds shall continue to be held in escrow pending the resolution of Fleet's application for attorney's fees.

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

141

CA 09-02077

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

IN THE MATTER OF ROBERT SILLS AND AUDREY
ELAINE SILLS, AS CO-EXECUTORS OF THE ESTATE
OF ANGELINE V. SILLS, DECEASED,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

FLEET NATIONAL BANK, JOAN ROYSTON AND
KIRK RICHARDSON, RESPONDENTS-RESPONDENTS.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS
CO-EXECUTORS OF THE ESTATE OF ANGELINE V.
SILLS, DECEASED, PLAINTIFFS-APPELLANTS,

V

FLEET BANK AND JOAN ROYSTON,
DEFENDANTS-RESPONDENTS.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS
CO-EXECUTORS OF THE ESTATE OF ANGELINE V.
SILLS, DECEASED, PLAINTIFFS-APPELLANTS,

V

JOAN ROYSTON, DEFENDANT-RESPONDENT.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

(APPEAL NO. 2.)

GATES & ADAMS, P.C., ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR
PETITIONERS-APPELLANTS AND PLAINTIFFS-APPELLANTS.

MCDONOUGH & ARTZ, P.C., BINGHAMTON (PHILIP J. ARTZ OF COUNSEL), FOR
RESPONDENT-RESPONDENT AND DEFENDANT-RESPONDENT JOAN ROYSTON.

THE WOLFORD LAW FIRM LLP, ROCHESTER (ELIZABETH A. WOLFORD OF COUNSEL),
FOR RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (PAUL V. NUNES OF COUNSEL), FOR
RESPONDENT-RESPONDENT FLEET NATIONAL BANK AND DEFENDANT-RESPONDENT
FLEET BANK.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered June 3, 2009. The order, among other things, adjudged that all reasonable fees and disbursements incurred by guardian ad litem Audrey Patrone Peartree in an appeal of the court's decision and order dated January 28, 2009 be paid for by the Estate of Angeline V. Sills.

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

Same Memorandum as in *Sills v Fleet Natl. Bank* ([appeal No. 1]
___ AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

142

CA 09-02078

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

IN THE MATTER OF ROBERT SILLS AND AUDREY
ELAINE SILLS, AS CO-EXECUTORS OF THE ESTATE
OF ANGELINE V. SILLS, DECEASED,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

FLEET NATIONAL BANK, JOAN ROYSTON AND
KIRK RICHARDSON, RESPONDENTS-RESPONDENTS.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS
CO-EXECUTORS OF THE ESTATE OF ANGELINE V.
SILLS, DECEASED, PLAINTIFFS-APPELLANTS,

V

FLEET BANK AND JOAN ROYSTON,
DEFENDANTS-RESPONDENTS.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS
CO-EXECUTORS OF THE ESTATE OF ANGELINE V.
SILLS, DECEASED, PLAINTIFFS-APPELLANTS,

V

JOAN ROYSTON, DEFENDANT-RESPONDENT.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

(APPEAL NO. 3.)

GATES & ADAMS, P.C., ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR
PETITIONERS-APPELLANTS AND PLAINTIFFS-APPELLANTS.

MCDONOUGH & ARTZ, P.C., BINGHAMTON (PHILIP J. ARTZ OF COUNSEL), FOR
RESPONDENT-RESPONDENT AND DEFENDANT-RESPONDENT JOAN ROYSTON.

THE WOLFORD LAW FIRM LLP, ROCHESTER (ELIZABETH A. WOLFORD OF COUNSEL),
FOR RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (PAUL V. NUNES OF COUNSEL), FOR
RESPONDENT-RESPONDENT FLEET NATIONAL BANK AND DEFENDANT-RESPONDENT
FLEET BANK.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered July 31, 2009. The order granted the application of Audrey Patrone Peartree, as guardian ad litem for decedent Angeline V. Sills, to retain Elizabeth A. Wolford as counsel to represent her in an appeal of the court's decision and order dated January 28, 2009 and ordered that all reasonable fees and disbursements incurred by the guardian ad litem in that appeal be paid for by the Estate of Angeline V. Sills.

It is hereby ORDERED that the order so appealed from is unanimously vacated without costs and the matter is remitted to Supreme Court, Steuben County, for further proceedings in accordance with the same Memorandum as in *Sills v Fleet Natl. Bank* ([appeal No. 1] ___ AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

143

CA 09-02079

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

IN THE MATTER OF ROBERT SILLS AND AUDREY
ELAINE SILLS, AS CO-EXECUTORS OF THE ESTATE
OF ANGELINE V. SILLS, DECEASED,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

FLEET NATIONAL BANK, JOAN ROYSTON AND
KIRK RICHARDSON, RESPONDENTS-RESPONDENTS.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS
CO-EXECUTORS OF THE ESTATE OF ANGELINE V.
SILLS, DECEASED, PLAINTIFFS-APPELLANTS,

V

FLEET BANK AND JOAN ROYSTON,
DEFENDANTS-RESPONDENTS.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS
CO-EXECUTORS OF THE ESTATE OF ANGELINE V.
SILLS, DECEASED, PLAINTIFFS-APPELLANTS,

V

JOAN ROYSTON, DEFENDANT-RESPONDENT.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

(APPEAL NO. 4.)

GATES & ADAMS, P.C., ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR
PETITIONERS-APPELLANTS AND PLAINTIFFS-APPELLANTS.

MCDONOUGH & ARTZ, P.C., BINGHAMTON (PHILIP J. ARTZ OF COUNSEL), FOR
RESPONDENT-RESPONDENT AND DEFENDANT-RESPONDENT JOAN ROYSTON.

THE WOLFORD LAW FIRM LLP, ROCHESTER (ELIZABETH A. WOLFORD OF COUNSEL),
FOR RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (PAUL V. NUNES OF COUNSEL), FOR
RESPONDENT-RESPONDENT FLEET NATIONAL BANK AND DEFENDANT-RESPONDENT
FLEET BANK.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered September 16, 2009. The order, among other things, adjudged that all reasonable fees and disbursements incurred by guardian ad litem Audrey Patrone Peartree in appeals of the court's decision and order dated May 19, 2009 and order dated July 26, 2009 be paid for by the Estate of Angeline V. Sills.

It is hereby ORDERED that the order so appealed from is unanimously vacated without costs and the matter is remitted to Supreme Court, Steuben County, for further proceedings in accordance with the same Memorandum as in *Sills v Fleet Natl. Bank* ([appeal No. 1] ___ AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

144

CA 10-00139

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

IN THE MATTER OF ROBERT SILLS AND AUDREY
ELAINE SILLS, AS CO-EXECUTORS OF THE ESTATE
OF ANGELINE V. SILLS, DECEASED,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

FLEET NATIONAL BANK, JOAN ROYSTON AND
KIRK RICHARDSON, RESPONDENTS-RESPONDENTS.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS
CO-EXECUTORS OF THE ESTATE OF ANGELINE V.
SILLS, DECEASED, PLAINTIFFS-APPELLANTS,

V

FLEET BANK AND JOAN ROYSTON,
DEFENDANTS-RESPONDENTS.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

ROBERT SILLS AND AUDREY ELAINE SILLS, AS
CO-EXECUTORS OF THE ESTATE OF ANGELINE V.
SILLS, DECEASED, PLAINTIFFS-APPELLANTS,

V

JOAN ROYSTON, DEFENDANT-RESPONDENT.

AUDREY PATRONE PEARTREE, GUARDIAN AD LITEM,
RESPONDENT.

(APPEAL NO. 5.)

GATES & ADAMS, P.C., ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR
PETITIONERS-APPELLANTS AND PLAINTIFFS-APPELLANTS.

MCDONOUGH & ARTZ, P.C., BINGHAMTON (PHILIP J. ARTZ OF COUNSEL), FOR
RESPONDENT-RESPONDENT AND DEFENDANT-RESPONDENT JOAN ROYSTON.

THE WOLFORD LAW FIRM LLP, ROCHESTER (ELIZABETH A. WOLFORD OF COUNSEL),
FOR RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (PAUL V. NUNES OF COUNSEL), FOR
RESPONDENT-RESPONDENT FLEET NATIONAL BANK AND DEFENDANT-RESPONDENT
FLEET BANK.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered December 31, 2009. The order granted the application of Audrey Patrone Peartree, as guardian ad litem for decedent Angeline V. Sills, to retain Elizabeth A. Wolford as counsel to represent her in an appeal of the court's decision and order dated September 10, 2009, and ordered that all reasonable fees and disbursements incurred by the guardian ad litem in that appeal be paid for by the Estate of Angeline V. Sills.

It is hereby ORDERED that the order so appealed from is unanimously vacated without costs and the matter is remitted to Supreme Court, Steuben County, for further proceedings in accordance with the same Memorandum as in *Sills v Fleet Natl. Bank* ([appeal No. 1] ___ AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

147

KA 10-01907

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

ORDER

WILLIAM REED, DEFENDANT-RESPONDENT.

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

LINDA GEHRON, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from a new sentence of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 11, 2010 imposed upon defendant's conviction of criminal possession of a controlled substance in the third degree. Defendant was resentenced pursuant to the 2009 Drug Law Reform Act upon his 2003 conviction.

It is hereby ORDERED that the sentence so appealed from is unanimously affirmed (*see People v Hill*, ___ AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

150

KA 10-01904

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

ORDER

ROY WATSON, ALSO KNOWN AS DARIUS BROWN,
DEFENDANT-RESPONDENT.

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

LINDA GEHRON, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from a new sentence of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 11, 2010 imposed upon defendant's conviction of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the fourth degree, criminal possession of a controlled substance in the fifth degree, criminal possession of marihuana in the fourth degree and resisting arrest. Defendant was resentenced pursuant to the 2009 Drug Law Reform Act upon his 1996 conviction.

It is hereby ORDERED that the sentence so appealed from is unanimously affirmed (see *People v Hill*, ___ AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

152

KA 10-01905

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

OPINION AND ORDER

WILLIE A. HILL, JR., DEFENDANT-RESPONDENT.

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

LINDA GEHRON, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from a new sentence of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 11, 2010 imposed upon defendant's conviction of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree and reckless driving. Defendant was resentenced pursuant to the 2009 Drug Law Reform Act upon his 1999 conviction.

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

Opinion by SMITH, J.: This appeal concerns the proper method of calculating whether a defendant is eligible for resentencing pursuant to CPL 440.46. As relevant here, in 1994 defendant was convicted of assault in the first degree (Penal Law § 120.10)¹, a violent felony offense (§ 70.02 [1] [a]), for acts that were committed in 1994, and he was sentenced to an indeterminate term of incarceration. In 1999 he was convicted of, inter alia, criminal possession of a controlled substance in the third degree (§ 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]) based on events that occurred in 1998, and he was sentenced to an indeterminate term of incarceration as a second felony offender pursuant to the sentencing laws applicable at that time. Defendant, acting pro se, filed a motion that was received by Supreme Court in 2009, seeking resentencing pursuant to CPL 440.46. The People opposed the motion, contending that defendant was ineligible for resentencing because the total time between the commission of his prior and present felony offenses, excluding jail time, was less than 10 years and thus he had an "exclusion offense" as that term is defined in CPL 440.46 (5) (a)

¹ The record does not reflect the subdivision applicable to this conviction, although all subdivisions of section 120.10 are violent felony offenses.

(i). The People appeal from a judgment that, inter alia, granted defendant's motion for resentencing.

Contrary to the contention of the People, the court properly concluded that defendant's prior conviction, although a violent felony, did not constitute an "exclusion offense" within the meaning of the statute. In pertinent part, the statute defines an "exclusion offense" as

"a crime for which the person was previously convicted within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, which was . . . a violent felony offense as defined in section 70.02 of the penal law" (*id.*).

Defendant concedes that the crime for which he previously was convicted in 1994 is a violent felony offense. Furthermore, the parties agree that defendant committed and was previously convicted of that offense less than 5 years prior to the commission of the instant felony offense, i.e., criminal possession of a controlled substance in the third degree, and more than 10 years prior to his motion for resentencing, after deducting the time in which he was incarcerated between his commission of the two felony offenses. Consequently, the issue before us is whether the statute requires that the look-back period of 10 years be measured from the date of commission of the felony offense for which defendant seeks resentencing, as the People contend, or from the date of the motion for resentencing, as defendant contends. Based upon the plain language of the statute, we agree with defendant that the look-back period is to be measured from the date of the motion for resentencing.

It is a long-settled proposition that, in determining the Legislature's intent in enacting a statute, a court should interpret the statute in a manner that is most consistent with the plain language of the statute (*see generally People v Kisina*, 14 NY3d 153, 158; *People v Washington*, 228 AD2d 23, 26, *lv denied* 90 NY2d 899). Stated differently, inasmuch

"[a]s the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof . . . In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [internal quotation marks

omitted]).

Here, the statute indicates that an exclusion offense is, *inter alia*, a crime committed "within the preceding ten years" (CPL 440.46 [5] [a]). Contrary to the People's contention, there is no indication that such phrase is to be measured from the date of the commission of the offense for which defendant is seeking resentencing. In order to adopt the People's interpretation, we would have to add language to the statute to provide that an exclusion offense is a crime committed within the 10 years preceding the commission of the present felony offense. It is well settled, however, that " 'a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact' " (*Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394, *rearg denied* 85 NY2d 1033, quoting *McKinney's Cons Laws of NY*, Book 1, Statutes § 363, at 525; *see Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, 28).

