SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 6, 2015

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. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1

TP 14-01330

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

IN THE MATTER OF ROBERT KLEIN, PETITIONER,

V ORDER

CAPTAIN KISER, RESPONDENT.

ROBERT KLEIN, 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, Livingston County [Robert B. Wiggins, A.J.], entered March 20, 2014) 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: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

2

TP 14-01311

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

IN THE MATTER OF MICHAEL CHIOVARO, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

ANTHONY J. LANA, BUFFALO, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered July 15, 2014) 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: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

10

CAF 14-00120

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

IN THE MATTER OF CORY J.S.,
RESPONDENT-RESPONDENT.

OSWEGO COUNTY ATTORNEY,
PETITIONER-APPELLANT.

MEMORANDUM AND ORDER

RICHARD C. MITCHELL, COUNTY ATTORNEY, OSWEGO (JAMES K. EBY OF COUNSEL), FOR PETITIONER-APPELLANT.

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered December 8, 2013 in proceedings pursuant to Family Court Act article 3. The order dismissed the petitions.

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

Memorandum: In this juvenile delinquency proceeding pursuant to Family Court Act article 3, petitioner appeals from an order granting respondent's motion to dismiss two petitions in furtherance of justice pursuant to Family Court Act § 315.2. Contrary to petitioner's contention, we conclude that Family Court neither exceeded its authority nor abused its discretion when it dismissed the petitions. The record supports the court's determination, upon its examination and consideration of the relevant statutory factors, that "a finding of delinquency or continued proceedings would constitute or result in injustice" (§ 315.2 [1]; *see Matter of Chris H.*, 197 AD2d 689, 689-690).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

12

CAF 13-01327

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

IN THE MATTER OF CHRISTIAN L. JONES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LAURA S. TUCKER, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, HANCOCK ESTABROOK, LLP (ALAN J. PIERCE OF COUNSEL), PRO BONO APPEALS PROGRAM, ALBANY, FOR RESPONDENT-APPELLANT.

MARRIS & BARTHOLOMAE, P.C., SYRACUSE (WILLIAM R. BARTHOLOMAE OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered May 16, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and physical custody of the subject child.

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

Memorandum: We affirm the order granting the petition seeking modification of a prior order of custody for reasons stated in the decision at Family Court. We note only that a subsequent order of the same court, entered July 22, 2014, which modified the provisions regarding visitation, has rendered moot the contention of respondent mother that the court erred in failing to provide her with more extensive visitation (*see Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1576).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

13

CA 14-01350

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

ERIC ANDERSON, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 112563.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC ANDERSON, CLAIMANT-RESPONDENT PRO SE.

Appeal from a judgment of the Court of Claims (Stephen J. Lynch, J.), entered November 13, 2013. The judgment awarded the claimant money damages as against defendant.

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

Memorandum: Defendant, State of New York (State), appeals from a judgment awarding claimant money damages stemming from an incident in which claimant, who was an inmate at a state correctional facility, was assaulted by a fellow inmate. The Court of Claims determined that the State was negligent in failing to provide adequate staffing for the mess hall. The State appeals, and we now reverse and dismiss the claim.

"On appeal from a judgment following a bench trial, this Court may 'independently consider the probative weight of the evidence and the inferences that may be drawn therefrom, and grant the judgment that we deem the facts warrant' " (*Blakesley v State of New York*, 289 AD2d 979, 979, *lv denied* 98 NY2d 605; *see Baba-Ali v State of New York*, 19 NY3d 627, 640). We conclude upon our review of the record that the court's verdict was not based on a fair interpretation of the evidence (*see generally Farace v State of New York*, 266 AD2d 870, 870). The State's duty to safeguard inmates "is limited to risks of harm that are reasonably foreseeable" (*Sanchez v State of New York*, 99 NY2d 247, 253; *see Melvin v State of New York*, 101 AD3d 1654, 1654-1655; *Padgett v State of New York*, 163 AD2d 914, 914, *lv denied* 76 NY2d 711), and we conclude that claimant failed to demonstrate that the State did not provide adequate supervision to prevent a risk of harm that was reasonably foreseeable (*see generally Sanchez v State of New York*, 36 AD3d 1065, 1067, *lv denied* 8 NY3d 815; *Harris v City of*

New York, 28 AD3d 223, 223, *lv denied* 7 NY3d 704).

Here, the evidence established that there was no history of violence between the two inmates and no indication that the other inmate posed a threat to claimant (*see Melvin*, 101 AD3d at 1655; *Vasquez v State of New York*, 68 AD3d 1275, 1276). Claimant testified that there were about 30 inmates and one correction officer in the mess hall at the time of the incident. He presented evidence that the inmate stabbed him with the handle of a plastic toothbrush that had been sharpened to a point, and that the correction officer ordered them to stop fighting and banged his baton on a table to call for assistance. The State submitted evidence that inmates had to empty their pockets and go through a metal detector before entering the mess hall. The State further submitted evidence that it was appropriate to have one correction officer supervising up to 40 inmates, and that the correction officer's response to the attack was appropriate.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

20

CA 14-01173

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

MICHAEL M. KROSSBER AND DEBORAH M. KROSSBER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JAMES CHERNISS AND MARY S. CHERNISS,
DEFENDANTS-RESPONDENTS.

ZIMMERMAN & TYO, ATTORNEYS, SHORTSVILLE (JOHN E. TYO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered January 10, 2014. The order granted the motion of defendants for summary judgment and dismissed the 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: Plaintiffs commenced this action seeking injunctive relief and monetary damages based upon damage to their property allegedly caused by defendants' diversion of additional surface water onto plaintiffs' property. Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint. "A plaintiff 'seeking to recover [from an abutting property owner for the flow of surface water] must establish that . . . improvements on the defendant's land caused the surface water to be diverted, that damages resulted and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the defendant's property' " (*Villafrank v David N. Ross, Inc.*, 120 AD3d 935, 936; *see Kossoff v Rathgeb-Walsh*, 3 NY2d 583, 589-590). Here, defendants established that their improvements were made in good faith, but they admitted that they constructed a berm on their property, which may be considered an artificial means of diverting water (*see Long v Sage Estate Homeowners Assn., Inc.*, 16 AD3d 963, 965-966, *lv dismissed in part and denied in part* 5 NY3d 756). Defendants thus failed to meet their initial burden of establishing that water was not diverted onto plaintiffs' property by artificial means (*see Villafrank*, 120 AD3d at 936). The issue "whether the berm 'so changed, channeled or increased

the flow of surface water onto plaintiff[s'] land as to proximately cause damage[] to the property' " cannot be determined on this motion for summary judgment (*Long*, 16 AD3d at 965).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

27

TP 14-01154

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

IN THE MATTER OF TERRANCE AGOSTINI, PETITIONER,

V ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

THOMAS J. EOANNOU, BUFFALO, FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Christopher J. Burns, J.], entered June 24, 2014) 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: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

28

KA 13-01961

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAROLD R. HUNT, JR., ALSO KNOWN AS ROB HUNT,
DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered September 9, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree, incest 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: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, criminal sexual act in the first degree (Penal Law § 130.50 [4]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. We agree with defendant that the waiver of the right to appeal is invalid because the perfunctory inquiry made by County 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 Hamilton*, 49 AD3d 1163, 1164). Indeed, on this record we cannot determine "whether the court ensured 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Johnson*, 109 AD3d 1191, 1191, *lv denied* 22 NY3d 997). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

29

KA 13-01914

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARY R. BAKER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered September 4, 2013. The judgment revoked a sentence of probation and imposed a sentence of imprisonment.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

30

KA 11-01580

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN BANKS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered July 26, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment revoking the sentence of probation upon his admission to violating a condition thereof and sentencing him to a term of imprisonment for his conviction of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We agree with defendant that, in each appeal, the waiver of the right to appeal "does not encompass his challenge to the severity of the sentence because 'no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal' with respect to his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence" (*People v Peterson*, 111 AD3d 1412, 1412; *see People v Maracle*, 19 NY3d 925, 928).

We further agree with defendant that the written waiver of the right to appeal does not preclude him from challenging the sentence in each appeal. "A detailed written waiver can supplement a court's on-the-record explanation of what a waiver of the right to appeal entails, but a written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal" (*People v*

Pressley, 116 AD3d 794, 795, *lv denied* 23 NY3d 967 [internal quotation marks omitted]). Here, although defendant signed such a written waiver in each appeal, the record establishes that County Court did not sufficiently explain the significance of the appeal waiver or ascertain defendant's understanding thereof (*see People v Frysinger*, 111 AD3d 1397, 1398; *see also Pressley*, 116 AD3d at 795; *see generally People v Bradshaw*, 18 NY3d 257, 267). Nevertheless, we reject defendant's challenge to the severity of the sentence in each appeal.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

31

KA 11-01581

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN BANKS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered July 26, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same Memorandum as in *People v Banks* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

32

KA 11-01196

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD BYNUM, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MISHA A. COULSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 16, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree and criminal possession of stolen property in the fifth 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 robbery in the second degree (Penal Law § 160.10 [1]) and criminal possession of stolen property in the fifth degree (§ 165.40). Contrary to defendant's contention, Supreme Court did not abuse its discretion in conducting the trial in his absence. The court provided defendant with the requisite warnings pursuant to *People v Parker* (57 NY2d 136, 141) and informed him of the date on which the trial would begin, but defendant "waived his right to be present at trial . . . by failing to appear at the appointed time or within a reasonable time thereafter" (*People v Lewis*, 57 AD3d 1505, 1506, *lv denied* 12 NY3d 785). In addition, "the court made a proper inquiry and placed its reasoning on the record for determining that defendant's absence was deliberate" (*People v Zafuto*, 72 AD3d 1623, 1624, *lv denied* 15 NY3d 758; *see People v Brooks*, 75 NY2d 898, 899).

Defendant contends that the court erred in denying that part of his omnibus motion seeking to suppress showup identification testimony. Even assuming, arguendo, that the court erred in denying that part of the omnibus motion, we conclude that the error is harmless beyond a reasonable doubt (*see People v Wade*, 118 AD3d 1370, 1370-1371, *lv denied* 24 NY3d 965; *People v Rodriguez*, 32 AD3d 1203, 1204, *lv denied* 8 NY3d 849).

Defendant further contends that he was deprived of a fair trial

by prosecutorial misconduct during the prosecutor's opening statement and summation. Defendant failed to preserve that contention for our review inasmuch as he did not object to the alleged misconduct (*see People v Ward*, 107 AD3d 1605, 1606, *lv denied* 21 NY3d 1078; *People v Glenn*, 72 AD3d 1567, 1568, *lv denied* 15 NY3d 805). 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]; *Glenn*, 72 AD3d at 1568).

We reject defendant's contention that he was denied effective assistance of counsel. Viewing defense counsel's representation as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's contention, the court's *Sandoval* ruling did not constitute an abuse of discretion (*see People v Sandoval*, 34 NY2d 371, 374). The court properly permitted questioning concerning defendant's prior convictions of theft, escape, and criminal impersonation inasmuch as those crimes "involved acts of dishonesty and thus were probative with respect to the issue of defendant's credibility" (*People v Salsbery*, 78 AD3d 1624, 1626, *lv denied* 16 NY3d 836; *see People v Stevens*, 109 AD3d 1204, 1205, *lv denied* 23 NY3d 1043). Finally, the sentence is not unduly harsh or severe.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

33

KA 12-02108

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICKEY A. DARLING, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (JOSEPH M. CALIMERI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered September 10, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends that County Court failed to ensure that he had a full understanding of his plea, and that his plea therefore was not knowing, voluntary and intelligent. Defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see People v Russell*, 55 AD3d 1314, 1314-1315, *lv denied* 11 NY3d 930; *People v Harrison*, 4 AD3d 825, 826, *lv denied* 2 NY3d 740). Furthermore, the narrow exception to the preservation rule does not apply because defendant said nothing during the plea colloquy that "clearly casts significant doubt upon [his] guilt or otherwise calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666; *see People v Bishop*, 115 AD3d 1243, 1244, *lv denied* 23 NY3d 1018). In any event, the record demonstrates that defendant's plea was knowing, voluntary and intelligent (*see People v Cox*, 111 AD3d 1310, 1310, *lv denied* 23 NY3d 1025; *People v Weakfall*, 108 AD3d 1115, 1116, *lv denied* 21 NY3d 1078; *see generally People v Seeber*, 4 NY3d 780, 781-782). Contrary to defendant's contention, "there is no requirement that defendant recite the underlying facts of the crime to which he is pleading guilty" (*People v Bailey*, 49 AD3d 1258, 1259, *lv denied* 10 NY3d 932).

