SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 26, 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

1386

CA 12-00867

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

CHARTER SCHOOL FOR APPLIED TECHNOLOGIES, DOMINIQUE WILSON, AS PARENT AND NATURAL GUARDIAN OF MICHAEL EPPERSON, AN INFANT, AND TONYA ROBINSON, AS PARENT AND NATURAL GUARDIAN OF NOELLE CLARK, NAILAH ROBINSON, AND LAYLA ROBINSON, INFANTS, PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION FOR CITY SCHOOL DISTRICT OF CITY OF BUFFALO, DEFENDANT-APPELLANT-RESPONDENT. (APPEAL NO. 1.)

HISCOCK & BARCLAY, LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (LISA A. COPPOLA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an amended order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 5, 2012. The amended order, among other things, granted in part plaintiffs' motion for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action for, inter alia, breach of contract, arising from an agreement in which defendant agreed to provide school bus transportation for students who resided within the City of Buffalo but attended plaintiff Charter School for Applied Technologies (hereafter, CSAT). In appeal No. 1, defendant appeals from an amended order that, inter alia, granted those parts of plaintiffs' motion for partial summary judgment on liability on the first two causes of action, alleging breach of contract, and directed a trial on the issue of damages on those causes of action, and granted that part of plaintiffs' motion for partial summary judgment dismissing the fourth affirmative defense, in which defendant contended that the contract was void due to the term limits rule. Plaintiffs cross-appeal from those parts of the amended order denying in part their motion for summary judgment on the seventh cause of action, alleging the violation of the Open Meetings Law (Public Officers Law § 100 *et seq*.), and granting those parts of defendant's

cross motion for summary judgment dismissing the fifth and sixth causes of action, which alleged violations of Education Law §§ 3622 and 3635. In appeal No. 2, defendant appeals from a judgment subsequently entered in plaintiffs' favor after a trial on damages.

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

Addressing first the parties' contentions with respect to the amended order, we reject defendant's contention that the contract is unenforceable because it violates the term limits rule. In general, "[t]he term limits rule prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute or charter provision to do so" (*Matter of Karedes v Colella*, 100 NY2d 45, 50). The applicable statute, Education Law § 2554 (19), permits a school board to enter into contracts for the transportation of children to and from school for a period not to exceed five years. Here, the initial term of the contract was for approximately 17 months, and it was to be renewed automatically for five-year terms. Contrary to defendant's contention, the automatic renewal provision did not violate the term limits rule (*see generally Matter of Lewiston-Porter Cent. Sch. Dist. v Sobol*, 154 AD2d 777, 778-779*, lv dismissed* 75 NY2d 978). Here, the contract affords successor Boards of Education the opportunity to terminate the contract under certain circumstances, and thus they are able "to exercise legislative and governmental powers in accordance with their own discretion" (*Karedes*, 100 NY2d at 50; *cf. Matter of Boyle*, 35 Ed Dept Rep, Decision No. 13,501, at *3).

We agree with defendant, however, that Supreme Court erred in granting plaintiffs' motion to the extent that they sought partial summary judgment on liability on the first two causes of action. We therefore modify the amended order accordingly. The first cause of action alleged that defendant breached paragraph four of the contract, but the contract further provides that CSAT's remedy for breach of that paragraph is to terminate the contract. "Construction of an unambiguous contract is a matter of law" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324), 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, 162-163). Consequently, we conclude that the court erred in granting that part of plaintiffs' motion seeking partial summary judgment on the first cause of action, and we further conclude that defendant is entitled to summary judgment in its favor on that cause of action. Although it does not appear that defendant specifically addressed this

issue in its cross motion, we may search the record notwithstanding that failure because that cause of action was the subject of plaintiffs' motion, which placed the issue before the motion court (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430; *Simet v Coleman Co., Inc.*, 42 AD3d 925, 927). Upon exercising our power to search the record (*see* CPLR 3212 [b]; *see generally Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 111-112), we grant summary judgment in favor of defendant dismissing the first cause of action, and we further modify the amended order accordingly.

The second cause of action alleged, inter alia, that defendant breached the contract by terminating it in the absence of any of the factors that would permit termination. Plaintiff concedes, however, that defendant had the right to terminate the contract if it "determine[d] at any time that the provision of transportation as provided in this Agreement results in a potentially substantial burden (in the discretion of [defendant]) because of any other school or schools seeking transportation or payment for transportation in connection with a location outside of the corporate borders of the Buffalo City School District [hereafter, District]." Plaintiffs, as the parties seeking summary judgment, had the burden of submitting evidence negating the existence of any triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). We agree with defendant that plaintiffs failed to establish as a matter of law that there was not a "potentially substantial burden" arising from requests by other schools for transportation. Thus, we conclude that plaintiffs failed to meet their initial burden on the motion with respect to the second cause of action (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), and we therefore further modify the amended order accordingly. Contrary to defendant's contention, however, it failed to meet its similar burden on the cross motion (*see generally id.*), and thus the court properly denied that part of the cross motion seeking summary judgment dismissing the second cause of action.

Contrary to plaintiffs' contention on their cross appeal, the court properly granted those parts of defendant's cross motion for summary judgment dismissing the fifth and sixth causes of action. In those causes of action, plaintiffs alleged that defendant's 2009 amendment to the transportation policy violated Education Law §§ 3622 and 3635 by providing transportation to students attending school within the District but refusing to transport CSAT students in like circumstances. It is undisputed, however, that CSAT is located outside the District, and "students attending school outside the [D]istrict are not 'in like circumstances' with students attending school within the [D]istrict" (*Matter of Hatch v Board of Educ., Ithaca City School Dist.*, 81 AD2d 717, 717; *see O'Donnell v Antin*, 81 Misc 2d 849, 852, *affd* 36 NY2d 941, *appeal dismissed* 423 US 919; *Matter of Brown v Allen*, 23 AD2d 591, 591). Thus, Education Law §§ 3621 (2) (a) and 3635 (1) (c) do not provide a basis for a cause of action against defendant.

Contrary to plaintiffs' further contention, the court also properly granted that part of defendant's cross motion for summary judgment dismissing the seventh cause of action, which alleged the

violation of the Open Meetings Law. Defendant met its initial burden on the cross motion by establishing that its June 24, 2009 executive session was held for the purpose of receiving advice from counsel regarding pending litigation, which is permissible under the Open Meetings Law (*see* Public Officers Law § 105 [1] [d]; *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 686). Plaintiffs failed to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562).

With respect to the judgment in appeal No. 2, we reject defendant's contention that the court erred in denying its motion in limine prior to the trial on damages. Defendant's motion to preclude plaintiffs from introducing any evidence with respect to damages was " 'the functional equivalent of a motion for partial summary judgment' " (*Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 224-225; *see Rondout Elec. v Dover Union Free School Dist.*, 304 AD2d 808, 811), which was untimely (*see Ofman v Ginsberg*, 89 AD3d 908, 909). Defendant failed to provide "a satisfactory explanation for the untimeliness" (*Brill v City of New York*, 2 NY3d 648, 652), and thus the court properly denied the motion.

In any event, we note in particular that the court properly denied defendant's motion in limine on the merits insofar as it sought to preclude plaintiffs from introducing evidence of damages incurred after January 11, 2011, the date on which both CSAT's charter and the contract would have renewed but for defendant's termination of the contract. The court properly determined that plaintiffs were entitled to present evidence of damages that were the " 'natural and probable consequence[s] of [defendant's] breach' " (*Brody Truck Rental v Country Wide Ins. Co.*, 277 AD2d 125, 125, *lv dismissed* 96 NY2d 854; *see Kenford Co. v County of Erie*, 73 NY2d 312, 319).

Additionally, the court did not abuse its discretion in denying defendant's motion to preclude CSAT from presenting certain documents and the testimony of an expert witness due to untimely disclosure. Initially, we note that defendant never made an expert witness demand under CPLR 3101 (d) (1) (i). In any event, a court's broad discretion to control discovery should be disturbed only upon a showing of clear abuse of discretion (*see Roswell Park Cancer Inst. Corp. v Sodexo Am., LLC*, 68 AD3d 1720, 1721), and plaintiffs have made no such showing here.

Based upon our modification of the amended order, we remit the matter to Supreme Court for a trial on the issue of liability. In the event that defendant is found liable at that trial, the damages award shall be reinstated (*see e.g. Brownrigg v New York City Hous. Auth.*, 70 AD3d 619, 622).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

1387

CA 12-00937

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

CHARTER SCHOOL FOR APPLIED TECHNOLOGIES, DOMINIQUE WILSON, AS PARENT AND NATURAL GUARDIAN OF MICHAEL EPPERSON, AN INFANT, AND TONYA ROBINSON, AS PARENT AND NATURAL GUARDIAN OF NOELLE CLARK, NAILAH ROBINSON, AND LAYLA ROBINSON, INFANTS, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION FOR CITY SCHOOL DISTRICT OF CITY OF BUFFALO, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

HISCOCK & BARCLAY, LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (LISA A. COPPOLA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (John A. Michalek, J.), entered March 30, 2012. The judgment awarded plaintiffs the sum of $6,873,646.91 against defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated without costs, the amended order entered March 5, 2012 is modified on the law by denying those parts of plaintiffs' motion with respect to the first and second causes of action in their entirety and by granting defendant summary judgment dismissing the first cause of action, and as modified the amended order is affirmed and the matter is remitted to Supreme Court, Erie County, for a trial on the issue of liability.

Same Memorandum as in *Charter School for Applied Tech. v Board of Educ. for City School Dist. of City of Buffalo* ([appeal No. 1] ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

32

CA 12-01395

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

THOMAS R. SPAULDING, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LOOMIS MASONRY, INC., UPSTATE CONSTRUCTION SERVICES, INC., STRUCTURAL ASSOCIATES, INC., AND HUEBER-BREUER CONSTRUCTION CO., INC., DEFENDANTS-RESPONDENTS.

MEGGESTO, CROSSETT & VALERINO, LLP, SYRACUSE (JAMES A. MEGGESTO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (MOLLY M. RYAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS UPSTATE CONSTRUCTION SERVICES, INC. AND STRUCTURAL ASSOCIATES, INC.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR DEFENDANT-RESPONDENT LOOMIS MASONRY, INC.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (JAMES W. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-RESPONDENT HUEBER-BREUER CONSTRUCTION CO., INC.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 14, 2011. The order granted the motions of defendants for summary judgment and dismissed the complaint.

Now, upon reading and filing the stipulation discontinuing the appeal insofar as it concerns defendant Hueber-Breuer Construction Co., Inc., signed by the attorneys for the parties on February 14, 25, and 27, and March 4, 2013,

It is hereby ORDERED that said appeal insofar as it concerns defendant Hueber-Breuer Construction Co., Inc. is unanimously dismissed upon stipulation and the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell from a large plastic barrel on which he was standing while performing work for his employer. In reaching for a tool on an adjacent wall, plaintiff grabbed masonry bricks on a column wrap, and the bricks came loose, causing him to lose his balance. In the complaint, plaintiff asserted a negligence cause of action based on the alleged defective construction of the

brick column wrap. Defendant Structural Associates, Inc. (SAI) contracted with plaintiff's employer to serve as the general contractor for the construction of the building in which plaintiff was injured (project). SAI contracted with defendant Upstate Construction Services, Inc. (Upstate) to serve as a subcontractor on the project, and Upstate, in turn, subcontracted with defendant Loomis Masonry, Inc. (Loomis) to perform certain masonry work on the project. Construction of the project, including the brick column wrap, was completed approximately six years before plaintiff's accident. As relevant to this appeal, SAI, Upstate and Loomis (hereafter, defendants) moved for summary judgment dismissing the complaint, and Supreme Court granted their motions. We affirm.

Plaintiff contends that the court erred in granting defendants' motions inasmuch as they owed plaintiff a duty of care pursuant to the instrument of harm doctrine. We reject that contention. It is well settled that, "[b]ecause a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138). Here, defendants established as a matter of law that they did not owe any duty to plaintiff, and plaintiff failed to raise a triable issue of fact. Although defendants had contractual obligations with respect to the construction of the project for plaintiff's employer, as a general rule "a contractual obligation, standing alone, will . . . not give rise to tort liability in favor of a third party," i.e., a person who is not a party to the contract (*id.*; *see Church v Callanan Indus.*, 99 NY2d 104, 111). There is an exception to that general rule, however, "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launche[s] a force or instrument of harm' " (*Espinal*, 98 NY2d at 140), thereby "creat[ing] an unreasonable risk of harm to others, or increas[ing] that risk" (*Church*, 99 NY2d at 111). Contrary to plaintiff's contention, the instrument of harm doctrine does not apply to the facts of this case, and thus there was no duty of care running from defendants to plaintiff based on that doctrine (*see generally id.* at 111-112; *Cooper v Time Warner Entertainment-Advance/Newhouse Partnership*, 16 AD3d 1037, 1038-1039).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

33

CAF 12-00393

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

IN THE MATTER OF THE ADOPTION OF
ANGELINA K. AND AMIYA K.

ELIZA W. AND MICHAEL W., MEMORANDUM AND ORDER
PETITIONERS-RESPONDENTS;

MICHAEL K., RESPONDENT-APPELLANT.

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

SUSAN B. MARRIS, ATTORNEY FOR THE CHILDREN, MANLIUS, FOR AMIYA K. AND ANGELINA K.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered February 1, 2012 in an adoption proceeding. The order adjudged that respondent had abandoned the subject children and dispensed with his consent for adoption.

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

Memorandum: Respondent, the biological father of the subject children, appeals from an order determining, following an evidentiary hearing, that he abandoned the children and that his consent to the adoption of the subject children is not required. "[T]here are two steps in determining whether the biological father's consent may be dispensed with in a proceeding seeking approval of the adoption of his child[ren]" (*Matter of Anthony S.*, 291 AD2d 702, 702, *lv denied* 98 NY2d 609). "Using the guidelines set forth in Domestic Relations Law § 111 (1) (d), [Family C]ourt must first decide whether the father has demonstrated a substantial relationship with his child[ren] conferring [on him] the right to consent" to the adoption (*id.*; *see Matter of Andrew Peter H.T.*, 64 NY2d 1090, 1091). "Only after the [biological] father establishes his right of consent to the adoption . . . does the court proceed to determine [pursuant to section 111 (2) (a)] whether he has forfeited that right by evincing 'an intent to forego his . . . parental . . . rights and obligations as manifested by his . . . failure for a period of six months to visit the child[ren] and communicate with the child[ren] or person having legal custody of the child[ren], although able to do so' " (*Andrew Peter H.T.*, 64 NY2d at 1091, quoting § 111 [2] [a]).

Although here it is not clear whether the court made a threshold finding pursuant to section 111 (1) (d), we conclude in any event that

the court's failure to make such a finding would not warrant reversal. Any failure by the court to follow the two-step process set forth above is harmless inasmuch as the record supports a finding that the father's consent to the adoption of the children is not required under either subdivision (1) (d) or subdivision (2) (a) of Domestic Relations Law § 111 (*see Matter of Taylor R.*, 290 AD2d 830, 832-833; *see also Matter of Ethan S. [Tarra C.-Jason S.]*, 85 AD3d 1599, 1599, *lv denied* 17 NY3d 711). The record establishes that, despite having been awarded supervised visitation of the children on April 21, 2009, the father did not exercise his right to such visitation. At the time of the hearing, the father had not visited the children in over three years and had not attempted to send gifts to the children since September 2009. Moreover, the father had not made any child support payments to petitioner mother since January 2010, when the Department of Taxation and Finance garnished his tax return.

Based on this record, we conclude that the father failed to meet his burden of establishing his right to consent to the adoption of his children (*see* Domestic Relations Law § 111 [1] [d]). A biological father's failure to visit the children and to pay for their support, while significant in determining whether he established a substantial relationship with the children pursuant to section 111 (1) (d), are not determinative factors in the event that they are properly explained (*see Ethan S.*, 85 AD3d at 1599). Although the court was presented with conflicting testimony regarding the alleged interference of petitioner mother and petitioner stepfather with the father's relationship with the children, the court resolved the competing credibility issues in favor of petitioners. "It is well established that the court's credibility determinations are . . . entitled to great deference" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1544-1545, *lv denied* 18 NY3d 808 [internal quotation marks omitted]), and we see no basis to disturb the court's determination here. Moreover, even assuming, arguendo, that the father had demonstrated his right to consent, we conclude that the record establishes that the court properly dispensed with the father's consent on the ground of abandonment (*see* § 111 [2] [a]). There is no evidence in the record that the father had any contact with the children in the six months preceding the filing of the adoption petitions.

We reject the father's further contention that the court committed reversible error in limiting the evidence presented at the hearing to the six-month time period preceding the filing of the adoption petitions. Insofar as the majority of the testimony elicited during the hearing concerned events that occurred outside that six-month time frame, we conclude that the court did not prevent the father from fully establishing the nature of his relationship with the children and the alleged efforts made by petitioners to exclude him from the children's lives.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

34

CA 12-00864

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

JAMIE RAAB, PLAINTIFF-RESPONDENT,

V ORDER

KALEIDA HEALTH, THE CHILDREN'S HOSPITAL OF BUFFALO, JOHN FAHRBACH, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

DAMON MOREY LLP, BUFFALO (BARBARA L. SCHIFELING OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GAIR, GAIR, CONASON, STEIGMAN & MACKAUF, NEW YORK CITY (JEFFREY B. BLOOM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

CONNORS & VILARDO, LLP, BUFFALO (MICHAEL J. ROACH OF COUNSEL), FOR DEFENDANTS VEETAI LI, M.D. AND UNIVERSITY AT BUFFALO NEUROSURGERY, INC.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 20, 2011. The order denied the motion of defendants Kaleida Health, The Children's Hospital of Buffalo and John Fahrbach for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on March 19 and 29, 2013, and filed in the Erie County Clerk's Office on April 9, 2013,

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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CAF 12-00097

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

IN THE MATTER OF LONNIE BOWIE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY CHILDREN'S SERVICES,
RESPONDENT-RESPONDENT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR PETITIONER-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered December 15, 2011 in a proceeding pursuant to Family Court Act article 6. The order denied the petition for sole custody.

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

Memorandum: Petitioner father appeals from an order denying his petition seeking sole custody of his son. The child previously was found to be an abandoned child in a proceeding pursuant to Social Services Law § 384-b seeking to terminate the parental rights of the child's mother and was placed in respondent agency's custody. The father was determined to be a "notice father" in connection with that proceeding, i.e., he was entitled to notice of an adoption of the child pursuant to Domestic Relations Law § 111-a (*see* Social Services Law § 384-b [12]). The father's contention that Family Court erred in characterizing him as a "notice father" rather than a "consent father" is not properly before us. We note, in any event, that the father failed to establish that he had a substantial relationship with the child such that his consent to an adoption as an unwed father would be required pursuant to Domestic Relations Law § 111 (1) (d) (*see Matter of Raquel Marie X.*, 76 NY2d 387, 394; *Matter of Jayden C. [Michelle R.]*, 82 AD3d 674).

The father's further contention that respondent failed to comply with Family Court Act §§ 1017 and 1021 by using its best efforts to promote the father's relationship with his child also is not properly

before us on this appeal. Those sections of the Family Court Act are applicable when a child is initially removed from a parent's custody, and thus they are not applicable in the instant proceeding. Finally, the court properly denied petitioner's custody petition (*see generally Matter of Ammann v Ammann*, 209 AD2d 1032, 1033).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

59

CA 12-01288

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

SHAWN GILES, ALSO KNOWN AS SHAWN ANTHONY COFFEE,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

A. GI YI, GERALD BREEN, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

ATHARI & ASSOCIATES, LLC, UTICA (NICOLE C. PELLETIER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (GARY H. ABELSON OF COUNSEL), FOR DEFENDANT-RESPONDENT GERALD BREEN.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP, WHITE PLAINS (WILLIAM WINGERTZAHN OF COUNSEL), FOR DEFENDANT-RESPONDENT A. GI YI.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 15, 2011. The order, insofar as appealed from, granted the motion of defendant Gerald Breen to compel plaintiff to produce certain medical reports, under penalty of preclusion, and denied the cross motion of plaintiff for a protective order.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of his exposure to lead-based paint while residing in a number of apartments rented to his mother from 1992 through 1996, including apartments owned by A. Gi Yi and Gerald Breen (defendants). As amplified by his bills of particulars, plaintiff alleged that he suffered 35 injuries as a result of his lead exposure, including neurological damage, diminished cognitive function and intelligence, behavioral problems, developmental deficiencies, increased probability of emotional and psychological impairments, hyperactivity, irritability, memory deficits, decreased educational and employment opportunities, and speech and language delays.

Pursuant to CPLR 3121 and Uniform Rule 202.17 (22 NYCRR 202.17), Breen served notices fixing the time and place of two medical examinations (hereafter, examinations) and requested “copies of any reports of any physicians who have treated or examined the plaintiff”

in advance of the examinations (*see* 22 NYCRR 202.17 [b] [1]). In response, plaintiff provided Breen with educational records and medical records of his treating physicians. None of those records, however, linked the particular conditions, symptoms, or problems that plaintiff was experiencing with his exposure to lead (*see Nero v Kendrick*, 100 AD3d 1383, 1383).

Breen postponed the examinations and moved to compel plaintiff to produce "medical reports of treating or examining medical service providers detailing a diagnosis of all injuries alleged to have been sustained by plaintiff as a result of exposure to lead-based paint" or, in the alternative, to "preclud[e] the plaintiff[] from introducing proof concerning said injuries." Breen asserted that, without such information, he would be "forced to determine the nature and extent of the [examinations] to be performed without any evidence that the alleged injuries sustained by plaintiff: (1) exist, and (2) are causally related to ingestion and/or inhalation of lead-based paint as alleged in [the c]omplaint." A. Gi Yi joined in Breen's motion to compel.

Plaintiff opposed the motion and cross-moved for, inter alia, a protective order pursuant to CPLR 3103. Plaintiff contended that his bills of particulars provided defendants with sufficient notice of his alleged injuries. With respect to causation, plaintiff's attorney asserted that plaintiff "suffered [lead] neurotoxicity at . . . blood lead levels known to cause severe brain and nerve damage during his residence at the defendants' respective properties," and cited various government reports and studies detailing the potential effects of lead poisoning in young children. Plaintiff further contended that defendants were in effect seeking an expert report pursuant to CPLR 3101 (d) as opposed to the report of a medical provider pursuant to 22 NYCRR 202.17, and were improperly requesting that plaintiff "prematurely go through the expense of retaining an expert."

Plaintiff appeals from an order that granted the motion "in all respects," denied the cross motion, and directed plaintiff to produce "a medical report or reports of any treating or examining medical service provider detailing a diagnosis of any injuries alleged to have been sustained by the plaintiff . . . and causally relating said injuries to plaintiff's alleged exposure to lead-based paint . . . before any [examinations] are conducted." The order further provided that, "in the event the plaintiff fails to produce the aforementioned report or reports, [he] shall be precluded from introducing any proof concerning injuries alleged to have been sustained by the plaintiff." We affirm.

It is well settled that "[a] trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an abuse of that discretion" (*Finnegan v Peter, Sr. & Mary L. Liberatore Family Ltd. Partnership*, 90 AD3d 1676, 1677; *see Hann v Black*, 96 AD3d 1503, 1504; *WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1619). New York has long adhered to a policy of liberal, open pretrial disclosure (*see Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954; *DiMichel v South Buffalo Ry.*

Corp., 80 NY2d 184, 193). CPLR 3101 (a), which governs discoverability, broadly provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (*see Hoenig v Westphal*, 52 NY2d 605, 608; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3101:4). That provision "has been liberally construed to require disclosure where the matter sought will 'assist preparation for trial by sharpening the issues and reducing delay and prolixity' " (*Hoenig*, 52 NY2d at 608, quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406). "Thus, restricted only by a test for materiality 'of usefulness and reason' . . . , pretrial discovery is to be encouraged" (*id.*, quoting *Allen*, 21 NY2d at 406).

With respect to specific disclosure devices, CPLR 3121 (a) provides for a physical or mental examination of any party when that party's physical or mental condition is "in controversy" (*see Hoenig*, 52 NY2d at 609; Connors, Practice Commentaries, CPLR 3121:1). CPLR 3121 (b) provides for the exchange of certain medical reports (*see Hoenig*, 52 NY2d at 609), and Uniform Rule 202.17 "elaborates on the exchange of medical reports in tort actions, supplying more detail than CPLR 3121 (b)" (Connors, Practice Commentaries, CPLR 3121:8 at 313). Uniform Rule 202.17 provides in relevant part that, "*[e]xcept where the court otherwise directs*, in all actions in which recovery is sought for personal injuries, disability or death, physical examinations and the exchange of medical information shall be governed by the provisions hereinafter set forth: (a) At any time after joinder of issue and service of a bill of particulars, the party to be examined or any other party may serve on all other parties a notice fixing the time and place of examination . . . (b) At least 20 days before the date of such examination, or on such other date as the court may direct, the party to be examined shall serve upon and deliver to all other parties the following, which may be used by the examining medical provider: (1) copies of the medical reports of those medical providers who have previously treated or examined the party seeking recovery. These shall include a recital of the injuries and conditions as to which testimony will be offered at the trial, referring to and identifying those x-ray and technicians' reports which will be offered at the trial, including a description of the injuries, a diagnosis and a prognosis" (emphasis added).

CPLR 3103 (a) vests a trial court with the discretion to "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device," either "on its own initiative, or on motion of any party or of any person from whom discovery is sought." Such an order "shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (*id.*).

Under the unique circumstances of this case, we conclude that Supreme Court did not abuse its broad discretion in directing plaintiff to produce a medical report containing a diagnosis of the alleged injuries sustained by plaintiff and causally relating such injuries to lead exposure before any CPLR 3121 examinations are conducted. As previously noted, plaintiff alleges numerous and wide-

ranging neurological, physiological, psychological, educational, and occupational effects of his childhood exposure to lead. Although plaintiff disclosed his medical and educational records, none of those records diagnoses plaintiff with a lead-related injury or causally relates any of plaintiff's alleged physical or mental conditions to lead exposure. Indeed, plaintiff's mother testified at her deposition that no health care provider had ever told her that plaintiff had "any residual injuries from lead exposure." The only reference in the disclosed records to an injury that may have been caused by exposure to lead is a school district health and development assessment, which states that "[e]levated [blood] lead level may have had an effect" on plaintiff's educational performance.

Although the dissent is correct that CPLR 3121 and 22 NYCRR 202.17 do not *require* the disclosure directed in this case, they likewise do not *preclude* a trial judge from proceeding in the manner at issue herein. As the Court of Appeals has noted, "CPLR 3121 does not limit the scope of general discovery available, subject to the discretion of the trial court, under CPLR 3101" (*Kavanagh*, 92 NY2d at 953-954). Rather, CPLR 3121 "broadens rather than restricts discovery" (*Hoenig*, 52 NY2d at 609). With respect to Uniform Rule 202.17, that rule is prefaced by the phrase "[e]xcept where the court otherwise directs," thus preserving the trial judge's discretion to manage the discovery process (*see generally* CPLR 3101 [a]; 3103 [a]).

Contrary to the view of the dissent, our affirmance of the trial court's order does not impose "unduly burdensome obligations not contemplated by 22 NYCRR 202.17" upon all personal injury plaintiffs. Rather, we simply conclude that where, as here, the records produced by a plaintiff pursuant to Uniform Rule 202.17 contain no proof of medical causation, i.e., evidence causally linking the plaintiff's alleged injuries to his or her exposure to lead, it is not an abuse of discretion for a trial court to determine that "defendants should not be put to the time, expense and effort of arranging for and conducting a medical examination of plaintiff without the benefit of [a] report[or reports] linking the symptoms or conditions of plaintiff to defendants' alleged negligence" (*Nero*, 100 AD3d at 1384; *see generally* CPLR 3101 [a]; *Finnegan*, 90 AD3d at 1677; *Neuman v Frank*, 82 AD3d 1642, 1643).

In contrast to the vast majority of personal injury actions, which involve discrete injuries sustained at a specific point in time, lead paint cases typically involve exposure over a sustained period of time and, unlike other toxic tort cases, there is no "signature injury" that is linked to lead exposure in the way that, for example, mesothelioma is linked to asbestos, emphysema is linked to cigarette smoke, or adenosis is linked to diethylstilbestrol, known as DES (*Brenner v American Cyanamid Co.*, 263 AD2d 165, 173; *see* Lindsay F. Wiley, *Rethinking the New Public Health*, 69 Wash & Lee L Rev 207, 242 [2012]; Kenneth R. Lepage, *Lead-Based Paint Litigation and the Problem of Causation: Toward a Unified Theory of Market Share Liability*, 37 BC L Rev 155, 158 [1995]). The injuries plaintiff alleges herein, such as hyperactivity, speech and language delays, irritability, memory

deficits, and the increased probability of emotional and psychological impairments, "could have been caused by some source other than lead" (*Brenner*, 263 AD2d at 173) and, indeed, there is nothing in the disclosed medical records linking plaintiff's alleged injuries to lead exposure.

The dissent further asserts that our ruling requires a plaintiff to retain an "expert" at an "early stage of litigation." We disagree with that assertion. Contrary to the dissent's characterization, the order at issue on appeal was issued near the close of discovery, after the parties had exchanged medical and educational records and conducted depositions of the relevant witnesses. Moreover, the trial court did not require plaintiff to retain an expert within the meaning of CPLR 3101 (d) to render an opinion on causation. Rather, the court ordered plaintiff to produce a "medical report or reports of any treating or examining medical service provider." Pursuant to Uniform Rule 202.17 (b) (1), medical reports "may consist of completed medical provider, workers' compensation, or insurance forms that provide the information required by this paragraph," i.e., "a description of the injuries, a diagnosis and a prognosis." Thus, the court simply required plaintiff to provide *some* documentation diagnosing plaintiff with the injuries alleged and linking those injuries to the exposure to lead before requiring defendants to proceed with a physical or mental examination.

As the Court of Appeals has noted, the purpose of CPLR 3121 (a) is to afford the examining party the "opportunity to present a *competing* assessment" of the other party's physical or mental condition, which presumes that the examining party has received from the plaintiff medical reports concerning the plaintiff's claimed injuries and theory of causation (*Kavanagh*, 92 NY2d at 955 [emphasis added]). The trial court's order is thus consistent with 22 NYCRR 202.17 and the CPLR's general emphasis on broad disclosure, which facilitates more meaningful trial preparation "by requiring each party to 'tip their hand' well in advance of trial. This avoids surprise and tends to base the final result on the facts rather than on tactics" (Connors, Practice Commentaries, CPLR 3101:4 at 18).

We therefore conclude that, under the circumstances of this case, "it cannot be said that the trial court abused its discretion in finding that the need for the discovery outweighed the burden on the protesting party" (*Kavanagh*, 92 NY2d at 955), and thus there is no basis to " 'disturb the court's control of the discovery process' " (*Marable v Hughes*, 38 AD3d 1344, 1345).

All concur except WHALEN, J., who dissents and votes to reverse the order insofar as appealed from in accordance with the following Memorandum: I respectfully dissent because the majority's holding imposes unduly burdensome obligations not contemplated by 22 NYCRR 202.17 upon individuals seeking recovery for personal injuries. Contrary to the view of the majority, 22 NYCRR 202.17 does not require a personal injury plaintiff to retain an expert to address the issue of causation and provide the expert's report to the defendant prior to the defense medical examination of plaintiff.

Pursuant to CPLR 3121, defendants in personal injury actions may require a plaintiff to submit to a medical examination (*see* CPLR 3121 [a]). The procedures for the examination itself and the exchange of medical records prior to the examination are governed by 22 NYCRR 202.17. Pursuant to paragraph (b) of the regulation, a party submitting to such a medical examination must provide "to all other parties" at least 20 days before the date of the examination "(1) copies of the medical reports of those medical providers who have previously treated or examined the party seeking recovery. These shall include a recital of the injuries and conditions as to which testimony will be offered at the trial, referring to and identifying those X-ray and technicians reports which will be offered at the trial, including a description of the injuries, a diagnosis and a prognosis. Medical reports may consist of completed medical provider, workers' compensation, or insurance forms that provide the information required by this paragraph; (2) duly executed and acknowledged written authorizations permitting all parties to obtain and make copies of all hospital records and such other records, including X-ray and technicians' reports, as may be referred to and identified in the reports of those medical providers who have treated or examined the party seeking recovery." In the event that a party fails to disclose the material discussed in paragraph (b), he or she shall generally be precluded from introducing the materials at trial (*see* 22 NYCRR 202.17 [h]). Likewise, the court will not hear the testimony of any treating or examining medical provider whose medical reports have not been provided (*see id.*).

In its holding today, the majority concludes that, under 22 NYCRR 202.17 (b), plaintiff is required: (1) to retain an expert witness to render an opinion that plaintiff's medical conditions are causally related to his alleged exposure to lead-based paint; and (2) to provide that expert's report to defendants before plaintiff submits to the medical examination sought by defendants. Stated another way, the majority's holding requires plaintiff to *create* proof as to the cause of his medical conditions prior to undergoing defendants' medical examination. Such a requirement, however, is outside the scope of 22 NYCRR 202.17.

Of course, for plaintiff to succeed at trial, he will likely need to retain an expert to review his medical records and render the type of causation opinion contemplated by the majority. However, nothing in the language of 22 NYCRR 202.17 requires plaintiff to make such a disclosure, which is tantamount to an expert disclosure, at this early stage of litigation. Instead, by its plain language, 22 NYCRR 202.17 (b) (1) requires only the disclosure of "medical reports of those *medical providers who have previously treated or examined the party seeking recovery*" (emphasis added).

First, under 22 NYCRR 202.17 (b) (1), a personal injury plaintiff is required only to provide medical reports from "medical providers." Although the term "medical providers" is not defined in the regulation or in the CPLR, the term must be reasonably interpreted to mean individuals who render medical services. Indeed, other states have adopted similar definitions in various contexts (*see e.g.* OAR 436-010-

0005 [27], [28] [within context of workers' compensation, Oregon regulation defining "Medical Service Provider" as "a person duly licensed to practice one or more of the healing arts" and "Medical Provider" as "a medical service provider, a hospital, medical clinic, or vendor of medical services"]; *see also Palmer v Caruso*, 2009 WL 4251114,*3 n 2 [WD Mich] [noting that a policy directive of the Michigan Department of Corrections defines "Medical Service Provider" as "[a] physician, physician assistant or nurse practitioner licensed by the State of Michigan or certified to practice within the scope of his/her training"]). In my view, an expert witness retained to render an opinion as to causation solely for purposes of litigation is not a "medical provider" as that term is commonly understood, and the disclosure of such an expert's report is outside the scope of 22 NYCRR 202.17 (b).

Second, even if I were to assume that a retained expert witness is somehow a "medical provider" within the meaning of 22 NYCRR 202.17 (b) (1), I would conclude that the regulation requires a personal injury plaintiff to provide only the reports of medical providers who have "*previously* treated or examined the party seeking recovery" (emphasis added). Nothing in section 202.17 (b) (1) requires a personal injury plaintiff to create a report that has not previously been generated by one of his medical providers. That interpretation is supported by 22 NYCRR 202.17 (g), which outlines the procedure for a personal injury plaintiff's submission of supplemental reports when the plaintiff "intends at the trial to offer evidence of further or additional injuries or conditions, nonexistent or not known to exist at the time of service of the original medical reports." Subdivision (g) allows a plaintiff to serve a supplemental medical report "not later than 30 days before trial" so long as the plaintiff makes himself or herself available for an additional medical examination "not more than 10 days" after the service of the supplemental medical report. Although this case does not involve a new injury or condition, I see no basis for allowing a plaintiff to introduce evidence of new injuries after the initial defense medical examination but, at the same time, denying him or her the ability to follow the same procedure with respect to a new expert report.

In this case, the majority relies on our decision in *Nero v Kendrick* (100 AD3d 1383) for its holding. In *Nero*, this Court reasoned that the moving "defendants should not be put to the time, expense and effort of arranging for and conducting a medical examination of plaintiff without the benefit of reports linking the symptoms or conditions of [the injured] plaintiff to [their] alleged negligence" (*id.* at 1384). However, our decisions here and in *Nero* effectively require plaintiffs to incur onerous expert witness expenses at an early stage of litigation out of a concern for the convenience of defendants. Such a requirement will have a chilling effect on personal injury litigation as law firms representing plaintiffs will be hesitant to accept new cases if they are required to retain expert witnesses at the outset of the litigation.

Ultimately, 22 NYCRR 202.17 simply does not address whether a personal injury plaintiff must retain an expert witness to render an

opinion on the issue of causation and/or disclose that expert's report prior to the defense medical examination. Pursuant to 22 NYCRR 202.1 (d), the provisions of part 202, which includes 22 NYCRR 202.17, "shall be construed consistent with the [CPLR], and matters not covered by these provisions shall be governed by the CPLR." The disclosure of expert witnesses is governed by CPLR 3101 (d), which does not require plaintiffs to provide expert reports prior to defense medical examinations. For these reasons, I respectfully dissent and would reverse the order insofar as appealed from, based on my conclusion that Supreme Court abused its discretion in granting the motion to compel and denying the cross motion for inter alia, a protective order, thus directing plaintiff to obtain and produce an expert report on the issue of causation prior to the defense medical examination. To the extent that *Nero* (100 AD3d 1383) holds otherwise, I conclude that the case was wrongly decided.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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KA 08-02494

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE KAHLEY, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, INTERIM CONFLICT DEFENDER, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered September 20, 1993. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: Following a jury trial in 1993, defendant was convicted of murder in the second degree (Penal Law § 125.25 [1]). On direct appeal, defendant raised a number of contentions, one of which challenged the admissibility of identification testimony admitted at trial. Although we initially reserved decision and remitted the matter to County Court for a hearing on the issue whether an identification procedure employed by the police was confirmatory (*People v Kahley*, 214 AD2d 960), we ultimately affirmed the judgment of conviction (*People v Kahley*, 227 AD2d 934, *lv denied* 89 NY2d 925). In 2009, defendant moved for a writ of error coram nobis, asserting that his appellate attorney was ineffective for failing to raise an issue on direct appeal that would have resulted in reversal, i.e., that the court, in violation of CPL 310.30, failed to notify him of the contents of a note received from the jury during its deliberations. We granted the writ (*People v Kahley*, 60 AD3d 1438) and now consider the appeal de novo. On this appeal, defendant contends, inter alia, that he is entitled to a new trial due to the court's failure to comply with CPL 310.30.

The relevant law is well settled. CPL 310.30 (1) provides generally that, upon receiving a note from the jury during deliberations requesting further instruction or information, "the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper." In *People v O'Rama* (78 NY2d

270), which was decided two years before defendant's trial, the Court of Appeals provided more detailed instructions for the handling of jury notes. The Court advised that, "whenever a substantive written jury communication is received by the Judge, it should be marked as a court exhibit and, before the jury is recalled to the courtroom, read into the record in the presence of counsel. Such a step would ensure a clear and complete record, thereby facilitating adequate and fair appellate review. After the contents of the inquiry are placed on the record, counsel should be afforded a full opportunity to suggest appropriate responses . . . [T]he trial court should ordinarily apprise counsel of the substance of the responsive instruction it intends to give so that counsel can seek whatever modifications are deemed appropriate *before* the jury is exposed to the potentially harmful information. Finally, when the jury is returned to the courtroom, the communication should be read in open court so that the individual jurors can correct any inaccuracies in the transcription of the inquiry and, in cases where the communication was sent by an individual juror, the rest of the jury panel can appreciate the purpose of the court's response and the context in which it is being made" (*id.* at 277-278). In *O'Rama*, the Court concluded that the trial court's failure to disclose the contents of a jury note to defendant was a mode of proceedings error that required reversal even in the absence of an objection (*id*. at 279), reasoning that the court's error "deprived [defendant] of the opportunity to have input, through counsel or otherwise, into the court's response to an important, substantive juror inquiry" (*id.* at 279-280).

In subsequent cases, the Court made clear that not all *O'Rama* violations constitute mode of proceedings errors (*see People v Ramirez*, 15 NY3d 824, 825-826; *People v Kisoon*, 8 NY3d 129, 134-135; *People v Starling*, 85 NY2d 509, 516). The only errors that require reversal in the absence of preservation are those that go to the trial court's "core responsibilities" under CPL 310.30, such as giving notice to defense counsel and the prosecutor of the contents of a jury note (*People v Tabb*, 13 NY3d 852, 853).