Finally, the statute provides in that same sentence that the relevant 10-year period excludes any time "during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony" (CPL 440.46 [5] [a]). Thus, where the Legislature intended to use the time of the commission of the present felony offense as the starting point for calculating a time period, it unequivocally did so, leading inexorably to the conclusion that it did not intend that the 10-year period be calculated from the commission of the present felony offense. Consequently, the People's "suggested interpretation is wholly at odds with the wording of the statute and would require us to rewrite the statute. This we cannot do" (*People v Smith*, 63 NY2d 41, 79, *cert denied* 469 US 1227, *reh denied* 471 US 1049).

Accordingly, we conclude that the sentence should be affirmed (*see People v Sosa*, ___ AD3d ___ [Feb. 8, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

153

KA 10-01684

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES ADAMS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 3, 2009. The judgment convicted defendant, upon a jury verdict, of aggravated driving while intoxicated and driving while intoxicated.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a]) and driving while intoxicated (§ 1192 [3]). Defendant contends that his discovery rights were violated based on the People's failure to retain a videotape of the stop. We reject that contention. The issue concerning the alleged existence of a videotape of the stop was contested at trial and thus presented an issue of credibility for the jury (*see People v Smith*, 73 AD3d 1469, 1470, *lv denied* 15 NY3d 778), and Supreme Court granted defendant's request for an adverse inference charge with respect to the alleged videotape in the event that the jury credited defendant's version that there was in fact such a videotape (*see People v Safford*, 74 AD3d 1835, 1836-1837).

Also contrary to defendant's contention, the court properly refused to suppress any evidence resulting from the traffic stop inasmuch as the stop was based on probable cause (*see People v Wright*, 42 AD3d 942, 942-943, *lv denied* 9 NY3d 1011). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

154

KA 09-01375

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LESLIE JOHNSON, 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 (William D. Walsh, J.), rendered July 1, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]) and assault in the second degree (§ 120.05 [2]), defendant contends that she was denied effective assistance of counsel. Several of the alleged instances of ineffective assistance specified by defendant, e.g., that she was not properly advised of the pretrial plea offer and that her attorney did not conduct a proper investigation, are based on matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (see *People v Miller*, 59 AD3d 1124, 1125, *lv denied* 12 NY3d 819; *People v Keith*, 23 AD3d 1133, 1134-1135, *lv denied* 6 NY3d 815). We reject defendant's contention with respect to the remaining instances of alleged ineffective assistance. Insofar as defendant contends that she was denied effective assistance of counsel based on the failure of defense counsel to make certain suppression motions, we note that defendant failed to demonstrate that any such motions would have been successful. It is well settled that "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152; see *People v Pringle*, 71 AD3d 1450, 1451, *lv denied* 15 NY3d 777). We have reviewed the remaining instances of alleged ineffective assistance set forth by

defendant and conclude that she received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147).

We agree with defendant, however, that assault in the second degree (Penal Law § 120.05 [2]) is a lesser included offense of assault in the first degree (§ 120.10 [1]) "and therefore should have been considered only in the alternative as an inclusory concurrent count of assault in the first degree" (*People v Flecha*, 43 AD3d 1385, 1386, lv denied 9 NY3d 990; see CPL 300.30 [4]). We thus modify the judgment accordingly. We have considered defendant's remaining contentions and conclude that none requires reversal.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

172

KA 09-02484

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ELHAJJI ELSHABAZZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered August 27, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from two judgments convicting him, respectively, upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and upon his plea of guilty of criminal possession of marijuana in the fourth degree (§ 221.15). Contrary to the contention of defendant in each appeal, his waiver of the right to appeal was knowingly, voluntarily and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Callahan*, 80 NY2d 273, 280). The valid waiver of the right to appeal encompasses defendant's contention concerning the denial of his request for youthful offender status (*see People v Harris*, 77 AD3d 1326; *People v Williams*, 37 AD3d 1193). In any event, that contention is without merit. "Supreme Court carefully considered the request to be considered a youthful offender and stated the reasons for its denial" (*Williams*, 37 AD3d at 1194), and it cannot be said that the court abused its discretion in denying that request (*see id.*; *People v Ariola*, 15 AD3d 882, amended on rearg 17 AD3d 1172, lv denied 5 NY3d 784; *People v Smith*, 286 AD2d 878, lv denied 98 NY2d 641).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

173

KA 09-02483

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ELHAJJI ELSHABAZZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered August 27, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of marihuana in the fourth degree.

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

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

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

176

KA 06-01618

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RONALD HURLBERT, JR., DEFENDANT-APPELLANT.

BETZJITOMIR & BAXTER, LLP, BATH (SUSAN BETZJITOMIR OF COUNSEL), FOR DEFENDANT-APPELLANT.

JASON L. COOK, DISTRICT ATTORNEY, PENN YAN (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Dennis F. Bender, A.J.), rendered March 16, 2006. The judgment convicted defendant, upon a jury verdict, of kidnapping in the first degree (two counts), rape in the first degree (five counts), criminal sexual act in the first degree (two counts), criminal possession of a weapon in the third degree (four counts) and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, two counts of kidnapping in the first degree (Penal Law § 135.25 [2] [a]), five counts of rape in the first degree (§ 130.35 [1]), two counts of criminal sexual act in the first degree (§ 130.50) and criminal possession of a weapon in the third degree (§ 265.02 [1]) in connection with acts committed by defendant against his girlfriend over a five-day period. Contrary to defendant's contention, he was not denied effective assistance of counsel based on defense counsel's failure to assert a defense of mental disease or defect (*see generally People v Baldi*, 54 NY2d 137, 147). Although defendant told the victim that he wanted to kill himself, the record does not support the defense that, "as a result of mental disease or defect, defendant lacked substantial capacity to know or appreciate either . . . [t]he nature and consequences of [his] conduct[] or . . . [t]hat the conduct was wrong" (§ 40.15). Indeed, the testimony of the victim, which was corroborated by physical evidence, and that of defendant, belie his contention that defense counsel should have asserted that defense.

We reject defendant's further contention that County Court erred in permitting defense counsel to represent defendant after the court

discovered that defense counsel had previously represented a prosecution witness who waived her attorney-client privilege for purposes of cross-examination. Although the court did not inquire of defendant whether he understood the risks that may be involved with respect to the potential conflict (*see generally People v McDonald*, 68 NY2d 1, 8, *rearg dismissed* 69 NY2d 724; *People v Gomberg*, 38 NY2d 307, 313-314), the failure to make such an inquiry does not constitute reversible error because defendant has not established that the potential conflict of interest bore "a substantial relation to the conduct of the defense" (*People v Harris*, 99 NY2d 202, 211 [internal quotation marks omitted]). Indeed, defense counsel vigorously cross-examined that witness, and his questions included information regarding the conviction with respect to which he represented her.

Contrary to defendant's contention, the People laid a proper foundation for the admission in evidence of tape-recorded telephone conversations between defendant and the victim and the transcript of those recordings. The victim testified that she made the tapes on a microcassette recorder, that the tapes had not been altered and that the recordings constituted an accurate reproduction of the conversations she had with defendant (*see People v Ely*, 68 NY2d 520, 527; *People v Williams*, 55 AD3d 1398, *lv denied* 11 NY3d 901). In addition, the court properly determined that the probative value of the tapes outweighed the potential for prejudice inasmuch as they were relevant with respect to the element of forcible compulsion in the counts charging rape in the first degree and criminal sexual act in the first degree (Penal Law § 130.50 [1]; *see generally People v Cook*, 251 AD2d 1033, *affd* 93 NY2d 840).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence. The victim and defendant gave differing accounts of the events that took place over the relevant time period. The victim's testimony was corroborated by physical evidence, including handcuffs on which the victim's DNA was found and the rope and tape that defendant used to restrain her, and by the description of the victim's demeanor by witnesses who observed defendant and the victim during the time period in question. The jury was entitled to credit the victim's testimony, and we see no reason to disturb its determination (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's contention, his sentence, the aggregate maximum term of which is 105 years (*see Penal Law* § 70.30 [1] [d] [i]), is not illegal. "[W]here[, as here,] the crimes are committed through separate and distinct acts, even though part of a single transaction, consecutive sentences are possible regardless of whether the statutory elements of the offenses overlap" (*People v Salcedo*, 92 NY2d 1019, 1021). The court imposed consecutive determinate terms of imprisonment of 15 years on the rape and criminal sexual act counts, which run concurrently to the indeterminate terms of imprisonment imposed on the kidnapping counts (*see generally People v Ramirez*, 89 NY2d 444, 451). The court properly ordered the indeterminate terms of imprisonment imposed on the weapons counts to run concurrently with

each other and the terms imposed on the kidnapping counts (*see generally id.*), but consecutively to the terms imposed on the rape and criminal sexual act counts (*see generally Salcedo*, 92 NY2d at 1021). Because defendant has been convicted of class A felonies, the sentence is not eligible for the limiting provisions contained in Penal Law § 70.30 (1) (e) (vii) (A) and we decline to exercise our discretion to reduce the sentence as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [b]*). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

178

KA 10-01144

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CORNELL LONG, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 21, 2009. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that Supreme Court erred in assessing 15 points against him under the risk factor for number and nature of prior crimes, based on his previous youthful offender adjudication. "In the context of the criminal history section of the risk assessment instrument [RAI], the term crime includes criminal convictions, youthful offender adjudications and juvenile delinquency findings" (*People v Irving*, 45 AD3d 1389, 1389, *lv denied* 10 NY3d 703 [internal quotation marks omitted]).

We agree with defendant, however, that the court failed to comply with Correction Law § 168-n (3), pursuant to which the court was required to set forth the findings of fact and conclusions of law upon which it based its determination. The statement of the court that it reviewed the case summary, RAI and all relevant information and evidence and that it accepted the findings contained in the case summary and RAI, without further explanation, was insufficient to meet the statutory requirement (*see People v Flax*, 71 AD3d 1451; *People v Hubel*, 70 AD3d 1492, 1493-1494; *People v Cullen*, 53 AD3d 1105). "[T]he failure of the court to set forth [those] findings of fact and conclusions of law . . . 'preclud[es] meaningful appellate review of the propriety of the court's risk level assessment' " (*Flax*, 71 AD3d at 1452). We therefore hold the case, reserve decision and remit the

matter to Supreme Court for compliance with the statute (*see Cullen*,
53 AD3d 1105; *People v Terrill*, 17 AD3d 1045).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

184

CA 10-01281

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

DOMINIC R. PARTON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ONONDAGA COUNTY, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

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

SUGARMAN LAW FIRM, LLP, SYRACUSE (AMY M. VANDERLYKE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered January 6, 2010. The order granted the application of plaintiff for leave to file and serve a late notice of claim.

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

Memorandum: Supreme Court did not abuse its discretion in granting plaintiff's application seeking leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). Plaintiff offered a reasonable excuse for failing to serve the notice of claim within the statutory 90-day period (*see* § 50-e [1] [a]; *see generally* *Matter of LaMay v County of Oswego*, 49 AD3d 1351, 1352, *lv denied* 10 NY3d 715). Contrary to defendant's contention, plaintiff "made a persuasive showing that [Onondaga County (defendant)] 'acquired actual knowledge of the essential facts constituting the claim' . . .[, and defendant has] made no particularized or persuasive showing that the delay caused [it] substantial prejudice" (*Wetzel Servs. Corp. v Town of Amherst*, 207 AD2d 965; *see Matter of Rodriguez v Western Regional Off-Track Betting Corp.*, 74 AD3d 1811).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

185

CA 10-01125

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

IN THE MATTER OF NEW YORK STATE COMMISSION OF
CORRECTION, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY B. HOWARD, INDIVIDUALLY AND IN HIS
CAPACITY AS SHERIFF OF ERIE COUNTY,
RESPONDENT-APPELLANT.

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO, PHILLIPS LYTTLE LLP (TIMOTHY
W. HOOVER OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 30, 2010 in a proceeding pursuant to CPLR article 4. The judgment granted the petition pursuant to Correction Law § 46 (4) to compel respondent to comply with various regulations.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the 8th, 9th, and 15th decretal paragraphs and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this special proceeding seeking "an [o]rder pursuant to [a]rticle 4 of the CPLR and . . . Correction Law [§] 46 (4)" directing respondent to comply with certain regulations applicable to the management of county jails and penitentiaries (*see generally* 9 NYCRR subtit AA, ch I), and respondent appeals from a judgment granting the petition. We agree with respondent that Correction Law § 46 (4) provides for relief in the nature of mandamus to compel and thus the procedural requirements of CPLR article 78 are applicable to a special proceeding seeking relief pursuant to Correction Law § 46. Respondent contends that, pursuant to CPLR article 78, petitioner must establish that it has "a clear legal right to the relief sought" (*Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16). We conclude, however, that Correction Law § 46 (4) grants petitioner a clear legal right to an order directing respondent to comply with regulations promulgated by petitioner based on petitioner's determination that respondent, after being afforded an opportunity for remediation, failed to comply with those regulations. Nevertheless, we agree with respondent that

Supreme Court erred in granting those parts of the petition directing respondent to comply with 9 NYCRR 7006.7 (b) and (c) and 9 NYCRR 7032.4 (d). Petitioner determined that respondent was in compliance with those regulations prior to commencing this proceeding and the investigations with respect to those alleged violations were closed (see generally *Matter of Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO v State of New York*, 229 AD2d 286, 291, lv denied 90 NY2d 807). We therefore modify the judgment accordingly.