The sentence is not unduly harsh or severe.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

34

KA 14-00040

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISAAC L. MCDONALD, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN 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 December 11, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree, disseminating indecent materials to minors in the first degree and failure to register internet identifiers.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Niagara County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of, inter alia, rape in the third degree (Penal Law § 130.25 [2]). We agree with defendant that County Court failed to rule on his motion to withdraw his guilty plea. Contrary to the People's contention, we cannot "deem the court's failure to rule on the . . . motion as a denial thereof" (*People v Spratley*, 96 AD3d 1420, 1421; *see People v Concepcion*, 17 NY3d 192, 197-198). We therefore hold the case, reserve decision, and remit the matter to County Court to determine defendant's motion.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

35

CA 14-01219

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

JOSEPH MORREALE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH FROELICH, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MELISSA L. VINCTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (DAVID W. OLSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered February 11, 2014. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when he fell down a set of stairs leading to the front entrance of a two-family dwelling owned by defendant. Plaintiff alleged that he was beginning to descend the stairs when he grabbed a finial that broke off from the wrought iron railing to which it had been welded, causing him to fall. In his complaint, plaintiff claimed defendant's negligent maintenance of the railing caused his fall. Supreme Court denied defendant's motion for summary judgment dismissing the complaint, and we affirm.

We agree with defendant that he met his burden of establishing that he maintained his property "in a reasonably safe condition in view of all the circumstances" (*Boderick v R.Y. Mgt. Co., Inc.*, 71 AD3d 144, 147; *see Basso v Miller*, 40 NY2d 233, 241). However, we reject defendant's contention that plaintiff failed to raise a question of fact. Rather, we conclude that the evidence submitted by plaintiff, namely his expert's opinion that the railing had been allowed to corrode over a long period of time and that the corrosion constituted a dangerous condition which caused plaintiff to fall, raised a question of fact whether defendant had, in fact, reasonably maintained his property (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We reject defendant's further contention that plaintiff's expert improperly relied upon photographs in forming his opinion because they

had not been "authenticated." The record, including the date stamp on the photographs themselves as well as the testimony of defendant, his wife, and plaintiff's daughter, establishes that the photographs were taken soon after plaintiff's fall and that they depicted the railing as it appeared at that time (*cf. Santiago v Burlington Coat Factory*, 112 AD3d 514, 515; *Kozma v Biberfeld*, 264 AD2d 817, 818).

We reject defendant's final contention that he established as a matter of law that he was not negligent in allowing the railing to corrode. " 'Violation of the Building Code constitutes some evidence of negligence' " (*Brigandi v Piechowicz*, 13 AD3d 1105, 1106; *see Thorne v Cauldwell Terrace Constr. Corp.*, 63 AD3d 826, 827), and the Property Maintenance Code of New York State (PMCNYS), incorporated by reference into the Uniform Fire Prevention and Building Code (*see* 19 NYCRR 1226.1), requires property owners to coat all exterior metal surfaces with a corrosion inhibitor and to "stabilize[]" all surfaces that have already become corroded (*see* PMCNYS § 304.2). Consequently, it will be "for a jury to decide whether defendant[] violated the Building Code and, if so, whether that violation proximately caused plaintiff's accident" (*Romanowski v Yahr*, 5 AD3d 985, 986).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

36

CA 14-00806

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

EVA E. DUNLOP, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SAINT LEO THE GREAT R.C. CHURCH AND CATHOLIC DIOCESE OF BUFFALO, DEFENDANTS-RESPONDENTS.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFF-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KATIE L. RENDA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 19, 2013. The order, among other things, granted the cross motion of defendant Catholic Diocese of Buffalo to dismiss the complaint against it.

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

Memorandum: On a prior appeal, this Court granted the motion of defendant Saint Leo the Great R.C. Church (Church) seeking to dismiss the action against it on the ground that plaintiff did not timely serve the complaint after the Church made a demand therefor (*Dunlop v Saint Leo the Great R.C. Church*, 109 AD3d 1120, *lv denied* 22 NY3d 858). Plaintiff subsequently moved for a default judgment against defendant Catholic Diocese of Buffalo (Diocese), and the Diocese cross-moved for an order dismissing the complaint against it for, among other things, lack of personal jurisdiction, asserting that plaintiff never properly effectuated service of process upon it. Supreme Court granted that part of the cross motion and awarded costs to the Diocese. We affirm.

As a preliminary matter, we note that, "[t]o avoid dismissal of this action, plaintiff[] [was] required to prove by a preponderance of the evidence that jurisdiction was obtained over" the Diocese (*Dunn v Pallett*, 66 AD3d 1179, 1180; *see Joseph v Siebtechnik, G.M.B.H.*, 172 AD2d 1056, 1056). In our view, plaintiff failed to meet that burden. Plaintiff contends that she obtained jurisdiction over the Diocese by serving its agent, i.e., the Church, but that contention is without merit. Plaintiff tendered no evidence establishing that the Church is a designated agent for service of process on the Diocese. In addition, plaintiff failed to establish that the Church was the " 'involuntary' agent" of the Diocese for the service of process

inasmuch as she failed to establish " 'such complete control by the [Diocese] over the [Church] that it negates the conclusion that the [Church] is operated as a separate and independent entity' " (*Feszczyszyn v Gen. Motors Corp.*, 248 AD2d 939, 940-941). We conclude, instead, that the record establishes the Diocese and the Church are separate and distinct business entities (*see Heenan v Roman Catholic Diocese of Rockville Ctr.*, 158 AD2d 587, 588). Plaintiff's attempt to use Religious Corporations Law §§ 91 and 92 to establish an involuntary agency relationship is unpersuasive inasmuch as those statutes do not confer on the Diocese the requisite complete control over the Church (*see* § 5).

Plaintiff further contends that she obtained jurisdiction over the Diocese by serving counsel for the Diocese, but the record does not contain any proof of such service. Indeed, counsel for the Diocese submitted an affirmation in which he stated that he "never agreed to accept service of process or any pleadings on behalf of the [Diocese] with respect to [this] matter."

Contrary to plaintiff's further contention, the court properly awarded costs to the Diocese as the prevailing party on the cross motion (*see* CPLR 8106). In light of our determination, we do not reach plaintiff's remaining contention.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

37

CA 14-01275

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

COMBUSTION SCIENCE & ENGINEERING, INC.,
PLAINTIFF-APPELLANT,

V ORDER

ARGUS ENGINEERING, PLLC, DEFENDANT-RESPONDENT.

MELVIN & MELVIN, PLLC, SYRACUSE (MARK LAWRENCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GERMAIN & GERMAIN, LLP, SYRACUSE (JOHN J. MARZOCCHI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered February 13, 2014. The order denied the motion of plaintiff for summary judgment.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

38

CA 14-01220

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

JASON THOME, PLAINTIFF,

V

BENCHMARK MAIN TRANSIT ASSOCIATES, LLC, PICONE CONSTRUCTION CORPORATION, AND CHRISTA CONSTRUCTION, LLC, DEFENDANTS.

CHRISTA CONSTRUCTION, LLC, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

INDUSTRIAL POWER & LIGHTING CORP., THIRD-PARTY DEFENDANT-RESPONDENT,
AND FISHER CONCRETE, INC., THIRD-PARTY DEFENDANT-APPELLANT.

MEMORANDUM AND ORDER

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ARTHUR A. HERDZIK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 10, 2014. The order, among other things, denied in part the motion of third-party defendant Fisher Concrete, Inc. for leave to serve a second amended third-party answer.

It is hereby ORDERED that said appeal from the order insofar as it denied the motion to preclude expert testimony is unanimously dismissed, and the order is modified on the law by granting that part of the motion seeking leave to serve a second amended third-party answer to assert the affirmative defense that the settlement among plaintiff, defendant-third-party plaintiff, and third-party defendant Industrial Power & Lighting Corp. was not reasonable, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for personal injuries he allegedly sustained when a lift he was operating fell into a hole at a construction site. Defendant-third-party

plaintiff, Christa Construction, LLC (Christa), commenced a third-party action against third-party defendants, Industrial Power & Lighting Corp. (IPL) and Fisher Concrete, Inc. (Fisher). Supreme Court granted plaintiff's motion for summary judgment on, inter alia, his Labor Law § 240 (1) claim but, on a prior appeal, this Court concluded that there was a triable issue of fact whether plaintiff's actions were the sole proximate cause of his injuries and denied that part of the motion (*Thome v Benchmark Main Tr. Assoc., LLC*, 86 AD3d 938, 939-940). Plaintiff, Christa, and IPL later settled the main action and the third-party action with respect to IPL.

Fisher made three separate motions seeking several different forms of relief. In its first motion, Fisher sought partial summary judgment dismissing IPL's cross claims and summary judgment dismissing Christa's claims for contribution and indemnification. In its second motion, Fisher moved for leave to serve a second amended answer to the third-party complaint, seeking to assert several additional affirmative defenses including the affirmative defense that the settlement among plaintiff, Christa and IPL was not reasonable. In its third motion, Fisher sought an order precluding Christa and IPL from introducing testimony from an expert witness. In addition, IPL moved for summary judgment dismissing Fisher's cross claims against it. The court granted that part of Fisher's motion for partial summary judgment seeking dismissal of Christa's claim for contribution, but denied the remainder of that motion. The court also granted in part Fisher's motion for leave to serve a second amended third-party answer, but denied that part of the motion seeking to assert the affirmative defense that the settlement among plaintiff, Christa, and IPL was not reasonable. Furthermore, the court denied without prejudice Fisher's motion to preclude expert testimony. Finally, the court granted IPL's motion to dismiss Fisher's cross claims against IPL. Fisher now appeals.

We note at the outset that we dismiss the appeal insofar as it concerns Fisher's motion to preclude. In that motion, Fisher sought to preclude Christa and IPL from calling an expert to testify that Fisher violated certain provisions of the Industrial Code, on the ground that the Industrial Code provisions that formed the basis for the expert's testimony did not apply. Generally, an order denying a motion in limine, even when "made in advance of trial on motion papers[,] constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" (*Cotgreave v Public Adm'r of Imperial County (Cal.)*, 91 AD2d 600, 601; *see Winograd v Price*, 21 AD3d 956, 956). "Inasmuch as those parts of the order herein merely adjudicated the admissibility of evidence and do not affect a substantial right, no appeal lies as of right from those parts of the order" (*Innovative Transmission & Engine Co., LLC v Massaro*, 63 AD3d 1506, 1507 [internal quotation marks and brackets omitted]; *see Angelicola v Patrick Heating of Mohawk Val., Inc.*, 77 AD3d 1322, 1323).

Fisher contends that the court abused its discretion in denying that part of its motion seeking leave to assert in its second amended third-party answer the affirmative defense that the settlement among

plaintiff, Christa, and IPL was not financially reasonable. We agree, and we therefore modify the order accordingly.