Here, after the jury had been deliberating for approximately two hours, the court stated on the record, "We have received an additional note requesting [the testimony of Simmons and Carmichael concerning] who left the house before the shots were fired." We note that, although the court referred to an "additional note," there is no indication in the record that a prior note had been sent by the jury. Once the jury was returned to the courtroom, the court stated, "Ladies and gentlemen, the court reporter has been preparing her notes and she will now read to you the testimony of Dr. Albert and . . . Rucker. After that testimony, we'll excuse you to have your lunch and to have the court reporter further prepare her notes and then resume with the testimony of the other witnesses approximately one hour later. Go ahead."

The record reflects that the court reporter then read testimony of Dr. Albert and Rucker to the jury, but the record does not identify what portion of the testimony was read. The jury was then excused for lunch. Approximately an hour and a half later, the jury was returned

to the courtroom and informed by the court that the court reporter was prepared to read the testimony of Simmons and Carmichael, as well as the testimony of Weaver, who testified for the prosecution that he was with defendant when the fatal shot was fired. The court's reference to Weaver's testimony is the first indication in the record that the jury had requested a readback of his testimony. The requested testimony of those three witnesses was read to the jury, which later rendered a guilty verdict.

There can be no dispute that the court failed to follow several of the procedures outlined in *O'Rama*. For instance, the court failed to mark any of the jury notes as exhibits and did not read the notes into the record. Defendant, however, did not object to the court's handling of the jury notes and, thus, his contention that the court violated CPL 310.30 is unpreserved for our review (*see* CPL 470.05 [2]). As defense counsel correctly conceded at oral argument of this appeal, the court did not commit mode of proceedings errors in failing to mark the jury notes as exhibits and to read them into the record. Because CPL 310.30 does not mandate the marking and reading of notes into the record, it logically follows that those are not among the court's "core responsibilities" under the statute (*Tabb*, 13 NY3d at 853; *cf. People v Weaver*, 89 AD3d 1477, 1478-1479). We perceive no basis to review defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant nevertheless contends that he is entitled to a new trial because the court committed a mode of proceedings error for which preservation is not required in failing to advise him of the contents of what appears to have been the first note sent by the jury, i.e., the note requesting a readback of testimony from Dr. Albert and Rucker, and possibly Weaver. In response, the People suggest that notice of the first note was provided to defendant off the record, as evidenced by the fact that defense counsel remained silent when informed by the court that it had received an "additional note" to that sent requesting the testimony of Simmons and Carmichael. Because the court failed to follow the *O'Rama* procedures, however, it cannot be said with certainty whether defense counsel received such notice off the record, and we decline to resolve the issue based on inference and conjecture.

Because it is unclear from the record whether defendant was notified of the contents of the jury note or notes requesting a readback of the testimony of Dr. Albert, Rucker and Weaver, we hold the case, reserve decision and remit the matter to County Court for a reconstruction hearing on that issue (*see People v Martinez*, 186 AD2d 14, 14-15; *see generally People v Cruz*, 42 AD3d 901, 901; *People v Russo*, 283 AD2d 910, *lv denied* 96 NY2d 867).

We agree with the dissent that the core requirements of CPL 310.30 are triggered only by a "substantive juror inquiry" (*O'Rama*, 78 NY2d at 280). We further agree that a request by the jury for a readback of the entire testimony of a witness is not a substantive inquiry, inasmuch as the appropriate response from the court to such a note is "obvious" (*People v Lockley*, 84 AD3d 836, 838, *lv denied* 17

NY3d 807; *see generally People v Alcide*, 95 AD3d 897, 898, *lv granted* 19 NY3d 956 ["Since the jury merely requested read-backs of certain trial testimony, the alleged error did not constitute a mode of proceedings error which would obviate the preservation requirement"]; *People v Gerrara*, 88 AD3d 811, 812-813, *lv denied* 18 NY3d 957, *cert denied* ___ US ___, 133 S Ct 857; *People v Bryant*, 82 AD3d 1114, 1115, *lv denied* 17 NY3d 792).

On this record, however, it cannot be determined whether the jury requested the *entire* testimony of witnesses Dr. Albert, Rucker and Weaver. Indeed, the dissent acknowledges as much, stating that "we can infer from the transcript" that the jury requested the entire testimony of those witnesses. The dissent must resort to inference here because, as noted, the court failed to comply with the *O'Rama* procedures by marking the note as an exhibit and reading it into the record. In any event, we do not believe that the inference drawn by the dissent is supported by the transcript.

If the jury requested only a portion of any of the witnesses' testimony, a mode of proceedings error would have occurred if the court failed to notify defense counsel of the jury note, considering that input from defense counsel would have been helpful in determining what portions of the testimony should be included in the readback. In our view, given the incomplete nature of the record, the issue whether the jurors requested a readback of the entire testimony of the witnesses in question also should be resolved at the reconstruction hearing, assuming, of course, that the court first determines that notice of the unrecorded note was not in fact given to defense counsel.

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

All concur except SMITH, J.P., and PERADOTTO, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent inasmuch as we conclude that there is no need for a reconstruction hearing with respect to defendant's unpreserved *O'Rama* contention (*see People v O'Rama*, 78 NY2d 270). Because we agree with the majority that the remainder of defendant's contentions are without merit, we would affirm the judgment without holding the case and remitting the matter to County Court for a reconstruction hearing.

Under *O'Rama* and its progeny, when the trial court receives a "substantive juror inquiry" (*id.* at 280), CPL 310.30 requires the court to provide "meaningful notice to counsel of the specific content of the jurors' request" (*People v Kisoon*, 8 NY3d 129, 134; *see O'Rama*, 78 NY2d at 276). As the Court of Appeals has explained, "[t]he point of [its] decision in *O'Rama* . . . was 'not to mandate adherence to a rigid set of procedures, but rather to delineate a set of guidelines calculated to maximize participation by counsel at a time when counsel's input is most meaningful, i.e., before the court gives its formal response' " (*People v Lykes*, 81 NY2d 767, 769, quoting *O'Rama*, 78 NY2d at 278). Thus, the purpose of the notice requirement is to "ensure counsel's opportunity to frame intelligent suggestions for the

fairest and least prejudicial response . . . to the jury" (*Kisoon*, 8 NY3d at 134; *see O'Rama*, 78 NY2d at 277-278). Where a jury note "contain[s] a substantive inquiry, the [trial court]'s failure to provide counsel an opportunity to participate meaningfully in formulating its response [constitutes] a mode of proceedings error that requires reversal," even in the absence of preservation (*People v Stocks*, 101 AD3d 1049, 1051; *see People v Tabb*, 13 NY3d 852, 852).

We conclude that the jury notes at issue, which requested readbacks of the entire testimony of various witnesses, were not substantive in nature and, therefore, did not implicate the court's core responsibilities under CPL 310.30 (*see People v Gerrara*, 88 AD3d 811, 812-813, *lv denied* 18 NY3d 957, *cert denied* ___ US ___, 133 S Ct 857; *People v Bryant*, 82 AD3d 1114, 1114, *lv denied* 17 NY3d 792). The record reflects that the court received three notes requesting readbacks of the testimony of five witnesses. The second note requested the testimony of Simmons and "Carmichael's testimony of who left the house before the shots were fired." The third note requested Carmichael's entire testimony. Although the first note was not summarized on the record, we can infer from the transcript that the jury requested the testimony of Dr. Albert, Rucker, and Weaver. At 12:39 p.m., the court advised the jury that the court reporter "will now read to you the testimony of Dr. Albert and . . . Rucker. After that testimony, we'll excuse you to have your lunch and to have the court reporter further prepare her notes and then resume with the testimony of the other witnesses." The jury was excused at 1:00 p.m. and, in the presence of defendant and defense counsel and outside the presence of the jury, the court explained that "[a]t this time we'll read Mr. Simmons' and [Weaver's] [testimony] and we'll go over . . . Carmichael's testimony before the jury hears it."

When the jury returned to the courtroom at 2:35 p.m., the court advised the jury that "[a]t this time we'll read the testimony of [Weaver] for you and . . . Simmons and then we'll excuse you for a few moments while we clarify some issues on the Carmichael testimony." After a read back of the testimony of Simmons and Weaver, the court again excused the jury and held a bench conference with counsel, apparently to determine how best to respond to the jury's request for a portion of Carmichael's testimony. Before that response was given, however, the court received a third note requesting the entirety of Carmichael's testimony, which was then read to the jury.

In our view, inasmuch as the jury merely requested readbacks of the entire testimony of certain witnesses, defendant's contention that the court did not strictly comply with the procedure set forth in CPL 310.30 required preservation (*see Gerrara*, 88 AD3d at 812-813; *Bryant*, 82 AD3d at 1114). Notably, the nature of the jury's inquiries required no input from defendant or defense counsel in framing the court's responses thereto. The jury requested readbacks of the testimony of five witnesses, and the court responded by reading the testimony of those witnesses in full.

In sum, because "neither defense counsel nor defendant could have provided a meaningful contribution" to the court's responses to the

jury notes in question (*People v Ochoa*, 14 NY3d 180, 188), defendant "was not denied the opportunity to provide input regarding a *substantive response or re-instruction to the jury*" (*Lykes*, 178 AD2d 927, 927-928, *affd* 81 NY2d 767 [emphasis added]) and neither reversal nor remittal for a reconstruction hearing is required.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01274

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

ROBERT K. MONETTE AND SHARON M. MONETTE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CHRISTINA L. TRUMMER, ET AL., DEFENDANTS,
JIM BALL PONTIAC-BUICK-GMC, INC. AND JIM BALL
HOLDINGS, LLC, DEFENDANTS-APPELLANTS.

LAW OFFICE OF DESTIN C. SANTACROSE, BUFFALO (CHRISTOPHER R. TURNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DWYER, BLACK & LYLE, LLP, OLEAN (KEVIN M. HABBERFIELD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered September 29, 2011 in a personal injury action. The order denied the motion of defendant Jim Ball Pontiac-Buick-GMC, Inc. for summary judgment dismissing the complaint and all cross claims against it.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted, and the complaint and all cross claims against defendant Jim Ball Pontiac-Buick-GMC, Inc. are dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Robert K. Monette (plaintiff) when a parked vehicle in which he was seated was rear-ended by a vehicle owned by defendant Jesse L. Ball and operated by defendant Christina L. Trummer. Trummer had borrowed the vehicle from her boyfriend, defendant David Leederman, who in turn had been loaned the vehicle by Jim Ball Pontiac-Buick-GMC, Inc. (defendant) while defendant was servicing Leederman's pickup truck. In the complaint, as amplified by the bill of particulars, plaintiffs assert, inter alia, that defendant is vicariously liable under Vehicle and Traffic Law § 388 as a co-owner of the vehicle involved in the accident. Defendant appeals from an order denying its motion for summary judgment dismissing the complaint and all cross claims against it. We reverse.

On the date of the accident, Leederman brought his pickup truck to defendant for servicing, and defendant agreed to loan Leederman a vehicle while it repaired his truck. Defendant owned four or five "loaner vehicles," but those vehicles were all with other customers at

that time. After Leederman was unable to rent a vehicle from a nearby rental company, defendant's chief financial officer asked Jesse Ball, an employee of defendant and the daughter of defendant's owner, James Ball, whether she would be willing to permit Leederman to use her vehicle while his truck was being serviced. She agreed, and Leederman signed a "rental agreement" with defendant. Later that evening, Leederman allowed Trummer to drive Jesse Ball's vehicle to work, whereupon the subject accident took place.

Pursuant to Vehicle and Traffic Law § 388, an owner of a motor vehicle is vicariously liable for the negligent use or operation of such vehicle by anyone operating the vehicle with the owner's express or implied permission (*see* § 388 [1]; *A Dan Jiang v Jin-Liang Liu*, 97 AD3d 707, 708; *Vyrtle Trucking Corp. v Browne*, 93 AD3d 716, 717; *Mikelinich v Caliandro*, 87 AD3d 99, 102). The term "owner" is defined as "[a] person, other than a lien holder, having the property in or title to a vehicle . . . The term includes a person entitled to the use and possession of a vehicle . . . subject to a security interest in another person and also includes any lessee or bailee of a motor vehicle . . . having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days" (§ 128; *see* § 388 [3]).

We agree with defendant that it established as a matter of law that it was not the owner of the vehicle involved in the motor vehicle accident at issue, and that plaintiffs failed to raise a triable issue of fact with respect to ownership of that vehicle. Plaintiffs concede that Jesse Ball, not defendant, was the titleholder of the vehicle (*see Zegarowicz v Ripatti*, 77 AD3d 650, 652; *Them-Tuck Chung v Pinto*, 26 AD3d 428, 429). Plaintiffs further concede that defendant did not "hav[e] the exclusive use [of the vehicle], under a lease or otherwise, for a period greater than thirty days" (Vehicle and Traffic Law § 128; *see A Dan Jiang*, 97 AD3d at 908; *Progressive Halcyon Ins. Co. v Giacometti*, 72 AD3d 1503, 1506). Plaintiffs contend, however, that defendant possessed an unspecified "property interest" in the vehicle, thus rendering it a "co-owner" within the ambit of Vehicle and Traffic Law § 388. We reject that contention.

The record establishes that Jesse Ball leased the vehicle at issue from GMAC. Although Jesse Ball was an employee of defendant, the vehicle was her personal vehicle. Jesse Ball made the lease payments on the vehicle and paid for the insurance on the vehicle, which was insured under a policy separate from that of defendant's policy. By contrast, defendant's loaner vehicles were owned by defendant and insured under a policy of insurance issued to defendant. Further, the record reflects that Jesse Ball's vehicle was loaned to Leederman under unusual circumstances. After purchasing his pickup truck from defendant, Leederman discovered a number of problems with the truck. When Leederman made an appointment to repair the truck, defendant assured him that it would provide him with a replacement vehicle while his truck was being repaired. At the time Leederman dropped off his truck, however, none of defendant's loaner vehicles was available, and efforts to secure a rental vehicle for Leederman were likewise unsuccessful. Only then did defendant approach Jesse

Ball for permission to use her vehicle, which she granted. Notably, Jesse Ball testified that she had not previously been asked to loan her vehicle to a customer. We thus conclude that there is no evidence that Jesse Ball and defendant shared ownership of the vehicle for purposes of Vehicle and Traffic Law § 388.

Although the dissent concludes that there are issues of fact "regarding whether defendant had sufficient 'use and possession' of the vehicle to be considered a co-owner" with Jesse Ball, Vehicle and Traffic Law § 388 defines the term "owner" as "a person entitled to the use and possession of a vehicle . . . *subject to a security interest in another person*" (§ 128 [emphasis added]). The record establishes that it was Jesse Ball, not defendant, who as the lessee of the vehicle was entitled to its use and possession subject to GMAC's security interest. Further, there is no record support for the dissent's assertion that the inclusion of a "stock number" for the vehicle in question is indicative of co-ownership.

Plaintiffs' bill of particulars further asserts that defendant "negligently entrust[ed] the vehicle to an inexperienced and incompetent driver." We agree with defendant that it is entitled to summary judgment dismissing the complaint against it insofar as it is premised upon a claim of negligent entrustment. "To establish a cause of action under a theory of negligent entrustment, 'the defendant must . . . have some *special knowledge concerning a characteristic or condition peculiar to the [person to whom a particular chattel is given]* which renders [that person's] use of the chattel unreasonably dangerous' " (*Cook v Schapiro*, 58 AD3d 664, 666, *lv denied* 12 NY3d 710; *see Burrell v Barreiro*, 83 AD3d 984, 985-986). Here, there is no evidence that defendant possessed any special knowledge concerning a characteristic or condition peculiar to Leederman that rendered his use of Jesse Ball's vehicle unreasonably dangerous (*see Burrell*, 83 AD3d at 986). Before loaning the vehicle to Leederman, defendant verified that he had a valid driver's license and recorded Leederman's insurance and credit card information. Further, Leederman signed a rental agreement pursuant to which, inter alia, he affirmed that he was over the age of 25 and agreed that he would not permit anyone under 21 years of age to operate the vehicle. Trummer, who was operating the vehicle at the time of the accident, was not with Leederman when he was loaned the vehicle from defendant. In opposition to the motion, plaintiffs failed to raise a triable issue of fact as to special knowledge on the part of defendant and, notably, they do not address the negligent entrustment claim in their responding brief.

We therefore reverse the order, grant defendant's motion, and dismiss the complaint and all cross claims against it.

All concur except SCONIERS and VALENTINO, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent because we conclude that, on this record, Jim Ball Pontiac-Buick-GMC, Inc. (defendant) failed to satisfy its initial burden in moving for summary judgment dismissing the complaint and all cross claims against it of establishing as a matter of law that it was not an owner of the

vehicle that rear-ended the parked vehicle in which plaintiff Robert K. Monette was seated at the time of this accident (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). As a result, we would affirm the order denying defendant's motion.

Vehicle and Traffic Law § 388 (1) imposes vicarious liability on "[e]very owner of a vehicle used or operated in this state . . . for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with permission, express or implied, of such owner." "Owner" is defined in Vehicle and Traffic Law § 128 in relevant part as "[a] person, other than a lien holder, having the property in or title to a vehicle" and "includes a person entitled to the use and possession of a vehicle . . . subject to a security interest in another person *and also includes* any lessee or bailee of a motor vehicle . . . having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days" (emphasis added). Plaintiffs concede that there is no evidence that defendant had "the exclusive use" of the vehicle "for a period greater than thirty days." In addition, it is undisputed that the vehicle was leased through GMAC, which accordingly had a security interest in it. The question that remains, however, is whether defendant was entitled "to the use and possession of [the] vehicle" (*id.*). Although "[g]enerally ownership is in the registered owner of the vehicle or one holding the documents of title" (*Fulater v Palmer's Granite Garage, Inc.*, 90 AD2d 685, 685, *appeal dismissed* 58 NY2d 826; *see Young v Seckler*, 74 AD2d 155, 156-158), the record does not include either the vehicle's title or the New York State registration. In any event, "a party may rebut the inference that arises from [a title or registration]" (*Fulater*, 90 AD2d at 685).

Viewing the evidence in the light most favorable to plaintiffs, who are opposing defendant's motion (*see generally Victor Temporary Servs. v Slattery*, 105 AD2d 1115, 1117), we conclude that there are issues of fact regarding whether defendant had sufficient "use and possession" of the vehicle to be considered a co-owner with defendant Jesse Ball. James Ball, defendant's owner and Jesse Ball's father, testified at his deposition that, on the day of the accident, "[a]ll our loaner cars were out, and the only car we had was my daughter's. So we used that and put it on a loaner agreement . . . , same as we would any other loaner car that we had." He also agreed that the vehicle was from his place of business. Although Jesse Ball consented to the use of the vehicle in this manner, it is unclear whether defendant obtained her permission as a co-owner with equal rights to possession or whether she provided the vehicle to defendant for use in the context of a bailment. To the extent that the testimony of Jesse Ball and James Ball created questions of fact on the issue of ownership (*see Young*, 74 AD2d at 159 [Damiani, J.P., concurring]), defendant failed to meet its burden, and we need not consider plaintiffs' evidence (*see generally Alvarez*, 68 NY2d at 324). Moreover, defendant's notation of a "stock number" for the vehicle in question on the loaner agreement lends further support to plaintiffs' theory of co-ownership.

Defendant further contends that assuming, arguendo, that it is an owner of the vehicle, the Graves Amendment (49 USC § 30106) shields it from liability. We conclude that defendant did not meet its initial burden on that ground "inasmuch as it did not offer competent proof that it was engaged in the business or trade of leasing or renting motor vehicles" (*Cassidy v DCFS Trust*, 89 AD3d 591, 591).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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KA 11-01860

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD D. ROSSBOROUGH, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

TERRENCE M. PARKER, DISTRICT ATTORNEY, BELMONT (AMANDA B. FINN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered September 20, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that County Court erred in summarily denying his motion to withdraw his plea and for the assignment of new counsel. With respect to that part of defendant's motion to withdraw his plea, we note that a court need only afford a defendant a "reasonable opportunity to present his contentions" (*People v Tinsley*, 35 NY2d 926, 927; *see People v Allen*, 99 AD3d 1252, 1252), and we conclude that the court did so here. Further, with respect to the merits of that part of defendant's motion to withdraw his plea, his contention that the plea was coerced by defense counsel is belied by his statements during the plea colloquy that no one forced him to plead guilty and that he was satisfied with the representation of defense counsel (*see People v Strasser*, 83 AD3d 1411, 1411; *People v Irvine*, 42 AD3d 949, 949, *lv denied* 9 NY3d 962). Defendant failed to preserve for our review his further contention that he was induced to enter his plea by false representations concerning his minimum sentencing exposure and the pendency of "bail jumping" charges against him (*see People v Alvarado*, 82 AD3d 458, 458, *lv denied* 17 NY3d 791). In any event, there was nothing coercive in any alleged misstatement of the sentencing range by the court, and the record establishes that defendant potentially faced "bail jumping" charges that were ultimately encompassed by his plea (*see People v Cerveira*, 6 AD3d 294, *lv denied* 3 NY3d 704).

With respect to that part of defendant's motion for the assignment of new counsel, the record belies defendant's contention that defense counsel took a position adverse to that of defendant in his pro se motion to withdraw the plea, and thus there was no reason for the court to assign new counsel (*see Allen*, 99 AD3d at 1252-1253; *Strasser*, 83 AD3d at 1411-1412). Indeed, defendant failed to establish any conflict of interest or other irreconcilable conflict with defense counsel (*cf. People v Sides*, 75 NY2d 822, 824-825).

To the extent that defendant's contention that he was denied effective assistance of counsel based on defense counsel's participation in the factual component of the plea allocution survives his guilty plea (*see generally People v Neal*, 56 AD3d 1211, 1211, *lv denied* 12 NY3d 761), we reject that contention. The record demonstrates that the factual component of the plea allocution was performed under the court's supervision and that defendant's right to counsel was adequately safeguarded (*see People v Robbins*, 33 AD3d 1127, 1128-1129). To the extent that defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to show him the presentence report survives his guilty plea (*see generally Neal*, 56 AD3d at 1211), we likewise conclude that defendant's contention lacks merit. Defendant was not entitled to review the presentence report inasmuch as "the record establishes that defendant was represented by counsel and that the presentence report was reviewed by defense counsel" (*People v June*, 30 AD3d 1016, 1017, *lv denied* 7 NY3d 813, *reconsideration denied* 7 NY3d 868; *see* CPL 390.50 [2] [a]; *see generally People v Vaughan*, 20 AD3d 940, 942, *lv denied* 5 NY3d 857), and thus it cannot be said that there was no legitimate explanation for defense counsel's alleged deficiency in failing to show it to him (*see generally People v Rivera*, 71 NY2d 705, 709).

Inasmuch as the local criminal court issued a divestiture order and defendant was held over for grand jury action and executed a waiver of indictment and consent to be prosecuted by a superior court information, we conclude that defendant's further contention that the court had no jurisdiction is without merit (*see People v Barber*, 280 AD2d 691, 692, *lv denied* 96 NY2d 825; *People v Talham*, 41 AD2d 354, 356). Finally, defendant's contention that he was denied the right to counsel when he waived a preliminary hearing before he was assigned counsel is without merit (*see People v Kelone*, 292 AD2d 640, 641, *lv denied* 98 NY2d 677).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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CAF 11-01240

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

IN THE MATTER OF AIDEN J.W.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHAEL E.M., RESPONDENT-APPELLANT.

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

SUSAN M. SUSSMAN, NIAGARA FALLS, FOR PETITIONER-RESPONDENT.

ALVIN M. GREENE, ATTORNEY FOR THE CHILD, BUFFALO, FOR AIDEN J.W.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered June 13, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: Respondent father appeals from an order finding that he permanently neglected his child and terminating his parental rights. We reject the father's contention that Family Court failed to consider the appropriate factors, including the "special circumstances of an incarcerated parent," in determining that the child was permanently neglected (Social Services Law § 384-b [7] [a]). Indeed, we agree with the court that the father "has failed to demonstrate any commitment to the responsibilities of parenthood and demonstrates a fundamental defect in his understanding of proper parenting responsibilities." The petitioning agency is not required to " 'guarantee that the parent succeed in overcoming his or her predicaments' . . . but, rather, the parent must 'assume a measure of initiative and responsibility' " (*Matter of Whytnei B. [Jeffrey B.]*, 77 AD3d 1340, 1341).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01246

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

JAMES EMSLIE AND LISA ANN EMSLIE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

RECREATIVE INDUSTRIES, INC.,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANT.

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

THOMAS E. STILES, BROOKLYN, FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered April 5, 2012. The order conditionally stayed the action.

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

Memorandum: This action arises from an incident in which plaintiff James Emslie, a British citizen residing in Scotland, allegedly sustained serious physical injuries in England while he was a passenger on an all-terrain vehicle (ATV) manufactured by defendant Recreative Industries, Inc. (RII), a New York entity. RII moved to dismiss the action pursuant to CPLR 327 based on the doctrine of forum non conveniens, contending that England is the more convenient forum. Supreme Court granted the motion to the extent that it stayed the action in Erie County on the conditions that RII agreed to waive the right to raise the defenses of lack of jurisdiction and the statute of limitations in an action to be commenced by plaintiffs in Scotland or England within 90 days of service of the court's order or, in the event of an appeal thereof, within 90 days of service of an order of the Appellate Division. The court further imposed the condition that RII agreed to waive the right to seek any attorney's fees or costs in the action to be commenced in Scotland or England. RII appeals and plaintiffs cross-appeal.

Contrary to plaintiffs' contention on their cross appeal, the court properly conditionally stayed this action on the ground of forum non conveniens. As a preliminary matter, we reject plaintiffs' contention that the "Governing Law and Jurisdiction" provision in the

operator's manual of the ATV contractually binds RII to submit to the jurisdiction of the court in Erie County or otherwise estops RII from seeking to dismiss the complaint based upon the ground of forum non conveniens. That provision expressly provides that the "parties" consent to jurisdiction in Erie County, and it is undisputed that the term "parties" refers to the owner of the ATV and RII. It is also undisputed that neither plaintiff was the owner of the ATV, and we thus conclude as a matter of law that the provision in question does not apply herein (*see generally Tigue v Commercial Life Ins. Co.*, 219 AD2d 820, 821).

We further conclude that the court properly determined that "the action, although jurisdictionally sound, would be better adjudicated elsewhere" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479, *cert denied* 469 US 1108). Plaintiffs are both British citizens residing in Scotland. The accident occurred in England, and other witnesses, including the driver of the ATV, are located there. As the trial court in the federal action between the same parties noted, "highly material evidence, such as the eyewitness testimony, accident investigation documents and witnesses, the scene of the accident, and the vehicle itself, which will not be readily within plaintiffs' control in this court, would be more accessible to both sides in a British forum" (*Emslie v Recreative Indus., Inc.*, 2010 WL 1840311, at *9 [WD NY], *affd* 655 F3d 123). Moreover, RII is amenable to service of process in Scotland or England, and it does not take issue with the conditions imposed by the court concerning the waiver of defenses based on jurisdiction and the statute of limitations.

Plaintiffs nevertheless contend that neither Scotland nor England is an adequate alternative forum because those jurisdictions would not permit them to retain counsel on a contingency fee basis, would hinder their right to a jury trial, which would have been guaranteed in Erie County, and would not recognize plaintiff wife's cause of action for loss of consortium. Although various courts have considered the burden imposed on plaintiffs with respect to the first two factors (*see e.g. Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 328; *Gyenes v Zionist Org. of Am.*, 169 AD2d 451, 452), we conclude under the circumstances of this case that those factors do not warrant reversal. With respect to the third factor, we note that the record contains submissions from plaintiffs and RII establishing that, although plaintiff wife could not pursue a cause of action for loss of consortium in Scotland or England, plaintiff husband would be permitted to recover compensation for the services she provided for him in tending to his injuries. Courts have concluded under similar circumstances that a foreign forum is adequate despite the fact that it does not recognize such a cause of action (*see e.g. Massaquoi v Virgin Atl. Airways*, 945 F Supp 58, 61 [SD NY]; *Bell v British Telecom*, 1995 WL 476684, at *2 [SD NY]; *see also Bewers v American Home Prods. Corp.*, 99 AD2d 949, 949-950, *affd* 64 NY2d 630). We likewise reach that conclusion here, particularly in light of the well-established principle set forth by the United States Supreme Court that the possibility of a change in substantive law, even one that would be less favorable to plaintiffs, "should ordinarily not be

given conclusive or even substantial weight" in the scope of a forum non conveniens inquiry (*Piper Aircraft Co. v Reyno*, 454 US 235, 247, *reh denied* 455 US 928).

To the extent that plaintiffs contend for the first time on their cross appeal that they are entitled to the imposition of additional conditions upon the stay, that contention is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Turning to RII's appeal, we conclude that the court erred in imposing the condition that RII may not seek attorney's fees or costs in an action brought by plaintiffs in Scotland or England. We therefore modify the order accordingly. Pursuant to CPLR 327 (a), courts are empowered to "stay or dismiss the action in whole or in part on any conditions that may be just." Indeed, in granting motions under CPLR 327, courts often impose conditions requiring the defendants to waive the right to assert a defense based upon lack of jurisdiction and/or the statute of limitations (*see e.g. Mensah v Moxley*, 235 AD2d 910, 912; *Dawson v Seenardine*, 232 AD2d 521, 521; *Dales v Tiessen*, 231 AD2d 920, 920-921). In this case, however, we conclude that the court abused its discretion by infringing on RII's substantive right to collect attorney's fees and costs if it were to prevail in a "loser pays" jurisdiction such as Scotland or England.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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KA 11-01835

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC KIRKLAND, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered August 26, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree, grand larceny in the third degree and possession of burglar's tools.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), grand larceny in the third degree (§ 155.35 [1]), and possession of burglar's tools (§ 140.35), defendant contends that his plea was not voluntarily and knowingly entered. Defendant's contention is actually a challenge to the factual sufficiency of the plea allocution and is not preserved for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665; *People v Granger*, 96 AD3d 1667, 1667, *lv denied* 19 NY3d 1102). Even assuming, arguendo, that defendant's contention with respect to a comment he made during the plea colloquy "calls into question the voluntariness of the plea" and thus falls within the narrow exception to the preservation requirement, we conclude that County Court properly conducted the requisite inquiry to clarify that defendant was voluntarily entering his plea (*Lopez*, 71 NY2d at 666).

Defendant further contends that the court erred in ordering him to pay restitution without conducting a hearing. Defendant's contention "is not properly before this Court for review because [defendant] did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order during the sentencing proceeding" (*People v Horne*, 97 NY2d 404, 414 n 3; *see People v McCarthy*, 83 AD3d 1533, 1534, *lv denied* 17 NY3d

819). 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]).

Defendant also failed to preserve for our review his contention that the court erred in imposing a collection surcharge of 10% of the amount of restitution (*see* CPL 470.05 [2]). A court must impose a surcharge of 5% of the amount of restitution, but an additional surcharge of up to 5% is permitted "[u]pon the filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution or reparation in a particular case exceeds five percent of the entire amount of the payment or the amount actually collected" (Penal Law § 60.27 [8]). Defendant contends that the affidavit of the probation officer in this case is insufficient to warrant the additional surcharge. We disagree with our dissenting colleagues that the issue whether a surcharge of 10% is properly imposed does not require preservation. While this Court has in the past relied on the illegal sentence exception to the preservation requirement of CPL 470.05 (2) when reviewing that issue (*see People v Gahrey M.O.*, 231 AD2d 909, 910; *see generally People v Seaberg*, 74 NY2d 1, 9), more recent decisions from the Court of Appeals have established that issues regarding restitution require preservation (*see Horne*, 97 NY2d at 414 n 3). In addition, the Court of Appeals has held that the mandatory surcharge set forth in Penal Law § 60.35 (1) is not part of a sentence (*see People v Guerrero*, 12 NY3d 45, 48; *People v Hoti*, 12 NY3d 742, 743). Those cases compel us to conclude that an issue regarding a surcharge imposed on restitution pursuant to Penal Law § 60.27 (8) must be preserved for our review and that we cannot rely on the illegal sentence exception to the preservation requirement. We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the consecutive sentences imposed on his felony convictions are illegal. "[S]entences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other" (*People v Laureano*, 87 NY2d 640, 643; *see* Penal Law § 70.25 [2]). Here, the court properly imposed consecutive sentences on the felony convictions because "[t]he crime of burglary was completed when defendant entered [the electronics store] with the intent to commit a crime [and] [t]he ensuing larceny was a separate crime, perpetrated through defendant's separate act of stealing property" (*People v Frazier*, 16 NY3d 36, 41). We reject defendant's further contention that the sentence is unduly harsh or severe, particularly with respect to the consecutive terms of incarceration (*see generally Frazier*, 16 NY3d at 41). The consecutive terms of incarceration were part of the plea agreement, and defendant has a history of burglary and theft offenses.

CENTRA, J.P., CARNI and VALENTINO, JJ., concur; FAHEY and SCONIERS, JJ., concur in the following Memorandum: We concur inasmuch as we

respectfully disagree with the conclusion of the majority that defendant was required to preserve for our review his contention that the Ontario County Probation Department affidavit was inadequate to support an enhanced surcharge of 10% of the entire amount of restitution that he was ordered to pay as part of the sentence (*see* Penal Law § 60.27 [8]). In our view, that contention does not require preservation because " '[a] defendant cannot be deemed to have waived his right to be sentenced as provided by law' " (*People v Gahrey M.O.*, 231 AD2d 909, 910). Thus, contrary to the view of the majority, we conclude that we are obligated to address the merits of defendant's contention regarding the sufficiency of the affidavit in question.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01478

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

AMANDA FLORES,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

FRANCIS X. VESCERA, DEFENDANT-RESPONDENT,
AND CHRISTOPHER VESCERA,
DEFENDANT-APPELLANT-RESPONDENT.

GREENE, HERSHDORFER & SHARPE, SYRACUSE (SHERRY R. BRUCE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

ATHARI & ASSOCIATES, LLC, UTICA (NICOLE C. PELLETIER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered March 23, 2012. The order, among other things, denied the motion of plaintiff for a protective order and denied in part the cross motion of defendant Christopher Vescera for a protective order.

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

Memorandum: Christopher Vescera (defendant) appeals and plaintiff cross-appeals from an order denying plaintiff's motion for a protective order permitting her to videotape a neuropsychological evaluation (NPE) using a one-way mirror, and denying that part of defendant's cross motion to preclude plaintiff's counsel or other representative from attending the NPE. With respect to plaintiff's motion, we note that there is no express statutory authority to videotape medical examinations (*see* CPLR 3121; 22 NYCRR 202.17; *Lamendola v Slocum*, 148 AD2d 781, 781, *lv dismissed* 74 NY2d 714), and videotaping has not been allowed in the absence of "special and unusual circumstances" (*Lamendola*, 148 AD2d at 781). We conclude that plaintiff failed to establish the requisite special and unusual circumstances (*cf. Mosel v Brookhaven Mem. Hosp.*, 134 Misc 2d 73). With respect to defendant's cross motion, we conclude that Supreme Court properly determined that defendant failed to make the requisite positive showing of necessity for the exclusion of plaintiff's counsel or other representative from attending the NPE by establishing that the presence of such an individual would impair the validity and effectiveness of the NPE (*see Jessica H. v Spagnola*, 41 AD3d 1261,

1262-1263).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

202

KA 09-01366

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDI E., ALSO KNOWN AS BRANDI G.,
DEFENDANT-APPELLANT.

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

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

Appeal from an adjudication of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 18, 2009. Defendant was adjudicated a youthful offender upon a jury verdict finding her guilty of endangering the welfare of a child.

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

Memorandum: Defendant appeals from a youthful offender adjudication upon a jury verdict finding her guilty of endangering the welfare of a child (Penal Law § 260.10 [1]). We note as background that, in a prior trial concerning the same indictment, the jury acquitted defendant of two counts of assault in the first degree under circumstances evincing a depraved indifference to human life (§ 120.10 [3]), each of which arose from a separate incident. The jury, however, convicted defendant of a third count of that offense, which arose from a third incident, and one count of endangering the welfare of a child (§ 260.10 [1]), which was based upon all three incidents. Supreme Court vacated the conviction upon a subsequent CPL article 440 motion and directed a new trial upon the remaining assault in the first degree count and the endangering the welfare of a child count. Prior to the new trial, which is at issue here, defendant apparently moved to preclude the prosecution from presenting any evidence with respect to the two incidents that were the bases for the assault charges of which she was acquitted (two prior incidents) on the ground that admission of that evidence was barred by the doctrine of collateral estoppel. The court indicated that it would not preclude evidence of the two prior incidents at that time, but would rule upon any objection made by defendant during the trial. The court, in effect, denied defendant's motion when it permitted the People to introduce at the new trial evidence concerning the two prior incidents

over defendant's objections.

Defendant contends that the court violated the doctrine of collateral estoppel when it permitted the People to introduce at the new trial evidence related to the assault charges of which she was acquitted, i.e., evidence of the two prior incidents. We reject that contention. "Collateral estoppel originally developed in civil litigation, but it is now clear that the doctrine applies generally to criminal proceedings as well" (*People v Goodman*, 69 NY2d 32, 37; *see Ashe v Swenson*, 397 US 436, 443). "The doctrine of collateral estoppel, or issue preclusion, operates in a criminal prosecution to bar relitigation of issues necessarily resolved in defendant's favor at an earlier trial" (*People v Acevedo*, 69 NY2d 478, 484). Thus, the doctrine applies in a situation such as this, where at a prior trial there was a mixed verdict in which the jury acquitted a defendant of certain charges, but was unable to reach a verdict on the remaining charges (*see e.g. People v Marmorato*, 138 AD2d 410, 411, *lv denied* 71 NY2d 970). "Application of the collateral estoppel doctrine requires that the court determine what the first judgment decided and how that determination bears on the later judgment . . . The rule is easily stated but frequently difficult to implement because the meaning of a general verdict is not always clear and mixed verdicts may, at times, appear inherently ambiguous. Nevertheless, the court must assume the jury reached a rational result . . . , and a defendant claiming the benefit of estoppel carries the burden of identifying the particular issue on which he [or she] seeks to foreclose evidence and then establishing that the fact finder in the first trial, by its verdict, necessarily resolved that issue in his [or her] favor" (*Goodman*, 69 NY2d at 40; *see e.g. People v Johnson*, 14 AD3d 460, 461-462). "Defendant's burden to show that the jury's verdict in the prior trial *necessarily* decided a particular factual issue raised in the second prosecution is a heavy one indeed, and as a practical matter severely circumscribes the availability of collateral estoppel in criminal prosecutions . . . '[I]t will normally be *impossible* to ascertain the exact import of a verdict of acquittal in a criminal trial' " (*Acevedo*, 69 NY2d at 487; *see People v Cole*, 306 AD2d 558, 561, *lv denied* 100 NY2d 515; *cf. People v Rossi*, 222 AD2d 717, 717-718, *lv denied* 88 NY2d 884).

Here, we conclude that the court properly denied defendant's motion to preclude the evidence regarding the two prior incidents. Inasmuch as the endangering the welfare of a child count of which she was convicted in the prior trial was based in part on the two prior incidents that were the bases for the two assault counts of which she was acquitted, it is possible that the jury in the prior trial concluded that defendant was involved in those incidents but that her actions did not evince a depraved indifference to human life, a necessary element of the assault counts. Consequently, we conclude that defendant failed to meet her heavy burden of "establishing that the fact finder in the first trial, by its verdict, necessarily resolved that issue in [her] favor" (*Goodman*, 69 NY2d at 40).

Defendant's contention that the evidence is legally insufficient to support her conviction is not preserved for our review because her

motion for a trial order of dismissal "was not specifically directed at the same alleged shortcoming in the evidence raised on appeal" (*People v Brown*, 96 AD3d 1561, 1562, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; see *People v Myers*, 100 AD3d 1567, 1567). In any event, that contention is without merit inasmuch as the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), establishes that defendant failed to obtain medical treatment for her infant daughter after she stopped breathing (*see People v Lewis*, 83 AD3d 1206, 1207, *lv denied* 17 NY3d 797; *see generally People v Matos*, 19 NY3d 470, 475-477; *People v Mayo*, 4 AD3d 827, 827-828). Thus, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Additionally, viewing the evidence in light of the elements of the crime of endangering the welfare of a child 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 further contention, although a prospective juror initially made statements indicating that she might have "a state of mind that [was] likely to preclude [her] from rendering an impartial verdict based upon the evidence adduced at the trial" (CPL 270.20 [1] [b]), "she ultimately stated unequivocally that she could follow the law and be fair and impartial" (*People v Gladding*, 60 AD3d 1401, 1402, *lv denied* 12 NY3d 925; *see generally People v Chambers*, 97 NY2d 417, 419; *People v Arnold*, 96 NY2d 358, 362). Thus, the court did err in denying defendant's challenge for cause to that prospective juror (*cf. People v Johnson*, 94 NY2d 600, 614-615).