We reject respondent's contention that the standards for town and village lockups (see generally 9 NYCRR subtit AA, ch IV), rather than the standards for county jails and penitentiaries (see generally 9 NYCRR subtit AA, ch I), should have been applied to arrested persons awaiting arraignment in respondent's custody. Pursuant to Correction Law § 500-a (2-b), the facilities controlled by respondent, i.e., the Erie County Holding Center and the Erie County Correctional Facility, may "be used for the detention of persons under arrest being held for arraignment," and such persons are lawfully committed to the custody of respondent as if they had been judicially committed (§ 500-c [9]). We therefore conclude that the standards for county jails and penitentiaries are properly applied to all persons lawfully committed to those Erie County facilities regardless of arraignment status.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

186

CA 10-01458

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

IN THE MATTER OF DEMAR MATHIS,
PETITIONER-RESPONDENT,

V

ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

Appeal from a judgment (denominated decision and order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 17, 2009 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

187

CA 10-01459

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

IN THE MATTER OF DEMAR MATHIS,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

Appeal from a judgment (denominated decision and order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered December 18, 2009 in a proceeding pursuant to CPLR article 78. The judgment granted respondent's motion for leave to reargue, and upon reargument adhered to the court's determination granting the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination terminating his employment as a correction officer for failure to complete his probationary period in a satisfactory manner. Supreme Court granted the petition, annulled the determination, reinstated petitioner in his former position and awarded him back pay. The court thereafter granted the motion of respondent to reargue its opposition to the petition and, upon reargument, the court erred in adhering to its prior decision. We reverse.

We agree with respondent that, at the time of his termination, petitioner was a probationary employee who could be terminated " 'for almost any reason[] or for no reason at all' " (*Matter of Swinton v Safir*, 93 NY2d 758, 762-763; see *Matter of Taylor v State Univ. of N.Y.*, 13 AD3d 1149). Petitioner's probationary term was to expire on October 29, 2007, but it was extended by 92 days pursuant to 4 NYCRR 4.5 (g). The court, in concluding that petitioner was no longer a probationary employee on the date he was terminated, calculated the extension using calendar days rather than workdays. Petitioner, however, did not challenge respondent's calculation of the probation extension in his petition. Even assuming, arguendo, that the court could base its determination on a ground not raised in the petition

(see *Matter of Roth v Syracuse Hous. Auth.*, 270 AD2d 909, lv denied 95 NY2d 756), we conclude that the court erred in calculating the expiration date of the extended probationary term. Where, as here, a probationary term is extended pursuant to 4 NYCRR 4.5 (g), the extension is "one workday for every workday" the employee has missed (*Matter of Beck v Walker*, 286 AD2d 996, 996; see *Matter of Fischer v Hongisto*, 75 AD2d 973, 974, appeal dismissed 53 NY2d 703).

"As a probationary employee, petitioner had no right to challenge the termination by way of a hearing or otherwise, absent a showing that he was dismissed in bad faith or for an improper or impermissible reason" (*Swinton*, 93 NY2d at 763; *Matter of Carroll v New York State Canal Corp.*, 51 AD3d 1389; *Taylor*, 13 AD3d at 1149). Petitioner made no such showing here. Indeed, he had excessive absenteeism, disobeyed a direct order to return to work and continued to have absenteeism problems after being counseled with respect thereto. As respondent correctly contends, "[c]hronic absenteeism is a sufficient basis for terminating a probationary employee" (*Matter of Skidmore v Abate*, 213 AD2d 259, 260; see *Matter of Williams v Commissioner of Off. of Mental Health of State of N.Y.*, 259 AD2d 623), as is the refusal to comply with a direct order (see *Carroll*, 51 AD3d 1389).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

189

CA 10-01867

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

STEVEN J. KELLERSON AND MARY KELLERSON,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ZENAIDA F. ASIS, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (ALISON M.K. LEE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (AMY M. VANDERLYKE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 23, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Steven J. Kellerson (plaintiff) when he was struck by a vehicle operated by defendant. Plaintiff was working in an automatic car wash tunnel at the time of the accident. According to plaintiffs, plaintiff sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories set forth in Insurance Law § 5102 (d). We conclude that Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident. Even assuming, arguendo, that defendant met her initial burden on the motion, we conclude that plaintiffs raised triable issues of fact whether plaintiff sustained a serious injury under both categories (*see Parkhill v Cleary*, 305 AD2d 1088, 1089-1090). In opposition to the motion, plaintiffs submitted the affirmation of plaintiff's treating orthopedic surgeon, who reviewed the results of an MRI and other diagnostic tests and conducted his own objective tests. The orthopedic surgeon concluded that plaintiff had sustained, inter alia, a complex tear of the posterior horn of the right knee meniscus requiring surgical repair and a permanent 15% loss of use of the right leg that were causally related to the accident. That evidence was sufficient to defeat defendant's motion (*see Jaramillo v Lobo*, 32 AD3d 417).

We reject defendant's contention that the court erred in denying her motion because there was a "gap" in plaintiff's treatment. Plaintiff's treating orthopedic surgeon provided the un rebutted explanation that, although plaintiff's condition had improved to a point where he could be discharged from active treatment, the potential for further meniscal tear complications was ever present and, consistent with the orthopedic surgeon's earlier predictions, further treatment, i.e., surgery, became necessary when plaintiff's condition worsened. Needless continuous medical treatment is not necessary to establish a serious injury (see *Brown v Dunlap*, 4 NY3d 566, 577). We conclude that plaintiff established a reasonable explanation for the gap in or cessation of treatment sufficient to defeat defendant's motion (see *id.*).

We reject defendant's further contention that plaintiffs improperly served a supplemental bill of particulars after the note of issue was filed and defendant had moved for summary judgment dismissing the complaint. "A party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than [30] days prior to trial," so long as the continuing damages and disabilities are an anticipated sequelae of the injuries described in the original bill of particulars (CPLR 3043 [b]; see *Tate v Colabello*, 58 NY2d 84, 86-87). Here, plaintiffs' supplemental bill of particulars merely expanded upon the continuing disabilities alleged in the original bill of particulars and did not set forth a new legal theory of liability or new injuries (see *Tate*, 58 NY2d at 87). Early on in treatment, plaintiff's orthopedic surgeon specifically mentioned the possibility of a meniscal tear, and plaintiffs disclosed that statement in the original bill of particulars. Defendant contends that plaintiffs were not permitted to serve a supplemental bill of particulars after she had moved for summary judgment because her motion effectively stayed disclosure (see CPLR 3214 [b]). That contention is without merit inasmuch as a supplemental bill of particulars is not a disclosure device pursuant to CPLR 3102 (a).

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

190

CA 10-01282

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

J.N.K. MACHINE CORPORATION, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TBW, LTD., WOOLSCHLAGER INC. AND
BERNARD C. WOOLSCHLAGER, DEFENDANTS-APPELLANTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered November 19, 2009 in a breach of contract action. The order, among other things, granted in part plaintiff's amended motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the amended motion for partial summary judgment concerning defendants' use of the computer inventory program and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action seeking damages based on defendants' failure to pay for goods sold by plaintiff to defendants. Plaintiff and defendants entered into a written contract providing, inter alia, that defendants would purchase the entire inventories of the two stores owned by plaintiff for \$650,000. Supreme Court granted in part plaintiff's amended motion for partial summary judgment on the first two causes of action, for breach of contract against defendant TBW, Ltd. and defendants, respectively. We agree with defendants at the outset that the court erred in determining that the goods at issue were a single "commercial unit" and thus that defendant had accepted the goods pursuant to UCC 2-606 (2). The automobile and truck parts comprising the inventories of the two stores did not constitute "a single whole for purposes of sale and division of which materially impairs its character or value on the market" (UCC 2-105 [6]).

We nevertheless conclude that the court properly granted that part of plaintiff's amended motion for partial summary judgment on the issue whether defendant had accepted the goods. Plaintiff established that defendants failed to reject the goods in a timely manner, thus

they accepted the goods pursuant to UCC 2-606 (1) (b), and defendants did not raise a triable issue of fact with respect thereto (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). The "[r]ejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer[s] seasonably notif[y] the seller" (UCC 2-602 [1]). "Generally, what is a timely rejection is a question of fact for the jury . . . However, as in the instant case, when only one inference may be drawn as to the reasonableness of the time in which defendant[s] rejected the goods, it becomes a question of law" (*Tabor v Logan*, 114 AD2d 894, 894). Here, the record establishes that defendants did not attempt to reject the goods until approximately five months after taking possession of them, and we therefore conclude as a matter of law that defendants' attempted rejection did not occur within a reasonable time period (see UCC 2-602 [1]; 2-606 [1] [b]; *Cliffstar Corp. v Cape Cod Biolab Corp.*, 37 AD3d 1073, 1074-1075).

We agree with defendants that the court erred in granting that part of plaintiff's amended motion for partial summary judgment on the issue concerning defendants' use of the computer inventory program owned by plaintiff, and we therefore modify the order accordingly. There is a triable issue of fact whether the written contract was supplemented by an oral agreement allowing defendants to use plaintiff's computer inventory program (see generally *Zuckerman*, 49 NY2d at 562). Plaintiff failed to establish that the written contract was "a complete and exclusive statement of the terms of the agreement" (UCC 2-202 [b]; see generally *Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 599-600), and thus the written contract may be "explained or supplemented . . . by evidence of consistent additional terms," including evidence of a contemporaneous oral agreement (UCC 2-202 [b]; see generally *Tambe Elec., Inc. v Home Depot U.S.A., Inc.*, 49 AD3d 1161). Defendants submitted evidence establishing that plaintiff orally agreed to allow them to use the computer inventory program for as long as was needed, and that oral agreement does not "contradict or negate a term of the writing" (*Hunt Foods & Indus. v Doliner*, 26 AD2d 41, 43; see UCC 2-202).

Contrary to the further contention of defendants, the court properly refused to consider parol evidence concerning the purchase price or quantity of goods at issue. The contract unambiguously provided that defendant was purchasing the entire inventory of plaintiff's stores for a specific price, and the deposition testimony and affidavits relied upon by defendants in opposition to the amended motion do "not 'explain[]' or 'supplement[]' the unambiguous contract [terms] but, rather, they impermissibly contradicted [those terms]" (*Cliffstar Corp.*, 37 AD3d at 1074, quoting UCC 2-202).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

193

KA 09-01456

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GEORGE E. ROGERS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered June 15, 2009. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends he was entitled to a downward departure from his presumptive risk level. Defendant failed to preserve that contention for our review (*see People v Gilbert*, 78 AD3d 1584, 1585-1586; *People v Kelley*, 64 AD3d 1192, *lv denied* 13 NY3d 708). In any event, that contention lacks merit inasmuch as defendant failed to " 'present clear and convincing evidence of special circumstances justifying a downward departure' " (*People v Clark*, 66 AD3d 1366, 1367, *lv denied* 13 NY3d 713; *see People v Sawyer*, 78 AD3d 1517).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

194

KA 10-00217

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PRISCILLA GUMPTON, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, 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 August 26, 2009. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the third degree, grand larceny in the fourth degree (two counts) and criminal possession of stolen property in the third degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of, inter alia, two counts of grand larceny in the fourth degree (Penal Law § 155.30 [1]), defendant contends that County Court abused its discretion in denying her motion to withdraw the guilty plea. We reject that contention (*see generally People v Dozier*, 74 AD3d 1808, *lv denied* 15 NY3d 804). "Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Robertson*, 255 AD2d 968, *lv denied* 92 NY2d 1053). Although in support of the motion defense counsel attacked the strength of the People's proof and contended that the case was "eminently triable," it is well settled that " 'defendant [was] not entitled to withdraw [her] plea merely because [s]he discover[ed] . . . that [her] calculus misapprehended the quality of the State's case' " (*People v Jones*, 44 NY2d 76, 81, *cert denied* 439 US 846). In any event, any "assertion of innocence by defendant in support of the motion is belied by [her] admission of guilt during the plea colloquy" (*People v Conde*, 34 AD3d 1347, 1347).

To the extent that the contention of defendant that she was denied effective assistance of counsel is not forfeited by the plea (*see People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), it is lacking in merit (*see generally People v Ford*, 86 NY2d 397, 404).

