SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 15, 2013

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. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

763/12

CA 11-01463

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

ANTHONY D'ANNA, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF KATRINA D'ANNA, PLAINTIFF-RESPONDENT,

V ORDER

KENMORE-TOWN OF TONAWANDA UNION FREE SCHOOL DISTRICT, ET AL., DEFENDANTS, ANTHONY A. DANTONIO AND ROSEANNE DANTONIO, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF ANTHONY BURKHARDT, DEFENDANTS-APPELLANTS.

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP, WILLIAMSVILLE (RICHARD A. LILLING OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GARVEY & GARVEY, BUFFALO (MATTHEW J. GARVEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 6, 2010. The order, insofar as appealed from, denied the motion of defendants Anthony A. Dantonio and Roseanne Dantonio for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on February 12, 2013,

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1115

CA 12-00772

PRESENT: FAHEY, J.P., PERADOTTO, CARNI, AND WHALEN, JJ.

DESTINY SPINA AND BELINDA C. STEVENS,
PLAINTIFFS-RESPONDENTS,

V ORDER

KIMPEX, INC. AND KIMPEX (U.S.A.) LTD.,
DEFENDANTS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MICHAEL T. FEELEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and partial judgment (one paper) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 15, 2011. The order and partial judgment, inter alia, granted the motion of plaintiffs to set aside the jury verdict.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 22, 2013, and filed in the Niagara County Clerk’s Office on February 26, 2013,

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1179

KA 10-02347

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NJERA A. WILSON, DEFENDANT-APPELLANT.

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

NJERA A. WILSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered November 23, 2010. The judgment convicted defendant, upon a jury verdict, 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 a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]). The general motion by defendant for a trial order of dismissal is insufficient to preserve for our review his contention that the verdict is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, we reject defendant's contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences to support the jury's finding that defendant committed the crime of which he was convicted based upon the evidence at trial (*see generally People v Bleakley*, 69 NY2d 490, 495). We therefore further conclude that defendant was not denied effective assistance of counsel based on defense counsel's failure to move for a trial order of dismissal on more specific grounds. It is well settled that " '[a] defendant is not denied effective assistance of trial counsel [where defense] counsel does not make a motion or argument that has little or no chance of success' " (*People v March*, 89 AD3d 1496, 1497, *lv denied* 18 NY3d 926, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

Defendant further contends that the verdict is against the weight of the evidence because the testimony of the victim was not credible.

The credibility issues identified by defendant on appeal were placed before the jury, and "[w]e accord great deference to the [jury's] resolution of [those] credibility issues . . . 'because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record' " (*People v Ange*, 37 AD3d 1143, 1144, *lv denied* 9 NY3d 839, quoting *People v Lane*, 7 NY3d 888, 890). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, the showup identification procedure was not unduly suggestive, and County Court properly permitted the in-court identification of defendant. Although showup procedures are generally disfavored (*see People v Ortiz*, 90 NY2d 533, 537), "such procedures are permitted 'where [they are] reasonable under the circumstances—that is, when conducted in close geographic and temporal proximity to the crime—and the procedure used was not unduly suggestive' " (*People v Woodard*, 83 AD3d 1440, 1441, *lv denied* 17 NY3d 803, quoting *People v Brisco*, 99 NY2d 596, 597). Here, defendant was apprehended one block from the scene of the crime and within minutes of its occurrence. Also contrary to defendant's contention, the showup procedure was not rendered unduly suggestive by the fact that defendant was handcuffed and in a patrol car when he was returned to the scene of the crime (*see People v Duuvon*, 77 NY2d 541, 545; *People v Santiago*, 83 AD3d 1471, 1471, *lv denied* 17 NY3d 800; *People v Stoneham*, 50 AD3d 1575, 1576, *lv denied* 10 NY3d 940).

By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his present challenge to that ruling (*see People v Miller*, 59 AD3d 1124, 1125, *lv denied* 12 NY3d 819; *People v Caito*, 23 AD3d 1135, 1136). In any event, that contention is without merit (*see generally People v Hayes*, 97 NY2d 203, 207-208).

Finally, the contentions of defendant in his pro se supplemental brief do not warrant reversal or modification of the judgment. Specifically, the prosecutor's comments during summation were "either a fair response to defense counsel's summation or fair comment on the evidence" (*People v McEathron*, 86 AD3d 915, 916 [internal quotation marks omitted], *lv denied* 19 NY3d 975). Similarly, the court's *Allen* charge and its instructions on interested witnesses and the failure to testify were proper (*see People v Alvarez*, 86 NY2d 761, 763; *see generally People v Bell*, 38 NY2d 116, 120). We therefore also conclude that defendant's ineffective assistance contention as it relates to defense counsel's failure to object to those comments and charges is without merit (*see Stultz*, 2 NY3d at 287).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1184

CA 12-00075

PRESENT: SCUDDER, P.J., CARNI, SCONIERS, VALENTINO, AND WHALEN, JJ.

COUNTY OF ERIE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

M/A-COM, INC., ET AL., DEFENDANTS,
AND KEVIN J. COMERFORD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVID J. SEEGER, P.C., BUFFALO (DAVID J. SEEGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (KATHERINE M. LIEBNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 22, 2011. The order denied in part the motion of defendant Kevin J. Comerford to dismiss the first amended complaint against him.

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

Memorandum: Plaintiff, County of Erie (County), commenced this action to recover damages from its former employee, Kevin J. Comerford (defendant), for fraud and breach of fiduciary duty. Defendant appeals from an order denying in part his motion to dismiss the first amended complaint against him on the ground, inter alia, that the County lacks capacity to sue. The first amended complaint alleges that defendant, in his capacity as County Commissioner of Central Police Services, issued a memorandum to the County Legislature containing false representations concerning the appropriate vendors with which the County should contract for the upgrade of its computer-aided dispatch system. The first amended complaint further alleges that, based upon defendant's memorandum, the County entered into a contract with defendants M/A-Com, Inc., Tyco Electronics Corporation, and Intergraph Corporation (M/A-Com contract) that obligated the County to pay the sum of $4,093,000 for goods and services that at the time of the complaint had not been provided or completed.

There is no dispute that the County Legislature did not pass a resolution authorizing the commencement of this action. Contrary to defendant's contention, however, we conclude that, notwithstanding the absence of such a resolution, the County Executive was empowered to commence this action on behalf of the County (*see Matter of County of*

Rockland v Town of Clarkstown, 167 Misc 2d 367, 371). Under the County Charter, the County Executive is the Chief Executive Officer, the administrative head of the County government, and the Chief Budget Officer of the County. The County Charter grants the County Executive "all necessary incidental powers to perform and exercise any of the duties and functions specified . . . or lawfully delegated to him" (Erie County Charter § 302 [former (n)], now [m]). The County Executive is empowered by the County Charter to authorize the County Attorney to commence civil litigation to enforce any of the duties and functions lawfully designated to the County Executive (*see* § 602; *see also* § 302 [former (m)], now [l]; [former (n)], now [m]). Inasmuch as this action seeks to recover over $4 million dollars of the County's funds that were allegedly improperly paid under the M/A-Com contract as a result of defendant's alleged fraud, we conclude that the County Executive's duties as Chief Executive Officer and Chief Budget Officer of the County clearly embrace the subject matter of this action and empower him to authorize the County Attorney to commence the litigation (*see Rockland County*, 167 Misc 2d at 371).

As the dissent correctly notes, section 602 of the Erie County Charter permits the County Attorney to perform "such *additional and related duties* as may be prescribed by law, by the county executive or by resolution of the county legislature" (emphasis added). Inasmuch as section 602 specifically discusses the power of the County Attorney to prosecute an action, the dissent contends that section 602 "cannot be read to encompass the enumerated power to commence a civil action." To do so, in the opinion of our dissenting colleagues, "would render superfluous the County Legislature's inclusion of that enumerated power within section 602."

In our view, the dissent has conflated the distinct acts of prosecuting an action and commencing an action. Erie County Charter § 602 and County Law § 501 (1) limit the duties of a County Attorney, insofar as relevant to this appeal, to prosecuting or defending actions brought by or against the County. As the dissent correctly states, the board of supervisors or the legislature of a county is generally empowered to bring, i.e., commence, a civil action. Thus, the power to commence a civil action constitutes an additional and related duty, and our interpretation of both Erie County Charter § 602 and County Law § 501 (1) does not render any language in section 602 superfluous.

We reject defendant's further contention that the first amended complaint fails to plead a cause of action for fraud with sufficient particularity (*see* CPLR 3016 [b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492).

As an alternate ground on which to dismiss the fraud cause of action, the dissent concludes that, to the extent that "[t]he operative allegations behind the County's fraud cause of action . . . are based solely on 'information and belief,' " those allegations are insufficient. We do not take issue with the legal authority cited by the dissent, but we decline to dismiss a complaint on a legal theory

not raised by the defendant on the underlying motion to dismiss or on appeal. "It is well settled that '[a]n appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had those theories or questions been presented in the court of first instance' " (*Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We disagree with the dissent's conclusion that defendant's general contention that the first amended complaint fails to state a cause of action alleging fraud encompasses the specific theory that the County failed to identify the source of the information of the allegations made on "information and belief." Had defendant advanced that theory, it is likely that the County would have been able to offer proof to overcome it. Indeed, the ease with which the County's pleading deficiency could be overcome is the basis for the dissent's determination to dismiss the first amended complaint "without prejudice." The County was not put on notice that such a theory for dismissal was being raised by defendant and thus had no opportunity to refute or overcome it (*cf. Belco Petroleum Corp. v AIG Oil Rig*, 164 AD2d 583, 598-599). We decline to dismiss the first amended complaint on a deficiency that easily could have been addressed had it been raised by defendant.

Finally, we reject defendant's contention that he is immune from suit because he exercised discretion in recommending the M/A-Com contract, inasmuch as he is not being sued for an injury to a member of the public (*see Valdez v City of New York*, 18 NY3d 69, 76).

All concur except SCONIERS and WHALEN, JJ., who dissent and vote to modify in accordance with the following Memorandum: We respectfully dissent because we cannot agree with the majority that plaintiff, County of Erie (County), has the capacity to sue and that the first amended complaint sufficiently states a fraud cause of action against Kevin J. Comerford (defendant). We would therefore modify the order by granting in its entirety defendant's motion to dismiss the first amended complaint against him based on those grounds.

We first address the majority's conclusion that the County has the capacity to sue defendant. "[C]apacity concerns a litigant's power to appear and bring its grievance before the court" (*Matter of Graziano v County of Albany*, 3 NY3d 475, 478-479 [internal quotation marks and citation omitted]). To reach its conclusion, the majority reasons that the Erie County Charter empowers the County Executive to authorize the County Attorney to commence an action without a resolution by the County Legislature. We disagree. Pursuant to the County Law, the power to authorize a county attorney to bring civil actions and proceedings belongs to the board of supervisors or legislature of a county rather than its county executive (*see County of Sullivan v Town of Thompson*, 99 AD2d 574, 574-575; *see e.g. County of Niagara v Town of Royalton*, 48 AD3d 1072; *see generally* County Law §§ 150-a; 501 [1]). Of course, a county may supersede the provisions of the County Law by enacting a local charter that conflicts with or limits the County Law (*see* § 2 [b]; *Matter of Gallagher v Regan*, 42 NY2d 230, 235; *Long Is. Liquid Waste Assn. v Cass*, 115 AD2d 710, 711-712, *lv dismissed* 67 NY2d 870). Indeed, the Erie County Charter includes a provision recognizing that principle and mandating that,

"wherever and whenever any state law . . . is inconsistent with this charter, such law shall be deemed to the extent of such inconsistency to be superseded by this charter insofar as the county of Erie and its government are affected" (Erie County Charter § 103). Thus, the relevant inquiry in this case is whether the Erie County Charter supersedes the County Law and empowers the County Executive to authorize the County Attorney to bring a civil action in the absence of a resolution from the County Legislature. Contrary to the conclusion of the majority, we conclude that it does not. In support of its conclusion, the majority relies on Erie County Charter §§ 302 (m) (former [n]) (hereafter, § 302 [m]) and 602, but, in our view, neither section contains language so empowering the County Executive.

We turn first to section 602, which lists the powers and duties of the County Attorney and provides that "[t]he county attorney shall be the legal advisor for the county and, on its behalf in county matters, of its officers and administrative units. He or she shall, in all county legal matters of a civil nature, advise all county officers and employees and, where in the interest of the county, prepare all necessary papers and written instruments in connection therewith, prosecute or defend all actions or proceedings of a civil nature brought by or against the county; prepare resolutions, ordinances, legalizing acts and local laws to be presented for action by the county legislature, together with notices and other items in connection therewith; and perform such additional and related duties as may be prescribed by law, by the county executive or by resolution of the county legislature."

Section 602 describes three categories of powers and/or duties that fall within the purview of the County Attorney: (1) advising the County in civil legal matters, which include prosecuting or defending actions; (2) preparing resolutions and/or local laws; and (3) performing "such *additional and related duties* as may be prescribed by law, by the county executive or by resolution of the county legislature" (*id.* [emphasis added]). It is the third category of duties on which the majority must necessarily base its conclusion that the County Executive may authorize the County Attorney to commence an action without a resolution from the County Legislature. Such an interpretation of section 602, however, runs contrary to the rules of statutory construction. Because "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" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583; *see Bluebird Partners v First Fid. Bank*, 97 NY2d 456, 460-461; *Matter of New York Skyline, Inc. v City of New York*, 94 AD3d 23, 26-27, *lv denied* 19 NY3d 809), and " 'effect and meaning must, if possible, be given to the entire statute and every part and word thereof' " (*Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation*, 18 NY3d 289, 296, quoting McKinney's Cons Law of NY, Book 1, Statutes § 98; *see Sanders v Winship*, 57 NY2d 391, 395-396). "[A]ll parts of a statute are to be harmonized with each other, as well as with the general intent of the statute" (*Rangolan v County of Nassau*, 96 NY2d 42, 48), and a construction "resulting in the

nullification of one part of the [statute] by another[ ] is impermissible" (*Matter of New York County Lawyers' Assn. v Bloomberg*, 95 AD3d 92, 101 [internal quotation marks omitted], *affd* 19 NY3d 712). "A construction rendering statutory language superfluous is to be avoided" (*Matter of Branford House v Michetti*, 81 NY2d 681, 688).

Applying the foregoing rules to this case, we note that the power to commence a civil action is enumerated in section 602 as one of the powers and duties of the County Attorney. That is not to suggest, however, that the County Attorney may commence a civil action on the County's behalf of his own volition. Section 602 must be read in conjunction with the County Law § 501 (1), which empowers a county "board of supervisors [or legislature] . . . to bring civil actions and proceedings[, whereas] the county attorney's authority is limited to prosecuting them" (*County of Sullivan*, 99 AD2d at 574-575). Pursuant to the last sentence of section 602, the County Executive may authorize the County Attorney to perform only "*additional and related duties*" (emphasis added). Those "additional and related duties," however, cannot be read to encompass the enumerated power to commence a civil action. Doing so would render superfluous the County Legislature's inclusion of that enumerated power within section 602. Stated another way, the power to commence a civil action cannot reasonably be "additional" or "related" to itself. Thus, the majority's reliance on section 602 is misplaced (*see Branford House*, 81 NY2d at 688).

Likewise, we are not persuaded by the reasoning in the case cited by the majority, *Matter of County of Rockland v Town of Clarkstown* (167 Misc 2d 367). In that case, the court relied on a provision in the Rockland County Charter that was substantially similar to section 602 of the Erie County Charter. Section C16.02 of the Rockland County Charter provides in relevant part that the "County Attorney shall be the legal advisor of the county and all county agencies on civil matters and shall prosecute or defend actions or proceedings of a civil nature brought by or against the county. *He shall have and exercise such other and related powers and duties as may be conferred or imposed upon him by law and perform such other related duties required by the County Executive or the Legislature*" (*County of Rockland*, 167 Misc 2d at 369). From that section, the court concluded that the Rockland County Executive "is empowered by the Rockland County Charter to authorize the County Attorney to commence civil litigation to enforce any of the duties and functions lawfully designated to the County Executive" (*id.* at 370). Based on the rules of statutory construction noted above, however, we conclude that the court made the same error of statutory construction made by the majority in this case.

Next, contrary to the view of the majority, Erie County Charter § 302 (m) does not require a different result. That provision gives the County Executive "all necessary incidental powers" to perform any of his enumerated duties or functions. We acknowledge that the "right to sue and be sued" has sometimes been included within the broad category of "incidental powers" (*New York City Tunnel Auth. v Consolidated Edison Co. of N.Y., Inc.*, 269 App Div 449, 453, *revd on other grounds*

295 NY 467, *rearg denied* 296 NY 745). In this case, however, granting the broad power to commence litigation to the Erie County Executive without a resolution from the County Legislature based on Erie County Charter § 302 (m) still renders the language of section 602 superfluous. Section 302 (m) cannot be read to empower the County Executive to authorize the County Attorney to perform the enumerated duty of commencing litigation when section 602 expressly limits the County Executive's direction over the County Attorney to performing "additional" or "related" duties.

The rules of statutory construction "require that, where it is possible to do so, the various parts of the statutory scheme be harmonized, reading and construing them together . . . , and reconciling the apparently conflicting provision in the manner most consistent with the overall legislative intent" (*Matter of Ador Realty, LLC v Division of Hous. & Community Renewal*, 25 AD3d 128, 134). In our view, the Erie County Charter does not evince that the County Legislature intended to deviate from the rule set forth in the County Law that it, rather than the County Executive, may authorize the County Attorney to commence a civil action (*see* County Law § 501 [1]; *County of Sullivan*, 99 AD2d at 575; *see e.g. County of Niagara*, 48 AD3d at 1072).

Indeed, in describing the powers and duties of the County Legislature, Erie County Charter § 202 explicitly provides that "the county legislature shall have and exercise *all powers and duties of the county . . .*" (emphasis added). It is well established that Erie County is a municipal corporation with the right to sue and be sued (*see* NY Const, art X, § 4; County Law § 3; *see generally Beneke v Town of Santa Clara*, 28 AD3d 998, 999). Thus, consistent with the provisions of the County Law, the County Legislature clearly intended to grant itself the right to sue and be sued (*see generally Beneke*, 28 AD3d at 999; *County of Sullivan*, 99 AD2d at 575).

On the other hand, the powers and duties of the County Executive are more narrowly defined. The County Executive's powers and duties are enumerated in Erie County Charter § 302. Conspicuously absent from that list of powers and duties is a "catch-all" provision akin to the language identified above in section 202. The County Legislature clearly knew how to empower a branch of the Erie County Government with "all powers and duties of the county" (§ 202), but chose not to bestow those powers on the County Executive. Therefore, because it is undisputed in this case that the County Attorney acted only at the direction of the County Executive and without a resolution from the County Legislature, we would dismiss the first amended complaint on the ground that the County lacked the capacity to sue.

Even if we were to agree with the majority that sections 602 and 302 (m) empower the County Executive to authorize the County Attorney to commence a civil action, we nevertheless disagree with the majority's implicit conclusion that the power is so broad that the County Executive may authorize the County Attorney to commence the instant action against defendant.

That conclusion is not inconsistent with section 302 (m). To be sure, to the extent that the County Executive possesses a specific duty or function by virtue of section 302, the Erie County Charter provides him with broad powers to exercise that duty or function (*see* § 302 [m]). Here, however, the County's action against defendant involves matters outside the County Executive's enumerated duties.

The County Executive is "the chief executive officer and administrative head of the county government" (Erie County Charter § 302 [a]) and is "responsible for the exercise of all executive and administrative powers in relation to any and all functions of county government not otherwise specified in [the Erie County Charter]" (§ 302 [l]). He or she shall also "appoint to serve . . . the head of every department and other administrative unit of the county" (§ 302 [b]) and "[s]upervise and direct the internal organization and reorganization of each department or other administrative unit the head of which he or she has power to appoint" (§ 302 [c]). Notably, the Commissioner of Central Police Services (CPS) is appointed by and "shall serve at the pleasure of the county executive" (§ 1501). The County Executive, therefore, has a supervisory role with respect to CPS. The instant action, however, involves allegations of fraud against the *former* Commissioner of CPS. In our view, it does not flow from the County Executive's power to supervise and direct CPS that the County Executive, without a resolution from the County Legislature, may authorize the County Attorney to commence a civil action against a former county employee who resigned before the County Executive took office. Simply stated, this action falls outside the enumerated powers granted to the County Executive in section 302.

Consequently, this case is distinguishable from *County of Rockland*, on which the majority heavily relies. Notwithstanding its threshold error in concluding that the Rockland County Executive had power to authorize the County Attorney to commence a civil action, the court in *County of Rockland* nevertheless pointedly recognized that any such power necessarily would be limited to matters that fell within the County Executive's enumerated duties (*see County of Rockland*, 167 Misc 2d at 370-371). In that case, the Rockland County Executive was the "chief budget officer" and the lawsuit involved the County budget (*id.*). The County of Rockland commenced separate proceedings against the Town of Clarkstown and the Town of Ramapo "to compel the subject Towns to add deficits caused by County revenue chargebacks to the Town's portion of each annual budget" (*id.* at 368).

In this case, even though the County Executive is the County's Chief Executive Officer and Chief Budget Officer (*see* Erie County Charter § 302 [a], [d]), the nexus between the fraud action commenced by the County and the County Executive's enumerated powers is far more tenuous than it was in *County of Rockland*. Every decision by a county agency ultimately has some effect on a county's budget. The four million dollars allegedly at issue in this action notwithstanding, the majority's holding today allows the County Executive to circumvent the County Legislature and direct the County Attorney to commence litigation for any decision that could have an impact on the County's budget, no matter how small.

Therefore, even if we were to accept the majority's position that the Erie County Charter empowers the County Executive to authorize the County Attorney to commence a civil action in some instances, we would nevertheless reach the conclusion that the County lacks the capacity to sue defendant herein.

Finally, we note that there is an alternate ground on which the fraud cause of action, the sole remaining cause of action in the first amended complaint, must be dismissed, albeit without prejudice. The operative allegations behind the County's fraud cause of action against defendant are based solely on "information and belief." For example, the County alleges that, "[u]pon information and belief, [defendant] was advised by New York State Homeland Security that the proposed contract with M/A-Com was unauthorized and illegal." It is well established that allegations based on "information and belief" are insufficient to support a fraud cause of action, which must be pleaded with particularity, unless "the source of such information [is] revealed" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443; *see Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 370; *see generally* CPLR 3016 [b]).

We do not dispute that defendant herein failed to raise this specific issue as a basis to dismiss the fraud cause of action, the sole remaining cause of action against him, and we agree with the proposition that " '[a]n appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had those theories or questions been presented in the court of first instance' " (*Ciesinski v Town of Aurora*, 202 AD2d 984, 985, quoting *Fresh Pond Rd. Assoc. v Estate of Schacht*, 120 AD2d 561, 561, *lv denied* 68 NY2d 802). Nevertheless, defendant moved to dismiss the first amended complaint for, inter alia, failure to state a cause of action alleging fraud and argued that the allegations of fraud made against him were too vague. In our view, defendant's challenge to the fraud cause of action necessarily encompasses the sufficiency of the allegations of that cause of action. We do not agree with the majority that the County should, in effect, be permitted to proceed on patently insufficient fraud allegations in the face of defendant's challenge to the sufficiency of those very allegations.

At the same time, we recognize that the County has never been given the opportunity to cure the deficiencies in its allegations and come forward with the source of the information on which its beliefs are based. We decline to offer an opinion whether the County will do so successfully, but we believe that it is incumbent on the County, at the pleading stage, "to disclose the sources of its information and belief and otherwise come forward with whatever evidence it has" concerning its allegations of fraud against defendant, and we also believe "that it should be given another opportunity to do so" (*Belco Petroleum Corp. v AIG Oil Rig*, 164 AD2d 583, 599). Therefore, even assuming, arguendo, that the County has the capacity to sue defendant, we would dismiss the fraud cause of action against him without prejudice to allow the County to replead its allegations of fraud. If the County cannot provide legally sufficient amended allegations of

fraud, then defendant will be able to challenge such allegations. This was the approach taken by the First Department in an analogous case, *Belco Petroleum Corp.* (164 AD2d at 598-599), and we see no reason not to employ it here. We note that, to the extent that the County may encounter a statute of limitations issue upon further amending its complaint, CPLR 205 (a) would operate to save the claim from being time-barred.

For the reasons stated herein, we respectfully dissent and would modify the order by granting defendant's motion to dismiss the sole remaining cause of action against him based on the County's lack of capacity to sue and the County's failure to state a cause of action alleging fraud.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1190

CA 12-00076

PRESENT: SCUDDER, P.J., CARNI, SCONIERS, VALENTINO, AND WHALEN, JJ.

COUNTY OF ERIE, PLAINTIFF-RESPONDENT,

V ORDER

M/A-COM, INC., ET AL., DEFENDANTS,
AND KEVIN J. COMERFORD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVID J. SEEGER, BUFFALO, FOR DEFENDANT-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (KATHERINE M. LIEBNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 23, 2011. The order denied the motion of defendant Kevin J. Comerford to compel plaintiff to pay the costs of his defense in the action.

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: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1320

CA 11-02261

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

IN THE MATTER OF THOMAS C. ZEMBIEC,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, MONROE COUNTY SHERIFF'S DEPARTMENT, PATRICK O'FLYNN, SHERIFF, MONROE COUNTY SHERIFF'S DEPARTMENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, AND UNDERSHERIFF WILLIAM SANBORN, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, RESPONDENTS-APPELLANTS.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (JAMES L. GELORMINI OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CHRISTINA A. AGOLA, PLLC, ROCHESTER (CHRISTINA A. AGOLA OF COUNSEL), ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered April 27, 2012 in a proceeding pursuant to CPLR article 78. The judgment awarded petitioner General Municipal Law § 207-c benefits beginning on December 4, 2009.

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

Memorandum: Petitioner, an employee of respondent Monroe County Sheriff's Department (MCSD), commenced this CPLR article 78 proceeding seeking, inter alia, to annul the July 19, 2010 determination that he is not entitled to General Municipal Law § 207-c benefits (disability benefits). Supreme Court concluded that the determination was arbitrary and capricious, and issued the instant judgment awarding petitioner disability benefits commencing on December 4, 2009, the date of petitioner's request for those benefits. We affirm.

We note as background that petitioner previously commenced a CPLR article 78 proceeding seeking to annul the June 15, 2009 determination denying petitioner's first request for disability benefits (prior proceeding). In the prior proceeding, respondents appealed and petitioner cross-appealed from an amended judgment granting those parts of the petition seeking disability benefits from August 12, 2008 through June 15, 2009 as well as petitioner's regular pay from June 15, 2009 through March 25, 2010. This Court modified the amended judgment by denying that part of the petition seeking an award of

regular pay from June 15, 2009 through March 25, 2010 on the ground that petitioner was required to report to a modified duty assignment on June 15, 2009, but did not do so (*Matter of Zembiec v County of Monroe* [appeal No. 2], 87 AD3d 1358, 1359).

Respondents contend that petitioner's claim in this proceeding is precluded by the doctrine of res judicata. We reject that contention. Petitioner's instant claim is based on a December 2, 2009 status report prepared by an MCSD physician, in which the physician determined that petitioner was not fit to return to work (status report). Petitioner submitted, inter alia, the status report in the prior proceeding to establish the requisite "direct causal relationship between job duties and the resulting illness or injury" (*Matter of White v County of Cortland*, 97 NY2d 336, 340). Contrary to respondents' contention, petitioner's submission of the status report in the prior proceeding does not establish that the claims asserted by petitioner in this proceeding and in the prior proceeding (collectively, proceedings) arose out of the same transaction or series of transactions. It is well settled that the determination whether a "factual grouping constitutes a transaction or series of transactions depends on how the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether . . . their treatment as a unit conforms to the parties' expectations or business understanding or usage" (*Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193, *rearg denied* 55 NY2d 878 [internal quotation marks omitted]). Here, although the proceedings both involve claims concerning petitioner's entitlement to disability benefits and are arguably related in time inasmuch as certain events relevant to this appeal, i.e., the issuance of the status report and petitioner's second request for disability benefits, occurred while the prior proceeding was pending, the proceedings are based upon two different transactions—respondents' June 15, 2009 denial of benefits and respondents' July 19, 2010 denial of benefits (*see generally Matter of Reilly v Reid*, 45 NY2d 24, 30). Thus, in the prior proceeding, the court was concerned only with the issue whether respondents' June 15, 2009 determination was "arbitrary and capricious" (CPLR 7803 [3]). Indeed, the court stated in the amended judgment in the prior proceeding that petitioner's "current condition and ability to perform the modified assignment . . . [was] beyond the scope of the [prior] proceeding." Moreover, we note that the court's "review of [the] administrative determination [in the prior proceeding was] limited to the 'facts and record adduced before the agency' " (*Matter of Kelly v Safir*, 96 NY2d 32, 39, *rearg denied* 96 NY2d 854, quoting *Matter of Featherstone v Franco*, 95 NY2d 550, 554), and the court therefore could not rely on post-determination submissions, such as the status report, in evaluating the determination.

We also reject respondents' alternative contention that petitioner's instant claim is barred by collateral estoppel. We conclude that the issues concerning petitioner's ability to return to work and his eligibility for disability benefits in December 2009 were not decided in the prior proceeding (*see generally Beuchel v Bain*, 97 NY2d 295, 303-304, *cert denied* 535 US 1096). Our decision in the prior appeal does not require a different result (*see Zembiec*, 87 AD3d

at 1359). Although we determined that the court erred in awarding petitioner regular pay from June 15, 2009 through March 25, 2010, we did not foreclose the possibility that petitioner may, at some point after June 15, 2009, again become eligible for disability benefits.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1429

CAF 11-02140

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

IN THE MATTER OF DAHMANI M.

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

JANA M., RESPONDENT-APPELLANT.

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

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

RALPH G. DEMASI, ATTORNEY FOR THE CHILD, SYRACUSE, FOR DAHMANI M.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered September 15, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child. Contrary to the mother's contention, Family Court did not abuse its discretion in determining that a suspended judgment, i.e., a "brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311), was not in the child's best interests (*see Matter of Jane H. [Susan H.]*, 85 AD3d 1586, 1587, *lv denied* 17 NY3d 709; *see generally Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 430). "Although [the mother] participated in [some of] the services offered by petitioner, [s]he failed to address successfully the problems that led to the removal of the child[ ] and continued to prevent [his] safe return" (*Matter of Kyle S.*, 11 AD3d 935, 936 [internal quotation marks omitted]). The mother also did not have a viable plan for the child while she was incarcerated (*see Matter of Gena S.*, 101 AD3d 1593, 1594). The record therefore supports the court's refusal to grant a suspended judgment inasmuch as the record establishes that the mother had no "realistic, feasible plan to care for the child[ ] . . . and . . . that [she] was not likely to change her behavior" (*Matter of Sean W. [Brittany W.]*, 87 AD3d 1318, 1319, *lv denied* 18 NY3d 802 [internal quotation marks

omitted]).

The mother further contends that she was denied effective assistance of counsel on the grounds that her attorney failed to request posttermination contact and allegedly failed to call the child's maternal grandmother as a witness during the dispositional hearing. We reject that contention. With respect to the posttermination contact, a court has no authority to direct continuing contact between a parent and child once that parent's rights have been terminated pursuant to Social Services Law § 384-b (*see Hailey ZZ.*, 19 NY3d at 426). Thus, the mother was not prejudiced by her attorney's failure to request posttermination contact (*see generally Sean W.*, 87 AD3d at 1319). With respect to her attorney's alleged failure to call the child's maternal grandmother as a witness, the mother did not meet her burden of demonstrating that the alleged failure resulted in actual prejudice (*see Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17 NY3d 704). Indeed, there is no support in the record for the mother's contention that the child's maternal grandmother was willing or able to care for the child during the mother's incarceration and thus should have been called as a witness to testify to that effect.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1439

CA 12-01229

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

GARY STEIGER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LPCIMINELLI, INC. AND ORCHARD PARK CCRC,
DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CAMPBELL & SHELTON LLP, EDEN (ERIC M. SHELTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Sheila A. DiTullio, A.J.), entered May 15, 2012. The order, inter alia, denied the motion of defendants for summary judgment dismissing the second amended complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by granting those parts of defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against defendant LPCiminelli, Inc. insofar as they are based upon actual notice and against defendant Orchard Park CCRC in their entirety, and for summary judgment dismissing the Labor Law § 241 (6) cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he tripped and fell while exiting a portable toilet that was located on land owned by defendant Orchard Park CCRC (Orchard Park). Orchard Park hired defendant LPCiminelli, Inc. (Ciminelli) to act as the general contractor or construction manager for the construction of Fox Run at Orchard Park, a retirement community (Fox Run). Plaintiff was employed as a service technician by a telephone company (employer), which contracted directly with Orchard Park for the installation of fiber optic telephone, Internet, and cable television systems at Fox Run. On the date of the accident, plaintiff was working inside Fox Run's healthcare center building (hereafter, health center). After finishing his work for the morning, plaintiff and a coworker planned to drive to the nearby office of their employer for lunch. Plaintiff and the coworker left the health center and walked into the parking lot in front of the building, where their trucks were parked. Before leaving for lunch, plaintiff decided to use one of the portable toilets located on the sidewalk adjacent to the parking lot. The

toilets were set back approximately 1½ to 2 feet from the sidewalk curb. Plaintiff stepped onto the curb from the parking lot and entered one of the toilets. When plaintiff exited the toilet, he took a step with his right foot onto the sidewalk, rolled his left ankle on the edge of the curb, and fell into the parking lot, breaking his right wrist and injuring his left ankle.