" 'Generally, [l]eave 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 . . . , and the decision whether to grant leave to amend . . . is committed to the sound discretion of the court' " (*Palaszynski v Mattice*, 78 AD3d 1528, 1528; *see* CPLR 3025 [b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). Pursuant to CPLR 3018 (b), a party must plead as an affirmative defense "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading" (*id.*; *see generally Wooten v State of New York*, 302 AD2d 70, 73, *lv denied* 1 NY3d 501). Furthermore, "[w]henever a defendant feels the need to deny something not mentioned in the complaint, the defendant should transform the 'denial' into an affirmative defense and plead it as such" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3018:15, at 314). Consequently, we agree with Fisher that the amendment at issue was proper because the settlement had not occurred when the third-party complaint and Fisher's initial and amended third-party answers were served. Thus, the settlement could not have been "mentioned in the complaint" (*id.*), nor could the affirmative defense have been raised in the initial or amended third-party answers.

Christa contends that the court properly denied the motion seeking leave to amend because the proposed amendment is patently without merit in light of "the general rule [] that the indemnitor will be bound by any reasonable good faith settlement the indemnitee might thereafter make" (*Fidelity Natl. Tit. Ins. Co. of N.Y. v First N.Y. Tit. & Abstract*, 269 AD2d 560, 561 [internal quotation marks omitted]; *see Caruso v Northeast Emergency Med. Assoc., P.C.*, 85 AD3d 1502, 1507; *Goldmark Indus. v Tessoriere*, 256 AD2d 306, 307). We reject that contention. It is well settled that, "[w]here a party voluntarily settles a claim, [the party] must demonstrate that [it] was legally liable to the party whom [it] paid and that the amount of [the] settlement was reasonable in order to recover against an indemnitor" (*HSBC Bank USA v Bond, Schoeneck & King, PLLC*, 55 AD3d 1426, 1428 [internal quotation marks omitted]). Christa failed to submit any evidence establishing that the settlement was reasonable (*cf. Nesterczuk v Goldin Mgmt., Inc.*, 77 AD3d 800, 804; *Freehill v ITT Sheraton Corp.*, 74 AD3d 876, 877; *Fidelity Natl. Tit. Ins. Co. of N.Y.*, 269 AD2d at 561-562), and we therefore conclude that the court abused its discretion in determining that such general rule should apply to bar Fisher's proposed affirmative defense.

Fisher's contention that the court erred in granting IPL's motion for summary judgment dismissing Fisher's cross claim for indemnification against IPL, because Fisher is an intended third-party beneficiary of the indemnification clause in the contract between Christa and IPL, is without merit for the reasons stated in the court's bench decision. Fisher's remaining contention was raised for the first time in its reply papers, and it is "well settled that contentions raised for the first time in reply papers are not properly

before [us]" (*Jacobson v Leemilts Petroleum, Inc.*, 101 AD3d 1599, 1600; *see Nick's Garage, Inc. v Liberty Mut. Fire Ins. Co.*, 120 AD3d 967, 968).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

39

CA 14-01300

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

CLEARVIEW FARMS LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID PAPKE AND MICHELLE OLDS,
DEFENDANTS-RESPONDENTS.

ANDREW J. DICK, ROCHESTER, FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF HEIDI W. FEINBERG, ROCHESTER (HEIDI W. FEINBERG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered January 30, 2014. The order, among other things, denied plaintiff's motion to modify an order dated November 19, 2013.

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

Memorandum: Plaintiff commenced this action seeking damages for defendants' breach of their residential lease agreement with plaintiff. After a bench trial, Supreme Court reached a verdict in favor of plaintiff and thereafter issued an order awarding plaintiff $1,676.66 for unpaid rent and utilities, without prejudgment interest, and $150 for attorney's fees. Plaintiff did not appeal that order and instead filed a motion to "modify" the court's order to include prejudgment interest. Although plaintiff denominated the motion as one to "modify" the court's order, we conclude from the papers submitted in support of the motion that it was, in effect, a motion for leave to reargue the denial of prejudgment interest, which the court denied (*see Matter of Hoover v Derry*, 3 AD3d 659, 659; *C.R. v Pleasantville Cottage School*, 302 AD2d 259, 260). No appeal lies from an order denying a motion for leave to reargue (*see Hill v Milan*, 89 AD3d 1458, 1458; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

We decline to impose sanctions or to award attorney's fees, costs, or disbursements to defendants, as defendants request in their brief. Such action is not warranted inasmuch as we conclude that plaintiff's appeal does not constitute "frivolous conduct" as defined in 22 NYCRR 130-1.1 (c) (*see Amherst Magnetic Imaging Assoc. v Community Blue, HMO of Blue Cross of W. N.Y.*, 286 AD2d 896, 898, *lv*

denied 97 NY2d 612).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

40

CA 14-01086

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

IN THE MATTER OF SMALL SMILES LITIGATION

TIMOTHY ANGUS, AS PARENT AND NATURAL GUARDIAN OF INFANT JACOB ANGUS, ET AL., PLAINTIFFS, AND SHERAIN RIVERA, AS PARENT AND NATURAL GUARDIAN OF INFANT SHADAYA GILMORE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, SMALL SMILES DENTISTRY OF ALBANY, LLC, MAZIAR IZADI, D.D.S., NASSEF LANCEN, D.D.S., ALBANY ACCESS DENTISTRY, PLLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA NY, LLC, SMALL SMILES DENTISTRY OF ALBANY AND ALBANY ACCESS DENTISTRY, PLLC.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, ALBANY (MELISSA A. MURPHY-PETROS OF COUNSEL), FOR DEFENDANTS-APPELLANTS MAZIAR IZADI, D.D.S. AND NASSEF LANCEN, D.D.S..

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 17, 2013. The order, insofar as appealed from, denied in part the summary judgment motions of defendants-appellants.

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

Memorandum: Sherain Rivera (plaintiff), among other plaintiffs, commenced this action seeking damages for injuries sustained by her infant daughter as a result of, inter alia, allegedly unnecessary dental treatment performed at a “Small Smiles” dental clinic in Albany, New York, without informed consent or with fraudulently obtained consent. This action was coordinated for purposes of discovery and dispositive motions with two other actions in Supreme

Court, Onondaga County. Although there are four groups of defendants involved in the three coordinated actions (*Matter of Small Smiles Litig.*, 109 AD3d 1212, 1212-1213), the only group relevant to the instant appeal is that comprised of the corporate defendants-appellants (collectively, New FORBA defendants) and the two individual defendants-appellants, the dentists who provided treatment to plaintiff's infant daughter at the Albany clinic location. Supreme Court denied in part the motion of the New FORBA defendants for partial summary judgment as well as the motions of the two dentists for summary judgment dismissing the amended complaint against them.

The New FORBA defendants contend on appeal that the court erred in denying those parts of their motion with respect to the causes of action for battery, the violation of General Business Law § 349, negligence, and concerted action, and erred in refusing to strike plaintiff's demand for punitive damages. The individual dentists, Maziar Izadi, D.D.S., and Nassef Lancen, D.D.S., each contend on appeal that the court erred in refusing to dismiss the amended complaint against them.

Contrary to the contention of the New FORBA defendants, the cause of action asserting the complete absence of consent and/or fraudulently induced consent for treatment is properly treated as one for battery rather than for dental malpractice, and is not duplicative of the dental malpractice cause of action (*see Small Smiles Litig.*, 109 AD3d at 1214; *VanBrocklen v Erie County Med. Ctr.*, 96 AD3d 1394, 1394). It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided " 'no consent at all' " (*VanBrocklen*, 96 AD3d at 1394; *see Wiesenthal v Weinberg*, 17 AD3d 270, 270-271). The court properly denied that part of the New FORBA defendants' motion with respect to the battery cause of action, inasmuch as they failed to meet their initial burden of establishing that they "did not intentionally engage in offensive bodily contact without plaintiff's consent" (*Guntlow v Barbera*, 76 AD3d 760, 766, *appeal dismissed* 15 NY3d 906).

We reject the contention of the New FORBA defendants that the court erred in denying that part of their motion with respect to the cause of action under General Business Law § 349. A cause of action for deceptive business practices under section 349 "requires proof that the defendant engaged in consumer-oriented conduct that was materially deceptive or misleading, causing injury" (*Corcino v Filstein*, 32 AD3d 201, 201). Even assuming, arguendo, that the New FORBA defendants met their initial burden by establishing that the underlying transaction was private in nature and the allegedly deceptive acts were not aimed at the public at large (*see generally Confidential Lending, LLC v Nurse*, 120 AD3d 739, 741), we conclude that plaintiff's submissions raised issues of fact concerning whether the New FORBA defendants engaged in a scheme to place profits before patient care, which allegedly included fraudulent practices that impacted consumers at large beyond a particular dentist's treatment of an individual patient (*see Morgan Servs. v Episcopal Church Home & Affiliates Life Care Community*, 305 AD2d 1105, 1106; *see generally*

Zuckerman v City of New York, 49 NY2d 557, 562).

We likewise reject the contention of the New FORBA defendants that the court erred in refusing to dismiss the negligence cause of action, which was based in part upon an alleged violation of Limited Liability Company Law § 1203, because any violation of that section was not a proximate cause of injury to plaintiff's daughter. Even assuming, arguendo, that the New FORBA defendants met their initial burden of establishing as a matter of law that they are not liable under that statute, we conclude that there are issues of fact whether they violated that statute, whether that violation was part of an overall scheme to place the maximizing of profits over the quality of patient care, and whether any of the injuries sustained by plaintiff's daughter were caused thereby (*see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784).

We reject the further contention of the New FORBA defendants that the court erred in refusing to strike the demand for punitive damages (*see Garber v Lynn*, 79 AD3d 401, 402-403). To the extent that those defendants contend that a stipulation in bankruptcy court to limit collection of any money judgment obtained by plaintiff to insurance proceeds precludes a claim for punitive damages, we conclude that such contention does not serve as a basis for affirmative relief at this juncture.

Contrary to the contention of the individual dentists, the court properly refused to dismiss the amended complaint against them on the ground that plaintiff's daughter was not injured during the treatment and sustained no compensable damages thereby. Even assuming, arguendo, that they met their initial burden of establishing that plaintiff's daughter was not injured by the treatment they performed (*see generally Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 800, 801), we conclude that plaintiff raised a triable issue of fact whether her daughter sustained injuries as a result of such treatment (*see generally Zuckerman*, 49 NY2d at 562).

Lastly, in light of our determination with respect to the motions of the individual dentists, we reject the contention of the New FORBA defendants that there is no independent tort to support plaintiff's cause of action for concerted action liability (*see generally Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289, 295; *cf. Brenner v American Cyanamid Co.*, 288 AD2d 869, 870).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

41

CA 14-01346

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

KENNETH F. MAVING, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LISA M. MAVING, DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered November 13, 2013. The order granted the quantum meruit application of defendant for attorneys' fees.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and defendant's application is denied.

Memorandum: In this divorce action, plaintiff appeals from an order granting defendant's quantum meruit application for attorneys' fees. The parties' stipulation of settlement, which was incorporated but not merged into the judgment of divorce, provided that defendant could make an application for attorneys' fees within 15 days of the date of the stipulation. Defendant's attorney, however, did not file the application until almost six months after the date of the stipulation.