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

203

KA 08-01758

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN RIVERA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW DUBRIN 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 (Richard A. Keenan, J.), rendered June 26, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant failed to preserve for our review his contention that he was deprived of his constitutional right of confrontation by County Court's limitation of his cross-examination of a prosecution witness with respect to the witness's mental health (*see People v Bryant*, 93 AD3d 1344, 1344-1345; *People v Bernardez*, 63 AD3d 1174, 1175, *lv denied* 13 NY3d 794; *see generally People v Angelo*, 88 NY2d 217, 222). In any event, that contention, as well as defendant's further contention that the court abused its discretion in precluding further cross-examination about the witness's mental health, is without merit. "It is well settled that '[a]n accused's right to cross-examine witnesses . . . is not absolute' . . . [and that t]he trial court has discretion to determine the scope of the cross-examination of a witness" (*People v Corby*, 6 NY3d 231, 234, quoting *People v Williams*, 81 NY2d 303, 313; *see People v Lester*, 83 AD3d 1578, 1578, *lv denied* 17 NY3d 818; *People v Francisco*, 44 AD3d 870, 870, *lv denied* 9 NY3d 1033). Thus, trial courts "retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is

repetitive or only marginally relevant" (*Delaware v Van Arsdall*, 475 US 673, 679; *see Francisco*, 44 AD3d at 870). A defendant may question a witness about his or her mental health or psychiatric history upon a showing that the witness's "capacity to perceive and recall events was impaired by a psychiatric condition" (*People v Gaffney*, 30 AD3d 1096, 1096, *lv denied* 7 NY3d 789; *see People v Baranek*, 287 AD2d 74, 78) or that "such evidence would bear upon [the witness's] credibility or otherwise be relevant" (*People v Middlebrooks*, 300 AD2d 1142, 1143, *lv denied* 99 NY2d 630 [internal quotation marks omitted]; *see People v Byers*, 254 AD2d 494, 494, *lv denied* 93 NY2d 1043; *People v Knowell*, 94 AD2d 255, 260-261). Here, we conclude that defendant failed to make the requisite showing that the witness in fact had a history of mental illness or that such evidence would bear upon her capacity to perceive or recall the events at issue (*see Middlebrooks*, 300 AD2d at 1143; *Byers*, 254 AD2d at 494; *Knowell*, 94 AD2d at 261). Defense counsel's statement that the witness was "suffering from or being treated for some variety of mental health issue" was speculative inasmuch as it was based upon the assertions that "everyone" was aware that the witness was taking unspecified "mental health medications" and that the witness reportedly had visited a mobile "mental health unit" some three months after the events at issue. Thus, that statement was insufficient to warrant further cross-examination regarding the witness's mental condition (*see People v Brown*, 24 AD3d 884, 887, *lv denied* 6 NY3d 832; *cf. Baranek*, 287 AD2d at 78-79; *People v Knowell*, 127 AD2d 794, 794).

We reject the further contention of defendant that the People committed a *Brady* violation by failing to disclose the identity of two witnesses in a timely manner. "To establish a *Brady* violation, a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" (*People v Fuentes*, 12 NY3d 259, 263, *rearg denied* 13 NY3d 766). We conclude that the evidence at issue is not exculpatory in nature and thus does not constitute *Brady* material (*see generally People v King*, 79 AD2d 992, 993). Defendant sought the identity of and contact information for two witnesses named in a police report. According to the police report, the relevant witnesses said that they observed a group of five or six Hispanic males shooting at the victim. They described one of the suspects as "young" and another of the suspects as a thin Hispanic male with a "poof hairstyle pulled back." Even assuming, arguendo, that those descriptions are inconsistent with defendant's physical appearance, we note that the witnesses were unable to describe the remaining members of the group, and the witnesses' descriptions therefore did not exclude defendant as a perpetrator (*see People v Chin*, 67 NY2d 22, 33; *People v Alvarez*, 44 AD3d 562, 563-564, *lv denied* 9 NY3d 1030; *People v La Bombard*, 99 AD2d 851, 852-853; *cf. People v Daly*, 57 AD3d 914, 915-917, *affd* 14 NY3d 848). Moreover, we conclude that defendant was afforded "a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case" (*People v Cortijo*, 70 NY2d 868, 870), but he failed to do so (*see People v Chandler*, 279 AD2d

262, 262, *lv denied* 96 NY2d 781; *see generally People v Nielsen*, 67 AD3d 1440, 1440-1441).

Contrary to defendant's further contention, we conclude that the court did not abuse its discretion in removing him from the courtroom during the prosecutor's summation. Although a criminal defendant has a constitutional right to be present at his or her trial, a defendant may forfeit that right by engaging in disruptive behavior (*see People v Parker*, 92 AD3d 807, 807, *lv denied* 19 NY3d 966; *People v Sanchez*, 7 AD3d 645, 646, *lv denied* 3 NY3d 681; *People v Jackson*, 262 AD2d 1031, 1032, *lv denied* 94 NY2d 881). Thus, a defendant "may be removed from the courtroom if, after being warned by the trial court, the disruptive conduct continues" (*People v Joyner*, 303 AD2d 421, 421, *lv denied* 100 NY2d 563; *see* CPL 260.20), and that is the case here (*see Parker*, 92 AD3d at 807; *Jackson*, 262 AD2d at 1032; *see also People v Mercer*, 66 AD3d 1368, 1369, *lv denied* 13 NY3d 940).

Finally, we reject defendant's contention that he was entitled to an adverse inference charge on the ground that the police failed to record his interrogation (*see People v McMillon*, 77 AD3d 1375, 1375, *lv denied* 16 NY3d 897; *People v Holloway*, 71 AD3d 1486, 1487, *lv denied* 15 NY3d 774; *People v Hammons*, 68 AD3d 1800, 1801, *lv denied* 14 NY3d 801).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

204

KA 11-00855

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD A. DEKENIPP, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered February 15, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree, criminal mischief in the fourth degree and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that all of the sentences imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of robbery in the third degree (Penal Law § 160.05), criminal mischief in the fourth degree (§ 145.00 [3]), and two counts of endangering the welfare of a child (§ 260.10 [1]), based upon his theft of two pairs of shoes from a department store while his two young children were present. We reject defendant's contention that County Court erred in permitting the store's security guard to make an in-court identification of defendant. Even assuming, arguendo, that the showup procedure was unduly suggestive, we conclude that the People established that the security guard had an independent basis for his in-court identification (*see People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833). The security guard testified that he observed defendant over the store's closed-circuit security camera system for approximately five to eight minutes under good lighting conditions and that he was able to obtain "close ups" of defendant. The security guard thereafter observed defendant in the parking lot during daylight hours for approximately five minutes, at which point he was "face to face" with defendant and close enough to touch him (*People v Sanchez*, 292 AD2d 844, 844, *lv denied* 98 NY2d 680 [internal quotation marks omitted]; *see People v Peryea*, 239 AD2d 933, 933, *lv denied* 90 NY2d 909; *People v Bostic* [appeal No. 2], 222 AD2d 1073, 1073, *lv denied* 88 NY2d 876; *People v Nance*, 185 AD2d 610, 610, *lv*

denied 80 NY2d 976).

Defendant also contends that the evidence is legally insufficient to support the robbery conviction because it did not establish that he stole shoes from the department store. We reject that contention. "[E]ven in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678 [internal quotation marks omitted]; *see People v Danielson*, 9 NY3d 342, 349). The evidence here included the security guard's testimony that he discovered a new shoe box containing a used pair of shoes in defendant's abandoned shopping cart. He also found a new "Transformers" shoe box containing a pair of used "Spiderman" sneakers in the store's shoe department. A police officer testified that, on the day of the incident, he discovered a pair of new "Transformers" children's sneakers at defendant's house and observed defendant's daughter wearing one new sneaker. We conclude that the evidence, although largely circumstantial, could lead a rational person to conclude that defendant stole shoes from the department store. Additionally, even assuming, arguendo, that a different result would not have been unreasonable, we conclude that, viewing the evidence in light of the elements of the crime of robbery in the third degree as charged to the jury (*see Danielson*, 9 NY3d at 349), it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that the criminal mischief conviction is supported only by inadmissible hearsay. Any alleged error of the court in admitting in evidence the credit card receipt regarding the payment for a repair of the victim's vehicle, which was struck and damaged by defendant's vehicle during the course of defendant's flight from the store parking lot (*see People v Michallow*, 201 AD2d 915, 916-917, *lv denied* 83 NY2d 874), is harmless inasmuch as the victim's testimony established that the cost of the repair exceeded the statutory threshold (*see People v Singleton*, 291 AD2d 869, 870, *lv denied* 98 NY2d 640).

Defendant's contention that the court should have compelled the testimony of a defense witness who invoked her Fifth Amendment privilege against self-incrimination is likewise without merit. As a general rule, a "witness is the judge of his [or her] right to invoke the [Fifth Amendment] privilege" (*People v Arroyo*, 46 NY2d 928, 930; *see People v Grimes*, 289 AD2d 1072, 1073, *lv denied* 97 NY2d 755). A witness "may claim the privilege based upon the fact that the proposed testimony would be so inconsistent with prior statements under oath as to expose him [or her] to conviction for perjury" (*People v Bagby*, 65 NY2d 410, 413-414 [internal quotation marks omitted]; *see People v Shapiro*, 50 NY2d 747, 759-760). Here, the witness was under indictment for perjury stemming from her allegedly false testimony at the grand jury proceedings in this matter. Based upon our review of the court's questioning of the witness outside the presence of the

jury and with her counsel present, we perceive no basis to conclude that the witness's invocation of the privilege was "clearly contumacious" (*Matter of Grae*, 282 NY 428, 434 [internal quotation marks omitted]; *see Grimes*, 289 AD2d at 1073) or that "the witness'[s] answer[s] [could not] subject [her] to prosecution" (*State of New York v Skibinski*, 87 AD2d 974, 974).

We conclude, however, that the sentence is illegal insofar as the court directed that the sentences imposed shall run consecutively to each other. "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 [internal quotation marks omitted]; *see generally People v Moore* [appeal No. 1], 78 AD3d 1658, 1658, *lv denied* 17 NY3d 798). "[S]entences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other" (*People v Ramirez*, 89 NY2d 444, 451 [internal quotation marks omitted]; *see People v Wright*, 19 NY3d 359, 363; *People v Laureano*, 87 NY2d 640, 643; *see also* Penal Law § 70.25 [2]). "The defendant benefits if either prong is present, and the prosecution's burden is to countermand both prongs" (*Wright*, 19 NY3d at 363 [internal quotation marks omitted]).

Here, "the acts which constituted the crime of endangering the welfare of a child were not separate and distinct from the acts which constituted the crimes of" robbery and criminal mischief (*People v Nichols*, 35 AD3d 508, 509, *lv denied* 8 NY3d 925; *see generally Ramirez*, 89 NY2d at 451). As a result, the sentences imposed on the robbery and criminal mischief counts must run concurrently with the sentences imposed on the endangering the welfare of a child counts. Furthermore, the evidence establishes that, during his flight from the department store, defendant "floored" his vehicle in reverse with his driver's side door open, striking the security guard as well as the vehicle parked beside his vehicle. Those acts served as the basis for the criminal mischief count and for the "use of physical force" element of the robbery count (Penal Law § 160.00; *see* § 160.05), and thus the sentences imposed on the robbery and the criminal mischief counts must also run concurrently (*see generally People v Sturkey*, 77 NY2d 979, 980-981; *People v Taylor*, 197 AD2d 858, 858-859). We therefore modify the judgment accordingly.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

205

KA 12-00359

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL F. ATKINSON, ALSO KNOWN AS PAUL FRANCIS ATKINSON, ALSO KNOWN AS PAUL ATKINSON, DEFENDANT-APPELLANT.

KELIANN M. ELNISKI, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 20, 2011. The judgment convicted defendant, upon his plea of guilty, of arson in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of arson in the second degree (Penal Law § 150.15), defendant contends that he was denied effective assistance of counsel because defense counsel failed to seek suppression of tangible evidence and his statement to the police and to advise him of certain rights forfeited as a consequence of his plea. That contention survives his guilty plea only insofar as he asserts that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance" (*People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869 [internal quotation marks omitted]; *see People v Culver*, 94 AD3d 1427, 1427-1428, *lv denied* 19 NY3d 1025; *People v Bethune*, 21 AD3d 1316, 1316, *lv denied* 6 NY3d 752; *see also People v Strickland*, 103 AD3d 1178, ___). Defendant's contention with respect to ineffective assistance of counsel, however, concerns matters outside the record and thus must be raised by way of a motion pursuant to CPL article 440 (*see Strickland*, 103 AD3d at ___; *see also People v Williams*, 48 AD3d 1108, 1109, *lv denied* 10 NY3d 872). The further contention of defendant that his plea was not knowingly, intelligently or voluntarily entered is not preserved for our review because defendant failed to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Montanez*, 89 AD3d 1409, 1409; *People v Connolly*, 70 AD3d 1510, 1511, *lv denied* 14 NY3d 886). In any event, we conclude that defendant understood the nature

and consequences of the plea and that it was knowingly, intelligently and voluntarily entered (*see People v White*, 85 AD3d 1493, 1494; *People v Watkins*, 77 AD3d 1403, 1403-1404, *lv denied* 15 NY3d 956). Defendant's contention that he was not credited for jail time that he served before entering his plea is not properly raised on direct appeal from the judgment of conviction and instead the proper procedural vehicle is a CPLR article 78 proceeding (*see People v Person*, 256 AD2d 1232, 1232-1233, *lv denied* 93 NY2d 856; *People v Searor*, 163 AD2d 824, 824, *lv denied* 76 NY2d 896). Finally, under the circumstances here, the sentence is not unduly harsh or severe.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

208

CA 12-00188

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

JOSEPH LAUZONIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COLLEEN LAUZONIS, DEFENDANT-APPELLANT.

FLAHERTY & SHEA, BUFFALO (KATHLEEN E. HOROHOE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEONARD G. TILNEY, JR., LOCKPORT, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Frank Caruso, J.), entered December 9, 2011 in a divorce action. The judgment, among other things, adjudged that plaintiff pay child support to defendant in the amount of $275 per week.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the 5th and 17th decretal paragraphs and providing that defendant shall receive one half of the value of the Investacorp account as of the date of the commencement of this action and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Defendant wife appeals from a judgment that, inter alia, dissolved the parties' marriage on the ground of cruel and inhuman treatment, awarded the wife maintenance and child support, and distributed the marital property. Contrary to the wife's contention, we conclude that Supreme Court did not err in imputing annual income in the amount of $20,000 to her for purposes of calculating child support and maintenance. "Courts have considerable discretion to . . . impute an annual income to a parent" (*Juhasz v Juhasz*, 59 AD3d 1023, 1025, *lv dismissed* 12 NY3d 848 [internal quotation marks omitted]; *see Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1180), and a court's imputation of income will not be disturbed so long as there is record support for its determination (*see Sharlow v Sharlow*, 77 AD3d 1430, 1431; *Juhasz*, 59 AD3d at 1025). Here, we conclude that the court did not abuse its discretion in determining that the wife is capable of earning $20,000 a year based upon her education, qualifications, employment history, past income, and demonstrated earning potential (*see Filiaci v Filiaci*, 68 AD3d 1810, 1811; *Matter of Hurd v Hurd*, 303 AD2d 928, 928; *Mayle v Mayle*, 299 AD2d 869, 869).

We agree with the wife, however, that the court erred in failing to distribute certain marital assets, i.e., an investment account, a

403-b deferred compensation account, and plaintiff husband's preretirement death benefits. With respect to the investment account, which the parties referred to as the "Investacorp account," there is no question that those funds constitute marital property. Both parties testified at trial that they refinanced the marital home in the spring of 2008, a few months before commencement of the divorce action, and invested the proceeds from the refinancing in the stock market. Indeed, the husband acknowledged at trial that the Investacorp account should be divided equally between the parties after he is reimbursed from that account for the amount he paid for the parties' custodial evaluator. The court, however, awarded the entire account balance to the husband on the ground that "the testimony and evidence is not enough to award the balance of said account to the [wife]." Where, as here, however, the property at issue is held jointly, "an equal disposition of that property should be presumptively in order, with the burden on the party seeking a greater share to establish entitlement" (Alan D. Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C236B:33; *see Diener v Diener*, 281 AD2d 385, 386; *see generally Swett v Swett*, 89 AD3d 1560, 1561-1562). Here, the husband did not overcome the presumption that the jointly titled property, i.e., the Investacorp account, should be divided equally between the parties (*see generally Murray v Murray*, 101 AD3d 1320, 1321; *Marshall v Marshall*, 91 AD3d 610, 612; *Ponzi v Ponzi*, 45 AD3d 1327, 1327-1328; *Boardman v Boardman*, 300 AD2d 1110, 1110). Thus, we agree with the wife that the court should have equitably distributed that marital asset (*see Leeds v Leeds*, 281 AD2d 601, 601-602, *appeal dismissed* 96 NY2d 858, *lv denied* 97 NY2d 602). We therefore modify the judgment by vacating the 17th decretal paragraph and directing that the wife shall receive one half of the value of the Investacorp account as of the date of the commencement of this action (*see generally Moody v Sorokina*, 40 AD3d 14, 20-21, *appeal dismissed* 8 NY3d 978, *reconsideration denied* 9 NY3d 887; *Bennett v Bennett*, 13 AD3d 1080, 1082-1083, *lv denied* 6 NY3d 708).

We likewise agree with the wife that at least a portion of the husband's 403-b account is marital property subject to equitable distribution and that the court therefore erred in failing to distribute that asset (*see Roehmholdt v Russell*, 272 AD2d 938, 940; *see generally Rosenkrantz v Rosenkrantz*, 184 AD2d 478, 479-480; *Matter of Trickel v Trickel*, 88 AD2d 741, 742). The husband made contributions to that account from his wages during the course of the marriage and thus, as the husband acknowledged at trial, the account should be divided equitably "pursuant to the formulas outlined by the courts" (*see DeLuca v DeLuca*, 97 NY2d 139, 144; *see generally Nugent-Schubert v Schubert*, 88 AD3d 967, 968). We therefore remit this matter to Supreme Court for equitable distribution of the husband's 403-b account (*see Roehmholdt*, 272 AD2d at 940).

We further agree with the wife that the court erred in failing to equitably distribute the husband's in-service death benefit, which was provided through the teacher retirement system. It is well settled that employment-based death benefits that accrue during the marriage

are marital property subject to equitable distribution (*see e.g. Ndulo v Ndulo*, 66 AD3d 1263, 1264; *Spilman-Conklin v Conklin*, 11 AD3d 798, 802; *see generally* Domestic Relations Law § 236 [B] [1] [c]; *Kazel v Kazel*, 3 NY3d 331, 334-335; *Majauskas v Majauskas*, 61 NY2d 481, 489-491; *Cowley v Cowley*, 15 AD3d 974, 976) and, contrary to the husband's contention, the court's award to the wife of a share of the husband's pension does not evidence its intent to grant the husband sole possession of his death benefit. Rather, it appears from the record that the court simply failed to consider the husband's preretirement death benefit when it equitably distributed the parties' assets (*see generally Rosenkrantz*, 184 AD2d at 479-480; *Trickel*, 88 AD2d at 742). We thus also remit this matter to Supreme Court for a determination of the value of the death benefit at the time of the commencement of this action and for the equitable distribution thereof (*see generally McDonald v McDonald*, 275 AD2d 1037, 1038; *Roehmholdt*, 272 AD2d at 940; *Knight v Knight*, 258 AD2d 955, 956). We note that, although the wife in her brief requested remittal of this matter for equitable distribution of certain mutual funds, which the parties referred to as the "Equine Financial/Washington Funds," the wife conceded at oral argument that those funds are the same as the Investacorp account.

The wife further contends that the court abused its discretion in failing to award her any portion of the husband's enhanced earnings from his master's degree, which he earned in part during the marriage. We agree, and we therefore remit this matter to Supreme Court for a determination of the appropriate percentage of those enhanced earnings that should be awarded to the wife. The record before us establishes that, at the very least, the wife made a "modest" contribution toward the husband's attainment of a master's degree and thus that she is entitled to some portion of his enhanced earnings (*Gallagher v Gallagher*, 93 AD3d 1311, 1314, *lv denied in part and dismissed in part* 19 NY3d 1022 [internal quotation marks omitted]; *see Martinson v Martinson*, 32 AD3d 1276, 1277; *Schiffmacher v Schiffmacher*, 21 AD3d 1386, 1387). Indeed, the record demonstrates that the parties married shortly after the wife graduated from college and that, at the time, the husband was teaching high school and had five years in which to obtain his master's degree. The wife testified that she put her own master's degree "on hold" while the husband pursued his degree. During that period of time, the wife substitute taught, performed household duties, and assisted the husband with his course work. In addition, the wife testified that she helped the husband by taking over his swim club, planning practices for the varsity swim teams he coached, and volunteering to coach those teams for him several times a week. Moreover, from 2000 through 2002, the wife worked part-time as the head coach of a university swim team and, from 2001 until May 2002, when the parties' first child was born, she worked full-time as an elementary school teacher.

With respect to the wife's contention concerning the award of child support, we note that we are unable to ascertain from the record before us how the court calculated the child support award in the amount of $275 per week and whether, as the wife contends, the court deducted maintenance from the husband's income before calculating his child support obligation (*see* Domestic Relations Law § 240 [1-b] [b]

[5] [vii] [C]). We therefore further modify the judgment by vacating the 5th decretal paragraph, and we remit this matter to Supreme Court to determine the amount of the husband's child support obligation in compliance with the Child Support Standards Act (*see Vanyo v Vanyo*, 79 AD3d 1751, 1752; *Matter of Miller v Miller*, 55 AD3d 1267, 1268-1269; *Stanley v Hain*, 38 AD3d 1205, 1206-1207). Finally, the wife contends that the court erred in failing to award her a money judgment for amounts owed by the husband to her pursuant to an order requiring him to pay $200 per week toward groceries during the pendency of this action. We conclude that the court failed to determine what amounts, if any, the husband owes to the wife for arrears with respect to that order (grocery arrears). The wife contended that, as of March 2010, the husband owed her $9,519.45 in grocery arrears, while the husband asserted at trial that he satisfied the order in full by making payments to the wife and by purchasing groceries for her. In support of that assertion, the husband submitted copies of checks he sent to the wife, receipts from restaurants, and receipts for purchases of groceries and miscellaneous household items dated from December 29, 2008 until June 14, 2010. Many of the receipts relate to purchases of non-grocery items or purchases made at fast-food establishments, and it is not evident from the record whether the husband's in-kind purchases coupled with the payments he made to the wife satisfied his grocery obligation in full. We therefore remit this matter to Supreme Court to determine the amount of the grocery arrears, if any, owed to the wife and to award an appropriate money judgment for any such arrears (*see generally LiGreci v LiGreci*, 87 AD3d 722, 726-727; *Binette v Binette-Acker*, 18 AD3d 589, 590; *Lesch v Lesch*, 201 AD2d 900, 901, *lv dismissed* 87 NY2d 1055).

Finally, we note that, upon remittal, the court should hold a hearing with respect to the various issues to be decided, if necessary.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-00708

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

ALEXANDROS TSOULIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ABBOTT BROS. II STEAK OUT, INC.,
DEFENDANT-APPELLANT.

PETRALIA, WEBB & O'CONNELL, P.C., ROCHESTER (ARNOLD R. PETRALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

HALL AND KARZ, CANANDAIGUA (PETER ROLPH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered February 15, 2012. The order, among other things, denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action for, inter alia, specific performance of an option to purchase real property contained in the parties' lease agreement. In a prior appeal, this Court modified the order of Supreme Court by granting plaintiff's cross motion for specific performance of the option to purchase and directing the parties to obtain a third appraisal to establish the price of the subject real property, including the building located thereon (property) (*Tsoulis v Abbott Bros. II Steak Out, Inc.*, 82 AD3d 1612, 1612). Thereafter, defendant moved for summary judgment dismissing the complaint, contending that plaintiff forfeited his rights under the option to purchase by failing to pay rent for the property after August 2011 and by allegedly damaging the property by, inter alia, removing fixtures and equipment. Plaintiff cross-moved for summary judgment on the complaint and for an order directing that he is entitled to specific performance of the option to purchase and to an appraisal of the property in compliance with this Court's prior order (*id.* at 1614). The court denied the motion and granted the cross motion, and defendant appeals.

We note as background that, on August 22, 2011, defendant's attorney sent a letter to plaintiff's attorney in which he asserted that plaintiff never signed a lease renewal with respect to the property and that, even if a lease renewal had been signed, the

renewal term would have expired on July 31, 2011 (August 2011 letter). Therefore, according to defendant, plaintiff was a "holdover" tenant having a "month[-]to[-]month" tenancy. The record demonstrates that plaintiff continued to occupy the property and to pay rent until August 25, 2011.

Notwithstanding the August 2011 letter, defendant contends that plaintiff breached the option to purchase and forfeited his rights thereunder by failing to pay rent after August 2011. We reject that contention. In our previous order, we determined that plaintiff had validly exercised the option to purchase and that plaintiff was still obligated to pay rent pursuant to the lease agreement, which did not merge with the purchase contract for the property (*id.* at 1613*; see Bostwick v Frankfield*, 74 NY 207, 212-213). Inasmuch as defendant notified plaintiff that the lease agreement had expired and that plaintiff's tenancy continued on only a month-to-month basis, plaintiff was not obligated to pay rent after August 25, 2011, i.e., the date he vacated the property, and thus plaintiff did not breach the option to purchase by failing to make such payments.

We reject defendant's further contention that the court erred in denying its motion because plaintiff damaged the property by, inter alia, removing fixtures and equipment. Initially, we note that defendant has not asserted a counterclaim with respect to the alleged damages to the property. In any event, plaintiff submitted competent evidence disputing defendant's damage claims and thus raised triable issues of fact on the motion. Further, plaintiff submitted the expert affidavit of an appraiser who opined that, notwithstanding defendant's damage claims, the real property and contents of the building could still be valued and appraised as of 2004—a date preceding those claims and accepted by defendant.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01857

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

TONYA TIEDE, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

FRONTIER SKYDIVERS, INC., HOLLANDS INTERNATIONAL FIELD AIRPORT, AL HOLLANDS, DAYSTAR TRADING & VENTURES, LLC, PAUL GATH, DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

DIXON & HAMILTON, LLP, GETZVILLE (MICHAEL B. DIXON OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS FRONTIER SKYDIVERS, INC. AND PAUL GATH.

STEPHENS & STEPHENS, LLP, BUFFALO (R. WILLIAM STEPHENS OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS HOLLANDS INTERNATIONAL FIELD AIRPORT AND AL HOLLANDS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT DAYSTAR TRADING & VENTURES, LLC.

FEROLETO LAW, BUFFALO (PAUL B. BECKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 5, 2012. The order dismissed plaintiff's cause of action for gross negligence and otherwise denied the motions of defendants to dismiss the amended complaint.

It is hereby ORDERED that said appeals and cross appeal are unanimously dismissed without costs.

Same Memorandum as in *Tiede v Frontier Skydivers, Inc.* ([appeal No. 2] ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

216

CA 12-01861

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

TONYA TIEDE, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

FRONTIER SKYDIVERS, INC., HOLLANDS INTERNATIONAL FIELD AIRPORT, AL HOLLANDS, DAYSTAR TRADING & VENTURES, LLC, PAUL GATH, DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

DIXON & HAMILTON, LLP, GETZVILLE (MICHAEL B. DIXON OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS FRONTIER SKYDIVERS, INC. AND PAUL GATH.

STEPHENS & STEPHENS, LLP, BUFFALO (R. WILLIAM STEPHENS OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS HOLLANDS INTERNATIONAL FIELD AIRPORT AND AL HOLLANDS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT DAYSTAR TRADING & VENTURES, LLC.

FEROLETO LAW, BUFFALO (PAUL B. BECKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered March 20, 2012. The order dismissed plaintiff's cause of action for gross negligence and otherwise denied the motions of defendants to dismiss the amended complaint.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she sustained when a plane in which she was a passenger crashed shortly after takeoff from defendant Hollands International Field Airport (Hollands Airport), which is allegedly owned and operated by defendant Al Hollands. The plane was owned by defendant Daystar Trading & Ventures, LLC (Daystar) and was operated by defendant Paul Gath, a pilot for defendant Frontier Skydivers, Inc. (Frontier). A week before the accident, plaintiff had enrolled in a one-hour course on skydiving provided by Frontier and signed a release

of liability and assumption of risk agreement (release agreement). Pursuant to the release agreement, plaintiff assumed the risk of any injuries resulting from her participation in "parachuting activities" and agreed to release the "Released Parties" from liability "for injuries or damages arising out of [her] participation in 'parachuting activities': even if caused by [negligence] . . . or other fault of 'Released Parties.' " The "Released Parties" include Frontier and Hollands Airport together with their owners, instructors, agents, employees, pilots and aircraft owners. On the date of the accident, plaintiff had returned to Hollands Airport to perform a tandem skydiving jump with a Frontier instructor, but the plane crashed before she was able to complete her jump.

Hollands Airport, Hollands, Gath, Frontier, and Daystar (collectively, defendants) moved to dismiss plaintiff's amended complaint pursuant to CPLR 3211. Supreme Court granted the motions in part by dismissing the cause of action for gross negligence and otherwise denied the motions. Defendants appeal, and plaintiff cross-appeals.

We note at the outset that the order in appeal No. 1 is superceded by the subsequent order in appeal No. 2 (*see Foster v Kanous*, 24 AD3d 1205, 1205; *Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051). We therefore dismiss defendants' appeals and plaintiff's cross appeal from the order in appeal No. 1 (*see Foster*, 24 AD3d at 1205; *Eric D.*, 162 AD2d at 1051) and, in the exercise of our discretion, we treat the notices of appeal from the order in appeal No. 1 of Frontier, Gath, Hollands Airport, and Hollands as valid and deem the appeals as taken from the order in appeal No. 2 (*see Foster*, 24 AD3d at 1205).

On their appeals, defendants contend that the court erred in failing to dismiss the amended complaint in its entirety because the release agreement bars plaintiff's claims and General Obligations Law § 5-326 does not render the release agreement void. We reject that contention. Defendants assert that section 5-326 does not apply here because Frontier is an instructional facility, rather than a recreational facility. Where a facility is "used for purely instructional purposes," section 5-326 is inapplicable even if the instruction that is provided relates to an activity that is recreational in nature (*Bacchiocchi v Ranch Parachute Club*, 273 AD2d 173, 175; *see Millan v Brown*, 295 AD2d 409, 411; *cf. Debell v Wellbridge Club Mgt., Inc.*, 40 AD3d 248, 249-250). "In assessing whether a facility is instructional or recreational, courts have examined, inter alia, the organization's name, its certificate of incorporation, its statement of purpose and whether the money it charges is tuition or a fee for use of the facility" (*Lemoine v Cornell Univ.*, 2 AD3d 1017, 1019, *lv denied* 2 NY3d 701). On a motion to dismiss pursuant to CPLR 3211, a court "may . . . consider affidavits and other evidentiary material to 'establish conclusively that plaintiff has no cause of action' " (*Mantione v Crazy Jakes, Inc.*, 101 AD3d 1719, 1720). We conclude that Frontier's facility is not used purely for instructional purposes based upon our review of Frontier's certificate of incorporation, including the statement of

purpose contained therein; the services for which plaintiff paid a fee, i.e., whether she paid for a course of instruction or for use of the facilities; as well as the other evidence submitted by defendants. Thus, defendants have failed to establish as a matter of law that General Obligations Law § 5-326 does not apply here (*see generally Bacchiocchi*, 273 AD2d at 174-175; *Rogowicki v Troser Mgt.*, 212 AD2d 1035, 1035; *Wurzer v Seneca Sport Parachute Club*, 66 AD2d 1002, 1003) and have failed to establish conclusively that plaintiff has no cause of action.

On cross appeal, plaintiff contends that the court improperly dismissed her cause of action alleging gross negligence. We reject that contention. Even "accept[ing] the facts as alleged in the [amended] complaint as true [and] accord[ing] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87), we conclude that plaintiff has not alleged conduct on the part of defendants that "evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [internal quotation marks omitted]). Thus, the court properly granted that part of defendants' motions to dismiss the gross negligence cause of action.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

225

KA 11-01380

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BAILEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), 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 (Matthew J. Murphy, III, J.), rendered June 6, 2011. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of sexual abuse in the first degree (Penal Law § 130.65 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). That valid waiver forecloses defendant's challenge 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).

In appeal No. 2, defendant appeals from a judgment convicting him upon a jury verdict of failing to register internet identifiers as a sex offender (Correction Law §§ 168-f [4]; 168-t). As part of his plea bargain with respect to the conviction that is the subject of appeal No. 1, defendant agreed to waive his right to appeal from the judgment of conviction in appeal No. 2. Thus, defendant's knowing, voluntary, and intelligent waiver of the right to appeal in appeal No. 1 encompassed his right to appeal his conviction in appeal No. 2. That valid waiver forecloses our review of his contention that the verdict is against the weight of the evidence (*see People v Allick*, 72 AD3d 1615, 1616; *People v Dickerson*, 309 AD2d 966, 967, *lv denied* 1 NY3d 596), his challenges to various rulings made by County Court during trial (*see Allick*, 72 AD3d at 1616), his challenges to the

court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833), and his challenge to the severity of the sentence (*see generally Lopez*, 6 NY3d at 255). Finally, to the extent that defendant contends that the sentence imposed is illegal, that contention survives his valid waiver of the right to appeal (*see People v Seaberg*, 74 NY2d 1, 9). We conclude, however, that the sentence is legal.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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KA 10-02301

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYQWAN COLES, ALSO KNOWN AS SMOOTH/SMOOVE/KEVIN HARRIS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CHRISTOPHER HAMMOND OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 16, 2010. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the third degree (two counts), unlawful possession of marihuana and criminally using drug paraphernalia in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Ontario County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts each 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]). Defendant's contention that the evidence is legally insufficient to support the conviction of those counts is preserved for our review only insofar as he contends that the two main prosecution witnesses were not credible (*see People v Gray*, 86 NY2d 10, 19), and that contention is without merit (*see People v Moore* [appeal No. 2], 78 AD3d 1658, 1659). The relevant witnesses' testimony was not "incredible as a matter of law inasmuch as it was not . . . manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925).

We reject defendant's contention that County Court erred in denying his *Batson* challenge. The prosecutor provided race-neutral reasons for exercising a peremptory challenge with respect to the prospective juror, i.e., that the juror had a law degree and he did not want jurors with law degrees on the panel (*see People v Ardrey*, 92

AD3d 967, 969, *lv denied* 19 NY3d 861), and that she worked as a human rights specialist, which the prosecutor perceived as a career indicating a bias in favor of the defense (*see People v Tucker*, 256 AD2d 1019, 1020). The court properly determined that the proffered reasons were not pretextual (*see People v Johnson*, 74 AD3d 1912, 1913; *People v Sampson*, 74 AD3d 1866, 1867, *lv denied* 15 NY3d 923).

Contrary to defendant's further contention, the court properly denied his motion for a mistrial, which was based on allegations of prosecutorial misconduct during summation. In his opening statement, defense counsel told the jurors that they would "see a lot of sharks" during the trial. In his summation, defense counsel said "I promised you sharks and we got sharks," and then said that two of the prosecution witnesses were sharks. In response, the prosecutor said "[s]harks are predators. Sharks take advantage of smaller, weaker fish. That is the shark right there, (INDICATING)." Later, he said "[t]he only shark—well, there's two I guess you could say, but they're sitting on that side of the Courtroom. They didn't take that witness stand like [two prosecution witnesses] did and tell you the truth." Defense counsel objected and moved for a mistrial. The court issued a curative instruction that the jury was to disregard the prosecutor's "comment that there's two sharks sitting over there and further disregard the comment that they didn't take the witness stand. You are instructed to disregard that. Obviously the reference was to [d]efendant and [defense counsel], and obviously [defense counsel] doesn't have to testify. He is not a witness in this case." Although defendant did in fact testify, we conclude that the court should have instructed the jury that defendant was not required to do so and that the People bore the burden of proof (*see People v Peterson*, 71 AD3d 1419, 1420, *lv denied* 14 NY3d 891). Nevertheless, we conclude that the prosecutor's comments were not so egregious as to deny defendant a fair trial (*see People v Williams*, 195 AD2d 986, 987, *lv denied* 82 NY2d 905).

Many of the remaining instances of alleged prosecutorial misconduct have not been preserved for our review (*see* CPL 470.05 [2]), and in any event most of the instances that defendant contends constituted misconduct were entirely proper, such as the prosecutor's fair comment on the evidence (*see People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915). To the extent that any of the conduct was improper, we conclude that the " 'improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Johnson*, 303 AD2d 967, 968, *lv denied* 100 NY2d 583; *see People v Caldwell*, 98 AD3d 1272, 1273, *lv denied* 20 NY3d 985).

Defendant failed to preserve for our review his challenges to the validity of the search warrant (*see* CPL 470.05 [2]), and we decline to exercise our power to review those challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant further contends that the court should have suppressed the evidence seized from his apartment and his statement to the police because the police entered his home unlawfully prior to the issuance of the warrant. "It is firmly established that 'police officers need either a warrant or probable cause plus exigent circumstances in order

to make a lawful entry into a home' " (*People v Kilgore*, 21 AD3d 1257, 1257, quoting *Kirk v Louisiana*, 536 US 635, 638). While we agree with the court that the police had probable cause to enter defendant's apartment, we conclude that the court erred in determining that there were exigent circumstances.

Factors to consider in determining whether exigent circumstances exist are "(1) the nature and degree of urgency involved and the amount of time needed to obtain a warrant; (2) a reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought[;] and (4) information indicating that the possessors of the contraband are aware that the police are on their trail" (*People v Lewis*, 94 AD2d 44, 49; *see also People v Bost*, 264 AD2d 425, 426). Here, the People failed to meet their burden of establishing that exigent circumstances existed to enter defendant's apartment without a warrant (*see generally People v Knapp*, 52 NY2d 689, 694). The People established that, earlier that day, defendant sold drugs to a police agent inside his residence. In the afternoon, defendant again sold drugs to the police agent at a location outside his home. Defendant was arrested after that sale as he was driving his vehicle back toward his residence. The police went to defendant's residence 45 minutes after his arrest and climbed through a window to make sure that no one was inside the residence who could destroy evidence before the police could obtain a warrant.

Based on that evidence, we conclude that there was no urgency to enter defendant's residence. Although there was a reasonable belief that contraband was inside the residence, there was no reasonable belief that it was about to be removed, that the police would be in danger as they guarded the residence, or that defendant had accomplices who would try and destroy any contraband inside the residence. Indeed, defendant was in custody at the police station at the time of the search, and there was no testimony that any other person was likely to be inside the residence (*see People v Weathers*, 100 AD3d 1521, 1522; *People v Harper*, 100 AD3d 772, 774). Moreover, this case does not involve a situation where the police agent told the officers that other persons were present when she purchased the drugs from defendant (*cf. People v Bryant*, 91 AD3d 558, 558, *lv denied* 20 NY3d 1009; *People v Lasso-Reina*, 305 AD2d 121, 122, *lv denied* 100 NY2d 595).