Defendant's assertion that defense counsel was ineffective is contradicted by her statements during the plea colloquy (see *People v Harris*, 63 AD3d 1653, lv denied 13 NY3d 744). Moreover, we note that "[d]efense counsel negotiated 'an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Gross*, 50 AD3d 1577, quoting *Ford*, 86 NY2d at 404). Defendant failed to preserve for our review her contention that the People failed to place on the record at the time of the plea the proof they intended to offer at trial inasmuch as she did not move to withdraw her plea or to vacate the judgment of conviction on that ground (see generally *People v Jones*, 71 AD3d 1573, 1574, lv denied 15 NY3d 775). In any event, during the plea proceeding defendant unequivocally admitted the elements of the crimes to which she pleaded guilty, and "the court's inquiry was sufficient to demonstrate that [her] plea was knowingly, intelligently and voluntarily entered" (*People v Pane*, 292 AD2d 850, 850, lv denied 98 NY2d 653). Finally, the sentence is not unduly harsh or severe.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

195

KA 10-00821

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH A. COHENS, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER W. SCHLECHT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Stephen R. Sirkin, A.J.), rendered October 30, 2009. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Defendant failed to preserve for our review his contention that County Court violated his right to a jury trial by offering to impose the minimum lawful sentence if he agreed to waive the right to a jury trial and instead to proceed with a bench trial (*see People v Sanchez*, 306 AD2d 86, *lv denied* 1 NY3d 580; *see also People v Dixon*, 50 AD3d 1519, *lv denied* 10 NY3d 958). In any event, in light of defendant's extensive experience with the court system and the fact that he was represented by counsel, we conclude that defendant's right to a jury trial was not violated by the conditional promise of the court to impose the minimum sentence (*see People v Daniels*, 209 AD2d 340, 341; *cf. People v Nicholson*, 35 AD3d 886, 888-889; *see generally Sanchez*, 306 AD2d at 86).

Defendant further contends that the verdict is inconsistent or repugnant because the court dismissed the charge of menacing in the second degree (Penal Law § 120.14 [1]) but found him guilty of criminal possession of a weapon in the third degree based on his possession of a knife. We reject that contention. The record reflects that defendant was charged with two counts of criminal possession of a weapon, based on his possession of a knife and a two-by-four piece of wood, respectively, and the court acquitted defendant of the count based on his possession of the piece of wood. According to the People's bill of particulars, however, the menacing charge was

based on defendant's use of "both" the knife and the piece of wood. Thus, in dismissing the menacing count, the court apparently found that the People did not prove that defendant intentionally placed or attempted to place the victim in reasonable fear of physical injury, serious physical injury or death by displaying "both" the knife and the piece of wood. We therefore conclude that the court's dismissal of the menacing count did not necessarily negate any element of the count of which defendant was convicted, which involved his possession of the knife, and that the verdict thus was neither inconsistent nor repugnant (see *People v Rayam*, 94 NY2d 557, 561-563; *People v Bray*, 46 AD3d 1232, 1234).

We reject defendant's contention that his use of the weapon was justified under Penal Law § 35.20 (2) and thus that the evidence is legally insufficient and the verdict is against the weight of the evidence. Because the possession of a weapon is distinct from the use of such weapon, "there are no circumstances when justification . . . can be a defense to the crime of criminal possession of a weapon" (*People v Pons*, 68 NY2d 264, 267; see *People v White*, 75 AD3d 109, 122-123, lv denied 15 NY3d 758; *People v Abdul-Hakeem*, 172 AD2d 177, lv denied 78 NY2d 960, 964). Similarly, the fact that the knife held by defendant during the incident was not recovered does not render the evidence legally insufficient or the verdict against the weight of the evidence (see *People v Wade*, 274 AD2d 438, lv denied 95 NY2d 939).

Defendant failed to preserve for our review his additional contention that his right to due process was violated by the admission of knives recovered from his home resembling the knife at issue (see CPL 470.05 [2]). In any event, that contention also lacks merit because it merely goes to the weight to be accorded such evidence, not its admissibility (see *People v Malcolm*, 216 AD2d 118, 119). Finally, we reject defendant's challenge to the severity of the sentence inasmuch as he received the minimum legal sentence for a second felony offender.

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

196

KA 10-01674

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CORRENE G. SAWYER-PLATO, DEFENDANT-APPELLANT.

JOHN G. LEONARD, ROME, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (John S. Balzano, A.J.), rendered September 16, 2008. The judgment convicted defendant, upon a nonjury verdict, of misdemeanor driving while intoxicated (two counts) and refusal to submit to a field screening test.

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

Memorandum: Defendant appeals from a judgment convicting her, after a nonjury trial, of two counts of driving while intoxicated (DWI) as a misdemeanor (Vehicle and Traffic Law § 1192 [2], [3]) and refusal to submit to a field screening test (§ 1194 [1] [b]). On July 22, 2007, defendant was arraigned in Sylvan Beach Village Court on, inter alia, two counts of DWI as a misdemeanor. A certified copy of defendant's abstract of driving record from the New York State Department of Motor Vehicles (DMV abstract) indicated, however, that defendant was convicted of DWI in Oneida City Court in Madison County on August 26, 2004, and the People thus sought a felony DWI indictment from the Oneida County grand jury. By indictment filed December 13, 2007, defendant was charged, inter alia, with two counts of DWI as a felony, and she was arraigned on that indictment on January 4, 2008. At that time, the People announced their readiness for trial.

Thereafter, a certificate of conviction was produced that demonstrated that the DMV abstract was erroneous, inasmuch as the August 26, 2004 conviction in Oneida City Court was not for DWI but, rather, was for driving while ability impaired (Vehicle and Traffic Law § 1192 [1]), a violation. As a result, on February 26, 2008, the People moved to amend the indictment to reduce the two DWI charges from felonies to misdemeanors. County Court granted the motion over defendant's objection. Defendant thereafter moved, inter alia, to dismiss the indictment, as amended, based on the alleged violation of

her statutory right to a speedy trial. According to defendant, the People had 90 days in which to announce their readiness for trial (see CPL 30.30 [1] [b]) and failed to do so. Defendant contended that she was originally charged with misdemeanors, that the felony indictment was based on erroneous documentation, and that, when the error was discovered, the indictment was amended by reducing the felony counts to misdemeanors, thus rendering applicable the 90-day time period rather than the six-month time period. The court properly denied defendant's motion.

As the Court of Appeals has written, "unless an event occurs which triggers the specific contingencies of CPL 30.30 (5), [which is not the case here,] the general rule articulated in CPL 30.30 (1) controls the calculation of the readiness period throughout the criminal action. Under that provision, the readiness time requirement is based on the most serious offense charged in the criminal action, measured from the date of filing of the first accusatory instrument" (*People v Cooper*, 98 NY2d 541, 546; see *People v Cooper*, 90 NY2d 292, 294; *People v Tychanski*, 78 NY2d 909, 912). Here, the most serious offenses charged in this case were the two felony counts of DWI. While the documentation that defendant had a predicate DWI conviction, which formed the basis for the felony charges, was later shown to be erroneous, that does not negate the fact that "the most serious offense charged in the criminal action" was a felony (*Cooper*, 98 NY2d at 546). As a result, the People had six months in which to declare their readiness for trial (see CPL 30.30 [1] [a]; *People v Searles*, 2003 NY Slip Op 51402[U]), and they timely did so on January 4, 2008. Finally, we reject defendant's further contention that the People's declaration of readiness on January 4 was rendered ineffective by the subsequent reduction of the felony counts to misdemeanors.

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

197

KA 04-03053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIE J. DELANCY, DEFENDANT-APPELLANT.

MICHAEL P. STACY, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered October 4, 2004. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), defendant contends that the evidence of his possession of the weapon is legally insufficient to support the conviction. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant constructively possessed the firearm in question by exercising dominion and control over the area from which the firearm was seized (*see* § 10.00 [8]; *People v Manini*, 79 NY2d 561, 572-573). Defendant further contends that the verdict is repugnant inasmuch as he was acquitted of criminal possession of a controlled substance in the seventh degree (§ 220.03). We reject that contention as well (*see generally People v Tucker*, 55 NY2d 1, 4, rearg denied 55 NY2d 1039). Supreme Court properly charged the jury that, in order to find defendant guilty of criminal possession of a weapon in the third degree, it must find that defendant "knowingly possesse[d] any *firearm*," while with respect to criminal possession of a controlled substance in the seventh degree the jury had to find that defendant "knowingly and unlawfully possesse[d] a *controlled substance*," including heroin. Here, the jury was entitled to find that defendant exercised dominion and control over the firearm, which was found near

his person, but not over the heroin, which was located further away from his person.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

198

KA 07-00943

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT C. HALTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Stephen R. Sirkin, A.J.), rendered February 27, 2007. The judgment convicted defendant, upon a nonjury verdict, of sexual abuse in the first degree, rape in the second degree, criminal sexual act in the second degree, and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, *inter alia*, sexual abuse in the first degree (Penal Law § 130.65 [3]), and rape in the second degree (§ 130.30 [1]). 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). Where, as here, the determination of guilt or innocence requires an assessment of the credibility of the witnesses, we afford "[g]reat deference . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*id.*).

Contrary to defendant's further contention, County Court properly applied the Rape Shield Law (CPL 60.42) in precluding evidence of the alleged prior sexual conduct of one of the victims. "Regardless of whether the [Rape] Shield Law applied, the connection between the proffered evidence and the victim's motive or ability to fabricate sodomy charges against defendant was so tenuous that the evidence was entirely irrelevant" (*People v Segarra*, 46 AD3d 363, 364, *lv denied* 10 NY3d 816; *see generally People v Williams*, 81 NY2d 303, 312-315).

Defendant failed to preserve for our review his further contention that the court erred in permitting the mother of the

victims to testify that one of them had reported the incidents to her (see *People v Rodriguez*, 284 AD2d 952, lv denied 96 NY2d 924; *People v Graham*, 167 AD2d 866, lv denied 77 NY2d 906). Defendant also failed to preserve for our review his contention that the court failed to take into account jail time credit to which he is entitled in determining the duration of the order of protection (see *People v Nieves*, 2 NY3d 310, 315-317). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

200

KA 09-02161

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BOBBY L. LILLEY, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (AARON D. CARR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered July 13, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the second degree (Penal Law § 215.50 [3]), defendant contends that his waiver of the right to appeal was invalid and that County Court impermissibly enhanced his sentence by issuing a stay away order of protection in favor of the victim (*see generally* CPL 530.13 [4]). We note at the outset that it is of no moment whether defendant's waiver of his right to appeal was invalid. Such a waiver, even if valid, would not preclude our consideration of defendant's contention concerning the order of protection, because such an order was not a part of the plea agreement, nor was such an order discussed during the plea colloquy (*see generally People v Doris*, 64 AD3d 813, *lv denied* 13 NY3d 796). Nevertheless, we conclude that defendant's contention with respect to the order of protection is without merit. "An order of protection may properly be issued independent of a plea agreement" (*People v Smith*, 294 AD2d 916, 916) and, although such an order is issued at sentencing, it is not a part of defendant's sentence (*see People v Nieves*, 2 NY3d 310, 316; *People v Dixon*, 16 AD3d 517). Contrary to defendant's further contention, the court had the authority to issue the order of protection in the absence of the victim's consent (*see People v Monacelli*, 299 AD2d 916, *lv denied* 99 NY2d 617).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

201

KA 10-01906

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FAISAL MOLLAIE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 3, 2009. The judgment convicted defendant, upon a nonjury verdict, of harassment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of harassment in the second degree (Penal Law § 240.26 [1]). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, we reject that contention. The People presented the testimony of the victim that defendant attempted to strike her with a closed fist, followed her throughout their apartment, grabbed her repeatedly, and knocked her to the ground. In addition, they presented the testimony of a police officer who stated that he observed that the victim was bleeding and bruised immediately after the incident. That testimony is legally sufficient to establish that defendant, acting "with intent to harass, annoy or alarm [the victim,] . . . subject[ed her] . . . to physical contact, or attempt[ed] or threaten[ed]" to do so (§ 240.26 [1]; *see generally People v Bleakley*, 69 NY2d 490, 495). It is well settled that a "defendant may be presumed to intend the natural and probable consequences of his [or her] actions . . ., and [that] intent may be inferred from the totality of conduct of the accused" (*People v Mahoney*, 6 AD3d 1104, 1104, *lv denied* 3 NY3d 660 [internal citations and quotation marks omitted]; *see People v Roman*, 13 AD3d 1115, 1116, *lv denied* 4 NY3d 802). Moreover, viewing the evidence in light of the elements of the crime 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 Bleakley*, 69 NY2d at 495).

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

All concur except SCONIERS, J., who dissents and votes to reverse in accordance with the following Memorandum: I agree with my colleagues that defendant failed to preserve for our review his contention that the conviction of harassment in the second degree (Penal Law § 240.26 [1]) is not supported by legally sufficient evidence. Nevertheless, I respectfully dissent inasmuch as I agree with defendant that the evidence is in fact legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495), and in my view we should exercise our discretion to reach defendant's contention in the interest of justice and reverse the judgment (*see CPL 470.15 [6] [a]*). "A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person . . . [h]e or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same" (Penal Law § 240.26 [1]). Here, the evidence established that, while defendant was in his apartment talking to a third party on his cellular telephone, his wife (complainant), grabbed the phone from his hand and ran away. As a result, defendant chased the complainant throughout the apartment and repeatedly asked her to return the phone. The complainant testified that, during the chase, defendant pushed her on the shoulder and grabbed her arm. Both defendant and the complainant testified consistently that, throughout this incident, defendant repeatedly asked the complainant to return his phone and did not utter any threats. Rather, he merely insisted that the phone be returned. Thus, while the evidence established that defendant intended to retrieve his phone from the complainant, it is insufficient to support the conclusion that he had the requisite "intent to harass, annoy or alarm another person" (§ 240.26). Therefore, the proof of intent is insufficient to support the conviction of harassment in the second degree (*see generally Matter of Anthony J. v David K.*, 70 AD3d 1220, 1221; *Matter of Lewis v Robinson*, 41 AD3d 996, 997).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

204

CAF 10-00946

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

IN THE MATTER OF NICOLE J.R.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JASON M.R., RESPONDENT-RESPONDENT.