Plaintiff contends that Supreme Court erred in granting defendant's late application for attorneys' fees, which was in violation of the stipulation of settlement. We agree. Because "[m]arital settlement agreements are judicially favored" (*Simkin v Blank*, 19 NY3d 46, 52), "[o]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation" (*Hallock v State of New York*, 64 NY2d 224, 230, citing *Matter of Frutiger*, 29 NY2d 143, 149-150). Here, defendant asserts that her attorney mistakenly thought he had 30 days from the entry of judgment of divorce to file the application. We conclude, however, that the unilateral mistake of defendant's attorney does not excuse defendant's failure to comply with the terms of a stipulation where, as here, the language in the stipulation is clear, unequivocal, and unambiguous (*see Morey v Sings*, 174 AD2d 870, 872; *Hirsch v*

Manzione, 130 AD2d 714, 714-715; 27 Richard A. Lord, Williston on Contracts § 70:104 at 520 [4th ed 1990]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

42

CA 14-01272

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

MELISSA A. TRACY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID CHRISTA CONSTRUCTION, INC., LECHASE CONSTRUCTION SERVICES, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

HISCOCK & BARCLAY LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HIRSCH & TUBIOLO, P.C., ROCHESTER (BRYAN S. KORNFIELD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered September 26, 2013. The order denied the motion of defendants David Christa Construction, Inc. and LeChase Construction Services, LLC, for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when she slipped and fell at the Greater Rochester International Airport. Defendant David Christa Construction, Inc. (Christa) was the construction manager for a construction project at the airport, and defendant LeChase Construction Services, LLC (LeChase) was the general contractor for the project. Defendants-appellants (defendants) moved for summary judgment dismissing the complaint against them contending, inter alia, that they did not owe plaintiff a duty of care. We conclude that Supreme Court erred in denying the motion. As a preliminary matter, we note that, during the pendency of this appeal, plaintiff withdrew her contention that the deposition testimony excerpts submitted by defendants in support of their motion were not in admissible form, and we therefore do not address that contention. We conclude that defendants met their initial burden of establishing that they owed no duty of care to plaintiff who, at the time of her accident, was merely a third-party passerby with no relationship of privity with defendants (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In opposition, plaintiff failed to establish that any of the exceptions set forth in *Espinal v Melville Snow Contrs.* (98 NY2d 136, 140)

applies (*see generally id.*; *Sniatecki v Violet Realty*, 98 AD3d 1316, 1320-1321).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

43

CA 14-00318

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

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

V MEMORANDUM AND ORDER

LAKEVIEW ADVISORS, LLC, ET AL., RESPONDENTS,
RESOLUTION MANAGEMENT, LLC, NEAVERTH
ENTERPRISES, LLC, ARENA DEVELOPMENT, LLC AND
ROBERT J. GOODYEAR, RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 1.)

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

V

NEAVERTH ENTERPRISES, LLC, ARENA DEVELOPMENT,
LLC, ROBERT J. GOODYEAR, ANITA M. HANSEN AND
GARY ALBANESE, RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 2.)
(APPEAL NO. 1.)

UNDERBERG & KESSLER LLP, BUFFALO (EDWARD P. YANKELUNAS OF COUNSEL), AND MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, NEW YORK CITY, FOR PETITIONER-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (DENNIS C. VACCO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS RESOLUTION MANAGEMENT, LLC, NEAVERTH ENTERPRISES, LLC, ARENA DEVELOPMENT, LLC AND ROBERT J. GOODYEAR.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered September 26, 2013. The order and judgment dismissed the proceedings, released certain escrow funds and terminated an undertaking.

It is hereby ORDERED that said appeal from that part of the order and judgment granting relief with respect to respondents Anita M. Hansen and Gary Albanese is unanimously dismissed, the order and judgment is reversed on the law without costs, the amended petition in proceeding No. 1 and the petition in proceeding No. 2 are granted, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: These proceedings pursuant to CPLR article 52 have previously been before

us, and the facts of this litigation appear in two of our prior orders in this case (*Matter of Colonial Sur. Co. v Neaverth Enters., LLC*, 101 AD3d 1712; *Colonial Sur. Co. v Lakeview Advisors, LLC*, 93 AD3d 1253). We add here only that these consolidated appeals concern the most recent decision of Supreme Court following a hearing that it held to make the determinations directed by our prior orders. In appeal No. 1, petitioner, Colonial Surety Company (Colonial), contends that the court erred in denying its amended petition in proceeding No. 1 and petition in proceeding No. 2, releasing certain escrow funds, and terminating Colonial's undertaking. In appeal No. 2, Colonial contends that the court erred in granting the motion of respondents Resolution Management, LLC (Resolution), Anita M. Hansen, and Gary Albanese for an order striking Colonial's demand for a jury trial.

We note at the outset that the parties entered into a stipulation in proceeding No. 2 discontinuing that proceeding against Hansen and Albanese with prejudice. We therefore dismiss as moot those parts of the appeals from the order and judgment in appeal No. 1 and the order in appeal No. 2 insofar as they granted relief with respect to those respondents in proceeding No. 2.

On the merits, we address first Colonial's contentions in appeal No. 2 because, to the extent Colonial may have been entitled to a jury trial, we would reverse the orders in both appeals and remit the matter to Supreme Court for a trial. Ultimately, however, we conclude that the court properly struck Colonial's demands for a jury trial. "[T]he right to trial by jury is zealously protected in our jurisprudence and yields only to the most compelling circumstances" (*John W. Cowper Co. v Buffalo Hotel Dev. Venture*, 99 AD2d 19, 21). "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever" (NY Const, art 1, § 2). "That guarantee extends to all causes of action to which the right attached at the time of adoption of the 1894 Constitution . . . Historically, however, actions at law were tried by a jury, [and] matters cognizable in equity were tried by the Chancellor. Even though the two systems have merged, vestiges of the law-equity dichotomy remain in the area relating to trial by jury" (*Cowper*, 99 AD2d at 21).

Thus, the right to a jury trial "depends upon the nature of the relief sought" (*Arrow Communication Labs. v Pico Prods.*, 219 AD2d 859, 860). Under the CPLR, a jury trial is available in an action "in which a party demands and sets forth facts which would permit a judgment for a sum of money *only*" (CPLR 4101 [1] [emphasis added]). Where a plaintiff joins legal and equitable causes of action in a complaint, it waives its right to a jury trial (*see Sullivan v Troser Mgmt., Inc.*, 75 AD3d 1059, 1060; *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 481, 482-483; *Cowper*, 99 AD2d at 21). However, "if 'a sum of money alone can provide full relief to the plaintiff under the facts alleged, then there is a right to a jury trial' " (*Arrow Communication Labs.*, 219 AD2d at 860; *see Cadwalader Wickersham & Taft v Spinale*, 177 AD2d 315, 316).

In *V P Supply Corp. v Normand* (27 AD2d 797), a case involving a proceeding pursuant to CPLR 5227 to "obtain the payment of a debt owed to [a] judgment *debtor*" (*id*. at 797 [emphasis added]), we concluded that there "may [be] a right of jury trial (CPLR 410)" (*id.* at 798). The jury trial demands in the appeals before us, however, were made by Colonial, i.e., a judgment *creditor*, in the context of proceedings it had commenced to enforce its own money judgment. Under such circumstances, "whether trial by jury is required . . . [is a] nicer question" (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5225:6 at 391). Professor Siegel posited that "it would appear that [the judgment creditor] cannot insist on one. The context of [the judgment creditor's] standing in the proceeding makes it the equivalent of the old creditor's bill in equity, or in any event analogizes to where a plaintiff seeks both equitable and legal relief in respect of the same claim in the same action, which results in a waiver by the plaintiff but not by the defendant . . . [The judgment creditor] in that situation is seeking legal relief insofar as he wants an adjudication of whether [respondent] owes a money debt [to the judgment debtor], and equitable relief in that he wants the debt, if found due, to be paid not to the [judgment debtor], but to the [judgment] creditor" (*id*.).

That position was based in part on *Leedpak, Inc. v Julian* (78 Misc 2d 519). As in the instant case, the petitioner therein, a judgment creditor, "move[d] under CPLR 5227 for an order requiring [the] respondent to pay the amount of the judgment on the basis that [the] respondent [was] indebted to the judgment debtor in an amount exceeding the judgment" (*id.* at 519-520). While the court in *Leedpak* held that there was a right to a jury trial "at least as to [the] respondent" (*id*. at 520, citing *V P Supply Corp.*, 27 AD2d at 798), the situation was "somewhat different . . . [w]ith respect to [the] petitioner" (*id*. at 521). Specifically, the court in *Leedpak* wrote that "[t]he common-law obligation of [the] respondent, if any, [was] to the judgment debtor, not to [the] petitioner. [The] [p]etitioner [asked] the court to direct [the] respondent to pay to [the] petitioner a debt owed to a third person, the judgment debtor. This would seem to be analogous to, and an outgrowth of, the ancient creditor's bill in equity. [The] [p]etitioner is in a sense asking both legal and equitable relief—legal relief in requiring [the] respondent to pay a debt allegedly owed by [the] respondent to the judgment debtor, and equitable relief in requiring the proceeds to be paid to [the] petitioner for application on the judgment debtor's debt to [the] petitioner. The situation thus[] 'may in some respects be analogized to the difference between a plaintiff who chooses to join legal and equitable causes in a suit in equity and a defendant who is brought into equity and required, among other things, to defend there a law cause of action. It is held that the plaintiff waives the right by joinder . . . but that [the] defendant does not' " (*id.*, quoting *Matter of Garfield*, 14 NY2d 251, 258; *cf. Klein v Loeb Holding Corp.*, 24 Misc 3d 899, 901-905).

Likewise, we conclude that enforcement of a judgment under CPLR 5225 and 5227 against a party other than the judgment debtor is an outgrowth of the "ancient creditor's bill in equity," which was used

after all remedies at law had been exhausted. We thus conclude that Colonial's use of CPLR 5225 and 5227 in this case is in furtherance of both legal and equitable relief and, therefore, that Colonial is not entitled to a jury trial on those combined legal and equitable claims (*see Leedpak, Inc.*, 78 Misc 2d at 519-520; David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5225:6 at 391).

We now turn to appeal No. 1, and we provide a brief summary of the facts giving rise to the proceedings. By its amended petition in proceeding No. 1, Colonial sought to enforce a judgment it obtained against nonparty Paul W. O'Brien, the manager and sole principal of respondent Lakeview Advisers, LLC (Lakeview). Colonial alleged that Lakeview was O'Brien's alter ego, and sought to enforce the judgment against O'Brien by obtaining an order directing Resolution to give Colonial certain payments that Resolution purportedly owed to Lakeview. According to Resolution's president, Mark Bohn, Resolution was formed as a "shell corporation" or "single-purpose entity" to acquire the assets of nonparty FA Holdings in Bankruptcy Court. Bohn was also president of FA Holdings, which entered bankruptcy in 2008, and he acknowledged that Resolution borrowed the money to purchase the assets of FA Holdings from Lakeview.

While proceeding No. 1 was pending, however, Supreme Court directed Resolution to deposit the disputed payments into an escrow account. According to Resolution and Lakeview, Lakeview itself was not entitled to those payments inasmuch as Lakeview was simply a conduit for funds loaned indirectly by the noteholders to Resolution through Lakeview. Resolution further alleged that, as a consequence of that arrangement, it had renegotiated the loans made to it by Lakeview such that Resolution owed the money on those loans directly to the noteholders, rather than to Lakeview, and thereby eliminated its debt to Lakeview.

At the hearing held by the court to make the determinations directed by our prior orders, O'Brien and Bohn maintained, inter alia, that Lakeview was used as a mere conduit for the loans from the noteholders to Resolution. Moreover, both O'Brien and Bohn maintained that the loans owed by Resolution to Lakeview were renegotiated in February 2010 such that Resolution became responsible for paying the noteholders directly. In March 2010, however, both Bohn and O'Brien represented to the trustee in the FA Holdings bankruptcy proceeding that no renegotiation or reformation of the loans had taken place. In view of that representation, we conclude that respondents are barred by judicial estoppel from asserting that the loan modification converting Resolution's obligation to repay Lakeview into an obligation to repay the noteholders directly—thereby extinguishing the debt of Resolution to Lakeview, upon which Colonial has a claim—actually occurred (*see Pacer's Bar & Grill, Inc. v Weinson's, Inc.*, 46 AD3d 1473, 1474; *see also Kittner v Eastern Mut. Ins. Co.*, 80 AD3d 843, 846-847, *lv dismissed* 16 NY3d 890, 18 NY3d 911; *D & L Holdings v Goldman Co.*, 287 AD2d 65, 71-72).