While we conclude that the People did not establish that exigent circumstances existed, they raised the independent source theory at the suppression hearing (*cf. Weathers*, 100 AD3d at 1522). In light of its determination that exigent circumstances existed, the court did not rule on whether defendant established that the seizure of the evidence and his statement to the police were causally related to the unlawful entry into his residence (*see generally People v Arnau*, 58 NY2d 27, 32, *cert denied* 468 US 1217). We have no power to " 'review issues either decided in an appellant's favor, or not ruled upon, by the trial court' " (*People v Concepcion*, 17 NY3d 192, 195), and we thus cannot address the independent source theory (*see People v*

Ingram, 18 NY3d 948, 949). We therefore hold the case, reserve decision and remit the matter to County Court to determine whether the evidence and statement should be suppressed as the fruit of the illegal entry (*see People v Adams*, 96 AD3d 1588, 1589; *see generally People v Muhammad*, 17 NY3d 532, 547).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

229

KA 11-01343

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN BOYSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, MITCHELL GORIS STOKES & O'SULLIVAN, LLC, CAZENOVIA (STEWART F. HANCOCK, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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 June 20, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress the evidence seized by the police during the search of defendant's person incident to his unlawful arrest is granted, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [3]), defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking to suppress controlled substances seized from his person and his residence. We agree in part with defendant. Because the evidence at the suppression hearing established that defendant was arrested inside his home without a warrant and in the absence of exigent circumstances, the arrest was unlawful, and thus the court erred in denying his motion insofar as it sought suppression of the small amount of drugs seized from his person during the search incident to arrest (*see People v Kozlowski*, 69 NY2d 761, 762, *rearg denied* 69 NY2d 985; *People v Kilgore*, 21 AD3d 1257, 1257-1258; *see generally Payton v New York*, 445 US 573). We reject defendant's contention, however, that the court erred in refusing to suppress the more substantial quantity of drugs found by the police in his apartment. The police seized those drugs during a search executed pursuant to a lawful warrant, which was based upon "information obtained prior to and independent of the illegal entry" and was not tainted by any evidence

that should have been suppressed because of the *Payton* violation (*People v Arnau*, 58 NY2d 27, 33; *see generally* CPL art 690; *People v Hanlon*, 36 NY2d 549, 559).

We reject defendant's contention that the package of cocaine that was sent from Paraguay and addressed to him was unlawfully seized by customs agents in violation of 19 USC § 482. Given the size and weight of the package, the customs agents reasonably suspected that it may contain merchandise that was imported contrary to law, and thus a search of the package was lawful under 19 USC § 482 even in the absence of any reason to believe that the package contained drugs or contraband (*see United States v Ramsey*, 431 US 606, 611-615; *see generally United States v Gaviria*, 805 F2d 1108, 1111-1112, *cert denied* 481 US 1031). In any event, even if defendant's package had been opened in violation of 19 USC § 482, we conclude that defendant's constitutional rights were not violated, and therefore suppression of the contents of that package was not required (*see People v Patterson*, 78 NY2d 711, 716-717; *see also People v Crawley*, 265 AD2d 905, 905, *lv denied* 94 NY2d 821). Defendant's constitutional rights were not violated inasmuch as the opening of the package from overseas constituted a border search (*see Ramsey*, 431 US at 620-621), which may be conducted "without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country" (*United States v Montoya de Hernandez*, 473 US 531, 537).

We therefore reverse the judgment of conviction, vacate the guilty plea, grant that part of defendant's omnibus motion seeking to suppress the evidence seized by the police during the search of defendant's person incident to his unlawful arrest, and remit the matter to Supreme Court for further proceedings on the indictment.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

230

KA 11-01381

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BAILEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), 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 (Matthew J. Murphy, III, J.), rendered June 6, 2011. The judgment convicted defendant, upon a jury verdict, of failing to register internet identifiers as a sex offender.

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

Same Memorandum as in *People v Bailey* ([appeal No. 1] ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

231

CAF 12-01651

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF BRANDON A.,
RESPONDENT-APPELLANT.

LIVINGSTON COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

JOHN M. LOCKHART, ATTORNEY FOR THE CHILD, GENESEO, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered April 9, 2012 in a proceeding pursuant to Family Court Act article 3. The order, inter alia, adjudicated respondent to be a juvenile delinquent.

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

On appeal from an order, inter alia, adjudicating respondent to be a juvenile delinquent based upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31), respondent contends that the petition was facially insufficient. We agree. We note at the outset that, because a facially sufficient petition is a jurisdictional prerequisite to adjudicating respondent a juvenile delinquent, respondent's admission does not preclude his challenge to the petition (*see Matter of Shane B.*, 4 AD3d 650, 651). A juvenile delinquency petition is facially sufficient when "the allegations of the factual part of the petition, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the respondent committed the crime or crimes charged" and when "non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof" (Family Ct Act § 311.2 [2], [3]; *see Matter of Angel A.*, 92 NY2d 430, 433).

Respondent correctly contends that the petition fails to include sufficient nonconclusory factual allegations to establish reasonable cause and a prima facie case for the crime charged. The petition alleged that respondent knowingly and unlawfully sold a controlled substance, i.e., Adderall (*see* Penal Law § 220.31). The Court of Appeals has made clear that "[s]tanding alone, a conclusory statement that a substance seized from a defendant was a particular type of

controlled substance does not meet the reasonable cause requirement" (*People v Kalin*, 12 NY3d 225, 229). Petitioner must provide factual allegations that establish a reliable basis for inferring the presence of a controlled substance (*see id.*; *Angel A.*, 92 NY2d at 434-435). The petition here is supported by only the conclusory statements of respondent's classmate and an officer that the substance was Adderall. Their statements are not "supported by evidentiary facts showing the basis for the conclusion that the substance sold was actually [Adderall]" (*People v Dumas*, 68 NY2d 729, 731; *cf. Kalin*, 12 NY3d at 229-231; *Angel A.*, 92 NY2d at 432-435; *People v Pearson*, 78 AD3d 445, 445, *lv denied* 16 NY3d 799).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

232

CAF 12-01649

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF DANIEL O'CONNELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARY O'CONNELL, RESPONDENT-APPELLANT.

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

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (DENIS A. SCINTA OF COUNSEL), FOR PETITIONER-RESPONDENT.

REBECCA J. TALMUD, ATTORNEY FOR THE CHILDREN, WILLIAMSVILLE, FOR DANIELLE O. AND KAITLYN O.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered December 9, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner primary physical custody of the parties' youngest child.

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

Memorandum: Petitioner father commenced this proceeding seeking an order modifying the parties' existing custody arrangement with respect to their children, Danielle and Kaitlyn, who were 15 and 13 years old, respectively, at the time of the hearing. Pursuant to their judgment of divorce, which incorporated the terms of their oral stipulation, the parties shared joint legal custody of their children, but respondent mother had primary physical custody and the father had unsupervised visitation. After a hearing, Family Court issued an order directing, inter alia, that the mother maintain primary physical custody of Danielle and that the father have primary physical custody of Kaitlyn. The mother appeals, and we affirm.

Contrary to the mother's contention, the father met his burden of establishing " 'a change in circumstances sufficient to warrant an inquiry into whether the best interests of the [children] warranted a change in custody' " (*Matter of Dingeldey v Dingeldey,* 93 AD3d 1325, 1326*; see Matter of York v Zullich*, 89 AD3d 1447, 1448; *Matter of Hughes v Davis*, 68 AD3d 1674, 1675; *Matter of Perry v Korman*, 63 AD3d 1564, 1565). Here, the mother's testimony at the hearing established that her relationship with Kaitlyn had become strained due to the

mother's inability to communicate effectively with Kaitlyn. The court, after considering that testimony, as well as the mother's demeanor, properly concluded that there was a change in circumstances concerning both children inasmuch as the mother had become less fit than the father with respect to her ability to effectively communicate with the children (*see Matter of Dorsa v Dorsa*, 90 AD3d 1046, 1046-1047; *see also Matter of Burch v Willard*, 57 AD3d 1272, 1273; *see generally Eschbach v Eschbach*, 56 NY2d 167, 174).

With respect to the best interests analysis, we note that " '[a] change of custody should be made only if the totality of the circumstances warrants a change that is in the best interests of the child' . . . 'Among the factors to be considered are the quality of the home environment and the parental guidance the custodial parent provides for the child . . . , the ability of each parent to provide for the child's emotional and intellectual development . . . , the financial status and ability of each parent to provide for the child . . . , the relative fitness of the respective parents, and the length of time the present custody arrangement has been in effect' " (*Matter of Maher v Maher*, 1 AD3d 987, 988-989; *see Fox v Fox*, 177 AD2d 209, 210). "In determining whether the custodial parent can continue to provide for the child's various needs, the court must be cognizant of the individual needs of each child. It is, of course, entirely possible that a circumstance such as a total breakdown in communication between a parent and child that would require a change in custody would be applicable only as to the best interests of one of several children" (*Eschbach*, 56 NY2d at 172), although "sibling relationships should not be disrupted 'unless there is some overwhelming need to do so' " (*White v White*, 209 AD2d 949, 950, *lv dismissed* 85 NY2d 924; *see Maher*, 1 AD3d at 989). "[A] court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [internal quotation marks omitted]; *see Matter of Green v Mitchell*, 266 AD2d 884, 884).

Here, the parties vary only in their ability "to provide for the child's emotional and intellectual development" (*Maher*, 1 AD3d at 989), and the court implicitly concluded that the mother was the less fit parent with respect to that factor (*see Eschbach*, 56 NY2d at 174). The court determined that it was in Kaitlyn's best interests to reside with the father because of the stress caused by the mother's interactions with her, but that it was in Danielle's best interests to continue residing with the mother because she had learned to cope with her mother's personality. "Although the separation of siblings is unfortunate" (*Maher*, 1 AD3d at 989), here the children have different needs. Indeed, this "is one of those rare cases where the breakdown in communication between the parent and child that would require a change of custody is 'applicable only as to the best interests of one of [two] children' " (*Gary D.B. v Elizabeth C.B.*, 281 AD2d 969, 971, quoting *Eschbach*, 56 NY2d at 172). Additionally, the children attend the same school and, pursuant to the visitation schedule, the children will spend time together at each party's house during the week and

every weekend. The record here supports the court's determination that it is in Kaitlyn's best interests to reside with the father because of the antagonistic relationship between Kaitlyn and the mother, despite her separation from Danielle (*see Dorsa*, 90 AD3d at 1047; *Maher*, 1 AD3d at 989; *Gary D.B.*, 281 AD2d at 971; *cf. White*, 209 AD2d at 951; *Fox*, 177 AD2d at 213).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

234

CAF 12-00555

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF CLARENCE R. BROWN, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MELODY M. DIVELBLISS, RESPONDENT-RESPONDENT.

ELIZABETH A. SAMMONS, WILLIAMSON, FOR PETITIONER-APPELLANT.

STEPHEN R. WARNER, ATTORNEY FOR THE CHILD, SODUS, FOR ALYCIA D.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered February 29, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking visitation with the parties' child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Family Court, Wayne County, for further proceedings in accordance with the following Memorandum: Petitioner father, an inmate serving a 15-year sentence in state prison, appeals from an order dismissing his petition seeking visitation with his then nine-year-old daughter (child). The father had never previously sought custody of or visitation with the child. During a court appearance occurring shortly after the petition was filed, respondent mother agreed to transport the child to prison so that the child could visit with the father during the pendency of the proceeding. At a subsequent court appearance, the Attorney for the Child (AFC) informed Family Court that the child had one visit with the father, but did not wish to have any further contact with him. The AFC further stated that the child's school counselor told him that contact between the child and the father was not "preferable." The mother's attorney stated that, although the mother had encouraged the child to visit the father, the child told the mother that she did not wish to visit the father. The AFC and the mother thus moved to dismiss the father's petition. We agree with the father that the court erred in granting the motion based on the record before it.

" '[A]n award of visitation is always conditioned upon a consideration of the best interests of the child' " (*Matter of Mills v Sweeting*, 278 AD2d 943, 943-944). "It is generally presumed to be in a child's best interest to have visitation with his or her noncustodial parent and the fact that a parent is incarcerated will

not, by itself, render visitation inappropriate" (*Matter of Cierra L.B. v Richard L.R.*, 43 AD3d 1416, 1416-1417 [internal quotation marks omitted]; *see Matter of Fewell v Ratzel*, 99 AD3d 1237, 1237; *Matter of Crowell v Livziey*, 20 AD3d 923, 923). "Unless there is a compelling reason or substantial evidence that visitation with an incarcerated parent is detrimental to a child's welfare, such visitation should not be denied" (*Matter of Thomas v Thomas*, 277 AD2d 935, 935; *see Matter of Lonobile v Betkowski*, 261 AD2d 829, 829). Moreover, " '[a] determination of the [child's] best interests should only be made after a full evidentiary hearing unless there is sufficient information before the court to enable it to undertake an independent comprehensive review of the [child's] best interests' " (*Mills*, 278 AD2d at 944; *see Matter of Secrist v Brown*, 83 AD3d 1399, 1400, *lv denied* 17 NY3d 706).

Here, we conclude that "the record is not sufficient to determine whether visitation [with the father] would be detrimental to [the child's] welfare" (*Crowell*, 20 AD3d at 923 [internal quotation marks omitted]). Additionally, neither the mother nor the AFC presented any evidence rebutting the presumption that visitation with the father is in the child's best interests, and the record does not otherwise contain any evidence rebutting that presumption (*see Fewell*, 99 AD3d at 1237; *Matter of Diedrich v Vandermallie*, 90 AD3d 1511, 1511; *Matter of Buffin v Mosley*, 263 AD2d 962, 962-963). Although both the AFC and the mother indicated that the child had visited with the father only once and that, after the visit, the child did not wish to have any further contact with the father, "[t]he opposition of [the mother] and the [AFC to visitation], unsupported by 'any testimony regarding the psychological health of the child and whether [s]he would be harmed by visitations in prison,' is insufficient to support" a determination that visitation with the father would be detrimental to the welfare of the child (*Crowell*, 20 AD3d at 923; *see Buffin*, 263 AD2d at 962-963). Moreover, "no sworn testimony or other evidence was presented, nor did the court conduct [an] in camera interview[] with the [child]" (*Thomas*, 277 AD2d at 935). We therefore reverse the order, deny the motion, reinstate the petition, and remit the matter to Family Court for further proceedings on the petition, including an evidentiary hearing, if necessary.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

240

CA 12-01630

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

JESSICA M. SCHMIDT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TINA M. GUENTHER, DEFENDANT-RESPONDENT,
HEATHER E. WATT AND MARY WATT,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

BURGIO, KITA & CURVIN, BUFFALO (HILARY C. BANKER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GELBER & O'CONNELL, LLC, WILLIAMSVILLE (KRISTOPHER SCHWARZMUELLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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

Appeal from an order of the Supreme Court, Niagara County (Catherine Nugent Panepinto, J.), entered June 21, 2012. The order, insofar as appealed from, denied the motion of defendants Heather E. Watt and Mary Watt for summary judgment dismissing the complaint and all cross claims against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint and all cross claims against defendants Heather E. Watt and Mary Watt are dismissed.

Memorandum: Plaintiff commenced this personal injury action after being involved in a four-vehicle rear-end collision in July 2008 on Transit Road near its intersection with Rapids Road in the Town of Lockport. The first vehicle in the chain was operated by Heather E. Watt and was owned by Mary Watt (collectively, defendants); the second was operated by defendant Mark J. Besecker; the third was operated by plaintiff; and the fourth was operated by defendant Tina M. Guenther. While Besecker successfully avoided rear-ending defendants' vehicle and plaintiff successfully stopped before rear-ending Besecker's vehicle, Guenther was not able to stop her vehicle in time, and she rear-ended plaintiff's vehicle. Defendants contend that Supreme Court erred in denying their motion for summary judgment dismissing the complaint and all cross claims against them because Besecker and plaintiff had completely and successfully stopped their vehicles behind defendants' vehicle before plaintiff's vehicle was rear-ended

by Guenther's vehicle. According to defendants, that stop broke the chain of causation and thereby relieved them of liability for plaintiff's subsequent injuries. We agree. We therefore reverse the order insofar as appealed from (*see Schmidt v Guenther*, 103 AD3d 1162).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

241

CA 12-00974

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

DEBORAH E. MARROW, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ANTHONY L. MARROW, DECEASED, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 111701.)

HOGAN WILLIG, PLLC, GETZVILLE (JOHN B. LICATA OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Jeremiah J. Moriarty, III, J.), dated October 4, 2011. The judgment dismissed the claim after a nonjury trial.

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

Memorandum: Claimant commenced this wrongful death action individually and as administratrix of the estate of Anthony L. Marrow (decedent), seeking damages for the fatal injuries sustained by decedent when a vehicle that was entering the adjacent highway from an entrance ramp struck decedent's motorcycle as the motorcycle was traveling on the highway. The driver of the vehicle who struck the motorcycle (driver) lost control of her vehicle after driving onto the shoulder of the entrance ramp as she rounded a curve. At trial, claimant sought to establish that the driver lost control of her vehicle due to the negligence of defendant in not repaving the entire shoulder of the entrance ramp, which resulted in a 2½-inch drop-off in the middle of the shoulder.

We note at the outset that claimant appeals from a decision dismissing her claim after a nonjury trial, but no appeal lies from a decision (*see Pecora v Lawrence*, 28 AD3d 1136, 1137). We exercise our discretion, however, to treat the notice of appeal as valid and deem the appeal as taken from the judgment entered upon the decision (*see* CPLR 5520 [c]; *Brown v State of New York*, 79 AD3d 1579, 1581).

Initially, we agree with claimant that the Court of Claims erred insofar as it determined that defendant was entitled to qualified

immunity. Under the doctrine of qualified immunity, "a governmental body may be held liable when its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan" (*Friedman v State of New York*, 67 NY2d 271, 284; *see Weiss v Fote*, 7 NY2d 579, 589, *rearg denied* 8 NY2d 934; *Kosoff-Boda v County of Wayne*, 45 AD3d 1337, 1338). Here, defendant did not raise the defense of qualified immunity in its answer to the claim or at trial (*cf. Brown*, 79 AD3d at 1580) and, in any event, defendant failed to establish that the decision to armor coat the entrance ramp and only part of the shoulder, rather than to resurface the entrance ramp including the entire shoulder, resulted from any study. Indeed, defendant's expert admitted that there was no "plan" with respect to that decision, and we thus conclude that defendant failed to establish that the qualified immunity doctrine is applicable.

In the alternative, the court concluded that the drop-off was not an unreasonably dangerous condition and, further, that the drop-off was not a proximate cause of the accident. Contrary to claimant's contention, we conclude that the verdict is not against the weight of the evidence (*see Garofalo v State of New York*, 17 AD3d 1109, 1110, *lv denied* 5 NY3d 707; *Ring v State of New York*, 8 AD3d 1057, 1057, *lv denied* 3 NY3d 608). "When the State or one of its governmental subdivisions undertakes to provide a paved strip or shoulder alongside a roadway, it must maintain the shoulder in a reasonably safe condition for foreseeable uses, including its use resulting from a driver's negligence" (*Bottalico v State of New York*, 59 NY2d 302, 304; *see Stiuso v City of New York*, 87 NY2d 889, 891). The court credited the testimony of witnesses that the 2½-inch drop-off was considered "reasonably safe" under the New York State Department of Transportation Highway Maintenance Guidelines. The court's determination that the drop-off did not constitute a dangerous condition is thus supported by the record (*cf. Sevilla v State of New York*, 111 AD2d 1046, 1047-1048).

In addition, the court's determination that the drop-off was not a proximate cause of the accident and that, instead, the sole proximate cause of the accident was the driver's negligence is also supported by the record (*see McCauley v State of New York*, 8 NY2d 938, 940, *rearg denied* 8 NY2d 1157). Defendant's expert testified that it would not have been a problem for a vehicle to mount the drop-off and return to the roadway. He explained that the driver here had turned the wheel of her vehicle sharply to the right to return to the roadway and then turned the wheel sharply to the left in an attempt to recover control of her vehicle. As a result of her sharp turns, the vehicle appeared to be "fishtailing," which is consistent with the observation of the various witnesses. It is also consistent with the driver's statement that she had tried to steer but did not use her brakes. The opinion of defendant's expert that the driver's reaction was due to inexperience and panic was supported by the testimony of the police investigators that the driver had overcorrected her steering and lost control of her vehicle. We reject the contention of claimant that the court could not consider the driver's inexperience in making its proximate cause determination (*see Ether v State of New York*, 235 AD2d 685, 686). Further, we note that, although claimant's expert

testified that the driver encountered a “scrubbing” hazard when she drove onto the shoulder and that the drop-off played a role in causing the accident, defendant’s expert refuted that testimony by asserting that there was no scrubbing re-entry onto the roadway. The court credited the testimony of defendant’s expert inasmuch as it concluded that there was no physical evidence that the driver encountered a scrubbing hazard, and we defer to that credibility determination (*see Ring*, 8 AD3d at 1057). We therefore conclude that the record supports the court’s determination that the driver’s negligence in failing to maintain control of her vehicle was the sole proximate cause of the accident (*see Schwartz v New York State Thruway Auth.*, 95 AD2d 928, 929, *affd* 61 NY2d 955).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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CA 12-01575

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

WILLIAM M. HOLST, LARRY J. PIERCE, LILLIAN BRAUNBACH, DAVID P. MARTIN, LINDA ZGODA-MARTIN, MARY E. PANKOW, STEVEN SMITH, ROBIN MARIE SMITH, ROBERT J. MARTIN, CARRIE A. MARTIN, DAVID S. WINNERT, MICHELE MUELLER, KENNETH J. ULICKI AND MARILYN M. ULICKI, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VICTOR LIBERATORE AND SALLY LIBERATORE, DEFENDANTS-RESPONDENTS.

GOODELL & RANKIN, JAMESTOWN (KIMBERLY THRUN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered October 24, 2011. The order denied the motion of plaintiffs for leave to amend the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and plaintiffs' motion seeking leave to amend the complaint is granted.

Memorandum: Plaintiffs appeal from an order that denied their motion seeking leave to amend their complaint. Defendants own property abutting a lake, and plaintiffs are nearby property owners. In their complaint, plaintiffs allege that they have a right-of-way over defendants' property providing them with access to the lake. We agree with plaintiffs that Supreme Court erred in denying their motion seeking leave to amend the complaint to add an adverse possession cause of action.

"Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*McFarland v Michel*, 2 AD3d 1297, 1300 [internal quotation marks omitted]; *see* CPLR 3025 [b]; *Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198). Although "[t]he decision to allow or disallow the amendment is committed to the court's discretion" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959), we conclude that the court here abused its discretion in denying plaintiffs' motion. Defendants have failed

to demonstrate the existence of any prejudice or surprise that would result from the amendment, or that the proposed amendment was palpably insufficient or patently devoid of merit. Indeed, as demonstrated by their answer, defendants interpreted plaintiffs' original complaint as setting forth a claim to the subject right-of-way by adverse possession.

Contrary to defendants' contention, "[a] court should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face" (*Landers v CSX Transp., Inc.*, 70 AD3d 1326, 1327 [internal quotation marks omitted]; *see Matter of Clairol Dev., LLC v Village of Spencerport*, 100 AD3d 1546, 1546; *Lucido v Mancuso*, 49 AD3d 220, 229). Moreover, the original complaint provided the necessary evidentiary support for the motion (*see McFarland*, 2 AD3d at 1300; *see also Dever v DeVito*, 84 AD3d 1539, 1541, *lv dismissed* 18 NY3d 864; *Farrell v K.J.D.E. Corp.*, 244 AD2d 905, 905). Contrary to defendants' further contention, there was no extended delay in seeking leave to amend the complaint and, in any event, " '[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' " (*Edenwald Contr. Co.*, 60 NY2d at 959; *see generally Boxhorn v Alliance Imaging, Inc.*, 74 AD3d 1735, 1736).

"Although it would have been better practice for plaintiff[s] to have included the proposed amended complaint with [their] . . . motion to amend," we conclude that plaintiffs' failure to submit a copy of the proposed amended complaint here is not fatal to their motion (*Walker v Pepsico, Inc.*, 248 AD2d 1015, 1015; *see Crystal Run Newco, LLC v United Pet Supply, Inc.*, 70 AD3d 1418, 1420). Plaintiffs brought the instant motion before CPLR 3025 (b) was amended to require submission of the proposed amended pleading. Additionally, although plaintiffs' motion seeking leave to amend the complaint refers only to an adverse possession cause of action, we would not read the proposed amendment so narrowly as to foreclose a prescriptive easement claim inasmuch as "[p]leadings shall be liberally construed" and "[d]efects shall be ignored if a substantial right of a party is not prejudiced" (CPLR 3026; *see generally Angie v Johns Manville Corp.*, 94 AD2d 939, 940).

We have reviewed defendants' remaining contention concerning plaintiffs' alleged failure to join necessary parties and conclude that it is without merit.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

244

CA 12-01742

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

HARRIET C. BOARDMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KATHERINE D. KENNEDY, AS EXECUTRIX OF THE ESTATE OF JOHN R. KENNEDY, DECEASED, AND KATHERINE D. KENNEDY, DEFENDANT-RESPONDENT.

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ZIMMERMAN & TYO, ATTORNEYS, SHORTSVILLE (JOHN E. TYO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Ontario County (John J. Ark, J.), entered March 7, 2012. The judgment and order granted defendant's motion seeking dismissal of the complaint and summary judgment dismissing the complaint, and denied the cross motion of plaintiff for partial summary judgment on her first cause of action.

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

Memorandum: Plaintiff, the ex-wife of decedent John R. Kennedy, commenced this action against decedent's widow, individually and as executrix of decedent's estate. Pursuant to the terms of a matrimonial stipulation between plaintiff and decedent, entered on November 15, 1990, plaintiff received, inter alia, a one-half interest in an individual retirement account (IRA) owned by decedent. That stipulation was thereafter incorporated into their judgment of divorce, entered March 1, 1991. Plaintiff alleges that she never received her one-half share of the IRA.

We conclude that Supreme Court properly granted defendant's motion seeking dismissal of the complaint under CPLR 3211 and summary judgment dismissing the complaint under CPLR 3212, and properly denied plaintiff's cross motion for partial summary judgment on the first cause of action. The first cause of action, for enforcement of decedent's obligation with respect to the IRA under the matrimonial stipulation and the judgment of divorce, is governed by the six-year statute of limitations set forth in CPLR 213 (1) and (2), not by the 20-year statute of limitations for an action to enforce a money judgment set forth in CPLR 211 (b) (*see Tauber v Lebow*, 65 NY2d 596,

598; *Woronoff v Woronoff*, 70 AD3d 933, 934, *lv denied* 14 NY3d 713). Thus, the first cause of action is untimely (*see Woronoff*, 70 AD3d at 934).

The second cause of action, alleging fraud, is also time-barred inasmuch as this action was commenced more than six years after the alleged fraud was committed and more than two years after plaintiff, acting with reasonable diligence, could have discovered the alleged fraud (*see* CPLR 213 [8]; *see also* CPLR 203 [g]; *see generally Rite Aid Corp. v Grass*, 48 AD3d 363, 364). We note that plaintiff did not have to wait until decedent retired in order to obtain her share of his IRA; instead, she was immediately entitled to her half of that account. Thus, it should not have taken her approximately 20 years to realize that she did not receive her share of that asset.

Finally, the third cause of action, for unjust enrichment, is time-barred by the six-year statute of limitations set forth in CPLR 213 (1), which "start[ed] to run upon the occurrence of the wrongful act giving rise to a duty of restitution" (*Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 192 AD2d 501, 503). In any event, with respect to that part of the unjust enrichment cause of action asserted against defendant individually, we conclude that, while it is not necessary for plaintiff to be in privity with defendant, their relationship is too attenuated to support that cause of action inasmuch as plaintiff and defendant "simply had no dealings with each other" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 517-518).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

245

CA 12-00526

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

CHRISTINE ANDOLINA-STOVCSIK, ALSO KNOWN AS CHRISTINA A. STOVCSIK, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MARY ANDOLINA, ALSO KNOWN AS MARY K. ANDOLINA, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CONESUS LAKE NURSING HOME, LLC, BRENDA ROBINSON, LPN, BETHANY LEVEN, RN, PAULETTE PFUNTER, LPN, LINDA CLARK, RN, BEVERLY FELDER, RN, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

CELLINO & BARNES, P.C., BUFFALO (BRIAN A. GOLDSTEIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (RICHARD E. ALEXANDER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order (denominated decision and order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered October 18, 2011. The order, inter alia, denied that part of plaintiff's cross motion for sanctions.

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

Memorandum: Plaintiff commenced this wrongful death action seeking damages for the fatal injuries sustained by plaintiff's decedent as a result of defendants' alleged negligence and medical malpractice. In appeal No. 1, plaintiff, as limited by her brief, appeals from an order insofar as it denied that part of her cross motion for sanctions pursuant to 22 NYCRR 130-1.1. We conclude that Supreme Court did not abuse its discretion in declining to sanction the attorney for defendants-respondents (*see* 22 NYCRR 130-1.1 [a], [c] [3]; *Moody v Sorokina*, 56 AD3d 1246, 1246).

In appeal No. 2, plaintiff appeals from an order that denied her motion to compel discovery of certain documents. The court conducted an in camera review of the disputed documents and determined that they were privileged. We note at the outset that the contention of defendants-respondents that plaintiff waived appellate review by

entering into a stipulation to be bound by an informal discovery procedure is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We further note that we are unable to address plaintiff's contentions that the documents in question are not privileged, and that there was a discrepancy between the privilege log provided to plaintiff pursuant to CPLR 3122 (b) and the documents submitted to the court for in camera review. Consideration of those issues requires examination of the documents reviewed in camera by the court, but those documents were not included in the record on appeal, and plaintiff did not otherwise seek to submit them to this Court for in camera review. Therefore, plaintiff " 'must suffer the consequences' " of submitting an incomplete record to this Court (*Cherry v Cherry*, 34 AD3d 1186, 1186).

Contrary to plaintiff's further contention, the court "properly directed [defendants-respondents] to submit . . . the documents set forth in . . . [the] privilege log [of defendants-respondents] for in camera inspection in order to assist the court in determining whether the documents in fact are privileged" under 42 USC § 1396r (b) (1) (B) and Education Law § 6527 (3) (*Klinger v Mashioff*, 50 AD3d 746, 747; *see generally Baliva v State Farm Mut. Auto. Ins. Co.*, 275 AD2d 1030, 1031). The issue "whether a particular document is or is not protected is necessarily a fact-specific determination . . . , most often requiring in camera review" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 378; *see generally Ross v Northern Westchester Hosp. Assn.*, 43 AD3d 1135, 1136).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

246

CA 12-01073

PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND WHALEN, JJ.

CHRISTINE ANDOLINA-STOVCSIK, ALSO KNOWN AS CHRISTINA A. STOVCSIK, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MARY ANDOLINA, ALSO KNOWN AS MARY K. ANDOLINA, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CONESUS LAKE NURSING HOME, LLC, BRENDA ROBINSON, LPN, BETHANY LEVEN, RN, PAULETTE PFUNTER, LPN, LINDA CLARK, RN, BEVERLY FELDER, RN, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

CELLINO & BARNES, P.C., BUFFALO (BRIAN A. GOLDSTEIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (RICHARD E. ALEXANDER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order (denominated decision and order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered May 2, 2012. The order denied plaintiff's motion to compel discovery of certain documents.

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

Same Memorandum as in *Andolina-Stovcsik v Conesus Lake Nursing Home, LLC* ([appeal No. 1] ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

251

KA 10-00251

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDDIE O. COLLINS, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered December 9, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (four counts) and criminal possession of a weapon in the third 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 four counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and two counts of criminal possession of a weapon in the third degree (§ 265.02 [1]). Contrary to defendant's contention, County Court properly instructed the jury on counts one through three of the indictment with respect to the automobile presumption (*see* § 265.15 [3]). Those counts concerned the sawed-off shotgun recovered from the vehicle in which defendant was a passenger and, in this case, there was no "clearcut" evidence at trial that the shotgun was found in the possession of a specified passenger in the vehicle other than defendant (*People v Lemmons*, 40 NY2d 505, 511). In such circumstances, the "[automobile] presumption's applicability is properly left to the trier of fact under an appropriate charge" (*id.* at 512).

We reject defendant's further contention that the suppression court erred in determining that the traffic stop was permissible. It is well established that the police may lawfully stop a vehicle for a traffic infraction of excessively tinted windows (*see People v McGriff*, 219 AD2d 829, 830). In this case, the testimony adduced at the suppression hearing established that the police officers' traffic stop was supported by the requisite probable cause to believe that there had been a violation of Vehicle and Traffic Law § 375 (12-a) (b) (*see People v Estrella*, 48 AD3d 1283, 1285, *affd* 10 NY3d 945, *cert*

denied 555 US 1032; *see also People v Binion*, 100 AD3d 1514, 1515). Specifically, one of the officers testified that the vehicle had "dark tinted windows" and that he could "just barely see that there was an occupant in the driver's seat."

As defendant correctly concedes, he failed to preserve for our review his contention that the court erred by instructing the jury with respect to constructive possession (*see People v Carr*, 59 AD3d 945, 946, *affd* 14 NY3d 808), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We further conclude that defendant was not denied effective assistance of counsel based on defense counsel's failure to object to the charge (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, the sentence is not unduly harsh or severe.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

256

KA 07-01852

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORLAN PAGE, DEFENDANT-APPELLANT.

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 8, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), attempted robbery in the first degree (two counts), burglary in the first degree (two counts) 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 upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]), defendant contends that Supreme Court abused its discretion in precluding him from offering expert testimony on the reliability of eyewitness identifications. We reject that contention. "If . . . sufficient evidence corroborates an eyewitness's identification of the defendant, then . . . testimony concerning eyewitness identifications is unnecessary" (*People v Santiago*, 17 NY3d 661, 669; *see People v LeGrand*, 8 NY3d 449, 459). Here, expert testimony was not required because "there were two strong eyewitness identifications, as well as many items of circumstantial evidence that, when viewed as a whole, provided substantial corroboration" (*People v Munnerlyn*, 92 AD3d 507, 507-508, *lv denied* 19 NY3d 965; *see People v Fernandez*, 78 AD3d 726, 726-727, *lv denied* 16 NY3d 830; *People v Smith*, 57 AD3d 356, 357, *lv denied* 12 NY3d 821).

Contrary to defendant's contention, the court did not err in imposing a sanction other than dismissal of the charges based on the People's loss of a basketball jersey that was found in the vicinity of the crime scene and that matched the eyewitness descriptions of clothing worn by the perpetrator. It is within the sound discretion of the court to determine the appropriate sanction for the loss of evidence (*see People v Kelly*, 62 NY2d 516, 521), and the court's

"overriding concern must be to eliminate any prejudice to the defendant while protecting the interests of society" (*id.* at 520). "The loss or destruction of evidence prior to trial does not necessarily require dismissal of the charge[s] and indeed dismissal is considered a drastic remedy rarely invoked as an appropriate sanction for the People's failure to preserve evidence" (*People v Haupt*, 71 NY2d 929, 931). Here, defendant was able to mitigate any prejudice caused by the loss of the basketball jersey by cross-examining a police officer about the loss of the jersey and presenting evidence that, prior to the loss of the jersey, the People collected a DNA sample from it that did not match the DNA of defendant. In addition, defense counsel referred to the loss of the jersey in his summation. Under these circumstances, and "[g]iven that the exculpatory value of the missing evidence is completely speculative . . . , the court did not abuse its discretion in imposing the lesser sanction" of a permissive adverse inference instruction (*People v Pfahler*, 179 AD2d 1062, 1063; *see generally People v Feliciano*, 301 AD2d 480, 481, *lv denied* 100 NY2d 538; *People v Hill*, 266 AD2d 929, 929, *lv denied* 94 NY2d 903).

Defendant contends that the prosecutor's peremptory challenges with respect to two prospective jurors constitute *Batson* violations. We reject that contention. The People offered race-neutral reasons for each peremptory challenge at issue, and the reasons were not pretextual (*see generally People v Smocum*, 99 NY2d 418, 422; *People v Allen*, 86 NY2d 101, 109-110). Specifically, the People explained that they used one peremptory challenge with respect to an African-American woman because her brother was a prison chaplain and she therefore was likely to be sympathetic to defendant (*see generally People v McCoy*, 46 AD3d 1348, 1349, *lv denied* 10 NY3d 813). The People further explained that they used a peremptory challenge with respect to another African-American woman because, inter alia, she was blind in one eye and partially deaf in one ear and those disabilities may have affected her ability to see and hear the evidence at trial (*see People v Falkenstein*, 288 AD2d 922, 922, *lv denied* 97 NY2d 704).

Although we agree with defendant that the prosecutor on summation improperly suggested that defendant had the burden of proof, we conclude that the prosecutor's "improper comment[s were] not so egregious that defendant was thereby deprived of a fair trial" (*People v Willson*, 272 AD2d 959, 960, *lv denied* 95 NY2d 873). We note in particular that the court sustained defendant's objections to the improper comments and instructed the jury to disregard them, and the jury is presumed to have followed the court's instructions (*see generally People v Wallace*, 59 AD3d 1069, 1070, *lv denied* 12 NY3d 861). Moreover, "the court clearly and unequivocally instructed the jury that the burden of proof on all issues remained with the prosecution" (*People v Pepe*, 259 AD2d 949, 950, *lv denied* 93 NY2d 1024; *see People v Matthews*, 27 AD3d 1115, 1116). Defendant concedes that his remaining contentions concerning prosecutorial misconduct during summation are not preserved for our review (*see* CPL 470.05 [2]; *People v Cox*, 21 AD3d 1361, 1363-1364, *lv denied* 6 NY3d 753). In any event, " '[t]he [remaining] challenged remarks generally constituted

fair comment on the evidence and [the] reasonable inferences to be drawn therefrom, and . . . were responsive to defense arguments' " (*People v Taylor*, 68 AD3d 1728, 1728, *lv denied* 14 NY3d 845).

Defendant contends that the court erred in allowing the People to present evidence of a prior conviction by presenting testimony concerning the existence of defendant's fingerprints in the system. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Crump*, 77 AD3d 1335, 1336, *lv denied* 16 NY3d 857), and we conclude in any event that the People did not in fact thereby present evidence of a prior conviction. "[T]he testimony of a detective that the defendant's fingerprints were already in the system, which was not specifically identified as police-related, did not compel the inference that the defendant had a past criminal history" (*People v Clemmons*, 83 AD3d 859, 860, *lv denied* 19 NY3d 971; *see People v Henry*, 71 AD3d 1159, 1160, *lv denied* 15 NY3d 774).

Defendant further contends that the court erred in refusing to suppress identification testimony on the ground that the photo array from which the identification was made was unduly suggestive. "Because the subjects depicted in the photo array [were] sufficiently similar in appearance so that the viewer's attention [was] not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection, the photo array was not unduly suggestive" (*People v Gonzalez*, 89 AD3d 1443, 1444, *lv denied* 19 NY3d 973, *reconsideration denied* 20 NY3d 932 [internal quotation marks omitted]). We also reject defendant's contention that the subsequent lineup identification procedure was unduly suggestive (*see generally People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833).

Defendant failed to preserve for our review his contention that the People committed a *Rosario* violation by failing to disclose a photograph (*see* CPL 470.05 [2]), and that contention lacks merit in any event. The photograph does not constitute *Rosario* material because it is not "a statement made by a prosecution witness" (*People v Martinez*, 298 AD2d 897, 898, *lv denied* 98 NY2d 769, *cert denied* 538 US 963, *reh denied* 539 US 911; *see* CPL 240.45 [1] [a]).

Finally, defendant contends that he was denied effective assistance of counsel because defense counsel, inter alia, failed to make objections during trial and thereby failed to preserve several issues for appellate review. We reject that contention. As discussed above, defendant's unpreserved contentions are without merit, and "[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). With respect to the remaining alleged deficiencies on the part of defense counsel, we conclude that, viewing the record as a whole and as of the time of the representation, defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d

137, 147).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

261

KA 11-01661

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE R. RIGBY, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Patricia D. Marks, J.), rendered April 6, 2010. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of two counts of reckless endangerment in the first degree (Penal Law § 120.25), defendant contends that the indictment must be dismissed because the prosecutor failed to inform the grand jury of defendant's request to call a witness to the incident giving rise to the charges. We note at the outset that defendant's contention concerns the integrity of the grand jury proceeding (*see generally People v Hill*, 5 NY3d 772, 773), and it therefore survives defendant's guilty plea (*see People v Gilmore*, 12 AD3d 1155, 1155-1156). Nevertheless, we conclude that the prosecutor properly informed the grand jury of defendant's request to call a witness (*see* CPL 190.50 [6]; *cf. Hill*, 5 NY3d at 773; *People v Calkins*, 85 AD3d 1676, 1677). The record establishes that defendant requested in writing that the grand jury cause a certain person to be called as a witness, and the prosecutor read defendant's request verbatim to the grand jury and afforded the grand jury the opportunity to determine whether it wanted to hear testimony from that person. By pleading guilty, defendant forfeited his further contention that the indictment should be dismissed because the prosecutor failed to introduce exculpatory evidence before the grand jury (*see People v Crumpler*, 70 AD3d 1396, 1397, *lv denied* 14 NY3d 839). Finally, the sentence is not unduly harsh or severe.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

263

CA 12-01837

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

WILLIAM V. CAFFERY, PLAINTIFF-APPELLANT,

V ORDER

TIME WARNER CABLE, INC., DEFENDANT-RESPONDENT.