Defendants appeal from an order that, inter alia, denied their motion for summary judgment dismissing the second amended complaint. Contrary to the contention of defendants, we conclude that Supreme Court properly denied that part of their motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against Ciminelli except insofar as those claims are based upon actual notice. Where, as here, the worker's injuries result from a dangerous condition at the work site rather than from the manner in which the work is performed, the general contractor or owner "may be liable in common-law negligence and under Labor Law § 200 if it has control over the work site and [has created or has] actual or constructive notice of the dangerous condition" (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416 [internal quotation marks omitted]; *see Bannister v LPCiminelli, Inc.*, 93 AD3d 1294, 1295; *Rodriguez v BCRE 230 Riverdale, LLC*, 91 AD3d 933, 934-935; *Selak v Clover Mgt., Inc.*, 83 AD3d 1585, 1587; *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582). Thus, "[d]efendants, as the parties seeking summary judgment dismissing those claims, were required to 'establish as a matter of law that they did not exercise any supervisory control over the general condition of the premises or that they neither created nor had actual or constructive notice of the dangerous condition on the premises' " (*Ozimek*, 83 AD3d at 1416; *see Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708-709; *Perry v City of Syracuse Indus. Dev. Agency*, 283 AD2d 1017, 1017).

We conclude that defendants failed to meet that burden with respect to Ciminelli with the exception of actual notice. Defendants failed to demonstrate that Ciminelli lacked any supervisory control over the general condition of the premises inasmuch as their own submissions established, inter alia, that Ciminelli's project superintendent and project manager had offices on the premises and were present at the construction site on a daily basis, held coordination meetings with field personnel, and required all contractors and subcontractors to sign a safety form (*see Mott v Tromel Constr. Corp.*, 79 AD3d 829, 830-831). Defendants likewise failed to establish that Ciminelli did not create the allegedly dangerous condition, i.e., the placement of the portable toilets in proximity to the curb. It is undisputed that Ciminelli was responsible for the placement of the portable toilets, and Ciminelli failed to demonstrate as a matter of law that the placement of the portable toilets did not constitute a dangerous condition. Indeed, the record establishes the potential danger created by that placement. Photographs of the accident scene show that the toilets were located a short distance from the curb. Further, plaintiff's coworker confirmed that, on the date of the accident, he "stumbled" on his way out of the portable toilet, having forgotten that "there was an extra step there." After plaintiff's accident, the portable toilets were

relocated, and the coworker testified that he "didn't have any more problems stepping in and out of them."

Defendants also failed to establish that Ciminelli lacked "constructive notice of the condition, i.e., they failed to establish as a matter of law that the condition was not visible and apparent or that it had not existed for a sufficient length of time before the accident to permit [Ciminelli] or [its] employees to discover and remedy it" (*Finger v Cortese*, 28 AD3d 1089, 1091; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838). The portable toilets had been located on the sidewalk for at least a week prior to the accident, and Ciminelli representatives were present at the work site on a daily basis. Moreover, the photographs in the record establish that the potential danger created by the placement of the portable toilets, i.e., their proximity to the sidewalk curb, is readily apparent.

We agree with defendants, however, that they met their burden of establishing Ciminelli's lack of actual notice as a matter of law "[b]y showing that it did not receive any complaints about the area prior to plaintiff's fall" (*Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857; *see Ferrington v Dudkowski*, 49 AD3d 1267, 1267) and that plaintiff failed to raise a triable issue of fact with respect thereto (*see Ferrington*, 49 AD3d at 1267; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Ciminelli's project superintendent and project manager testified at their depositions that they did not receive any complaints about the placement of the toilets on the sidewalk and that they were not aware of any incidents involving the toilets prior to the accident, and plaintiff submitted no proof to the contrary (*see Quigley v Burnette*, 100 AD3d 1377, 1378; *Constanzo v Woman's Christian Assn. of Jamestown*, 92 AD3d 1256, 1257). We therefore modify the order by granting that part of defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against Ciminelli insofar as they are premised upon actual notice.

We further conclude that defendants met their burden with respect to the Labor Law § 200 and common-law negligence claims against Orchard Park. Specifically, defendants established that Orchard Park "lacked control over the general condition of the premises and neither created nor had actual or constructive notice of any allegedly dangerous condition thereof, and . . . plaintiff failed to raise a triable issue of fact" (*Hennard v Boyce*, 6 AD3d 1132, 1133). The executive director of Fox Run testified at his deposition that Orchard Park had no responsibility for directing or controlling the construction work, and had no responsibility for site safety. Orchard Park did not have a representative on the job site on a regular basis and was not involved in acquiring or placing the portable toilets at the site. We therefore further modify the order by granting those parts of defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against Orchard Park in their entirety.

Finally, we agree with defendants that the court erred in denying

that part of their motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action. That cause of action is premised upon defendants' alleged violation of 12 NYCRR 23-1.7 (e) (1), which provides that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping." Although that Industrial Code provision is sufficiently specific to support a Labor Law § 241 (6) claim (*see Boyd v Mammoet W., Inc.*, 32 AD3d 1257, 1258; *Cowan v ADF Constr. Corp.*, 26 AD3d 802, 803), we conclude that defendants met their burden of establishing that it is inapplicable to the facts of this case and that plaintiff failed to raise a triable issue of fact with respect thereto (*see Boyd*, 32 AD3d at 1258; *Fura v Adam's Rib Ranch Corp.*, 15 AD3d 948, 948; *Schroth v New York State Thruway Auth.*, 300 AD2d 1044, 1045). The area where the accident occurred was not a "passageway" that defendants were obligated to keep free of obstructions or other conditions that might cause tripping (*see Lech v Castle Vil. Owners Corp.*, 79 AD3d 819, 820; *Hageman v Home Depot U.S.A., Inc.*, 45 AD3d 730, 731; *Boyd*, 32 AD3d at 1258; *Meslin v New York Post*, 30 AD3d 309, 310).

Although the regulations do not define the term "passageway" (*see* 12 NYCRR 23-1.4), courts have interpreted the term to mean a defined walkway or pathway used to traverse between discrete areas as opposed to an open area (*see Motyka v Ogden Martin Sys. of Onondaga Ltd. Partnership*, 272 AD2d 980, 981; *Bale v Pyron Corp.*, 256 AD2d 1128, 1128; *see also O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 225-226, *affd* 7 NY3d 805; *Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 595; *Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1157; *Smith v McClier Corp.*, 22 AD3d 369, 371; *Fura*, 15 AD3d at 948; *Bauer v Niagara Mohawk Power Corp.*, 249 AD2d 948, 949). Here, plaintiff tripped on the curb of a sidewalk that bordered the parking lot and that ran along the front of the health center where he was working on the date of the accident. Plaintiff described the parking lot as a "big . . . open parking lot" where he and other workers parked their vehicles to access the health center. We have held that a parking lot is not a passageway within the meaning of 12 NYCRR 23-1.7 (*see Talbot v Jetview Props., LLC*, 51 AD3d 1396, 1397-1398; *see also Bonvino v Long Is. Coll. Hosp.*, 21 Misc 3d 1110[A], 2008 NY Slip Op 52034[U], *5-6; *see generally Garland v Zelasko Constr.*, 241 AD2d 953, 954).

With respect to the sidewalk itself, plaintiff "was not using [it] as a passageway when the accident occurred" (*Parker v Ariel Assoc. Corp.*, 19 AD3d 670, 672; *see Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622; *cf. Hertel v Hueber-Breuer Constr. Co., Inc.*, 48 AD3d 1259, 1260). When plaintiff tripped, he was not using the sidewalk at issue as a means of traveling between work areas or between his work area and the parking lot where his vehicle was parked. Indeed, plaintiff testified that, during the month that he was working in the health center, he never walked on the sidewalk at issue because "[t]he johns were on them." Rather, plaintiff stepped over the sidewalk into the parking lot, and thus the alleged passageway itself was the "obstruction" (12 NYCRR 23-1.7 [e] [1]). Had plaintiff been using the sidewalk as a passageway, he would not

have encountered the same tripping hazard. The photographs and deposition testimony in the record establish that the portable toilets could be accessed from the sidewalk without having to navigate the curb. We therefore further modify the order by granting that part of defendants' motion for summary judgment dismissing the Labor Law § 241 (6) cause of action (*see generally Coaxum v Metcon Constr., Inc.*, 93 AD3d 403, 404; *Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 938; *Verel*, 41 AD3d at 1157).

All concur except WHALEN, J., who dissents in part and votes to modify in the following Memorandum: Respectfully, I dissent with the majority insofar as they conclude that Supreme Court erred in denying that part of defendants' motion for summary judgment dismissing the Labor Law § 241 (6) cause of action. I would therefore affirm the order insofar as it denied that part of the motion. Contrary to the majority's determination, I conclude that defendants' submissions raised a triable issue of fact whether plaintiff was using the sidewalk as a passageway when the accident occurred. Thus, in my view, defendants failed to meet their burden of demonstrating that 12 NYCRR 23-1.7 (e) (1) is inapplicable to the facts of this case.

"12 NYCRR 23-1.7 (e) (1) does not exempt any construction site 'passageway' from its scope; it clearly requires that '*[a]ll* passageways shall be kept free from . . . obstructions or conditions which could cause tripping' " (*Smith v McClier Corp.*, 22 AD3d 369, 370). Responsibility under Labor Law § 241 (6) "extends not only to the point where the . . . work was actually being conducted, but to the entire site" (*id.* at 371 [internal quotation marks omitted]).

As noted by the majority, in this case plaintiff was exiting a portable toilet when he tripped over the curb of a sidewalk on which the toilets were located. The sidewalk bordered a parking lot and ran along the front of the health center, in which plaintiff had been working on the date of the accident. The portable toilets were placed on the sidewalk for the workers to use and thus were part of the entire work site.

Further, the purpose of a sidewalk is to provide a surface upon which a person may safely pass from one location to another. The record establishes that a worker could not access the portable toilets without stepping on the sidewalk. Thus, there is evidence that the sidewalk was a passageway that provided workers access to the portable toilets. Moreover, the record establishes that, when the door to a portable toilet opened onto the sidewalk, it created a very narrow area of the sidewalk upon which a person could step when exiting the toilet. Defendants submitted the deposition testimony of the project superintendent for defendant LPCiminelli, Inc. (Ciminelli), in which he testified that plaintiff could have exited the toilet, turned right, and walked down the sidewalk back to the work site. Instead, plaintiff chose to walk straight into the parking lot and thus tripped over the curb of the sidewalk at issue. The fact that Ciminelli's own employee testified that plaintiff could have walked on the sidewalk at issue back to the work site is sufficient to create a triable issue of fact whether that sidewalk was a passageway on which plaintiff was

injured and thus whether 12 NYCRR 23-1.7 (e) (1) was violated.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1441

CA 12-00398

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

HAYWARD BAKER, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

C.O. FALTER CONSTRUCTION CORP., ZURICH AMERICAN INSURANCE COMPANY, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 1.)

ALARIO & FISCHER, P.C., SYRACUSE (LINDA E. ALARIO OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (CLIFFORD G. TSAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered June 28, 2011. The order, among other things, granted in part plaintiff's motion for partial summary judgment and granted defendants' cross motion for partial summary judgment dismissing the second cause of action, for unjust enrichment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety and by denying the cross motion and as modified the order is affirmed without costs.

Memorandum: Plaintiff was hired by defendant C.O. Falter Construction Corp. (Falter) as a subcontractor to complete foundational work on a wastewater treatment plant project in Onondaga County. During the course of construction, various issues arose concerning the adequacy of plaintiff's installation of a jet grout bottom seal, and Falter ultimately refused to pay plaintiff the balance due on their contract. Plaintiff thereafter commenced this action seeking recovery of that amount together with the additional expenses that it allegedly incurred in performing remedial work in connection with the jet grout bottom seal. Falter asserted in a counterclaim that plaintiff had breached their contract based on its deficient installation of the jet grout bottom seal. Supreme Court granted in part plaintiff's motion for partial summary judgment and awarded plaintiff the contract balance. The court concluded, however, that there are issues of fact concerning plaintiff's entitlement to

the additional expenses, and it therefore denied plaintiff's motion for partial summary judgment to that extent. In addition, the court granted defendants' cross motion for partial summary judgment dismissing the second cause of action, for unjust enrichment.

Defendants contend on their appeal that the court erred in granting that part of plaintiff's motion with respect to the balance of the amount due on the contract because they have a viable counterclaim for plaintiff's breach of contract arising from the same transaction. We agree (*see Yoi-lee Realty Corp. v 177th St. Realty Assoc.*, 208 AD2d 185, 189-190). Indeed, there is no dispute that there were deficiencies in the jet grout bottom seal, and defendants submitted evidence that plaintiff failed to follow its own procedures in completing the work (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore modify the order in appeal No. 1 accordingly.

Plaintiff contends on its cross appeal that the court erred in denying its motion for partial summary judgment with respect to its alleged additional costs based upon a "changed conditions" clause in a different contract that, according to plaintiff, was incorporated into the contract between plaintiff and Falter. We reject that contention. "[A] reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified" (*Guerini Stone Co. v Carlin Constr. Co.*, 240 US 264, 277; *see Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244). Here, the only references in the contract to the extraneous writing at issue do not relate to or incorporate the "changed conditions" clause in the extraneous writing. The court therefore properly concluded that the "changed conditions" clause was not incorporated into the contract between plaintiff and Falter and that plaintiff thus cannot recover any additional expenses under that clause.

We further conclude that there are issues of fact concerning whether the contract was one of performance or design specification, thus precluding summary judgment with respect to the additional expenses that plaintiff allegedly incurred in remediating the jet grout bottom seal. "A performance specification [contract] requires a contractor to produce a specific result without specifying the particular method or means of achieving that result" (*Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.*, 180 AD2d 222, 229). "In other words, the contractual risk of nonperformance is upon the contractor" (*id.*). In contrast, a design specification contract is one in which "the owner specifies the design, materials and methods and impliedly warrants their feasibility and sufficiency" (*id.*). "In that instance, the contractor's guarantee . . . is limited to the quality of the materials and workmanship employed in following the owner's design" (*id.* at 230). The proper characterization of a construction contract as one of either performance or design specification "depends upon the language of the contract as a whole," and relevant factors in such an inquiry "include the nature and degree of the contractor's involvement in the specification process, and the degree to which the contractor is allowed to exercise discretion in carrying out its performance" (*id.*). Here, the unresolved issues of fact with respect to those

factors, particularly as to plaintiff's ability to change the design without Falter's approval, precludes a determination whether as a matter of law the subject contract is one of either performance or design specification, and thus whether plaintiff may recover expenses incurred in remediating the jet grout bottom seal.

The court likewise properly denied that part of plaintiff's motion for partial summary judgment on its cause of action for unjust enrichment. We agree with the court that plaintiff did not meet its burden on the motion. "A cause of action for unjust enrichment requires a showing that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff . . . The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another" (*Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC*, 31 AD3d 983, 987-988). Here, there is no evidence that defendant was paid by Onondaga County for the work that plaintiff allegedly performed, and there is thus no support for plaintiff's allegation that defendant was in any way unjustly enriched by such work. The court erred, however, in granting defendants' cross motion for partial summary judgment dismissing that cause of action because it is well established that a " 'bona fide dispute' " concerning whether additional work is covered by a contract is sufficient to permit an unjust enrichment cause of action to proceed (*Tom Greenauer Dev., Inc. v Burke Bros. Constr., Inc.*, 74 AD3d 1747, 1748, quoting *Pulver Roofing Co., Inc. v SBLM Architects, P.C.*, 65 AD3d 826, 828). We therefore further modify the order in appeal No. 1 accordingly.

Defendants contend in appeal No. 2 that the court erred in granting plaintiff's cross motion for leave to renew its motion for partial summary judgment at issue in appeal No. 1. We note, however, that the court, upon granting leave to renew, adhered to its prior decision. We thus agree with plaintiff that defendants are not aggrieved by the order in appeal No. 2 (*see Savino v DeLeyer*, 160 AD2d 989, 990-991). We further conclude in appeal No. 2 that, contrary to plaintiff's contention on its appeal, the court upon renewal properly denied its motion for partial summary judgment with respect to the additional expenses sought.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1442

CA 12-00540

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

HAYWARD BAKER, INC.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

C.O. FALTER CONSTRUCTION CORP., ZURICH AMERICAN INSURANCE COMPANY, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

BOND, SCHOENECK & KING, PLLC, SYRACUSE (CLIFFORD G. TSAN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

ALARIO & FISCHER, P.C., SYRACUSE (LINDA E. ALARIO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered February 29, 2012. The order, among other things, granted plaintiff's cross motion for leave to renew its motion for partial summary judgment and, upon renewal, adhered to its prior decision.

It is hereby ORDERED that said appeal by defendants is unanimously dismissed and the order is affirmed without costs.

Same Memorandum as in *Hayward Baker, Inc. v C.O. Falter Constr. Corp*. ([appeal No. 1] ___ AD3d ___ [Mar. 15, 2013]).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1466

CA 12-00809

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

RENEE SCIARA AND MATTHEW SCIARA,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

SURGICAL ASSOCIATES OF WESTERN NEW YORK, P.C.
AND GEORGE BLESSIOS, M.D.,
DEFENDANTS-RESPONDENTS.

USHA CHOPRA, M.D. AND FAGER & AMSLER, LLP,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

BRIAN P. FITZGERALD, P.C., BUFFALO (BRIAN P. FITZGERALD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

FAGER & AMSLER, LLP, LATHAM (NANCY MAY-SKINNER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOSEPH V. MCCARTHY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered September 14, 2011 in a medical malpractice action. The order, among other things, granted that part of plaintiffs' motion seeking to compel nonparty witness Usha Chopra, M.D. to appear for the completion of her deposition.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the cross motion of respondent Usha Chopra, M.D. in its entirety and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiffs appeal and Usha Chopra, M.D. (respondent), a nonparty, cross-appeals from an order related to the deposition testimony of respondent. Plaintiffs commenced this medical malpractice action alleging, inter alia, that defendant George Blessios, M.D. was negligent with respect to surgery he performed on Renee Sciara (plaintiff). Respondent, a pathologist, examined tissue removed from plaintiff during the surgery. The deposition of respondent was discontinued following a contentious verbal exchange between plaintiffs' counsel and respondent's counsel that arose when respondent's counsel interrupted the deposition to clarify a question asked by plaintiffs' counsel. Plaintiffs moved, inter alia, for an order precluding respondent's counsel from participating in any respect in the continued deposition of

respondent. Respondent cross-moved, inter alia, for an order permitting her counsel to participate in her deposition. Supreme Court granted the motion in part by directing, inter alia, that respondent was required to complete her deposition. The court also granted the cross motion in part by permitting respondent's counsel to participate in the deposition as provided for in 22 NYCRR 221.2 and 221.3. The court erred in granting the cross motion to that extent (*see Thompson v Mather*, 70 AD3d 1436, 1438), and we therefore modify the order accordingly.

As we stated in *Thompson*, "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition. CPLR 3113 (c) provides that the examination and cross-examination of deposition witnesses 'shall proceed *as permitted* in the trial of actions in open court' " (*id.* [emphasis added]), and it is axiomatic that counsel for a nonparty witness is not permitted to object or otherwise participate in a trial (*see e.g. id.*). We recognize that 22 NYCRR 221.2 and 221.3 may be viewed as being in conflict with CPLR 3113 (c) inasmuch as sections 221.2 and 221.3 provide that an "attorney" may not interrupt a deposition except in specified circumstances. Nevertheless, it is well established that, in the event of a conflict between a statute and a regulation, the statute controls (*see Matter of Hellner v Board of Educ. of Wilson Cent. School Dist.*, 78 AD3d 1649, 1651).

We also recognize the practical difficulties that may arise in connection with a nonparty deposition, which also have been the subject of legal commentaries (*see e.g.* 232 Siegel's Practice Review, *Objections by Nonparty Witness?* at 4 [Apr. 2011]; Patrick M. Connors, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3313:7, 2013 Pocket Part at 31-33). However, we decline to depart from our conclusion in *Thompson* (70 AD3d at 1438) that the express language of CPLR 3113 (c) prohibits the participation of the attorney for a nonparty witness during the deposition of his or her client. We further note, however, that the nonparty has the right to seek a protective order (*see* CPLR 3103 [a]), if necessary.

We have reviewed the remaining contentions of plaintiffs and respondent and conclude that they are without merit. We note that documents included in the appendix to plaintiffs' brief are outside the record on appeal and therefore have not been considered (*see Sanders v Tim Hortons*, 57 AD3d 1419, 1420).

All concur except FAHEY and MARTOCHE, JJ., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part because we cannot agree with the majority that Supreme Court erred in granting in part the cross motion of Usha Chopra, M.D. (respondent), a nonparty, by permitting respondent's counsel to participate in a limited fashion during plaintiffs' continued deposition of respondent. We therefore would affirm the order. The majority relies on the statement of this Court in *Thompson v Mather* (70 AD3d 1436, 1438) that "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition." We note that *Thompson* involved 22 NYCRR 202.15,

which concerns the videotaping of deposition testimony that may be filed with the clerk of the trial court and specifically refers to objections "made by any of the *parties* during the course of the deposition" (22 NYCRR 202.15 [g] [1], [2] [emphasis added]). Here, the deposition was not taken pursuant to that rule, but rather was taken pursuant to 22 NYCRR part 221, entitled Uniform Rules for the Conduct of Depositions, which permits *deponents*, not merely "parties," to raise objections during the course of the deposition (*see e.g.* 22 NYCRR 221.2). We note that, in *Thompson*, the plaintiff moved for an order precluding the nonparty deponent's counsel from objecting to the videotaped trial testimony " 'except as to privileged matters or in the event that she were to deem questioning to be abusive or harassing' " (*id.* at 1437). Thus, even the plaintiff's counsel in *Thompson* recognized that a nonparty has certain rights at the deposition.

The majority also relies, as did this Court in *Thompson*, on CPLR 3113 (c), which provides that the examination and cross-examination of deposition witnesses "shall proceed as permitted in the trial of actions in open court." The majority thus concludes that, because counsel for a nonparty witness is not permitted to object or otherwise to participate at a trial, counsel for the nonparty witness likewise is not permitted to object or otherwise participate at the nonparty's deposition. The majority believes that there is a conflict between CPLR 3113 (c) and 22 NYCRR 221.2 and 221.3, which regulations permit an "attorney" to interrupt a deposition in specified circumstances.

We do not believe that CPLR 3113 (c) must be interpreted in a manner that establishes a conflict with the Uniform Rules for the New York State Trial Courts. "Where the language of a statute is ambiguous or uncertain, the construction placed on it by contemporaries . . . will be given considerable weight in its interpretation" (McKinney's Cons Laws of NY, Book 1, Statutes § 128 [a]), as in the case of a practical construction that has received general acquiescence for a long period of time. In that regard, CPLR 3113 (c), which became effective in 1963 with the adoption of the CPLR in place of the prior Civil Practice Act, does not have a direct corollary in the Civil Practice Act. Former section 202 of the Civil Practice Act discusses the "[m]anner of taking testimony" in a deposition, but there is no identical predecessor to CPLR 3113 (c).

The rules in question here, namely, 22 NYCRR 221.1 and 221.2, became effective in 1986, approximately 23 years after the adoption of CPLR 3113 (c). As one commentator has stated, numerous cases over the years addressing issues arising at depositions of nonparties have noted, without comment or criticism, the active participation of counsel for the nonparty at the deposition (David Paul Horowitz, *May I Please Say Something*, 83 NY St BJ 82, 83 [July/Aug. 2011], citing *Horowitz v Upjohn Co.*, 149 AD2d 467). We can only presume that the Chief Administrator of the Courts was aware of CPLR 3113 (c) when the Uniform Rules regarding depositions were adopted and that the Chief Administrator would not create a direct conflict with a statute.

The long-standing practice of counsel for a nonparty witness

objecting at a deposition is exemplified by the Second Department's decision in *Horowitz.* There, the Second Department stated that the nonparty witness, a partner of the defendant physicians at the time the infant plaintiff's mother was their patient, was entitled to refuse to answer questions that sought testimony in the nature of opinion evidence (*id.* at 467-468). There was no discussion of CPLR 3113 (c) or the rules. The relief fashioned by the Second Department "was favorable *to the objections raised by counsel for the non[]party at the deposition*. The Second Department evinced no problem with the participation of counsel for the nonparty at the deposition, thereby, at the very least impliedly countenancing the practice" (Horowitz, 83 NY St BJ at 83 [emphasis added]).

In our view, the result reached by the court here was reasonable. It is beyond cavil that trial courts have broad discretion in supervising discovery. For example, CPLR 3101 (b) provides that, "[u]pon objection by a person entitled to assert the privilege, privileged matters should not be obtainable." That section suggests that a nonparty may not be required to disclose privileged matter whether it be at a deposition or at trial. The question of what constitutes "privileged matter" is a significant legal one and we fail to see how a nonparty witness at a deposition, without the benefit of counsel, would be so knowledgeable as to assert the privilege in the appropriate circumstance. Similarly, CPLR 3103 (a) authorizes a court, on its own initiative, "or on motion of any party or of any person from whom discovery is sought," to issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device. That section similarly would allow a nonparty witness, as "any person from whom discovery is sought" (*id.*), to seek a protective order conditioning the use of a deposition by allowing the nonparty to have counsel at the deposition for the purpose of raising appropriate objections.

There is also the practical question faced by a nonparty at the deposition, when the statute of limitations has not yet run against that nonparty. Indeed, the decision in *Thompson* encourages a plaintiff, faced with commencing an action against several defendants, whether in the medical malpractice realm or some other area of law (*see Alba v New York City Tr. Auth.*, 37 Misc 3d 838 [Labor Law]), to name the seemingly least culpable party as a defendant and depose ostensibly more culpable parties, with the idea that information, perhaps incriminating and always under oath, may be gleaned from the "nonparties" who do not have the right to have counsel present.

In conclusion, we do not believe that there is a direct and obvious conflict between CPLR 3113 (c) and the Uniform Rules, and we further conclude that the court did not abuse its discretion in allowing the nonparty witness here to have counsel present at the deposition for a limited purpose. We therefore would affirm the order.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

1467

CA 12-00810

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

RENEE SCIARA AND MATTHEW SCIARA,
PLAINTIFFS-APPELLANTS,

V ORDER

SURGICAL ASSOCIATES OF WESTERN NEW YORK, P.C.
AND GEORGE BLESSIOS, M.D.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

BRIAN P. FITZGERALD, P.C., BUFFALO (BRIAN P. FITZGERALD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOSEPH V. MCCARTHY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered September 19, 2011 in a medical malpractice action. The order, among other things, granted that part of defendants' motion seeking a court appointed referee to supervise any future depositions in this matter.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

10

CA 12-01385

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

WILLIAM JOSEPH DEANGELIS AND KAREN DEANGELIS,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

MARTENS FARMS, LLC,
DEFENDANT-APPELLANT-RESPONDENT,
AND KRISTIE E. MARION, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (ESAM AHMAD ELBADAWI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

BARTH SULLIVAN BEHR, SYRACUSE (DAVID WALSH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered December 12, 2011. The order, among other things, denied the motion of defendant Martens Farms, LLC for summary judgment.

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

Memorandum: This personal injury action arises out of a motor vehicle accident in which a vehicle operated by William Joseph DeAngelis (plaintiff) was rear-ended by a vehicle operated by defendant Kristie E. Marion. After the accident, it was discovered that diesel fuel had been spilled onto the roadway shortly before the accident by a truck owned by defendant Martens Farms, LLC (Martens), which occurred when the truck's fuel filter failed. We conclude that Supreme Court properly denied both Martens's motion for summary judgment dismissing the amended complaint and all cross claims against it and plaintiffs' motion for partial summary judgment on the issue of liability, i.e., negligence and serious injury (*see Ruzycki v Baker*, 301 AD2d 48, 51-52).

Martens's motion was based on the grounds, inter alia, that it neither caused nor had notice of the defect that resulted in diesel fuel being spilled on the roadway and that, in any event, the spilled fuel was not a proximate cause of the accident as a matter of law.

Martens failed to meet its initial burden of establishing as a matter of law that it neither caused the fuel leak nor had notice of a defect in the leaking fuel filter. It is well settled that a moving party "must affirmatively establish the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980; *see Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364; *Dodge v City of Hornell Indus. Dev. Agency*, 286 AD2d 902, 903). Even assuming, arguendo, that Martens met its initial burden of establishing that the spilled diesel fuel was not a proximate cause of the motor vehicle accident by offering the affidavit of its accident reconstruction expert, we conclude that plaintiffs raised an issue of fact by submitting an affidavit of their own accident reconstruction expert. As a result, "[t]he papers before the court on that issue 'presented a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution' " (*Baity v General Elec. Co.*, 86 AD3d 948, 952; *see Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624).

We likewise conclude with respect to plaintiffs' motion that, just as there are issues of fact precluding summary judgment in Martens's favor, those same issues of fact require denial of that part of plaintiffs' motion for partial summary judgment against Martens with respect to negligence, including proximate cause. In addition, while the fact that Marion's vehicle rear-ended plaintiff's stopped vehicle is prima facie evidence of Marion's negligence, the presence of diesel fuel on the road at the time of the accident rebuts the presumption of negligence by providing a nonnegligent explanation for the collision, thereby requiring denial of that part of plaintiffs' motion for partial summary judgment against Marion with respect to negligence (*see Ramadan v Maritato*, 50 AD3d 1620, 1621; *see also Dalton v Lucas*, 96 AD3d 1648, 1649-1650). Lastly, even assuming, arguendo, that plaintiffs met their initial burden in moving for partial summary judgment on the issue of serious injury, the papers submitted in opposition created an issue of fact regarding whether plaintiff sustained a serious injury in this motor vehicle accident (*see* Insurance Law § 5102 [d]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

14

CA 12-01422

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

THOMAS M. SULLIVAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TROSER MANAGEMENT, INC., DEFENDANT-APPELLANT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (RICHARD GLEN CURTIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered November 17, 2011. The amended order, among other things, denied defendant's motion for summary judgment.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by vacating the determination that defendant has exercised its option to purchase plaintiff's stock and as modified the amended order is affirmed without costs.

Memorandum: Defendant appeals from an amended order denying its motion for summary judgment seeking a determination that plaintiff must sell his shares of stock to defendant for $183,910, the value determined by defendant's expert in accordance with the formula set forth in *Lewis v Vladeck, Elias, Vladeck, Zimny & Engelhard* (57 NY2d 975). Supreme Court also noted that the parties sought "clarification as to whether defendant actually exercised its option to purchase plaintiff's stock" under the terms of the parties' "buy-sell" agreement (hereafter, buy-sell agreement), and the court determined that defendant had in fact exercised that option. For the reasons that follow, we modify the amended order by vacating the determination that defendant has exercised its option to purchase plaintiff's stock, and we otherwise affirm.

Plaintiff commenced this action in 2003 seeking specific performance of that part of an agreement entered into by the parties in 1986 (hereafter, Agreement), contemporaneously with the buy-sell agreement, providing that he would receive an 18% equity interest in defendant, a closely held corporation, upon termination of the Agreement on December 31, 1991. The amended complaint also sought an accounting, an inspection of defendant's books and records, a determination that defendant is "required to repurchase" plaintiff's

shares of stock once the shares are issued to plaintiff, and a determination of the parties' rights under the buy-sell agreement. This Court has decided three prior appeals arising from this litigation (*Sullivan v Troser Mgt., Inc.*, 75 AD3d 1059 [*Sullivan III*]; *Sullivan v Troser Mgt., Inc.*, 34 AD3d 1233 [*Sullivan II*]; *Sullivan v Troser Mgt., Inc.*, 15 AD3d 1011).

As a result of the prior appeals and the various orders of Supreme Court, it has been determined, inter alia, that plaintiff is entitled to 18% of defendant's stock pursuant to the Agreement; the "Purchase Price" of the stock cannot be determined pursuant to the buy-sell agreement because the stockholders, i.e., plaintiff and Daniel Fuller, never agreed upon a value for the shares, as required by paragraph 9 of the buy-sell agreement; and plaintiff is not entitled to a jury trial because the amended complaint sought equitable relief. In addition, in *Sullivan III* (75 AD3d at 1061), we concluded that the court erred in denying plaintiff's cross motion for partial summary judgment seeking an order determining that his shares in defendant " 'be valued on the basis of his percentage interest in Defendant's assets' in the event that defendant exercises its option to purchase his shares," and we therefore modified the order accordingly.