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

JASON M. RADUNS, RESPONDENT-RESPONDENT PRO SE.

CHARLES PLOVANICH, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR SAMANTHA
C.R. AND REESE J.R.

Appeal from an order of the Family Court, Orleans County (James P. Punch, J.), entered September 22, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, modified the terms of petitioner's visitation.

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

Memorandum: Petitioner mother commenced this Family Court Act article 6 proceeding seeking to modify the visitation provision of an order by awarding her, inter alia, monthly visitation with the parties' two children at the correctional facility where she is presently incarcerated. The mother subsequently filed a second petition alleging that the father had violated a temporary order of visitation (violation order) issued while the modification petition was pending. After a hearing, Family Court granted the first petition in part by awarding the mother six supervised visits per year with the children at the correctional facility, and the court in addition determined that the children are prohibited from having any further contact with their stepfather (visitation order). In a separate order, the court dismissed the mother's second petition. As a preliminary matter, we note that the notice of appeal recites an incorrect entry date of the visitation order and instead recites the date on which the violation order was entered. Nevertheless, we exercise our discretion to treat the notice of appeal as validly taken from the visitation order inasmuch as all of the mother's contentions on appeal concern that order (*see generally* CPLR 5520 [c]; *Foye v Parker*, 15 AD3d 907). We likewise excuse any defect in the manner in which the notice of appeal was served and treat the appeal as timely taken pursuant to CPLR 5520 (a) (*see generally Dalton v City of*

Saratoga Springs, 12 AD3d 899, 899-900).

With respect to the merits of the visitation order, we reject the mother's contention that the court improperly limited her visitation with the children. "Visitation decisions are generally left to Family Court's sound discretion, requiring reversal only where the decision lacks a sound and substantial basis in the record" (*Matter of Flood v Flood*, 63 AD3d 1197, 1198; see *Matter of Wojcik v Newton* [appeal No. 2], 11 AD3d 1011). Here, the record reflects that the mother was convicted of burglary in September 2008 and was sentenced as a second felony offender to a minimum aggregate term of incarceration of 5 years and 10 months and a maximum aggregate term of incarceration of 14 years. At the hearing on the petitions, a police officer testified that one of the parties' children was with the mother when she committed one of the burglaries for which she is presently incarcerated. In its bench decision, the court expressed concern with respect to the nature of the mother's communications with the children, noting that the mother casually lies, that her judgment is impaired, and that she appears to be morally indifferent. The court further determined that the mother was "lacking in credibility." Thus, deferring to "the court's firsthand assessment of the character and credibility of the parties" (*Matter of Thayer v Thayer*, 67 AD3d 1358, 1359), we conclude that there is a sound and substantial basis in the record to support the determination limiting the mother's visitation with the children to six supervised visits per year (see *Matter of Baker v Blanchard*, 74 AD3d 1427, 1428-1429; *Matter of Garraway v Laforet*, 68 AD3d 1192, 1194; *Matter of Bougor v Murray*, 283 AD2d 695, 695-696).

The mother further contends that the court erred in prohibiting the children from having any contact with her husband, the children's stepfather, based solely upon the hearsay testimony of respondent father concerning an allegation that the stepfather engaged in inappropriate sexual conduct with one of the children. Preliminarily, we note that the mother failed to preserve for our review her present contention that the court erred in admitting at the hearing the father's uncorroborated hearsay testimony concerning the alleged sexual abuse inasmuch as she did not object to that testimony at the hearing (see *Matter of Stacey L.B. v Kimberly R.L.*, 12 AD3d 1124, 1125, lv denied 4 NY3d 704). In any event, we note that there is no evidence to suggest that the stepfather had regular contact or visitation with the children, and we thus conclude that, in light of the allegation of sexual misconduct against the stepfather, we see no basis to disturb the court's determination that the children should have no contact with him.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

205

CA 10-01275

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

KAREN COOK, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ILEANE SUITOR, ET AL., DEFENDANTS,
AND BLATNER'S AUTO, INC., DEFENDANT-RESPONDENT.

CANTOR, LUKASIK, DOLCE & PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 3, 2010 in a personal injury action. The order granted the motion of defendant Blatner's Auto, Inc. for summary judgment dismissing plaintiff's complaint in its entirety along with all cross claims against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the motorcycle on which she was a passenger collided with a vehicle owned and operated by defendant Ileana Sutor. The collision occurred at an intersection in North Tonawanda when Sutor, after stopping at a stop sign, attempted to take a left turn onto the street on which the motorcycle was traveling. It is undisputed that the driver of the motorcycle had the right-of-way. According to plaintiff, Blatner's Auto, Inc. (defendant), a used car dealership located on a corner of the intersection, was negligent in parking vehicles on its lot in a manner that obstructed the views of Sutor and the motorcycle driver. Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint and all cross claims against it.

Plaintiff concedes that defendant had no common-law duty to maintain its property to ensure that the view of motorists on the public highway was unobstructed (*see generally Meloe v Gardner*, 40 AD3d 1055, 1056; *Echorst v Kaim*, 288 AD2d 595). Plaintiff contends, however, that defendant's liability arises from its violation of various provisions of the North Tonawanda City Code. We reject that contention. Although a violation of the City Code may constitute evidence of negligence (*see Barnes v Stone-Quinn*, 195 AD2d 12, 14),

defendant established as a matter of law that its placement of vehicles did not violate any provision of the City Code, and in response plaintiff failed to raise an issue of fact. We note that, although Suitor testified that "something" blocked her view of the intersection, she was unable to identify the object, and in any event she testified at her deposition that the alleged object obstructing her view was not on defendant's property but instead on the street. We further note that, although plaintiff contended that the view of the motorcycle driver was obstructed by defendant's parked vehicles, the motorcycle driver in fact did not testify at his deposition that his view was obstructed by the parked vehicles or by anything else on defendant's property. We thus conclude that the court properly granted defendant's motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

206

CA 10-01739

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

ROBERT W. WOOD, II, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

RICHARD J. NIGRO, JR., DEFENDANT,
CITY OF BUFFALO POLICE DEPARTMENT, CITY OF
BUFFALO, COUNTY OF ERIE AND ERIE COUNTY
CENTRAL POLICE SERVICES, DEFENDANTS-APPELLANTS.

DAVID RODRIGUEZ, ACTING CORPORATION COUNSEL, BUFFALO (CARMEN J. GENTILE OF COUNSEL), FOR DEFENDANTS-APPELLANTS CITY OF BUFFALO POLICE DEPARTMENT AND CITY OF BUFFALO.

MARTIN A. POLOWY, ACTING COUNTY ATTORNEY, BUFFALO (BRIAN R. LIEBENOW OF COUNSEL), FOR DEFENDANTS-APPELLANTS COUNTY OF ERIE AND ERIE COUNTY CENTRAL POLICE SERVICES.

SIEGEL, KELLEHER & KAHN, LLP, BUFFALO (ROBERT D. STEINHAUS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 20, 2009. The order denied the motions of defendants City of Buffalo Police Department, City of Buffalo, County of Erie, and Erie County Central Police Services to dismiss all causes of actions and cross claims against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions are granted and the complaint against defendants-appellants is dismissed.

Memorandum: Plaintiff commenced this action alleging, *inter alia*, that the City of Buffalo Police Department, the City of Buffalo, the County of Erie and the Erie County Central Police Services (collectively, defendants-appellants), were negligent in failing to protect plaintiff from being assaulted by defendant Richard J. Nigro, Jr. after plaintiff's friend had called 911 and requested assistance. We agree with defendants-appellants that Supreme Court erred in denying their respective motions to dismiss the complaint against them for failing to state a cause of action (*see* CPLR 3211 [a] [7]). It is well settled that a municipality may not be held liable for its alleged negligence in failing to provide police protection in the absence of a special relationship between the municipality and the injured party, and that one of the essential elements of that special relationship is "some form of direct contact between the

municipality's agents and the injured party" (*Cuffy v City of New York*, 69 NY2d 255, 260). Here, plaintiff admitted that he did not call 911, and thus "there [is] no evidence that [plaintiff] contacted the municipalit[ies'] agents" to satisfy the direct contact element of the special relationship exception to the general rule with respect to the nonliability of a municipality (*Merced v City of New York*, 75 NY2d 798, 800; see *Laratro v City of New York*, 8 NY3d 79, 83-84; *Cuffy*, 69 NY2d at 260). "To hold, as plaintiff here asks, that direct contact and reliance by a friend . . . can create a special relationship would unacceptably dilute the general rule of municipal nonliability" (*Laratro*, 8 NY3d at 84).

In light of our determination, we do not address the remaining contentions of defendants-appellants.

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

207

CA 10-01718

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

IN THE MATTER OF THE ARBITRATION BETWEEN
TOWN OF WEBB UNION FREE SCHOOL DISTRICT,
PETITIONER-APPELLANT,

AND

MEMORANDUM AND ORDER

ATLANTIC ENERGY SERVICES, INC.,
RESPONDENT-RESPONDENT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE
(KATHERINE E. GAVETT OF COUNSEL), FOR PETITIONER-APPELLANT.

THE MURRAY LAW FIRM, PLLC, CLIFTON PARK (JOSEPH C. BERGER OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered October 19, 2009 in a proceeding pursuant to CPLR article 75. The order and judgment dismissed the petition to vacate an arbitration award.

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

Memorandum: Petitioner appeals from an order and judgment dismissing its petition to vacate an arbitration award (see CPLR 7511 [b] [1]). We reject petitioner's contention that the arbitrator exceeded her authority by refusing to apply the law. It is well settled that, " '[a]bsent [a] provision in the arbitration clause itself, an arbitrator is not bound by principles of substantive law or by rules of evidence' " (*Matter of Mays-Carr [State Farm Ins. Co.]*, 43 AD3d 1439, 1440, quoting *Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308). There was no such provision in the arbitration clause here, and thus the arbitrator was entitled to do justice as she saw fit (see *Silverman*, 61 NY2d at 308). We further reject petitioner's contention that the arbitration award violated public policy (see generally *Matter of Police Benevolent Assn. [City of Buffalo]*, 4 NY3d 660, 664).

Finally, although we are concluding herein that Supreme Court properly dismissed the petition, we decline to grant respondent's request for attorney's fees and costs associated with this appeal. While a court may impose sanctions for frivolous conduct, including conduct that is "completely without merit in law" (22 NYCRR 130-1.1 [c] [1]), or that "is undertaken primarily to delay or prolong the

resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1 [c] [2]), there is no indication of any such frivolous conduct here.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

208

CA 10-01726

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

IN THE MATTER OF ROGER NYE AND SHIRLEY NYE,
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF THE TOWN OF GRAND
ISLAND, RESPONDENT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (PAUL PERLMAN OF COUNSEL), FOR
RESPONDENT-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John A. Michalek, J.), entered March 16, 2010 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the second decretal paragraph and as modified the judgment is affirmed without costs, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Respondent granted the request of petitioners for an area variance to construct a roof over a deck on the side of their house, but in addition to constructing the roof as approved, petitioners used additional material such that the deck was enclosed, at least temporarily, on three sides. After respondent's Code Enforcement Officer indicated that the construction exceeded that approved by respondent, petitioners' request for a second variance for the additional construction was denied. Respondent appeals from a judgment that granted the CPLR article 78 petition seeking, inter alia, to annul the determination denying petitioners' application for the second variance and ordered respondent to grant the second variance.

In determining whether to grant the second area variance, respondent was required to consider the five factors set forth in Town Law § 267-b (3) (b) (*see Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 612-613; *Matter of Ifrah v Utschig*, 98 NY2d 304, 307-308). Respondent's determination must be annulled if, inter alia, the record "does not reflect that [respondent] weighed the benefit to the applicant[s] against the detriment to the health, safety, and welfare of the neighborhood" in the event that the

variance was granted (*Matter of Hannett v Scheyer*, 37 AD3d 603, 605). Here, we conclude on the record before us that respondent did not engage in that balancing test upon considering those five statutory factors (see *Matter of W.K.J. Young Group v Zoning Bd. of Appeals of Vil. of Lancaster*, 16 AD3d 1021, 1022; *Matter of D'Angelo v Zoning Bd. of Town of Webster*, 229 AD2d 945, lv denied 89 NY2d 803), and thus Supreme Court properly granted that part of the petition seeking to annul the determination. We conclude, however, that the court erred in further granting the petition insofar as it seeks an area variance. Rather, the court should have remitted the matter to respondent for a new determination of the request for the second variance (see *Matter of Russia House at Kings Point, Inc. v Zoning Bd. of Appeals of Vil. of Kings Point*, 40 AD3d 767, 768; *Matter of Miller v Zoning Bd. of Appeals of Town of E. Hampton*, 276 AD2d 633, 634; cf. *Matter of Bianco Homes II, Inc. v Weiler*, 295 AD2d 506, 507, lv dismissed 100 NY2d 526). We therefore modify the judgment accordingly, and we remit the matter to respondent for a new determination of petitioners' application for a second variance.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

209

CA 10-01812

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

STEPHEN MURDOCH, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

NIAGARA FALLS BRIDGE COMMISSION,
DEFENDANT-RESPONDENT.