LEWIS & LEWIS, P.C., BUFFALO (ALLAN M. LEWIS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (DENNIS P. GLASCOTT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 1, 2012. The order denied the motion of plaintiff for summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties,

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

266

CA 12-01554

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

PAUL J. SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NESTLE PURINA PETCARE COMPANY,
DEFENDANT-APPELLANT.

NESTLE PURINA PETCARE COMPANY, THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT,

V

E.E. AUSTIN & SON, INC., THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (ARLOW M. LINTON OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (JERRY MARTI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

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

Appeal and cross appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered February 17, 2012. The order denied the motions of defendant-third-party plaintiff and the cross motion of third-party defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendant-third-party plaintiff and the cross motion of third-party defendant for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims except insofar as the latter claim is based on the alleged violation of 12 NYCRR 23-1.7 (e) (2) and dismissing those claims to that extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action against defendant-third-party plaintiff, Nestle Purina Petcare Company (Nestle), seeking damages for injuries he sustained when he “slip[ped] and/or trip[ped]” and fell while working on a construction project inside a grain silo owned by Nestle. Nestle subsequently commenced a third-party action against plaintiff’s

employer, third-party defendant, E.E. Austin & Son, Inc. (Austin), which had entered into a written contract with Nestle to modify the interior of the silo. Immediately before the accident, plaintiff was standing on a ladder while vacuuming grain dust off the top of a hose rack. Plaintiff stepped off the ladder and onto accumulated grain dust and a hose that was hanging off the rack, whereupon he twisted his ankle and fell. Nestle moved for summary judgment seeking contractual indemnification in its third-party action and for summary judgment dismissing plaintiff's complaint. Austin cross-moved for summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims and for summary judgment determining that Nestle is not entitled to contractual indemnification from Austin. Nestle appeals and Austin cross-appeals from an order denying their respective motions and cross motion.

We conclude that Supreme Court erred in denying those parts of Nestle's motion and Austin's cross motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) cause of action inasmuch as "plaintiff's injury resulted from a separate hazard wholly unrelated to the danger that brought about the need for the ladder in the first instance—an unnoticed or concealed object on the floor" (*Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916; *see Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823, 825; *Meslin v New York Post*, 30 AD3d 309, 310). We therefore modify the order accordingly.

We reject the further contentions of Nestle and Austin that the court erred in denying those parts of their motion and cross motion for summary judgment with respect to plaintiff's Labor Law § 241 (6) cause of action insofar as it is based upon an alleged violation of 12 NYCRR 23-1.7 (e) (2). That regulation provides in relevant part that "[t]he parts of floors . . . where persons work or pass shall be kept free . . . from scattered tools and materials . . . insofar as may be consistent with the work being performed." Although that regulation "is applicable because the object[, i.e., the hose,] over which plaintiff tripped was not an integral part of the work he was performing" (*Arenas v Bon-Ton Dept. Stores, Inc.*, 35 AD3d 1205, 1206), on this record there is an issue of fact whether the hose constituted a scattered tool that was a tripping hazard within the meaning of 12 NYCRR 23-1.7 (e) (2) (*see Torres v Forest City Ratner Cos., LLC*, 89 AD3d 928, 929; *Cafarella v Harrison Radiator Div. of Gen. Motors*, 237 AD2d 936, 938; *see generally Arenas*, 35 AD3d at 1206). Contrary to the contentions of Nestle and Austin, plaintiff may properly rely on that regulation despite the fact that it is raised for the first time in opposition to the motion and cross motion and is not set forth in the complaint or bill of particulars inasmuch as plaintiff's reliance thereon "raises no new factual allegations or theories of liability and results in no discernible prejudice to [Nestle and Austin]" (*Landon v Austin*, 88 AD3d 1127, 1129-1130; *see Sanders v St. Vincent Hosp.*, 95 AD3d 1195, 1196; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 233).

We conclude, however, that the court erred in denying those parts of Nestle's motion and Austin's cross motion for summary judgment

dismissing the Labor Law § 241 (6) cause of action to the extent that it is based upon an alleged violation of 12 NYCRR 23-1.7 (d), and we therefore further modify the order accordingly. Pursuant to that regulation, "[i]ce, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." That regulation is not applicable to the facts of this case because "the [grain dust] on which plaintiff slipped was the very condition he was charged with removing" and thus was an integral part of the task plaintiff was performing (*Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58, 60; *see Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 789, *lv denied* 12 NY3d 709; *Basile v ICF Kaiser Engrs. Corp.*, 227 AD2d 959, 959). Furthermore, we note that plaintiff on appeal has abandoned any reliance on the remaining regulations set forth in his bill of particulars with respect to the basis for the alleged violation of Labor Law § 241 (6), and we thus additionally modify the order by granting the motion and cross motion for summary judgment dismissing the Labor Law § 241 (6) claim to that extent as well (*see Roosa v Cornell Real Prop. Servicing, Inc.*, 38 AD3d 1352, 1354; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Contrary to Nestle's contention, the court properly denied that part of its motion for summary judgment dismissing plaintiff's Labor Law § 200 claim and common-law negligence cause of action. "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law" (*Lombardi v Stout*, 80 NY2d 290, 295). Nevertheless, plaintiff " 'need not establish that [Nestle] had supervisory control over the work being performed in the event that the accident was caused by a defective condition on the premises and [Nestle] had actual [or] constructive notice of such defect' " (*Bannister v LPCiminelli, Inc.*, 93 AD3d 1294, 1295; *see Selak v Clover Mgt., Inc.*, 83 AD3d 1585, 1587). Here, Nestle "failed to show that it did not create the dangerous condition or that it lacked control over the premises and lacked actual or constructive notice of the dangerous condition" (*Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1156).

Finally, we conclude that the court properly denied those parts of the motion of Nestle and the cross motion of Austin for summary judgment on the issue of Nestle's entitlement to contractual indemnification from Austin. "An indemnification agreement will be deemed void and unenforceable if the party seeking indemnification was itself negligent" (*Giglio v St. Joseph Intercommunity Hosp.*, 309 AD2d 1266, 1268, *amended on rearg* 2 AD3d 1485; *see* General Obligations Law § 5-322.1; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 794, *rearg denied* 90 NY2d 1008). Contrary to the contentions of Nestle and Austin, there is a triable issue of fact whether Nestle was negligent, and we therefore "are unable to determine at this stage of the litigation whether the indemnity provision in the contract between [Nestle] and [Austin] violates General Obligations Law § 5-322.1" (*Miller v Pike Co., Inc.*, 52 AD3d

1240, 1241). Contrary to Austin's further contention, Workers' Compensation Law § 11 does not bar Nestle from seeking contractual indemnification from Austin inasmuch as the contract between them contains an express indemnification provision (*see Rodrigues v N & S Bldg. Contrs., Inc*., 5 NY3d 427, 431-432). Contrary to Nestle's further contention, the contract's indemnification provision does not contain limiting language that insulates it from the ambit of General Obligations Law § 5-322.1 (*see generally Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207-209; *Ostuni v Town of Inlet*, 64 AD3d 854, 855).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

277

KA 12-02083

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER CONKLIN, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), dated November 1, 2012. The order granted that part of defendant's omnibus motion seeking to dismiss the indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to dismiss the indictment is denied, the indictment is reinstated and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: On appeal from an order that granted that part of defendant's omnibus motion seeking to dismiss the indictment pursuant to CPL 210.35 (5), the People contend that Supreme Court erred in determining that the integrity of the grand jury proceedings had been compromised due to prosecutorial misconduct. We agree with the People. " '[D]ismissal of an indictment under CPL 210.35 (5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury' " (*People v Sheltray*, 244 AD2d 854, 855, *lv denied* 91 NY2d 897; *see People v Huston*, 88 NY2d 400, 409). As the Court of Appeals has stated, "not every improper comment, elicitation of impermissible testimony, impermissible question or mere mistake renders an indictment defective" (*Huston*, 88 NY2d at 409; *see People v Butcher*, 11 AD3d 956, *lv denied* 3 NY3d 755).

Here, the court stated in its written decision that the grand jury proceeding was defective due to the prosecutor's cross-examination of defendant and "the insufficiency of [the prosecutor's] curative instruction." Although the court did not specify the basis for its conclusion that the cross-examination was defective, it appears that the court was concerned that the prosecutor asked

defendant whether he was aware that the complainant made a recording of the incident between them that led to the criminal charges. In response, defendant testified that, yes, he had "been told" that there was a recording, whereupon the prosecutor asked whether he was still willing to testify that he did not raise his voice or become upset during the incident. Defendant responded, "I didn't really become upset. No." No evidence of a recording was presented to the grand jury, and the complainant, who had testified before defendant, had not been asked whether she made a recording.

We conclude that, in the absence of any indication in the record that the prosecutor lacked a good faith basis to ask defendant whether he was aware that the complainant had recorded the incident, the court erred in determining that the prosecutor engaged in misconduct during his cross-examination that warrants dismissal of the indictment. Indeed, given that defendant testified that he had been told that there was a recording, it appears that the prosecutor in fact had a good faith basis to ask the question. In any event, we do not perceive how defendant could have been prejudiced by the prosecutor's cross-examination. As noted, when asked whether he was aware that there was a recording, defendant stated that he would adhere to his testimony that he did not raise his voice and did not become upset during the incident. Thus, the prosecutor's apparent attempt at impeachment not did succeed. If anything, the prosecutor's reference to the recording and the failure of the prosecutor to present evidence of such a recording worked to defendant's benefit. We also note that the complainant's testimony was legally sufficient to establish that defendant committed the charged crime even if he did not raise his voice or become upset during the incident.

We further conclude that the prosecutor did not engage in misconduct when, in response to questions whether the complainant made a recording, he instructed the grand jury members that he did not have any further evidence and that they should make their "decision based on the testimony you heard in the grand jury from the witnesses." When a grand jury member then asked, "Does that mean there is [no recording]," the prosecutor responded, "You can certainly consider the testimony that you heard. That's the best answer I can give you. And nothing that you didn't hear." Even assuming, arguendo, that defendant is correct that the prosecutor should have instructed the grand jury members that they could re-call the complainant to ask her whether a recording existed, we conclude that the prosecutor's failure to do so was not fraudulent in nature or so egregious as to impair the integrity of the proceeding. We therefore reverse the order, deny that part of defendant's omnibus motion seeking to dismiss the indictment and reinstate the indictment.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

278

KA 11-01986

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD L. NELSON, JR., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT W. ZIMMERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered March 3, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree, aggravated criminal contempt, criminal contempt 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 his plea of guilty of, inter alia, assault in the first degree (Penal Law § 120.10 [4]) and aggravated criminal contempt (§ 215.52 [1]). Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution with respect to the crime of aggravated criminal contempt (*see People v Lopez*, 71 NY2d 662, 665). Contrary to defendant's contention, the plea colloquy did not cast significant doubt upon his guilt such that County Court had a duty to conduct a further inquiry to ensure that the plea was knowing and voluntary (*see generally id.* at 666). Indeed, "[t]he court's duty to inquire further is not triggered merely by the failure of a pleading defendant, whether or not represented by counsel, to recite every element of the crime pleaded to" (*id.* at 666 n 2). The record belies defendant's contention that a further inquiry was required with respect to the order of protection; the court discussed the order of protection, defendant conceded it was in place when he physically attacked the victim, and he admitted that he knew of the conditions of that order and that he violated them when he physically attacked the victim.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

283

CA 11-02395

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

IN THE MATTER OF KHA'SUN CREATOR ALLAH,
PETITIONER-APPELLANT,

V ORDER

ALBERT PRACK, DIRECTOR, S.H.U./INMATE
DISCIPLINARY PROGRAMS, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES,
RESPONDENT-RESPONDENT.

KHA'SUN CREATOR ALLAH, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (M. William Boller, A.J.), dated September 19, 2011. The order denied the request of petitioner for expungement and directed that a new disciplinary hearing be conducted.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

295.1

CA 12-01891

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

LEONARD E. RIEDL CONSTRUCTION, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL HOMEYER AND CLARA HOMEYER,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

DIRK J. OUDEMOOL, SYRACUSE, FOR DEFENDANTS-APPELLANTS.

GORIS & O'SULLIVAN, LLC, CAZENOVIA (MARK D. GORIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 20, 2011. The order awarded attorney's fees to plaintiff.

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

Same Memorandum as in *Leonard E. Riedl Constr., Inc. v Homeyer* ([appeal No. 1] ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

295

CA 12-01715

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

LEONARD E. RIEDL CONSTRUCTION, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL HOMEYER AND CLARA HOMEYER,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

DIRK J. OUDEMOOL, SYRACUSE, FOR DEFENDANTS-APPELLANTS.

GORIS & O'SULLIVAN, LLC, CAZENOVIA (MARK D. GORIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered November 28, 2011. The order and judgment granted plaintiff a money judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, breach of contract based upon defendants' alleged failure to pay for work performed by plaintiff pursuant to a construction contract. In appeal No. 1, defendants appeal from an order and judgment entered after a nonjury trial that awarded plaintiff damages in the amount of $70,175.55, i.e., $54,466 in damages for the balance owed under the contract, and $15,709.55 in interest provided for in the contract. In appeal No. 2, defendants appeal from an order granting plaintiff's application for attorney's fees and costs incurred in obtaining the order and judgment in appeal No. 1.

Contrary to defendants' contention in appeal No. 1, the court's conclusion that plaintiff did not waive its right to payment is supported by a fair interpretation of the evidence (*see Farace v State of New York*, 266 AD2d 870, 870; *see generally Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499). "It is well settled that a general release is governed by principles of contract law . . . and that, where a release is unambiguous, the intent of the parties must be ascertained from the plain language of the agreement" (*Dommer Constr. Corp. v Savarino Constr. Servs. Corp.*, 85 AD3d 1617, 1617-1618 [internal quotation marks omitted]). "However, when the evidence in the record including, inter alia, the circumstances surrounding the release, as well as the parties' course

of dealings, evinces that the parties' intentions were not reflected in the general terms of the release, the release does not conclusively establish a defense as a matter of law" (*Orangetown Home Improvements, LLC v Kiernan*, 84 AD3d 902, 903-904; *see Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 495). Thus, " '[w]here a waiver form purports to acknowledge that no further payments are owed, but the parties' conduct indicates otherwise, the instrument will not be construed as a release' " (*E-J Elec. Installation Co. v Brooklyn Historical Socy.*, 43 AD3d 642, 644; *see generally CNP Mech., Inc. v Allied Bldrs., Inc.*, 84 AD3d 1748, 1749).

Here, plaintiff's representative signed a document entitled "Contractor's Final Waiver and Affidavit," which provided that the construction project was "fully completed"; "all bills for labor and/or materials furnished in connection with the construction of said buildings and work of improvement have been fully paid"; and plaintiff "waives any and all lien rights which he may have or may have had on account of or arising out of the construction of said buildings and work of improvement." Nevertheless, the evidence at trial established that, at the time that document was signed, the work had not been completed and defendants had verbally agreed to make additional payments for the completion of additional work. The evidence at trial further established that defendants complied with that verbal agreement by making additional payments to plaintiff after plaintiff's representative had signed the purported waiver. The court thus properly concluded that the parties did not treat the document signed by plaintiff's representative as a final and complete waiver of any further claims by plaintiff (*see generally E-J Elec. Installation Co.*, 43 AD3d at 644). Contrary to defendants' further contentions in appeal No. 1, the evidence at trial supports the court's award of damages and the court's conclusion that plaintiff is entitled to contractual interest on that portion of the unpaid balance that was not withheld by defendants pursuant to General Business Law § 756-a (2) (a) (i) (*see generally Farace*, 266 AD2d at 870).

With respect to appeal No. 2, the parties' contract provides that "[t]he prevailing party shall be entitled to all costs, including but not limited to reasonable attorney fees, related to any proceeding" to enforce the terms of the contract. Contrary to defendants' contention, plaintiff is entitled to attorney's fees under the contract because plaintiff herein "prevail[ed] on the central claims advanced, and receive[d] substantial relief in consequence thereof" (*Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279, 279).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

296

KA 11-01643

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD A. SAID, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered March 1, 2011. 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 affirmed.

Memorandum: In appeal Nos. 1 and 2, defendant appeals from judgments convicting him upon his pleas of guilty of criminal contempt in the first degree (Penal Law § 215.51 [b] [iii]; [c]). We conclude with respect to each appeal that defendant's waiver of the right to appeal is invalid because the brief inquiry made by Supreme Court was "insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Allen*, 64 AD3d 1190, 1191, *lv denied* 13 NY3d 794). Also with respect to each appeal, we reject the contention of defendant that the court erred in denying his motion to withdraw the guilty plea. The determination whether to permit a defendant to withdraw a guilty plea rests within the sound discretion of the court (*see People v Cantu*, 202 AD2d 1033, 1033), and here there was no abuse of discretion.

With respect to appeal No. 2, although defendant's jurisdictional challenge to the superior court information (SCI) survives the plea and would in any event have survived a valid waiver of the right to appeal (*see People v Heinig*, 21 AD3d 1297, 1297, *lv denied* 6 NY3d 813), we nevertheless reject that challenge. According to defendant, the SCI is jurisdictionally defective because he was not arraigned on the felony complaint charging criminal contempt in the first degree.

The record, however, establishes that the court sat as a local criminal court for arraignment purposes and arraigned defendant on the felony complaint.

We reject defendant's challenge to the severity of the sentence in each appeal. Defendant's further contention that the court erred in setting a 15-year duration for the order of protection issued in connection with both judgments is not preserved for our review (*see People v Nieves*, 2 NY3d 310, 315-317), and is without merit in any event (*see* CPL 530.12 [former (5) (A) (ii)]). Defendant also failed to preserve for our review his contention that the court failed to take into account jail time credit to which he is entitled in determining the duration of the order of protection (*see Nieves*, 2 NY3d at 315-317), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Jackson*, 81 AD3d 1320, 1321, *lv denied* 16 NY3d 896).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

297

KA 11-01644

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD A. SAID, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered March 1, 2011. 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 affirmed.

Same Memorandum as in *People v Said* ([appeal No. 1] ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

298

KA 07-01032

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERTO A. ASTACIO, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, 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 (Roy W. King, A.J.), rendered November 2, 2006. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, assault in the first degree and 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, inter alia, burglary in the first degree (Penal Law § 140.30 [2]) and assault in the first degree (§ 120.10 [4]). To the extent defendant challenges the legal sufficiency of the evidence supporting the conviction of assault in the first degree, that contention is not preserved for our review (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678) and, in any event, lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Additionally, viewing the evidence in light of the elements of the crimes of burglary in the first degree and assault in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to those crimes is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The evidence establishes that defendant's actions were a "sufficiently direct cause" of the injuries to the relevant victim (*People v Petrosino*, 299 AD2d 851, 852, *lv denied* 99 NY2d 618 [internal quotation marks omitted]; *see People v Darrow*, 260 AD2d 928, 929; *see generally People v Stewart*, 40 NY2d 692, 697). Moreover, "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]). Defendant contends that the assault in the first degree count in the indictment of which he was convicted is duplicitous. That contention is not

preserved for our review (*see People v Sponburgh*, 61 AD3d 1415, 1416, *lv denied* 12 NY3d 929), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant's contention that the People committed a *Brady* violation is also not preserved for our review (*see People v Jacobs*, 71 AD3d 693, 693, *lv denied* 14 NY3d 888; *People v Caswell*, 56 AD3d 1300, 1303, *lv denied* 11 NY3d 923, *reconsideration denied* 12 NY3d 781) and, in any event, lacks merit (*see People v Griffin*, 48 AD3d 894, 895, *lv denied* 10 NY3d 959; *see also People v Dizak*, 93 AD3d 1182, 1184, *lv denied* 19 NY3d 972, *reconsideration denied* 20 NY3d 932). Moreover, "a defendant's constitutional right to a fair trial is not violated when, as here, he is given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case" (*People v Morrison*, 90 AD3d 1554, 1555, *lv denied* 19 NY3d 1028, *reconsideration denied* 20 NY3d 934 [internal quotation marks omitted]). Contrary to defendant's further contention, there was no error under *People v Trowbridge* (305 NY 471), which restricts *third-party* testimony regarding an eyewitness's pretrial identification of a defendant, because here the *eyewitness* herself testified as to her identification of defendant (*see People v Thomas*, 17 NY3d 923, 926; *People v Bolden*, 58 NY2d 741, 742-743).

Defendant failed to preserve for our review his contention that County Court erred in discharging a sworn juror and, contrary to defendant's contention, preservation is required inasmuch as the court's alleged error is not a mode of proceedings error (*see People v Powell*, 79 AD3d 1791, 1792, *lv denied* 17 NY3d 799; *see also People v Kelly*, 5 NY3d 116, 119-120). In any event, defendant's contention regarding the alleged error in discharging that juror lacks merit inasmuch as the court properly discharged the juror from service pursuant to CPL 270.35 (*see People v Washington*, 50 AD3d 1539, 1540, *lv denied* 11 NY3d 742; *see also People v Jeanty*, 94 NY2d 507, 516-517, *rearg denied* 95 NY2d 849; *People v Forino*, 65 AD3d 1259, 1260, *lv denied* 13 NY3d 907).

Defendant also did not preserve for our review his contention that the court erred in failing to discharge a sworn juror (*see People v Dennis*, 91 AD3d 1277, 1279, *lv denied* 19 NY3d 995), and we reject his contention that the court's alleged error is a mode of proceedings error for which preservation is not required (*see Powell*, 79 AD3d at 1792, citing *Kelly*, 5 NY3d at 119-120). In any event, defendant's contention lacks merit (*see Dennis*, 91 AD3d at 1279; *see generally People v Buford*, 69 NY2d 290, 298).

Assuming, arguendo, that defendant preserved for our review his contention that the testimony of a police investigator violated defendant's constitutional right of confrontation (*see generally Crawford v Washington*, 541 US 36, 53-54), we conclude that the statements at issue were "testimonial" and thus violated his right of confrontation (*see Morrison*, 90 AD3d at 1556). Nevertheless, we conclude that the error is harmless. "Trial errors resulting in

violation of a criminal defendant's Sixth Amendment right to confrontation 'are considered harmless when, in light of the totality of the evidence, there is no reasonable possibility that the error affected the jury's verdict' " (*id.* at 1557, quoting *People v Porco*, 17 NY3d 877, 878, *cert denied* ___ US ___, 132 S Ct 2453). Here, the evidence of guilt was overwhelming inasmuch as it included testimony from several eyewitnesses, as well as a statement defendant gave linking himself to the crimes, and there was no reasonable possibility that the error affected the jury's verdict (*see generally People v Crimmins*, 36 NY2d 230, 237).

To the extent that defendant's additional contention that he was denied a fair trial by prosecutorial misconduct is preserved for our review (*see* CPL 470.05 [2]), it is without merit. The alleged misconduct was "not so egregious as to deprive defendant of a fair trial" (*People v Wittman*, 103 AD3d 1206, 1207). Finally, viewing the evidence, the law, and the circumstances of this case in totality and at the time of representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

299

KA 11-00342

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY W. WILLIS, JR., DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), rendered December 8, 2008. The order directed defendant to pay restitution.

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

Memorandum: On appeal from an order requiring him to pay restitution in the amount of $141,750, defendant contends that County Court erred in failing to conduct a hearing on the issue of his ability to pay restitution. Defendant failed to preserve that contention for our review (*see People v Dillon*, 90 AD3d 1468, 1468-1469, *lv denied* 19 NY3d 1025). In any event, we conclude that it lacks merit. "Consideration of defendant's ability to pay was not required because restitution was ordered as part of a nonprobationary sentence that included a period of incarceration as a significant component" (*People v Ford*, 77 AD3d 1176, 1177, *lv denied* 17 NY3d 816; *see People v Henry*, 64 AD3d 804, 807, *lv denied* 13 NY3d 860). We thus reject defendant's further contention that he received ineffective assistance of counsel based on defense counsel's failure to request a hearing on defendant's ability to pay restitution. Defense counsel was not ineffective for failing to request a hearing that had no "colorable basis" (*People v Rivera*, 71 NY2d 705, 709; *see Ford*, 77 AD3d at 1177).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

300

KA 09-00283

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAVEL PRIMAKOV, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 14, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the first degree, burglary in the third degree and criminal possession of stolen property 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 a jury verdict of, inter alia, criminal possession of a weapon in the first degree (Penal Law § 265.04 [2]) arising out of an incident in which defendant and his accomplice burglarized a gun shop and stole a number of guns. We note that defendant was indicted for that crime as both a principal and an accomplice (*see* § 20.00). Following the burglary, defendant and his accomplice fled by foot over snow-covered ground. The police apprehended them separately some distance from the crime scene.

Defendant contends that his conviction of criminal possession of a weapon in the first degree is not based on legally sufficient evidence because the People failed to establish that he possessed the requisite 10 or more firearms (*see* Penal Law § 265.04 [2]). We reject that contention. The proof establishes that 16 guns were stolen during the burglary and that 13 of those guns qualified as “firearms” inasmuch as they were pistols or revolvers (*see* § 265.00 [3]). Contrary to defendant’s contention, the fact that he did not personally possess 10 or more of the firearms at the time he was apprehended does not render the evidence legally insufficient to support the conviction of criminal possession of a weapon in the first degree. The record establishes that the 13 firearms removed from the gun shop were found in the possession of defendant or his accomplice, were recovered in their immediate vicinity at the time they were

arrested, or were recovered along the route that one or both of them took in fleeing from the gun shop. Thus, there was a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495; *see generally People v Mateo*, 13 AD3d 987, 988, *lv denied* 5 NY3d 883). Contrary to defendant's further contention, viewing the evidence in light of the element of the crime of criminal possession of a weapon in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, we have considered defendant's remaining contentions and conclude that none requires reversal or modification of the judgment.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

301

CAF 12-00498

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

IN THE MATTER OF CHESTER J. THOMAS, SR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GABRIELLE C. SMITH, RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered February 23, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Monroe County, for further proceedings on the petition.

Memorandum: Petitioner, an inmate at a correctional facility, contends that Family Court erred in summarily dismissing his petition alleging that respondent violated a prior order based on his failure to appear by video or telephone for proceedings held on a specified adjourned date. We agree. Although Family Court was entitled to dismiss the petition with prejudice for failure to prosecute based on the existence of "exceptional circumstances or an unreasonable neglect to prosecute" (*Matter of Stacey O. v Donald P.*, 137 AD2d 965, 966), here there were no such exceptional circumstances, nor can it be said on this record that there was an "unreasonable neglect to prosecute" (*id.*). Indeed, the record before us does not establish the basis for petitioner's failure to appear by telephone or video from the correctional facility but, rather, the court merely stated on the record that its staff had attempted to call the correctional facility and "didn't get through." We therefore reverse the order, reinstate the petition and remit the matter to Family Court for further proceedings on the petition.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

303

CAF 12-00562

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

IN THE MATTER OF ANNA B. AND WILLIAM B.

KEITH C., PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT.

COLUCCI & GALLAHER, P.C., BUFFALO (REGINA A. DEL VECCHIO OF COUNSEL), FOR PETITIONER-APPELLANT.

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

PAMELA THIBODEAU, ATTORNEY FOR THE CHILDREN, WILLIAMSVILLE, FOR ANNA B. AND WILLIAM B.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered February 28, 2012. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated and the matter is remitted to Family Court, Erie County, for further proceedings on the petition.

Memorandum: Petitioner father commenced this proceeding seeking modification or vacatur of a stay-away order of protection against him. We note as background that, pursuant to article 6 of the Family Court Act and upon the father's default, Family Court (Rosa, J.) terminated the father's parental rights with respect to Anna B. and William B. (children) and also issued an order of protection, which is the subject of this appeal (termination proceeding). The order of protection states that it was issued pursuant to articles 3, 7 and 10 of the Family Court Act, and an "order on review" issued in conjunction therewith provided that the order of protection was issued under article 6. Pursuant to the order of protection, the father was required to stay away from the children until the youngest child reaches the age of 18. Nearly 10 years later, the father filed the instant petition for modification or vacatur of the order of protection, claiming "changed circumstances." Respondent, Erie County Department of Social Services (DSS), moved to dismiss the petition on the ground that the father lacked standing to bring the petition because, inter alia, his parental rights had been terminated. Family Court (Rodwin, J.) granted the motion and dismissed the petition without prejudice. The court reasoned that the father lacked standing

because the presumption of regularity applied to the termination proceeding, including the order of protection, and the father failed to meet his burden of establishing that he was not served with notice of the petition seeking the order of protection or the order of protection itself. The father appeals and, under the circumstances of this case, we reverse.

We agree with the father that, on these facts, he has standing to challenge the validity of the order of protection. Contrary to the contention of DSS, we conclude that the termination of the father's parental rights does not bar the father from challenging the order of protection. Although the termination of the father's parental rights would preclude him from thereafter seeking access to or rights with respect to the children (*see e.g. Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1595; *Matter of April C.*, 31 AD3d 1200, 1201), the father does not seek that relief. Instead, as noted, the father seeks modification or vacatur of the order of protection. Pursuant to Family Court Act § 656, the court may issue an order of protection in conjunction with any other order issued pursuant to article 6, i.e., an order terminating parental rights. We conclude that the order terminating the father's parental rights is separate and distinct from the order of protection entered in conjunction with that termination order. Thus, the father has standing to challenge the validity of that separate order of protection.

We also agree with the father that the court improperly dismissed the petition. During the proceedings at issue, the father contended that he never had notice of either the DSS petition seeking, inter alia, an order of protection or the order of protection itself. As noted, in dismissing the petition, the court reasoned that the presumption of regularity applied to the proceedings giving rise to the order of protection. The presumption of regularity assumes that statutory requirements, including those regarding service, were followed (*see People v Dominique*, 90 NY2d 880, 881). Here, however, inasmuch as it seeks dismissal of the petition, DSS has the burden to establish that it properly served the father so as to obtain jurisdiction over him with respect to the order of protection (*cf. generally Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589). "Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service" (*id.*; *see generally* Family Ct Act §§ 153-b, 154). DSS, however, failed to meet that burden inasmuch as it failed to submit such an affidavit, and the record is devoid of evidence that the father was served with either the DSS petition giving rise to the order of protection or the order of protection itself. Consequently, we conclude that the court erred in granting the motion to dismiss, and we reinstate the petition.

In view of our determination, we do not address the father's remaining contentions.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

304

CAF 12-00442

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

IN THE MATTER OF ARIANNA M., GAUGE M. AND DYLAN C.

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

BRIAN M., RESPONDENT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-APPELLANT.

CARACCIOLI & ASSOCIATES, PLLC, WATERTOWN (IRIS YAO OF COUNSEL), FOR PETITIONER-RESPONDENT.

LISA A. PROVEN, ATTORNEY FOR THE CHILDREN, WATERTOWN, FOR DYLAN C., GAUGE M. AND ARIANNA M.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered February 21, 2012 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had abused and neglected the subject children.

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

Memorandum: Respondent father appeals from an order of fact-finding and disposition determining that he sexually abused and neglected two of his children and derivatively neglected another child. Contrary to the father's contention, the findings of abuse and neglect are supported by a preponderance of the evidence (*see Matter of Merrick T.*, 55 AD3d 1318, 1318; *Matter of Stephanie B.*, 245 AD2d 1062, 1062). We accord great weight and deference to Family Court's determinations, "including its drawing of inferences and assessment of credibility," and we will not disturb those determinations where, as here, they are supported by the record (*Matter of Shaylee R.*, 13 AD3d 1106, 1106). We agree with the father that the court erred in admitting in evidence the written report of a social worker who performs sexual abuse assessments because it contained prior consistent statements that bolstered her trial testimony (*see generally Aurnou v Craig*, 184 AD2d 1048, 1049). We conclude, however, that the error is harmless inasmuch as it does not appear from the court's decision that the court relied on the report (*see Matter of*

Wise v Burks, 61 AD3d 1058, 1059).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

305

CAF 11-01532

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

IN THE MATTER OF NICHOLAS C.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ERIKA H., RESPONDENT-RESPONDENT,
AND ROBERT C., RESPONDENT-APPELLANT.

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

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

FRANCIS I. WALTER, ATTORNEY FOR THE CHILD, SYRACUSE, FOR NICHOLAS C.

Appeal from an order of the Supreme Court, Onondaga County (Michael L. Hanuszczak, A.J.), dated June 2, 2011 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, adjudged that respondent Robert C. neglected the subject child.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the petition against respondent Robert C. is dismissed.

Memorandum: Respondent father appeals from an order that, inter alia, adjudged that he neglected the child who is the subject of this proceeding. "[A] party seeking to establish neglect must show, by a preponderance of the evidence . . . , first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent . . . to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368; *see* Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]). At the fact-finding hearing, moreover, "only competent, material and relevant evidence may be admitted" (§ 1046 [b] [iii]). Here, "[t]he evidence offered in support of the petition against the father consisted almost entirely of out-of-court statements made by the mother to a police officer and caseworker[s] concerning a domestic dispute" (*Matter of Imani B.*, 27 AD3d 645, 646; *see Matter of Christy C.*, 74 AD3d 561, 562). Those statements were not admissible against the father in the absence of a showing that they came within a statutory or common-law exception to the hearsay rule (*see Imani B.*,

27 AD3d at 646). Contrary to the statement of Supreme Court, we conclude that the hearsay statements were not admissible "under article 10" of the Family Court Act (*see generally* § 1046 [a]). We decline to address petitioner's alternative theories for the admissibility of the mother's hearsay statements that were not advanced at the fact-finding hearing (*see Imani B.*, 27 AD3d at 646). The nonhearsay evidence in the record is insufficient to establish that the child's physical, mental or emotional condition was impaired or in imminent danger of becoming impaired as a consequence of the father's conduct (*see Matter of Imani O. [Marcus O.]*, 91 AD3d 466, 468; *Imani B.*, 27 AD3d at 646).

Finally, we note that, " 'because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings' " (*Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17 NY3d 704). We therefore have considered the father's contention that he was denied effective assistance of counsel at the dispositional hearing, despite the fact that the dispositional order has expired. We conclude, however, that his contention lacks merit (*see Matter of June MM.*, 62 AD3d 1216, 1218, *lv denied* 13 NY3d 704; *see also Matter of Lamar J.F.*, 8 AD3d 1091, 1092).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

306

CA 12-01798

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF FINAL ACCOUNT OF MANUFACTURERS AND TRADERS TRUST COMPANY (AS SUCCESSOR TO CENTRAL TRUST COMPANY), PETITIONER-RESPONDENT, AS THE TRUSTEE OF THE TRUST UNDER ARTICLES THIRD AND FOURTH OF THE LAST WILL AND TESTAMENT OF EVELYN B. MULVEY, DECEASED, FOR THE BENEFIT OF MARY HULL, ALSO DECEASED.

MEMORANDUM AND ORDER

EUGENE P. LABUE, GUARDIAN AD LITEM FOR DAVID A. LAWSON, RESPONDENT;

RICHARD I. MULVEY, APPELLANT.

RICHARD I. MULVEY, APPELLANT PRO SE.

EUGENE P. LABUE, ROCHESTER, RESPONDENT PRO SE.

Appeal from a decree of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered May 23, 2012. The decree awarded compensation to respondent Eugene P. LaBue, guardian ad litem for David A. Lawson.

It is hereby ORDERED that the decree so appealed from is unanimously modified on the law by reducing the award of fees to respondent to $8,000 and as modified the decree is affirmed without costs.

Memorandum: Richard I. Mulvey, appearing pro se, appeals from a decree that awarded compensation to Eugene P. LaBue (respondent), guardian ad litem for David A. Lawson. Petitioner, as trustee of a trust created by decedent Evelyn B. Mulvey, commenced this proceeding for judicial settlement of account after the death of the trust beneficiary. Respondent represented Lawson, who was a potential remainder beneficiary of the trust (subject remainder beneficiary), and advocated for a specific interpretation of the trust, which was ultimately rejected by Surrogate's Court. Following the accounting, the Surrogate determined that the subject remainder beneficiary was entitled to $3,179 as his share of the trust principal and awarded respondent a fee in the amount of $12,000 for his services as guardian ad litem (fee). In a prior appeal, Richard I. Mulvey, another remainder beneficiary of the trust, appealed from the decree awarding respondent the fee, and we reversed the decree insofar as it awarded that fee on the ground that the record was inadequate to support it

(*Matter of Manufacturers & Traders Trust Co. [Mulvey]*, 92 AD3d 1276). We remitted the matter to Surrogate's Court for further proceedings and, on remittal, the Surrogate again awarded respondent a fee in the amount of $12,000.

We agree with Richard I. Mulvey that the fee is unreasonable on its face. "It is well settled that a guardian ad litem is entitled to a reasonable fee, and the reasonableness of the fee is determined based on the same factors used to determine the reasonableness of legal fees in general" (*id.* at 1277). Those factors "include the time and labor expended, the difficulty of the questions involved and the required skill to handle the problems presented, the attorney's experience, ability, and reputation, the amount involved, the customary fee charged for such services, and the results obtained" (*Matter of Barich*, 91 AD3d 769, 770 [internal quotation marks omitted]). Here, although respondent submitted the requisite affidavit establishing his entitlement to a fee pursuant to 22 NYCRR 207.45 (a) (*see id.*; *cf. Matter of Slade*, 99 AD2d 668, 668), we conclude that the Surrogate abused his discretion in awarding respondent a fee in the amount of $12,000, and we therefore modify the decree by reducing the fee to the amount of $8,000 (*cf. Matter of Phinney* [appeal No. 2], 251 AD2d 1048, 1048-1049; *see generally Matter of Dessauer*, 96 AD3d 1560, 1561). For example, the Surrogate abused his discretion in awarding respondent his hourly rate for 14 hours of legal research on the underlying issue, and compensating respondent for hand-delivering certain documents to the court and sending copies thereof to various people. Moreover, although not dispositive, we further conclude that the fee should be considered in light of the amount of the trust principal received by the subject remainder beneficiary, and in light of the fee awarded to another guardian ad litem representing a similarly situated remainder beneficiary. Notably, the fee of the other guardian ad litem was significantly less than respondent's fee, and the remainder beneficiary represented by that guardian ad litem received a much larger amount of the trust principal than the subject remainder beneficiary.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

308

CA 12-01304

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

STEPHEN F. MENTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF OLEAN, DEFENDANT-APPELLANT.

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

FESSENDEN LAUMER & DEANGELO, JAMESTOWN (MARY B. SCHILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered February 28, 2012 in a personal injury action. The order 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 to recover damages for injuries he sustained when he slipped from a diving board at a pool owned by defendant while he was preparing to dive into the pool. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff assumed the risks associated with diving in the pool. Supreme Court denied the motion, and we affirm.

The doctrine of primary assumption of risk "generally constitutes a complete defense to an action to recover damages for personal injuries . . . and applies to the voluntary participation in sporting activities" (*Gardner v Town of Tonawanda*, 48 AD3d 1083, 1084 [internal quotation marks omitted]). Under that doctrine, "a person who voluntarily participates in a sporting activity generally consents, by his or her participation, to those injury-causing events, conditions[] and risks [that] are inherent in the activity" (*Cotty v Town of Southhampton*, 64 AD3d 251, 253; *see generally Morgan v State of New York*, 90 NY2d 471, 482-486; *Turcotte v Fell*, 68 NY2d 432, 438-440; *Belvedere v Holiday Val., Inc.*, 60 AD3d 1459, 1460). The owner of recreational premises owes a duty "to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" (*Morgan*, 90 NY2d at 484 [internal quotation marks omitted]). A plaintiff, however, will not be deemed to have consented to "concealed or unreasonably increased

risks" (*id.* at 485). Thus, in assessing whether the relevant duty has been breached, it must be determined "whether the conditions caused by the defendant['s] negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport" (*id.* [internal quotation marks omitted]).

Here, we conclude that defendant failed to meet its initial burden on the motion inasmuch as its submissions indicate that the nonskid material on the surface of the diving board had not been recently reapplied, and establish that the area in the middle of the diving board, from which plaintiff fell, was worn and smoother than the other areas of the board (*cf. id.* at 488; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Even assuming, arguendo, that defendant met its initial burden on the motion, we conclude that plaintiff raised an issue of fact in opposition thereto (*see Morgan*, 90 NY2d at 488; *Zuckerman*, 49 NY2d at 562). Plaintiff submitted evidence that he fell while walking down the middle of the diving board, that there was no nonskid material on the middle of the board, and that the area from which he fell was smooth, slippery and significantly worn.