On this appeal, we conclude that the court properly denied defendant's motion for summary judgment directing plaintiff to sell his shares of stock to defendant at a price of $183,910. The court properly determined that our decision in *Sullivan III* did not mandate that plaintiff's stock be valued pursuant to the *Lewis* formula, which was the method advocated by plaintiff on the prior appeal in *Sullivan III* (*id.* at 1060), or by any other particular valuation method. As noted, this Court wrote in *Sullivan III* that plaintiff's cross motion was for "partial summary judgment seeking an order determining that his shares 'be valued on the basis of his percentage interest in Defendant's assets' in the event that defendant exercises its option to purchase his shares," as was the case in *Lewis*; no particular valuation method was specified (*id.* at 1061). Thus, contrary to defendant's contention, we did not determine that the value of plaintiff's shares should be determined pursuant to a net asset valuation, the valuation method approved but not mandated by the Court of Appeals in *Lewis* for shares of a law firm. It therefore follows that the court was not bound by the doctrine of law of the case or to apply *Lewis* in determining the value of plaintiff's stock (*see generally Town of Angelica v Smith*, 89 AD3d 1547, 1550), nor does the doctrine of judicial estoppel apply to prevent plaintiff from abandoning his prior endorsement of *Lewis* (*see Baje Realty Corp. v Cutler*, 32 AD3d 307, 310).

We further conclude that the court properly determined that defendant otherwise failed to meet its burden of establishing as a matter of law that its method for determining the value of plaintiff's stock is the only appropriate valuation method. Rather, while it was established in *Sullivan III* that plaintiff's shares must be valued " 'on the basis of his percentage interest' " in defendant's assets (*id.* at 1061), issues of fact remain with respect to the appropriate

method of valuing those assets. Although plaintiff is not entitled to the "fair value" of the stock under Business Corporation Law § 1118 (b) because he does not own 20% of the outstanding shares and there is no evidence that defendant has engaged in "illegal, fraudulent or oppressive actions" toward plaintiff (§ 1104-a [a] [1]), it does not follow, as defendant suggests, that plaintiff is entitled only to book value. As the Court of Appeals has stated, "[t]here is no uniform rule for valuing stock in closely held corporations. 'One tailored to the particular case must be found, and that can be done only after a discriminating consideration of all information bearing upon an enlightened prediction of the future' " (*Amodio v Amodio*, 70 NY2d 5, 7, quoting *Snyder's Estate v United States*, 285 F2d 857, 861).

We reject defendant's related contention that the buy-sell agreement dictates that book value be used to determine the purchase price of plaintiff's shares. As plaintiff notes, the buy-sell agreement provides that, if the stockholders, i.e., plaintiff and Daniel Fuller, did not agree upon the value of the shares for a period of two years, the agreed upon value shall be *adjusted* by the increase or decrease in defendant's book value since the date of the last agreed upon value. Here, as we held in *Sullivan III*, the parties never agreed upon the value of the shares, and we thus conclude that there was nothing to adjust and book value does not come into play. Because defendant is not entitled to summary judgment on the issue of valuation, it shall be for the court to determine the appropriate valuation method based on the evidence at trial.

We agree with defendant, however, that the court erred in determining as a matter of law that it had exercised its option to purchase plaintiff's stock at a price to be determined by the court in the future. Our ruling on this issue is based solely on our construction of the papers before the court. As noted, the amended complaint sought, inter alia, a determination that defendant be "required to repurchase" plaintiff's shares of stock. At no time has either party moved for summary judgment with respect to that request for relief. Upon remittal following our decision in *Sullivan III*, defendant moved for summary judgment "directing that the plaintiff sell his shares of stock in the Defendant in accordance with the [*Lewis*] formula." After the court issued a decision and order denying the motion, plaintiff's attorney wrote a letter to the court seeking clarification as to whether defendant is obligated to purchase the stock at the price to be determined by the court at trial. Plaintiff noted that defendant had admitted that it exercised its option to purchase plaintiff's shares but that, in its opposition papers, "defendant suggests that [its] exercise of the option was somehow conditioned upon plaintiff selling his shares at a price that defendant finds acceptable." After an exchange of letters to the court from counsel for both parties, the court issued the "amended decision and order" on appeal in which, as previously noted, the court wrote that the parties sought "post-argument clarification" on the issue whether defendant exercised its option to purchase the stock. The court found that defendant did so on July 14, 2005, when defendant's attorney sent a letter to opposing counsel stating that defendant elected to purchase the stock for $120,615 "in accordance

with the formula set forth in paragraph 9 of said Buy-Sell Agreement."

We conclude that an issue of this magnitude, relating directly to relief requested in the amended complaint, may not be determined as a matter of law in the absence of a motion for summary judgment or a trial. It should not be determined as a result of an informal letter-request by counsel for clarification. Even assuming that the letter to the court from plaintiff's attorney may be treated as a motion for summary judgment, we conclude that the letter was not supported by evidence in admissible form, and plaintiff would therefore have failed to meet his initial burden of proof (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Our reference to the option in *Sullivan III* — where we stated that plaintiff is "entitled to monetary relief only in the event that defendant elects to exercise [the] option" (*id.* at 1060) — was made solely in the context of reviewing the amended complaint to determine whether plaintiff was entitled to a jury trial. The issue whether defendant had already exercised the option had not been raised on appeal and was not advanced before the motion court in the context of *Sullivan III*.

We note in conclusion that the issue whether defendant has exercised its option to purchase plaintiff's stock may be determined by the court in the event that defendant refuses to purchase the stock at the price set by the court following the trial on the value of the shares.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

15

CA 12-01473

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

WILLIAM JOSEPH DEANGELIS AND KAREN DEANGELIS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARTENS FARMS, LLC, DEFENDANT-RESPONDENT,
AND KRISTIE E. MARION, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BARTH SULLIVAN BEHR, SYRACUSE (DAVID WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (ESAM AHMAD ELBADAWI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

GOLDBERG SEGALLA LLP, SYRACUSE (KENNETH M. ALWEIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered May 23, 2012. The order bifurcated the trial.

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

Memorandum: In this negligence action in which plaintiffs seek damages for injuries allegedly sustained by plaintiff William Joseph DeAngelis in a motor vehicle accident, Supreme Court did not abuse its discretion in granting the motion of defendant Martens Farms, LLC (Martens) to bifurcate the trial. Although issues of liability and damages in a negligence action generally "are distinct and severable and should be tried separately" (*Iglesias v Brown*, 59 AD3d 992, 993; *see* 22 NYCRR 202.42 [a]), an exception to that rule arises where the plaintiff's injuries have "an important bearing" on the issue of liability (*Parmar v Skinner*, 154 AD2d 444, 445; *see Kotarski v Kotecki & Sons*, 239 AD2d 909, 910). Notably, plaintiffs supported the motion while defendant Kristie E. Marion opposed bifurcation. In opposing the motion, however, Marion failed to establish the need to depart from the general rule (*see Hrusa v Bogdan*, 278 AD2d 947, 947; *Armstrong v Adelman Automotive Parts Distrib. Corp.*, 176 AD2d 773, 773-774; *see also Fetterman v Evans*, 204 AD2d 888, 889-890).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

18

CA 12-00987

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

RICHARD B. SWEGAN AND DEBRA A. DINNOCENZO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ERIC SVENSON, MARCELLE L. SVENSON,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

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

SELLSTROM LAW FIRM, LLP, JAMESTOWN (STEPHEN E. SELLSTROM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered February 2, 2012. The order, insofar as appealed from, denied the motion of defendants Eric Svenson and Marcelle L. Svenson for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the second cause of action against defendants Eric Svenson and Marcelle L. Svenson and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action asserting, inter alia, causes of action for conversion and trespass and seeking damages resulting from the removal of two boundary line trees located partially on property owned by plaintiffs. The trees were removed during the course of renovations performed by Eric Svenson and Marcelle L. Svenson (defendants) on their adjoining property. Defendants hired defendant David McKee, an architect, to provide various architectural design and consulting services as well as project management for the renovations, and McKee hired defendant David Mathews, sued individually and doing business as Great Lakes Tree Service, to cut and remove the two trees. We conclude that Supreme Court erred in denying that part of defendants' motion for summary judgment dismissing the amended complaint against them with respect to the second cause of action, for "destruction of interest," but otherwise properly denied the motion. We therefore modify the order accordingly.

With respect to the first and third causes of action, for

conversion and trespass, defendants contend that they cannot be directly liable because they did not cut down the trees, nor can they be vicariously liable because McKee and Mathews were not defendants' agents. Regardless of McKee's status as an independent contractor, defendants may be held liable for the trespass and ensuing conversion if they "directed the trespass or such trespass was necessary to complete the contract" between defendants and McKee (*Axtell v Kurey*, 222 AD2d 804, 805*, lv denied* 88 NY2d 802; *see Gracey v Van Camp*, 299 AD2d 837, 838). Even assuming, arguendo, that defendants met their initial burden, we conclude that the court properly determined that plaintiffs raised issues of fact whether defendants "directed the trespass or [whether] such trespass was necessary to complete the contract" (*Axtell*, 222 AD2d at 805; *see Morrison v Wescor Forest Prods. Co.*, 28 AD3d 1225, 1226). Defendants contend for the first time on appeal that they were entitled to summary judgment dismissing the cause of action for conversion on the ground that they had the right as joint owners to remove the trees because they were structurally unsafe and created a safety hazard or private nuisance, and thus that contention is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Defendants further contend that they were entitled to summary judgment dismissing the fourth cause of action, for treble damages under RPAPL 861, on the ground that there is no evidence that they acted recklessly, willfully or wantonly. That contention is likewise raised for the first time on appeal and thus is not properly before us (*see id.*).

Finally, we note that the second cause of action, for "destruction of interest," is duplicative of the cause of action for conversion, and we therefore grant defendants' motion with respect to the second cause of action (*see generally M.D. Carlisle Realty Corp. v Owners & Tenants Elec. Co. Inc.*, 47 AD3d 408, 409).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

23

KAH 11-00862

PRESENT: SMITH, J.P., FAHEY, VALENTINO, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
TARHENE FINCH, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DAWSON BROWN, SUPERINTENDENT, GROVELAND
CORRECTIONAL FACILITY, ET AL.,
RESPONDENTS-RESPONDENTS.

GENESEE VALLEY LEGAL AID, INC., GENESEO (JEANNIE MICHALSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered October 25, 2010 in a habeas corpus proceeding. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the writ of habeas corpus is sustained, and

It is further ORDERED that respondent is directed to discharge petitioner from custody forthwith.

Memorandum: Petitioner commenced this habeas corpus proceeding alleging that he was unlawfully subjected to a period of postrelease supervision that was imposed administratively by the New York State Department of Corrections and Community Supervision (DOCCS) rather than by the sentencing court. We agree.

Only a sentencing court may impose a period of postrelease supervision and DOCCS cannot remedy a court's failure to impose it by administrative action (*see* CPL 380.20, 380.40 [1]; *Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358, 360). Sentencing is a critical stage of criminal proceedings (*see People v Harris*, 79 NY2d 909, 910), and a defendant has "a statutory right to hear the court's pronouncement as to what the entire sentence encompasses, directly from the court" (*People v Sparber*, 10 NY3d 457, 470). At sentencing in this case, the court stated that "the supervisory period under the violent felony offender sentencing statute will be five years, which means when you come out on parole, you will be on five years of parole at the conclusion of the ten-year

sentence." We conclude that the court did not pronounce the period of postrelease supervision at sentencing as required by CPL 380.20 and 380.40 (1), and thus petitioner was not sentenced to a period of postrelease supervision (*see People ex rel. Lewis v Warden, Otis Baum Correctional Ctr.*, 51 AD3d 512, 512). Because petitioner served his sentence, he must be immediately released.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

25

KA 09-01157

PRESENT: SMITH, J.P., FAHEY, VALENTINO, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KERRY A. COLEMAN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Stephen T. Miller, A.J.), rendered April 6, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the matter is remitted to Monroe County Court for further proceedings on the superior court information.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal contempt in the first degree (Penal Law § 215.51 [c]), defendant contends that his guilty plea was not knowingly, voluntarily and intelligently entered. Although that contention is not preserved for our review, we conclude that defendant's statements during the plea colloquy "cast significant doubt upon his guilt with respect to the crime of [criminal contempt in the first degree as charged in the superior court information (SCI)], and thus this case falls within the exception to the preservation requirement" (*People v Jones*, 64 AD3d 1158, 1159, *lv denied* 13 NY3d 860; *see People v Lopez*, 71 NY2d 662, 666). An essential element of the crime of criminal contempt in the first degree pursuant to Penal Law § 215.51 (c) is that the defendant has violated an order of protection issued pursuant to "sections two hundred forty and two hundred fifty-two of the domestic relations law [regarding orders of protection issued during child custody and divorce proceedings], articles four, five, six and eight of the family court act [regarding child custody, paternity, parental rights and family offenses, respectively, or] section 530.12 of the criminal procedure law [regarding victims of family offenses]." Another essential element of the crime is that defendant has "been previously convicted of the crime of . . . [, inter alia,] criminal contempt in the . . . second degree for violating an order of protection as

described herein within the preceding five years" (Penal Law § 215.51 [c]). Here, during an attempt to plead guilty, defendant indicated that he had been previously convicted of the crime of criminal contempt in the second degree and that he had an appeal pending with respect to that conviction. He further indicated that such conviction resulted from his actions at a school board meeting and that the order of protection that he was alleged to have violated in this offense was issued during that prior criminal contempt proceeding. County Court stated that it could not accept defendant's plea because defendant was challenging the predicate conviction. At a subsequent proceeding, defendant agreed with the prosecutor's statement that defendant was no longer challenging the predicate conviction, and the court accepted his guilty plea. Although the court, before accepting defendant's plea, questioned him regarding his previous challenge to the predicate conviction, it did not question him concerning the basis for the issuance of the instant order of protection violated by defendant or concerning the basis of defendant's predicate conviction. We conclude that defendant's factual recitation negated essential elements of the crime to which he pleaded guilty inasmuch as his colloquy indicated that the order of protection was not issued pursuant to the statutory sections set forth in Penal Law § 215.51 (c), and that the predicate conviction was not based upon a violation of such an order of protection. Thus, the court had a "duty to inquire further to ensure that defendant's guilty plea [was] knowing and voluntary" (*People v Lopez*, 71 NY2d 662, 666). Consequently, as the People correctly concede, "[a]lthough [the court] made some further inquiries of defendant, none of them [was] even remotely sufficient to determine that the plea was entered intelligently and with knowledge of the nature of the charge" (*People v Roy*, 77 AD3d 1310, 1311 [internal quotation marks omitted]). We therefore reverse the judgment, vacate the plea, and remit the matter to County Court for further proceedings on the SCI (*see People v Jenkins*, 94 AD3d 1474, 1475; *see also Roy*, 77 AD3d at 1310).

Defendant further contends that the SCI is jurisdictionally defective because it fails to allege that he violated that part of the order of protection directing him to stay away from the person on whose behalf the order was issued. "Because defendant's contention is related to the sufficiency of the factual allegations, as opposed to a failure to allege the material elements of the crime, that contention does not survive defendant's guilty plea" (*People v Price*, 234 AD2d 978, 978-979, *lv denied* 90 NY2d 862). Inasmuch as we are vacating the plea, however, we address defendant's contention, and we conclude that it lacks merit. The SCI is jurisdictionally sufficient because it alleges that defendant committed the crime of criminal contempt in the first degree and tracks the language of the relevant section of the Penal Law (*see id.*). Thus, if defendant seeks greater specificity, his remedy is to demand a bill of particulars (*see People v Starkweather*, 83 AD3d 1466, 1466).

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

remaining contentions.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

28

CAF 12-00078

PRESENT: SMITH, J.P., FAHEY, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF GABRIELLA G. AND HADASSAH G.

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

JEANNINE G., RESPONDENT-APPELLANT.

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT.

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

SUSAN B. MARRIS, ATTORNEY FOR THE CHILDREN, MANLIUS, FOR HADASSAH G. AND GABRIELLA G.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered December 16, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed respondent under the supervision of petitioner for a period of 12 months.

It is hereby ORDERED that said appeal from the order insofar as it concerns disposition is unanimously dismissed and the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order that, inter alia, adjudicated her two children to be neglected based on her failure to supply them with an adequate education (*see* Family Ct Act § 1012 [f] [i] [A]). As a preliminary matter, we note that the appeal from the order insofar as it concerns the disposition must be dismissed as moot because that part of the order has expired by its terms (*see Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1546, *lv denied* 18 NY3d 808; *Matter of Thomas C. [Jennifer C.]*, 81 AD3d 1301, 1302, *lv denied* 16 NY3d 712; *Matter of Francis S. [Wendy H.]*, 67 AD3d 1442, 1442, *lv denied* 14 NY3d 702). The mother "may nevertheless challenge the underlying neglect adjudication because it 'constitutes a permanent stigma to a parent and it may, in future proceedings, affect a parent's status' " (*Matter of Matthew B.*, 24 AD3d 1183, 1183).

Contrary to the mother's contention, petitioner met its burden of establishing educational neglect by a preponderance of the evidence (*see Matter of Cunntrel A. [Jermaine D.A.]*, 70 AD3d 1308, 1308, *lv dismissed* 14 NY3d 866). " 'Proof that a minor child is not attending

a public or parochial school in the district where the parent[] reside[s] makes out a prima facie case of educational neglect pursuant to section 3212 (2) (d) of the Education Law' " (*Matthew B.*, 24 AD3d at 1184). " 'Unrebutted evidence of excessive school absences [is] sufficient to establish . . . educational neglect' " (*id.*). Petitioner submitted the children's school records and the testimony of the caseworker, which established "that each child had 'a significant, unexcused absentee rate that [had] a detrimental effect on [each] child's education' " (*Cunntrel A.*, 70 AD3d at 1308). The mother failed to present " 'evidence that the [children are] attending school and receiving the required instruction in another place' or to establish a reasonable justification for the children's absences and thus failed to rebut the prima facie evidence of educational neglect" (*id.*).

Finally, we reject the contention of the mother that she received ineffective assistance of counsel at the fact-finding hearing. "It is not the role of this Court to second-guess the attorney's tactics or trial strategy" (*Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351-1352, *lv denied* 7 NY3d 717) and, based on our review of the record, we conclude that the mother received meaningful representation (*see id.* at 1352).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

31

CA 12-00519

PRESENT: SMITH, J.P., VALENTINO, WHALEN, AND MARTOCHE, JJ.

CAROL H. SCULLY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL J. SCULLY, DEFENDANT-RESPONDENT.

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 14, 2011. The judgment, inter alia, equitably distributed the marital assets of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing defendant to obtain a life insurance policy with plaintiff as the beneficiary in the amount of $500,000 and to maintain that policy until the youngest child reaches the age of majority and the judgment is otherwise affirmed without costs.

Memorandum: Plaintiff appeals from certain parts of a judgment of divorce that, inter alia, directed defendant to pay to plaintiff the amount of $30,160 per year in child support and to pay his pro rata share of 80% of the children's private school tuition. Contrary to plaintiff's contention, we conclude that Supreme Court did not abuse its discretion in refusing to award child support on the parties' combined income in excess of $130,000 (*see Burns v Burns*, 70 AD3d 1501, 1502; *Frost v Frost*, 49 AD3d 1150, 1151). In deciding to limit the child support award to the first $130,000 in combined parental income, the court properly considered the factors set forth in Domestic Relations Law § 240 (1-b) (f), including the fact that the divorce would not result in a change in the children's standard of living (*see Burns*, 70 AD3d at 1502). Plaintiff's contention that the court erred in calculating the parties' pro rata shares was raised for the first time in her reply brief and thus that contention is not properly before us on appeal (*see Turner v Canale*, 15 AD3d 960, 960, *lv denied* 5 NY3d 702).

We reject plaintiff's contention that the court erred in ordering that defendant's maintenance obligation be terminated on December 31, 2011. " 'As a general rule, the amount and duration of maintenance

are matters committed to the sound discretion of the trial court' " (*Frost*, 49 AD3d at 1150-1151). We conclude that the court's determination here to terminate maintenance on December 31, 2011 was not an abuse of discretion inasmuch as the court properly considered the factors set forth in Domestic Relations Law § 236 (B) (6) (a) (*see Smith v Winter*, 64 AD3d 1218, 1220, *lv denied* 13 NY3d 709). Contrary to plaintiff's further contention, we conclude that the court did not abuse its discretion in directing that defendant was not obligated to begin paying his pro rata share of the children's private high school tuition until January 1, 2012 (*see generally Fruchter v Fruchter*, 288 AD2d 942, 943).

We also conclude that the court properly distributed the marital property. Plaintiff " 'failed to trace the source of the funds [that she contended were separate property] with sufficient particularity to rebut the presumption that they were marital property' " (*Bailey v Bailey*, 48 AD3d 1123, 1124; *see Bennett v Bennett*, 13 AD3d 1080, 1082, *lv denied* 6 NY3d 708). Contrary to plaintiff's contention, the court did not abuse its discretion in determining the value of the marital home. "[V]aluation [of marital property] is an exercise properly within the fact-finding power of the trial courts, guided by expert testimony" (*Burns v Burns*, 84 NY2d 369, 375). " 'Supreme Court has broad discretion in crediting the testimony of an expert witness' in determining value" (*Walasek v Walasek*, 243 AD2d 851, 852-853), and the court properly exercised its discretion when it credited the testimony of defendant's expert concerning the estimated costs of making necessary repairs to the marital home.

We agree with plaintiff, however, that the court erred in failing to direct defendant to obtain a life insurance policy to secure his obligation for child support and his pro rata share of the children's private school tuition (*see* Domestic Relations Law § 236 [B] [8] [a]; *Corless v Corless*, 18 AD3d 493, 494). We therefore conclude that defendant is obligated to obtain a life insurance policy listing plaintiff as the beneficiary in the amount of $500,000 and to maintain that policy until the youngest child reaches the age of majority (*see generally Corless*, 18 AD3d at 494), and we modify the judgment accordingly. We have reviewed plaintiff's remaining contentions and conclude that they are without merit.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

35

CA 12-00807

PRESENT: SMITH, J.P., FAHEY, VALENTINO, WHALEN, AND MARTOCHE, JJ.

ANTHONY PRAVE, III, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
ALSO KNOWN AS NEW YORK CENTRAL MUTUAL,
DEFENDANT-RESPONDENT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOEGGEMAN, GEORGE & CORDE, P.C., ALBANY (PAUL A. HURLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered September 14, 2011. The order, among other things, denied in part the motion of plaintiff for summary judgment, and granted the cross motion of defendant for consolidation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion and granting the motion in its entirety and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Cayuga County, for entry of a judgment in favor of plaintiff in accordance with the following Memorandum: This appeal arises from an incident in which plaintiff was injured after nonparty James Henderson struck him while opening the driver's side door of a vehicle covered under a liability policy issued by defendant, New York Central Mutual Fire Insurance Company, also known as New York Central Mutual (NYCM). Plaintiff commenced a personal injury action against, inter alia, Henderson (underlying action). NYCM disclaimed coverage and refused to defend or indemnify Henderson in the underlying action on the ground that the incident was the result of an intentional act by Henderson that was not covered under the policy. Henderson therefore commenced an action against NYCM in Supreme Court, Oneida County (declaratory judgment action), seeking, inter alia, a declaration that NYCM had a duty to defend and indemnify him in the underlying action. In a prior appeal in the declaratory judgment action (prior appeal), this Court concluded that NYCM was required to defend Henderson and that the issue of indemnification would depend upon the outcome of the trial in the underlying action, i.e., whether Henderson was found to be negligent (*Henderson v New York Cent. Mut. Fire Ins. Co.*, 56 AD3d 1141, 1143). After the trial in the underlying action, it was determined that Henderson was negligent in causing plaintiff's

injuries, and a judgment was granted in favor of plaintiff in the amount of $70,000.

Plaintiff then commenced this Insurance Law § 3420 (b) action in Supreme Court, Cayuga County, against NYCM seeking to enforce the judgment in the underlying action. Thereafter, plaintiff moved for, inter alia, summary judgment on the complaint, and NYCM cross-moved to consolidate this matter with the declaratory judgment action. The court granted plaintiff's motion in part by dismissing NYCM's first, second, fourth and sixth affirmative defenses and otherwise denied the motion. The court also granted NYCM's cross motion and ordered that this matter be transferred to Supreme Court, Oneida County, for consolidation with the declaratory judgment action.

We agree with plaintiff that the court erred in failing to grant his motion for summary judgment in its entirety and in granting NYCM's cross motion and thereby transferring this matter. We therefore modify the order accordingly, and we remit the matter to Supreme Court, Cayuga County, for entry of a money judgment in favor of plaintiff. It is well settled that "Insurance Law § 3420 . . . grants an injured party a right to sue the tortfeasor's insurer . . . under limited circumstances—the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days . . . '[T]he effect of the statute is to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement' " (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 354-355). Here, NYCM does not contend that plaintiff failed to meet those statutory requirements, and plaintiff properly commenced this action against NYCM. Moreover, as plaintiff correctly contends, the determinations in the underlying action and in the prior appeal establish that NYCM is required to indemnify Henderson and that, as a result, plaintiff has a right to seek indemnification from NYCM pursuant to section 3420. In the prior appeal, we concluded that "[t]he court . . . erred in declaring that NYCM has no duty to indemnify [Henderson]. As noted, the complaint in the underlying action alleges negligent conduct on the part of . . . Henderson and, if he accidentally or negligently caused [plaintiff's] injuries while opening the driver's door, that event may be considered an 'automobile accident' within the meaning of the policy . . . and we thus conclude that the court erred in determining as a matter of law that NYCM had no such duty. Rather, 'that determination will abide the trial' in the underlying action" (*Henderson*, 56 AD3d at 1143, quoting *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 138). Henderson was found to be negligent in the underlying action and, based upon our determination in the prior appeal, NYCM was therefore required to indemnify him. Here, plaintiff submitted evidence in support of his motion establishing as a matter of law that the judgment in the underlying action included a finding that Henderson was negligent, and NYCM failed to raise a triable issue of fact.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

36

CA 12-01503

PRESENT: SMITH, J.P., FAHEY, VALENTINO, WHALEN, AND MARTOCHE, JJ.

WALTER J. NARY, II, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROSEMARY JONIENTZ, DEFENDANT.

STATE FARM INSURANCE COMPANIES, APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (GARY H. ABELSON OF COUNSEL), FOR APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered October 27, 2011. The order, insofar as appealed from, directed State Farm Insurance Companies to produce certain documentation.

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

Memorandum: In this personal injury action, nonparty State Farm Insurance Companies (State Farm) appeals from an order insofar as it denied in part State Farm's motion to quash the subpoena duces tecum of plaintiff and ordered State Farm to produce certain documents. We conclude that this appeal is moot inasmuch as the documents at issue herein were never admitted in evidence at trial (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714; *Matter of Gannett Co., Inc. v Doran*, 74 AD3d 1788, 1789). The exception to the mootness doctrine does not apply under these circumstances (*see generally Hearst Corp.*, 50 NY2d at 714-715).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

39

CA 12-01461

PRESENT: SMITH, J.P., FAHEY, VALENTINO, WHALEN, AND MARTOCHE, JJ.

MARIE M. GARVEY, PLAINTIFF-RESPONDENT,

V ORDER

MEDAMERICA FINGERLAKES LONG TERM CARE INSURANCE COMPANY, DEFENDANT, AND CARESCOUT, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (STEPHEN W. KELKENBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

CARNEY & GIALLANZA, BUFFALO (MARY G. CARNEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

BOND SCHOENECK & KING, SYRACUSE (J.P. WRIGHT OF COUNSEL), FOR DEFENDANT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered April 3, 2012. The order, insofar as appealed from, denied in part the motion of defendant CareScout to dismiss the amended complaint against it.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on November 27, 2012, and filed in the Erie County Clerk’s Office on December 6, 2012,

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

46

KA 11-00490

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERBERT H. HAYNES, JR., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered March 30, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (three counts), assault in the second degree (two counts), harassment in the second degree (two counts) and criminal mischief in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of burglary in the first degree (Penal Law § 140.30 [2]) under count two of the indictment to burglary in the second degree (§ 140.25 [2]), reducing the conviction of assault in the second degree (§ 120.05 [2]) under count four of the indictment to attempted assault in the second degree (§§ 110.00, 120.05 [2]), and vacating the sentences imposed on those counts, and as modified the judgment is affirmed and the matter is remitted to Ontario County Court for sentencing on the conviction of burglary in the second degree and attempted assault in the second degree.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the first degree (Penal Law § 140.30 [2], [3]) and assault in the second degree (§ 120.05 [2]). We agree with defendant that the evidence is legally insufficient to support his conviction of burglary in the first degree as charged in count two of the indictment and assault in the second degree as charged in count four of the indictment because there is insufficient evidence that the victim sustained a physical injury (*see* §§ 120.05 [2]; 140.30 [2]), i.e., "impairment of physical condition or substantial pain" (§ 10.00 [9]). Although " 'substantial pain' cannot be defined precisely, . . . it can be said that it is more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447). " '[P]etty slaps, shoves, kicks and the like delivered out of hostility, meanness and similar motives' constitute only harassment and not assault,

because they do not inflict physical injury" (*id.* at 448; *see Matter of Philip A.*, 49 NY2d 198, 200). Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and his or her pain, whether the victim sought medical treatment, and the motive of the offender (*see Chiddick*, 8 NY3d at 447-448; *People v Spratley*, 96 AD3d 1420, 1421). "Motive is relevant because an offender more interested in displaying hostility than in inflicting pain will often not inflict much of it" (*Chiddick*, 8 NY3d at 448).

Here, the victim and other witnesses testified that one of defendant's companions struck the victim in the arm, neck and head with a baseball bat. The victim testified that he sustained a bruise on his arm, which did "[n]ot [last] at all." No bruise is apparent in the photograph of the victim's arm taken shortly after the incident. The victim also testified that his neck was bruised in the attack, although that bruise is likewise not visible in the photograph contained in the record. Finally, the victim identified a photograph of his head and testified that he sustained "a lump, but you can't really see it." After the incident, the victim went to the hospital with his brother and a friend who were also attacked. According to the victim, medical personnel "looked at [him], but it wasn't serious." Although we agree with the People that an attack with a baseball bat is "an experience that would normally be expected to bring with it more than a little pain" (*id.* at 447; *see People v Henderson*, 77 AD3d 1311, 1311, *lv denied* 17 NY3d 953), here the victim testified that his injuries hurt only "[a] little bit," and that the pain lasted "a couple of days, no longer than a week." Further, it is undisputed that the victim was not the main target of the attack, but rather was an unfortunate bystander (*see generally Chiddick*, 8 NY3d at 447-448). We thus conclude that the evidence adduced at trial is legally insufficient to establish that the victim sustained a physical injury, i.e., physical impairment or substantial pain (*see Matter of Shawn D.R.-S.*, 94 AD3d 1541, 1541-1542; *People v Lunetta*, 38 AD3d 1303, 1304-1305, *lv denied* 8 NY3d 987; *People v Patterson*, 192 AD2d 1083, 1083; *cf. Matter of Nico S.C.*, 70 AD3d 1474, 1475; *People v Smith*, 45 AD3d 1483, 1483, *lv denied* 10 NY3d 771; *People v Wooden*, 275 AD2d 935, 936, *lv denied* 96 NY2d 740). We further conclude, however, that the evidence is legally sufficient to support a conviction of the lesser included offenses of burglary in the second degree (Penal Law § 140.25 [2]) and attempted assault in the second degree (§§ 110.00, 120.05 [2]), and we therefore modify the judgment accordingly. Contrary to the further contention of defendant, viewing the evidence in light of the elements of the remaining crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those crimes is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that he was deprived of a fair trial by prosecutorial misconduct during voir dire and throughout the trial. "By failing to object to most of the statements by the prosecutor that are now alleged to constitute misconduct, defendant failed to preserve for our review his contentions with respect to those statements" (*People v Hess*, 234 AD2d 925, 925, *lv denied* 90 NY2d 1011; *see* CPL

470.05 [2]; *People v Justice*, 99 AD3d 1213, 1216; *People v Nappi*, 83 AD3d 1592, 1594, *lv denied* 17 NY3d 820). In any event, we conclude that, although certain comments made by the prosecutor were improper, those comments "were 'not so egregious as to deprive defendant of his right to a fair trial,' when viewed in the totality of the circumstances of this case" (*People v Martina*, 48 AD3d 1271, 1273, *lv denied* 10 NY3d 961; *see Justice*, 99 AD3d at 1216). We further conclude that defendant was not denied effective assistance of counsel based on the failure of defense counsel to object to the prosecutor's improper comments on summation (*see People v Lopez*, 96 AD3d 1621, 1623, *lv denied* 19 NY3d 998; *People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954).