KANTOR & GODWIN, PLLC, WILLIAMSVILLE (STEVEN L. KANTOR OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

MORENUS, CONWAY, GOREN & BRANDMAN, BUFFALO (ROBERT E. GALLAGHER, JR.,
OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 16, 2009 in a personal injury action. The judgment and order, upon a jury verdict, dismissed the complaint in its entirety.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while repairing a bridge owned by defendant. Supreme Court previously granted defendant's motion for summary judgment dismissing the complaint insofar as it alleged the violation of Labor Law § 240 (1) and § 241 (6) and, after the case proceeded to a bifurcated trial on liability on those parts of the complaint alleging the violation of Labor Law § 200 and alleging common-law negligence, the jury returned a verdict in favor of defendant. Plaintiff failed to preserve for our review his contention that the verdict is against the weight of the evidence inasmuch as he failed to make a timely motion to set aside the verdict on that ground (see *Homan v Herzig* [appeal No. 2], 55 AD3d 1413, 1413-1414; *Givens v Rochester City School Dist.*, 294 AD2d 898, 899) and, in any event, that contention lacks merit (see generally *Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *Ruddock v Happell*, 307 AD2d 719, 720; *Jaquay v Avery*, 244 AD2d 730, 730-731). Plaintiff likewise failed to preserve for our review his contention that the references by defendant to plaintiff's employer during the trial violated the court's ruling in limine, inasmuch as he did not object to any such reference by defendant's attorney (see CPLR 5501 [a] [3]).

We reject the further contention of plaintiff that he is entitled to a new trial because defendant utilized certain undisclosed safety

documents, which were not received in evidence, while cross-examining plaintiff's safety expert. The court gave plaintiff the option of moving for a mistrial, but plaintiff instead requested a curative instruction. The court then gave a prompt curative instruction, which the jury is presumed to have followed, thus alleviating any prejudice to plaintiff resulting from defendant's brief references to the safety documents (see *Bethmann v Widewaters Group*, 306 AD2d 923, 924).

We agree with plaintiff, however, that the court erred in refusing to instruct the jury that the violation of a regulation promulgated by the Occupational Safety and Health Administration (OSHA) may constitute evidence of negligence (see PJI 2:29; see generally *Cruz v Long Is. R.R. Co.*, 22 AD3d 451, 453-454, lv denied 6 NY3d 703; *Landry v General Motors Corp., Cent. Foundry Div.*, 210 AD2d 898). Plaintiff asserted claims based on defendant's violation of OSHA regulations in his bill of particulars, which was thereafter twice supplemented, and plaintiff's expert safety consultant testified with respect to the applicability of specific OSHA regulations to plaintiff's accident. Nonetheless, we conclude that reversal is not required based on the court's error (see CPLR 2002). Given the jury's determination that defendant did not have the authority to control the activity that caused plaintiff's injury, a proper charge concerning the effect of defendant's alleged regulatory violations would not have changed the jury's verdict (see generally *Stalikas v United Materials*, 306 AD2d 810, 811, *affd* 100 NY2d 626).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

210

CA 10-01460

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

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

AND

MEMORANDUM AND ORDER

DOUGLAS E. HAAK AND CARMELA HAAK,
RESPONDENTS-APPELLANTS.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF
COUNSEL), FOR RESPONDENTS-APPELLANTS.

BROWN & KELLY, LLP, BUFFALO (CAROLYN M. HENRY OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County
(Richard C. Kloch, Sr., A.J.), entered April 13, 2010. The order
granted the application of petitioner for a permanent stay of
arbitration.

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

Memorandum: Douglas E. Haak (respondent) is a police officer who
was involved in an accident during a high-speed chase of a vehicle
operated by John J. Davis, Jr. and owned by Snorac, Inc. (Snorac), a
rental car company. Respondent's vehicle struck another police
vehicle while pursuing Davis, causing respondent to sustain, inter
alia, an orbital fracture. Other officers continued the chase, and
Davis later crashed into a building and was apprehended after he fled
on foot. Approximately 22 months after the incident, respondent
notified petitioner, his automobile insurance carrier, of his accident
and potential claim for supplementary uninsured/underinsured motorist
(SUM/UM) benefits. Respondent and his wife, respondent Carmela Haak,
simultaneously commenced a personal injury action against Davis and
Snorac. Petitioner disclaimed coverage on the ground that respondent
failed to provide notice of the claim "as soon as practicable," as
required by the policy, prompting respondents to serve a notice of
intention to arbitrate. Petitioner thereafter commenced this
proceeding seeking a permanent stay of arbitration. Supreme Court
properly granted the petition.

It is well settled that "[t]he requirement that an insured notify
its liability carrier of a potential claim 'as soon as practicable'
operates as a condition precedent to coverage" (*White v City of New*

York, 81 NY2d 955, 957). "[I]n the SUM[/UM] context, the phrase 'as soon as practicable' means that 'the insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured' " (*Rekemeyer v State Farm Mut. Auto. Ins. Co.*, 4 NY3d 468, 474). Whether an insured has given notice as soon as practicable should be determined on a case-by-case basis, taking into account all of the relevant circumstances (see *Matter of Metropolitan Prop. & Cas. Ins. Co. v Mancuso*, 93 NY2d 487, 494-495). Factors to consider include the seriousness and nature of the insured's injuries, and the extent of the tortfeasor's coverage (see *id.* at 493; *Matter of Allstate Ins. Co. [Earl]*, 284 AD2d 1002, 1004), as well as "the time within which an insured's injuries manifest themselves" (*Unwin v New York Cent. Mut. Fire Ins. Co.*, 268 AD2d 669, 670).

Here, we conclude that respondent's notice of the potential claim, given almost two years after the accident, was untimely under the circumstances of this case. It was obvious from the outset that respondent had sustained a serious injury within the meaning of Insurance Law § 5104 (see § 5102 [d]), and respondent knew or should have known shortly after the accident that Davis was uninsured. Respondents contend that respondent was not required to provide notice of the claim until the court in the underlying personal injury action had granted Snorac's motion for summary judgment dismissing the complaint against it based upon the Graves Amendment (49 USC § 30106), which generally exempts rental car companies from the vicarious liability provisions of Vehicle and Traffic Law § 388. Until then, respondents assert, they did not know that the Davis vehicle was uninsured or underinsured. We reject that contention. The Graves Amendment unequivocally applies to Snorac unless Davis's use of the vehicle was not "during the period of the rental or lease" (49 USC § 30106 [a]). In our view, that information could have been ascertained by respondents well before the court granted Snorac's motion in the underlying action and, in any event, there is no indication in the record before us that respondents made any efforts to obtain such information. We thus conclude that respondents failed to meet their burden "of establishing a reasonable excuse for the [almost] two-year delay in giving notice" (*Matter of State Farm Mut. Auto. Ins. Co. [Cybulski]*, 1 AD3d 905, 906).

Finally, we reject respondents' further contention that the decision of the Court of Appeals in *Rekemeyer* (4 NY3d at 475-476) requires that petitioner show prejudice before disclaiming coverage. In *Rekemeyer*, the insured provided timely notice of the accident but not the claim, and the insurer thus had an opportunity to investigate the accident. Here, in contrast, respondent provided notice of the accident at the same time that he provided notice of the claim, approximately 22 months after the accident occurred (see *Matter of Progressive Northeastern Ins. Co. [Heath]*, 41 AD3d 1321, 1322). Thus, the limited no-prejudice rule set forth in *Rekemeyer* does not apply.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

212.1

CA 10-02056

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

IN THE MATTER OF COLONIAL SURETY
COMPANY, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LAKEVIEW ADVISORS, LLC, RESOLUTION
MANAGEMENT, LLC, RESPONDENTS-RESPONDENTS,
AND NATIONAL CREDIT ADJUSTERS, LLC, RESPONDENT.
(APPEAL NO. 1.)

UNDERBERG & KESSLER LLP, BUFFALO (EDWARD P. YANKELUNAS OF COUNSEL),
FOR PETITIONER-APPELLANT.

LAW OFFICE OF JOSEPH G. MAKOWSKI, LLC, BUFFALO (CARL STEINBRENNER OF
COUNSEL), FOR RESPONDENT-RESPONDENT LAKEVIEW ADVISORS, LLC.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (DENNIS C. VACCO OF
COUNSEL), FOR RESPONDENT-RESPONDENT RESOLUTION MANAGEMENT, LLC.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered July 13, 2010 in a proceeding pursuant to CPLR article 52. The order, among other things, directed respondent Resolution Management, LLC to pay the sum of \$537,000 into an escrow account.

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

Same Memorandum as in *Colonial Sur. Co. v Lakeview Advisors, LLC* ([appeal No. 2] ___ AD3d ___ [Feb. 18, 2011]).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

212.2

CA 10-02057

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

IN THE MATTER OF COLONIAL SURETY
COMPANY, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LAKEVIEW ADVISORS, LLC, RESOLUTION
MANAGEMENT, LLC, RESPONDENTS-RESPONDENTS,
AND NATIONAL CREDIT ADJUSTERS, LLC, RESPONDENT.
(APPEAL NO. 2.)

UNDERBERG & KESSLER LLP, BUFFALO (EDWARD P. YANKELUNAS OF COUNSEL),
FOR PETITIONER-APPELLANT.

LAW OFFICE OF JOSEPH G. MAKOWSKI, LLC, BUFFALO (CARL STEINBRENNER OF
COUNSEL), FOR RESPONDENT-RESPONDENT LAKEVIEW ADVISORS, LLC.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (DENNIS C. VACCO OF
COUNSEL), FOR RESPONDENT-RESPONDENT RESOLUTION MANAGEMENT, LLC.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered September 16, 2010 in a proceeding pursuant to CPLR article 52. The order and judgment, among other things, denied and dismissed the petition.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioner previously obtained a judgment against Paul W. O'Brien, the manager and sole principal of respondent Lakeview Advisors, LLC (Lakeview). Petitioner commenced this proceeding pursuant to CPLR article 52 seeking to enforce that judgment with respect to, inter alia, a debt owed to Lakeview by respondent Resolution Management, LLC (Resolution), as well as Resolution's accounts receivable in which Lakeview had a security interest. Petitioner contended that it was entitled to pierce the corporate veil of Lakeview and thus to execute its judgment upon Lakeview's interest in that property. In appeal No. 1, petitioner appeals from an order that, inter alia, directed Resolution to pay the sum of \$537,000 into an escrow account pending resolution of the proceeding. In appeal No. 2, petitioner appeals from an order and judgment that, inter alia, vacated the order in appeal No. 1 and dismissed the petition.

Initially, we note that the appeal from the order in appeal No. 1

must be dismissed because the right to appeal from that intermediate order terminated upon the entry of the order and judgment in appeal No. 2 (see *Murphy v CSX Transp., Inc.* [appeal No. 1], 78 AD3d 1543; *Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435). The issues raised in appeal No. 1 will be considered upon the appeal from the order and judgment in appeal No. 2 (see *Matter of Aho*, 39 NY2d 241, 248).

We agree with petitioner that Supreme Court abused its discretion in dismissing the petition. By its order in appeal No. 1, the court pierced the corporate veil of Lakeview and concluded that it was the alter ego of O'Brien based, inter alia, upon the evidence in the record establishing that O'Brien was using Lakeview in an attempt to thwart petitioner's attempts to collect on its underlying judgment. Although respondents contend that we should determine that the court erred in piercing the corporate veil and in concluding that Lakeview was the alter ego of O'Brien, they did not take a cross appeal from that order and thus are not entitled to that affirmative relief (see *Reynhout v Hueston*, 70 AD3d 1409; *Millard v Alliance Laundry Sys., LLC*, 28 AD3d 1145, 1148; *Matijiw v New York Cent. Mut. Fire Ins. Co.*, 15 AD3d 875, 876; see generally CPLR 5515). Consequently, any issue concerning the court's having pierced the corporate veil is not before us. In its bench decision underlying the order and judgment in appeal No. 2, the court concluded, among other things, that it "would not be equitable" to permit petitioner to pursue money that Resolution owed to Lakeview because to do so would "prejudice creditors of Lakeview," i.e., six entities (hereafter, note holders) that allegedly loaned Lakeview the money that it in turn later loaned to Resolution. We agree with petitioner that, based on the evidence in the record and the court's determination of the credibility of the witnesses who testified at the hearing on the instant petition, the court abused its discretion in its balancing of the equities.