Finally, we note that defendant's reliance on *Cook v Town of Oyster Bay* (267 AD2d 192) is of no moment. There, the infant plaintiff slipped and injured herself while using defendant's diving board, and the Second Department reversed an order denying defendant's motion for summary judgment dismissing the complaint (*see id.* at 192-193). Our review of the record in *Cook* reveals that the facts of that case are distinguishable from the facts presented here. In *Cook*, the plaintiff admitted that she slipped due to a puddle of water on the diving board and that such water was "a normal thing" that was "there everyday." Additionally, unlike this case, one of the defendant's employees in *Cook* testified that the defendant had reapplied the nonskid surface to the diving board numerous times over the years. Here, by contrast, one of defendant's employees testified that he was not aware of any surface coatings being applied to the diving board in the two years preceding plaintiff's accident. Another of defendant's employees testified that, although he had applied black tread and nonskid materials to the board's surface several years ago, he had not since reapplied those materials. Finally, numerous employees of defendant admitted that the middle of the board, where plaintiff had slipped, was worn smoother than the outer edges, had less nonskid material on it, and had worn paint.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

312

CA 12-01082

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

PUTRELO CONSTRUCTION COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF MARCY, DEFENDANT-RESPONDENT.

TOWN OF MARCY, THIRD-PARTY PLAINTIFF,

V

BONACCI ARCHITECTS, PLLC, SUCCESSOR
IN INTEREST TO FULIGNI-FRAGOLA
ARCHITECTS, PLLC, THIRD-PARTY
DEFENDANT-RESPONDENT.

SHEATS & BAILEY, PLLC, BREWERTON (JASON BAILEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELT EVANS, LLP, CLINTON (ANTHONY G. HALLAK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JAMES G. STEVENS, JR., OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered March 21, 2012. The order granted the motion of third-party defendant for partial summary judgment dismissing the second cause of action of plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for breach of contract in connection with its construction of a new town hall for defendant-third-party plaintiff (hereafter, defendant). Third-party defendant, the successor in interest to the architect who contracted with defendant, moved for partial summary judgment dismissing plaintiff's second cause of action, which sought delay damages. Defendant joined in that motion. Supreme Court properly granted the motion based on plaintiff's failure to file a notice of claim within the time limitations of Town Law § 65 (3). That statute requires a written verified claim to be filed "within six months after the cause of action shall have accrued" (*id.*). Plaintiff, relying on

Micro-Link, LLC v Town of Amherst (73 AD3d 1426, 1427), contends that the second cause of action did not accrue until the claim for payment of delay damages was actually or constructively rejected by defendant. Plaintiff's reliance on *Micro-Link, LLC* is misplaced inasmuch as the contract between plaintiff and defendant in this case provided for a different date of accrual. It is well settled that parties may provide in their contract for a different date of accrual, "and such a provision will govern in the absence of duress, fraud or misrepresentation" (*Matter of Oriskany Cent. Sch. Dist. [Booth Architects]*, 206 AD2d 896, 897, *affd* 85 NY2d 995; *see* CPLR 201). Here, the contract provided that "[a]s to acts or failures to act occurring prior to the relevant date of Substantial Completion, . . . any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion." Thus, pursuant to the contract, the second cause of action accrued on the date of substantial completion, which was May 23, 2005. Inasmuch as the notice of claim was not filed within six months of that date, it was untimely, and the court therefore properly granted the motion for partial summary judgment dismissing the second cause of action (*see Mohl v Town of Riverhead*, 62 AD3d 969, 970).

Plaintiff contends that the contract provision setting the accrual date does not apply because plaintiff's claims could not be ascertained until the date of final completion. That contention is without merit because, pursuant to that contract provision, the relevant inquiry is whether plaintiff's claim is based on "acts or failures to act" prior to the relevant date of substantial completion, not whether plaintiff could determine on that date the total amount of damages it sustained. The record establishes that the contract accrual date applies because plaintiff's claim for delay damages under the second cause of the action is based on "acts or failures to act occurring prior to the relevant date of Substantial Completion." We reject plaintiff's further contention that the certificate of substantial completion issued by third-party defendant is insufficient under the contract because it was executed by third-party defendant only, and not by plaintiff or defendant. The contract provides that the architect is to prepare the certificate of substantial completion and submit it to the owner and contractor "for their written acceptance of responsibilities assigned to them in such Certificate." The contract, however, does not require the owner and contractor to agree with the date of substantial completion set by the architect. Moreover, plaintiff's own documents establish that the date of substantial completion was no later than May 23, 2005.

Finally, we reject plaintiff's remaining contentions that defendant waived compliance with or is estopped from relying on Town Law § 65 (3) (*see Mohl*, 62 AD3d at 970). "A municipality may be estopped from asserting that a claim was filed untimely when its improper conduct induces reliance by a party who changes his position to his detriment or prejudice" (*Wilson v City of Buffalo*, 298 AD2d 994, 995, *lv denied* 99 NY2d 505 [internal quotation marks omitted]). Here, there is no evidence that defendant engaged in any improper conduct dissuading plaintiff from serving a timely notice of claim

(*see generally id.*).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

319

KA 12-01189

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

MICHAEL MIRAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE PARRINELLO LAW FIRM, LLP, ROCHESTER (BRUCE F. FREEMAN OF COUNSEL), AND CERULLI, MASSARE & LEMBKE, FOR DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), rendered October 15, 2010. The judgment convicted defendant, upon his plea of guilty, of offering a false instrument for filing in the second degree.

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

Opinion by FAHEY, J.: In appeal Nos. 1 through 3, defendants appeal from respective judgments convicting them of crimes related to Medicaid and Medicare fraud. In doing so, defendants raise the issues whether the Attorney General of the State of New York (hereafter, Attorney General) has authority under Executive Law § 63 (3) to prosecute defendants for crimes involving Medicare, and whether Executive Law § 63 (3) is preempted by 42 USC § 1396b (q) (3). For the reasons that follow, we agree with the People that Executive Law § 63 (3) empowers the Attorney General to prosecute crimes related to Medicare fraud in connection with an authorized investigation of Medicaid fraud. We further conclude that Executive Law § 63 (3) is not preempted by 42 USC § 1396b (q) (3), and we thus conclude that the judgment in each appeal should be affirmed.

I

Medicaid is a joint federal-state program established pursuant to what is astutely described as a scheme of "unparalleled complexity" (*Roach v Morse*, 440 F3d 53, 58 [internal quotation marks omitted]), embodied in title XIX of the Social Security Act (42 USC § 1396 *et seq.*) and implemented in this state by article 5, title 11 of the Social Services Law and 18 NYCRR subpart 360-4. Medicaid is a state-administered program, and the federal government reimburses the state

for a percentage of costs incurred in the proper and efficient administration of a Medicaid plan (*see* 42 USC § 1396b [a]; *see also Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 659). Medicare, in turn, is a federal healthcare program for the aged and disabled, and is administered by the Department of Health and Human Services (42 USC § 1395 *et seq.*).

This case had its genesis in an investigation conducted by the Attorney General into defendants' submissions of false billing claims to both the state Medicaid office and the federal Medicare office. Briefly, defendant Michael Miran (Michael) is a clinical psychologist, and defendant Esta Miran (Esta) is his wife. Defendant Michael Miran, Ph.D. Psychologist, P.C. (Corporation) is an entity that Michael and Esta co-founded, and through that body submitted false billing claims. The parties agree that the Corporation was a Medicare provider and, according to the People, Michael was an enrolled Medicaid provider.

Defendants' patients were so-called "dual eligibles," i.e., their indigent status entitled them to both Medicare and Medicaid coverage. Pursuant to an agreement between the state and federal governments, Medicare funded the majority of the medical costs for defendants' patients, and Medicaid paid the applicable copayment. Defendants' medical billing agent billed Medicare for relevant services rendered and, after receiving payment from Medicare, charged Medicaid for the unpaid amount using the Medicaid billing code closest to the relevant Medicare billing code.

That practice eventually attracted the attention of state authorities. On April 26, 2002, years before this investigation began, the Commissioner of Health (COH) requested that the Attorney General investigate and prosecute Medicaid fraud (hereafter, referral). That referral provided as follows:

> "Pursuant to Executive Law § 63 (3), I hereby request that you investigate and prosecute the alleged commission of any indictable offense or offenses arising out of any violation of the Public Health Law, the Social Services Law or any other applicable state law or any regulation promulgated thereunder relating to: (1) fraud in the administration of the Medicaid program; (2) the provision of medical assistance and the activities of providers of medical assistance under the state Medicaid plan; (3) the abuse or neglect of patients in health care facilities receiving payments under the Medicaid plan or the misappropriation of patients' private funds in such facilities; and (4) the operation, management or funding of health-related entities and facilities subject to oversight by this Department . . .
>
> "In addition, I request that you prosecute any person or persons believed to have committed any

> of the above crimes or offenses, and any crime or offense arising out of your investigation or prosecution or both, or properly joinable with the foregoing offenses in such prosecution . . .”[1]

Following the referral, the state Medicaid Fraud Control Unit (MFCU), which operates in the office of the Attorney General, commenced the subject investigation against defendants. At some point, the Attorney General learned of a simultaneous federal inquiry into defendants’ activities by the Federal Bureau of Investigation (FBI) and Office of Inspector General (OIG) and, on April 21, 2006, the OIG acknowledged and granted the Attorney General’s request to continue its adjudication of the matter.

The subject investigation yielded a 31-count indictment, which charged defendants with various crimes generally relating to false statements in the medical records of certain Medicaid and Medicare patients,[2] as well as the larcenous receipt of payment through false representations as to services provided to Medicaid and Medicare participants. Defendants thereafter moved for dismissal of the indictment on two grounds. By a motion in which Esta joined, Michael and the Corporation sought an order dismissing the indictment on the ground that the Attorney General “has not been authorized to investigate or prosecute the charges in the Indictment pursuant to Executive Law § 63 (3).” The People opposed the motion, contending that the Attorney General has jurisdiction to investigate and prosecute Medicaid fraud and related Medicare fraud based on the 1978 referrals of the COH and the CDSS, and the 2002 referral of the COH.

In a second motion to dismiss, defendants collectively sought “dismissal of the Indictment pursuant to the doctrine of Federal/State ‘Conflict Preemption.’ ” Specifically, defendants contended that 42 USC § 1396b (q) (3) is the controlling federal statute that gives state MFCUs the power to investigate federal Medicare-related fraud to a limited extent. Defendants further contended that Executive Law § 63 (3) conflicts with 42 USC § 1396b (q) (3), and that section 63 (3) thus is nullified under the principle of conflict preemption. Defendants did not, however, contend that section 63 (3) is expressly preempted by 42 USC § 1396b (q) (3). In opposition to the second motion to dismiss, the People, inter alia, contended that no express or implied conflict exists between the statutes at issue.

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[1] The COH’s 2002 referral appears to have updated a 1978 referral of the COH given the assumption by the Department of Health (DOH) of the duties as the single state agency administering the state’s Medicaid program in 1996 (*see* L 1996, ch 474, §§ 233-248). The Commissioner of the Department of Social Services (CDSS) also referred to the Attorney General the issue of Medicaid fraud in 1978.

[2] Medicaid fraud was the subject of 25 of the 31 counts of the indictment.

By separate orders, County Court (Marks, J.) denied both motions, reasoning that the People satisfied their burden of proof with respect to Executive Law § 63 (3) by producing the 1978 and 2002 referrals of the COH and CDSS requesting that the Attorney General investigate and prosecute Medicaid fraud and rejecting defendants' contention with respect to preemption. The day after County Court denied the second motion to dismiss, the parties appeared before Supreme Court (Dollinger, A.J.) and entered respective guilty pleas, each in full satisfaction of the indictment. Specifically, Michael pleaded guilty to offering a false instrument for filing in the second degree (Penal Law § 175.30), a lesser included offense of the indicted crime of offering a false instrument for filing in the first degree (§ 175.35). Esta, in turn, pleaded guilty to offering a false instrument for filing in the first degree (*id.*), while the Corporation pleaded guilty to grand larceny in the second degree (§ 155.40 [1]), which resulted from the Corporation's receipt of $257,946.93 of state and federal funds to which it was not entitled. In its plea agreement, the Corporation, inter alia, agreed to make restitution to the Medicaid program in the amount of $114,647.21, and to the Medicare program in the amount of $143,299.72. The respective plea agreements preserved defendants' right to raise the issues of preemption and compliance with Executive Law § 63 (3) on their appeal from the judgments convicting them upon their guilty pleas, and we are called upon to address those issues herein.

II

We now turn to the merits, and address first the issue whether the Attorney General had authority to investigate and prosecute defendants under Executive Law § 63 (3). It is beyond argument that the Attorney General "has no . . . general authority [to conduct prosecutions] and is without any prosecutorial power except when specifically authorized by statute" (*People v Gilmour*, 98 NY2d 126, 131 [internal quotation marks omitted]; *see People v Cuttita*, 7 NY3d 500, 507). Authority to investigate and prosecute is afforded to the Attorney General by, inter alia, Executive Law § 63 (3), which provides as follows:

> "Upon request of the governor, comptroller, secretary of state, commissioner of transportation, superintendent of financial services, commissioner of taxation and finance, commissioner of motor vehicles, or the state inspector general, or the head of any other department, authority, division or agency of the state, [the Attorney General shall] investigate the alleged commission of any indictable offense or offenses in violation of the law which the officer making the request is especially required to execute or in relation to any matters connected with such department, and to prosecute the person or persons believed to have committed the same and any crime or offense arising out of such investigation or prosecution or both, including

> but not limited to appearing before and presenting all such matters to a grand jury" (*cf.* General Business Law §§ 358, 692; Executive Law § 70-a).

Unauthorized prosecutorial participation by the Attorney General requires the dismissal of any indictment resulting therefrom (*see Gilmour*, 98 NY2d at 135), and here defendants seek that relief. In doing so, defendants do not dispute that the COH is "especially required to execute" Medicaid provisions contained in the laws of this state (Executive Law § 63 [3]), and instead contend that section 63 (3) prevents the Attorney General from prosecuting Medicare-related offenses that are discovered during an investigation into potential Medicaid fraud.

We are thus presented with a question of statutory interpretation, and in such instances

> " '[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature. The starting point is always to look to the language itself and where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning' " (*Pultz v Economakis*, 10 NY3d 542, 547, quoting *State of New York v Patricia II.*, 6 NY3d 160, 162 [internal quotation marks, brackets and citations omitted]; *see Lynch v Waters*, 82 AD3d 1719, 1721).

Applying those rules, we agree with the People that the Attorney General's investigation and prosecution of defendants was authorized by the COH referral. Inasmuch as the DOH administers this state's Medicaid program (*see* Social Services Law § 363-a), there can be no dispute that the COH referral permitted the Attorney General to investigate Medicaid fraud. Moreover, what here was the Attorney General's concomitant investigation of Medicaid *and* Medicare fraud with respect to defendants was permitted by way of the broad ambit of the "arising out of" language in Executive Law § 63 (3), i.e., the clause of that statute allowing the "prosecut[ion] [of] the person or persons believed to have committed the same and *any* crime or offense *arising out of such investigation or prosecution*" (emphasis added).

Indeed, "courts . . . have uniformly construed [Executive Law § 63 (3)] as bestowing upon the Attorney [] General the broadest of powers" (*Matter of Mann Judd Landau v Hynes*, 49 NY2d 128, 135), and the phrase " 'arising out of', in its most common sense, has been defined as originating from, incident to or having connection with" (*People v Young*, 220 AD2d 872, 874, *lv denied* 87 NY2d 909). The location of that phrase in section 63 (3) makes it obvious that the Attorney General may prosecute any crime (here, Medicare fraud) connected to an authorized investigation (here, Medicaid fraud) (*see generally People v Zarro*, 66 AD3d 1050, 1051-1052, *lv denied* 14 NY3d 894, *reconsideration denied* 15 NY3d 811; *Young*, 220 AD2d at 874). Although this prosecution involved a joint effort between federal and

state authorities, nothing in section 63 (3) prohibits such collaboration, and defendants' further contention that this case had no relation to Medicaid fraud is forfeited by their pleas (*see People v Plunkett*, 19 NY3d 400, 405 ["appellate claims challenging what is competently and independently established by a plea (are) forfeited"]).

III

We next address the issue whether Executive Law § 63 (3) is preempted by 42 USC § 1396b (q) (3). Initially, to the extent that defendants rely on the theory of "express" preemption, i.e., that Congress explicitly mandated preemption of state law through 42 USC § 1396b (q) (3), we conclude that such a theory is not preserved for our review inasmuch as it was not raised by defendants before the motion court. Nevertheless, under the circumstances of this case we exercise our power to review that part of defendants' contention with respect to "express" preemption as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), particularly because the issue of express preemption was raised by the People in opposition to defendants' second motion and thus was before the court in any event.

Under the Supremacy Clause of the United States Constitution (*see* US Const, art VI, cl 2), state law may be preempted "either by express provision, by implication, or by a conflict between federal and state law" (*New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645, 654). "[D]espite the variety of these opportunities for federal preeminence, [however, courts] have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of [preemption] with the starting presumption that Congress does not intend to supplant state law" (*id.*).

Thus, "[i]n preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress' " (*Arizona v United States*, ___ US ___, ___, 132 S Ct 2492, 2501). "Congressional purpose is the 'ultimate touchstone' in determining whether federal law preempts a particular state action" (*Smith v Dunham-Bush, Inc.*, 959 F2d 6, 8, quoting *Allis-Chalmers Corp. v Lueck*, 471 US 202, 208) and, in searching for legislative intent to preempt, we must "examine the statute's express objectives, its structure, the plain meaning of its language, and its interpretation by the courts" (*id.*, citing *FMC Corp. v Holliday*, 498 US 52). When the text of a federal statute "is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors [preemption]' " (*Altria Group, Inc. v Good*, 555 US 70, 77, quoting *Bates v Dow Agrosciences LLC*, 544 US 431, 449).

A.

Turning first to the issue of express preemption, we note that such preemption occurs when Congress has explicitly mandated preemption in the statute's language (*see Shaw v Delta Air Lines,*

Inc., 463 US 85, 95; *see also Brown v Hotel & Rest. Empls. & Bartenders Intl. Union Local 54*, 468 US 491, 500-501), and we conclude that there is no " 'clear and manifest' " purpose on the face of 42 USC § 1396b (q) (3) to preempt state law (*Arizona*, ___ US at ___, 132 S Ct at 2501). That statute provides in relevant part that the phrase "State medicaid fraud control unit" means

> "a single identifiable entity of the State government . . . [whose] function is conducting a statewide program for the investigation and prosecution of violations of all applicable State laws regarding any and all aspects of fraud in connection with (A) any aspect of the provision of medical assistance and the activities of providers of such assistance under the State [Medicaid] plan under this subchapter; and (B) upon the approval of the Inspector General of the relevant Federal agency, any aspect of the provision of health care services and activities of providers of such services under any Federal health care program . . . , if the suspected fraud or violation of law in such case or investigation is primarily related to the State [Medicaid] plan under this subchapter."

Defendants contend that express preemption exists here because the last clause in 42 USC § 1396b (q) (3) expressly prohibits prosecution in cases such as this, where the suspected fraud is not "primarily related to" Medicaid. Without addressing the question whether the suspect fraud primarily relates to Medicaid,[3] we reject that contention. Essentially, defendants posit that, in defining an MFCU, Congress precluded such an entity from investigating Medicare fraud unless such investigation was primarily related to state Medicaid fraud. A mere negative *implication* in that language cannot be deemed an explicit mandate with respect to the alleged preemption of section 63 (3) (*see Shaw*, 463 US at 95). In other words, in the absence of a clear reflection of a preemptive purpose (*cf. Egelhoff v Egelhoff ex rel. Breiner*, 532 US 141, 146-150), defendants' contention with respect to express preemption fails. Defendants refer us to the legislative history of 42 USC § 1396b (q) (3), including various excerpts from the Congressional Record, in further support of their contention with respect to express preemption, but such history is not germane to this preemption analysis (*see Cipollone v Liggett Group, Inc.*, 505 US 504, 516; *Smith*, 959 F2d at 8 [preemption analysis turns on "the statute's express objectives, its structure, the plain meaning of its language, and its interpretation by the courts"]). In any event, that legislative history is unhelpful to defendants.

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[3] We reiterate here the point that 25 of the 31 counts in the indictment involve Medicaid fraud.

B.

Turning next to the issue of conflict preemption, we note that such preemption "occurs 'when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" ' " (*United States v Locke*, 529 US 89, 109, quoting *California v ARC Am. Corp.*, 490 US 93, 100-101). We first address what we refer to as the "impossibility" form of conflict preemption, which occurs when compliance with both state and federal law is impossible. Here, compliance with both the state law (Executive Law § 63 [3]) and federal law (42 USC § 1396b [q] [3]) at issue is possible, and thus the impossibility form of conflict preemption does not apply to this case.

As noted, Executive Law § 63 (3) provides that,

> "[u]pon request of the . . . head of any . . . department, authority, division or agency of the state, [the Attorney General shall] investigate the alleged commission of any indictable offense or offenses in violation of the law which the officer making the request is especially required to execute or in relation to any matters connected with such department, *and* . . . *prosecute the person or persons believed to have committed the same and any crime or offense arising out of such investigation or prosecution or both*" (emphasis added).

Put simply, that statute allows the Attorney General to prosecute crimes arising out of the investigation of Medicaid fraud, which is precisely what occurred here.

In the course of its investigation, the Attorney General also complied with 42 USC § 1396b (q) (3). As noted, that statute provides that the purpose of an MFCU is to

> "conduct[ ] a statewide program for the investigation and prosecution of violations of all applicable State laws regarding any and all aspects of fraud in connection with (A) any aspect of the provision of medical assistance and the activities of providers of such assistance under the State [Medicaid] plan under this subchapter; and (B) upon the approval of the Inspector General of the relevant Federal agency, any aspect of the provision of health care services and activities of providers of such services under any Federal health care program . . . , if the suspected fraud or violation of law in such case or investigation is primarily related to the State [Medicaid] plan under this subchapter."

Here, the Attorney General's office acted as an MFCU in investigating the subject Medicaid fraud, thus complying with part (A) of section 1396b (q) (3). With respect to part (B) of that section, the record establishes that the Attorney General continued in its role as an MFCU as it investigated Medicare fraud related to the subject Medicaid fraud with the permission of the OIG. We conclude that the referral from the COH, which requested that the Attorney General investigate Medicaid fraud, reflects that the "suspected fraud" considered by section 1396b (q) (3) (B) was fraud committed against New York State, and as such the "piggybacking" of the Medicare investigation onto the Attorney General's Medicaid investigation complied with section 1396b (q) (3). Hence, as noted, the "impossibility" form of conflict preemption does not apply here.

We next address what we refer to as the "impediment" form of conflict preemption, which occurs when the state law impedes accomplishment and execution of the full purposes and objective of Congress. That form of conflict preemption is also inapplicable here.

The federal statutory scheme at issue requires that states supervise their Medicaid programs by creating entities to prosecute fraud (*see* 42 USC § 1396a [a] [61]). Section 1396b (a) (6) (B) relieves part of a state's financial burden in that respect by providing for federal reimbursement of a portion of costs incurred by states in complying with the requirement that states prosecute Medicaid fraud, and section 1396b (q) (3) simply describes the function of a state entity that investigates and prosecutes Medicaid fraud and Medicare fraud in connection with Medicaid fraud. Executive Law § 63 (3) considers the prosecutorial authority of the Attorney General, and thus is unrelated to the federal statute at issue. Indeed, we note that section 63 (3) appears to support the objectives of the subject federal statute, and thus the impediment form of conflict preemption has no application to this case.

IV

Accordingly, we conclude that each of the judgments on appeal should be affirmed.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

320

KA 12-01197

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

ESTA MIRAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE PARRINELLO LAW FIRM, LLP, ROCHESTER (BRUCE F. FREEMAN OF COUNSEL), AND CERULLI, MASSARE & LEMBKE, FOR DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), rendered October 15, 2010. The judgment convicted defendant, upon her plea of guilty, of offering a false instrument for filing in the first degree.

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

Same Opinion as in *People v Miran* ([appeal No. 1] ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

321

KA 12-01198

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

MICHAEL MIRAN, PH.D. PSYCHOLOGIST, P.C.,
DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

THE PARRINELLO LAW FIRM, LLP, ROCHESTER (BRUCE F. FREEMAN OF COUNSEL), AND CERULLI, MASSARE & LEMBKE, FOR DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), rendered October 15, 2010. The judgment convicted defendant, upon a plea of guilty, of grand larceny in the second degree.

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

Same Opinion as in *People v Miran* ([appeal No. 1) ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

323

KA 11-01386

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. BUTLER, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered June 28, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence imposed and as modified the judgment is affirmed, and the matter is remitted to Genesee County Court for the filing of a predicate felony offender statement and resentencing.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [12]). Contrary to defendant's contention, County Court properly refused to suppress the physical evidence that the police observed and removed from defendant's clenched buttocks during a strip search. Defendant contends that the search warrant permitting a search of defendant's residence and person for a gun and narcotics did not authorize the systematic search of defendant, pursuant to which the police required him to remove one article of clothing at a time. We reject that contention inasmuch as the search warrant specifically directed a search of defendant's person (*cf. People v Mothersell*, 14 NY3d 358, 361). Although no narcotics were found in defendant's clothing, the police observed a plastic bag protruding from his clenched buttocks during a visual inspection of his body. Contrary to defendant's further contention, the police did not conduct a "visual body cavity inspection," which "occurs when a police officer looks at [a defendant's] anal or genital cavities, usually by asking [the defendant] to bend over" or squat (*People v Hall*, 10 NY3d 303, 306, *cert denied* 555 US 938; *cf. Mothersell*, 14 NY3d at 361; *People v Colon*, 80 AD3d 440, 440), nor did they conduct a "manual body cavity

search," which "includes some degree of touching or probing of a body cavity that causes a physical intrusion beyond the body's surface" (*Hall*, 10 NY3d at 306-307). Instead, the police removed the plastic bag containing crack cocaine "without touching [defendant] or invading his anal cavity" (*Matter of Demitrus B.*, 89 AD3d 1421, 1422).

Defendant failed to preserve for our review his contention that the People failed to comply with the procedural requirements of CPL 400.21 when he was sentenced as a second felony offender (*see People v Butler*, 96 AD3d 1367, 1368, *lv denied* 20 NY3d 931). We nevertheless exercise our power to reach that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), and conclude that the record does not reflect that the People filed a statement as required by CPL 400.21 (2), or that defendant admitted the prior felony (*cf. Butler*, 96 AD3d at 1368). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for the filing of a predicate felony offender statement pursuant to CPL 400.21 prior to resentencing (*see People v Carrasquillo*, 96 AD3d 1369, 1369).

Finally, the sentence is not unduly harsh or severe.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

334

CA 12-01707

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

WALTER P. MALESA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KRISTI M. BURG, WHEELS LT., TAKEDA AMERICA HOLDINGS, INC., ALSO KNOWN AS TAKEDA AMERICA, INC., AND TAKEDA PHARMACEUTICALS AMERICA, INC., ALSO KNOWN AS TAKEDA PHARMACEUTICALS AMERICA SALES CO., DEFENDANTS-APPELLANTS.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (PAMELA S. SCHALLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MICHAEL G. COOPER, HAMBURG, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Michael L. D'Amico, A.J.), entered January 5, 2012. The order, insofar as appealed from, denied the motion of defendants 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 consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this personal injury action seeking damages for injuries that he sustained as a result of an automobile accident. Defendants 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 their motion. In our view, defendants established their entitlement to summary judgment dismissing the complaint, as amplified by the bill of particulars, with respect to two of the three categories of serious injury allegedly sustained by plaintiff. We therefore modify the order accordingly. We conclude that defendants established that plaintiff did not sustain a permanent consequential limitation of use, and plaintiff failed to raise an issue of fact whether the injury was both permanent and consequential, i.e., important or significant (*see Kordana v Pomellito*, 121 AD2d 783, 784, *appeal dismissed* 68 NY2d 848). We further conclude that defendants

established as a matter of law that plaintiff did not sustain a significant limitation of use and that plaintiff failed to raise an issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, the evidence submitted by plaintiff in opposition to the motion does not provide " 'either a quantitative or qualitative assessment to differentiate serious injuries from mild or moderate ones' " (*Secore v Allen*, 27 AD3d 825, 827; *see Scott v Aponte*, 49 AD3d 1131, 1134). Even assuming, arguendo, that the injuries sustained by plaintiff were caused by the accident, we conclude that plaintiff's proof "fell short of demonstrating that [the injuries] constituted a significant limitation" (*Scott*, 49 AD3d at 1134). We agree with the court, however, that there is an issue of fact whether plaintiff sustained a serious injury within the meaning of the 90/180-day category (*see Rienzo v La Greco*, 11 AD3d 1038; *DiNunzio v County of Suffolk*, 256 AD2d 498, 498, *lv denied* 93 NY2d 812).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

336

CA 12-01868

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

SHAWN HALAS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DICK'S SPORTING GOODS, DEFENDANT,
AND BIG DOG TREESTANDS, INC.,
DEFENDANT-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 9, 2012. The order, among other things, denied the motion of defendant Big Dog Treestands, Inc. to dismiss the complaint pursuant to CPLR 3211 (a) (8).

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries he sustained when he fell from a tree stand manufactured by Big Dog Treestands, Inc. (defendant) and sold by defendant Dick's Sporting Goods (Dick's). Defendant moved pursuant to CPLR 3211 (a) (8) to dismiss the complaint against it based on lack of personal jurisdiction, and Supreme Court denied the motion. We affirm.

A foreign corporation is amenable to suit in New York courts under CPLR 302 (a) (1) if it "transacts any business within the state or contracts anywhere to supply goods or services in the state." Typical business transactions include sales, soliciting customers, contracting, providing services, and shipping products into the state (*see e.g. George Reiner & Co. v Schwartz*, 41 NY2d 648, 653; *Symenow v State St. Bank & Trust Co.*, 244 AD2d 880, 880-881). Additionally, the assertion of personal jurisdiction may be reasonable where a party maintains a website that "provides information, permits access to [email] communication, describes the goods or services offered, downloads a printed order form, or allows online sales with the use of a credit card, and sales are, in fact, made . . . in this manner in the forum state" (*Grimaldi v Guinn*, 72 AD3d 37, 50). Although " 'the ultimate burden of proof rests with the party asserting jurisdiction,

. . . in opposition to a motion to dismiss pursuant to CPLR 3211 (a) (8), [plaintiff] need only make a prima facie showing that the defendant . . . was subject to the personal jurisdiction of . . . Supreme Court' " (*Constantine v Stella Maris Ins. Co., Ltd.*, 97 AD3d 1129, 1130). We conclude that plaintiff met that burden.

Here, defendant had an exclusive distributorship agreement with Dick's, and maintained a website that provided information relating to its products, directed consumers to retail locations where they could purchase the products, and allowed for the direct purchase of the products through a credit card. Therefore, defendant was transacting business in New York through the use of its website, and the court properly concluded that there is long-arm jurisdiction under CPLR 302 (a) (1).

We also conclude in any event that defendant is subject to long-arm jurisdiction pursuant to CPLR 302 (a) (3) (ii). Under that provision, courts "may exercise personal jurisdiction over any non-domiciliary . . . who . . . commits a tortious act without the state causing injury to person . . . within the state . . . if he . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." "The conferral of jurisdiction under [that] provision rests on five elements: First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214).

The first three elements are met based on plaintiff's allegations that defendant committed a tortious act outside New York by manufacturing the product that caused plaintiff's injuries after he purchased and used the product in New York. With respect to the fourth element, we conclude that defendant should have reasonably expected that its negligence would have consequences in individual states, including New York, because its distributor targets the nationwide market (*see Crair v Saxena*, 277 AD2d 275, 276). While the tree stand was not specifically earmarked for use in New York, defendant sold it to a company that distributes products to states across the country, including New York (*see generally Martinez v American Std.*, 91 AD2d 652, 653-654, *affd* 60 NY2d 873). By virtue of what was an exclusive distribution agreement with Dick's, which has locations in 36 states including New York, defendant could have reasonably foreseen that its product would have an impact in any state where Dick's distributed the product, including New York (*see Crair*, 277 AD2d at 276). Finally, with respect to the fifth element, i.e., whether defendant derived substantial revenue from interstate commerce, we conclude that, in the context of this motion to dismiss, plaintiff is entitled to jurisdictional discovery on the fifth element because he "established that facts may exist to exercise personal jurisdiction over [defendant] . . . , and made a sufficient start to

warrant further disclosure on the issue of whether personal jurisdiction may be established over [defendant]" (*Williams v Beemiller, Inc.*, 100 AD3d 143, 154, *amended on rearg* 103 AD3d 1191 [internal quotation marks omitted]).

Having concluded that defendant's relationship with New York comes within the terms of CPLR 302, we must next determine whether "the exercise of jurisdiction comports with due process" (*LaMarca*, 95 NY2d at 214; *see Constantine*, 97 AD3d at 1132), i.e., whether defendant has the requisite minimum contacts with New York (*see LaMarca*, 95 NY2d at 216), and whether the "prospect of defending [this action] . . . comport[s] with traditional notions of fair play and substantial justice" (*id.* at 217 [internal quotation marks omitted]). We conclude that, in light of defendant's website and exclusive distributorship agreement, the exercise of jurisdiction over defendant comports with due process (*see Andrew Greenberg, Inc. v Sirtech Can., Ltd.*, 79 AD3d 1419, 1422-1423).

Moreover, the court did not abuse its discretion in accepting late responding papers from plaintiff inasmuch as the court determined that plaintiff had demonstrated a " 'valid excuse' " for the delay (*Associates First Capital v Crabill*, 51 AD3d 1186, 1188, *lv denied* 11 NY3d 702; *see* CPLR 2214 [b]; *Mallards Dairy, LLC v E&M Engrs. & Surveyors, P.C.*, 71 AD3d 1415, 1416). Notably, the delay was minimal and there was no showing of prejudice to defendant (*see Associates First Capital*, 51 AD3d at 1187-1188). Additionally, the court did not err in considering the affidavit submitted by plaintiff's attorney in opposition to the motion (*see generally Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414; *Leon v Martinez*, 84 NY2d 83, 87-88).

Finally, contrary to defendant's contention, plaintiff had the option of serving defendant under either Business Corporation Law § 307 or CPLR 311 and thus properly served defendant under CPLR 311 (*see Hessel v Goldman, Sachs & Co.*, 281 AD2d 247, 247-248, *lv dismissed in part and denied in part* 97 NY2d 625). CPLR 311 (a) (1) determines the method of service upon any domestic or foreign corporation, and provides that "[a] business corporation *may also* be served pursuant to [Business Corporation Law §§ 306 or 307]" (emphasis added). Here, service was properly effected under CPLR 311 because plaintiff personally served defendant's authorized agent for service in accordance with CPLR 311 (a) (1) and thus, contrary to defendant's contention, plaintiff was not required to comply with the provisions of Business Corporation Law § 307 (*see Van Wert v Black & Decker*, 246 AD2d 773, 774; *cf. Flick v Stewart-Warner Corp.*, 76 NY2d 50, 57, *rearg denied* 76 NY2d 846).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

338

CA 12-01225

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

KG2, LLC, DOING BUSINESS AS AURORA SALES & SERVICE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRUCE WELLER, DOING BUSINESS AS AURORA TRUCK SUPPLY COMPANY, DEFENDANT-APPELLANT, ET AL., DEFENDANT.

EUGENE VINCENT BURKE, WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (SHARON STERN GERSTMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (ASHLEY J. LITWIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered December 28, 2011. The order, insofar as appealed from, granted in part plaintiff's motion for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is denied in its entirety.

Memorandum: Plaintiff purchased its business from a seller that four years earlier had purchased the business from Bruce Weller, sued herein as Bruce Weller, doing business as Aurora Truck Supply Company (defendant). For approximately six years after plaintiff's purchase, Weller continued to lease to plaintiff the real property where the business was located. At the termination of the lease, plaintiff relocated approximately two miles away, and Weller resumed a business at the property with a similar name and trade. Plaintiff alleged in the complaint that defendant and another unknown defendant engaged in unfair competition based on trademark or trade name infringement and misappropriation of goodwill.

We agree with defendant that Supreme Court erred in granting that part of plaintiff's motion for partial summary judgment on liability on the first cause of action, for unfair competition, and in scheduling a trial on damages. "[T]o prevail in an unfair competition case, the plaintiff may prove either: (1) that the defendant's activities have caused confusion with, or have been mistaken for, the plaintiff's activities in the mind of the public, or are likely to cause such confusion or mistake; or (2) that the defendant has acted

unfairly in some manner" (104 NY Jur 2d, Trade Regulation § 196; *see generally Allied Maintenance Corp. v Allied Mech. Trades*, 42 NY2d 538, 543). We conclude that the affidavit of plaintiff's owner in support of plaintiff's motion for summary judgment was merely conclusory and failed to establish the elements of the cause of action for unfair competition based on trademark or trade name infringement or misappropriation of goodwill (*see generally Cobrin v County of Monroe*, 212 AD2d 1011, 1012). Indeed, the affidavit of plaintiff's owner set forth in a conclusory manner only that defendant's use of a similar trade name caused substantial confusion and that defendant acted in bad faith. We note that the court concluded that the affidavit of plaintiff's owner alone, without resort to the attached exhibits, established liability on the cause of action for unfair competition by demonstrating that defendant caused "confusion among numerous customers." However, the affidavit alone does not support the court's statement that plaintiff's owner received complaints from dissatisfied customers as a result of poor workmanship provided by defendant, and that plaintiff's owner established "through his affidavit" that there have been approximately 34 different incidents in which customers expressed confusion between plaintiff's business and defendant's business. Rather, the exhibits attached to the affidavit as purported business records provide the information supporting that statement.

We agree with defendant that plaintiff "failed to establish a proper foundation for the admission of [those exhibits] under the business record exception to the hearsay rule" (*Palisades Collection, LLC v Kedik*, 67 AD3d 1329, 1330). For a document to be admissible as a business record, it must be established that "it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR 4518 [a]), and plaintiff's owner did not aver in his affidavit that the documents were records made in the regular course of business. Also, the assertion of plaintiff's counsel that the exhibits were maintained in the regular course of business is insufficient both because the assertion is made for the first time on appeal and because plaintiff's counsel did not have "personal knowledge of the [record] maker's business practices and procedures" to establish the requisite foundation (*West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949, 950). Finally, plaintiff in support of its motion submitted only one affidavit of a customer, who asserted that he mistakenly called Aurora Truck Supply, i.e., defendant's business, and a representative there claimed to be plaintiff's owner. We conclude that the circumstances of the confusion of that sole customer are insufficient to establish a claim of unfair competition as a matter of law (*see Camelot Assoc. Corp. v Camelot Design & Dev.*, 298 AD2d 799, 800).

Finally, we conclude with respect to the claim for misappropriation of good will as a basis for the unfair competition cause of action that plaintiff failed to make the requisite prima facie showing of both misappropriation of goodwill and bad faith (*see Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690, 692-693).

In light of our determination that plaintiff failed to meet its burden on the motion, we need not address defendant's remaining contentions.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

344

KA 11-01224

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROME TROTT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JESSAMINE I. JACKSON 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 (Penny M. Wolfgang, J.), rendered May 9, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the period of postrelease supervision and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that Supreme Court erred in denying his motion to suppress certain physical evidence and his statements to the police because he was subjected to an unlawful seizure. We reject that contention inasmuch as the evidence at the suppression hearing established that the police officers who arrested defendant had "a reasonable suspicion" that defendant committed, was committing or was about to commit a felony or misdemeanor (*People v De Bour*, 40 NY2d 210, 223). Specifically, a confidential informant who had supplied reliable information to the police on approximately 40 previous occasions described defendant and his whereabouts to a police officer and informed him that defendant was carrying a loaded weapon holstered to his chest. The police officer set up surveillance in the area, saw defendant within seconds and then called another police officer to serve as backup. The two officers drove in one vehicle to defendant's location without activating the vehicle's lights or sirens. Upon approaching defendant, the officers noticed defendant turning his back on them, acting in a nervous manner and reaching for his chest. When defendant ignored repeated requests from the officers to show his hands, the officers asked defendant if he had something in his possession that was causing him to act that way. Defendant responded

that he had his mother's gun. The officers secured the gun, placed defendant under arrest and advised him of his *Miranda* rights. Throughout the encounter, the officers had their guns holstered and they did not pat down defendant or handcuff him until he admitted to possessing a gun. We conclude that those circumstances did not subject defendant to an unlawful seizure (*see People v Jenkins*, 209 AD2d 164, 165; *see generally People v Bora*, 83 NY2d 531, 534-536).