Having concluded that respondents are judicially estopped from

contending that Resolution's debt to Lakeview is extinct, we turn to the question whether, following the hearing, the court properly concluded that Colonial is not entitled to collect against the noteholders pursuant to CPLR 5225 (b), which considers the payment or delivery of property of a judgment debtor, or against Resolution pursuant to CPLR 5227, which considers payments of debts owed to a judgment debtor, pursuant to CPLR 5240. Section 5240 provides, inter alia, that "[t]he court may at any time . . . make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure."

We conclude that the court erred in applying CPLR 5240 here, and we therefore reverse the order and judgment in appeal No. 1, grant the amended petition in proceeding No. 1 and the petition in proceeding No. 2, and remit the matter to Supreme Court to grant an injunction prohibiting the dissipation of assets prior to the satisfaction of Colonial's judgment against O'Brien. As we have noted, the court's "broad discretionary power" to use equity to prevent enforcement of a judgment is not unlimited, and it must balance the "harm likely to result from execution, against the necessity of using that immediate means of attempted satisfaction" (*Colonial Sur. Co.*, 93 AD3d at 1256). Here, Lakeview and Resolution essentially contend, and the court agreed, that because the debt between Resolution and Lakeview was effectively illusory, it would be unfair to allow Colonial, a stranger to Resolution and the Lakeview-Resolution transaction, to enforce its judgment against that debt. We conclude, however, that Resolution used Lakeview, if not to perpetrate a fraud on the Bankruptcy Court, to conceal the true nature of the loan to Resolution from the Bankruptcy Court's view, and it would contravene public policy to allow Resolution to appear to enter into a valid loan agreement with Lakeview for purposes of the FA Holdings bankruptcy proceeding but then invoke CPLR 5240 in an attempt to avoid the effect of that loan agreement in this proceeding (*see Greenleaf v Lachman*, 216 AD2d 65, 66, *lv denied* 88 NY2d 802). Indeed, the record reflects that the bulk of the loan by Lakeview to Resolution came directly from Bohn and the other principal of Resolution, or from loans based on property owned by them, and that the noteholders are largely mere "fronts" for Bohn and the other principal of Resolution, filtered through Lakeview to create the appearance of an arm's-length loan to buy the assets of FA Holdings, in order to alleviate the suspect nature of the transaction (*see e.g. Wolverton v Shell Oil Co.*, 442 F2d 666, 669), and the special scrutiny that comes with such sales to bankrupts or their privies (*see e.g. Matter of Silver Bros. Co., Inc.*, 179 BR 986, 1010 n 14).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

44

CA 14-00319

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

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

V MEMORANDUM AND ORDER

LAKEVIEW ADVISORS, LLC, ET AL., RESPONDENTS,
AND RESOLUTION MANAGEMENT, LLC,
RESPONDENT-RESPONDENT.
(PROCEEDING NO. 1.)

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

V

NEAVERTH ENTERPRISES, LLC, ET AL.,
RESPONDENTS,
ANITA M. HANSEN AND GARY ALBANESE,
RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 2.)
(APPEAL NO. 2.)

UNDERBERG & KESSLER LLP, BUFFALO (EDWARD P. YANKELUNAS OF COUNSEL), AND MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, NEW YORK CITY, FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered October 4, 2013. The order granted the motion of respondents Resolution Management, LLC, Anita M. Hansen and Gary Albanese to strike the jury demand of petitioner and struck the jury demand.

It is hereby ORDERED that said appeal from that part of the order granting relief with respect to respondents Anita M. Hansen and Gary Albanese is unanimously dismissed, and the order is affirmed without costs.

Same Memorandum as in *Matter of Colonial Sur. Co. v Lakeview*

Advisors, LLC ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

45

TP 14-01326

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

IN THE MATTER OF DAVID FRANZ, PETITIONER,

V MEMORANDUM AND ORDER

MARTIN G. D'AMBROSE, TOWN/VILLAGE ADMINISTRATOR, EAST ROCHESTER AND VILLAGE OF EAST ROCHESTER, RESPONDENTS.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (MATTHEW J. FUSCO OF COUNSEL), FOR PETITIONER.

COUGHLIN & GERHART, LLP, BINGHAMTON (PAUL J. SWEENEY 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 an order of the Supreme Court, Monroe County [Thomas A. Stander, J.], entered July 23, 2014) to review a determination of respondents. The determination denied petitioner's application for benefits under General Municipal Law § 207-c.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he is not entitled to General Municipal Law § 207-c benefits. After a hearing, the Hearing Officer issued a report recommending that petitioner's application for such benefits be denied on the ground that there was no causal link between petitioner's alleged injuries and the motor vehicle accident at issue. Respondents issued a final determination comporting with the Hearing Officer's recommendation. On this record, we are constrained to conclude that respondents' determination that there was no causal link between petitioner's alleged injuries and the accident is supported by substantial evidence (*see Matter of Hensel v City of Utica*, 115 AD3d 1217, 1218, *lv denied* 23 NY3d 908, *rearg denied* 24 NY3d 975).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

46

CA 14-01098

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

IN THE MATTER OF SMALL SMILES LITIGATION

KELLY VARANO, AS PARENT AND NATURAL GUARDIAN OF INFANT JEREMY BOHN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA, NY, LLC, FORBA, LLC, NOW KNOWN AS LICSAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAC NY, LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, SMALL SMILES DENTISTRY OF SYRACUSE, LLC, DANIEL E. DEROSE, MICHAEL A. DEROSE, D.D.S., EDWARD J. DEROSE, D.D.S., ADOLPH R. PADULA, D.D.S., WILLIAM A. MUELLER, D.D.S., MICHAEL W. ROUMPH, NAVEED AMAN, D.D.S., KOURY BONDS, D.D.S., YAQOOB KHAN, D.D.S., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA, NY, LLC AND SMALL SMILES DENTISTRY OF SYRACUSE, LLC.

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C., ALBANY (LIA B. MITCHELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS FORBA, LLC, NOW KNOWN AS LICSAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAC NY, LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, DANIEL E. DEROSE, MICHAEL A. DEROSE, D.D.S., EDWARD J. DEROSE, D.D.S., ADOLPH R. PADULA, D.D.S., WILLIAM A. MUELLER, D.D.S. AND MICHAEL W. ROUMPH.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, ALBANY (MELISSA A. MURPHY-PETROS OF COUNSEL), FOR DEFENDANTS-APPELLANTS NAVEED AMAN, D.D.S., KOURY BONDS, D.D.S. AND YAQOOB KHAN, D.D.S.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 17, 2013. The order, insofar as appealed from, denied in part the summary judgment motions of defendants-appellants.

It is hereby ORDERED that the case is held and the decision is reserved in accordance with the following Memorandum: Defendants-appellants (defendants) appeal from an order denying in part their pretrial motions for summary judgment. We note that, in *Varano v FORBA Holdings, LLC* ([appeal No. 2] ___ AD3d ___ [Feb. 6, 2015]), decided herewith, we are reversing the order that granted plaintiff's motion pursuant to CPLR 4404 (a) to set aside the verdict, and we are remitting the matter to Supreme Court to decide the motion following an evidentiary hearing. In the interest of judicial economy, we hold this case and reserve decision, pending resolution of that motion (*see generally Buffalo United Charter Sch. v New York State Pub. Empl. Relations Bd.*, 107 AD3d 1437, 1438). In the event that the court denies plaintiff's motion upon remittal, these appeals by defendants will be moot (*see generally Douglas v Kingston Income Partners '87*, 2 AD3d 1079, 1082, *lv denied* 2 NY3d 701).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

48

CA 14-01009

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

RYAN M. FORRESTEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARGUERITA M. FORRESTEL, DEFENDANT-APPELLANT.

LEONARD G. TILNEY, JR., LOCKPORT, FOR DEFENDANT-APPELLANT.

JOHN P. PIERI, BUFFALO, FOR PLAINTIFF-RESPONDENT.

KRISTIN L. ARCURI, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered September 19, 2013. The order awarded the parties joint custody of their children and prohibited relocation of the children to the Netherlands.

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

Memorandum: Defendant mother appeals from an order that, inter alia, awarded the parties joint custody of their children and denied her request to relocate with the children to the Netherlands.

Contrary to the mother's contention, Supreme Court's explanation of its reasons for rejecting her expert's opinion "is supported by the record, and thus it cannot be said that the court arbitrarily rejected [that] opinion" (*Matter of Alexandra H. v Raymond B.H.*, 37 AD3d 1125, 1126; *see Matter of Hopkins v Wilkerson*, 255 AD2d 319, 319-320). Contrary to the mother's further contention, the court's determination that joint custody with plaintiff father is in the children's best interests "is supported by a sound and substantial basis in the record and thus [should] not be disturbed" (*Wideman v Wideman*, 38 AD3d 1318, 1319 [internal quotation marks omitted]). Although the custody trial included evidence of acrimony between the parties, the record supports the court's determination that "the parties are not so embattled and embittered as to effectively preclude joint decision making" (*Capodiferro v Capodiferro*, 77 AD3d 1449, 1450 [internal quotation marks omitted]).

The mother contends that the court erred in denying her request to relocate with the children to the Netherlands. We reject that contention. Inasmuch as this case involves an initial custody determination, "it cannot properly be characterized as a relocation

case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) need be strictly applied" (*Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272, *appeal dismissed* 19 NY3d 887, 20 NY3d 1052; *see Matter of Moore v Kazacos*, 89 AD3d 1546, 1546, *lv denied* 18 NY3d 1052). "Although a court may consider the effect of a parent's relocation as part of a best interests analysis, relocation is but one factor among many in its custody determination" (*Saperston*, 93 AD3d at 1272; *see Matter of Quistorf v Levesque*, 117 AD3d 1456, 1457). Here, the court "properly determined that the children's relationship with [the father] would be adversely affected by the proposed relocation because of the distance between [Erie] County and [the Netherlands]" (*Matter of Jones v Tarnawa*, 26 AD3d 870, 871, *lv denied* 6 NY3d 714; *see Matter of Ramirez v Velazquez*, 91 AD3d 1346, 1347).

Finally, we reject the mother's contention that the court erred in refusing to allow the testimony of a therapist who provided treatment to one of the children. The Attorney for the Child "did not consent to the disclosure of confidential communications between the child and [her] therapist" (*Matter of Ascolillo v Ascolillo*, 43 AD3d 1160, 1161; *cf. Matter of Billings v Billings*, 309 AD2d 1194, 1194).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

49

KA 11-01083

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered June 9, 2010. The appeal was held by this Court by order entered January 3, 2014, decision was reserved and the matter was remitted to the Supreme Court, Erie County, for further proceedings (113 AD3d 1116). The proceedings were held and completed.

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 robbery in the first degree (Penal Law § 160.15 [3]) and robbery in the second degree (§ 160.10 [2] [a]). We previously held the case, reserved decision and remitted the matter to Supreme Court for a reconstruction hearing to determine whether defendant and his attorney were notified of the contents of a jury note and what action, if any, the court took with respect to that note (*People v Williams*, 113 AD3d 1116, 1117). During the reconstruction hearing, the parties stipulated to the admission in evidence of the jury note, and of the transcript of that part of the trial proceedings concerning the jury note, which had been inadvertently excluded from the original record on appeal. That evidence establishes that the jury note consisted of a request for a readback of the entire testimony of a witness, and that the court read the note into the record in the presence of defendant and his attorney. Then, pursuant to the court's direction, the court reporter read back the requested testimony. Inasmuch as the jury note requested only the readback of a witness's entire testimony, defendant was required to preserve his challenge to the court's response (*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). Defendant failed to do so, and his contention therefore is unpreserved (*see People v Alcide*, 21 NY3d 687, 693-694). 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]).

Defendant also failed to preserve for our review his challenge to the legal sufficiency of the evidence with respect to whether he possessed and used a dangerous instrument, and whether the victim suffered a physical injury, inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' at" those alleged shortcomings in the evidence (*People v Gray*, 86 NY2d 10, 19). In any event, defendant's contention lacks merit, inasmuch as there is a "valid line of reasoning and permissible inferences" that could lead reasonable persons to the conclusion reached by the jury based on the evidence presented at trial (*People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is contrary to the weight of the evidence (*see generally Bleakely*, 69 NY2d at 495).