Contrary to defendant's contention, the sentence is not unduly harsh or severe. As defendant correctly contends, however, the certificate of conviction mistakenly recites that he was sentenced to a five-year period of postrelease supervision on each conviction of assault in the second degree when, in fact, the court imposed no periods of postrelease supervision. The certificate of conviction must therefore be amended to reflect that defendant was not sentenced to any periods of postrelease supervision on the two assault convictions (*see generally People v Saxton*, 32 AD3d 1286, 1286-1287).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

47

KA 09-01194

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FELIX MENDEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered May 6, 2009. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and endangering the welfare of a child (§ 260.10 [1]). We reject defendant's contention that County Court committed reversible error in admitting in evidence a recorded telephone conversation in which defendant allegedly referred to his commission of prior bad acts. The record establishes that the court gave the curative instruction requested by defendant. Defendant did not object further or seek a mistrial, and thus the curative instruction "must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944). In any event, we conclude that the curative instruction sufficiently alleviated any prejudicial effect of permitting the jury to hear the unredacted recording (*see People v Borden*, 90 AD3d 1652, 1652, *lv denied* 18 NY3d 992). We reject defendant's further contention that the court erred in failing to repeat the curative instruction verbatim in its jury charge. During its charge, the court reminded the jury of the "cautionary instruction" it had previously given, and we conclude under the circumstances of this case that the court thereby sufficiently cautioned the jury concerning the limited purpose for which the recorded conversation had been admitted (*see People v Williams*, 50 NY2d 996, 998). Defendant failed to preserve for our review his contention that the court erred in admitting portions of the recorded conversation that allegedly referenced his invocation of

his right to counsel and the right to remain silent (*see* CPL 470.05 [2]). In any event, that contention has no merit because the recording does not contain any reference to the invocation of those rights during custodial interrogation (*cf. People v De George*, 73 NY2d 614, 618). We therefore reject defendant's further contention that defense counsel was ineffective in failing to object to the admission of those portions of the recording in evidence (*see People v Watson*, 90 AD3d 1666, 1667, *lv denied* 19 NY3d 868).

Defendant failed to preserve for our review his contention that his conviction of section 130.75 (1) (b) violates the ex post facto prohibition in article I (§ 10 [1]) of the US Constitution (*see People v Ramos*, 13 NY3d 881, 882, *rearg denied* 14 NY3d 794; *People v Carey*, 92 AD3d 1224, 1224, *lv denied* 18 NY3d 992). In any event, we conclude that defendant's contention has no merit (*see generally People v Walter*, 5 AD3d 1107, 1108-1109, *lv denied* 3 NY3d 650, *reconsideration denied* 3 NY3d 712), and thus that he also was not denied effective assistance of counsel based on defense counsel's failure to advance that contention (*see Watson*, 90 AD3d at 1667). Defendant also failed to preserve for our review his contention that he was unconstitutionally punished for exercising his right to a trial (*see People v Motzer*, 96 AD3d 1635, 1636, *lv denied* 19 NY3d 1104). In any event, that contention lacks merit because there is no evidence in the record that the court was motivated by "vindictiveness" in sentencing defendant following the trial (*People v Patterson*, 106 AD2d 520, 521; *see Motzer*, 96 AD3d at 1636). Finally, the sentence is not unduly harsh or severe.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

51

CA 12-01283

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF THE ESTATE OF SHIRLEY G. SCHULTZ, DECEASED.

REBECCA J. EVERETT, CO-EXECUTOR OF THE ESTATE OF SHIRLEY G. SCHULTZ, DECEASED, PETITIONER-RESPONDENT;

PAUL F. SCHULTZ, II, CO-EXECUTOR OF THE ESTATE OF SHIRLEY G. SCHULTZ, DECEASED, OBJECTANT-APPELLANT.

MEMORANDUM AND ORDER

FLAHERTY & SHEA, BUFFALO (MICHAEL J. FLAHERTY OF COUNSEL), FOR OBJECTANT-APPELLANT.

GEORGE W. NARBY, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered October 13, 2011. The amended order, insofar as appealed from, granted the motion of petitioner for summary judgment, dismissed the objections of objectant and settled the final account of petitioner.

It is hereby ORDERED that the amended order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, the objections to the account filed by objectant are reinstated, ordering paragraphs three through seven are vacated and the matter is remitted to Surrogate's Court, Erie County, for a hearing on the objections.

Memorandum: Objectant is both a beneficiary and a co-executor of the last will and testament (Will) of his mother (decedent), who was survived by six adult children. Letters testamentary were issued to objectant and petitioner, his sister, who is also both a beneficiary and a co-executor of the Will. The Will specified that, due to the fact that decedent had previously deeded real property to objectant and a third sibling, she bequeathed to them only tangible personal property, with certain exceptions. Petitioner and the three remaining siblings were the beneficiaries of decedent's residuary estate.

When informal attempts to settle the estate failed, petitioner filed a petition for judicial settlement, to which was attached her final account. Objectant filed two objections to the final account, contending first that it did not contain a statement of the tangible personal property bequeathed to him and the third sibling, and second

that it did not contain a statement of all uncollected debts due to decedent. Specifically, objectant alleged that decedent had loaned the sum of $65,000 to one of the beneficiaries and that there remained a balance on that loan of approximately $50,000.

The day before the scheduled hearing on the petition, Surrogate's Court, sua sponte, canceled the hearing on the ground that objectant lacked standing to file the objections. Petitioner thereafter moved for summary judgment dismissing the objections and for judicial settlement of her final account. Objectant opposed the motion, and two of the other residuary beneficiaries cross-moved to revoke their previously executed releases and to join in the objections. In a memorandum and order, the Surrogate granted the motion and denied the cross motion. The Surrogate thereafter issued an order and an amended order that, inter alia, settled the final account but did not specifically address the cross motion. Inasmuch as a decision controls an order in the case of a discrepancy (*see Utica Mut. Ins. Co. v McAteer & FitzGerald, Inc.*, 78 AD3d 1612, 1612-1613), we conclude that the cross motion was denied. In any event, because only objectant has filed a notice of appeal, any issue with respect to the propriety of the denial of the cross motion is not before this Court. We conclude that the Surrogate erred in granting the motion.

"Although, generally, all persons required to be served with process in an accounting proceeding may file objections, this is not always so since the court will not permit objections to be filed where the objecting party will not be benefitted by them, even if sustained" (*Matter of Woods*, 36 AD2d 880, 880; *see Matter of Freeman*, 198 AD2d 897, 898, *lv denied* 83 NY2d 751, *cert denied* 513 US 838). Were objectant not a co-executor of the Will, we would agree with the Surrogate that he lacks standing to file any objection related to petitioner's failure to include the alleged debt in the accounting; the inclusion of the debt in the estate would affect only the residuary beneficiaries and not objectant (*see Freeman*, 198 AD2d at 898; *Woods*, 36 AD2d at 880). With respect to the tangible personal property, however, resolution of that objection could inure to objectant's benefit, and objectant therefore has standing, as a beneficiary of the Will, to assert that objection (*cf. Freeman*, 198 AD2d at 898; *Woods*, 36 AD2d at 880).

Regardless of his standing as a beneficiary, we conclude that objectant has standing, as a co-executor of the Will, to file both objections. An executor is a fiduciary who owes "a duty of undivided loyalty to the decedent and ha[s] a duty to preserve the assets that [decedent] entrusted to them" (*Matter of Donner*, 82 NY2d 574, 584; *see Matter of Carbone*, 101 AD3d 866, 868), and "an executor's duties are derived from the will itself, not from the letters issued by the Surrogate" (*Matter of Skelly*, 284 AD2d 336, 336). "Suffice it to say, an executor who knows that his co[-]executor is committing breaches of trust and not only fails to exert efforts directed towards prevention but accedes to them is legally accountable" (*Matter of Rothko*, 43 NY2d 305, 320).

Relying on *Matter of Miller* (NYLJ, Mar. 19, 2003, at 23, col 4),

the Surrogate concluded that, because there were no remaining creditors of the estate and all of the other beneficiaries had executed releases absolving objectant of liability, objectant no longer had standing as a co-executor to file any objections to petitioner's final accounting. We conclude that the Surrogate's reliance on *Miller* was misplaced. The issue in *Miller* was the *management* of assets that had already been identified and placed in a trust, whereas here the issue is an executor's duty to *identify* assets that should be included in an estate. In any event, inasmuch as *Miller* is a trial level decision that fails to address an executor's duty to a decedent, it does not control the outcome of this appeal.

Contrary to the Surrogate's conclusion, the mere fact that the estate has no creditors and objectant can no longer be sued successfully by any of the beneficiaries does not establish that he has fulfilled his fiduciary duty to the decedent and the estate so as to vitiate his standing to raise objections to the accounting filed by the co-executor. An executor's duty is not fulfilled merely because he or she has obtained releases from liability. The standard of care for a fiduciary cannot be set so low; rather, a fiduciary has a "duty of active vigilance in the collection of assets belonging to the estate" (*Matter of Belcher*, 129 Misc 218, 220 [Sur Ct, NY County 1927]; *see generally King v Talbot*, 40 NY 76, 85-86).

With respect to the remaining issues of estoppel, waiver and laches, even assuming, arguendo, that petitioner met her initial burden on those legal theories, we conclude that objectant raised triable issues of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We note in any event that, regardless whether the objections were properly filed or are barred by estoppel, waiver or laches, a Surrogate has an independent, statutory duty to "settle the account as justice requires . . . , [and] to require the Surrogate to 'rubber stamp' the account because the parties do not object to it would vitiate [that] statutory directive . . . Indeed, it would seem self-evident that if a [court] may not be compelled to enter a decree, then the court must have the correlative power to deny a decree or, when inquiry is warranted, to satisfy itself on questions arising during the proceedings" (*Matter of Stortecky v Mazzone*, 85 NY2d 518, 524; *see* SCPA 2211 [1]). Here, it appears that valid questions have arisen and that an inquiry into the accounting is therefore required. We therefore conclude that the Surrogate erred in granting the motion and dismissing the objections, and we reinstate the objections and remit the matter to Surrogate's Court for a hearing on the objections.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

80

CA 12-01293

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

MARK PETTIT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RANDY B. GREEN, ET AL., DEFENDANTS,
SIX-S GOLF, LLC, SIX-S HOLDINGS, LLC, LARRY SHORT, DOING BUSINESS AS SIX-S GOLF COURSE AND WILLIAM F. SHORT, DOING BUSINESS AS SIX-S GOLF COURSE, DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Cattaraugus County (Gerald J. Whalen, J.), entered December 22, 2011. The order denied the motion of defendants Six-S Golf, LLC, Six-S Holdings, LLC, Larry Short, doing business as Six-S Golf Course, and William F. Short, doing business as Six-S Golf Course, for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint against defendants Six-S Golf, LLC, Six-S Holdings, LLC, Larry Short, doing business as Six-S Golf Course, and William F. Short, doing business as Six-S Golf Course, is dismissed.

Memorandum: Plaintiff commenced this negligence action to recover damages for injuries he sustained while attending a party hosted by defendant Jesse J. Dewey on premises allegedly owned by Six-S Golf, LLC, Six-S Holdings, LLC, Larry Short, doing business as Six-S Golf Course, and William F. Short, doing business as Six-S Golf Course (collectively, defendants). It is undisputed that other party guests accosted plaintiff, knocked him to the ground, and beat him. Defendants appeal from an order denying their motion for summary judgment dismissing the complaint against them, contending that as a matter of law they owed plaintiff no duty of care. We agree.

In general, "[landowners] are under a common-law duty to 'control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control' " (*Furio v Palm Beach Club*, 204 AD2d 1053,

1054, quoting *D'Amico v Christie*, 71 NY2d 76, 85; *see Dynas v Nagowski*, 307 AD2d 144, 146). Thus, landowners who are not present when a guest engages in harmful conduct and who have neither notice of nor control over such conduct are under no duty to protect others from such conduct (*see Cavaretta v George*, 265 AD2d 801, 802), unless the nature of the relationship between the landowners and the party host is such that the landowners, even if absent, are deemed to share in the duty imposed upon the host (*see D'Amico*, 71 NY2d at 87-88; *Dynas*, 307 AD2d at 146; *see generally Sideman v Guttman*, 38 AD2d 420, 429).

Here, defendants met their initial burden on the motion for summary judgment by establishing that they were not present and had neither notice of nor control over the conduct at issue (*see Dynas*, 307 AD2d at 146). Inasmuch as plaintiff did not establish any special relationship between defendants and Dewey such that they would be charged with Dewey's legal duty to protect plaintiff from harm, he failed to raise a triable issue of fact sufficient to defeat the motion (*see id.* at 146-148; *Cavanaugh v Knights of Columbus Council 4360*, 142 AD2d 202, 204, *lv denied* 74 NY2d 604).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

82

CA 12-01337

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

GEORGETOWN CAPITAL GROUP, INC. AND JOSEPH CURATOLO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

EVEREST NATIONAL INSURANCE COMPANY, DEFENDANT-APPELLANT, AND ROYAL ALLIANCE ASSOCIATES, INC., DEFENDANT.

SAIBER LLC, FLORHAM PARK, NEW JERSEY (DAVID J. D'ALOIA, OF THE NEW JERSEY BAR, ADMITTED PRO HAC VICE, OF COUNSEL), LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO, FOR DEFENDANT-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (HUGH C. CARLIN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered April 20, 2012 in a declaratory judgment action. The judgment, among other things, granted in part plaintiffs' motion for partial summary judgment and denied in part the cross motion of defendant Everest National Insurance Company for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting judgment in favor of plaintiff Georgetown Capital Group, Inc. as follows:

> It is ADJUDGED and DECLARED that Everest National Insurance Company is obligated to provide a defense to that plaintiff in the underlying federal actions,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking a declaration that defendant Everest National Insurance Company (ENIC) is obligated to defend and indemnify them in two underlying federal securities actions pursuant to a securities broker/dealer's professional liability policy (hereafter, policy) that ENIC issued to defendant Royal Alliance Associates, Inc. (hereafter, Royal). Royal is an SEC-registered broker-dealer and investment advisor, and plaintiff Georgetown Capital Group, Inc. (hereafter, Georgetown) is a financial services firm that offers securities and financial advisory services through Royal. Georgetown's investment advisors are all registered representatives of Royal. Plaintiff Joseph Curatolo is the

president and sole shareholder of Georgetown and also a registered representative of Royal.

The amended complaints in the underlying actions allege that Timothy Geidel, a former Georgetown employee and registered representative of Royal, offered and sold unregistered and fictitious securities to investors and that Royal and Georgetown failed to supervise Geidel. Geidel ultimately pleaded guilty in federal court to wire fraud and structuring.

Plaintiffs moved for partial summary judgment on the first and second causes of action seeking a declaration that ENIC is obligated to defend plaintiffs and/or Royal in the underlying actions, and ENIC cross-moved for summary judgment, contending that it has no duty to provide a defense in the underlying actions. As relevant to this appeal, we conclude that Supreme Court properly granted that part of plaintiffs' motion with respect to Georgetown, and denied ENIC's cross motion in that respect, but erred in failing to declare the rights of the parties in connection with plaintiffs' motion (*see Alexander v New York Cent. Mut.*, 96 AD3d 1457, 1457). We therefore modify the judgment accordingly.

An insurer's duty to defend is " 'exceedingly broad' and an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest . . . a reasonable possibility of coverage' " *(Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137, quoting *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 648). "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670). Thus, the duty to defend exists " 'even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered' " (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137, quoting *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63).

The insured has the initial burden of establishing coverage under an insurance policy while the insurer bears the burden of proving that an exclusion in the policy applies to defeat coverage (*see Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 220). "[E]xclusions are subject to strict construction and must be read narrowly" (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137). In order to establish that an exclusion defeats coverage, the insurer has the "heavy burden" of establishing that the exclusion is expressed in clear and unmistakable language, is subject to no other reasonable interpretation, and is applicable to the facts (*Continental Cas. Co.*, 80 NY2d at 654-655, citing *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311). An insurer "will be required to 'provide a defense unless it can "demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, [in toto], are subject to no other interpretation" ' " (*Automobile Ins. Co. of Hartford*, 7 NY3d at 137, quoting *Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 159).

Here, we conclude that plaintiffs met their initial burden of establishing that they are entitled to judgment declaring that ENIC must provide Georgetown with a defense under the policy by establishing that Georgetown is a party covered by the policy, that Georgetown has sustained a "Loss" defined by the policy, i.e., "Defense Costs," and that the underlying actions allege that Georgetown failed to supervise Geidel, which is a "Wrongful Act" defined by the policy. Contrary to ENIC's contention, we also conclude that plaintiffs established that some of the services provided by Geidel and set forth in the amended complaints in the underlying actions "potentially" fall within the policy definitions of "Professional Services" and an "Approved Activity" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714), such as advising clients to sell legitimate investments held by Georgetown and/or Royal and to invest the resulting money in the fictitious "securities." Those allegations are supported by the federal criminal complaint, which alleges that, "[i]n many instances, victims were directed by [Geidel] to liquidate their existing investments with Georgetown and Royal . . . so that their funds could be invested in higher yielding investment vehicles." Moreover, in his plea agreement, Geidel admitted that, "[t]o effectuate [his] fraud, [he] had victims authorize the wire transaction of funds held by their registered broker dealers and financial custodial agents."

We further conclude that ENIC failed to raise an issue of fact with respect to Georgetown in opposition to plaintiffs' motion. ENIC relies on, inter alia, the policy's exclusion for "Loss in connection with any Claim made against an Insured . . . arising out of, based upon, or attributable to the committing in fact of: any criminal or deliberately fraudulent act." We agree with plaintiffs, however, that ENIC failed to demonstrate that the allegations in the underlying actions fall " 'solely and entirely within th[at] policy exclusion[], and . . . are subject to no other interpretation' " (*Allstate Ins. Co.*, 79 NY2d at 159; *see Automobile Ins. Co. of Hartford*, 7 NY3d at 137). As noted above, the underlying actions include allegations that Georgetown and/or Royal failed to supervise Geidel and that Geidel advised investors to sell legitimate securities.

Contrary to ENIC's further contention, the fact that Royal may be insured under a separate fidelity bond has no bearing on whether the allegations in the underlying actions trigger a duty to defend in the instant case. The coverage sought here is not duplicative of that furnished by the fidelity bond, which provides that where a loss "result[s] directly from dishonest or fraudulent acts committed by a Registered Representative . . . [, s]uch dishonest or fraudulent acts must be committed by the Registered Representative *with the manifest intent . . . to cause the Insured to sustain such loss*" (emphasis added). Here, there is no claim that Geidel intended to cause a direct loss to Georgetown or Royal as opposed to his clients (*see generally Ernst & Young v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 304 AD2d 410, 410).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

85

CA 12-01321

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

MIGUEL A. FONSECA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DENISE A. CRONK, DEFENDANT-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER 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 (Donald A. Greenwood, J.), entered March 21, 2012 in a personal injury action. The order denied defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the permanent loss of use category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident when the vehicle he was driving was rear-ended by a vehicle operated by defendant. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and Supreme Court denied the motion. As plaintiff correctly concedes on appeal, there is no evidence that he sustained a serious injury under the permanent loss of use category set forth in his bill of particulars (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 299). We therefore modify the order accordingly.

We reject defendant's contention, however, that the court erred in denying her motion with respect to the remaining categories of serious injury alleged by plaintiff, i.e., permanent consequential limitation of use and significant limitation of use. In support of her motion, defendant asserted that those limitations were the result of a degenerative condition in plaintiff's cervical spine and thus were not causally related to the subject accident (*see generally Pommells v Perez*, 4 NY3d 566, 572). In support of the motion,

defendant submitted plaintiff's medical records in which, inter alia, one examining physician concluded that plaintiff had a normal range of motion and had suffered from a cervical strain or sprain that had resolved, while another examining physician noted substantial limitations in plaintiff's rotation and lateral bend that he concluded were caused by unrelated degenerative changes rather than the subject motor vehicle accident. We thus conclude that defendant met her burden on the motion, "leaving for plaintiff the burden to present objective medical proof of a serious injury causally related to the accident in order to survive summary dismissal" (*id*. at 574). In opposition to defendant's motion, plaintiff submitted the affidavit of his orthopedist, who opined that plaintiff "had a herniated disc at C6-7 which protruded to the extent it came in contact with and flattened the spinal cord," which "herniated disc was, . . . to a reasonable degree of medical certainty, caused by the accident of March 5, 2007." "It is well established that 'conflicting expert opinions may not be resolved on a motion for summary judgment' " (*Pittman v Rickard*, 295 AD2d 1003, 1004; *see Williams v Lucianatelli*, 259 AD2d 1003, 1003). Thus, contrary to defendant's contention in support of her motion, plaintiff raised a triable issue of fact whether there was a causal relationship between plaintiff's limitations and the subject accident.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

89

KA 12-00297

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NEIL GILLOTTI, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Niagara County Court (Matthew J. Murphy, III, J.), dated October 17, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in assessing 10 points against him under risk factor 15, for inappropriate employment. Inasmuch as defendant admitted that he possessed over 1,000 images and videos of child pornography, we conclude that his employment at an amusement park in the vicinity of children is "inappropriate" within the meaning of that risk factor (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 17-18 [2006]). We further conclude that "defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" of his risk level (*People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703), particularly in view of the fact that he does not dispute that he possessed pornographic materials depicting sexual violence against children or that he knowingly obtained employment placing him in the vicinity of children (*see People v Poole*, 90 AD3d 1550, 1551; *cf*. *People v Bretan*, 84 AD3d 906, 907-908).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

90

KA 11-00190

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MEL T. WILKINS, ALSO KNOWN AS MELZER WILKINS,
ALSO KNOWN AS MELZEE WILKINS, DEFENDANT-APPELLANT.

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

MEL T. WILKINS, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 12, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, resisting arrest and unlawful possession of marihuana.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and as a matter of discretion in the interest of justice by reversing that part convicting defendant under count two of the indictment and dismissing that count and by vacating the sentence imposed for criminal possession of a weapon in the second degree and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for resentencing on that offense.

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), criminal possession of a weapon in the third degree (§ 265.02 [1]), resisting arrest (§ 205.30), and unlawful possession of marihuana (§ 221.05), defendant contends that the evidence is legally insufficient on all counts except for unlawful possession of marihuana and that the verdict is against the weight of the evidence to that extent. We reject those contentions. The evidence, viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction with respect to the weapon counts under a theory of constructive possession (*see People v Sierra*, 45 NY2d 56, 59-60). Specifically, defendant owned the premises where the weapon was found, he testified that he lived there part-time, and he was there when the

search warrant was executed. Thus, the evidence is legally sufficient to establish that defendant exercised dominion and control over the area where the weapon was located (*see People v Shoga*, 89 AD3d 1225, 1227, *lv denied* 18 NY3d 886). The evidence is also legally sufficient to support the conviction of resisting arrest. The evidence established that defendant struggled with police officers after they were forced to remove him from a hiding place in a cubbyhole (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence with respect to the challenged counts (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that the search warrant was not properly issued because Supreme Court failed to conduct an adequate examination of the sworn testimony of the confidential informant to ensure that the search warrant was issued in compliance with CPL 690.40. We reject that contention. There was substantial compliance with the requirements of CPL 690.40 (1), i.e., there was sworn testimony before the issuing judge and the confidential informant's testimony was both recorded and summarized (*see generally People v Serrano*, 93 NY2d 73, 77-78). Nor was the search warrant overly broad because it authorized a search of the entire premises (*see generally People v Nieves*, 36 NY2d 396, 401). There were varying descriptions of the specific location of the drugs at the premises and the address was described as a multiple dwelling. The court thus properly found that it was reasonably clear that the dwelling area and the drug activities encompassed both the lower and upper levels of the premises to be searched.

As the People correctly concede, however, count two, for criminal possession of a weapon in the third degree, must be dismissed because it is a lesser inclusory concurrent count of criminal possession of a weapon in the second degree (*see generally People v Rodrigues*, 74 AD3d 1818, 1819, *lv denied* 15 NY3d 809, *cert denied* ___ US ___, 131 S Ct 1505). We therefore modify the judgment accordingly.

We further modify the judgment by vacating the sentence imposed for criminal possession of a weapon in the second degree because the court advised defendant that his determinate sentence on that count necessarily included a five-year period of postrelease supervision. We note that the court was authorized to impose a shorter period of postrelease supervision (*see* Penal Law § 70.45 [2] [f]), however, and we thus exercise our power to review the issue as a matter of discretion in the interest of justice (*see People v King*, 57 AD3d 1495, 1496), and we remit the matter to Supreme Court for resentencing on that count (*see People v Kropp*, 49 AD3d 1339, 1340; *People v Figueroa*, 17 AD3d 1130, 1131, *lv denied* 5 NY3d 788).

We have considered defendant's remaining contentions, including those raised in his pro se supplemental brief, and conclude that they

are without merit.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

92

KA 11-00966

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVAN DARK, ALSO KNOWN AS MIKE,
DEFENDANT-APPELLANT.

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

DAVAN DARK, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered April 11, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Erie County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Contrary to defendant's contention, we conclude that the evidence, when viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish his identity as the person who sold crack cocaine to the undercover police officers (*see People v Brown*, 92 AD3d 1216, 1216-1217, *lv denied* 18 NY3d 992; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence on the issue of identification (*see People v Young*, 74 AD3d 1471, 1472, *lv denied* 15 NY3d 811; *see generally Bleakley*, 69 NY2d at 495). Moreover, defendant's sentence is not unduly harsh or severe.

Defendant further contends on appeal that he was denied effective assistance of counsel because defense counsel failed to assert an agency defense or timely request a *Wade* hearing. We conclude with

respect to the failure to assert an agency defense that defendant received meaningful representation because "there is no denial of effective assistance based on the failure to 'make a motion or argument that has little or no chance of success' " (*People v Crump*, 77 AD3d 1335, 1336, *lv denied* 16 NY3d 857, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Defendant engaged in "[s]alesman-like behavior" by "touting the quality of the product" (*People v Roche*, 45 NY2d 78, 85, *cert denied* 439 US 958), and he lacked a preexisting relationship with the buyers (*see People v Ortiz*, 76 NY2d 446, 449-450, *remittitur amended* 77 NY2d 821; *see also People v Herring*, 83 NY2d 780, 782-783), who were undercover police officers. Thus, there was no basis for defense counsel to assert an agency defense on behalf of defendant. We conclude with respect to the alleged failure to make a timely request for a *Wade* hearing that the record establishes that defense counsel in fact timely requested a *Wade* hearing in his omnibus motion and again requested a *Wade* hearing in his motion for a trial order of dismissal.

Defendant also asserts that there was a *Brady* violation based on the People's failure to disclose a photograph that was taken by the cell phone camera of an undercover officer, and the failure of the police to preserve the photograph. The record demonstrates, however, both that the People learned at the same time as defendant that the photograph had been taken, and that the photograph was no longer in existence by the time that defendant was arrested. Thus, "the prosecution was not required to impart identifying information unknown to them and not within their possession" (*People v Hayes*, 17 NY3d 46, 52, *cert denied* ___ US ___, 132 S Ct 844). Moreover, inasmuch as " '[t]he exculpatory potential of this evidence [is] purely speculative, its destruction by the police does not violate the *Brady* rule' " (*People v Smith*, 306 AD2d 861, 862, *lv denied* 100 NY2d 599).

Defendant further contends in his pro se supplemental brief that County Court erred in denying his request for a *Wade* hearing. "There is no indication in the record, however, that the court ruled on the motion; i.e., the court neither granted nor denied it on the record before us" (*People v Chattley*, 89 AD3d 1557, 1558). " 'CPL 470.15 (1) precludes [this Court] from reviewing an issue that was either decided in an appellant's favor or was not decided by the trial court' " (*People v Adams*, 96 AD3d 1588, 1589, quoting *People v Ingram*, 18 NY3d 948, 949), "and thus the court's failure to rule on the motion cannot be deemed a denial thereof" (*Chattley*, 89 AD3d at 1558). We therefore hold the case, reserve decision and remit the matter to County Court to rule on defendant's request for a *Wade* hearing with respect to the identification procedures referenced in the People's CPL 710.30 notice.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

108

KA 10-01077

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON R. VOTRA, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (MARK MOODY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 10, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of robbery in the second degree (Penal Law § 160.10 [1]). We reject defendant's contention that County Court abused its discretion in denying his motion for recusal. "Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal . . . [and a] court's decision in this respect may not be overturned unless it was an abuse of discretion" (*People v Moreno*, 70 NY2d 403, 405-406; *see People v Williams*, 66 AD3d 1440, 1441-1442, *lv denied* 13 NY3d 911). Moreover, the court was not obligated to recuse itself on the ground that it had presided over the trial of defendant's codefendant (*see People v Bennett*, 238 AD2d 898, 899-900, *lv denied* 90 NY2d 890, *cert denied* 524 US 918).

Defendant further contends that his indelible right to counsel was violated because he was represented on unrelated charges at the time he was questioned by the police with respect to the present offense. We reject that contention. "[D]efendant was not in custody on the unrelated charge[s] for which he had previously invoked his right to counsel, and thus he did not have a derivative right to counsel with respect to the [robbery] charge" (*People v Mantor*, 96 AD3d 1645, 1646, *lv denied* 19 NY3d 1103; *see People v Steward*, 88 NY2d 496, 500-502, *rearg denied* 88 NY2d 1018). Defendant's contention that the court abused its discretion in denying his request for an

adjournment of the trial in order to obtain a transcript of his codefendant's trial is without merit, particularly given that the transcript might never be available due to the serious illness of the court reporter who transcribed the codefendant's trial. " 'The court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice' " (*People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956; *see People v Arroyo*, 161 AD2d 1127, 1127, *lv denied* 76 NY2d 852), which was not established here.

Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence because he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit. 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, acting with his codefendant who was actually present, forcibly stole cocaine and money from the respective victims (*see People v Leggett*, 101 AD3d 1694, 1694; *see generally People v Danielson*, 9 NY3d 342, 349; *People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that, although a different result would not have been unreasonable, the jury did not fail to give the conflicting evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

We have reviewed defendant's remaining contentions and conclude that none requires modification or reversal of the judgment.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

109

KA 11-00942

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALFONZO QUINNEY, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Erie County Court (Michael F. Pietruszka, J.), rendered November 17, 2010. The resentence imposed a period of postrelease supervision.

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

Memorandum: Defendant appeals from a resentence pursuant to which County Court added a mandatory period of postrelease supervision (PRS) to the sentence previously imposed on his conviction, following a jury trial, of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Contrary to the contention of defendant, the court did not violate his due process rights during resentencing when it did not reevaluate the term of incarceration previously imposed. We note that, when defendant was originally sentenced, the court was required to impose a five-year period of PRS (*see* § 70.45 [1], [2]) and, by failing to do so, committed a *Sparber* error (*see People v Lingle*, 16 NY3d 621, 629; *see generally People v Sparber*, 10 NY3d 457, 468-471). Resentencing following a *Sparber* error "is limited to remedying [the] specific procedural error–i.e., . . . mak[ing] the required pronouncement" of PRS (*Lingle*, 16 NY3d at 635 [internal quotation marks omitted]). Thus, "[t]he court . . . was bound to reimpose the original sentence, aside from the addition of any required period of postrelease supervision" (*People v Savery*, 90 AD3d 1505, 1506, *lv denied* 18 NY3d 928).

Defendant's further challenge to the severity of the sentence is not properly before us. "Where, as here, defendant appeals from a resentence conducted to address an error in failing to impose a period of [PRS], this Court is without authority to reduce the period of incarceration imposed" (*People v Condes*, 100 AD3d 1552, 1553; *see Lingle*, 16 NY3d at 635).

Finally, we have reviewed defendant's remaining contentions and conclude that none requires modification or reversal of the resentence.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

110

KA 11-01915

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL A. LUDWIG, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered September 16, 2011. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child.

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 predatory sexual assault against a child (Penal Law § 130.96), defendant contends that he was denied a fair trial by the prosecutor's references during her opening statement to prior consistent statements of the victim and by the prosecutor's bolstering of the victim's credibility through the elicitation of those prior consistent statements from five witnesses. Defendant's contention is preserved for our review only with respect to the testimony of two of those witnesses (*see* CPL 470.05 [2]). In any event, it is without merit. Two of the witnesses at issue were caseworkers who did not give any testimony regarding the victim's disclosures, and their testimony regarding her demeanor when they raised the abuse allegations with her was not improperly admitted (*see People v Shepherd*, 83 AD3d 1298, 1300, *lv denied* 17 NY3d 809). We conclude that the testimony of the remaining witnesses at issue, including the victim, did not constitute improper bolstering inasmuch as the evidence was not admitted for its truth (*see People v Rosario*, 100 AD3d 660, 661; *People v Burgos*, 90 AD3d 1670, 1671-1672, *lv denied* 19 NY3d 862). Rather, the evidence was admitted to explain how the victim eventually disclosed the abuse and how the investigation started (*see People v Galloway*, 93 AD3d 1069, 1072, *lv denied* 19 NY3d 996; *People v Gregory*, 78 AD3d 1246, 1246-1247, *lv denied* 16 NY3d 831; *People v Rich*, 78 AD3d 1200, 1202, *lv denied* 17 NY3d 799). Inasmuch as the testimony from the relevant witnesses was proper, defendant's

further contention that he was denied effective assistance of counsel based on defense counsel's failure to object to the testimony regarding the victim's prior consistent statements and the prosecutor's opening statement is without merit (*see People v Bernardez*, 85 AD3d 936, 938, *lv denied* 17 NY3d 857; *see also People v Hyatt*, 2 AD3d 749, 749-750, *lv denied* 1 NY3d 629).