Defendant's contention that the court erred in refusing to suppress his statements to the officers because he was not advised of his *Miranda* rights is without merit. Defendant was not arrested until he told the officers he had a gun and there was no requirement that he be read his *Miranda* rights before that point (*see People v Whyte*, 47 AD3d 852, 853; *see also People v Jones*, 118 AD2d 86, 89, *affd* 69 NY2d 853). Defendant failed to preserve for our review his further contention that the testimony of the officers was tailored to overcome constitutional objections (*see People v Watson*, 90 AD3d 1666, 1667, *lv denied* 19 NY3d 868), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We agree with defendant, however, that the period of postrelease supervision must be vacated. The court's statement that "this determinate sentence automatically includes a period of postrelease supervision of five years" reflects that the court misapprehended that it had discretion to sentence defendant to less than five years of postrelease supervision (*see People v Britt*, 67 AD3d 1023, 1024, *lv denied* 14 NY3d 770). We therefore modify the judgment by vacating the period of postrelease supervision, and we remit the matter to Supreme Court for "reconsideration of the length of that period and the reimposition of a period of postrelease supervision thereafter" (*id.*).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

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CAF 12-00335

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

IN THE MATTER OF BRADLEY OLUFSEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TRICIA PLUMMER, RESPONDENT-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

BOUVIER PARTNERSHIP, LLP, EAST AURORA (ROGER T. DAVISON OF COUNSEL), FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR MACI L.O.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered January 24, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner custody of the subject child.

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

Memorandum: Respondent mother appeals from an order that, inter alia, awarded sole custody of the parties' child to petitioner father and "liberal and frequent" visitation to her. Contrary to the mother's contention, we conclude that Family Court's best interests determination is supported by a sound and substantial basis in the record and that the court did not fail to consider the appropriate factors in awarding sole custody to the father (*see Eschbach v Eschbach*, 56 NY2d 167, 171; *Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1582, *lv denied* 20 NY3d 855; *Matter of Booth v Booth*, 8 AD3d 1104, 1104-1105, *lv denied* 3 NY3d 607; *see generally Fox v Fox*, 177 AD2d 209, 210). We note that "[i]t is well settled . . . that [a] concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent" (*Matter of Orzech v Nikiel*, 91 AD3d 1305, 1306 [internal quotation marks omitted]; *see Matter of Marino v Marino*, 90 AD3d 1694, 1695). Under such circumstances, we conclude that the child's emotional development is better served by sole custody to the father (*see generally Fox*, 177 AD2d at 210). Here, we note that there was evidence in the record

that the mother sought to interfere with the relationship between the father and the child by pressuring the child into making groundless allegations of sexual abuse against the father and by repeating those groundless allegations.

We reject the mother's contention that the court erred in relying heavily on the investigative report and opinion testimony of a licensed clinical psychologist. The psychologist met with the parties individually, visited their homes when the child was present, administered psychological tests to the parties and the child, and consulted with caseworkers with the Erie County Department of Social Services. At the hearing, the psychologist testified that the mother exhibited "a lack of emotional [attunement]" with the child and that they had an "unhealthy dynamic." He further testified that the mother could not effectively communicate with the father with respect to the child and that joint custody would be inappropriate. Although we agree with the mother that the opinion of a court-ordered psychologist is only one factor to be considered in a custody proceeding (*see generally Matter of Alexandra H. v Raymond B.H.*, 37 AD3d 1125, 1126), we conclude that there was additional evidence in the record supporting the court's determination that the father should have custody of the child. Moreover, we see no basis for disturbing the court's "first-hand assessment of the credibility of the witnesses" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449), including the psychologist.

Finally, the mother's further contention that the court erred in failing to hold a *Lincoln* hearing is not preserved for our review inasmuch as the mother did not request that the court conduct such a hearing (*see Matter of Thillman v Mayer*, 85 AD3d 1624, 1625; *see generally Matter of Lincoln v Lincoln*, 24 NY2d 270, 272-274). "In any event, based on the child's young age, we perceive no abuse of discretion in the court's failure to conduct a *Lincoln* hearing" (*Thillman*, 85 AD3d at 1625; *see Matter of Graves v Stockigt*, 79 AD3d 1170, 1171).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

352

CA 12-01607

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

MELISSA KWITEK AND ROBERT KWITEK, JR.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

FRANCES SEIER AND JUNE YOUNG,
DEFENDANTS-APPELLANTS.

HAGELIN KENT LLC, BUFFALO (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (KENNETH SZYSZKOWSKI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered May 11, 2012 in a personal injury action. The order, insofar as appealed from, denied in part defendants' motion for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motion is granted in its entirety and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Melissa Kwitek (plaintiff) in a motor vehicle accident on April 28, 2007, when the vehicle in which she was a passenger was rear-ended by a vehicle owned by one defendant and operated by the other. Plaintiffs allege that, as a result of the motor vehicle accident, plaintiff sustained, inter alia, injuries to her cervical and lumbar spine under the permanent loss of use, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury as defined in Insurance Law § 5102 (d). Defendants moved for summary judgment seeking dismissal of the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of those categories, and Supreme Court granted the motion only with respect to the permanent loss of use category. We agree with defendants that the court should have granted the motion in its entirety.

"[E]ven where there is objective medical proof [of a serious injury], when additional contributory factors interrupt the chain of causation between the accident and claimed injury—such as a gap in treatment, an intervening medical problem or a preexisting condition—summary dismissal of the complaint may be appropriate"

(*Pommells v Perez*, 4 NY3d 566, 572). Here, defendants met their initial burden on the motion with respect to the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories by offering "persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition" (*Carrasco v Mendez*, 4 NY3d 566, 580). Defendants submitted plaintiff's deposition testimony which established that plaintiff has a history of incidents involving her neck and lower back pre-dating the subject accident, including a 1995 incident in which she injured her lower back by lifting her then-seven-year-old brother; a 2000 motor vehicle accident; and a 2005 motor vehicle accident. Plaintiff treated with a chiropractor for those complaints from 1995 until the date of the accident. Defendants also submitted the affirmed report of a neurosurgeon who examined plaintiff, reviewed her medical records, and concluded that the only objective medical findings with respect to any alleged injury related to a preexisting degenerative condition of the lumbosacral spine (*see Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400; *see also Lauffer v Macey*, 74 AD3d 1826, 1827; *Clark v Perry*, 21 AD3d 1373, 1374). The neurosurgeon reviewed plaintiff's postaccident MRIs and concluded that the MRI of her cervical spine was "normal" and that, although the MRI of her lumbar spine showed a "small disc herniation at L5-S1," the herniation was not related to the subject accident. Rather, he concluded that plaintiff's lumbar spine showed "signs of chronic long standing changes consistent with her [pre]existing complaints of back pain." Based upon his physical examination of plaintiff and review of plaintiff's medical records, the neurosurgeon concluded that plaintiff suffered only a "very mild flare up of myofascial pain, musculoskeletal strain from a well documented [pre]existing condition."

Plaintiffs' submissions in opposition to the motion with respect to those three categories did "not 'adequately address how plaintiff's current medical problems, in light of [plaintiff's] past medical history, are causally related to the subject accident' " (*Anania v Verdgeline*, 45 AD3d 1473, 1474; *see Overhoff v Perfetto*, 92 AD3d 1255, 1256, *lv denied* 19 NY3d 804). Plaintiffs submitted the affidavit of plaintiff's treating chiropractor, who acknowledged that "there is some degeneration present on [plaintiff]'s lumbar spine MRI film," but concluded that "the disc herniation . . . is an acute finding and is causally related to her motor vehicle accident of April 28, 2007." The chiropractor, however, did not begin treating plaintiff until approximately seven months after the accident and did not review plaintiff's pre-accident medical records. Rather, the chiropractor's opinion appears to be based, at least in part, on plaintiff's self-reported history that her neck and lower back complaints leading up to the subject accident were "very mild in nature," and that she had "fully recovered" prior to the accident. That characterization of plaintiff's preexisting condition, however, is belied by the record, which establishes that plaintiff complained of neck and lower back pain less than two weeks prior to the subject accident. Inasmuch as the chiropractor did not review plaintiff's pre-accident medical records relative to her neck and lower back complaints, we conclude that his opinion that the subject motor vehicle accident was the competent producing cause of plaintiff's condition is purely

speculative and thus insufficient to raise an issue of fact as to causation (*see McCarthy v Bellamy*, 39 AD3d 1166, 1167; *see also Carrasco*, 4 NY3d at 579-580; *Hartman-Jweid*, 70 AD3d at 1400; *Spanos v Fanto*, 63 AD3d 1665; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

All concur except WHALEN, J., who dissents and votes to affirm in the following Memorandum: I respectfully disagree with the majority's conclusion that Supreme Court should have granted defendants' motion for summary judgment in its entirety, and I therefore dissent. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *see Zuckerman v City of New York*, 49 NY2d 557, 562). "Once [that] showing has been made . . . , the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Contrary to the view of the majority, I conclude that defendants did not meet their burden of establishing on their motion that Melissa Kwitek (plaintiff) was able to perform "substantially all" of her usual activities during no less than 90 days of the 180 days immediately following the accident, inasmuch as they failed to establish what plaintiff's "usual and customary daily activities" were before and after the accident, and thus failed to shift the burden to plaintiffs with respect to that category of serious injury (*Paolini v Sienkiewicz*, 262 AD2d 1020, 1020; *see* Insurance Law § 5102 [d]). Defendants established that plaintiff had been able to return to work during the relevant time frame but that, by itself, does not constitute all of her usual and customary daily activities. Consequently, defendants were not entitled to summary judgment with respect to the 90/180-day category.

I further disagree with the majority's conclusion that plaintiffs' submissions in opposition to the motion with respect to the categories of permanent consequential limitation of use and significant limitation of use did not adequately address how plaintiff's current medical problems, in light of her past medical history, are causally related to the subject accident. In my view, the majority's reliance on *Anania v Verdgeline* (45 AD3d 1473, 1474) and *Overhoff v Perfetto* (92 AD3d 1255, 1256, *lv denied* 19 NY3d 804) is misplaced. In both of those cases, pre-accident imaging studies revealed preexisting injuries, and those imaging studies were available to medical providers as a basis for comparison to postaccident imaging studies. In the case before us, there are no pre-accident imaging studies, nor is there a specific pre-accident diagnosis of a preexisting injury apart from plaintiff's general complaints of neck and lower back pain prior to the subject accident. Plaintiffs' expert averred that he was informed of plaintiff's pre-accident injuries and that he had reviewed and specifically disagreed with the opinion of defendants' expert that plaintiff's disc pathology is degenerative. In my view, the conflicting expert opinions on that issue are sufficient to raise a question of fact with respect to the

categories of permanent consequential limitation of use and significant limitation of use (*see Verkey v Hebard*, 99 AD3d 1205, 1206). I would therefore affirm the order.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

357

CA 12-00269

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

SAMAN SAFADJOU, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AZINE MOHAMMADI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THOMAS N. MARTIN, ROCHESTER, FOR DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered November 23, 2010. The order, inter alia, adjudged that defendant was properly served by email.

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

Same Memorandum as in *Safadjou v Mohammadi* ([appeal No. 3] ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

358

CA 12-00270

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

SAMAN SAFADJOU, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AZINE MOHAMMADI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THOMAS N. MARTIN, ROCHESTER, FOR DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from a corrected order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered January 6, 2011. The corrected order denied the motion of defendant to dismiss the complaint.

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

Same Memorandum as in *Safadjou v Mohammadi* ([appeal No. 3] ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

359

CA 12-00271

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

SAMAN SAFADJOU, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AZINE MOHAMMADI, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

THOMAS N. MARTIN, ROCHESTER, FOR DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered March 8, 2011. The judgment, inter alia, granted plaintiff a divorce and awarded plaintiff sole custody of the parties' child.

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

Memorandum: In these consolidated appeals arising from a matrimonial action, defendant contends that Supreme Court erred in ordering service of the summons with notice by email. We note at the outset that the orders from which defendant appeals, in appeal Nos. 1 and 2, are subsumed in the final judgment of divorce, which is the subject of appeal No. 3, and thus appeal Nos. 1 and 2 must be dismissed (*see Rooney v Rooney* [appeal No. 3], 92 AD3d 1294, 1295, *lv denied* 19 NY3d 810; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 989). With respect to appeal No. 3, we conclude that the court properly permitted plaintiff to serve defendant via email, and we therefore affirm.

"CPLR 308 (5) vests a court with the discretion to direct an alternative method for service of process when it has determined that the methods set forth in CPLR 308 (1), (2), and (4) are 'impracticable' " (*Astrologo v Serra*, 240 AD2d 606, 606; *see Matter of Kaila B.*, 64 AD3d 647, 648; *see generally Harkness v Doe*, 261 AD2d 846, 847). "Although the impractability standard is not capable of easy definition" (*Astrologo*, 240 AD2d at 606 [internal quotation marks omitted]), "[a] showing of impracticability under CPLR 308 (5) does not require proof of actual prior attempts to serve a party under the methods outlined pursuant to subdivisions (1), (2) or (4) of CPLR 308" (*Franklin v Winard*, 189 AD2d 717, 717; *see Contimortgage Corp. v Isler*, 48 AD3d 732, 734; *Astrologo*, 240 AD2d at 606; *see also* Siegel, NY Prac § 75 at 125 [5th ed 2011]). "The meaning of 'impracticable'

will depend upon the facts and circumstances of the particular case" (*Markoff v South Nassau Community Hosp.*, 91 AD2d 1064, 1065, *affd* 61 NY2d 283).

Here, we conclude that plaintiff made a sufficient showing that service upon defendant pursuant to CPLR 308 (1), (2), or (4) was impracticable, and thus that the court providently exercised its discretion in directing an alternative method of service (*see State St. Bank & Trust Co. v Coakley*, 16 AD3d 403, *lv dismissed* 5 NY3d 746; *Uzo v Uzo*, 307 AD2d 1032, 1032, *lv dismissed* 2 NY3d 823; *Astrologo*, 240 AD2d at 606-607; *cf. David v Total Identity Corp.*, 50 AD3d 1484, 1485). Plaintiff submitted evidence that defendant left the United States with the parties' child and declared her intention to remain in Iran with her family (*see Astrologo*, 240 AD2d at 606-607). Further, plaintiff established that Iran and the United States do not have diplomatic relations and that Iran is not a signatory to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (20 UST 361, TIAS No. 6638). Plaintiff thus requested alternative service upon defendant's parents in Iran, with whom defendant was residing.

In light of those unique circumstances, we conclude that the court properly determined that service upon defendant was "impracticable by any method of service specified in CPLR 308 (1), (2), and (4)." "Once the impracticability standard is satisfied, due process requires that the method of service be 'reasonably calculated, under all the circumstances, to apprise' the defendant of the action" (*Contimortgage Corp.*, 48 AD3d at 734, quoting *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314; *see Harkness*, 261 AD2d at 847). "In order to be constitutionally adequate, the method of service need not guarantee that the defendant will receive actual notice" (*Harkness*, 261 AD2d at 847; *see Bossuk v Steinberg*, 58 NY2d 916, 918). Here, the court initially ordered service of the summons by (1) personal service upon defendant's parents; (2) mail service upon defendant at her parents' address in Iran; and (3) service upon defendant by plaintiff's Iranian attorneys in accordance with Iranian law. Pursuant to that order, plaintiff mailed the summons and notice to defendant at her parents' last known address in Tehran and submitted a declaration by his Iranian attorney that at least two attempts were made to effect personal service upon defendant at that address. Although defendant contended that the address used for service was "bogus," the record reflects that the address was in fact used by defendant and/or her parents in some capacity. Indeed, defendant supplied that address to the child's pediatrician in requesting the child's medical records, and she averred that her father ultimately received the documents from a "tenant" who lived at that address.

When plaintiff was unable to effect personal service upon defendant's parents pursuant to the court's order, the court relieved him of that obligation and instead permitted service "via email at each email address that [p]laintiff knows [d]efendant to have." Although service of process by email "is not directly authorized by

either the CPLR or the Hague Convention, it is not prohibited under either state or federal law, or the Hague Convention" (*Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 141) and, indeed, "both New York courts and federal courts have, upon application by plaintiffs, authorized [e]mail service of process as an appropriate alternative method when the statutory methods have proven ineffective" (*id.* at 141-142). Contrary to the contention of defendant, we conclude that plaintiff made the requisite showing that service by email was "reasonably calculated to apprise defendant of the pending lawsuit and thus satisfie[d] due process" (*Harkness*, 261 AD2d at 847; *see Hollow v Hollow*, 193 Misc 2d 691, 696; *see generally Alfred E. Mann Living Trust*, 78 AD3d at 142). The record reflects that, for several months prior to the application for alternative service, the parties had been communicating via email at the two email addresses subsequently used for service. Although defendant claimed that she did not receive either of the emails, she acknowledged receipt of a subsequent email from plaintiff's attorney sent to the same two email addresses. We thus conclude that, under the circumstances of this case, the court properly determined that service of the summons with notice upon defendant by email was an appropriate form of service (*see Snyder v Alternate Energy Inc.*, 19 Misc 3d 954, 962).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

361

TP 12-01155

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

IN THE MATTER OF SAUL SABINO, PETITIONER,

V MEMORANDUM AND ORDER

WILLIAM F. HULIHAN, SUPERINTENDENT, MID-STATE CORRECTIONAL FACILITY, RESPONDENT.

SAUL SABINO, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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, Oneida County [Samuel D. Hester, J.], entered March 1, 2012) to review a determination of respondent. The determination found after a Tier II 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.

Memorandum: Petitioner seeks a review of the determination, following a Tier II hearing, that he violated inmate rules 113.22 (7 NYCRR 270.2 [B] [14] [xii] [using or possessing authorized property in an unauthorized area]) and 122.10 (270.2 [B] [23] [i] [smoking in an unauthorized area]). Contrary to petitioner's contention, the misbehavior report and the testimony of the author of that report constitute substantial evidence to support the charges (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966). Petitioner's contention that he was not smoking at the alleged time and place raised an issue of credibility for resolution by the Hearing Officer (*see id.*). The record does not support petitioner's contention that the Hearing Officer was biased against him (*see Matter of Colon v Fischer*, 83 AD3d 1500, 1501-1502). Petitioner failed to exhaust his administrative remedies with respect to his remaining contentions by failing to raise them on his administrative appeal, and this Court has no discretionary power to reach those contentions (*see id.* at 1502).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

362

KA 11-02040

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONDULA LANE, DEFENDANT-APPELLANT.

JEREMY D. ALEXANDER, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered March 15, 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 imposed upon his conviction of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and sentencing him to a determinate term of incarceration. We note at the outset that we do not consider defendant's contentions with respect to the sufficiency of the evidence regarding his subsequent arrest. The record establishes that County Court did not find that defendant violated the condition of his probation directing that he "shall violate no further laws," and thus there is no issue with respect to the evidence regarding that condition.

Contrary to defendant's contention, the court properly determined that the People met their burden of proving by a preponderance of the evidence that defendant violated the terms and conditions of his probation (*see People v Pringle*, 72 AD3d 1629, 1629, *lv denied* 15 NY3d 855; *People v Bergman*, 56 AD3d 1225, 1225, *lv denied* 12 NY3d 756). Contrary to defendant's further contention, the sentence imposed upon the violation of probation is not unduly harsh or severe.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

363

KA 11-01780

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY J. GAY, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), 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 June 27, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of stolen property in the fifth degree (Penal Law § 165.40), defendant contends that the verdict is against the weight of the evidence. We reject that contention. 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, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's accomplice testified that defendant stole an ATM from a bar, and that testimony was corroborated by other witnesses. Defendant contends that the People's witnesses lacked credibility, but we give great deference to the factfinder's " 'opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, citing *Bleakley*, 69 NY2d at 495; *see People v Sorrentino*, 12 AD3d 1197, 1197-1198, *lv denied* 4 NY3d 748). Indeed, a jury is able to "assess [the] credibility and reliability [of the witnesses] in a manner that is far superior to that of reviewing judges[,] who must rely on the printed record" (*People v Lane*, 7 NY3d 888, 890), and we perceive no reason to disturb the jury's credibility determinations.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

364

KA 12-00370

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC P. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 3, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). We reject defendant's contention that County Court erred in refusing to order judicial diversion instead of incarceration. The court considered the statutory factors pursuant to CPL 216.05 (3) (b) in making its determination, including whether defendant was eligible for diversion, whether he had a history of drug abuse, whether such abuse was a contributing factor to his criminal behavior, whether diversion could effectively address such abuse, and whether institutional confinement of defendant was necessary for the protection of the public. Courts are afforded great deference in making judicial diversion determinations, and we perceive no abuse of discretion here (*see Matter of Carty v Hall*, 92 AD3d 1191, 1192; *see generally People v Secore*, 102 AD3d 1059, 1060; *People v Dawley*, 96 AD3d 1108, 1109, *lv denied* 19 NY3d 1025; *People v Hombach*, 31 Misc 3d 789, 792). To the extent that defendant's contention that he was denied effective assistance of counsel survives his guilty plea (*see People v Hawkins*, 94 AD3d 1439, 1440-1441, *lv denied* 19 NY3d 974), we conclude that his contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404). We note that, although defense counsel's request that defendant be evaluated pursuant to CPL 216.05 was improperly made after defendant entered his plea of guilty, the court ignored that procedural error and reached the judicial diversion issue on the merits. We further conclude that the sentence is not unduly harsh or

severe.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

365

KA 09-01487

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRODY M. FOOS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered March 13, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

366

KA 08-01776

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEUANE H. HARVEY, ALSO KNOWN AS JEVENE HARVEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered July 28, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and reckless endangerment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and reckless endangerment in the second degree (§ 120.20). The People presented evidence at trial that defendant fired a weapon while standing on a sidewalk in the City of Rochester, and that children were playing in the adjacent street and pedestrians were on the sidewalk. Contrary to defendant's contention, he was not entitled to pretrial notice that the People intended to present a witness who would testify that defendant approached her several months after the shooting and asked her whether she was going to appear in court (*see People v Small*, 12 NY3d 732, 733). Even assuming, arguendo, that Supreme Court erred in determining that the evidence does not constitute *Molineux* evidence, we conclude that the court properly determined that the evidence was relevant to the issue of identity, and we further conclude that the probative value of the testimony on that issue outweighed any prejudice to defendant (*see People v Igbinosun*, 24 AD3d 1250, 1251; *see generally People v Ventimiglia*, 52 NY2d 350, 359-360). We reject defendant's contention that the sentence is unduly harsh and severe.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

368

KA 10-01359

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARVIN FORSYTHE, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

MARVIN FORSYTHE, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Oneida County Court (Michael L. Dwyer, J.), dated May 3, 2010. The order denied the motion of defendant pursuant to CPL 440.10.

It is hereby ORDERED that said appeal is unanimously converted to a motion for a writ of error coram nobis, the motion is granted in accordance with the following Memorandum and the matter is remitted to Oneida County Court for proceedings pursuant to CPL 470.45: After defendant was charged with criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), County Court granted that part of defendant's motion to dismiss the indictment charging him with those crimes. The People appealed, and we reversed the order and reinstated the indictment (*People v Forsythe*, 20 AD3d 936). Defendant had been represented by retained counsel during the proceedings in County Court, and the People's notice of appeal was served on defense counsel. Defense counsel sent a letter to the People requesting the grand jury minutes, but she did not file a brief in opposition to the People's appeal before this Court, nor does the record reflect that she otherwise made any appearance before this Court.

After we reinstated the indictment, defendant was convicted upon a jury verdict of attempted criminal possession of a controlled substance in the first degree (Penal Law §§ 110.00, 220.21 [1]) and attempted criminal possession of a controlled substance in the third degree (§§ 110.00, 220.16 [1]). Defendant appealed, and we affirmed (*People v Forsythe*, 59 AD3d 1121, *lv denied* 12 NY3d 816). After we denied defendant's motion for a writ of error coram nobis (*People v Forsythe*, 46 AD3d 1476, *lv denied* 10 NY3d 934), defendant moved to

vacate the judgment pursuant to CPL 440.10 on the ground that he was denied his right to counsel or his right to effective assistance of counsel on the People's interlocutory appeal from the order in *Forsythe* (20 AD3d 936). The court denied the motion, and we granted defendant permission to appeal.

A claim of ineffective assistance of appellate counsel must be raised in an error coram nobis proceeding (*see People v Bachert*, 69 NY2d 593, 595-596; *People v Smith*, 78 AD3d 1583, 1584). We convert defendant's appeal from the order denying his CPL 440.10 motion to a motion for a writ of error coram nobis (*see People v Angulo*, 140 AD2d 209, *lv dismissed* 72 NY2d 855), and we grant the motion.

"It is well settled that criminal defendants are entitled under both the Federal and State Constitutions to effective assistance of appellate counsel" (*People v Borrell*, 12 NY3d 365, 368). In addition, "defendants have important interests at stake on a People's appeal" (*People v Ramos*, 85 NY2d 678, 684). "Given the consequences of a reversal and the possible resumption of criminal proceedings, the defendant certainly has an interest in being informed that the People's appeal is pending and continuing" (*id.* at 684-685). "Moreover, . . . other rights requiring protection upon the People's appeal include the right to appellate counsel of the defendant's own choice, the right to appear [pro se] on the appeal, and the right to seek appointment of counsel upon proof of indigency" (*id.* at 685). However, due process does not require that a defendant be personally served with the People's appellate briefs (*see id.* at 681).

There is no showing on this record that the court upon dismissing the indictment complied with 22 NYCRR 200.40 (a) (1) through (3) by advising defendant that the People had the right to take an appeal; that defendant had the right to counsel on the appeal or to appear pro se; and that defendant had the right to assigned counsel on the appeal if he was financially unable to retain counsel (*see Matter of Donovan v Pesce*, 73 AD3d 137, 138, *lv denied* 15 NY3d 702). Nor is there any showing that the People or defense counsel advised defendant of those rights. The record establishes that the court issued its ruling dismissing the indictment to the prosecutor and defense counsel on April 6, 2005, and that the People filed their notice of appeal on April 7, 2005. According to defendant, defense counsel visited him in jail before the People filed their notice of appeal and apprised him of the court's ruling. Although the indictment was dismissed, defendant continued to be held on a violation of parole. Indeed, while defendant averred that defense counsel advised him that the People could potentially appeal from the order, he was never advised by defense counsel that he had "the right to counsel - - court appointed or retained - - [or] the right to proceed pro se" on the appeal.

Moreover, this Court failed to ascertain whether defendant was represented or had waived counsel on the People's appeal (*see People v Garcia*, 93 NY2d 42, 44). "When it was discerned that defendant was unrepresented on appeal, absent record evidence that defendant was informed of his right to counsel and that he waived that right, [this]

Court should not have proceeded to consider and decide the People's appeal" (*id.* at 46). The People contend that *Garcia* is distinguishable from this case because here it appeared to the People that defendant was represented by counsel, inasmuch as defense counsel informed the People that she had received the People's brief and requested the grand jury minutes. However, as previously noted, our records do not reflect that defense counsel made any appearance on behalf of defendant on the People's appeal. In addition, there is no showing that defendant was informed of his right to representation on the appeal or to appear pro se.

Therefore, the orders of this Court entered July 1, 2005 (*Forsythe*, 20 AD3d 936) and February 11, 2009 (*Forsythe*, 59 AD3d 1121) are vacated, the judgment of conviction is vacated, and this Court will consider the People's appeal de novo. The People shall perfect the appeal on or before July 25, 2013.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

370

CAF 12-01090

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

IN THE MATTER OF MATTHEW J. ROSKWITALSKI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CATHERINE D. FLEMING, RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR ANTONIA F., KIRA F. AND ELIZHA F.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 14, 2012. The order, among other things, suspended respondent's visitation with the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the conditions imposed on the resumption of visitation and as modified the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order that suspended her visitation with the three children in the custody of petitioner, the children's maternal grandfather, and directed her to engage in mental health counseling "to allow for future access to these children when deemed appropriate by the children's counselor." Contrary to the mother's contention, we conclude that the determination of Family Court to suspend visitation with all three children has a sound and substantial basis in the record (*see Matter of Hameed v Alatawaneh*, 19 AD3d 1135, 1135-1136; *Murek v Murek* [appeal No. 2], 292 AD2d 839, 840). In determining that visitation with the mother would be detrimental to the youngest child, the court properly considered the deleterious effects of such visitation on the two older children (*see Matter of Thomas v Thomas*, 35 AD3d 868, 869; *Matter of Herrera v O'Neill*, 20 AD3d 422, 423).

The court erred, however, in directing the mother to engage in mental health counseling as a condition of visitation and in delegating its authority to the children's counselor to determine when a resumption of visitation would be appropriate (*see Hameed*, 19 AD3d

at 1136). We therefore modify the order accordingly.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

371

CA 12-02126

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND CARNI, JJ.

IN THE MATTER OF BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION, INC., IAFF LOCAL 282, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO FISCAL STABILITY AUTHORITY, CITY OF BUFFALO AND BYRON BROWN, MAYOR, CITY OF BUFFALO, RESPONDENTS-RESPONDENTS.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF COUNSEL), FOR PETITIONER-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR RESPONDENT-RESPONDENT BUFFALO FISCAL STABILITY AUTHORITY.

GOLDBERG SEGALLA LLP, BUFFALO (MATTHEW C. VAN VESSEM OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CITY OF BUFFALO AND BYRON BROWN, MAYOR, CITY OF BUFFALO.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John A. Michalek, J.), entered January 30, 2012 in a proceeding pursuant to CPLR article 78. The judgment granted respondents' motions to dismiss the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 challenging the authority of respondent Buffalo Fiscal Stability Authority (BFSA) to prohibit respondents City of Buffalo (City) and Byron Brown, Mayor, City of Buffalo, from complying with an arbitration award (Rinaldo II award) that established a wage increase for the collective bargaining agreement in effect from July 1, 2002 to June 30, 2004 (*Matter of Buffalo Professional Firefighters Assn., Inc., IAFF Local 282 [Masiello]*, ___ AD3d ___ [Apr. 26, 2013]). It is undisputed that, in 2004, the BFSA issued a resolution to freeze the wages of City employees and that by Resolution 11-05, the BFSA determined that the wage freeze applied to the wages awarded in Rinaldo II. A prior arbitration award governing the same CBA (Rinaldo I award) was vacated in its entirety by the Court of Appeals (*Matter of Buffalo Professional Firefighters Assn., Inc., Local 282, IAFF, AFL-CIO-CLC [Masiello]*, 13 NY3d 803). Petitioner previously had commenced a CPLR article 78 proceeding to challenge the authority of

the BFSA to determine that the wage freeze applied to the Rinaldo I award, but that proceeding was dismissed as time-barred (*Matter of Foley v Masiello*, 38 AD3d 1201, 1202).

We agree with petitioner that the instant proceeding is not barred by the statute of limitations (*cf. Gress v Brown*, 20 NY3d 957, 959-960). Contrary to petitioner's contention, however, Supreme Court properly determined that the instant proceeding is barred by res judicata. It is well established that a dismissal of a proceeding as time-barred " 'is equivalent to a determination on the merits for *res judicata* purposes' " (*Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 n 3). Although petitioner in the instant proceeding is challenging a resolution of the BFSA that applied to Rinaldo II rather than Rinaldo I, which was at issue in *Foley*, both proceedings are between the same parties in interest and concern the same cause of action, i.e., the application of the wage freeze to wage rates for the same CBA, and the instant action therefore is barred by res judicata based on " 'claim preclusion' " (*Landau, P.C.*, 11 NY3d at 12-13; *see generally O'Brien v City of Syracuse*, 54 NY2d 353, 357).

We reject petitioner's contention that the court should have dismissed this proceeding as moot based upon its order in the proceeding pursuant to CPLR article 75 vacating the Rinaldo II award inasmuch as a reversal of that order on appeal would result in the reinstatement of the award (*see Matter of Utica Mut. Ins. Co. [Selective Ins. Co. of Am.]*, 27 AD3d 990, 991-992).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

374

CA 12-00260

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

GILBERTO AGUDO MARTINEZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

APRIL M. REMBERT, DEFENDANT-RESPONDENT.

GILBERTO AGUDO MARTINEZ, PLAINTIFF-APPELLANT PRO SE.

HISCOCK & BARCLAY, LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (John Lewis DeMarco, J.), entered December 22, 2011. The order affirmed a judgment of the Rochester City Court.

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

Memorandum: Plaintiff appeals from an order affirming City Court's judgment in favor of defendant in this small claims action. The record establishes that plaintiff and defendant gave different versions of the automobile accident, raising a credibility issue for the factfinder to resolve (*see generally Williams v Roper*, 269 AD2d 125, 126-127, *lv dismissed* 95 NY2d 898; *Moses v Randolph*, 236 AD2d 706, 707). We affirm the order, inasmuch as we agree with County Court that "substantial justice has . . . been done between the parties according to the rules and principles of substantive law" (UCCA 1807; *see Mead Home Improvement, Inc. v Goldstein*, 56 AD3d 1179, 1179). Contrary to plaintiff's further contention, there is no indication that City Court was biased against him (*see Makas v Every*, 224 AD2d 793, 794, *appeal dismissed* 88 NY2d 867).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

375

CA 11-02586

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

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

V MEMORANDUM AND ORDER

DONALD BRUSSO, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (LISA L. PAINE OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered November 2, 2011 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. Contrary to respondent's contention, we conclude that petitioner established by clear and convincing evidence at the dispositional hearing that he is a dangerous sex offender requiring confinement (*see* §§ 10.03 [e]; 10.07 [f]). Supreme Court, as the trier of fact, was in the best position to evaluate the credibility of the testimony presented and the weight to be accorded such testimony, and we discern no basis to disturb the court's determination (*see generally Matter of State of New York v Blair*, 87 AD3d 1327, 1327; *Matter of State of New York v Boutelle*, 85 AD3d 1607, 1607). We further reject respondent's contention that he was denied due process because the court did not set forth detailed findings of fact in support of its decision. There is no such requirement in Mental Hygiene Law article 10 and, in any event, we conclude that the court's bench decision adequately sets forth the basis for the court's decision.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

376

CA 12-01927

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

WILLIE J. YOUNG, PLAINTIFF-RESPONDENT,

V ORDER

RONALD K. BAUERLEIN, DEFENDANT-APPELLANT.

HAGELIN KENT LLC, BUFFALO (SEAN M. SPENCER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF MARK LEWIS, PLLC, CHEEKTOWAGA (MARK E. LEWIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered February 29, 2012. The order denied the motion of defendant for summary judgment dismissing the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on March 11 and 13, 2013, and filed in the Monroe County Clerk's Office on April 2, 2013,

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

377

CA 12-02127

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND CARNI, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION, INC., IAFF LOCAL 282, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

ANTHONY MASIELLO, MAYOR, CITY OF BUFFALO AND CITY OF BUFFALO, RESPONDENTS-RESPONDENTS.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN JOHNSEN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered January 30, 2012 in a proceeding pursuant to CPLR article 75. The order, among other things, vacated an arbitration award.

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 arbitration award is confirmed.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking to confirm a compulsory public interest arbitration award (hereafter, Rinaldo II award) pursuant to Civil Service Law § 209 (4) (c) (Taylor Law). Pursuant to Rinaldo II, petitioner's members were awarded, inter alia, a wage increase for the collective bargaining agreement (CBA) in effect from July 1, 2002 through June 30, 2004. The Court of Appeals previously had vacated in its entirety a prior compulsory public interest arbitration award with respect to that CBA (*Matter of Buffalo Professional Firefighters Assn., Inc., Local 282, IAFF, AFL-CIO-CLC [Masiello]*, 13 NY3d 803). It is undisputed that the Buffalo Fiscal Stability Authority (BFSA) determined that the wage increase awarded in Rinaldo II was governed by the wage freeze implemented in 2004 and that respondents therefore did not comply with the Rinaldo II award. We agree with petitioner that Supreme Court erred in granting respondents' cross motion seeking to vacate the award and instead should have granted petitioner's motion to confirm the award.

Respondents failed to meet their "heavy burden of demonstrating that the arbitrator[s'] award is . . . totally irrational or clearly

exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of Buffalo Professional Firefighters Assn. Local 282 [City of Buffalo]*, 12 AD3d 1087, 1088 [internal quotation marks omitted]). Where, as here, the role of the arbitration panel is to "write collective bargaining agreements for the parties . . . , [i]t follows that such awards, on judicial review, are to be measured according to whether they are rational or arbitrary and capricious" (*Matter of City of Buffalo v Rinaldo*, 41 NY2d 764, 766 [internal quotation marks omitted]). "[I]t need only appear from the decision of the arbitrators that the criteria specified in the statute[, i.e., the Taylor Law,] were 'considered' in good faith and that the resulting award has a 'plausible basis' " (*Caso v Coffey*, 41 NY2d 153, 158). We conclude that the decision of the arbitrators meets that standard here.

We further conclude that the award adequately addresses the basis for the wage increase in light of the proposal of respondent City of Buffalo (City) with respect to health insurance (*cf. Masiello*, 13 NY3d at 804). The reference of the arbitration panel to a separate arbitration award affecting petitioner and the City on the issue of health insurance was no more than an acknowledgment of a matter known to the parties, and did not prejudice the rights of either party (*see Matter of Watt v Roberts*, 79 AD3d 525, 526, *lv denied* 16 NY3d 709).

We acknowledge that, under the unique circumstances presented here, the City is prohibited from complying with the Rinaldo II award because the BFSA directed that the wage freeze applied to the award. "[W]hether or not authorized to do so, the BFSA froze [the] wages [at issue] and once this happened, the City and Mayor were bound by its action" (*Gress v Brown*, 20 NY3d 957, 960). We note that in a related appeal, we have affirmed the judgment dismissing the CPLR article 78 proceeding wherein petitioner challenged the authority of the BFSA to prohibit the respondents in that proceeding from complying with the Rinaldo II award, based on our determination that the CPLR article 78 proceeding was barred by res judicata (*Matter of Buffalo Professional Firefighters Assn., Inc., IAFF Local 282 v Buffalo Fiscal Stability Auth.*, ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

387

TP 12-02089

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

IN THE MATTER OF KEITH BRYANT, PETITIONER,

V ORDER

D. VENETTAZZI, ACTING DIRECTOR, SPECIAL HOUSING,
RESPONDENT.

KEITH BRYANT, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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 October 15, 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 petition is dismissed.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

388

KA 12-00599

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS A. TROMBLEY, JR., DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), 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. Farkas, J.), rendered February 1, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree and forgery 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 his plea of guilty of one count of burglary in the second degree (Penal Law § 140.25 [2]) and two counts of forgery in the second degree (§ 170.10 [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: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

394

KA 09-02468

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH J. DEFAZIO, JR., 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 Monroe County Court (Stephen T. Miller, A.J.), rendered April 28, 2009. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for further proceedings.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), defendant initially contends that his waiver of the right to appeal was not knowingly, voluntarily and intelligently entered due to his mental limitations. We reject that contention. "Although the record indicates that defendant had [learning disabilities], [t]here was not the slightest indication that defendant was uninformed, confused or incompetent when he" waived his right to appeal (*People v Nudd*, 53 AD3d 1115, 1115, *lv denied* 11 NY3d 834 [internal quotation marks omitted]). Furthermore, the record establishes that defendant "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256), and that he voluntarily waived the right to appeal (*see People v Tantao*, 41 AD3d 1274, 1275, *lv denied* 9 NY3d 882). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Defendant further contends that, in setting the duration of the orders of protection, County Court erred in failing to take into

account the jail time credit to which he is entitled. Although that contention is not foreclosed by the valid waiver of the right to appeal (*see People v Victor*, 20 AD3d 927, 928, *lv denied* 5 NY3d 833, 885), defendant failed to preserve it for our review (*see People v Nieves*, 2 NY3d 310, 315-317). We nevertheless exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we agree with defendant that the court failed to consider the jail time credit to which he is entitled (*see People v Goins*, 45 AD3d 1371, 1372). Consequently, the court erred in its determination of the maximum expiration date of the order of protection inasmuch as the duration of that order exceeds eight years from the date of expiration of the maximum term of the determinate sentence of imprisonment that was imposed (*see* CPL 530.12 [5]). We therefore modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify in the order of protection an expiration date in accordance with CPL 530.12 (5).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

395

KA 10-01178

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL P., DEFENDANT-APPELLANT.