Contrary to defendant's further contention, "defense counsel's failure to make a specific motion for a trial order of dismissal at the close of the People's case [does] not constitute ineffective assistance of counsel, inasmuch as any such motion would have had no chance of success" (*People v Horton*, 79 AD3d 1614, 1616, *lv denied* 16 NY3d 859; *see generally People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). With respect to defendant's remaining allegations of ineffective assistance of counsel, defendant failed to demonstrate a lack of strategic or other legitimate explanations for defense counsel's alleged shortcomings (*see People v McGee*, 87 AD3d 1400, 1402-1403, *affd* 20 NY3d 513; *People v Benevento*, 91 NY2d 708, 712-713). We conclude that the evidence, the law and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, defendant failed to preserve for our review his contention that the sentence was vindictive (*see People v Hurley*, 75 NY2d 887, 888; *People v Irrizarry*, 37 AD3d 1082, 1083, *lv denied* 8 NY3d 946) and, in any event, that contention is also without merit (*see Irrizarry*, 37 AD3d at 1083). It is well settled that " '[t]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial' " (*id*.). The sentence is not unduly harsh or severe.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

50

TP 14-01310

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

IN THE MATTER OF LORDUNIQUE CAMPBELL, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered July 15, 2014) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

51

KA 13-01566

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DARLENE BENSON-SEAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 13, 2013. The judgment convicted defendant, upon her plea of guilty, of manslaughter in the first degree.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

52

KA 14-01277

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIELLE KELLOGG, DEFENDANT-APPELLANT.

JOHN K. JORDAN, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered May 22, 2013. The judgment convicted defendant, upon her plea of guilty, of vehicular manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of vehicular manslaughter in the first degree (Penal Law § 125.13 [3]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal [her] conviction that [she] was also waiving [her] right to appeal the harshness of [her] sentence" (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Peterson*, 111 AD3d 1412, 1412). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

53

KA 11-00580

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PIERRE C. WILSON, 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 (Frank P. Geraci, Jr., J.), rendered November 3, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (six counts) and robbery in the second degree (23 counts).

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 and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of six counts of robbery in the first degree (Penal Law § 160.15 [3]) and 23 counts of robbery in the second degree (§ 160.10 [1]; [2] [a], [b]). We reject defendant's contention that his sentence is unduly harsh and severe. We agree with defendant, however, that, because restitution was not part of the plea agreement, County Court should have afforded him the opportunity to withdraw his plea before ordering him to pay restitution (*see People v Ponder*, 42 AD3d 880, 882, *lv denied* 9 NY3d 925; *People v Robinson*, 21 AD3d 1356, 1357). Although defendant failed to preserve his contention for our review, we exercise our power to review it as a matter of discretion in the interest of justice (*see Ponder*, 42 AD3d at 882). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the promised sentence or to afford defendant the opportunity to withdraw his plea.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

54

KA 10-01488

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTINE L. COPPETA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered June 15, 2010. The judgment convicted defendant, upon a jury verdict, of offering a false instrument for filing 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 her, upon a jury verdict, of two counts of offering a false instrument for filing in the first degree (Penal Law § 175.35), defendant's sole contention is that Supreme Court erred in denying her motion for a mistrial on the ground that the testimony of a witness that a bracelet was missing from the witness's residence was *Molineux* evidence and was improperly admitted because she did not receive the requisite notice of the testimony. We conclude that defendant's contention is without merit because the testimony did not implicate defendant in the commission of any uncharged crime and thus it did not constitute *Molineux* evidence (*see People v Hillard*, 79 AD3d 1757, 1758, *lv denied* 17 NY3d 796; *see generally People v Arafet*, 13 NY3d 460, 464-465).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

55

KA 10-00559

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEWIS MOORE, JR., DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), 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 (Michael L. Dwyer, J.), rendered September 11, 2009. The judgment convicted defendant, upon a nonjury verdict, of grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of grand larceny in the fourth degree (Penal Law § 155.30 [1]), defendant contends that County Court erred in admitting in evidence a spreadsheet listing the value of jackets stolen from the retail store and that the evidence of the value of the jackets stolen is legally insufficient to support the conviction. In objecting to the admission of the exhibit in evidence, defendant contended only that it contradicted the testimony of the store owner. We thus conclude that defendant failed to preserve for our review his present contention that the document did not meet the foundational requirements of the business records exception to the hearsay rule (*see People v Evans*, 59 AD3d 1127, 1128, *lv denied* 12 NY3d 815; *see also People v Billip*, 65 AD3d 430, 430, *lv denied* 13 NY3d 834; *People v Sanchez*, 260 AD2d 178, 178-179, *lv denied* 93 NY2d 1026). 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]). By making only a general motion to dismiss the indictment, defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that defendant's contention lacks merit.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

56

KAH 13-01517

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
SHERMAN WALKER, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MS. DOLCE, SUPERINTENDENT, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered May 28, 2013 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: We reject the contention of petitioner that Supreme Court erred in dismissing his petition for a writ of habeas corpus. The remedy of habeas corpus is unavailable because petitioner would not be eligible for immediate release from custody in the event that he succeeded on the merits of the proceeding (*see People ex rel. Porter v Napoli*, 56 AD3d 830, 831; *see also People ex rel. Hinton v Graham*, 66 AD3d 1402, 1402, *lv denied* 13 NY3d 934, *rearg denied* 14 NY3d 795). We note that, although this Court has the power to convert this proceeding into one pursuant to CPLR article 78 (*see People ex rel. Brown v New York State Div. of Parole*, 70 NY2d 391, 398), we deem such conversion to be inappropriate on the record before us. Finally, contrary to petitioner's contention, petitioner was afforded meaningful representation by the attorney assigned to represent him in connection with the habeas corpus proceeding (*see generally People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *People v Benevento*, 91 NY2d 708, 712).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

57

CA 13-01987

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

IN THE MATTER OF KIAMBU PORTER,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered October 3, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Sanchez v Evans*, 111 AD3d 1315).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

58

CA 13-01275

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF RICHARD HOLMES, CONSECUTIVE NO. 185048, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered April 18, 2013 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, directed that petitioner shall continue to be committed to a secure treatment facility.

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

Memorandum: In March 2009 petitioner was determined to be a dangerous sex offender in need of civil confinement (*see* Mental Hygiene Law § 10.07 [f]), and he is currently confined at the Central New York Psychiatric Center in Oneida County. Petitioner appeals from an order continuing his confinement in a secure treatment facility (§ 10.09 [h]). A subsequent order stayed all future annual review proceedings pending this appeal. Thus, contrary to respondents' contention, this appeal has not been rendered moot (*cf. Matter of Martinek v State of New York*, 108 AD3d 1048, 1049).

Contrary to petitioner's contention, we conclude that Supreme Court properly denied his motion to substitute counsel because "he made no good cause showing to warrant [the assignment of] substitute counsel" (*People v Walker*, 105 AD3d 1154, 1156, *lv denied* 21 NY3d 857; *see Matter of Brooks v State of New York*, 120 AD3d 1577, 1578-1579). Also contrary to petitioner's contention, we conclude that he waived

his right to an annual review hearing and thus was not entitled to an annual hearing. Here, petitioner indicated on the annual written notice of the right to petition the court for discharge, which included a waiver option, that he did not wish to waive his right to petition for discharge (*see* Mental Hygiene Law § 10.09 [a]; *Matter of Davis v State of New York*, 106 AD3d 1488, 1488). Nevertheless, petitioner responded "Yes, sir" when the court inquired of petitioner on the date scheduled for the hearing whether he was "willing to waive [his] right to a hearing or withdraw any requests for such a hearing." We therefore conclude that petitioner waived that right (*see* § 10.09 [d]; *Davis*, 106 AD3d at 1489-1490).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

59

CA 14-00748

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

HSBC BANK USA, NATIONAL ASSOCIATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PRIME, L.L.C., PHILIP J. SIMAO,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

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

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered December 18, 2013. The order, inter alia, granted summary judgment to plaintiff.

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

Memorandum: Plaintiff commenced this foreclosure action after Prime, L.L.C. (Prime) and Philip J. Simao (collectively, defendants) defaulted on a note executed by Prime and guaranteed by Simao. Defendants appeal from an order that granted plaintiff's motion for, inter alia, summary judgment on the complaint pursuant to CPLR 3212, dismissal of defendants' counterclaims and the appointment of a referee to compute plaintiff's damages. We reject at the outset defendants' contention that Supreme Court should have treated plaintiff's motion for summary judgment pursuant to CPLR 3212 as a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1). Contrary to defendants' contention, the mere fact that plaintiff relies on documentary evidence, i.e., a forbearance agreement containing a release, in support of its motion does not alter the fact that it is a motion for summary judgment (*see e.g. Bronson v Hansel*, 16 NY3d 850, 851). Defendants' contention that plaintiff's motion should have been treated as a CPLR 3211 motion to dismiss because issue had not been joined with respect to plaintiff's affirmative defense of release is raised for the first time in their reply brief and thus is not properly before us (*see Turner v Canale*, 15 AD3d 960, 961, *lv denied* 5 NY3d 702).

We likewise reject defendants' contention that the court erred in

granting plaintiff's motion before discovery was complete. Defendants "failed to demonstrate that facts essential to oppose the motion were in plaintiff's exclusive knowledge and possession and could be obtained by discovery" (*Franklin v Dormitory Auth. of State of N.Y.*, 291 AD2d 854, 854; *see* CPLR 3212 [f]; *Avraham v Allied Realty Corp.*, 8 AD3d 1079, 1079), and the " 'mere hope that somehow [defendants] will uncover evidence that will prove [their] case is not sufficient to defeat a motion for summary judgment' " (*Rowland v Wilmorite, Inc.*, 68 AD3d 1770, 1771).

We conclude with respect to the merits of that part of plaintiff's motion for summary judgment on the complaint that plaintiff "established [its] prima facie entitlement to summary judgment as a matter of law by submitting the mortgage, the underlying note, and evidence of a default" (*Ferri v Ferri*, 71 AD3d 949, 949), and defendants "failed to 'demonstrate the existence of a triable issue of fact regarding a bona fide defense to the action' " (*Ekelmann Group, LLC v Stuart* [appeal No. 2], 108 AD3d 1098, 1099; *see Dasz, Inc. v Meritocracy Ventures, Ltd.*, 108 AD3d 1084, 1084). Contrary to defendants' contention, there is no issue of fact concerning its defense that plaintiff breached the implied covenant of fair dealing by increasing the interest rate on the note by three percent retroactively to the date of the default. Here, the note expressly provided that upon default the interest rate would increase by three percent, and "[n]o obligation can be implied . . . [that] would be inconsistent with other terms of the contractual relationship" (*Murphy v American Home Prods. Corp.*, 58 NY3d 293, 304; *see Marine Midland Bank v Yoruk*, 242 AD2d 932, 933).

Also contrary to defendants' contention, the court properly considered plaintiff's defense of release in granting that part of plaintiff's motion to dismiss the counterclaims despite the fact that the defense was not pleaded in plaintiff's reply. " '[A] court may grant summary judgment based upon an unpleaded defense where[, as here,] reliance upon that defense neither surprises nor prejudices the [other party]' " (*Schaefer v Town of Victor*, 77 AD3d 1346, 1347; *see Syracuse Equip. Co. v Lebis Contr.*, 255 AD2d 992, 993). Defendants failed to establish any prejudice or surprise with respect to the unpleaded defense of release (*see Schaefer*, 77 AD3d at 1347). We further conclude that, contrary to defendants' contention, they "failed to raise a triable issue of fact with respect to their claim that the release is void based on fraud" (*Marlowe v Muhlnickel*, 294 AD2d 830, 831; *see generally Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276).