Defendant also contends that County Court erred in precluding his mother from testifying about a prior inconsistent statement of the victim, i.e., that she heard the victim say that she would only disclose what her mother told her to disclose (inconsistent statement testimony). To the extent that defendant contends that the preclusion of the inconsistent statement testimony denied him his constitutional right to present a defense, that contention is not preserved for our review (*see People v Lane*, 7 NY3d 888, 889; *People v Castor*, 99 AD3d 1177, 1181; *People v Metellus*, 54 AD3d 601, 602, *lv denied* 11 NY3d 899). To the extent that defendant contends that the inconsistent statement testimony was admissible to impeach the victim's credibility and to establish that the victim had a reason to fabricate the allegations against defendant, that contention is also not preserved for our review (*People v Marthone*, 281 AD2d 562, 562, *lv denied* 96 NY2d 904). When the People objected to the inconsistent statement testimony on hearsay grounds, defense counsel was unable to articulate an exception to the hearsay rule (*see generally People v Lyons*, 81 NY2d 753, 754). We decline to exercise our power to review the contentions regarding the inconsistent statement testimony as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "[N]othing in the record suggests that the victim was 'so unworthy of belief as to be incredible as a matter of law' or otherwise tends to establish defendant's innocence of [the] crime[] . . . , and thus it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Woods*, 26 AD3d 818, 819, *lv denied* 7 NY3d 765).

Defendant failed to preserve for our review his further contention that the sentence of 16 years to life imprisonment constitutes cruel and unusual punishment inasmuch as the maximum sentence for a crime with identical elements, i.e., course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), is 25 years (*see People v Verbitsky*, 90 AD3d 1516, 1516, *lv denied* 19 NY3d 868; *People v Wright*, 85 AD3d 1642, 1644, *lv denied* 17 NY3d 863). In any event, we reject that contention (*see People v Holmquist*, 5 AD3d 1041, 1041-1042, *lv denied* 2 NY3d 800; *see generally People v Thompson*, 83 NY2d 477, 479-480; *People v Lawrence*, 81 AD3d 1326, 1326-1327, *lv denied* 17 NY3d 797), as well as his contention that the sentence is unduly harsh or severe. Finally, defendant did not object to the order of protection at sentencing and thus failed to preserve for our review his contention that the court failed to comply with CPL 530.12 (5) by not stating its reasons for issuing the order

of protection (*see People v Kulyeshie*, 71 AD3d 1478, 1479, *lv denied* 14 NY3d 889). 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]).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

117

CA 12-01437

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

MARK HOGAN AND ELIZABETH HOGAN, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF JACK A. HOGAN, AN INFANT, AND ITHACA G. HOGAN, AN INFANT, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DAVID VANDEWATER, ET AL., DEFENDANTS, WILBUR L. STANFORD, JR. AND SUZANNE STANFORD, DEFENDANTS-APPELLANTS.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (KELLY G. COBLE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Lewis County (Charles C. Merrell, A.J.), entered November 8, 2011. The order, among other things, denied the motion of defendants Wilbur L. Stanford, Jr. and Suzanne Stanford for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Lewis County, for further proceedings in accordance with the following Memorandum: Plaintiffs commenced this action seeking declaratory and injunctive relief as well as damages for excessive use of a right-of-way, harassment, and false imprisonment. Wilbur L. Stanford, Jr. and Suzanne Stanford (defendants) served discovery demands that included a request for interrogatories, combined demands, and a demand for documents. After plaintiffs failed to respond to their discovery demands, defendants moved to compel plaintiffs to respond or, alternatively, to preclude plaintiffs from offering evidence at trial. Supreme Court ordered that plaintiffs were precluded from offering evidence at trial unless they responded to defendants' discovery demands within 20 days following the service of a copy of the order with notice of entry (preclusion order). When plaintiffs only partially complied with the preclusion order, defendants moved for summary judgment dismissing the complaint against them and, by the order on appeal, the court denied the motion in its entirety. We conclude that the court should have granted that part of the motion for summary judgment dismissing those claims for which plaintiffs did not submit evidence in response to the preclusion order.

Plaintiffs submitted interrogatories that were not sworn as

required by CPLR 3133 (b) (*see Kyung Soo Kim v Goldmine Realty, Inc.*, 73 AD3d 709, 710). Additionally, plaintiffs only partially complied with the combined demands and demand for documents. The preclusion order "was self-executing and [plaintiffs'] 'failure to produce [requested] items on or before the date certain' rendered it 'absolute' " (*Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827, 830; *see Rothman v Westfield Group*, 101 AD3d 703, 704; *Burton v Matteliano*, 98 AD3d 1248, 1250). Thus, plaintiffs are precluded from introducing any evidence at trial in support of their claims that was not submitted in response to the discovery demands (*see generally Wilson*, 10 NY3d at 830). Although it is undisputed that plaintiffs complied in part with the discovery demands such that defendants' motion should not be granted in its entirety, we are unable to discern on the record before us which parts of the complaint survive that motion. We therefore modify the order by granting the motion in part, and we remit the matter to Supreme Court to determine which parts of the complaint shall survive the motion.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

121

CA 12-00081

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

JOHN HATZFELD, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 118925.)

JOHN HATZFELD, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered October 19, 2011. The order granted the motion of defendant to dismiss the claim and dismissed the claim.

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

Memorandum: In this personal injury and medical malpractice action, claimant appeals from an order that, inter alia, granted defendant's motion to dismiss the claim on the grounds that the negligence claims were untimely and that claimant failed to state a cause of action for medical malpractice. Although claimant timely filed a written notice of intention to file a claim for the alleged negligence of defendant based upon an incident that occurred on March 5, 2008 in which claimant fell from his upper bunk at the Cayuga Correctional Facility, he failed to comply with Court of Claims Act § 10 (3) because he did not file the claim with respect to that incident until September 10, 2010, more than two years after the claim's accrual. "Failure to comply with either the filing or service provisions of the Court of Claims Act results in a lack of subject matter jurisdiction requiring dismissal of the claim" (*Tooks v State of New York*, 40 AD3d 1347, 1348, *lv denied* 9 NY3d 814). The Court of Claims therefore properly dismissed the claim insofar as it is based on the March 5, 2008 incident (*see id.*). Similarly, the court properly dismissed the claim insofar as claimant alleged that he was negligently transported to the hospital on September 16, 2008 inasmuch as he failed to file a notice of intention to file a claim or a claim with respect to that incident within 90 days after the claim's accrual (*see* § 10 [3]; *see also Wilson v State of New York*, 61 AD3d 1367, 1368).

Contrary to the contention of claimant, the continuous treatment

doctrine does not render his negligence claims timely. That doctrine applies only to an "action for medical, dental or podiatric malpractice" (CPLR 214-a). Also, although we agree with claimant that Court of Claims Act § 10 (6) permits a court to allow a claimant to file a late claim, claimant seeks that relief for the first time on appeal, and thus his contention that he should be afforded such relief is not properly before us (*see A.F. v State of New York*, 60 AD3d 1222, 1223; *Calderazzo v State of New York*, 74 AD2d 954, 954-955; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

With respect to that part of the claim alleging medical malpractice, we conclude that claimant failed to allege that there was a deviation from the standard of care by the healthcare providers or that any such deviation caused his injuries. The court therefore properly dismissed the claim to that extent as well (*see Parker v State of New York*, 242 AD2d 785, 786).

Finally, claimant contends for the first time on appeal that defendant's motion to dismiss was untimely, and thus that contention is not properly before us (*see Ciesinski*, 202 AD2d at 985).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

127

KA 98-05247

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAM CHINN, III, DEFENDANT-APPELLANT.

SAM CHINN, III, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (J. Kevin Mulroy, J.), rendered July 23, 1997. The judgment convicted defendant, upon his plea of guilty, of murder in the first degree and murder in the second degree.

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

Memorandum: Defendant appeals pro se from a judgment convicting him upon his plea of guilty of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]) and murder in the second degree (§ 125.25 [1]). We reject defendant's contention that his waiver of the right to appeal was invalid. "[T]he record establishes that he knowingly, intelligently and voluntarily waived his right to appeal as a condition of the plea bargain" (*People v Hicks*, 89 AD3d 1480, 1480, *lv denied* 18 NY3d 924), and County Court " 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*id.*). The record also establishes that defendant "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*id.* at 1481 [internal quotation marks omitted]).

Defendant further contends that his plea was involuntarily entered due to coercive statements made to him by the court. Although that contention survives the valid waiver of the right to appeal and is preserved for our review (*cf. People v Williams*, 91 AD3d 1299, 1299; *People v Moore*, 59 AD3d 983, 984, *lv denied* 12 NY3d 857), we conclude that defendant's "plea was knowingly, voluntarily, and intelligently entered" (*People v Knoxsah*, 94 AD3d 1505, 1505-1506; *see generally People v Shubert*, 83 AD3d 1577, 1578). Defendant's "responses to County Court's inquiries were sufficient to establish both his guilt and that the plea as a whole was knowing, intelligent and voluntary" (*People v Davis*, 84 AD3d 1645, 1646, *lv denied* 17 NY3d

815). Although defendant may have decided to plead guilty and be sentenced to life without parole out of fear that he would be sentenced to death if convicted after trial, that decision was a consequence of his own actions, having killed two people and confessing those crimes to the police in writing and on videotape. It cannot be said that the court, by advising defendant of the maximum punishment for capital murder, thereby coerced him into pleading guilty.

Defendant's contention "that exculpatory evidence was improperly withheld from him" and thus that there was a *Brady* violation is raised for the first time on appeal and therefore is unpreserved for our review (*People v Hayes*, 71 AD3d 1187, 1189, *lv denied* 15 NY3d 852, *reconsideration denied* 15 NY3d 921; *see People v Johnson*, 60 AD3d 1496, 1497, *lv denied* 12 NY3d 926). Moreover, defendant forfeited any such contention by pleading guilty (*see People v Kidd*, 100 AD3d 779, 779; *People v Philips*, 30 AD3d 621, 621, *lv denied* 8 NY3d 949, *reconsideration denied* 8 NY3d 989; *People v Knickerbocker*, 230 AD2d 753, 753-754, *lv denied* 89 NY2d 943). In any event, defendant's contention lacks merit, inasmuch as the record establishes that no arguably exculpatory evidence was withheld from defendant prior to the entry of his plea of guilty.

Defendant further contends that this Court's rules imposing the burden of preparing the appellate record on defendants-appellants are unconstitutional and that, as a result, he has been denied a fair opportunity for appellate review. That contention is encompassed by defendant's waiver of the right to appeal (*see generally People v Muniz*, 91 NY2d 570, 574) and, in any event, lacks merit. Similarly, defendant's waiver of the right to appeal "encompasses his challenges to the court's suppression rulings" (*People v Mitchell*, 93 AD3d 1173, 1174, *lv denied* 19 NY3d 999; *see People v Kemp*, 94 NY2d 831, 833). We note in any event that, "[r]egardless of whether defendant made a valid waiver of his right to appeal, . . . [his] argument[s] concerning the suppression hearing [are] unavailing" (*People v Caviness*, 95 AD3d 622, 622, *lv denied* 19 NY3d 995).

Defendant failed to preserve for our review his contention that the integrity of the suppression hearing was compromised because the prosecutor improperly coached one of his suppression hearing witnesses and the suppression court failed to maintain impartiality (*see generally People v Martin*, 96 AD3d 1637, 1638, *lv denied* 19 NY3d 998). In any event, there is no indication in the record that any suppression witness was improperly prepared to testify or that the court was biased. Further, defendant's contention that the indictment was defective because the People improperly re-presented the case to the grand jury to obtain first degree murder charges was forfeited by his guilty plea (*see People v Batista*, 299 AD2d 270, 270, *lv denied* 99 NY2d 626; *see also People v Mercer*, 81 AD3d 1159, 1160, *lv denied* 19 NY3d 999), and is also precluded by his waiver of the right to appeal (*see Mercer*, 81 AD3d at 1160; *People v Buckler*, 80 AD3d 889, 890, *lv denied* 17 NY3d 804).

Finally, defendant's contentions that he was denied his constitutional right to a speedy trial and his due process right to prompt prosecution survive the plea and waiver of the right to appeal (*see People v Cain*, 55 AD3d 1271, *lv denied* 11 NY3d 896), but they are unpreserved for our review because defendant "failed to move to dismiss the indictment on those grounds" (*People v Smith*, 48 AD3d 1095, 1096, *lv denied* 10 NY3d 870; *see People v Kemp*, 270 AD2d 927, 927, *lv denied* 95 NY2d 836). In any event, defendant's contentions lack merit. Defendant was indicted less than three months after the murders, and any delay after indictment was largely due to voluminous pretrial motions filed by the defense. In fact, defendant moved pro se to extend the time to file motions. A suppression hearing was expeditiously conducted, and further defense motions were made and decided. Although defendant was incarcerated between the time of his arrest on November 16, 1995 and his plea on July 2, 1997, that delay was not inordinate given that this was a capital case, and there is no evidence that the defense was impaired by reason of any delay (*see generally People v Decker*, 13 NY3d 12, 14-16; *People v Taranovich*, 37 NY2d 442, 445).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

128

KA 10-00386

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY FUDGE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANTHONY FUDGE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 14, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, unlawful fleeing a police officer in a motor vehicle in the third degree, resisting arrest, criminal possession of a controlled substance in the seventh degree and reckless driving.

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, inter alia, assault in the second degree (Penal Law § 120.05 [3]), defendant contends that he was denied effective assistance of counsel. We reject that contention. While defense counsel need not support a defendant's pro se motion for the assignment of new counsel, a defendant is denied the right to counsel when defense counsel becomes a witness against the defendant by taking a position adverse to the defendant in the context of such a motion (*see e.g. People v Kirkland*, 68 AD3d 1794, 1795; *People v Okolo*, 35 AD3d 1272, 1283, *lv denied* 8 NY3d 925). Here, however, the brief defense of her own performance by defendant's attorney did not create a prejudicial conflict (*see Okolo*, 35 AD3d at 1283; *People v Walton*, 14 AD3d 419, 420, *lv denied* 5 NY3d 796). Defendant failed to preserve for our review his further contention that he was deprived of his right to a fair trial because the court improperly denigrated defense counsel in the presence of the jury (*see People v Charleston*, 56 NY2d 886, 887-888). In any event, we conclude that defendant's contention is without merit (*cf. People v Lynch*, 60 AD3d 1479, 1481, *lv denied* 12 NY3d 926).

With respect to defendant's challenge to the severity of the sentence, we note that, to the extent defendant contends that he was improperly penalized for asserting his right to a trial, that contention is not preserved for our review (*see People v Griffin*, 48 AD3d 1233, 1236-1237, *lv denied* 10 NY3d 840; *People v Irrizarry*, 37 AD3d 1082, 1083, *lv denied* 8 NY3d 946; *People v Green*, 35 AD3d 1211, 1211, *lv denied* 8 NY3d 985) and, in any event, that contention lacks merit (*see Griffin*, 48 AD3d at 1236-1237). Moreover, the sentence imposed is not unduly harsh or severe.

Finally, we have reviewed defendant's contentions raised in his pro se supplemental brief and conclude that they are unpreserved for our review (*see* CPL 470.05 [2]), and in any event are without merit.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

129

KA 11-00328

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY J. ALLEN, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered December 10, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), burglary in the second degree (two counts) and robbery in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts each of murder in the second degree (Penal Law § 125.25 [3] [felony murder]), burglary in the second degree (§ 140.25 [1] [b], [c]), and robbery in the first degree (§ 160.15 [1], [3]). The conviction arises out of an incident during which defendant, who resided in a group home for juveniles, killed a staff member at the group home by striking her in the head multiple times with a table leg. Defendant then broke into the staff office of the group home and stole money and car keys, among other items. Defendant, his codefendant, and a third resident of the group home fled in a van belonging to the group home before being apprehended at a bus station.

We reject defendant's contention that County Court erred in failing to suppress his statement to the police. The testimony of the police officer who interviewed defendant following his apprehension, which was consistent with a videotape of the interview, established that defendant was properly advised of his *Miranda* rights and that he voluntarily waived them before giving a statement to the police (*see People v Ninham*, 174 AD2d 1043, 1043-1044).

We reject defendant's further contention that the court erred in constructively amending the indictment to charge that defendant not only acted in concert with a named codefendant, but also that he may

have acted in concert with "others" (*see People v Christie*, 210 AD2d 497, 497; *see also People v Dorfeuille*, 91 AD3d 1023, 1023-1024, *lv denied* 19 NY3d 996; *People v Roseboro*, 182 AD2d 784, 785). Defendant's contention that the amendment changed the theory of the prosecution is erroneous inasmuch as "[w]hether a defendant is charged as a principal or an accomplice to a crime has no bearing on the theory of the prosecution" (*People v Rivera*, 84 NY2d 766, 769; *see People v Duncan*, 46 NY2d 74, 79-80, *rearg denied* 46 NY2d 940, *cert denied* 442 US 910, *rearg dismissed* 56 NY2d 646). Indeed, the amendment merely reflected a variation in the proof that was presented by defendant (*see People v Spann*, 56 NY2d 469, 473).

We reject defendant's further contention concerning the court's refusal to charge criminal trespass in the third degree (Penal Law § 140.10) and petit larceny (§ 155.25) as lesser included offenses of burglary and robbery, respectively. Contrary to defendant's contention with respect to criminal trespass, there is no reasonable view of the evidence to support the theory that defendant broke into the staff office with the intent to retrieve his own money and no one else's, or that he formed an unlawful intent to commit a crime after he entered the office (*see People v Blim*, 63 NY2d 718, 720; *People v Harris*, 50 AD3d 1608, 1608, *lv denied* 10 NY3d 959; *People v Mercado*, 294 AD2d 805, 805, *lv denied* 98 NY2d 731). Contrary to defendant's contention with respect to petit larceny, in light of the overwhelming evidence of a forcible taking, there is no reasonable view of the evidence to warrant such a charge (*see People v Sulli*, 81 AD3d 1309, 1310, *lv denied* 17 NY3d 802; *People v Bowman*, 79 AD3d 1368, 1369-1370, *lv denied* 16 NY3d 828).

We likewise reject defendant's contention that the court erred in failing to instruct the jury on Penal Law § 20.10 inasmuch as there is no evidence to support a finding that defendant's conduct was "necessarily incidental" to the crimes perpetrated (*id.*; *see People v Lee*, 56 AD3d 1250, 1251-1252, *lv denied* 12 NY3d 818). Although we agree with defendant's further contention that it may have been helpful if the court had expressly instructed the jury that "[t]he testimony of one accomplice cannot be used to corroborate the testimony of another" (CJI2d[NY] Accomplice as a Matter of Fact n 5), we conclude that the charge as given adequately conveyed that principle (*see generally People v Gomez*, 16 AD3d 280, 280-281, *lv denied* 5 NY3d 789; *People v Konigsberg*, 137 AD2d 142, 146-147, *lv denied* 72 NY2d 912, *reconsideration denied* 72 NY2d 1046; *People v Watson*, 134 AD2d 871, 871, *lv denied* 71 NY2d 904).

Even assuming that the other juvenile residents who were present at the time of the incidents were accomplices, we conclude that their testimony was adequately corroborated by, inter alia, defendant's admissions to the police (*see People v Burgin*, 40 NY2d 953, 954; *People v Dawson*, 249 AD2d 977, 978, *lv denied* 93 NY2d 872); DNA and blood spatter evidence connecting defendant to the victim and the weapon (*see People v Mitchell*, 68 AD3d 1019, 1019, *lv denied* 14 NY3d 890; *People v Swift*, 241 AD2d 949, 949, *lv denied* 91 NY2d 881, *reconsideration denied* 91 NY2d 1013); evidence that, prior to the

commission of the crimes, defendant asked people in the neighborhood for a baseball bat or a knife "to take care of somebody"; and evidence that defendant, codefendant, and a third resident were apprehended at a bus station and defendant had several hundred dollars on his person (*see generally People v Exum*, 66 AD3d 1336, 1337).

Contrary to defendant's further contention, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We reject defendant's contention, improperly raised for the first time in his reply brief (*see generally People v Sponburgh*, 61 AD3d 1415, 1416, *lv denied* 12 NY3d 929), that the testimony of the eyewitnesses was incredible as a matter of law (*see People v Watkins*, 63 AD3d 1656, 1657, *lv denied* 13 NY3d 750; *People v Ptak*, 37 AD3d 1081, 1082, *lv denied* 8 NY3d 949).

The court properly denied defendant's application for youthful offender treatment because defendant's conviction of a class A-I felony rendered him ineligible for youthful offender status (*see* CPL 720.10 [2] [a] [i]; Penal Law § 125.25 [3]; *People v Glover*, 128 AD2d 636, 637, *lv denied* 70 NY2d 711). Finally, we conclude that the sentence is not unduly harsh or severe in light of the depraved nature of defendant's conduct and his refusal to accept responsibility.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

135

CA 12-01377

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

WILLIAM F. MARTIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UNITED PARCEL SERVICE OF AMERICA, INC.,
DEFENDANT-APPELLANT.

GREENBERG TRAURIG, LLP, FLORHAM PARK, NEW JERSEY (WENDY JOHNSON LARIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

GARY H. COLLISON, LIVERPOOL, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, A.J.), entered November 17, 2011. The order, among other things, denied defendant's motion 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 employment discrimination (*see* Executive Law § 296 [1], [3]), and defendant thereafter moved for summary judgment dismissing the complaint. Supreme Court properly denied the motion. Contrary to defendant's initial contention, it is not entitled to summary judgment as a matter of law on the ground that plaintiff is not able to prove all the elements of the causes of action in the complaint. "It is well established . . . that '[a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof' " (*Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364, quoting *Dodge v City of Hornell Indus. Dev. Agency*, 286 AD2d 902, 903; *see Brown v Smith*, 85 AD3d 1648, 1649).

We reject defendant's further contention that the court erred in concluding that there are triable issues of fact with respect to whether plaintiff could perform the essential elements of his prior position as a center manager. Assuming, arguendo, that defendant met its initial burden of establishing that "plaintiff could not perform the essential functions of the position of a" center manager (*McCarthy v St. Francis Hosp.*, 41 AD3d 794, 794, *lv denied* 9 NY3d 813), we conclude that there are triable issues of fact "whether, 'upon the provision of reasonable accommodations, [plaintiff was qualified to hold his position and to] perform [ ] in a reasonable manner' the essential function of that position" (*Dietrich v E.I. du Pont de*

Nemours & Co., 38 AD3d 1335, 1335, quoting Executive Law § 292 [21]). "[U]nder the broad[ ] protections afforded by the State [Human Rights Law], the first step in providing a reasonable accommodation is to engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested" (*Phillips v City of New York*, 66 AD3d 170, 176). Thus, "[t]he need for individualized inquiry when making a determination of reasonable accommodation is deeply embedded in the fabric of disability rights law . . . [E]mployers (and courts) must make a clear, fact-specific inquiry about each individual's circumstance" (*id*. at 175). In an employment discrimination case based on allegations of disability discrimination, "summary judgment is not available where there is a genuine dispute as to whether the employer has engaged in a good faith interactive process" (*id.* at 176; *see Taylor v Phoenixville School Dist.*, 184 F3d 296, 318; *cf. Romanello v Intesa Sanpaolo S.p.A.*, 97 AD3d 449, 451). Here, the court properly determined that defendant failed to eliminate all triable issues of fact with respect to, inter alia, whether defendant engaged in an interactive process to ascertain plaintiff's needs and whether a reasonable accommodation was possible. Finally, we conclude that defendant's remaining contentions are without merit, or they are raised for the first time on appeal and thus are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

136

CA 12-00963

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

IN THE MATTER OF THE ESTATE OF JOHN G. ALIBRANDI, DECEASED.

MARY BETH ALIBRANDI, PETITIONER-RESPONDENT;

SUSETTE WISE, OBJECTANT-APPELLANT.

MEMORANDUM AND ORDER

MATTHEW D. HUNTER, FOREST HILLS, FOR OBJECTANT-APPELLANT.

THURSTON LAW OFFICE, P.C., AUBURN (EARLE E. THURSTON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Cayuga County (Mark H. Fandrich, S.), entered January 19, 2012. The decree, among other things, admitted decedent's will to probate.

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

Memorandum: Preliminary letters testamentary were issued to petitioner, the daughter of decedent, upon her petition seeking to probate decedent's will. Objectant, decedent's granddaughter, filed objections to the probate of the will, alleging, inter alia, that decedent lacked testamentary capacity and that the will was procured by undue influence on the part of petitioner. Surrogate's Court granted petitioner's motion for summary judgment seeking dismissal of the objections and, inter alia, admitted decedent's will to probate. We affirm.

"It is the indisputable rule in a will contest that '[t]he proponent has the burden of proving that the testator possessed testamentary capacity and the [Surrogate] must look to the following factors: (1) whether []he understood the nature and consequences of executing a will; (2) whether []he knew the nature and extent of the property []he was disposing of; and (3) whether []he knew those who would be considered the natural objects of h[is] bounty and h[is] relations with them' " (*Matter of Kumstar*, 66 NY2d 691, 692, *rearg denied* 67 NY2d 647; *see Matter of Castiglione*, 40 AD3d 1227, 1228, *lv denied* 9 NY3d 806; *Matter of McCloskey*, 307 AD2d 737, 738, *lv denied* 100 NY2d 516). " 'Mere proof that the decedent suffered from old age, physical infirmity and . . . dementia when the will was executed is not necessarily inconsistent with testamentary capacity and does not alone preclude a finding thereof, as the appropriate inquiry is whether the decedent was lucid and rational at the time the will was

made' " (*Matter of Williams*, 13 AD3d 954, 957, *lv denied* 5 NY3d 705; *see Matter of Makitra*, 101 AD3d 1579, 1580; *Matter of Murray*, 49 AD3d 1003, 1004). "Where there is direct evidence that the decedent possessed the understanding to make a testamentary disposition, even 'medical opinion evidence assumes a relatively minor importance' " (*Makitra*, 101 AD3d at 1580).

Here, we conclude that, contrary to the contention of objectant, petitioner met her initial burden of establishing decedent's testamentary capacity through the submission of, inter alia, the self-executing affidavits and the SCPA 1404 hearing testimony of the two witnesses to the will's execution, decedent's longtime attorney and a paralegal with the attorney's law firm; the report from a contemporaneous neurological examination of decedent; and the results of decedent's September 2006 Mini-Mental State Examination (MMSE) (*see Murray*, 49 AD3d at 1004-1005; *Castiglione*, 40 AD3d at 1228; *Williams*, 13 AD3d at 956; *see generally Matter of Frank*, 249 AD2d 893, 894, *lv denied* 92 NY2d 807). The evidence offered by petitioner established that decedent's will was the culmination of several months of discussions among decedent, his financial advisors, and his longtime attorney. The attorney stated in an affidavit that, throughout those discussions, decedent "appeared to be of sound mind [and] memory, fully aware of the value of his estate and the natural objects of his bounty, focused on and in complete understanding of what he was doing and that it was his intent to do so[, and] . . . in all respects fully competent to make a will." According to the attorney, decedent showed no signs of lack of cognitive ability or memory loss during that time period. The paralegal, who also had known decedent for a number of years, similarly stated in an affidavit that it appeared that decedent was of sound mind and competent when he executed the will, and that decedent understood what he was signing (*see Williams*, 13 AD3d at 956; *see also Kumstar*, 66 NY2d at 692; *Castiglione*, 40 AD3d at 1228).

Decedent lived independently and made his own legal and financial decisions from the time that the will was executed in November 2006 until March 2008, when he moved in with petitioner because of his declining eyesight. The patient history from decedent's November 2006 neurological examination, which took place just weeks before the will was executed, states that decedent took care of his own hygiene and, with assistance due to his vision loss, his finances. In the will, decedent divided his estate equally among his four then-living children. According to the attorney, decedent did not include objectant, a child of decedent's predeceased daughter, in the will because he "had already made gifts to her." Indeed, objectant confirmed that she had "borrowed" money from decedent in the past. Further, objectant testified that there was a breakdown in her relationship with decedent approximately one year before he executed the will. Thus, the record reflects that decedent " 'knew those who would be considered the natural objects of h[is] bounty and h[is] relations with them' " (*Kumstar*, 66 NY2d at 692; *see Castiglione*, 40 AD3d at 1228).

In opposition to the motion, objectant relied primarily upon

decedent's Alzheimer's diagnosis, the November 2006 neurological examination, and his MMSE results, none of which raises an issue of fact as to testamentary capacity (*see Murray*, 49 AD3d at 1005; *Castiglione*, 40 AD3d at 1228; *Williams*, 13 AD3d at 956-957). As noted above, a mere diagnosis of Alzheimer's, dementia, or age-related memory deficits is not necessarily inconsistent with testamentary capacity because the relevant inquiry is whether the decedent was competent at the time the will was executed (*see Makitra*, 101 AD3d at 1580; *Murray*, 49 AD3d at 1005; *Williams*, 13 AD3d at 957). Although the report from the neurological exam indicates that the 89-year-old decedent had been diagnosed with Alzheimer's and that his short-term memory had reportedly declined over the last several years, the report also states that decedent communicated normally, was alert and oriented, spoke articulately and fluently, clearly conveyed ideas, exhibited good eye contact, and interacted appropriately (*see Murray*, 49 AD3d at 1005; *Williams*, 13 AD3d at 956-957). There is nothing in the report to indicate that decedent was not rational, lucid, or competent. As for the MMSE, decedent scored two points above the cutoff for "mild" cognitive impairment. Thus, "having failed to provide evidentiary support for [objectant's] allegation that decedent was incompetent in [November 2006], Surrogate's Court properly granted summary judgment [on that issue] in petitioner's favor" (*Murray*, 49 AD3d at 1005; *see Castiglione*, 40 AD3d at 1228).

We likewise conclude that the Surrogate properly granted that part of petitioner's motion for summary judgment dismissing the undue influence objection. "A will contestant seeking to prove undue influence must show the exercise of a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the [decedent] to do that which was against [his] free will" (*Makitra*, 101 AD3d at 1581, quoting *Kumstar*, 66 NY2d at 693 [internal quotation marks omitted]). "Undue influence must be proved by evidence of a substantial nature . . . , e.g., by evidence identifying the motive, opportunity and acts allegedly constituting the influence, as well as when and where such acts occurred" (*Makitra*, 101 AD3d at 1581 [internal quotation marks omitted]). "Mere speculation and conclusory allegations, without specificity as to precisely where and when the influence was actually exerted, are insufficient to raise an issue of fact" (*Matter of Walker*, 80 AD3d 865, 867, *lv denied* 16 NY3d 711; *see Matter of Capuano*, 93 AD3d 666, 668; *see generally Matter of Greenwald*, 47 AD3d 1036, 1037-1038). Here, even assuming, arguendo, that objectant identified a motive and opportunity for petitioner to exert influence upon decedent, we conclude that "there is no direct evidence that petitioner did anything to actually influence decedent's distribution of [his] assets" (*Walker*, 80 AD3d at 868). The attorney testified that he never discussed decedent's will or estate matters with any family members during decedent's lifetime. Petitioner averred that she "had absolutely nothing to do with [decedent]'s legal and financial matters in particular as they pertain to his preparation, direction, and the execution of his [will]," and that she did not discuss the will with decedent or the attorney prior to its execution. Petitioner was not present when decedent executed the will, and both

the attorney and the paralegal stated in their respective affidavits that he did not appear to be under any restraint or duress at the time. Finally, objectant last saw or spoke to decedent more than a year before he executed the will, and she admitted at her deposition that she had no evidence of undue influence, "just a feeling."

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

137

CA 12-01114

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

LLORD BYRON BROOKS, III, FRANK FLAY,
RICHARD S. LAING, JR. AND FRANK WICKINS,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

AXA ADVISORS, LLC AND RICHARD JEFFREY JEROME,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

THE PEARL LAW FIRM, P.A., PITTSFORD (JASON J. KANE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

WINGET, SPADAFORA & SCHWARTZBERG, LLP, NEW YORK CITY (STEVEN E. MELLON OF COUNSEL), AND HODGSON RUSS LLP, BUFFALO, FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), dated September 1, 2011. The order granted in part the motion of defendants to dismiss the complaint.