It is clear that the court has the authority under CPLR article 52 to consider the rights of other entities who may also have a claim to property or debts owed to a judgment creditor and, indeed, pursuant to CPLR 5225 (b) and 5227, "[t]he court may permit any adverse claimant to intervene in the [CPLR article 52] proceeding and may determine his [or her] rights in accordance with section 5239." In addition, "CPLR 5240 grants the courts broad discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts' " (*Guardian Loan Co. v Early*, 47 NY2d 515, 519; see *Rondack Constr. Servs., Inc. v Kaatsbaan Intl. Dance Ctr., Inc.*, 13 NY3d 580, 585; *Matter of Stern v Hirsch*, 79 AD3d 1046). The statute "serves as an equitable safety valve which allows a court to restrain execution upon its judgment where unwarranted hardship would otherwise result. The decisional process invoked is the balancing of harm likely to result from execution, against the necessity of using that immediate means of attempted satisfaction" (*Seyfarth v Bi-County Elec. Corp.*, 73 Misc 2d 363, 365; see *Fiore v Oakwood Plaza Shopping Ctr., Inc.*, 178 AD2d 311, 312, appeal dismissed 80 NY2d 826). One of the factors that the court was required to consider was whether "the record supports the

[petitioner]'s contention that [respondents are] attempting to frustrate [petitioner]'s attempts to collect the money owed" to petitioner by O'Brien (*Putnam County Natl. Bank of Carmel v Pryschlak*, 226 AD2d 358, 358; see *Matter of AMEV Capital Corp. v Kirk*, 180 AD2d 791).

Here, we conclude that the court failed to consider petitioner's right to execute upon its judgment, failed to take proper consideration of respondents' efforts to prevent petitioner from collecting on its judgment, and reached its conclusion regarding the prejudice to the note holders in the absence of any compelling evidence that such prejudice exists. Although both O'Brien and Mark Bohn, the president of Resolution, testified at the hearing on the petition that the note holders would be damaged, their credibility was severely damaged by, among other things, the court's finding that one of O'Brien's affidavits was "inherently incredible," and the denial of O'Brien's request to discharge in bankruptcy the judgment underlying this proceeding on the ground that he provided false filings and testimony in the bankruptcy matter. Indeed, notably absent from the record is any testimony or evidence from the note holders establishing that Resolution in fact repurchased the original notes, what the terms of such a repurchase might have been, or how the note holders would be prejudiced by any default or delay in repayment of their loans. In addition, the substituted promissory notes that allegedly demonstrated that a repurchase of the loan occurred were not notarized, and they were undated with the exception of one dated approximately eight months before the repurchase transaction is alleged to have occurred. Based upon our review of the record as a whole, we conclude that the court erred in determining that the prejudice to the note holders outweighed petitioner's right to collect on its judgment.

Consequently, we reverse the order and judgment and reinstate the petition, and we remit the matter to Supreme Court for further proceedings, including a new hearing on the petition. The court may determine the rights of any claimant to the funds held in escrow upon the intervention of such party pursuant to CPLR 5225 (b) and 5227. We further direct that, pending the disposition of the petition, the second, third and sixth ordering paragraphs of the order of this Court dated November 5, 2010 shall continue to be in full force and effect unless modified by Supreme Court in accordance with our decision herein, and we expressly incorporate those ordering paragraphs into our order in appeal No. 2. We note that petitioner has made several motions in this Court seeking discovery with respect to Resolution's compliance with the conditions of the order of this Court dated November 5, 2010. We refer those matters to Supreme Court, to be resolved in conjunction with the further proceedings on the petition.

We have considered petitioner's remaining contentions and conclude that they are without merit, or are academic in light of our determination.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

214

KA 09-01940

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VINCENT GRADY, DEFENDANT-APPELLANT.

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), entered December 19, 2006. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We agree with defendant that County Court erred in relying on certain factors to justify an upward departure from his presumptive classification as a level two risk. "A court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors . . . [,] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Howe*, 49 AD3d 1302, 1302 [internal quotation marks omitted]; *see People v Wheeler*, 59 AD3d 1007, *lv denied* 12 NY3d 711). Contrary to the court's determination, "danger to the community" is not an aggravating factor inasmuch as sex offenders at all three risk levels are, at varying degrees, deemed dangers to the community (*see generally* Correction Law § 168-1 [5]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 1 [2006]). In addition, the court erred in relying on defendant's history of marihuana, crack cocaine and alcohol abuse as an aggravating factor inasmuch as " 'defendant's history of substance abuse was already taken into account when defendant was assessed maximum points for that history [under risk factor 11] in the risk assessment instrument [RAI]' " (*People v Waleski*, 49 AD3d 1271; *see People v Perkins*, 35 AD3d 1167). The court also erred in relying on the failure of defendant to accept

responsibility for his offense and on his minimization of guilt as aggravating factors inasmuch as those factors were taken into account under risk factor 12 in the RAI (see Risk Assessment Guidelines and Commentary, at 15). We further conclude that the court erred in relying on defendant's purported learning disability and low IQ to justify an upward departure inasmuch as the record is devoid of any evidence that those factors are causally related to a risk of reoffense (see *People v Burgos*, 39 AD3d 520; *Perkins*, 35 AD3d 1167; cf. *People v Chandler*, 48 AD3d 770, 778; *People v McCollum*, 41 AD3d 1187).

The sole remaining factor relied upon by the court to justify an upward departure was the failure of defendant to complete substance abuse counseling. We conclude on the record before us that such a factor, without more, is insufficient to justify an upward departure. Inasmuch as the People raise no additional aggravating factors, defendant is properly classified as a level two risk (see generally *Burgos*, 39 AD3d 520; *Perkins*, 35 AD3d 1167). We therefore modify the order accordingly.

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

215

KA 09-02408

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID BUTLER, JR., DEFENDANT-APPELLANT.

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered September 30, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]). We reject defendant's contention that his waiver of the right to appeal is invalid. Defendant signed a plea agreement that required him to waive his right to appeal, and he indicated during the plea colloquy that he understood that he was waiving his right to appeal. Under the circumstances, we conclude that defendant's waiver of the right to appeal was knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Thomas*, 71 AD3d 1231, 1231-1232, *lv denied* 14 NY3d 893). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 256; *People v Hidalgo*, 91 NY2d 733, 737). That valid waiver also encompasses defendant's contention that the court erred in ordering restitution following sentencing, inasmuch as the amount of restitution was included in the plea agreement (*see generally People v Thomas*, 77 AD3d 1325).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

217

KA 09-01225

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROGER L. HUEBER, DEFENDANT-APPELLANT.

MATTHEW E. BROOKS, LOCKPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Niagara County Court (Sara S. Sperrazza, J.), entered September 15, 2008. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Based upon the total risk factor score of 85 points on the risk assessment instrument, defendant was presumptively classified as a level two risk. County Court thereafter determined that an upward departure was warranted and classified defendant as a level three risk. We agree with defendant that the court erred in assessing 15 points against him under risk factor 11, for drug and alcohol abuse (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 15 [2006]). At the SORA hearing, the People "bear the burden of proving the facts supporting the [risk level classification] sought by clear and convincing evidence" (§ 168-n [3]; *see People v Wroten*, 286 AD2d 189, 199, *lv denied* 97 NY2d 610). Although the record establishes that defendant used alcohol socially and that he and the victims consumed alcohol prior to some of the offenses, the record is devoid of clear and convincing evidence that defendant abused alcohol, had any prior offenses related to alcohol or drugs or had ever sought or been recommended for alcohol or drug treatment (*see* Risk Assessment Guidelines and Commentary, at 15; *cf. People v Green*, 71 AD3d 1499, *lv denied* 14 NY3d 713; *People v McClam*, 63 AD3d 1588, *lv denied* 13 NY3d 704; *People v Longtin*, 54 AD3d 1110, *lv denied* 11 NY3d 714). As a result of the court's error, defendant's total risk factor score

should have been 70 points, and he thus should have been presumptively classified as a level one risk (see generally *People v Aldrich*, 56 AD3d 1228).

We reject defendant's further contention, however, that an upward departure from his presumptive risk level was not warranted. We therefore modify the order by determining that defendant is a level two risk. "A court may make an upward departure from a presumptive risk level when, 'after consideration of the indicated factors . . . [,] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines' " (*People v Cruz*, 28 AD3d 819, 819; see *People v May*, 77 AD3d 1388). Here, the People established by clear and convincing evidence several factors not taken into account by the risk assessment guidelines that were "indicative that [defendant] poses an increased risk to public safety" (Risk Assessment Guidelines and Commentary, at 14).

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

219

KA 10-01297

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DEREK BACKUS, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 14, 2010. Defendant was resentenced upon a conviction of vehicular assault in the second degree (two counts) and driving while intoxicated.

It is hereby ORDERED that the resentence so appealed from is modified as a matter of discretion in the interest of justice by reducing the sentences imposed for vehicular assault in the second degree under counts one and two of the indictment to definite sentences of imprisonment of one year and as modified the resentence is affirmed and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a resentence imposed upon remittal of this matter to County Court (*People v Backus*, 56 AD3d 1119, *revd in part and vacated in part* 14 NY3d 876). In the prior appeal from a judgment convicting defendant upon his plea of guilty of two counts of vehicular assault in the second degree (Penal Law § 120.03 [1]) and one count of driving while intoxicated (Vehicle and Traffic Law § 1192 [3]), we modified the judgment by vacating the sentence, and we remitted the matter to the court "to resentence defendant or to 'entertain a motion by the People, should the People be so disposed, to vacate the plea and set aside the conviction in its entirety' " (*Backus*, 56 AD3d at 1120). Upon defendant's further appeal, the Court of Appeals reversed and vacated that part of the order that authorized the court to entertain a motion by the People to vacate the plea and set aside the conviction (*People v Backus*, 14 NY3d 876). The Court of Appeals stated that, "[d]efendant's sentence having been vacated, County Court is required to resentence defendant in accordance with the law" (*id.* at 877).

Upon remittal, the court resentenced defendant to indeterminate

terms of imprisonment of 1 to 3 years for the vehicular assault counts and a definite sentence of imprisonment of one year for driving while intoxicated, and it directed that the sentences run concurrently. We reject defendant's contention that the resentencing is illegal. The original sentence was vacated on the ground that it was illegal, and the court was not bound by the limits of the original sentence (see *People v Rogner*, 285 AD2d 749, *lv denied* 96 NY2d 941). Upon resentencing, the court was authorized to impose an indeterminate term of imprisonment for each count of vehicular assault, which is a class E felony (see Penal law § 70.00 [1]). Contrary to the further contention of defendant, we conclude that, "based on [the] record, there is no reasonable likelihood that the [resentencing] . . . was the result of vindictiveness" (*People v Young*, 94 NY2d 171, 180-181, *rearg denied* 94 NY2d 876).

We agree with defendant, however, that the resentencing is unduly harsh and severe. Defendant served eight months in jail prior to his release pursuant to CPL 460.50 (1). Following his release, defendant successfully completed chemical dependency treatment, refrained from using alcohol, maintained employment, pursued a second college degree and got back his driver's license. "[H]aving regard to the nature and circumstances of the crime[s] and to the history and character of the defendant, [we are] of the opinion that a sentence of imprisonment [was] necessary but that it [was] unduly harsh to impose an indeterminate or determinate sentence" for each of the felony counts (Penal Law § 70.00 [4]). Thus, as a matter of discretion in the interest of justice (see CPL 470.15 [6] [b]), we modify the resentencing by reducing the resentences for those counts to definite sentences of imprisonment of one year (see Penal Law § 70.00 [4]).

All concur except FAHEY, J., who dissents in part and votes to affirm in the following Memorandum: I respectfully dissent in part. Although County Court's remarks at the proceeding that preceded the resentencing were intemperate, I agree with the majority's conclusion that, "based on [the] record, there is no reasonable likelihood that the [resentencing] . . . was the result of vindictiveness" (*People v Young*, 94 NY2d 171, 180-181, *rearg denied* 94 NY2d 876). I cannot, however, agree with the majority that the resentencing is unduly harsh and severe. Our power to substitute our own discretion for that of the sentencing court is broad and plenary (see *People v Delgado*, 80 NY2d 780, 783; *People v Hearn*, 248 AD2d 889, 890), but it should be exercised only in extraordinary circumstances (see generally *People v Massey*, 45 AD3d 1044, 1048, *lv denied* 9 NY3d 1036). Here, the minimum possible range for an indeterminate sentence of imprisonment for each count of vehicular assault in the second degree (Penal Law § 120.03 [1]) was 1 to 3 years (§ 70.00 [3] [b]), which is exactly the term that the court imposed upon resentencing with respect to those counts. Indeed, the facts of this case do not present circumstances warranting further reduction of the resentencing to a definite sentence of imprisonment of one year. I would therefore affirm the resentencing and

remit the matter to County Court for proceedings pursuant to CPL
460.50 (5).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

221

KA 09-01583

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ORLANDO O. OCASIO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered July 24, 2009. The judgment convicted defendant, upon a nonjury verdict, of criminal sexual act in the first degree (three counts) and sexual abuse in the first degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a bench trial of three counts each of criminal sexual act in the first degree (Penal Law § 130.50 [3]) and sexual abuse in the first degree (§ 130.65 [3]). We reject the contention of defendant that he was denied effective assistance of counsel based upon defense counsel's alleged failure to conduct an effective cross-examination of the People's expert witnesses. That contention constitutes "a disagreement with the strategies and tactics of [defense] counsel [that], in hindsight, may have been unsuccessful but, nonetheless, do not rise to a level of ineffective assistance of counsel" (*People v Page*, 225 AD2d 831, 834, *lv denied* 88 NY2d 883; *see People v Barber*, 231 AD2d 835). To the extent that defendant's contention concerning ineffective assistance of counsel is based upon defense counsel's alleged failure to consult experts or to conduct an investigation with respect to the medical and psychological evidence presented through the People's expert witnesses, it involves matters outside the record on appeal (*see People v Cobb*, 72 AD3d 1565, 1567, *lv denied* 15 NY3d 803; *People v Washington*, 39 AD3d 1228, 1230, *lv denied* 9 NY3d 870). Thus, that contention must be raised by way of a motion pursuant to CPL article 440 (*see Cobb*, 72 AD3d at 1567; *see generally People v Okongwu*, 71 AD3d 1393), or an application seeking other post-conviction relief (*see generally Jackson v Conway*, ___ F Supp 2d ___ [2011]).