Finally, defendants' contention that their counterclaims should have been severed from plaintiff's foreclosure action is not properly before us inasmuch as it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

60

CA 13-00757

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

IN THE MATTER OF MARY D'ALESSANDRO, ON BEHALF OF VALLEMAIO PROPERTIES, LLC, DAVID BONIS, DEBORAH BURNS, THOMAS TURNER, BRUCE T. HENRY, PETITIONERS-PLAINTIFFS-APPELLANTS, ET AL., PETITIONER-PLAINTIFF,

V MEMORANDUM AND ORDER

GARY KIRKMIRE, DIRECTOR OF INSPECTION AND COMPLIANCE SERVICES, BUREAU OF NEIGHBORHOOD SERVICE CENTER OF CITY OF ROCHESTER, AND CITY OF ROCHESTER, RESPONDENTS-DEFENDANTS-RESPONDENTS.

SANTIAGO BURGER ANNECHINO LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

ROBERT J. BERGIN, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR THE NEW YORK STATE COALITION OF PROPERTY OWNERS & BUSINESSES, INC., AMICUS CURIAE.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered August 3, 2012 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, inter alia, declared that the case management fees imposed by defendant-respondent City of Rochester under section 90-21 of the Municipal Code are valid, constitutional and legally imposed.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion of petitioners-plaintiffs for summary judgment is granted, the cross motion of respondents-defendants for summary judgment is denied, the determinations against petitioners-plaintiffs David Bonis, Deborah Burns and Bruce T. Henry are annulled and judgment is granted in favor of petitioners-plaintiffs-appellants as follows:

> It is ADJUDGED and DECLARED that section 90-21 of the Municipal Code of the City of Rochester is unconstitutional under the United States and New York Constitutions.

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action

seeking, inter alia, to declare section 90-21 of the Municipal Code of the City of Rochester (Code) unconstitutional. That section of the Code permits respondent-defendant City of Rochester (City) to collect a "case management fee" (CMF) of $100 in any case in which a property owner has failed, for over one year, to comply with a notice and order notifying that owner of Code violations related to the property (Code § 90-21). The explicit intent of the CMF is "to obtain some reimbursement for the cost of [property] inspections and to reduce the number of [notice and order] cases" (§ 90-21 [A]). The CMF is assessed by the Director of Inspection and Compliance Services (Director) based upon his or her review of the "case file" (§ 90-21 [F]). A property owner may protest the CMF "in a writing delivered to the Director . . . within 10 business days from the date of the notice of assessment" (*id.*). That same Director must then "review the case file and the written submission of the owner and make a determination on the protest in writing within 10 business days from the date of the protest" (*id.*). The determination of the Director "shall be the final determination of the City . . . and shall be subject to review pursuant to [CPLR a]rticle 78" (*id.*). In the event that the CMF remains unpaid after 60 days, it shall become a lien against the property and, if unpaid on May 1, shall be added to the property taxes for that property (*see* § 90-21 [D]).

Respondent-defendant Gary Kirkmire, in his official capacity as the Director, imposed CMFs on petitioners, although he eventually waived the CMFs imposed on certain petitioners, finding that those CMFs were erroneously imposed. After petitioners commenced this proceeding/action, they moved for summary judgment on the petition/complaint and sought a judgment declaring that section 90-21 is invalid, that it impermissibly authorizes the imposition of the CMF without a trial and that defendants may not collect the CMF from property owners in the City or place an unpaid CMF on the property tax bills. Respondents-defendants (respondents) moved to dismiss the petition/complaint, and Supreme Court issued an order converting that motion, upon the consent of the parties, into a cross motion for summary judgment. The court also enjoined the City from imposing any further CMFs on petitioners or placing any further CMFs, penalties or interest on petitioners' property tax bills.

Following additional submissions by the parties, the court issued a judgment declaring that section 90-21 is constitutional and that the CMFs imposed by section 90-21 were valid and were constitutionally and legally imposed. The court further vacated the injunction previously imposed, concluded that petitioners were not denied procedural due process and confirmed the determinations of the Director with respect to petitioners David Bonis, Deborah Burns and Bruce T. Henry, for whom the CMFs were not waived. We now reverse.

The appealing petitioners contend that the CMF imposed by Code § 90-21 is, in actuality, a fine, and that it is imposed upon property owners without due process. We agree. Although "[t]he exceedingly strong presumption of constitutionality applies . . . to ordinances of municipalities[,] . . . [that] presumption is rebuttable" (*Lighthouse Shores v Town of Islip*, 41 NY2d 7, 11-12; *see Matter of Turner v*

Municipal Code Violations Bur. of City of Rochester, 122 AD3d 1376, 1377), and we conclude that petitioners have rebutted the presumption of constitutionality. We therefore reverse the judgment and grant judgment in favor of the appealing petitioners, declaring that section 90-21 is unconstitutional.

A determination whether the CMF is a fee or a fine imposed as a penalty is critical to our analysis because "[p]rocedural due process rights do not apply to legislation of general applicability," and thus the imposition of fees such as licensing fees are "not subject to attack on grounds of procedural due process. Fines [that are imposed as a penalty], however, can implicate procedural due process rights" (*Jones v Wildgen*, 320 F Supp 2d 1116, 1127 [D Kan 2004], *reconsideration granted in part on other grounds* 349 F Supp 2d 1358; *see Twin Lakes Dev. Corp. v Town of Monroe*, 1 NY3d 98, 106-107, *cert denied* 541 US 974). Respondents contend that the CMF is a fee charged in exchange for a service or benefit, i.e., the numerous inspections of the property while the notice and order is in effect. In our view, the CMF is the equivalent of a fine imposed as a penalty, i.e., a sum of money required to be paid as a result of either "doing some act which is prohibited, or omitting to do some act which is required to be done" (*City of Buffalo v Neubeck*, 209 App Div 386, 388; *see Matter of Dumbarton Oaks Rest. & Bar v New York State Liq. Auth.*, 58 NY2d 89, 93-94). The CMF is assessed only after respondents have determined that a property owner has violated the Code in the first instance and that the property owner has failed to abate those violations within one year.

It is well settled that states may not "deprive any person of life, liberty, or property, without due process of law" (US Const, 14th Amend, § 1; *see* NY Const, art I, § 6). Having concluded that the CMF is a fine imposed as a penalty on the property owner, we must determine whether the ordinance provides property owners with due process of law. As the Court of Appeals wrote in *Morgenthau v Citisource, Inc.* (68 NY2d 211), "[w]e have long recognized that 'due process is a flexible constitutional concept calling for such procedural protections as a particular situation may demand' . . . [,] and in determining whether [f]ederal due process standards have been met, we look to the three distinct factors that form the balancing test enunciated by the Supreme Court in *Mathews v Eldridge* (424 US 319, 335): 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail' " (*id.* at 221).

While we agree with the court that the private interest at stake, i.e., $100, "is relatively insubstantial," we conclude that there is a significant risk of erroneous deprivation of that interest through the procedures established by the ordinance. Petitioners submitted evidence establishing that, of the 583 CMFs challenged, 392 were voided. Indeed, as noted above, three of the petitioners had their

CMFs waived as erroneously imposed. We reject the contention of respondents that such evidence establishes that the procedures are "obviously effective." In our view, it establishes a serious flaw in the system.

Although " '[d]ue process does not, of course, require that the defendant in every civil case actually have a hearing on the merits' " (*Curiale v Ardra Ins. Co.*, 88 NY2d 268, 274, quoting *Boddie v Connecticut*, 401 US 371, 378), we conclude that due process requires some type of hearing at which the City should be required to establish that property owners did not abate the violation within the one-year period. Evidence in the record establishes that there may be significant disputes between property owners and inspectors concerning whether a violation has been satisfactorily abated. Inasmuch as the determination whether compliance has been achieved is made solely by City officials, the procedures established by section 90-21 do not provide a sufficient opportunity for the property owner to challenge that determination (*see Matter of Hecht v Monaghan*, 307 NY 461, 469-470; *see also Jones*, 320 F Supp 2d at 1127-1129). Moreover, the City official reviewing the written protest is the same official who assessed the CMF in the first instance. Contrary to the contention of respondents, the availability of a CPLR article 78 proceeding does not establish that the statute provides sufficient procedural due process because such proceedings "presuppose administrative procedures that conform with due process requirements" (*People v David W.*, 95 NY2d 130, 140; *cf. Matter of County of Broome [Ritter]*, 86 AD3d 817, 819, *lv denied* 17 NY3d 716).

Finally, we reject respondents' contention that additional procedural safeguards, such as a hearing, would be too costly and unduly burdensome. Indeed, we note that such hearings are provided in the red-light traffic cases where the penalty is $50 (*see Krieger v City of Rochester*, 42 Misc 3d 753, 770-771; *see generally* Vehicle and Traffic Law § 1111-b *et seq*.).

In view of our determination, we do not address the appealing petitioners' remaining contentions or the contention raised in the amicus brief.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

61

CA 14-00963

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

MARGARET PASSUCCI, AS ADMINISTRATRIX OF THE ESTATE OF LUCILLE FIERLE, DECEASED, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

ABSOLUT CENTER FOR NURSING AND REHABILITATION AT ALLEGANY, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT AURORA PARK, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT DUNKIRK, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT EDEN, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT ENDICOTT, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT GASPORT, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT HOUGHTON, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT ORCHARD PARK, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT SALAMANCA, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT THREE RIVERS, LLC, ABSOLUT CENTER FOR NURSING AND REHABILITATION AT WESTFIELD, LLC, ABSOLUT FACILITIES MANAGEMENT, LLC, ISRAEL SHERMAN, AND JOHN DOES 1-200, DEFENDANTS-APPELLANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM J. BRENNAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

BROWN CHIARI LLP, LANCASTER (MICHAEL C. SCINTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered January 10, 2014. The order granted in part and denied in part the motion of plaintiff for class certification.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

62

OP 14-01189

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

IN THE MATTER OF AMIL DINSIO, PETITIONER,

V MEMORANDUM AND ORDER

SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, RESPONDENT.
(PROCEEDING NO. 1.)

AMIL DINSIO, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Third Judicial Department and transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Appellate Division of the Supreme Court in the Third Judicial Department entered June 20, 2014).

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

Memorandum: In 1997, petitioner was convicted upon a jury verdict of, inter alia, robbery in the first degree and, on appeal, the judgment was modified in part and otherwise affirmed (*People v Dinsio*, 286 AD2d 517, 519, *lv denied* 97 NY2d 703, *cert denied* 536 US 942). Petitioner thereafter filed several motions pursuant to CPL article 440 seeking to vacate the judgment on various grounds, including the alleged destruction and fabrication of evidence. County Court denied the motions, and respondent denied petitioner's application for leave to appeal therefrom (*see* CPL 450.15 [1]; 460.15).

Petitioner commenced these original proceedings pursuant to CPLR article 78 in the nature of mandamus. In proceeding No. 1, petitioner seeks to compel respondent to determine the issues raised in his CPL article 440 motions or, alternatively, to remit the motions to County Court for purposes of an evidentiary hearing on the grounds raised. It is well established that "[t]he writ of mandamus is an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought" (*Matter of Johnson v Corbitt*, 87 AD3d 1214, 1215, *lv denied* 18 NY3d 802; *see Matter of Legal Aid Socy.*

of Sullivan County v Scheinman, 53 NY2d 12, 16; *Matter of State of New York v King*, 36 NY2d 59, 62). Trial courts are vested with the discretion to grant or deny a CPL article 440 motion, either with or without a hearing (*see* CPL 440.10 [1]; *People v Saxton*, 93 AD3d 1077, 1078, *lv denied* 18 NY3d 998; *People v Boyd*, 256 AD2d 170, 170, *lv denied* 93 NY2d 850), and the denial of such a motion is appealable only by leave of an intermediate appellate court (*see* CPL 450.15, 460.15; *People v Jermain*, 56 AD3d 1165, 1166, *lv denied* 11 NY3d 926). Thus, "inasmuch as the [decision whether to grant or deny such a motion] is entrusted to respondent's discretion and judgment . . . [,] mandamus does not lie" (*Matter of Johnson v Fischer*, 104 AD3d 1004, 1005). We therefore dismiss the petition in proceeding No. 1.