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

Same Memorandum as in *Brooks v AXA Advisors, LLC* ([appeal No. 2] ___ AD3d ___ [Mar. 15, 2013]).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

138

CA 12-01116

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

LLORD BYRON BROOKS, III, FRANK FLAY,
RICHARD S. LAING, JR. AND FRANK WICKINS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

AXA ADVISORS, LLC AND RICHARD JEFFREY JEROME,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

THE PEARL LAW FIRM, P.A., PITTSFORD (JASON J. KANE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WINGET, SPADAFORA & SCHWARTZBERG, LLP, NEW YORK CITY (STEVEN E. MELLON OF COUNSEL), AND HODGSON RUSS LLP, BUFFALO, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), dated December 6, 2011. The order denied that part of plaintiffs' motion seeking leave to renew, granted that part of plaintiffs' motion seeking leave to reargue, and upon reargument, adhered to the court's prior determination.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants in its entirety and dismissing the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiffs, former employees of Niagara Mohawk Power Corporation, commenced this action seeking damages allegedly resulting from their purchases of a variable annuity upon the recommendation of defendant Richard Jeffrey Jerome, a financial consultant employed by defendant AXA Advisors, LLC. Those purchases were made between 1999 and 2003, and the instant action was commenced on April 4, 2011. The complaint asserted causes of action for fraud, negligence, breach of contract and breach of fiduciary duty. In lieu of serving an answer, defendants moved to dismiss the complaint contending, inter alia, that it was time-barred (*see* CPLR 3211 [a] [5]). Supreme Court granted the motion in part by dismissing as time-barred the fraud and breach of contract causes of action as asserted by all four plaintiffs, and by dismissing as time-barred the remaining two causes of action, for negligence and breach of fiduciary duty, only as asserted by two of the four plaintiffs. Plaintiffs moved for leave to renew and reargue defendants' motion, and the court granted reargument but denied

renewal. Upon reargument, the court adhered to its prior determination. We note at the outset that plaintiffs appealed from both the initial order in appeal No. 1 and the order issued upon reargument in appeal No. 2, while defendants cross-appealed only from the order in appeal No. 1. We exercise our discretion, however, to treat defendants' notice of cross appeal as one taken from the order in appeal No. 2 (*see e.g. Kanter v Pieri*, 11 AD3d 912, 912), and we dismiss plaintiffs' appeal from the order in appeal No. 1 (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985).

We conclude that the court properly granted that part of defendants' motion with respect to the fraud cause of action. The statute of limitations for fraud is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff[s] . . . discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213 [8]; *see* CPLR 203 [g]; *Sargiss v Magarelli*, 12 NY3d 527, 532). Although the accrual dates differ for each plaintiff, defendants established that the action was commenced more than six years from the dates of the alleged acts of fraud, thus shifting the burden to plaintiffs to show that the two-year discovery exception applies (*see Vilsack v Meyer*, 96 AD3d 827, 828; *Siegel v Wank*, 183 AD2d 158, 159). The record supports the court's determination that plaintiffs possessed knowledge of facts from which they reasonably could have discovered the alleged fraud soon after it occurred, and in any event more than two years prior to the commencement of the action (*see Giarratano v Silver*, 46 AD3d 1053, 1056; *Prestrandrea v Stein*, 262 AD2d 621, 622-623).

We further conclude that the court properly granted that part of defendants' motion with respect to the breach of contract cause of action (*see* CPLR 213 [2]). That cause of action accrued upon the alleged breach of contract by defendants, which occurred more than six years prior to the commencement of the action, regardless of whether the damage to plaintiffs was sustained later and plaintiffs were unaware of the breach at the time it occurred (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402-403).

The court also properly granted those parts of defendants' motion with respect to the negligence and breach of fiduciary duty causes of action insofar as they are asserted by plaintiffs Llord Byron Brooks, III and Frank Wickins, but the court should have granted those parts of defendants' motion with respect to the remaining two plaintiffs as well. We therefore modify the order in appeal No. 2 by granting defendants' motion in its entirety. Contrary to the court's determination, the negligence cause of action is not one alleging professional malpractice, inasmuch as defendants are not professionals for purposes of malpractice liability and the continuous representation toll of the three-year statute of limitations (*see* CPLR 214 [6]; *see generally Chase Scientific Research v NIA Group*, 96 NY2d 20, 28-29). Rather, the three-year limitations period for injury to property applies (*see* CPLR 214 [4]; *Chase Scientific Research*, 96 NY2d at 30). The negligence cause of action accrued on the dates of injury to plaintiffs (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94), which in

the case of each plaintiff occurred more than three years prior to the commencement of the action. Finally, the breach of fiduciary duty cause of action is time-barred as asserted by each plaintiff under both the three-year statute of limitations for injury to property (*see* CPLR 214 [4]; *Yatter v Morris Agency*, 256 AD2d 260, 261) and the six-year statute of limitations for fraud (*see* CPLR 213 [8]; *Kaufman v Cohen*, 307 AD2d 113, 119).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

140

CA 12-01393

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

JESSIE B. JACKSON, JR., PLAINTIFF-RESPONDENT,

V ORDER

JAMES A. SCHWAB AND NANCY I. SCHWAB,
DEFENDANTS-APPELLANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (GEORGE W. COLLINS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN J. FLAHERTY, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 15, 2011. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 9, 2012,

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

141

CA 12-00494

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

S. SHANE KHANJANI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NORMAN SCHREIBER, DEFENDANT-RESPONDENT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSGROVE LAW FIRM, BUFFALO (J. MICHAEL LENNON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered October 24, 2011. The judgment awarded the plaintiff money damages as against defendant.

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

Memorandum: The parties entered into a contract pursuant to which defendant was to sell a parcel of real property to plaintiff, but the sale was never completed. Plaintiff thereafter commenced this breach of contract action seeking, inter alia, loss-of-bargain damages. Plaintiff appeals from a judgment entered upon a jury verdict that, among other things, awarded damages to him based upon a finding that defendant had breached the contract. We reject the contention of plaintiff that Supreme Court erred in instructing the jury with respect to loss-of-bargain damages.

Among the terms of the contract was a provision stating that "[i]t is the understanding of the parties that at the present time, seller is not in title to the property. Seller is a first mortgage holder and the mortgage is in default. In the event that the title holder does not agree to signing over a deed in lieu of foreclosure, the seller will institute a foreclosure proceeding with the courts. Seller shall be able to provide good and clear title in accordance with this contract." Defendant was unable to provide "good and clear" title to the property because he could not procure a foreclosure deed and a nonparty tenant outbid him at the foreclosure sale.

At the conclusion of the trial, plaintiff asked the court to instruct the jury that plaintiff may recover loss-of-bargain damages where a vendor contracts to sell a parcel of property to which he or she does not then hold title, even in the absence of bad faith on the

part of the seller. Contrary to plaintiff's contention, the court properly denied his request. It is well settled that "[t]he vendee in a contract for the sale of land is not ordinarily entitled, upon breach, on failure to convey, to recover of the vendor damages measured by the goodness of his bargain or the financial benefit which would result from performance, and it is only when the vendor is for some reason chargeable with bad faith in the matter that recovery beyond nominal damages on that account can be had" (*Northridge v Moore*, 118 NY 419, 422). Thus, "[i]f a vendee knows of the inability of his vendor to convey the title he has undertaken to convey, the vendee's damages are not measurable by the loss of his bargain" (*Kessler v Rae*, 40 AD2d 708, 709; *see Diamond Cent. v Gilbert*, 13 AD2d 931, 931; *see generally Margraf v Muir*, 57 NY 155, 159-160). Here, inasmuch as the contract unequivocally provided that the seller did not have title to the property at the time the parties entered into the agreement, the court properly refused to give plaintiff's requested instruction on loss-of-bargain damages.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

142

CA 12-01317

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

LARRY J. LOMAGLIO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CARMEN M. LOMAGLIO, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered March 5, 2012. The order, insofar as appealed from, denied the motion of defendant for an order finding plaintiff in contempt and directing plaintiff to provide defendant with medical insurance coverage and granted that part of the cross motion of plaintiff to terminate his obligation to provide defendant with medical insurance coverage.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of plaintiff's cross motion seeking an order terminating his obligation to provide defendant with the same level of medical insurance coverage that he provided during the marriage is denied, that part of defendant's motion seeking an order directing plaintiff to provide defendant with that medical insurance coverage is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: In this post-divorce action, defendant wife moved by order to show cause for, inter alia, a determination that plaintiff husband is in contempt for failing to comply with a prior order of this Court (prior order) and for an order directing plaintiff to provide her with continued medical insurance coverage in accordance with the prior order (*see Lo Maglio v Lo Maglio*, 273 AD2d 823, *appeal dismissed* 95 NY2d 926). Plaintiff cross-moved for an order terminating his obligation to pay for defendant's medical insurance pursuant to Domestic Relations Law § 236 (B) (8) (a) and awarding him attorney's fees. Defendant contends on appeal that Supreme Court erred in denying her motion and in granting that part of plaintiff's cross motion seeking to terminate his obligation to provide defendant with medical insurance coverage.

We agree with defendant that the court erred in terminating plaintiff's obligation to provide her with medical insurance coverage inasmuch as our prior order requires plaintiff to provide her with

that coverage. As a general rule, the doctrine of res judicata bars relitigation of previously adjudicated disputes "even where further investigation of the law or facts indicates that the controversy has been erroneously decided, whether due to oversight by the parties or error by the courts" (*Matter of Reilly v Reid*, 45 NY2d 24, 28; *see Matter of Allstate Ins. Co. v Williams*, 29 AD3d 688, 690). As relevant here, "a final judgment of divorce settles the parties' rights pertaining not only to those issues that were actually litigated, but also to those that could have been litigated" (*Xiao Yang Chen v Fischer*, 6 NY3d 94, 100; *see Rainbow v Swisher*, 72 NY2d 106, 110; *Cudar v Cudar*, 98 AD3d 27, 31; *see generally Boronow v Boronow*, 71 NY2d 284, 286, 290-291). "[A]bsent unusual circumstances or explicit statutory authorization, the provisions of [such a] judgment are final and binding on the parties, and may be modified only upon direct challenge" (*Rainbow*, 72 NY2d at 110). Here, plaintiff did not take an appeal from our prior order, seek reargument of that order, or make a proper application to modify it. He is therefore foreclosed from collaterally attacking it in the context of this action (*see Jeannotte v Jeannotte*, 235 AD2d 711, 714; *Lippman v Lippman*, 204 AD2d 1057, 1057-1058; *see generally Cohen v Kinzler*, 222 AD2d 393, 394, *lv denied* 88 NY2d 802).

We therefore reverse the order insofar as appealed from, deny that part of plaintiff's cross motion seeking an order terminating his obligation to provide defendant with the same level of medical insurance coverage that he provided during the marriage, grant that part of defendant's motion seeking an order directing plaintiff to provide defendant with that medical insurance coverage, and remit the matter to Supreme Court for further proceedings on the remaining relief requested in defendant's motion.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

145

KA 11-02355

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAUNCEY K. DEXTER, DEFENDANT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (ELIZABETH ENSELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered August 1, 2011. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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 Cattaraugus County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of driving while intoxicated (DWI) as a class E felony (Vehicle and Traffic Law §§ 1192 [2]; 1193 [1] [c] [i]). Defendant was sentenced to an indeterminate term of 1 to 3 years of incarceration followed by a one-year period of conditional discharge with an ignition interlock device requirement. Contrary to the contention of defendant, his sentence is not unconstitutionally disproportionate to his offense. Although the Court of Appeals in *People v Broadie* (37 NY2d 100, 111, *cert denied* 423 US 950) recognized that "a sentence that is 'grossly disproportionate to the crime' may be considered cruel and unusual punishment" (*People v Holmquist*, 5 AD3d 1041, 1042, *lv denied* 2 NY3d 800), we conclude that this is not one of those rare cases described in *Broadie*. Defendant failed to preserve for our review his further contention that the imposition of consecutive sentences of imprisonment and conditional discharge with an ignition interlock device are unconstitutional multiple punishments under Penal Law § 60.21 and Vehicle and Traffic Law §§ 1193 and 1198 (*see People v Rivera*, 9 NY3d 904, 905; *see also People v Davidson*, 98 NY2d 738, 739-740), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Farrelly*, 92 AD3d 1290, 1291, *lv denied* 19 NY3d 996).

The sentence is not unduly harsh or severe, particularly in light of defendant's three prior felony DWI convictions (*see People v Edenholm*, 9 AD3d 892, 893). We note, however, that the one-year period of conditional discharge imposed by County Court is illegal inasmuch as Penal Law § 65.05 (3) (a) provides that such period "shall be" three years for felony offenses, and "[n]either County Court nor this Court possesses interest of justice jurisdiction to impose a sentence less than the mandatory statutory minimum" (*People v Clark*, 176 AD2d 1206, 1206-1207, *lv denied* 79 NY2d 854; *see generally People v Vidaurrazaga*, 100 AD3d 664, 665). " 'Although this issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180, *lv denied* 8 NY3d 983). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to afford defendant the opportunity to accept an amended lawful sentence or to withdraw his guilty plea and thus be restored to his preplea status (*see People v Eron*, 79 AD3d 1774, 1775-1776).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

146

KA 11-01849

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMAL COOKE, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered July 18, 2011. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant contends that County Court erred in denying his request for a downward departure from his presumptive risk level. Specifically, defendant contends that, because his sentence for the underlying sex offense did not include a period of postrelease supervision, it was determined that he is not a risk to the community, and the lack of postrelease supervision therefore constitutes a mitigating factor warranting a downward departure. We reject that contention. A downward departure from the presumptive risk level is warranted where "there exists a[] . . . mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]; *see People v Coffey*, 45 AD3d 658, 658). Inasmuch as defendant's release from prison without "official" supervision is a factor adequately taken into account by risk factor 14 (Release Environment: Supervision) of the Risk Assessment Instrument (RAI), it is not a mitigating factor warranting a downward departure (*see generally People v Riverso*, 96 AD3d 1533, 1534). Indeed, the RAI assesses more points to a defendant released without official supervision because "[s]trict supervision is essential when a sex offender is released into the community" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17). Additionally, we note that, although other law enforcement personnel

involved in defendant's criminal action may have determined that defendant could be released without supervision following his incarceration, that determination is not controlling on the SORA court's risk level determination (*see generally People v Jackson*, 70 AD3d 1385, 1386, *lv denied* 14 NY3d 714).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

151

KA 11-02375

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID C. RODMAN, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO, FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered July 7, 2011. The judgment convicted defendant, upon his plea of guilty, of grand larceny 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, upon his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [1]). We reject defendant's contention that County Court erred in sentencing him in absentia. Although a defendant has the right to be present at every material stage of trial (*see People v Ciaccio*, 47 NY2d 431, 436), including sentencing (*see* CPL 380.40 [1]), that right may be waived (*see People v Parker*, 57 NY2d 136, 139). "If a defendant fails to appear at sentencing, he or she may be deemed to have waived the right to be present only if the defendant was previously advised of the consequences of failing to appear at sentencing" (*People v Syrell*, 42 AD3d 947, 947-948; *see People v Major*, 68 AD3d 1244, 1245, *lv denied* 14 NY3d 772). "Even when . . . there has been a valid waiver, however, the sentencing court must, inter alia, inquire into the possibility of locating defendant within a reasonable period of time before it may exercise its discretion to sentence defendant in absentia" (*Syrell*, 42 AD3d at 948; *see Parker*, 57 NY2d at 142; *Major*, 68 AD3d at 1245).

Defendant does not dispute that he was informed of the consequences of his failure to appear at sentencing. Rather, defendant contends only that the court erred in imposing a sentence without first inquiring into the circumstances of his failure to appear (*see generally Parker*, 57 NY2d at 142). We reject that contention. After defendant pleaded guilty, the court adjourned the matter on several occasions based on defendant's failure to appear. Additionally, before imposing the sentence, the court inquired into

defense counsel's efforts to locate defendant. Under the circumstances presented here, we cannot conclude that the Court abused its discretion by sentencing defendant in absentia (*see People v Torra*, 8 AD3d 751, 751-752; *People v Howington*, 216 AD2d 960, 960, *lv denied* 86 NY2d 781).

Contrary to defendant's further contention, the record supports a determination that he wilfully failed to pay restitution prior to the sentencing date, and thus the court did not err in imposing an enhanced sentence based on that failure (*see generally People v Hassman*, 70 AD3d 716, 717-718). It is undisputed that defendant failed to comply with the conditions of the sentencing commitment, and the court specifically informed defendant at the time of the plea that, if he failed to appear at sentencing, he could be sentenced to an indeterminate term of 1a to 4 years' incarceration (*see People v Haran*, 72 AD3d 1289, 1289-1290). Moreover, on numerous occasions after he entered the plea, defendant requested additional time in which to make restitution payments in whole or in part and represented to the court that he had the means to do so, and the court granted defendant's requests. As a result, there was sufficient information for the court to determine that, " 'in the first instance, the defendant agreed to pay the restitution in order to obtain the benefits of a favorable plea, but knew at the time that he . . . would very likely be unable to satisfy the obligation' " (*People v Murphy*, 71 AD3d 1466, 1467, *lv denied* 15 NY3d 754; *see Hassman*, 70 AD3d at 718; *see generally People v Bassoff*, 51 AD3d 682, 683, *lv denied* 11 NY3d 734; *People v Almo*, 300 AD2d 503, 504, *lv denied* 99 NY2d 611, 612). Finally, defendant's valid waiver of the right to appeal with respect to both the conviction and sentence encompasses his contention that the sentence imposed is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255-256; *People v Hidalgo*, 91 NY2d 733, 737; *cf. People v Maracle*, 19 NY3d 925, 928).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

153

CAF 11-02352

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

IN THE MATTER OF CHRISTOPHER B., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHRISTOPHER B., SR., RESPONDENT-APPELLANT.

IN THE MATTER OF CHRISTOPHER B., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

CHRISTOPHER B., SR., RESPONDENT-APPELLANT.

BERNADETTE M. HOPPE, BUFFALO, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR CHRISTOPHER B., JR.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 3, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that the subject child is the child of a mentally ill parent.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to his son on the ground of mental illness. Contrary to the father's contention, we conclude that petitioner met its burden of demonstrating by clear and convincing evidence that the father is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4] [c]; *see* § 384-b [6] [a]; *Matter of Vincent E.D.G. [Rozzie M.G.]*, 81 AD3d 1285, 1285, *lv denied* 17 NY3d 703; *see also Matter of Darius B. [Theresa B.]*, 90 AD3d 1510, 1510). The unequivocal testimony of petitioner's expert witness, a psychologist, and other witnesses established that the father was so disturbed in his behavior, feeling, thinking and judgment that, if his son were returned to his custody, his son would be in danger of becoming a neglected child (*see* § 384-b

[6] [a]). Moreover, although the father has participated in several treatment programs, he has been unable to overcome his significant limitations.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

155

CA 12-01384

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

JENNIFER L. ABBOTT, ET AL.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TONAWANDA COKE CORPORATION, ET AL., DEFENDANTS,
AND JAMES DONALD CRANE, ALSO KNOWN AS J.D.
CRANE OR J. DONALD CRANE, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (BENJAMIN M. ZUFFRANIERI, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD J. LIPPES & ASSOCIATES, BUFFALO, AND JOSEPH D. GONZALEZ, WESTLAKE VILLAGE, CALIFORNIA, OF THE CALIFORNIA BAR, ADMITTED PRO HAC VICE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered June 8, 2012. The order, among other things, denied that part of defendants' motion seeking to dismiss the first amended complaint against defendant James Donald Crane, also known as J.D. Crane or J. Donald Crane.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, damages for personal injuries and property damage that resulted from exposure to various toxic emissions allegedly released by defendant Tonawanda Coke Corporation (Tonawanda Coke). Plaintiffs assert in the first amended complaint that defendant James Donald Crane, also known as J.D. Crane or J. Donald Crane, is individually liable to plaintiffs because Crane, as an owner and officer of Tonawanda Coke, participated in and approved of decisions that resulted in the toxic emissions from the Tonawanda Coke plant. As relevant to this appeal, defendants moved to dismiss the first amended complaint against Crane, and Supreme Court denied that part of the motion. We affirm.

Inasmuch as defendants' motion is based on CPLR 3211 (a) (7), we must "accept the facts as alleged in the [first amended] complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . [T]he criterion is whether [plaintiffs have] a cause of action, not whether [they have] stated

one" (*Leon v Martinez*, 84 NY2d 83, 87-88 [internal quotation marks omitted]; *see Genesee/Wyoming YMCA v Bovis Lend Lease LMB, Inc.*, 98 AD3d 1242, 1244). Crane contends that the court erred in denying that part of defendants' motion to dismiss the first amended complaint against him because plaintiffs failed to allege that he actively participated in the tortious conduct and he cannot be held individually liable based upon his status as an owner and officer of Tonawanda Coke. We reject that contention. Although "[a] corporate officer is not held liable for the negligence of the corporation merely because of his official relationship[,]" that officer will be held liable if it is established "that the officer was a participant in the wrongful conduct" (*Olszewski v Waters of Orchard Park*, 303 AD2d 995, 996 [internal quotation marks omitted]). Plaintiffs alleged in the first amended complaint that Crane was or should have been aware of the relevant environmental regulations, was ultimately responsible for reporting benzene emissions to the Environmental Protection Agency, and personally supervised and exercised control over Tonawanda Coke's operations (*see Sisino v Island Motocross of N.Y., Inc.*, 41 AD3d 462, 464-465; *see also Poley v Rochester Community Sav. Bank* [appeal No. 2], 159 AD2d 944, 945). Thus, plaintiffs have alleged that Crane actively participated in the wrongful conduct by approving the policies that allegedly caused the environmental contamination (*see Sisino*, 41 AD3d at 464-465; *see also Poley*, 159 AD2d at 945).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

156

TP 12-01404

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

IN THE MATTER OF ANTONIO WILSON, PETITIONER,

V MEMORANDUM AND ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered July 27, 2012) to review a determination of respondent. The determination revoked the parole of petitioner.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the Administrative Law Judge (ALJ) revoking his release to parole supervision. "[I]t is well settled that a determination to revoke parole will be confirmed if the procedural requirements were followed and there is evidence [that], if credited, would support such determination" (*Matter of Layne v New York State Bd. of Parole*, 256 AD2d 990, 992, *lv dismissed* 93 NY2d 886, *rearg denied* 93 NY2d 1000; *see Matter of Lozada v New York State Div. of Parole*, 61 AD3d 1393, 1394). We conclude that the determination that petitioner violated the conditions of his release by consuming alcohol is supported by substantial evidence (*see generally Matter of Shaw v Murray*, 24 AD3d 1268, 1269, *lv denied* 6 NY3d 712). Among the evidence presented at the final parole revocation hearing was a signed form in which petitioner acknowledged that he consumed alcohol in violation of the conditions of his release. Additionally, the parole officer who prepared the form for petitioner's signature denied that petitioner was coerced or encouraged to sign the form. Petitioner's testimony that he had not consumed alcohol since his release from prison and that he was coerced into signing the acknowledgment form "merely presented a credibility issue that the ALJ was entitled to resolve against petitioner" (*Matter of Johnson v Alexander*, 59 AD3d

977, 978; *see Matter of Hampton v Kirkpatrick*, 82 AD3d 1639, 1639). We have reviewed petitioner's remaining contentions with regard to the evidence supporting the ALJ's determination and conclude that they are without merit.

Petitioner's further contention that the ALJ should have adjourned the hearing to seek more information regarding the intoximeter's maintenance and to seek an expert opinion is unpreserved for our review inasmuch as petitioner failed to request an adjournment (*see generally Lozada*, 61 AD3d at 1394; *see also Matter of Stanbridge v Hammock*, 55 NY2d 661, 663).

We reject petitioner's contention that the 30-month time assessment imposed against him is excessive. Petitioner correctly acknowledges that "[t]he Executive Law does not place an outer limit on the length of [the time] assessment [that may be imposed], and the [ALJ's] determination may not be modified upon judicial review in the absence of impropriety" (*Matter of Murchison v New York State Div. of Parole*, 91 AD3d 1005, 1005 [internal quotation marks omitted]; *see generally People ex rel. Matthews v New York State Div. of Parole*, 58 NY2d 196, 205). Under the circumstances of this case, including the fact that petitioner committed the violation only two days after his release, we discern no impropriety here. Finally, the record does not support petitioner's contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 146-147; *Matter of McDonald v Russi*, 213 AD2d 650, 650).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

158

CA 12-00733

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

ROBERT LABEEF, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEVEN H. BAITSELL, INDIVIDUALLY AND AS AN EMPLOYEE OF FLOWERS BY MR. JOHN AND SEAN PELKEY, DOING BUSINESS AS FLOWERS BY MR. JOHN, DEFENDANTS-RESPONDENTS.

SHANLEY LAW OFFICES, OSWEGO (P. MICHAEL SHANLEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTIN L. NORFLEET OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered July 11, 2011 in a personal injury action. The order granted defendants' motion 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 he sustained when his vehicle was rear-ended by a vehicle owned by defendant Sean Pelkey, doing business as Flowers by Mr. John, and operated by defendant Steven H. Baitsell, individually and as an employee of Flowers by Mr. John. We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff contends that the court erred in granting defendants' motion because he sustained a serious injury under the 90/180-day category of serious injury. We reject that contention. Defendants met their initial burden of establishing that plaintiff did not sustain a serious injury under the 90/180–day category, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In opposition to the motion, plaintiff submitted unsworn medical records, which were not in admissible form and thus were insufficient to show that plaintiff sustained a serious injury under the 90/180-day category (*see Dann v Yeh*, 55 AD3d 1439, 1441). The admissible medical evidence that plaintiff submitted indicated that approximately one month after the accident plaintiff could return to work with some

slight lifting restrictions and that he did not need household help, durable medical equipment or special transportation. Another admissible medical report indicated that nearly five months after the accident plaintiff walked with a non-antalgic gait, experienced no difficulty getting on and off the examination table or turning from a supine to a prone position, and was able to remove and replace his shoes. Although plaintiff states in his affidavit that he had some household help immediately after the accident and that his recreational activities were limited, he failed to submit the requisite objective evidence of "a medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102 [d]) and to establish that the injury caused the alleged limitations on plaintiff's daily activities (*see Dann*, 55 AD3d at 1441; *Calucci v Baker*, 299 AD2d 897, 898).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

159

CA 12-01405

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

KATELYN KIRK, AN INFANT CHILD UNDER THE AGE OF TEN (10) YEARS, BY HER PARENT AND NATURAL GUARDIAN, CHRISTY A. KIRK, AND CHRISTY A. KIRK, INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

UNIVERSITY OB-GYN ASSOCIATES, INC., DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

JOHN FOLK, M.D., APPELLANT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (DANIEL P. LARABY OF COUNSEL), FOR DEFENDANT-APPELLANT AND APPELLANT.

GREENE & REID, PLLC, SYRACUSE (JAMES T. SNYDER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered October 13, 2011. The order, inter alia, granted the motion of plaintiffs for leave to file and serve an amended summons and complaint to substitute John Folk, M.D. as a party.

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

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by Katelyn Kirk (infant plaintiff) during her delivery. The complaint named as defendants the hospital where the delivery occurred, University OB-GYN Associates, Inc., a medical practice group (University Associates), Robert Silverman, M.D., and "John Doe, M.D. and Jane Roe, M.D." (collectively, defendant physicians). The complaint alleged that defendant physicians were employed by or associated with University Associates and committed malpractice in their prenatal care and treatment of the infant plaintiff. Approximately one year after the expiration of the statute of limitations, plaintiffs moved for leave to amend their complaint by substituting nonparty John Folk, M.D.'s name in place of John Doe, M.D. Plaintiffs contended in support of their motion that, although Dr. Silverman was the primary obstetrician for plaintiff Christy A. Kirk during her pregnancy, he was unavailable to deliver the infant plaintiff. Plaintiffs alleged that, after

filing the complaint, they became aware that Dr. Folk, who was also employed by or associated with University Associates, was the attending physician who delivered the infant plaintiff and thus was "a proper party to th[e] action."

Contrary to the contention of University Associates and Dr. Folk (collectively, appellants), Supreme Court properly granted the motion. Plaintiffs met their burden of establishing the applicability of the relation back doctrine (*see generally Cardamone v Ricotta*, 47 AD3d 659, 660), and appellants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The relation back doctrine, set forth in *Brock v Bua* (83 AD2d 61, 68-71), adopted by the Court of Appeals in *Mondello v New York Blood Ctr. - Greater N.Y. Blood Program* (80 NY2d 219, 226), and refined in *Buran v Coupal* (87 NY2d 173, 177-182), allows the addition of a party after the expiration of the statute of limitations if (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits, and (3) the additional party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the additional party as well (*see Buran*, 87 NY2d at 178; *Doe v HMO-CNY*, 14 AD3d 102, 105; *see also* CPLR 203 [b]). "[T]he 'linchpin' of the relation back doctrine [is] notice to the defendant within the applicable limitations period" (*Buran*, 87 NY2d at 180).

Appellants do not dispute that the first prong of the relation back doctrine is satisfied because the claims against Dr. Folk and the original defendants arise out of the same occurrence, i.e., the infant plaintiff's birth, and we conclude that the second prong is satisfied as well (*see id.* at 178-179). With respect to the third prong, the Court of Appeals made it clear that "New York law requires merely mistake—not excusable mistake—on the part of the litigant seeking the benefit of the doctrine" (*id.* at 176). Appellants contend that here there was no mistake and only neglect on the part of plaintiffs. We agree with plaintiffs, however, that even if they were negligent, there was still a mistake by plaintiffs in failing to identify Dr. Folk as a defendant.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

160

CA 12-01320

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

CARRIE LISKIEWICZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARY E. HAMEISTER AND JAMES A. COREY,
DEFENDANTS-APPELLANTS.

THOMAS P. DURKIN, ROCHESTER, FOR DEFENDANTS-APPELLANTS.

ADAMS, HANSON, REGO, CARLIN, HUGHES, KAPLAN & FISHBEIN, WILLIAMSVILLE (BETHANY A. RUBIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered December 21, 2011. The order granted the motion of plaintiff for summary judgment dismissing the counterclaim of defendants.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries she sustained when her vehicle struck a vehicle owned by defendant James A. Corey and operated by defendant Mary E. Hameister. Plaintiff's vehicle, which was traveling at the speed limit, hit the passenger's side of the vehicle driven by Hameister when Hameister, after stopping at a stop sign, drove the vehicle through the intersection and directly into the path of plaintiff's vehicle. Plaintiff was not subject to any traffic control devices at the intersection.

We reject defendants' contention that Supreme Court erred in granting plaintiff's motion for summary judgment dismissing defendants' counterclaim for contribution. "It is well settled that a driver who has the right[-]of[-]way is entitled to anticipate that [the drivers of] other vehicles will obey the traffic laws that require them to yield" (*Lescenski v Williams*, 90 AD3d 1705, 1705, *lv denied* 18 NY3d 811 [internal quotation marks omitted]). Here, plaintiff met her initial burden on the motion by establishing as a matter of law that the sole proximate cause of the accident was Hameister's failure to yield the right-of-way to plaintiff (*see id.* at 1706; *Wallace v Kuhn*, 23 AD3d 1042, 1043; *see also Limardi v McLeod*, 100 AD3d 1375, 1375). In support of the motion, plaintiff submitted evidence demonstrating that, as Hameister approached the intersection, plaintiff "was traveling at a lawful rate of speed, had the

right-of-way with respect to her vehicle and did not have an opportunity to avoid the accident" (*Lescenski*, 90 AD3d at 1706). In response, defendants failed to "raise[] a triable issue of fact whether [plaintiff] was at fault in the happening of the accident or whether [s]he could have done anything to avoid the collision" (*Wallace*, 23 AD3d at 1043 [internal quotation marks omitted]). "[Defendants'] contention that [plaintiff] could be found negligent because [s]he failed to see [Hameister's] vehicle until immediately before the collision is based on speculation and is insufficient to defeat a motion for summary judgment" (*id.* [internal quotation marks omitted]; *see Lescenski*, 90 AD3d at 1706).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

161

CA 11-02577

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

THIRTY ONE DEVELOPMENT, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEFFREY COHEN, INDIVIDUALLY, AND THE GILL HOUSE AND CHARTER HOUSE INN, LLC, DEFENDANTS-RESPONDENTS.