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

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

Appeal from an adjudication of the Onondaga County Court (William D. Walsh, J.), rendered November 2, 2009. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant was adjudicated a youthful offender based upon his plea of guilty of aggravated criminal contempt (Penal Law § 215.52) and was sentenced to five years of probation. Defendant appeals from an adjudication revoking the sentence of probation and sentencing him to an indeterminate term of 1 to 3 years of incarceration. Contrary to the People's contention, we conclude that this appeal is not moot (*cf. People v Mackey*, 79 AD3d 1680, 1681, *lv denied* 16 NY3d 860).

Contrary to defendant's contention, County Court did not abuse its discretion in denying his request for an adjournment (*see People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956). Contrary to defendant's further contention, the determination of the court that he violated the terms of his probation is not against the weight of the evidence (*see People v Garries*, 299 AD2d 858, 858, *lv denied* 99 NY2d 558; *see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

396

KA 10-00230

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KENNETH J. GARTLER, DEFENDANT-APPELLANT.

SCOTT F. RIORDAN, KENMORE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 26, 2010. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony, and driving while ability impaired.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

399

CA 12-02094

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

NEW YORK MUNICIPAL INSURANCE RECIPROCAL, AS SUBROGOR OF COUNTY OF OSWEGO,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CASELLA CONSTRUCTION, INC., DEFENDANT-RESPONDENT.

CONGDON FLAHERTY O'CALLAGHAN REID DONLON TRAVIS & FISHLINGER, UNIONDALE (GREGORY A. CASCINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MELISSA L. VINCTON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered April 9, 2012. The order granted defendant's motion for summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint is reinstated.

Memorandum: Plaintiff, as subrogor of the County of Oswego, commenced this action seeking to recover damages for losses sustained when property at a landfill operated by the County of Oswego was damaged in a fire. In its complaint, plaintiff alleged, inter alia, that the fire occurred as a result of the negligence of defendant's employees, who were completing a construction project at the landfill on the date of the fire. Plaintiff appeals from an order granting defendant's motion for summary judgment dismissing the complaint. We conclude that defendant failed to meet its initial burden on the motion, and we therefore reverse the order and reinstate the complaint.

We reject the contention of defendant that it met its initial burden on the motion by establishing as a matter of law that plaintiff was unable to identify the cause of the fire without engaging in speculation. In order to establish proximate cause, "[p]laintiffs need not positively exclude every other possible cause of the accident. Rather, the proof must render those other causes sufficiently remote or technical to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence . . . A plaintiff need only prove that it

was more likely . . . or more reasonable . . . that the alleged injury was caused by the defendant's negligence than by some other agency" (*Gayle v City of New York*, 92 NY2d 936, 937 [internal quotation marks omitted]; *see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744). Furthermore, it is well settled that, in seeking summary judgment dismissing a complaint, a defendant "must affirmatively establish the merits of its . . . 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 Brown v Smith*, 85 AD3d 1648, 1649; *Atkins v United Ref. Holdings, Inc*., 71 AD3d 1459, 1459-1460). Here, defendant failed to meet its initial burden in support of its motion inasmuch as it failed to establish as a matter of law that its employees did not start the fire.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

400

CA 12-01351

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

PALLADIAN HEALTH, LLC AND PRISM HOLDINGS, INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SUMMER STREET CAPITAL II, L.P., SUMMER STREET CAPITAL NYS FUND II, L.P., SSC II PRISM HOLDINGS, INC. AND SSC NYS II PRISM HOLDINGS, INC., DEFENDANTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, BUFFALO (JAMES P. DOMAGALSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DADD, NELSON & WILKINSON, ATTICA (JAMES M. WUJCIK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered July 2, 2012. The order granted the motion of plaintiffs for leave to renew their motion to stay arbitration, and upon renewal, stayed the subject arbitration.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion upon renewal and vacating the stay of arbitration, and as modified the order is affirmed without costs.

Memorandum: Contrary to defendants' contention, we conclude that Supreme Court did not abuse its discretion in granting plaintiffs' motion for leave to renew their motion for a stay of arbitration (*see generally Smith v Cassidy*, 93 AD3d 1306, 1307). We agree with defendants, however, that upon renewal the court erred in granting plaintiffs' motion for a stay of arbitration, and we therefore modify the order accordingly. Plaintiffs sought a stay of arbitration pursuant to CPLR 2201, 3103 and 6301. Inasmuch as a "court's participation in the [arbitration] process is limited to the provisions contained in CPLR article 75" (*Susquehanna Val. Cent. Sch. Dist. at Conklin v Susquehanna Val. Teachers' Assn.*, 101 AD2d 933, 933, *appeal dismissed* 63 NY2d 610; *see also Matter of Horowitz v Pitterman*, 178 AD2d 939, 939), plaintiffs' reliance on CPLR 2201, 3103 and 6301 in support of their motion is misplaced. Rather, an application to stay arbitration is governed by CPLR 7503 (b), which precludes a party that has participated in arbitration from thereafter applying to stay arbitration. Here, plaintiffs participated in the arbitration at issue (*see N.J.R. Assoc. v Tausend*, 19 NY3d 597, 602;

see generally Greenwald v Greenwald, 304 AD2d 790, 790-791), and we thus conclude that the court erred in staying that arbitration. In view of our determination, we do not address defendants' remaining contentions.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

405

CA 12-01945

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

CARL FELDMAN AND DONNA FELDMAN,
PLAINTIFFS-RESPONDENTS,

V ORDER

LAMPARELLI CONSTRUCTION COMPANY, INC. AND
ST. VINCENT DEPAUL, DEFENDANTS-APPELLANTS.

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

COLLINS & COLLINS, LLC, BUFFALO (CHARLES H. COBB OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered June 5, 2012. The order, insofar as appealed from, denied in part the cross motion of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 1, 2013,

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

411

KA 10-00504

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAY SWINDON, DEFENDANT-APPELLANT.

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

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 October 14, 2009. The judgment convicted defendant, upon his plea of guilty, of unlawful surveillance in the second degree, endangering the welfare of a child and criminal possession of a weapon in the third degree.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

412

KA 11-02441

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE COLVIN, 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 (Matthew J. Murphy, III, J.), rendered June 30, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree and robbery 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 robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]) and robbery in the third degree (§ 160.05). 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: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

417

KA 06-02294

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIA A. RICE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Patricia D. Marks, J.), rendered June 28, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree (two counts) and attempted petit larceny.

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

Memorandum: On appeal from a judgment that convicted her following a jury trial of two counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and one count of attempted petit larceny (§§ 110.00, 155.25), defendant contends that the conviction of the two counts of criminal possession of a forged instrument is not supported by legally sufficient evidence. At the close of the People's case, defense counsel moved for a trial order of dismissal on the ground that the People had failed to establish that defendant knew that the traveler's checks she had attempted to cash were counterfeit. That motion was denied, and defendant then testified on her own behalf. Defendant concedes that defense counsel did not renew the motion at the close of defendant's proof, and her contention that the issue nevertheless is preserved for our review is without merit (*see People v Lane*, 7 NY3d 888, 889; *cf. People v Payne*, 3 NY3d 266, 273, *rearg denied* 3 NY3d 767).

Because defendant also challenges the weight of the evidence supporting the verdict on those two counts, we nevertheless address the evidence adduced concerning the element of knowledge (*see generally People v Stepney*, 93 AD3d 1297, 1298, *lv denied* 19 NY3d 968). Contrary to defendant's contention, the People presented sufficient evidence establishing that defendant knew the traveler's checks were counterfeit and, viewing the evidence in light of the elements of the crime of criminal possession of a forged instrument as

charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). As part of their direct case, the People introduced in evidence defendant's testimony before the grand jury. Moreover, defendant testified at trial and, inasmuch as she "elected to give h[er] version of the [events] and thereby put h[er] credibility in issue, we may unquestionably consider the plausibility of h[er] [testimony] in deciding whether the [jury] was justified in rejecting [it]" (*People v Potenza*, 92 AD2d 21, 29). We conclude that defendant's testimony was "patently incredible" (*People v Quinones*, 302 AD2d 210, 210, *lv denied* 100 NY2d 541). Indeed, "[t]he chain of circumstances surrounding defendant's receipt of [the] fraudulent [traveler's checks] from [a stranger in Nigeria], . . . and defendant's use of the [checks] supported the inference that defendant knew [they were] forged . . . Furthermore, defendant's [grand jury and] trial testimony explaining [her] acquisition of the [checks] was incredible, and this testimony contained material admissions that further supported the inference of knowledge" (*People v Credel*, 99 AD3d 541, 541, *lv denied* 20 NY3d 1060; *see People v Price*, 16 AD3d 323, 323, *lv denied* 5 NY3d 767).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

418

KA 12-00723

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JODY B. GILLETT, DEFENDANT-APPELLANT.

KELIANN M. ELNISKI, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 21, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Defendant's contention that County Court erred in failing to conduct a hearing on his challenge to the voluntariness of his statements to the police does not survive his guilty plea. "A guilty plea generally results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings" (*People v Fernandez*, 67 NY2d 686, 688), and the exception set forth in CPL 710.70 (2) does not apply here because defendant pleaded guilty before the court issued a decision on his suppression motion (*see generally People v Elmer*, 19 NY3d 501, 507-508). Defendant's challenge to the legal sufficiency of the evidence before the grand jury with respect to the third count of the indictment likewise does not survive the guilty plea (*see People v Smith*, 28 AD3d 1202, 1202, *lv denied* 7 NY3d 818; *see generally People v Iannone*, 45 NY2d 589, 600-601). Finally, defendant's contention that he was denied effective assistance of counsel "does not survive his guilty plea . . . because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance" (*People v Dean*, 48 AD3d 1244, 1245, *lv denied* 10 NY3d 839 [internal quotation marks omitted]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

427

CA 12-02018

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

FLAHERTY FUNDING CORPORATION AND DIANNE C. FLAHERTY, LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JENNIFER K. JOHNSON, ET AL., DEFENDANTS, AND MGIC INVESTOR SERVICES CORPORATION, DEFENDANT-APPELLANT.

FOLEY & LARDNER LLP, MILWAUKEE, WISCONSIN (MAX B. CHESTER, OF THE WISCONSIN BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (CHRISTOPHER D. THOMAS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 9, 2012. The order denied the motion of defendant MGIC Investor Services Corporation to dismiss.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint against defendant MGIC Investor Services Corporation is dismissed.

Memorandum: Plaintiffs commenced this action seeking, inter alia, money damages after defendant MGIC Investor Services Corporation (MISC) allegedly made negligent misrepresentations while performing underwriting services with respect to two mortgage loans on which the borrowers subsequently defaulted and the subject properties were sold at a loss. MISC contends that Supreme Court erred in denying its motion to dismiss the complaint against it pursuant to CPLR 3211 (a) (7) for failure to state a cause of action. We agree.

A cause of action for negligent misrepresentation must allege " '(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information' " (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180, quoting *J.A.O. Acquisitions Corp. v Stavitsky*, 8 NY3d 144, 148, *rearg denied* 8 NY3d 939). In this case, we agree with MISC that plaintiffs failed to allege the requisite special relationship between it and plaintiff Flaherty Funding Corporation (Flaherty) to state a cause of action for negligent misrepresentation.

Plaintiffs alleged that MISC was "Flaherty's underwriter" with respect to the first loan and was "the underwriter" on the second loan. Moreover, in the evidentiary material submitted by plaintiffs in support of their complaint, Wells Fargo Bank, N.A. is listed as MISC's "client," not Flaherty. "Generally, a special relationship does not arise out of an ordinary arm's length business transaction between two parties" (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296; *see Wright v Selle*, 27 AD3d 1065, 1067) and, here, we conclude that plaintiffs alleged, at most, that Flaherty and MISC had an ordinary business relationship (*see MBIA Ins. Corp.*, 87 AD3d at 296; *Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 86 AD3d 919, 920). The court therefore erred in denying MISC's motion to dismiss the complaint against it (*see generally Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Grossman v Pharmhouse Corp.*, 234 AD2d 918, 919).

In light of our conclusion, we need not address MISC's remaining contentions.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

435

TP 12-02002

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF JAMES M. WEST, PETITIONER,

V ORDER

MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

JAMES M. WEST, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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, Seneca County [Dennis F. Bender, A.J.], entered October 22, 2012) to review a determination of respondent. The determination found after a Tier II 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: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

437

KA 11-02601

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JUAN ROMAN, ALSO KNOWN AS JUANITO, ALSO KNOWN AS JUAN A. ROMAN, ALSO KNOWN AS JUAN A. ROMAN, JR., DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 9, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

447

CA 12-01276

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

CARROWAY LUXURY HOMES, LLC, PLAINTIFF-RESPONDENT,

V ORDER

RICHARD EDWARDS, DOING BUSINESS AS EDWARDS FRAMING & CONTRACTING, DEFENDANT-APPELLANT, ET AL., DEFENDANT.

COSTELLO, COONEY & FEARON PLLC, SYRACUSE (CHRISTOPHER G. TODD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, J.), entered October 14, 2011. The order, insofar as appealed from, granted the motion of plaintiff for summary judgment against defendant Richard Edwards, doing business as Edwards Framing & Contracting.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 4 and 9, 2013,

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

452

CA 12-01887

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

JAMES HENNING AND CHRISTINE HENNING,
PLAINTIFFS-APPELLANTS,

V ORDER

WILLIAM H. KING, JR., ESQ.,
DEFENDANT-RESPONDENT.

FORSYTH, HOWE, O'DWYER, KALB & MURPHY, P.C., ROCHESTER (SANFORD R. SHAPIRO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (ROBERT M. SHADDOCK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered August 30, 2012. The order, among other things, granted the motion of defendant seeking to vacate a judgment entered on June 29, 2012.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

458

CA 12-02102

PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ.

JOSHUA PASSALACQUA, AS ADMINISTRATOR OF THE ESTATE OF BRITTANY PASSALACQUA, DECEASED, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 120604.)

KENNY & KENNY, PLLC, SYRACUSE (JUSTIN D. HOWLAND OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Philip J. Patti, J.), entered March 21, 2012. The order granted the motion of defendant to dismiss the claim.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

459

KA 12-00214

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICOLE HARTMAN-MCMURRAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Wyoming County Court (Michael F. Griffith, J.), rendered October 4, 2011. The judgment convicted defendant, upon her plea of guilty, of aggravated driving while intoxicated.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of felony aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2], [2-a] [b]; 1193 [1] [c] [i] [B]). 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: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

460

KA 12-00133

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DENNIS D. HOLCOMB, ALSO KNOWN AS DENNIS DALE HOLCOMB, ALSO KNOWN AS DENNIS HOLCOMB, DEFENDANT-APPELLANT.

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

DENNIS D. HOLCOMB, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 27, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

465

KA 10-00815

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY RUMSEY, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (AMANDA M. CHAFEE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered March 3, 2010. The judgment convicted defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree and driving while intoxicated.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [iii]) and driving while intoxicated (§ 1192 [3]). Contrary to the contention of defendant, we conclude that his responses during the plea colloquy and his execution of a written waiver of the right to appeal establish that he intelligently, knowingly, and voluntarily waived his right to appeal (*see People v Kulyeshie*, 71 AD3d 1478, 1478-1479, *lv denied* 14 NY3d 889; *People v Griner*, 50 AD3d 1557, 1558, *lv denied* 11 NY3d 737; *see generally People v Lopez*, 6 NY3d 248, 256). Defendant's contention that he was denied effective assistance of counsel does not survive his plea or his valid waiver of the right to appeal because he "failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance' " (*People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912; *see People v Rizek* [appeal No. 1], 64 AD3d 1180, 1180, *lv denied* 13 NY3d 862).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

467

CAF 11-01882

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

IN THE MATTER OF CALEB G., ERIKA G.,
KRISTEN L. AND CARMEN T.
---------- ORDER
STEUBEN COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT;

DONIELE (G.)T., RESPONDENT-APPELLANT,
AND LARRY T., RESPONDENT.
(APPEAL NO. 1.)

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

ALAN P. REED, COUNTY ATTORNEY, BATH (RUTH A. CHAFFEE OF COUNSEL), FOR PETITIONER-RESPONDENT.

CAROLYN KELLOGG JONAS, ATTORNEY FOR THE CHILDREN, WELLSVILLE, FOR CALEB G., ERIKA G., KRISTEN L. AND CARMEN T.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered August 24, 2011 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that Caleb G., Erika G. and Kristen L. were neglected by respondents.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

468

CAF 11-02150

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

IN THE MATTER OF DONIELE J.T.,
PETITIONER-APPELLANT,

V ORDER

CLAIR H.G., RESPONDENT-RESPONDENT.

IN THE MATTER OF CLAIR H.G.,
PETITIONER-RESPONDENT,

V

DONIELE J.T., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

CAROLYN KELLOGG JONAS, ATTORNEY FOR THE CHILDREN, WELLSVILLE, FOR CALEB G. AND ERIKA J.G.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered September 28, 2011 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded primary physical placement of the subject children to Clair H.G.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

470

CA 12-01998

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

BENDERSON PROPERTIES, INC., PLAINTIFF-APPELLANT,

V ORDER

WYNIT, INC., DEFENDANT-RESPONDENT.

HAROLD M. HALPERN, WHEATFIELD, FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLC, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered July 5, 2012. The order denied plaintiff's motion for a protective order.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 21, 2013, and filed in the Erie County Clerk's Office on February 12, 2013,

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

471

CAF 12-01042

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

IN THE MATTER OF BRENDA BENJAMIN,
PETITIONER-APPELLANT,

V ORDER

LEONARD F. EDDY, SR., RESPONDENT-RESPONDENT.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (SCOTT A. OTIS OF COUNSEL), FOR PETITIONER-APPELLANT.

JANE G. LAROCK, WATERTOWN, FOR RESPONDENT-RESPONDENT.

WILLIAM J. RILEY, ATTORNEY FOR THE CHILD, BOONVILLE, FOR BRANDON E.

Appeal from an order of the Family Court, Lewis County (Charles C. Merrell, J.), entered May 15, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

475

CA 12-01558

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

VITRAN EXPRESS, INC., DOING BUSINESS AS
PJAX FREIGHT SYSTEM, PLAINTIFF-APPELLANT,

V ORDER

F&W TRANSPORT SERVICES, INC.,
DEFENDANT-RESPONDENT.

KLAPPER & FASS, WHITE PLAINS (DANIEL A. FASS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF MONTE J. ROSENSTEIN, P.C., MIDDLETOWN (MONTE J. ROSENSTEIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered July 15, 2011. The order granted the motion of defendant to vacate a default judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 26, 2013,

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

480

CA 11-01784

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

ELBERT WELCH, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 113903.)

ELBERT WELCH, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Philip J. Patti, J.), entered July 7, 2011. The order, insofar as appealed from, denied the motion of claimant for summary judgment.

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

Memorandum: Claimant, an inmate at a correctional facility, commenced this medical malpractice action alleging that various employees of defendant and the Niagara County jail failed to diagnose and treat him for hepatitis C. We conclude that the Court of Claims properly denied claimant's motion for summary judgment inasmuch as he failed to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Specifically, claimant failed to submit the affidavit of a medical expert stating that, with a reasonable degree of medical certainty, the expert believed that defendant's failure to diagnose and treat claimant in a proper manner was a " 'deviation[] from the accepted standard of medical practice and [was a] substantial factor[] in causing the late diagnosis and progression' " of claimant's hepatitis C (*Rivera v State of New York*, 19 AD3d 1030, 1031). Contrary to claimant's contention, the medical issues are not within the ordinary experience and knowledge of lay persons, and thus the opinion of a medical expert is required to establish that defendant's alleged negligence or deviation from an accepted standard of care caused or contributed to claimant's injuries (*see Wood v State of New York*, 45 AD3d 1198). Finally, claimant's contention that the court erred in denying his motion to strike the affidavit of defendant's medical expert is not properly before us on this appeal by claimant from the order entered July 7, 2011, which denied claimant's motion for summary judgment (*see State Farm Mut. Auto. Ins. Cos. v Jaenecke*,

81 AD3d 1474, 1475, *lv denied* 17 NY3d 701).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

481

CA 12-02029

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

DIANE P. LASKEY, PLAINTIFF-RESPONDENT,

V ORDER

DOUGLAS P. LASKEY, DEFENDANT-APPELLANT.

MUSCATO, DIMILLO & VONA, L.L.P., LOCKPORT (A. ANGELO DIMILLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRANDT, ROBERSON & BRANDT, P.C., LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 12, 2012. The order, among other things, granted the motion of plaintiff for equitable distribution of defendant's pension.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Burns v Burns*, 84 NY2d 369, 376-377).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

484

KA 12-00132

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH WASHINGTON, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RENÉ JUAREZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered April 13, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted 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 his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). Defendant's challenge to the sufficiency of the CPL 400.21 notice is not preserved for our review (*see People v Pellegrino*, 60 NY2d 636, 637; *People v Butler*, 96 AD3d 1367, 1368, *lv denied* 20 NY3d 931). In any event, "defendant waived strict compliance with that statute by admitting the prior felony conviction in open court" (*Butler*, 96 AD3d at 1368; *see People v Guillory*, 98 AD3d 835, 836, *lv denied* 20 NY3d 932; *People v Perez*, 85 AD3d 1538, 1541). Defendant further contends that the People failed to submit sufficient documentation establishing the period of defendant's prior incarceration for purposes of the tolling provision of Penal Law § 70.06 (1) (b) (v). That contention is also unpreserved for our review (*cf. Butler*, 96 AD3d at 1368; *see generally People v Samms*, 95 NY2d 52, 57), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

485

KA 11-00308

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE M. JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (John J. Connell, J.), rendered June 27, 2008. The judgment convicted defendant, upon a nonjury verdict, of robbery in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a nonjury verdict of robbery in the first degree (Penal Law § 160.15 [3]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (§ 160.15 [3]) and robbery in the third degree (§ 160.05). Viewing the evidence in light of the elements of the crime in the nonjury trial in appeal No. 1 (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The victim and another witness testified that defendant brandished a long kitchen knife while fleeing from the robbery. Although defendant testified that he neither brandished a knife nor had one on his person during or in immediate flight from the robbery, it is well settled that "[g]reat deference is to be accorded to the [factfinder's] resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony" (*People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956 [internal quotation marks omitted]). We see no basis to disturb County Court's credibility determinations (*see People v Maxwell*, 103 AD3d 1239, 1240).

Defendant contends that, if this Court reverses the judgment of conviction in appeal No. 1, then we should likewise reverse the judgment of conviction in appeal No. 2. We affirm the judgment in

appeal No. 2, however, in view of our determination in appeal No. 1 (*cf. People v Baker*, 20 NY3d 354, 364).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

487

KA 12-00856

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERT J. DONOVAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 15, 2012. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

489

KA 10-01012

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AUGUSTUS R. EAGLE, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Stephen T. Miller, A.J.), rendered May 15, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]), defendant contends that his plea was not knowingly, intelligently and voluntarily entered because his statement concerning defense counsel during the plea colloquy created doubt as to the voluntariness of his plea. Defendant's contention survives his valid waiver of the right to appeal, but he failed to preserve that contention for our review by failing to move to withdraw the plea or to vacate the judgment of conviction (*see People v Ruffins*, 78 AD3d 1627, 1628; *People v Davis*, 45 AD3d 1357, 1357-1358, *lv denied* 9 NY3d 1005). In any event, defendant's contention lacks merit. Although defendant responded "[n]o" during the plea colloquy when the prosecutor asked if he was satisfied with his attorney's representation of him, he did not request new counsel, nor did he raise any " 'serious complaints' " about his attorney (*People v Porto*, 16 NY3d 93, 100). Indeed, in a plea agreement document signed on the day of the plea, before the prosecutor conducted the plea colloquy, defendant indicated that he was satisfied with the representation provided by his attorney. Under those circumstances, County Court was not required to make any inquiry with respect to defendant's response to the prosecutor's question during the plea colloquy (*see id.* at 99-100; *see generally People v Sides*, 75 NY2d 822, 824-825). Defendant's contention regarding the factual sufficiency of the plea allocution is encompassed by the valid waiver

of the right to appeal and it is unpreserved for our review (*see People v Rios*, 93 AD3d 1349, 1349, *lv denied* 19 NY3d 966; *People v Williams*, 91 AD3d 1299, 1299).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

490

KA 09-00205

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE M. JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (John J. Connell, J.), rendered June 27, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and robbery in the third degree.

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

Same Memorandum as in *People v Johnson* ([appeal No. 1] ___ AD3d ___ [Apr. 26, 2013]).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

493

CAF 12-00777

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

IN THE MATTER OF LESTARIYAH A.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, ORDER
PETITIONER-RESPONDENT;

DEMETRIUS L., RESPONDENT-APPELLANT.

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

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (John B. Gallagher, Jr., J.), entered April 17, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order denied respondent's request for posttermination contact with the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Elsa R. [Gloria R.]*, 101 AD3d 1688, 1688-1689).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

494

CAF 12-00597

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

IN THE MATTER OF CATHERINE RICE,
PETITIONER-RESPONDENT,

V ORDER

MICHAEL E. MILLS, RESPONDENT-APPELLANT.

DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR PETITIONER-RESPONDENT.

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA, FOR AUSTIN M.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered February 21, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner unsupervised visitation with the subject child.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

499

CA 12-01124

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

TRG ADVISORS, INC., FORMERLY KNOWN AS P&A FINANCIAL SECURITIES, INC., TOUCHSTONE RETIREMENT GROUP, LLC, TOUCHSTONE-TRPC, LLC, R.J. WATSON, INC. AND CANDYCE WATSON, AS TRUSTEE OF R.J. WATSON, INC. 401 (K) PLAN, PLAINTIFFS-APPELLANTS,

V ORDER

P&A RETIREMENT PLAN SERVICES, INC., P&A ADMINISTRATIVE SERVICES, INC., MICHAEL A. RIZZO AND JOSEPH PRISELAC, JR., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (LAWRENCE J. MATTAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 9, 2012. The order, insofar as appealed from, denied in part the motion of plaintiffs for a preliminary injunction.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 23, 2013, and filed in the Erie County Clerk's Office on January 29, 2013,

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

500

CA 12-01472

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

TRG ADVISORS, INC., FORMERLY KNOWN AS P&A FINANCIAL SECURITIES, INC., PLAINTIFF-APPELLANT-RESPONDENT, ET AL., PLAINTIFFS,

V ORDER

P&A RETIREMENT PLAN SERVICES, INC., P&A ADMINISTRATIVE SERVICES, INC., MICHAEL A. RIZZO AND JOSEPH PRISELAC, JR., DEFENDANTS-RESPONDENTS-APPELLANTS. (APPEAL NO. 2.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (LAWRENCE J. MATTAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered July 18, 2012. The order and judgment granted in part and denied in part the motion of plaintiff TRG Advisors, Inc., formerly known as P&A Financial Securities, Inc., for partial summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 23, 2013, and filed in the Erie County Clerk's Office on January 29, 2013,

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

503.1

TP 12-01704

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

IN THE MATTER OF JOSHUA LINER, PETITIONER,

V ORDER

SUPERINTENDENT JAMES AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

JOSHUA LINER, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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, Livingston County [Dennis S. Cohen, A.J.], entered September 11, 2012) to review determinations of respondents. The determinations found after a Tier II hearing and Tier III hearing that petitioner had violated various inmate rules.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

522

KA 11-01651

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREL J. MUNN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES 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 (Penny M. Wolfgang, J.), rendered June 21, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, we conclude that Supreme Court fulfilled its duty of advising defendant that the promised sentence included a mandatory period of postrelease supervision (*see generally People v Catu*, 4 NY3d 242, 244-245), and we therefore reject defendant's further contention that his plea was not knowing and voluntary. The record establishes that "the plea represent[ed] a voluntary and intelligent choice among the alternative courses of action open to defendant" (*People v Ford*, 86 NY2d 397, 403; *see People v Cornell*, 16 NY3d 801, 802).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

523

KA 12-00447

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DYLAN BARCLAY, ALSO KNOWN AS DYLAN A. BARCLAY,
DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered August 26, 2011. 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 modified on the law by vacating the DNA databank fee, sex offender registration fee, and supplemental sex offender victim fee and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him as a juvenile offender upon his guilty plea of criminal sexual act in the first degree (Penal Law § 130.50 [1]), defendant contends that his bargained-for sentence of imprisonment of 2 to 6 years is unduly harsh and severe and that County Court erred in directing him to pay a DNA databank fee, a sex offender registration fee, and a supplemental sex offender victim fee. Based on our review of the record, we conclude that there is no basis for modifying the sentence of imprisonment as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We conclude, however, that the fees imposed must be vacated because defendant was sentenced as a juvenile offender (*see* Penal Law §§ 60.00 [2]; 60.10; *People v Stump*, 100 AD3d 1457, 1458). We therefore modify the judgment accordingly.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

524

KA 11-01285

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL CURETON, 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 Erie County Court (Thomas P. Franczyk, J.), rendered May 23, 2011. The judgment convicted defendant, after a nonjury verdict, of unlawful imprisonment in the second degree and criminal contempt in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of, inter alia, unlawful imprisonment in the second degree (Penal Law § 135.05), defendant contends that the verdict with respect to that crime is against the weight of the evidence. Although we agree with defendant that "an acquittal would not have been unreasonable," we conclude that, viewing the evidence in light of the elements of the crime in this nonjury trial, "[b]ased on the weight of the credible evidence . . . [County Court] was justified in finding the defendant guilty beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 348). The court was entitled to resolve credibility issues against defendant (*see People v Cuthrell*, 13 AD3d 1224, 1225, *lv denied* 4 NY3d 885), and to reject his version of the events (*see People v McCoy*, 100 AD3d 1422, 1422). "[U]pon our review of the record, we cannot say that the court failed to give the evidence the weight that it should be accorded" (*People v Britt*, 298 AD2d 984, 984, *lv denied* 99 NY2d 556). Finally, defendant's challenge to the legality of the sentence of probation imposed on the unlawful imprisonment count has been rendered moot as a result of the revocation of his sentence of probation (*see generally People v Meli*, 142 AD2d 938, 939, *lv denied* 72 NY2d 921).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

525

KA 11-00426

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL A. COLE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered June 9, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree (three counts).

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

527

KA 12-00341

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC X. MARTINEZ, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (JOHN E. TYO OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), entered September 7, 2011. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree and forcible touching (two counts).

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 rape in the first degree (Penal Law § 130.35 [1]) and two counts of forcible touching (§ 130.52). We agree with defendant that the waiver of the right to appeal was not valid inasmuch as the record does not establish that it was knowingly, intelligently and voluntarily entered (*see People v Bradshaw*, 18 NY3d 257, 259). Although the prosecutor engaged in a colloquy with defendant regarding the waiver of the right to appeal, County Court failed to address the waiver with defendant and we thus conclude that the court "took no measures to ensure that [defendant] . . . understood . . . and . . . validly waiv[ed] his right to appeal" (*People v Bradshaw*, 76 AD3d 566, 568, *affd* 18 NY3d 257).

We further conclude, however, that defendant's contention that the court erred in denying his motion seeking to sever three counts from the remaining 11 counts of the indictment was forfeited by his guilty plea (*see People v Konieczny*, 2 NY3d 569, 572; *People v Hansen*, 95 NY2d 227, 230). We reject defendant's further contention that the court erred in refusing to suppress his statement to the police, which was given without the assistance of an interpreter. The court credited the testimony of the police investigator who took the statement that she had no trouble communicating with defendant and that he responded appropriately to her questions. Defendant's oral statement was reduced to writing, and our review of that written statement establishes that defendant responded appropriately to the investigator's questions. "The [suppression]

court's determination is entitled to deference and will not be disturbed where it is supported by the record" (*People v Sanders*, 74 AD3d 1896, 1896; *see generally People v Prochilo*, 41 NY2d 759, 761). The sentence is not unduly harsh or severe.

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

535

CA 12-01792

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

TERESA FRENCH, PLAINTIFF-APPELLANT,

V ORDER

RIVERSHORE INCORPORATED AND THOMAS J. BECKHORN,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF FRANK S. FALZONE, ESQ., BUFFALO (FRANK S. FALZONE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAMON MOREY LLP, BUFFALO (MICHAEL L. AMODEO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered September 10, 2012. The order denied the motion of plaintiff for summary judgment on liability and denied the motion of plaintiff to dismiss or sever the third-party action.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 10, 2013, and filed in the Niagara County Clerk’s Office on January 14, 2013,

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

536

CA 12-02077

PRESENT: SCUDDER, P.J., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

ALBERT KILLIAN AND MELISSA KILLIAN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KEVIN HEIMAN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered August 17, 2011. The order, insofar as appealed from, denied the motion of defendant to dismiss the amended complaint.

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

Memorandum: Defendant appeals from an order that, inter alia, denied his motion to dismiss the amended complaint with prejudice on the ground that one of the plaintiffs failed to appear at trial for a scheduled cross-examination. Defendant's contention that Supreme Court abused its discretion in denying that motion involves matters outside the record on appeal. We therefore are unable to determine the merits of defendant's contention, and defendant, "as the appellant, . . . must suffer the consequences" of submitting an incomplete record (*Matter of Santoshia L.*, 202 AD2d 1027, 1028; *see Matter of Rodriguez v Ward*, 43 AD3d 640, 641).

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

545

KA 12-00570

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TIMOTHY ANDREWS, ALSO KNOWN AS TIMOTHY A. ANDREWS, ALSO KNOWN AS TIMOTHY AARON ANDREWS, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 12, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

547

KA 11-02543

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN M. GABAK, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (HEATHER PARKER HINES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered December 12, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

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

562

CA 12-02064

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

MONARCH COMPANIES, INC. AND MONARCH/DNC BUFFALO AIRPORT, FORMERLY KNOWN AS BUFFALO ENCOUNTER, PLAINTIFFS-RESPONDENTS,

V ORDER

DELAWARE NORTH COMPANIES TRAVEL HOSPITALITY SERVICES, INC., FORMERLY KNOWN AS CA ONE SERVICES, INC., DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LOWENSTEIN SANDLER LLP, ROSELAND, NEW JERSEY (MATTHEW M. OLIVER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered August 17, 2012. The order, among other things, granted the motion of plaintiffs for the appointment of a temporary receiver.

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

Entered: April 26, 2013

Frances E. Cafarell
Clerk of the Court

MOTION NO. (225/89) KA 02-00347. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL RHYMES, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND WHALEN, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (31/01) KA 98-05081. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V THOMAS WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND SCONIERS, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (286/02) KA 97-05362. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL SPIRLES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis and for other relief denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND WHALEN, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (201/07) KA 06-00534. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EUGENE WRIGHT, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (715/07) KA 04-01773. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PETER D. THOUSAND, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis and for other relief denied. PRESENT: SMITH, J.P.,

CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (1011/07) KA 06-00940. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDUNDABIRA O. OJO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND SCONIERS, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (732/08) KA 07-01017. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GERMAINE BROWN, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, County Court's deference to the decision of defendant to forgo a jury charge for lesser included offenses denied him the expert judgment of counsel, to which the Sixth Amendment entitles him. Upon our review of the motion papers, we conclude that the issue may have merit. Therefore, the order of June 6, 2008 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046). Defendant is directed to file and serve his records and briefs with this Court on or before July 25, 2013. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (6/10) KA 09-01559. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES WESOLOWSKI, DEFENDANT-APPELLANT. -- Motion for writ of

error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (1066/11) KA 06-01663. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWIN PEREZ, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND WHALEN, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (403/12) KA 08-01439. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD G. KIRK, SR., DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (448/12) CA 11-01853. -- SHARLENE MCKENZIE, AS EXECUTRIX OF THE ESTATE OF OSCAR MCKENZIE, JR., DECEASED, PLAINTIFF-APPELLANT, V ONONDAGA COUNTY AND ONONDAGA COUNTY BAR ASSOCIATION ASSIGNED COUNSEL PROGRAM, INC., DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (1252/12) CA 12-00182. -- JANNIE NESMITH, IN HER REPRESENTATIVE CAPACITY ONLY AS PARENT AND NATURAL GUARDIAN OF JANNIE PATTERSON, AN INFANT AND LORENZO PATTERSON, JR., PLAINTIFFS-RESPONDENTS, V ALLSTATE INSURANCE

COMPANY, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND WHALEN, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (1317/12) CA 12-01143. -- IN THE MATTER OF THE ARBITRATION BETWEEN PROFESSIONAL, CLERICAL, TECHNICAL, EMPLOYEES ASSOCIATION, PETITIONER-RESPONDENT, AND BOARD OF EDUCATION FOR BUFFALO CITY SCHOOL DISTRICT, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (1333/12) CA 12-01208. -- ROBERT LANDAHL AND GAIL LANDAHL, PLAINTIFFS-RESPONDENTS, V CITY OF BUFFALO AND U&S SERVICES, INC., DEFENDANTS-APPELLANTS. U&S SERVICES, INC., THIRD-PARTY PLAINTIFF-RESPONDENT, V INDUSTRIAL POWER & LIGHTING CORPORATION, THIRD-PARTY DEFENDANT-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 Apr. 26, 2013.)

MOTION NO. (1335/12) CA 12-01013. -- PENN MILLERS INSURANCE COMPANY, PLAINTIFF-APPELLANT-RESPONDENT, V C.W. COLD STORAGE, INC., DEFENDANT-RESPONDENT-APPELLANT, AND THRUWAY PRODUCE, INC., DEFENDANT-RESPONDENT. -- Motion for reargument, clarification, or leave to

appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (1363/12) CA 12-00459. -- JANNETTE MORALES, PLAINTIFF, V ASARESE MATTERS COMMUNITY CENTER, ET AL., DEFENDANTS, CITY OF BUFFALO PARKS AND RECREATION DEPARTMENT, CITY OF BUFFALO, DEFENDANTS-RESPONDENTS, AND COUNTY OF ERIE, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, SCONIERS, VALENTINO, AND MARTOCHE, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (1426/12) KA 11-01396. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RONALD D. ROSSBOROUGH, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, WHALEN, AND MARTOCHE, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (1438/12) CA 12-01105. -- LEE T. HENDRYX AND SHARON HENDRYX, PLAINTIFFS-RESPONDENTS, V RICHARD M. PAYNE, SUZANNE PAYNE, MARK NOLAN, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. RICHARD M. PAYNE, SUZANNE PAYNE AND ENCHANTED VALLEY RENTALS, LLC, THIRD-PARTY PLAINTIFFS-RESPONDENTS, V MARK NOLAN, THIRD-PARTY DEFENDANT-APPELLANT. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (1460/12) CA 12-00596. -- FRANK FERGUSON AND EVA FERGUSON, PLAINTIFFS-APPELLANTS, V HANSON AGGREGATES NEW YORK, INC., DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND MARTOCHE, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (1470/12) KA 11-00927. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ENNIS E. RUFFIN, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (81/13) CA 12-01423. -- IN THE MATTER OF THE ESTATE OF GLORIA H. LAMBERT, DECEASED. WAYNE C. LAMBERT, PETITIONER-RESPONDENT-RESPONDENT; JOHN R. LAMBERT, RESPONDENT-PETITIONER-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed Apr. 26, 2013.)

MOTION NO. (154/13) CA 12-00714. -- BERNICE MALCOLM, PLAINTIFF-APPELLANT, V HONEOYE FALLS-LIMA CENTRAL SCHOOL DISTRICT, HONEOYE FALLS-LIMA EDUCATION ASSOCIATION AND NEW YORK STATE UNITED TEACHERS, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ. (Filed Apr. 26, 2013.)

KA 11-01774. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD J. GALASSO, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Erie County Court, Thomas P. Franczyk, J. - Violation of Probation). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Apr. 26, 2013.)

KA 11-01775. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD J. GALASSO, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Erie County Court, Thomas P. Franczyk, J. - Violation of Probation). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Apr. 26, 2013.)

KA 12-01046. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANIEL L. GOODELL, ALSO KNOWN AS DANIEL GOODELL, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Genesee County Court, Robert C. Noonan, J. - Violation of Probation). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Apr. 26, 2013.)

KAH 12-00948. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. JEFFREY ROCKEFELLER, PETITIONER-APPELLANT, V SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Appeal dismissed as moot. Counsel's motion to be relieved of assignment granted. (Appeal from Judgment

[denominated order] of Supreme Court, Cayuga County, Mark Fandrich, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Apr. 26, 2013.)

KAH 12-00908. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. CHARLES STRAUSS, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- Appeal dismissed as moot. Counsel’s motion to be relieved of assignment granted. (Appeal from Judgment of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - CPLR Article 78). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Apr. 26, 2013.)