Defendant further contends that his right to effective assistance of counsel was violated when County Court failed to make an appropriate inquiry into his complaints concerning his representation and in response to his request for substitution of counsel. Defendant requested substitution of counsel in a letter received by the court approximately five months before trial, and defendant thereafter expressed no further dissatisfaction with defense counsel or renewed his request. Thus, under the circumstances of this case, we conclude that defendant abandoned his request for substitution of counsel (see *People v Hobart*, 286 AD2d 916, lv denied 97 NY2d 683). In any event, "[t]he failure to make a minimal inquiry [into the defendant's reasons for requesting substitution of counsel] does not mandate reversal when a defendant's request is based on . . . assertions that do not suggest a serious possibility of good cause for substitution" (*People v Moore*, 41 AD3d 1149, 1150, lv denied 9 NY3d 879, 992).

Finally, viewing the evidence in light of the elements of the crimes in this bench trial (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495).

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

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KA 05-02229

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAVONNE L. SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered June 14, 2005. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that Supreme Court erred in denying his *Batson* challenge. Defendant failed to object to the court's procedure for determining his *Batson* challenge and thus defendant failed to preserve his contention for our review (*see People v Parker*, 304 AD2d 146, 156, *lv denied* 100 NY2d 585). Defendant also failed to preserve for our review his contention that the court erred in denying his motion for a mistrial based on juror misconduct. Although defendant contends that the court failed to make a sufficient inquiry of the other jurors with respect to the misconduct of the juror in question, he failed to raise that issue in support of the motion (*see generally People v Torres*, 80 NY2d 944, *rearg denied* 81 NY2d 784). 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]*). Finally, the sentence is not unduly harsh or severe.

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

225

CAF 10-00103

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

IN THE MATTER OF SHIRLEY A.S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHARI D.S., RESPONDENT-APPELLANT.

IN THE MATTER OF SHIRLEY A.S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER;

DAVID A.S., RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered December 22, 2009 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to respondents' child based on a finding of permanent neglect. Although the mother does not challenge Family Court's finding of permanent neglect, she contends that the court abused its discretion in refusing to grant a suspended judgment. We reject that contention (*see Matter of Elijah D.*, 74 AD3d 1846; *Matter of Maryline A.*, 22 AD3d 227). When the dispositional hearing commenced, the mother was incarcerated in state prison for stealing money in order to purchase drugs. Although the mother had been released from prison by the last day of the hearing, she was living in a homeless shelter and did not yet have a job or any means to support the child. In addition, by her own admission, the mother had been addicted to illegal drugs for many years, and the child tested positive for codeine, morphine and opiates at birth. At the time of

the hearing, the mother had not seen the child in 2½ years. In contrast, the proposed adoptive parents had been caring for the child since her birth, and she was apparently doing well in their custody. Under the circumstances, it cannot be said that the court abused its discretion in freeing the child for adoption (see *Elijah D.*, 74 AD3d 1846; *Matter of Roystar T.*, 72 AD3d 1569, lv denied 15 NY3d 707; *Matter of Samantha Stephanie R.*, 71 AD3d 484).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

226

CAF 10-01316

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

IN THE MATTER OF DEBORAH L. PALADINO,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

FRANK P. PALADINO, RESPONDENT-RESPONDENT.

STEVEN C. BUITRON, SYRACUSE, FOR PETITIONER-APPELLANT.

ELISABETH A. BARKER, SYRACUSE, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczyk, J.), entered April 6, 2010 in a proceeding pursuant to Family Court Act article 4. The order granted respondent's objection to the order of the Support Magistrate dated January 25, 2010.

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

Memorandum: Family Court properly granted respondent father's objection to the order of the Support Magistrate granting the petition seeking to modify a prior order of child support. The father objected to the order insofar as it directed the Support Collection Unit to recompute the father's child support arrears by adding back in the amount for which the father was credited between the date that the parties' daughter began living with petitioner mother and the date the petition was filed. As the court properly concluded, it "was only empowered to make its modification of the prior support order retroactive to the date of the filing of the . . . petition" (*Matter of Aiken v Aiken*, 115 AD2d 919, 920; see Family Ct Act § 449 [2]). Further, "Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute" (*Matter of Johna M.S. v Russell E.S.*, 10 NY3d 364, 366) or the State Constitution (see NY Const, art VI, § 13). The court therefore had no general equity jurisdiction and lacked authority to grant retroactive relief to the mother based upon equitable principles (see generally *Matter of Brescia v Fitts*, 56 NY2d 132, 139).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

231

CA 09-00462

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

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DANIEL GIERSZEWSKI, A PATIENT IN THE CUSTODY
OF THE OFFICE OF MENTAL HEALTH,
RESPONDENT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL),
FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 2, 2009 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, ordered that respondent be supervised by the Division of Parole under conditions of strict and intensive supervision and treatment.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10, entered following a jury trial determining that he has a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i) and is a sex offender requiring strict and intensive supervision. We reject respondent's contention that the evidence is legally insufficient to support a finding that he suffers from a mental abnormality within the meaning of the statute. "A court may set aside a jury verdict as legally [insufficient] and enter judgment as a matter of law only where 'there is simply no valid line of reasoning and permissible inferences [that] could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial' " (*Matter of State of New York v Derrick B.*, 68 AD3d 1124, 1126).

Here, petitioner's two expert witnesses, a psychologist and a psychiatrist, testified at trial that respondent suffers from paraphilia and presents a significant risk of committing a sex offense in the future. Petitioner therefore sustained its burden of establishing by clear and convincing evidence that respondent suffers

from "a congenital or acquired condition, disease or disorder that affects [his] emotional, cognitive[] or volitional capacity . . . in a manner that predisposes him . . . to the commission of conduct constituting a sex offense and that results in [him] having serious difficulty in controlling such conduct" (§ 10.03 [i]; see generally *Matter of State of New York v Farnsworth*, 75 AD3d 14, 29, appeal dismissed 15 NY3d 848).

We further conclude that the verdict is not against the weight of the evidence. Although respondent's expert witness testified that respondent does not suffer from a mental abnormality and does not present a serious risk of reoffending, provided that he abstains from the use of alcohol, "[t]he jury verdict is entitled to great deference based on the jury's opportunity to evaluate the weight and credibility of conflicting expert testimony" (*Matter of State of New York v Chrisman*, 75 AD3d 1057; see also *Matter of State of New York v Donald N.*, 63 AD3d 1391, 1394). Upon our review of the record, we conclude that the evidence does not " 'preponderate[] so greatly in [respondent's] favor that the jury could not have reached its conclusion on any fair interpretation of the evidence' " (*Matter of State of New York v Shawn X.*, 69 AD3d 165, 169, lv denied 14 NY3d 702; see *Derrick B.*, 68 AD3d at 1126).

Respondent further contends that he was denied a fair trial based on the misconduct of the Assistant Attorney General. Respondent failed to object to the majority of the alleged instances of misconduct, and he therefore failed to preserve for our review his contention with respect thereto (see *Chrisman*, 75 AD3d 1057). In any event, although we note that several remarks of the Assistant Attorney General were inappropriate, none of those remarks was "so egregious or prejudicial as to deny respondent his right to a fair trial" (*id.* at 1058). We have reviewed respondent's remaining contentions and conclude that they are without merit.

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

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CA 10-01444

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

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANIES, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ZACHARY J. JAENECKE, PETER J. JAENECKE,
DEFENDANTS-APPELLANTS,
GARY L. COONS AND ANN M. COONS,
DEFENDANTS-RESPONDENTS.

PILARZ LAW FIRM, BUFFALO (MICHAEL PILARZ OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (John Lane, J.H.O.), entered February 24, 2010. The order and judgment declared, upon a jury verdict, that plaintiff is not obligated to defend or indemnify defendants Zachary J. Jaenecke and Peter J. Jaenecke.

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

Memorandum: Plaintiff commenced this action seeking a declaration that it is not obligated to defend or indemnify Zachary J. Jaenecke and Peter J. Jaenecke (defendants) in the underlying personal injury action commenced by defendants Gary L. Coons and Ann M. Coons. We note at the outset that the challenge by defendants to that part of the order and judgment declaring that "any bodily injury or damage to Gary L. Coons and Ann M. Coons was not caused by an accident resulting from the ownership, maintenance or use of the Jaenecke vehicle" is not properly before us. "An appeal from only part of an order [and judgment] constitutes a waiver of the right to appeal from other parts [thereof]" (*Johnson v Transportation Group, Inc.*, 27 AD3d 1135, 1135). Here, defendants limited their notice of appeal to that part of the order and judgment denying their motion during trial seeking a declaration that plaintiff was obligated to defend and indemnify them based on plaintiff's alleged failure to comply with Insurance Law § 3420 (d), and thus our review is limited to that issue (*see Matter of Violet Realty, Inc. v City of Buffalo Planning Bd.*, 20 AD3d 901, 903-904, *lv denied* 5 NY3d 713). We conclude that Supreme Court properly denied the motion and determined that plaintiff "was not required by

Insurance Law § 3420 (d) to issue a disclaimer in a timely fashion because its denial of coverage was based upon a lack of coverage and not a policy exclusion" (*Matter of Liberty Mut. Ins. Co. v Goddard*, 29 AD3d 698, 699).

Entered: February 18, 2011

Patricia L. Morgan
Clerk of the Court

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

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CA 10-00034

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

JEFFREY J. PITTS AND BRENDA L. PITTS,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

BELL CONSTRUCTORS, INC., ALSO KNOWN AS
BELL CONSTRUCTORS OF ROCHESTER,
DEFENDANT-RESPONDENT.

GOLDBERG SEGALLA LLP, SYRACUSE (SANDRA J. SABOURIN OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (MICHAEL L. AMODEO OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), dated December 7, 2009 in a personal injury action. The order, among other things, granted defendant's motion for summary judgment dismissing plaintiffs' complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of defendant's motion seeking summary judgment dismissing the Labor Law § 240 (1) cause of action and the Labor Law § 241 (6) cause of action insofar as it is premised upon the alleged violation of 12 NYCRR 23-1.7 (b) and reinstating those causes of action to that extent, and by granting plaintiffs' cross motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Jeffrey J. Pitts (plaintiff) when he fell from a column form in a trench. Plaintiff was standing on the column form while attempting to straighten out bolts located in other column forms in the trench. When the bar that plaintiff was using slipped off of a bolt, plaintiff lost his balance and fell into the trench.

Supreme Court erred in granting that part of defendant's motion for summary judgment dismissing the Labor Law § 240 (1) cause of action and in denying plaintiffs' cross motion for partial summary judgment on liability with respect to that cause of action. We therefore modify the order accordingly. Plaintiffs established their entitlement to judgment as a matter of law by demonstrating that

"plaintiff was not furnished with the requisite safety devices and that the absence of [such] safety devices was a proximate cause of his injuries" (*Williams v City of Niagara Falls*, 43 AD3d 1426, 1427). Although generally a fall into a trench from the ground on either side is not covered by the statute (see e.g., *Bradshaw v National Structures*, 249 AD2d 921; *Williams v White Haven Mem. Park*, 227 AD2d 923), where, as here, a plaintiff is working or walking over a plank or similar support suspended over a trench and falls into it, the statute applies (see *Wild v Marrano/Marc Equity Corp.*, 75 AD3d 1099).

The court also erred in granting that part of defendant's motion for summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it's premised upon the alleged violation of 12 NYCRR 23-1.7 (b), and we therefore further modify the order accordingly. That regulation is sufficiently specific to support a cause of action under section 241 (6) (see *Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543, 544), and a trench may be considered a hazardous opening within the meaning of the regulation if the opening is sufficiently large (see *Salazar v Novalex Contr. Corp.*, 72 AD3d 418, 422). The court, however, properly granted those parts of defendant's motion with respect to the alleged violation of the remaining regulations at issue inasmuch as they are either not sufficiently specific to support a cause of action (see *Partridge v Waterloo Cent. School Dist.*, 12 AD3d 1054, 1055-1056), or do not apply to the facts of this case (see *Curley v Gateway Communications*, 250 AD2d 888, 891-892).

Finally, we conclude that the court properly granted those parts of defendant's motion for summary judgment dismissing the Labor Law § 200 cause of action and the common-law negligence claim. Defendant met its initial burden of establishing that it did not supervise or control plaintiff's manner or method of work (cf. *Capasso v Kleen All of Am., Inc.*, 43 AD3d 1346, 1348), and plaintiffs failed to raise a triable issue of fact with respect thereto (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).