MCMAHON, KUBLICK & SMITH, P.C., SYRACUSE (JAN S. KUBLICK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JAMES R. MCGRAW, SYRACUSE, FOR DEFENDANT-RESPONDENT THE GILL HOUSE AND CHARTER HOUSE INN, LLC.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered April 29, 2011. The order, among other things, reaffirmed that plaintiff has no right to conduct an inspection of the property at issue prior to closing.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that the contract between plaintiff and defendant The Gill House and Charter House Inn, LLC (Gill House) for the purchase of certain real property is in full force and effect (purchase contract). Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7). During oral argument on the motion, the parties requested that Supreme Court make a limited determination with respect to plaintiff's claim that it had a right to conduct an inspection of the property before the closing (inspection claim). The court concluded that the parties were bound by the express provisions of the purchase contract, which precluded oral modifications and did not provide plaintiff with a right to inspect the property and, according to the order on appeal, issued a written decision to that effect. In the order on appeal, the court "reaffirmed" that determination and thereby effectively granted defendants' motion in part by dismissing plaintiff's inspection claim. The court otherwise denied defendants' motion. We affirm.

Contrary to plaintiff's contention, the court properly granted defendants' motion insofar as it dismissed plaintiff's inspection claim because the purchase contract conclusively establishes as a matter of law that plaintiff is not entitled to a pre-closing

inspection of the property. "On a motion to dismiss pursuant to CPLR 3211, the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [internal quotation marks omitted]). "Construction of an unambiguous contract is a matter of law" (*id.*), and "[t]he best evidence of what parties to a written agreement intend is what they say in their writing . . . Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [internal quotation marks omitted]; *see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162; *FAC Cont. LLC v Yickjing567 LLC*, 78 AD3d 1510, 1512). That rule is of "special import in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [internal quotation marks omitted]). As a result, "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*id.* [internal quotation marks omitted]).

Plaintiff contends that the actions of Gill House after signing the purchase contract had the effect of unilaterally modifying the terms of the contract and thus its verbal agreement to allow plaintiff to inspect the property before closing should have been enforced. We reject that contention. Here, the intention of the parties is clear from the plain language of the purchase contract, and neither party disputes that the contract does not expressly afford plaintiff the right to a pre-closing inspection of the property. Inasmuch as the purchase contract contains a merger clause that prohibits oral modifications of its terms, we decline to enforce the separate verbal agreement allegedly permitting plaintiff to inspect the property. We have reviewed plaintiff's remaining contentions and conclude that they are without merit.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

162

TP 12-01634

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

IN THE MATTER OF PAUL COOKHORNE,
PETITIONER-PLAINTIFF,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-DEFENDANT.

KAREN MURTAGH, BUFFALO (MARIA E. PAGANO OF COUNSEL), FOR PETITIONER-PLAINTIFF.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-DEFENDANT.

Proceeding pursuant to CPLR article 78 and declaratory judgment action (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Donna M. Siwek, J.], entered August 30, 2012) to review a determination of respondent-defendant and for an order declaring, among other things, that the age of sixteen and seventeen year old prisoners housed in New York State adult correctional facilities must be considered by respondent-defendant as a mitigating factor in all disciplinary proceedings. The determination found after a Tier III hearing that petitioner-plaintiff had violated various inmate rules.

It is hereby ORDERED that the order insofar as it transferred that part of the proceeding/action seeking declaratory relief is unanimously vacated without costs, the declaratory judgment action and CPLR article 78 proceeding are severed, the declaratory judgment action is remitted to Supreme Court, Erie County, for further proceedings, and the determination is modified in the exercise of discretion and the petition in the CPLR article 78 proceeding is granted in part by reducing the penalties of confinement in the Special Housing Unit and loss of good time and other privileges to a period of 18 months and as modified the determination is confirmed without costs.

Memorandum: In this hybrid CPLR article 78 proceeding and declaratory judgment action, petitioner-plaintiff (petitioner) challenges the determination following a Tier III prison disciplinary hearing finding him guilty of violating various inmate rules, including inmate rules 100.11 (7 NYCRR 270.2 [B] [1] [ii] [assault on staff]) and 104.11 (7 NYCRR 270.2 [B] [5] [ii]), and requests certain

declaratory relief. The charges stem from an incident in which petitioner was alleged to have injured a correction officer. As a preliminary matter, we note that we do not have jurisdiction to consider the declaratory judgment action as part of this otherwise properly transferred CPLR article 78 proceeding. We therefore vacate the order insofar as it transferred the declaratory judgment action, sever the declaratory judgment action and CPLR article 78 proceeding, and remit the declaratory judgment action to Supreme Court for further proceedings (*see Matter of Applegate v Heath*, 88 AD3d 699, 700; *Matter of Coleman v Town of Eastchester*, 70 AD3d 940, 941; *see also Matter of Cram v Town of Geneva*, 182 AD2d 1102, 1102-1103).

We reject petitioner's contention that the record lacks substantial evidence to support the determination that he violated the various inmate rules as charged in the misbehavior report. Substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180). We conclude that the misbehavior report, the testimony of a correction officer and the photographic evidence constitute substantial evidence that petitioner violated the charged inmate rules (*see Matter of Bryant v Coughlin*, 77 NY2d 642, 647).

We agree with petitioner, however, that the punishment imposed of four years' confinement in the Special Housing Unit (SHU) together with four years' loss of good time and various privileges " 'is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness' " (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233; *see generally Matter of Ciotoli v Goord*, 256 AD2d 1192, 1193). When considering the fact that petitioner was only 17 years old at the time of the incident, all of the circumstances surrounding the incident, as well as the disciplinary guidelines of respondent-defendant, we conclude that the maximum penalty that should have been imposed in this case is 18 months' confinement in the SHU together with the loss of 18 months' good time credit and 18 months' loss of phone, commissary and package privileges. We therefore modify the determination accordingly. Finally, we note that nothing herein should be construed as limiting the scope of the issues to be litigated or the relief to which petitioner may be entitled in deciding the causes of action pleaded in the declaratory judgment action.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

165

TP 12-01700

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

IN THE MATTER OF REGINALD MCFADDEN, PETITIONER,

V ORDER

ALBERT PRACK, DIRECTOR, SPECIAL HOUSING/INMATE DISCIPLINARY, RESPONDENT.

REGINALD MCFADDEN, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered September 11, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

168

TP 12-01555

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

IN THE MATTER OF RONALD CRANDALL, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, SPECIAL HEARINGS BUREAU, RESPONDENT.

RONALD CRANDALL, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered August 23, 2012) to review a determination of respondent. The determination denied the request of petitioner to amend an indicated report.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination denying his request to amend an indicated report of maltreatment to provide instead that the report was unfounded (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]). Contrary to petitioner's contention, we conclude that the hearsay evidence of maltreatment constituted substantial evidence supporting the determination (*see Matter of Jeannette LL. v Johnson*, 2 AD3d 1261, 1263-1264). Although petitioner's account of the events conflicted with the evidence presented by respondent, "it is not within this Court's discretion to weigh conflicting testimony or substitute its own judgment for that of the administrative finder of fact" (*Matter of Ribya BB. v Wing*, 243 AD2d 1013, 1014).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

169

TP 12-01599

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

IN THE MATTER OF JEFFREY MILLER, DOING BUSINESS AS JEFF'S CLUBHOUSE, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

PULOS AND ROSELL, LLP, HORNELL (TIMOTHY J. ROSELL OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Steuben County [Peter C. Bradstreet, A.J.], entered September 15, 2009) to review a determination of respondent. The determination found that petitioner had violated Public Health Law § 1399-o and assessed a fine in the amount of $500.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of an Administrative Law Judge (ALJ), made after a hearing, finding petitioner guilty of violating Public Health Law § 1399-o and imposing penalties. Petitioner contends that the ALJ's determination lacks a substantial basis in the record. We reject that contention.

When representatives of respondent entered petitioner's bar to investigate a complaint that petitioner allowed smoking in the bar, they noticed an odor of smoke and observed two patrons smoking at the bar. Petitioner was seated next to one of the smoking patrons, and was engaged in a conversation with them. Petitioner testified at the hearing that, although the smoking patrons did not comply with the bartender's instruction that they were not permitted to smoke inside the bar, the bartender nevertheless accommodated them by giving them an empty bottle in which to place their cigarette butts. The bartender also continued to serve the patrons after they failed to comply with her alleged instruction not to smoke. Petitioner contends that respondent's representatives "must at least see the violation and the interaction between the smokers and the owner/bartender when they

first ‘light up’ and what efforts were made to stop them.” Contrary to petitioner’s contention, however, we conclude that substantial evidence supports the ALJ’s determination that petitioner permitted smoking in the bar (*see* Public Health Law § 1399-o [1] [b]; *cf. Matter of Patricia Ann Cottage Pub, Inc. v Mermelstein*, 36 AD3d 816, 819-820; *see generally Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights*, 77 NY2d 411, 417, *rearg denied* 78 NY2d 909).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

170

KA 12-00162

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREG KING, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered December 7, 2011. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court violated his due process rights by relying on the case summary prepared by the Board of Examiners of Sex Offenders. We have previously addressed and rejected a similar contention (*see People v Latimore*, 50 AD3d 1604, 1605, *lv denied* 10 NY3d 717), and defendant has provided no basis for us to reconsider the issue. In contrast to the cases upon which defendant relies, he was provided with notice and an opportunity to be heard with respect to all of the information contained in the case summary (*cf. People v David W.*, 95 NY2d 130, 138; *People v Scott*, 96 AD3d 1430, 1430-1431; *People v Hackett*, 89 AD3d 1479, 1480).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

171

KA 12-00536

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE J. PANEK, DEFENDANT-APPELLANT.

ADAM H. VAN BUSKIRK, AURORA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Michael F. McKeon, A.J.), rendered February 21, 2012. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of felony driving while intoxicated ([DWI] Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). Defendant was sentenced to concurrent indeterminate terms of incarceration of 1 to 3 years on each count, and to a post-incarceration conditional discharge and an ignition interlock device requirement for the DWI offense. At the outset, we note that the certificate of conviction omits the conviction of and sentence for aggravated unlicensed operation of a motor vehicle in the first degree, as well as the sentence for the DWI offense of a conditional discharge, and it must therefore be amended accordingly (*see People v Saxton*, 32 AD3d 1286, 1286-1287).

Defendant contends that the post-incarceration conditional discharge does not apply to sentencing after a violation of probation, and constitutes an illegal sentence. We reject that contention. Upon revoking probation, County Court properly sentenced defendant to a period of incarceration (*see* Penal Law §§ 60.01 [4]; 70.00 [2] [e]; [3] [b]). Pursuant to Penal Law § 60.21, the court was also required to sentence defendant to a period of probation or conditional discharge, to run consecutively to any period of imprisonment. Inasmuch as section 60.21 applies "[n]otwithstanding [section 60.01 (2) (d)]," defendant's contention that the sentence violated section 60.01 (2) (d) is without merit (*see People v Oliver*, 98 AD3d 751,

751).

Defendant next contends that he should have been informed of the conditional discharge "prior to entering his plea of guilty or his admission to the violation of probation," and thus the conditional discharge with the ignition interlock device requirement should be stricken. Insofar as defendant challenges his conviction following his plea of guilty, that challenge is not properly before us because he did not appeal from the original judgment (*see People v Perna*, 74 AD3d 1807, 1807, *lv denied* 17 NY3d 716). Defendant relies on *People v Catu* (4 NY3d 242, 244-245) insofar as he contends that the conditional discharge was a direct consequence of his admission to the violation of probation, and that he therefore should have been advised of such at the time of his admission. Assuming, arguendo, that we agree with defendant, we conclude that the proper remedy would be vacatur of the admission (*see People v Hill*, 9 NY3d 189, 191, *cert denied* 553 US 1048), and defendant does not seek that relief (*see People v Primm*, 57 AD3d 1525, 1525, *lv denied* 12 NY3d 820; *People v Dean*, 52 AD3d 1308, 1308, *lv denied* 11 NY3d 736). Finally, contrary to defendant's contention, the sentence is "not unduly harsh or severe, particularly in view of defendant's [five] prior DWI convictions" (*People v Edenholm*, 9 AD3d 892, 893).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

173

KA 11-02530

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH R. ORTIZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MARCEL J. LAJOY, ALBANY, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered September 26, 2011. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth 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 grand larceny in the fourth degree (Penal Law § 155.30 [1]), defendant contends that he was denied effective assistance of counsel based upon the failure of his original attorney to facilitate his testimony before the grand jury and by his new attorney's failure to move to dismiss the indictment pursuant to CPL 190.50 (5) (c) based upon the alleged violation of his right to testify before the grand jury. Inasmuch as that contention does not impact the voluntariness of defendant's plea, it is foreclosed by his waiver of the right to appeal (*see People v Bonner*, 21 AD3d 1184, 1185-1186, *lv denied* 6 NY3d 773; *People v Carroll*, 21 AD3d 586, 586-587) and the guilty plea (*see People v Turner*, 40 AD3d 1018, 1019, *lv denied* 9 NY3d 882; *People v Vincent*, 305 AD2d 1108, 1109, *lv denied* 100 NY2d 588). In addition, because "defendant pleaded guilty with the assistance of new counsel, he forfeited the right to argue that he was denied the opportunity to testify before the grand jury as the result of the prior attorney's conduct" (*People v Weems*, 61 AD3d 472, 472, *lv denied* 13 NY3d 750; *see People v Moore*, 61 AD3d 494, 495, *lv denied* 12 NY3d 918).

We reject defendant's contention that the fine imposed as part of his sentence is illegal in view of the People's concession that the stolen property was returned and he realized no financial gain from the crime (*see People v McFarlane*, 18 AD3d 577, 578, *lv denied* 5 NY3d

791). Defendant's further contention that the amount of the fine is unduly harsh and severe survives his waiver of the right to appeal because that amount was not included in the terms of the plea bargain (*see People v Etkin*, 284 AD2d 579, 580-581, *lv denied* 96 NY2d 862). Defendant, however, failed to preserve his challenge to the amount of the fine for our review (*see id.* at 581), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

174

KA 08-02511

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONNELL M. BROWN, DEFENDANT-APPELLANT.

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

DONNELL M. BROWN, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered December 5, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), arising from a stabbing incident. Following the stabbing, the victim's roommate called 911 to report the incident. Defendant contends that he was denied effective assistance of counsel when defense counsel stipulated to the admission of the 911 recording in evidence at trial because it contained inadmissible hearsay that bolstered the testimony of the victim and prejudiced his defense of the case. Although we agree with defendant that defense counsel erred in stipulating to the admission of inadmissible hearsay, we reject defendant's contention that this single error was sufficiently egregious as to deprive him of a fair trial (*see People v Wells*, 101 AD3d 1250, 1255; *People v Singh*, 16 AD3d 974, 978, *lv denied* 5 NY3d 769; *People v Miller*, 291 AD2d 929, 929, *lv denied* 98 NY2d 712). Indeed, we note that the victim, who had known defendant prior to the incident, unequivocally identified defendant as the assailant at trial.

We reject defendant's further contention that Supreme Court erred in denying his motion to set aside the verdict on the ground of newly discovered evidence. The evidence in question, i.e., that the victim used crack cocaine on the night of the incident and had accused

defendant of having a relationship with the victim's girlfriend, was not in fact newly discovered inasmuch as defendant allegedly learned of that evidence on the evening before summations and thus had an opportunity to use it before the case was submitted to the jury (*see* CPL 330.30 [3]; *see generally People v White*, 272 AD2d 872, 872, *lv denied* 95 NY2d 859). In any event, the evidence merely impeaches or contradicts the testimony of the victim, and defendant failed to show that its admission would have created the probability of a more favorable verdict (*see* CPL 330.30 [3]; *People v Salemi*, 309 NY 208, 215-216, *cert denied* 350 US 950).

We have reviewed defendant's contention in his pro se supplemental brief and conclude that it is without merit. It is well settled that defense counsel is not ineffective for failing to bring a motion that would have had little or no chance of success (*see generally People v Caban*, 5 NY3d 143, 152; *People v Medaro*, 277 AD2d 252, 253, *lv denied* 96 NY2d 803).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

175

KA 11-01384

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD JULIUS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), entered June 7, 2010. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of sexual abuse in the first degree (Penal Law § 130.65 [1]) and sentencing him to, inter alia, a determinate term of incarceration of five years. Contrary to defendant's contention, we conclude that Supreme Court properly determined that the People established by the requisite "preponderance of the evidence" that defendant violated the terms and conditions of his probation (*People v Ortiz*, 94 AD3d 1436, 1436, *lv denied* 19 NY3d 999; *see* CPL 410.70 [3]; *People v Pringle*, 72 AD3d 1629, 1629, *lv denied* 15 NY3d 855; *People v Van Every*, 26 AD3d 777, 777). The evidence adduced at the hearing established that defendant had failed to obtain or maintain "legitimate verifiable employment," to undergo required evaluations, and to enroll in required treatment programs.

Relying on CPL 100.15 and 100.40 and juvenile delinquency cases, defendant further contends that the first, second and third declarations of delinquency were jurisdictionally defective because they failed to contain nonhearsay allegations. We reject that contention. First, CPL sections 100.15 (3) and 100.40 (1) (c) concern local criminal court accusatory instruments such as informations and misdemeanor and felony complaints. Those sections do not address the requirements for violation of probation (VOP) petitions, which are found in CPL article 410. Second, although Family Court Act § 360.2

(2) specifically requires that VOP petitions in juvenile delinquency proceedings contain "[n]on[]hearsay allegations . . . establish[ing], if true, every violation charged," there is no corresponding requirement in CPL article 410. At most, CPL 410.70 (2) requires that the court "file or cause to be filed . . . a statement setting forth the condition or conditions of the sentence violated and a reasonable description of the time, place and manner in which the violation occurred." There is no requirement that the statement contain nonhearsay allegations.

In any event, we agree with the People that, were there such a requirement in the CPL, the reasoning of *Matter of Markim Q.* (7 NY3d 405, 410-411) would apply such that the lack of nonhearsay allegations in the VOP petition would not constitute a jurisdictional defect. "A VOP petition, [unlike an original accusatory instrument], is not the foundation of the court's jurisdiction. It does not commence a new proceeding, but is simply a new step in an existing one" (*id.* at 410).

The People correctly concede that defendant's waiver of the right to appeal with respect to the VOP admissions on the first and third declarations of delinquency was insufficient to encompass his challenge to the severity of the sentence imposed upon the VOP (*see People v Maracle*, 19 NY3d 925, 928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

176

KA 11-00406

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR GASTON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 19, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that the 17-year preindictment delay violated his constitutional right to a speedy trial. We reject that contention. In examining the *Taranovich* factors (*People v Taranovich*, 37 NY2d 442, 445), we conclude that, although the 17-year preindictment delay was substantial, the nature of the charge was serious, and defendant remained at liberty until he was indicted. Moreover, the People met their burden of establishing a good-faith basis for the delay (*see People v Decker*, 13 NY3d 12, 14-16; *People v Chatt*, 77 AD3d 1285, 1285, *lv denied* 17 NY3d 793). In particular, they established that there was insufficient evidence to charge defendant shortly after the crimes occurred, and it was not until a witness gave new information to the police that identified defendant as the perpetrator and DNA testing was completed that the People brought the charges against defendant. While the delay may have caused some degree of prejudice to defendant, " 'a determination made in good faith to delay prosecution for sufficient reasons will not deprive defendant of due process even though there may be some prejudice to defendant' " (*Decker*, 13 NY3d at 14).

Defendant further contends that his right to be tried and convicted of only those crimes and upon only those theories charged in the indictment was violated (*see generally People v Grega*, 72 NY2d 489, 495-496). We reject that contention. The indictment here

charged defendant with causing the victim's death "by stabbing and beating her," and the evidence at trial established that the victim died as a result of the stab wounds. We conclude that the fact that the indictment included the "beating" allegation does not require reversal (*see generally People v Charles*, 61 NY2d 321, 327-328; *People v Rooney*, 57 NY2d 822, 823). Defendant failed to preserve for our review his further contentions that County Court failed to administer the requisite oath to the prospective jurors pursuant to CPL 270.15 (1) (a) (*see People v Schrock*, 73 AD3d 1429, 1432, *lv denied* 15 NY3d 855; *People v Dickens*, 48 AD3d 1034, 1034, *lv denied* 10 NY3d 958) and violated his right to trial by jury when certain exhibits were received in evidence in the jury's absence (*see* CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant's contention that the evidence is legally insufficient to support the conviction is preserved for our review only to the extent that he contends that the testimony of the main prosecution witness was incredible as a matter of law (*see People v Gray*, 86 NY2d 10, 19). We reject that contention (*see People v Moore* [appeal No. 2], 78 AD3d 1658, 1659-1660, *lv denied* 17 NY3d 798). It cannot be said that his testimony was "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant contends that he was denied a fair trial by the cumulative effect of alleged errors, but almost all of the alleged errors have not been preserved for our review (*see* CPL 470.05 [2]). In any event, we reject that contention (*see People v Gonzalez*, 52 AD3d 1228, 1229, *lv denied* 11 NY3d 788; *People v Wurthmann*, 26 AD3d 830, 831, *lv denied* 7 NY3d 765). We reject defendant's further contention that he received ineffective assistance of counsel. Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

178

KA 11-02532

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH R. ORTIZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MARCEL J. LAJOY, ALBANY, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered September 29, 2011. 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: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the second degree (Penal Law § 215.50 [3]). There is no valid ground supporting defendant's request that his conviction be vacated in the interest of justice. Defendant admitted his guilt at the plea proceeding, and his subsequent explanation of his conduct provides no basis for the exercise of our "extraordinary power to vacate a conviction in the interest of justice" (*People v White*, 75 AD3d 109, 126, *lv denied* 15 NY3d 758).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

180

KA 11-01378

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD HEARY, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 21, 2011. The judgment convicted defendant, upon a nonjury verdict, of manslaughter in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that the evidence is legally insufficient to support his conviction of manslaughter because the People failed to meet their burden of disproving his justification defense beyond a reasonable doubt (*see generally* § 25.00 [1]; *People v Steele*, 26 NY2d 526, 528). That contention is not preserved for our review inasmuch as defendant "did not move for a trial order of dismissal on that ground" (*People v Smalls*, 70 AD3d 1328, 1330, *lv denied* 14 NY3d 844, *reconsideration denied* 15 NY3d 778; *see generally People v Hawkins*, 11 NY3d 484, 492; *People v Gray*, 86 NY2d 10, 19). Defendant further contends that his conviction of manslaughter is not based on legally sufficient evidence because the People failed to establish that he intended to cause serious physical injury to the victim (*see* § 125.20 [1]). Inasmuch as defendant did not renew his motion to dismiss after he presented evidence, he failed to preserve that contention for our review (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *see also People v Kolupa*, 13 NY3d 786, 787; *People v Lane*, 7 NY3d 888, 889). Defendant acknowledges that he did not preserve for our review his challenges to the legal sufficiency of the evidence, but he additionally contends that he was denied effective assistance of counsel because defense counsel failed to preserve those challenges for our review. That contention lacks

merit. It is well settled that "[a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *see People v Harris*, 97 AD3d 1111, 1111-1112, *lv denied* 19 NY3d 1026). Here, there was no chance that such a motion would have succeeded.

In the alternative, defendant contends that the verdict on the manslaughter count is against the weight of the evidence. We reject that contention. With respect to the justification defense, it cannot be said that Supreme Court failed to give the evidence the weight it should be accorded in determining that "the victim did not brandish [a gun] during the altercation and that defendant's use of deadly force was not justified" (*People v Massey*, 61 AD3d 1433, 1433, *lv denied* 13 NY3d 746; *see* Penal Law § 35.15 [2] [a]; *see e.g. People v Butera*, 23 AD3d 1066, 1068, *lv denied* 6 NY3d 774, *reconsideration denied* 6 NY3d 832; *People v Wolf*, 16 AD3d 1167, 1168). Viewing the evidence in light of the elements of that crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not otherwise against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that the court erred in refusing to suppress his statement to the police. "[T]he record of the suppression hearing supports the court's determination that the statements were not coerced, i.e., defendant received no promises in exchange for making the statements nor was he threatened in any way, and the court's determination is entitled to great deference" (*People v Peay*, 77 AD3d 1309, 1310, *lv denied* 15 NY3d 955; *see People v McAvoy*, 70 AD3d 1467, 1467, *lv denied* 14 NY3d 890; *see generally People v Prochilo*, 41 NY2d 759, 761). Finally, the sentence is not unduly harsh or severe.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

181

CA 11-02507

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

NIESHA HAYNES, PLAINTIFF-APPELLANT,

V ORDER

KALEIDA HEALTH, CHILDREN'S HOSPITAL, KEVIN FITZPATRICK, M.D., AND MARGARET MULVIHILL, M.D., DEFENDANTS-RESPONDENTS.

NIESHA HAYNES, PLAINTIFF-APPELLANT PRO SE.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KATHERINE E. WILD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KALEIDA HEALTH, CHILDREN'S HOSPITAL AND MARGARET MULVIHILL, M.D.

BROWN & TARANTINO, LLC, BUFFALO (NICOLE D. SCHREIB OF COUNSEL), BUFFALO, FOR DEFENDANT-RESPONDENT KEVIN FITZPATRICK, M.D.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered October 11, 2011. The order granted the motions of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

183

CA 12-01224

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

IN THE MATTER OF WILLIAM DUNSMOOR,
PETITIONER-APPELLANT,

V ORDER

TOWN OF OSWEGO PLANNING BOARD AND UNITED
GROUP DEVELOPMENT CORP., RESPONDENTS-RESPONDENTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PETITIONER-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR RESPONDENT-RESPONDENT TOWN OF OSWEGO PLANNING BOARD.

MICHAEL J. STANLEY LAW OFFICE, OSWEGO (MICHAEL J. STANLEY OF COUNSEL), FOR RESPONDENT-RESPONDENT UNITED GROUP DEVELOPMENT CORP.

Appeal from a judgment (denominated order) of the Supreme Court, Oswego County (James W. McCarthy, J.), entered March 21, 2012 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

185

CA 12-01805

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

ALEXANDER LIFSON, EXECUTOR OF THE ESTATE
OF IRENE LIFSON, DECEASED,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-RESPONDENT,
AND DEREK J. KLINK, DEFENDANT-RESPONDENT-APPELLANT.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), AND LONGSTREET & BERRY, LLP, SYRACUSE, FOR PLAINTIFF-APPELLANT-RESPONDENT.

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

MARY ANNE DOHERTY, CORPORATION COUNSEL, SYRACUSE (ANN MAGNARELLI ALEXANDER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered March 1, 2012. The order, among other things, directed that a single de novo trial be conducted to determine the liability/culpable conduct of all parties.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of plaintiff insofar as it seeks a new trial to determine the liability of defendant Derek J. Klink only and granting the cross motion of that defendant insofar as it seeks to include in the trial the issue of the apportionment of liability among defendants and plaintiff's decedent, and by vacating the second ordering paragraph, and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiff appeals and Derek J. Klink (defendant) cross-appeals from an order directing that "a single de novo trial [be conducted] to determine the liability/culpable conduct of all parties" upon remittal of the matter by the Court of Appeals to Supreme Court (*Lifson v City of Syracuse*, 17 NY3d 492, 498). Plaintiff's decedent (decedent) was struck by a vehicle driven by defendant while she was crossing a street in defendant City of Syracuse (City). On a prior appeal, we affirmed the judgment following a bifurcated trial on liability determining that defendant was not at fault; that the City was 15% at fault; and that decedent was 85% at fault (*Lifson v City of Syracuse* [appeal No. 2], 72 AD3d 1523, 1524, *revd insofar as appealed from* 17 NY3d 1492). The Court of Appeals reversed so much of the order of this Court that determined that Supreme Court did not err in

giving an emergency instruction with respect to defendant's assertion that he did not see decedent crossing the street because he was temporarily blinded by sun glare. The Court of Appeals concluded that the error was not harmless because it could have affected the outcome of the trial, reinstated the amended complaint with respect to defendant and remitted the matter to Supreme Court for further proceedings "consistent with this opinion" (*Lifson*, 17 NY3d at 498).

We agree with plaintiff and defendant that the court erred in directing that a de novo trial be conducted "to determine the liability/culpable conduct of all parties" inasmuch as the liability of the City and decedent was established in the first trial and the court's error with respect to the jury charge affected only the determination of defendant's liability (*see Marus v Village Med.*, 51 AD3d 879, 881; *see generally Ferrer v Harris*, 55 NY2d 285, 289-290, *remittitur amended* 56 NY2d 737). We agree with the Second Department's conclusion in *Marus* that the jury should be directed that the City and decedent were at fault, "but that the issues of the percentage of [their] fault must be considered in conjunction with the percentage of fault, if any, of [defendant]" (*Marus*, 51 AD3d at 881). We therefore modify the order accordingly. Contrary to the City's contention, our decision in *Braun v Rycyna* (100 AD2d 721, 722) does not compel a different result. In *Braun*, we directed a new trial on liability with respect to all the defendants, in the interest of justice, because the theory of liability with respect to each defendant in that medical malpractice action was the same and the court's error in granting the motion of one defendant to dismiss the action against it at the close of proof could have impacted the verdict with respect to the remaining defendants (*id.*; *see Gruntz v Deepdale Gen. Hosp.*, 163 AD2d 564, 566-567). Here, the theories of liability with respect to defendant and the City are unrelated, and we therefore conclude that the erroneous jury charge, directed only at defendant's liability, did not impact the jury's verdict with respect to the City's liability.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

186

CA 12-01779

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

AMERICAN TOWER ASSET SUB, LLC AND AMERICAN TOWER ASSET SUB II, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BUFFALO-LAKE ERIE WIRELESS SYSTEMS CO., LLC, DEFENDANT-RESPONDENT.

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, NEW YORK CITY (WILLIAM N. AUMENTA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (THOMAS J. GAFFNEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered June 25, 2012. The order denied plaintiffs' motion for partial summary judgment and granted defendant's cross motion for partial summary judgment on liability on its second counterclaim.

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

Memorandum: Plaintiffs commenced this action seeking damages for, inter alia, breach of contract. In its amended answer, defendant asserted a second counterclaim seeking damages for breach of an "[o]ption [c]ontract" entered into by the parties in September 2003. As was made apparent during proceedings on this action, the second counterclaim was based on a document dated September 12, 2003 that was titled "Letter Agreement for the 26 site commitment" (Letter Agreement). Plaintiffs moved for partial summary judgment and, although it is not clear from the record, the parties do not dispute that plaintiffs thereby sought partial summary judgment dismissing the second counterclaim. Defendant cross-moved for partial summary judgment on the second counterclaim.

We agree with plaintiffs that Supreme Court erred in granting the cross motion and in denying the motion. We conclude that the Letter Agreement is not enforceable because it is barred by the statute of frauds (*see* General Obligations Law § 5-701 [a] [1]). We agree with plaintiffs that the court erred in relying on the doctrine of part performance to defeat that defense. The doctrine of part performance

is not applicable to actions governed by section 5-701 (*see Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 234 n 1; *Stephen Pevner, Inc. v Ensler*, 309 AD2d 722, 722; *Valentino v Davis*, 270 AD2d 635, 637-638). To the extent we stated otherwise in *James v Western N.Y. Computing Sys.* (273 AD2d 853, 854-855) and *Binkowski v Hartford Acc. & Indem. Co.* (60 AD3d 1473, 1474-1475), those cases are no longer to be followed. In light of our determination, we do not address plaintiffs' remaining contentions.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

188

CA 12-00456

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

WILLIAM J. BABCOCK, JR. AND WILLIAM J. BABCOCK, JR., AS EXECUTOR OF THE ESTATE OF LORNA F. BABCOCK, DECEASED, PLAINTIFFS-APPELLANTS,

V ORDER

H. ROBERT SCHOENBERGER, DEFENDANT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (BERYL NUSBAUM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 7, 2011. The order, inter alia, denied the motion of plaintiffs for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on February 14 and 15, 2013,

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

191

TP 12-01713

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

IN THE MATTER OF BRIAN CONWAY, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered September 10, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the amended petition is dismissed.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

192

KA 11-01186

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE JONES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 6, 2011. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law §125.25 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

193

KA 11-01781

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TIMOTHY J. GAY, DEFENDANT-APPELLANT.

MARCEL J. LAJOY, ALBANY, 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 (Craig J. Doran, J.), rendered April 11, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

194

KA 12-00044

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DOUGLAS B. BECKWITH, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered December 7, 2011. The judgment convicted defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree, aggravated driving while intoxicated and driving while intoxicated.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

195

KA 11-02524

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ERIC BROWNLEE, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered October 31, 2011. 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 (*see People v Iverson*, 90 AD3d 1561, 1561, *lv denied* 18 NY3d 811).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

196

KA 11-01164

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON B. OSGOOD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered November 18, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree, criminal contempt in the first degree, criminal contempt in the second degree and unauthorized use of a vehicle in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Allen* [appeal No. 2], 93 AD3d 1341, *lv denied* 19 NY3d 956).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

197

KA 11-02325

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON B. OSGOOD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), entered August 10, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

198

KA 11-02544

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL S. CARTER, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), entered December 12, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

199

KA 11-01949

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN D. SANDY, DEFENDANT-APPELLANT.

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

KEVIN D. SANDY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered September 7, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted 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 his plea of guilty of attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [7]). The record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

200

KA 12-01787

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK K. GOUPIL, DEFENDANT-APPELLANT.

LEONARD G. TILNEY, JR., LOCKPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered February 17, 2010. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (three counts).

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 three counts of predatory sexual assault against a child (Penal Law § 130.96), defendant contends that County Court erred in refusing to permit him to introduce evidence of the victim's prior sexual conduct pursuant to CPL 60.42. We reject that contention. The evidence in question does " 'not fall within any of the exceptions set forth in CPL 60.42 (1) through (4), and defendant failed to make an offer of proof demonstrating that such evidence was relevant and admissible pursuant to CPL 60.42 (5)' " (*People v Wright*, 37 AD3d 1142, 1143, *lv denied* 8 NY3d 951; *see People v Halter*, 19 NY3d 1046, 1049).

We also conclude that defendant failed to preserve for our review his contention that he was deprived of a fair trial based on prosecutorial misconduct during summation (*see* CPL 470.05 [2]; *People v Brown*, 94 AD3d 1461, 1462, *lv denied* 19 NY3d 955). In any event, defendant's contention is without merit because the prosecutor's comments were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915).

Defendant failed to preserve for our review his further contention that he was denied a fair trial based on the testimony of an expert with respect to child sexual abuse accommodation syndrome (CSAAS) (*see People v Lawrence*, 81 AD3d 1326, 1327, *lv denied* 17 NY3d

797) and, in any event, that contention is without merit. "Expert testimony concerning CSAAS is admissible to assist the jury in understanding the unusual conduct of victims of child sexual abuse where, as here, the testimony is general in nature and does 'not attempt to impermissibly prove that the charged crimes occurred' " (*People v Filer*, 97 AD3d 1095, 1096, *lv denied* 19 NY3d 1025, quoting *People v Carroll*, 95 NY2d 375, 387).

We reject defendant's contention that he was denied effective assistance of counsel. Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude on the record before us that defendant received meaningful representation (*see generally People v Flores*, 84 NY2d 184, 187; *People v Baldi*, 54 NY2d 137, 147). Insofar as defendant contends that defense counsel was ineffective in her cross-examination of the victim, we conclude that " '[s]peculation that a more vigorous cross-examination might have [undermined the credibility of a witness] does not establish ineffectiveness of counsel' " (*People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922). Contrary to his further contention, "[d]efendant was not denied effective assistance of counsel based on defense counsel's failure to object to the allegedly improper comments by the prosecutor on summation inasmuch as those comments did not constitute prosecutorial misconduct" (*People v Hill*, 82 AD3d 1715, 1716, *lv denied* 17 NY3d 806). Finally, the sentence is not unduly harsh or severe.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

213

CA 12-01378

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

CRISTA A. GRISANTI, AS PARENT AND NATURAL GUARDIAN OF AVA PANEK, A MINOR, PLAINTIFF-RESPONDENT,

V ORDER

DAVID I. KURSS, M.D., WOMEN'S WELLNESS CENTER, SAMUEL WEISSMAN, M.D., SAMUEL WEISSMAN, M.D., P.C., AND KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE SUBURBAN HOSPITAL, DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JENNIFER L. NOAH OF COUNSEL), FOR DEFENDANTS-APPELLANTS DAVID I. KURSS, M.D. AND WOMEN'S WELLNESS CENTER.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANTS-APPELLANTS SAMUEL WEISSMAN, M.D. AND SAMUEL WEISSMAN, M.D., P.C.

ROACH BROWN MCCARTHY GRUBER, P.C., BUFFALO (MATTHEW J. BATT OF COUNSEL), FOR DEFENDANT-APPELLANT KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE SUBURBAN HOSPITAL.

DEMPSEY & DEMPSEY, BUFFALO (HELEN KANEY DEMPSEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered October 5, 2011. The order denied the motions of defendants for summary judgment.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

221

TP 12-01565

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF DARYL KNICKERBOCKER,
PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered August 21, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

224

KA 12-00721

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DONALD A., DEFENDANT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE C. FODOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI P. RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from an adjudication of the Cattaraugus County Court (Larry M. Himelein, J.), rendered October 17, 2011. Defendant was adjudicated a youthful offender.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on November 11, 2012 and by the attorneys for the parties on December 10 and December 14, 2012,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

236

CA 12-00052

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

JOANN HOELTKE AND DONALD HOELTKE,
PLAINTIFFS-APPELLANTS,

V ORDER

ALLCARE DENTAL & DENTURES,
DEFENDANT-RESPONDENT.

SIM & RECORD, LLP, BAYSIDE (SANG J. SIM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

FELDMAN KIEFFER, LLP, BUFFALO (STEPHEN A. MANUELE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered November 26, 2011. The order, inter alia, granted defendant's motion to enforce a conditional order of preclusion and to strike plaintiffs' complaint and dismiss the action against defendant.

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: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

239

CA 12-01808

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

DIONNE WALLACE, PLAINTIFF-RESPONDENT,

V ORDER

KALEIDA HEALTH AND MAHMOUD KULAYLAT, M.D., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A SURGICAL SPECIALIST FOR KALEIDA HEALTH, DEFENDANTS-APPELLANTS.

HARTER SECREST & EMERY, LLP, BUFFALO (ROBERT C. WEISSFLACH OF COUNSEL), FOR DEFENDANT-APPELLANT KALEIDA HEALTH.

PHILLIPS LYTLE LLP, BUFFALO (JAMES R. GRASSO OF COUNSEL), FOR DEFENDANT-APPELLANT MAHMOUD KULAYLAT, M.D., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A SURGICAL SPECIALIST FOR KALEIDA HEALTH.

CHIACCHIA & FLEMING, LLP, HAMBURG (LISA A. POCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 15, 2012. The order denied the motions of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 11, 12 and 16, 2013,

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

242

CA 12-01201

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF DAVID THOMAS AND GLENN WALLACE,
PETITIONERS-APPELLANTS,

V ORDER

ZONING BOARD OF APPEALS OF TOWN OF GRAND ISLAND
AND DONALD R. TURNER, RESPONDENTS-RESPONDENTS.

RICHARD J. LIPPES & ASSOCIATES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR RESPONDENT-RESPONDENT ZONING BOARD OF APPEALS OF TOWN OF GRAND ISLAND.

DAMON MOREY LLP, CLARENCE (COREY A. AUERBACH OF COUNSEL), FOR RESPONDENT-RESPONDENT DONALD R. TURNER.

Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered March 23, 2012 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

248

TP 12-01865

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF SENECA PATTERSON, PETITIONER,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered October 3, 2012) to review a determination of respondent. The determination revoked the postrelease supervision of petitioner.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking his period of postrelease supervision and imposing a time assessment of 16 months. " '[A] determination to revoke parole [or postrelease supervision] will be confirmed if the procedural requirements were followed and there is evidence which, if credited, would support such determination' " (*Matter of Graham v Dennison*, 46 AD3d 1467, 1467 [internal quotation marks omitted]; *see Matter of Mosley v Dennison*, 30 AD3d 975, 976, *lv denied* 7 NY3d 712). Contrary to petitioner's contention, "the testimony of petitioner's parole officer at the hearing before the [Administrative Law Judge] provides substantial evidence to support the determination with respect to the [eight] charges concerning the violations by petitioner of his curfew [and domestic violence conditions]" (*Mosley*, 30 AD3d at 976; *see Graham*, 46 AD3d at 1467; *see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

249

KA 09-00530

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEPHEN MCFADDEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 13, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

250

KA 11-02402

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN PORTER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered October 7, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that Supreme Court erred in assessing 15 points against him under risk factor 14, for release without supervision. Inasmuch as defendant served his sentence in a local jail and he is due to be released without probation or parole supervision, he was properly assessed the points (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 17 [2006]). Even where, as here, defendant was convicted of a misdemeanor, "[o]nce [Supreme] Court determined that the defendant would be released without supervision, its inquiry was ended, and the assessment of 15 points based upon the absence of postrelease supervision was appropriate" (*People v Lewis*, 37 AD3d 689, 690, *lv denied* 8 NY3d 814). We further conclude that "defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure" of his risk level (*People v McDaniel*, 27 AD3d 1158, 1159, *lv denied* 7 NY3d 703).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

252

KA 12-00041

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN M. COLLINS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (JOHN E. TYO OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (William F. Kocher, J.), dated November 21, 2011. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Based on the risk assessment instrument prepared by the Board of Examiners of Sex Offenders, defendant was presumptively classified as a level one risk based on his total risk factor score. Following a SORA hearing, however, County Court determined that an upward departure to a level two risk was warranted. We reject defendant's contention that the court's upward departure is not supported by the requisite clear and convincing evidence (*see* § 168-n [3]). The presentence report contained evidence that defendant had frequently downloaded pictures of naked young girls onto his home computer, and the mental health therapist who evaluated defendant for SORA classification purposes diagnosed him as a pedophile. A "diagnosis [of pedophilia] alone would support a finding that defendant poses a serious risk to public safety, justifying the upward departure from the presumptively correct classification of defendant as a level [one] risk" (*People v Seils*, 28 AD3d 1158, 1158, *lv denied* 7 NY3d 709; *see People v Zehner*, 24 AD3d 826, 827 n). In any event, we conclude that "defendant's psychological abnormalities are causally related to any risk of reoffense, and thus that there is clear and convincing evidence of special circumstances to support the court's upward departure from defendant's presumptive risk level" (*People v Mallaber*, 59 AD3d 989,

990, *lv denied* 12 NY3d 710).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

253

KA 06-01240

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDY ALEXANDER, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, INTERIM CONFLICT DEFENDER, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered February 22, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the seventh degree, and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]), criminal possession of a controlled substance in the seventh degree (§ 220.03) and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). Defendant contends that County Court erred in designating the second-drawn juror as foreperson after the original foreperson asked to be relieved of that responsibility, and that preservation of her contention is not required because the court thereby committed a mode of proceedings error. Contrary to defendant's contention, such a designation, even if erroneous, would not constitute a mode of proceedings error (*see People v Marchese*, 261 AD2d 104, 104, *lv denied* 93 NY2d 1022; *see generally People v Agramonte*, 87 NY2d 765, 769-770). In any event, defendant's contention that the court erred in designating the second-drawn juror as foreperson is without merit (*see People v Burgess*, 280 AD2d 264, 265, *lv denied* 96 NY2d 798). Viewing the evidence, the law and the circumstances of this case, in totality and at the time of representation, we further conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to the further contention of defendant, the court

properly denied her severance motion. Defendant failed to preserve for our review her contention that the court erred in denying her motion to sever the counts against defendant and her codefendant, which were joined in a single indictment (*see* CPL 470.05 [2]; *cf. People v Chestnut*, 19 NY3d 606, 611 n 2). In any event, we conclude that her contention lacks merit (*see People v Boyd*, 272 AD2d 898, 898, *lv denied* 95 NY2d 850; *see also* CPL 40.10 [2]; 200.40 [1]). We also reject the contention of defendant that the court abused its discretion in denying her motion to sever her trial from that of her codefendant (*see People v Clark*, 66 AD3d 1489, 1489-1490, *lv denied* 13 NY3d 906).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

254

KA 11-00973

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOE W. GREEN, DEFENDANT-APPELLANT.

GENESEE VALLEY LEGAL AID, GENESEO (JEANNIE D. MICHALSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Dennis S. Cohen, J.), entered April 25, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Contrary to defendant's contention, County Court properly assessed 15 points against him under risk factor 11 based upon his history of drug and alcohol abuse. Defendant's criminal history includes convictions related to drugs and alcohol, and defendant admitted during the presentence investigation that his lengthy criminal history was attributable to his abuse of drugs and alcohol. Defendant further admitted that during the time period that included the instant offense he smoked marihuana and drank alcohol daily, usually to the point of intoxication. The court properly concluded that " 'his recent history of abstinence while incarcerated is not necessarily predictive of his behavior when no longer under such supervision' " (*People v Vangorder*, 72 AD3d 1614, 1614).

We agree with defendant, however, that the People failed to present the requisite clear and convincing evidence that the victim of the underlying crime suffered from a "mental disability" (*see generally* Correction Law § 168-n [3]), and thus the court erred in assessing 20 points against him under risk factor 6. Although the People presented evidence that the victim was diagnosed as mildly mentally retarded, "[t]he law does not presume that a person with mental retardation is unable to consent to sexual [activity], . . . and proof of incapacity must come from facts other than mental

retardation alone" (*People v Cratsley*, 86 NY2d 81, 86). Here, the remaining evidence in the record relating to the victim's capacity failed to establish that she was "incapable of appraising the nature of [her] own sexual conduct" (*id*. at 87; *see People v Easley*, 42 NY2d 50, 55-57; *cf. People v Jackson*, 70 AD3d 1385, 1385, *lv denied* 14 NY3d 714). Deducting those 20 points assessed under risk factor 6 results in a total risk factor score of 90, and thus defendant is presumptively a level two risk. Nevertheless, we agree with the court's alternative determination, consistent with the recommendation of the Board of Examiners of Sex Offenders, that an upward departure to a level three risk was warranted inasmuch as the risk assessment instrument "did not fully take into account the number and nature of defendant's prior crimes" (*People v Stevens*, 4 AD3d 786, 787, *lv denied* 2 NY3d 705).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

257

KA 08-02486

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA M. MILLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered November 13, 2008. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony.

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 felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]), defendant contends that he was deprived of a fair trial by the prosecutor's comments on summation, including a statement that defense counsel was trying to "divert [the jury's] attention away from the truth." Although the prosecutor's statement was improper (*see People v Paul*, 229 AD2d 932, 933; *People v Carter*, 227 AD2d 661, 663, *lv denied* 88 NY2d 1067; *People v Dunbar*, 213 AD2d 1000, 1000, *lv denied* 85 NY2d 972), that isolated comment did not deprive defendant of a fair trial (*see People v Santiago*, 289 AD2d 1070, 1071, *lv denied* 97 NY2d 761; *People v Chislum*, 244 AD2d 944, 945, *lv denied* 91 NY2d 924; *see generally People v Scott*, 60 AD3d 1483, 1484, *lv denied* 12 NY3d 859; *People v Roman*, 13 AD3d 1115, 1116, *lv denied* 4 NY3d 802). Furthermore, a prosecutor's closing statement must be evaluated in light of defense counsel's summation (*see People v Halm*, 81 NY2d 819, 821; *People v Morgan*, 66 NY2d 255, 259), and we conclude that the remainder of the prosecutor's comments at issue were "a fair response to defense counsel's summation and did not exceed the bounds of legitimate advocacy" (*People v Melendez*, 11 AD3d 983, 984, *lv denied* 4 NY3d 888; *see generally Halm*, 81 NY2d at 821).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

262

CAF 12-00247

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF LILLIANNA G.

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

ORENA G., RESPONDENT-APPELLANT.

DAVID J. PAJAK, ALDEN, 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 LILLIANNA G.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered January 11, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child and ordered that the child be freed for adoption. Contrary to the mother's contention, petitioner established "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between [the mother] and the child" (*Matter of Ja-Nathan F.*, 309 AD2d 1152, 1152; *see* Social Services Law § 384-b [3] [g] [i]; [7] [a]; *see generally Matter of Star Leslie W.*, 63 NY2d 136, 142). Furthermore, "Family Court properly determined that the child is a neglected child based upon the derivative evidence that [three] of the mother's other children were determined to be neglected children . . . , including the evidence that [the mother] had failed to address the mental health issues that led to those neglect determinations and the placement of the custody of those children" in a foster home (*Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1746-1747 [internal quotation marks omitted]).

Contrary to the mother's further contention, the court properly denied her request for a suspended judgment. A suspended judgment, as

provided for in section 633 of the Family Court Act, "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311; *see Matter of Baron C.*, 101 AD3d 1622, 1622; *see also Matter of Ada M.R.*, 306 AD2d 920, 920-921, *lv denied* 100 NY2d 509). "The court's assessment that [the mother] was not likely to change [her] behavior is entitled to great deference" (*Matter of Philip D.*, 266 AD2d 909, 909; *see Matter of Jane H. [Susan H.]*, 85 AD3d 1586, 1587, *lv denied* 17 NY3d 709).

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

273

KA 12-00156

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN M. PIEPER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered March 8, 2011. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). We agree with defendant that the purported waiver of the right to appeal is not valid inasmuch as County Court failed to obtain a knowing and voluntary waiver of that right at the time of the plea, and instead obtained the purported waiver at sentencing (*see generally People v Lopez*, 6 NY3d 248, 256). In any event, we conclude that the sentence, which was imposed in accordance with the terms of the plea agreement, is not unduly harsh or severe.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

279

KA 09-02650

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MANUEL CUBI, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 3, 2009. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). Defendant contends that the plea colloquy cast significant doubt on the voluntariness of his plea and that it was factually insufficient because he failed to admit that he intended to kill the victim and thus that the rare exception to the preservation doctrine applies. We reject that contention (*see People v Toxey*, 86 NY2d 725, 726, *rearg denied* 86 NY2d 839; *People v Lopez*, 71 NY2d 662, 666; *see generally People v McNair*, 13 NY3d 821, 822).

By failing to move to withdraw his plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contentions that the plea allocution was factually insufficient (*see Lopez*, 71 NY2d at 665), and that the plea was not knowingly and voluntarily entered (*see People v Bloom*, 96 AD3d 1406, 1406, *lv denied* 19 NY3d 1024). In any event, we conclude that defendant's contentions are without merit. With respect to the factual sufficiency of the plea allocution, we note that defendant explained to Supreme Court that he heard an argument involving the victim and defendant's mother and that he therefore retrieved a sawed-off shot gun that was hidden under a dumpster. Defendant approached the scene and heard the victim curse at his mother. When the victim looked at defendant, defendant shot him in the chest from a distance of 9 to 11 feet. We thus conclude that the plea allocution was factually sufficient. Although

defendant did not admit that he intended to kill the victim, it is well established that "an allocution based on a negotiated plea need not elicit from a defendant specific admissions as to each element of the charged crime . . . It is enough that the allocution shows that the defendant understood the charges and made an intelligent decision to enter a plea" (*People v Goldstein*, 12 NY3d 295, 301). We further conclude that the plea was knowingly and voluntarily entered inasmuch as the record establishes that the 16-year-old defendant understood the consequences of his plea of guilty and that he was pleading guilty in exchange for a negotiated sentence that was less than the maximum term of imprisonment (*see generally People v Harris*, 61 NY2d 9, 19). The sentence is not unduly harsh or severe.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

280

KAH 11-01017

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
HENRY T. SCOTT, PETITIONER-APPELLANT,

V ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

HENRY T. SCOTT, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered March 8, 2011 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

281

CAF 12-00553

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

IN THE MATTER OF DANICA DAVIS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN K. BOND, RESPONDENT-APPELLANT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered March 2, 2012 in a proceeding pursuant to Family Court Act article 4. The order confirmed the order of the Support Magistrate finding that respondent had willfully failed to obey a court order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioner mother commenced this proceeding alleging that respondent father violated a February 2011 order (February order) requiring him to pay child support in the amount of $155 per week. The Support Magistrate previously had issued an order "on consent" in November 2011 (November order), setting forth that the father admitted that he willfully violated the February order and finding him in willful violation of the February order. The Support Magistrate imposed a sentence of four months in jail but suspended the sentence on the condition that the father did not miss two consecutive support payments. The parties appeared before Family Court in January, February and March 2012, based on what appears from the record to be the father's alleged failure to pay support pursuant to the November order. On the date of the last appearance, in March 2012, the court dispensed with a hearing, took an oral admission of nonpayment from the father's attorney and, by the order on appeal, "confirmed" the order of the Support Magistrate to the extent that the Support Magistrate found the father to be in willful violation of the February order. The court sentenced the father to four months in jail.

Although the court had the discretion to revoke the suspension of the jail sentence, the court erred in doing so without first affording the father "an opportunity to be heard and to present witnesses . . . on the issue whether good cause existed to revoke the suspension of the sentence" (*Matter of Thompson v Thompson*, 59 AD3d 1104, 1105, quoting Family Ct Act § 433 [a] [internal quotation marks omitted];

see Ontario County Dept. of Social Servs. v Hinckley, 226 AD2d 1126, 1126). "No specific form of a hearing is required, but at a minimum the hearing must consist of an adducement of proof coupled with an opportunity to rebut it" (*Thompson*, 59 AD3d at 1105 [internal quotation marks omitted]). " '[I]t is well settled that neither a colloquy between a respondent and Family Court nor between a respondent's counsel and the court is sufficient to constitute the required hearing' " (*id.*). Here, there was only the admission of nonpayment by the father's attorney, which was insufficient (*see id.*), and there was no opportunity for the father to present evidence rebutting the allegations against him. We therefore reverse the order and remit the matter to Family Court for a hearing on the petition in compliance with Family Court Act § 433.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

284

CA 11-02143

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

DEBORAH VOSS, PROP-CO, LLC, CLASSI PEOPLE, INC., DOING BUSINESS AS SERTINO'S CAFÉ, AND DREAM PEOPLE, INC., DOING BUSINESS AS SHIVER MODEL, PLAINTIFFS-APPELLANTS,

V ORDER

THE NETHERLANDS INSURANCE COMPANY, D.R. CASEY CONSTRUCTION CORP., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

DIRK J. OUDEMOOL, SYRACUSE, FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN J. KROGMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT D.R. CASEY CONSTRUCTION CORP.

MURA & STORM, PLLC, BUFFALO (SCOTT D. STORM OF COUNSEL), FOR DEFENDANT-RESPONDENT THE NETHERLANDS INSURANCE COMPANY.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered June 8, 2011. The order granted the motion of defendant The Netherlands Insurance Company and the cross motion of defendant D.R. Casey Construction Corp. for partial summary judgment.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

285

CA 11-02144

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

DEBORAH VOSS, PROP-CO, LLC, CLASSI PEOPLE, INC., DOING BUSINESS AS SERTINO'S CAFÉ, AND DREAM PEOPLE, INC., DOING BUSINESS AS SHIVER MODEL, PLAINTIFFS-APPELLANTS,

V ORDER

THE NETHERLANDS INSURANCE COMPANY, D.R. CASEY CONSTRUCTION CORP., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

DIRK J. OUDEMOOL, SYRACUSE, FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN J. KROGMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT D.R. CASEY CONSTRUCTION CORP.

MURA & STORM, PLLC, BUFFALO (SCOTT D. STORM OF COUNSEL), FOR DEFENDANT-RESPONDENT THE NETHERLANDS INSURANCE COMPANY.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 27, 2011. The order denied plaintiffs' motion for leave to reargue.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

292

CA 12-01184

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

IN THE MATTER OF WILFREDO POLANCO,
PETITIONER-APPELLANT,

V ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE
DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

WILFREDO POLANCO, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered May 3, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Robles v Evans*, 100 AD3d 1455, 1455).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

315

CA 12-00980

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

STANLEY SICILIANO,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

JOHN R. PARRINELLO, ESQ. AND REDMOND &
PARRINELLO, LLP,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

DAVIDSON FINK, LLP, ROCHESTER (PAUL D. KELLY OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HISCOCK & BARCLAY, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (James P. Murphy, J.), entered February 15, 2012. The order granted in part and denied in part the motion of defendants for summary judgment and granted the cross motion of plaintiff for summary judgment on the issue of negligence.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 15 and 19, 2013,

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

316

CA 12-00981

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

STANLEY SICILIANO, PLAINTIFF-APPELLANT,

V ORDER

JOHN R. PARRINELLO, ESQ. AND REDMOND & PARRINELLO, LLP, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

DAVIDSON FINK, LLP, ROCHESTER (PAUL D. KELLY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (ROBERT A. BARRER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (James P. Murphy, J.), entered May 7, 2012. The order, insofar as appealed from, adhered to a prior determination that there are questions of fact on the issues of proximate cause and damages.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 15 and 19, 2013,

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

317

TP 12-01582

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

IN THE MATTER OF KAREEM FAUNTLEROY, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION AND ELIZABETH BLAKE, HEARING OFFICER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

KAREEM FAUNTLEROY, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Penny M. Wolfgang, J.], entered August 13, 2012) to review a determination of respondents. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

325

KA 11-02115

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSIE J. DUKES, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered August 31, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that Supreme Court erred in assessing 20 points under the risk factor for unsatisfactory conduct while confined or under supervision, based on sexual misconduct by defendant. Contrary to defendant's contention, there is no requirement that the conduct be "recent" in order for the court to assess 20 points in that category. Indeed, the Risk Assessment Guidelines provide that if an offender, "*while in custody* or under supervision, has been involved in inappropriate sexual behavior . . . the guidelines assess the offender 20 points" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 16 [2006] [emphasis added]; *see People v Carpenter*, 60 AD3d 833, 833).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

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

331

CAF 12-00774

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

IN THE MATTER OF SHALITTA T. LEE,
PETITIONER-RESPONDENT,

V ORDER

ANTHONY MONTEZ WILLIAMS, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered March 26, 2012 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objections to the order of the Support Magistrate.

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

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court

MOTION NO. (277/00) KA 98-05147. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD WALLACE, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (432/02) KA 01-01331. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AARON PAIGE, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (433/02) KA 01-01276. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AARON PAIGE, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (434/02) KA 01-01332. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AARON PAIGE, DEFENDANT-APPELLANT. (APPEAL NO. 3.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (435/02) KA 01-00668. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AARON PAIGE, DEFENDANT-APPELLANT. (APPEAL NO. 4.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (971/07) KA 06-00423. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RODNEY MITCHELL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, LINDLEY, AND VALENTINO, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (126/09) KA 07-02660. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RONALD TAYLOR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (1412/10) KA 10-00774. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TOBIAS BOYLAND, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND MARTOCHE, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (252/12) KA 10-02161. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDRE L. SCOTT, ALSO KNOWN AS ANDRE SCOTT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND MARTOCHE, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (587/12) KA 11-02517. -- HUGO RAFAEL RAMIREZ GABRIEL, ALSO KNOWN AS CESAR MENDEZ, ET AL., PLAINTIFFS-APPELLANTS-RESPONDENTS, V JOHNSTON’S

L.P. GAS SERVICE, INC., DEFENDANT-RESPONDENT-APPELLANT, ET AL., DEFENDANTS. (ACTION NO. 1.) -- HUGO RAFAEL RAMIREZ GABRIEL, ALSO KNOWN AS CESAR MENDEZ, ET AL., PLAINTIFFS-APPELLANTS, V ANTHONY A. DEMARCO, ANTHONY W. DEMARCO, ANTHONY DEMARCO & SONS, INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (ACTION NO. 2.) -- HUGO RAFAEL RAMIREZ GABRIEL, ALSO KNOWN AS CESAR MENDEZ, ET AL., PLAINTIFFS-APPELLANTS-RESPONDENTS, V RAYTHEON COMPANY, DEFENDANT-RESPONDENT-APPELLANT. (ACTION NO. 3.) -- Motion or reargument of the appeal is granted to the extent that, upon reargument, the opinion and order entered June 15, 2012 (98 AD3d 168) is amended by deleting the ordering paragraph and substituting the following ordering paragraph: "It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the third ordering paragraph and granting those parts of plaintiffs' motion for a protective order permitting the undeposed plaintiffs who have returned to Guatemala to be deposed in Guatemala via video conference and permitting the plaintiffs who have returned to Mexico and Guatemala to testify at trial by video and as modified the order is affirmed without costs." The opinion and order is further amended by inserting the following sentence after the first sentence of section IV: "Nevertheless, we exercise our power to reach that issue (*see generally Bracken v Niagara Frontier Transp. Auth.*, 251 AD2d 1068, 1069), and we conclude that the court erred in determining that those medical examinations must be conducted in the United States inasmuch as no such examinations have been requested (*see generally Murad v Russo*, 74 AD3d 1823, 1824, *lv dismissed* 16 NY3d 732; *Burnett v Columbus McKinnon Corp.*, 69

AD3d 58, 64)." The opinion and order is further amended by inserting the words "of plaintiffs' contention with respect to the video depositions" after the words "[w]e now turn to the merits" in section IV (A) (2). The opinion and order is further amended by deleting the words "that part of" and "concerning the depositions of plaintiffs" from the sentence in section VI. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (971/12) TP 12-00005. -- IN THE MATTER OF WILLIAM B. JOHNSTON, PETITIONER-RESPONDENT, V GALEN D. KIRKLAND, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENT-PETITIONER, SCOTT GEHL, HOUSING OPPORTUNITIES MADE EQUAL, INC., STEPHANIE M. GILLIAM, ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, MAYOR BYRON W. BROWN AND ERIE COUNTY EXECUTIVE CHRISTOPHER C. COLLINS, RESPONDENTS. -- Motion to reverse denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND SCONIERS, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (1104/12) CAF 11-01187. -- IN THE MATTER OF GENA S. GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; KAREN M., RESPONDENT-APPELLANT. JACQUELINE M. GRASSO, ESQ., ATTORNEY FOR THE CHILD, APPELLANT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: FAHEY, J.P., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (1105/12) CAF 11-01188. -- IN THE MATTER OF MISTY S. GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; KAREN M., RESPONDENT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: FAHEY, J.P., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (1106/12) CAF 11-01189. -- IN THE MATTER OF SHAUNDRA D. GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; KAREN M., RESPONDENT-APPELLANT. (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: FAHEY, J.P., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (1169/12) CA 12-00850. -- IN THE MATTER OF DEBORAH BURNS AND BRUCE HENRY, PETITIONERS-RESPONDENTS, V CARLOS CARBALLADA, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF NEIGHBORHOOD AND BUSINESS DEVELOPMENT OF CITY OF ROCHESTER, AND CITY OF ROCHESTER, RESPONDENTS-APPELLANTS. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (1275/12) CA 12-00826. -- IN THE MATTER OF KELIANN ELNISKI, PETITIONER-APPELLANT, V NIAGARA FALLS COACH LINES, INC., RAEANNE ARGY-TYLER AND MICHAEL J. DOWD, RESPONDENTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. Cross

motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (1301/12) TP 12-01223. -- IN THE MATTER OF JOHN RICHARD, PETITIONER, V HAROLD GRAHAM, SUPERINTENDENT, RESPONDENT. -- Motion for vacatur and other relief denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (1325/12) KA 11-01166. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KASIEM WILLIAMS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (1328/12) KA 10-00172. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ISIAH WILLIAMS, DEFENDANT-APPELLANT. (APPEAL NO. 3.) -- Motion for reargument of the appeal is granted to the extent that, upon reargument, the memorandum and order entered December 28, 2012 (101 AD3d 1734) is amended by deleting the third sentence from the seventh paragraph of the memorandum and substituting the following sentences: “Defendant subsequently proceeded pro se at sentencing at the first trial, i.e, the trial at issue in appeal No. 2. Defendant likewise proceeded pro se at that part of the *Wade* hearing concerning identification testimony relevant to the charges set forth in counts six and 8 through 15 of the indictment

at issue in appeal No. 3. Moreover, defendant proceeded pro se throughout the second trial, i.e., the trial at issue in appeal No. 3." The memorandum and order is further amended by adding the following sentence at the end of the seventh paragraph of the memorandum: "Likewise, we note that the new trial granted with respect to appeal No. 3 should also be preceded by a new suppression hearing with respect to the witnesses who identified defendant at trial in connection with the charges set forth in counts 8 through 15 of the indictment." PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (1337/12) CA 12-01085. -- TIANA SYKES, PLAINTIFF-APPELLANT-RESPONDENT, V STAN ROTH, DEFENDANT-RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 15, 2013.)

MOTION NO. (1391.1/12) CA 12-00263. -- RICARDO WRIGHT, PLAINTIFF-RESPONDENT, V JAMES J. SHAPIRO, JAMES J. SHAPIRO, P.A., DEFENDANTS-APPELLANTS, CHIKOVSKY & ASSOCIATES, P.A., ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Mar. 15, 2013.)

KA 11-00788. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEREMY

M. CECCE, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his plea of guilty of aggravated driving while intoxicated as a felony (Vehicle and Traffic Law §§ 1192 [2-a]; 1193 [1] [c] [i]), and driving while intoxicated as a felony (§§ 1192 [3]; 1193 [1] [c] [i]), and was sentenced to concurrent indeterminate terms of imprisonment of 1 2/3 to 5 years. Defendant appealed and his assigned counsel now moves to be relieved of the assignment on the ground that the appeal is frivolous (*see People v Crawford*, 71 AD2d 38). Upon our review of the record, we conclude that a nonfrivolous issue exists as to the legality of the sentence (*see* Penal Law § 70.00 [2] [e]). We therefore relieve counsel of her assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Ontario County Court, Craig J. Doran, J. - Driving While Intoxicated). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Mar. 15, 2013.)

KAH 12-00836. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. STANLEY JACKSON, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38). (Appeal from Supreme Court, Wyoming County, Mark H. Dadd, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., PERADOTTO, CARNI,

LINDLEY, AND WHALEN, JJ. (Filed Mar. 15, 2013.)