In proceeding No. 2, petitioner seeks to compel respondent to "process" his petition in proceeding No. 1 or, in the alternative, to transfer the matter to another court. Because respondent subsequently accepted petitioner's papers in proceeding No. 1 for filing and transferred the proceeding to this Court for determination, we conclude that proceeding No. 2 has been rendered academic and the petition therein is therefore dismissed (*see e.g. Matter of Mitchell v Knipel*, 121 AD3d 792, 792, *lv denied* ___ NY3d ___ [Dec. 18, 2014]). In proceeding No. 3, petitioner seeks to prohibit respondent from dismissing the first two proceedings and to compel respondent to transfer the proceedings to a different court. That proceeding has been rendered academic for the same reasons set forth above, and we therefore dismiss the petition in proceeding No. 3.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

63

OP 14-01190

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

IN THE MATTER OF AMIL DINSIO, PETITIONER,

V MEMORANDUM AND ORDER

SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, RESPONDENT.
(PROCEEDING NO. 2.)

AMIL DINSIO, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Third Judicial Department and transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Appellate Division of the Supreme Court in the Third Judicial Department entered June 20, 2014).

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

Same Memorandum as in *Matter of Dinsio v Supreme Court, Appellate Div., Third Judicial Dept*. ([proceeding No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

64

OP 14-01191

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

IN THE MATTER OF AMIL DINSIO, PETITIONER,

V MEMORANDUM AND ORDER

SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, RESPONDENT.
(PROCEEDING NO. 3.)

AMIL DINSIO, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Third Judicial Department and transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Appellate Division of the Supreme Court in the Third Judicial Department entered June 20, 2014).

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

Same Memorandum as in *Matter of Dinsio v Supreme Court, Appellate Div., Third Judicial Dept*. ([proceeding No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

65

CA 14-01132

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

JAMES ZIMMER, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF LANCASTER INDUSTRIAL DEVELOPMENT AGENCY, AMERICAN SALES COMPANY, INC. AND AMERICAN SALES COMPANY, LLC, DEFENDANTS-APPELLANTS-RESPONDENTS.

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 11, 2013. The order granted plaintiff's motion for partial summary judgment and granted in part and denied in part defendants' cross motion 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 cross motion seeking summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action and by denying that part of the cross motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it is based on the alleged violation of 12 NYCRR 23-1.21 (d) (2) and reinstating that cause of action to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while attempting to repair a rooftop commercial heating and air conditioning unit. Plaintiff's wrist was fractured when the upper section of a 40-foot extension ladder fell and struck plaintiff while plaintiff and a coworker were standing on the ground, attempting to set the ladder in place. Although the ladder was equipped with automatic positive acting locks to prevent and/or halt the uncontrolled retraction of the upper extension, those devices were iced-over at the time of plaintiff's accident as a result of the ladder having been stored outside the night before. Supreme Court granted plaintiff's motion for partial summary judgment on liability on the Labor Law § 240 (1) cause of action and granted only in part defendants' cross motion for summary judgment dismissing the complaint, dismissing the Labor Law § 241 (6) cause of action.

Contrary to defendants' contention on their appeal, the evidence established that plaintiff was injured by an elevation related risk within the scope of Labor Law § 240 (1). Although the feet of the lower section of the ladder were at the same level as plaintiff and the upper extendable section fell only a short distance, plaintiff is not precluded from recovery under section 240 (1) (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 6-7). Defendants' contention that plaintiff should have inspected the ladder "amounts, at most, to contributory negligence, a defense inapplicable to a Labor Law § 240 (1) [cause of action]" (*Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403).

We agree with defendants, however, that the court erred in denying that part of their cross motion with respect to the Labor Law § 200 and common-law negligence causes of action, and we therefore modify the order accordingly. "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; *see Gielow v Rosa Coplon Home*, 251 AD2d 970, 972, *lv dismissed in part and denied in part* 92 NY2d 1042, *rearg denied* 93 NY2d 889). Here, defendants met their initial burden by establishing that plaintiff's accident resulted from the manner in which the work was performed, not from any dangerous condition on the premises, and defendants exercised no supervisory control over the work (*see Leathers v Zaepfel Dev. Co., Inc.* [appeal No. 2], 121 AD3d 1500, 1503). Plaintiff failed to raise an issue of fact to defeat that part of the cross motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We conclude with respect to plaintiff's cross appeal that the court properly granted that part of defendants' cross motion for summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it is based on the alleged violation of 12 NYCRR 23-1.21 (b) (3) (iv). Pursuant to that regulation, "[a] ladder shall not be used . . . [i]f it has any flaw or defect of material that may cause ladder failure." Here, we conclude that the icing of the automatic positive acting locks is not a flaw or defect of material within the meaning of the regulation. We agree with plaintiff, however, that the court erred in granting defendants' cross motion with respect to the section 241 (6) cause of action insofar as it is based on the alleged violation of 12 NYCRR 23-1.21 (d) (2), and we therefore further modify the order accordingly. That regulation requires that "[e]ach upper section of any extension ladder when extended shall be locked in place by two automatic positive acting locks" and, here, contrary to defendants' contention, they failed to establish that the regulation is inapplicable to the facts of this case (*see generally Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 351; *Forschner v Jucca Co.*, 63 AD3d 996, 998).

Lastly, plaintiff's contention that he should be granted partial summary judgment on the Labor Law § 241 (6) cause of action insofar as it is based on the alleged violation of 12 NYCRR 23-1.21 (d) (2) was

raised for the first time in his reply papers and thus is not properly before us (*see Turner v Canale*, 15 AD3d 960, 961, *lv denied* 5 NY3d 702).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

66

CA 14-01196

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

LISA K. REED, PLAINTIFF-RESPONDENT,

V ORDER

CRAIG REED, DEFENDANT-APPELLANT.

THE WESTMAN LAW FIRM, JAMESTOWN (JAMES E. WESTMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LISA K. REED, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Chautauqua County (Stephen W. Cass, A.J.), entered September 10, 2013 in a divorce action. The order, among other things, appointed a neutral financial evaluator to appraise and value the portion of the business that defendant was to transfer to plaintiff.

Now, upon reading and filing the stipulation of discontinuance signed by plaintiff and the attorney for defendant on January 21, 2015,

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

67

TP 14-01375

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

IN THE MATTER OF NEW YORK STATE DIVISION
OF HUMAN RIGHTS AND GILBERT A. MURPHY,
PETITIONERS,

V MEMORANDUM AND ORDER

JOHN C. HILPL, RESPONDENT.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (ERIN SOBKOWSKI OF COUNSEL), FOR PETITIONER NEW YORK STATE DIVISION OF HUMAN RIGHTS.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Jefferson County [James P. McClusky, J.], entered July 3, 2014) to enforce a determination of the New York State Division of Human Rights. The order, among other things, directed respondent to pay petitioner Gilbert A. Murphy compensatory damages.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is granted and respondent is directed to pay petitioner Gilbert A. Murphy the sums of $12,790 as damages for mental anguish and humiliation and as compensation for the moving expenses he incurred and $1,000 as punitive damages, with interest at the rate of nine percent per annum commencing December 1, 2011.

Memorandum: Petitioner New York State Division of Human Rights (SDHR) commenced this proceeding pursuant to Executive Law § 298 seeking to enforce the final order of its Commissioner, which in turn substantially adopted the "recommended findings of fact, opinion and decision, and order" of an administrative law judge (ALJ). The ALJ concluded, following a public hearing, that respondent had engaged in unlawful discriminatory practices with respect to housing and awarded petitioner Gilbert A. Murphy compensatory damages of $12,790 and punitive damages of $1,000.

We conclude that "the determination of the Commissioner . . . 'is supported by substantial evidence' . . . and there is a rational basis for [that determination]" (*Matter of Rescue Mission Alliance v Mercado*, 224 AD2d 934, 935, *lv denied* 88 NY2d 805; *see Matter of Sherwood Terrace Apts. v New York State Div. of Human Rights*, 61 AD3d 1333, 1334; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181). We further conclude that the

awards of compensatory damages to petitioner Gilbert A. Murphy are supported by the record (*see Sherwood Terrace Apts.*, 61 AD3d at 1334; *Matter of Matteo v New York State Div. of Human Rights*, 306 AD2d 484, 485), and that the award of $1,000 in punitive damages is " 'supported by the evidence and [is] authorized by Executive Law § 497 (4) (c) (iv) as a deterrent against housing discrimination' " (*Sherwood Terrace Apts.*, 61 AD3d at 1334; *see Matteo*, 306 AD2d at 485).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

68

CA 14-01343

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

RONALD P. LEO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PAMELA S. LEO, DEFENDANT-RESPONDENT.

DADD, NELSON, WILKINSON & WUJCIK, ATTICA (JENNIFER M. WILKINSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WILLIAM R. HITES, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 17, 2013. The order and judgment, among other things, denied the motion of plaintiff to terminate or reduce his payments to defendant for maintenance and a distributive award.

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

Memorandum: Pursuant to the parties' 1998 separation agreement, which was incorporated but not merged into the judgment of divorce, plaintiff, inter alia, agreed to pay defendant $1,666.66 in maintenance per month and a distributive award of $1,058.80 per month; to maintain a $250,000 life insurance policy for the benefit of defendant; and to provide defendant with health and dental insurance. The monthly distributive award was subsequently modified to $700 per month by court order. In September 2011, plaintiff moved to terminate or reduce his obligations to defendant based on financial hardship, and, in May 2012, defendant cross-moved for enforcement of plaintiff's obligations under the separation agreement. Supreme Court denied plaintiff's motion and granted defendant's cross motion. We affirm.

Contrary to the parties' contentions with respect to the burden of proof to be applied when a party seeks to reduce the amount of maintenance set forth in a separation agreement that has been incorporated but not merged into a judgment of divorce, that party has the burden of establishing "extreme hardship" (Domestic Relations Law § 236 [B] [9] [b] [1]; *see Marrano v Marrano*, 23 AD3d 1104, 1105; *Mishrick v Mishrick*, 251 AD2d 558, 558). Under the particular circumstances presented here, and giving due deference to the court's credibility determinations (*see generally Quarty v Quarty*, 96 AD3d 1274, 1277), we perceive no error in the court's denial of plaintiff's motion to modify his obligations under the separation agreement (*see*

Barden v Barden, 245 AD2d 695, 696; *cf. Marrano*, 23 AD3d at 1105; *Malaga v Malaga*, 17 AD3d 642, 643).

We further conclude that plaintiff "knowingly, consciously and voluntarily disregarded the obligation under a lawful court order" (Domestic Relations Law § 244), and that the court therefore did not err in finding that plaintiff's failure to make the required payments to defendant from October 2011 to September 2013 was willful (*see Rainey v Rainey*, 83 AD3d 1477, 1480).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

69

CA 12-02141

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

IN THE MATTER OF RONNIE COVINGTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

RONNIE COVINGTON, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered June 6, 2012 in a CPLR article 78 proceeding. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, and the petition is reinstated.

Memorandum: Supreme Court erred in granting respondent's motion to dismiss the CPLR article 78 petition as time-barred (*see* CPLR 3211 [a] [5]). The applicable four-month statute of limitations pursuant to CPLR 217 did not begin to run until petitioner "received notice of the final administrative determination" (*Matter of Jackson v Fischer*, 67 AD3d 1207, 1208; *see Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834), and respondent failed to meet his burden of establishing that petitioner received such notice more than four months before commencing the instant proceeding (*see Jackson*, 67 AD3d at 1208; *Matter of Chrysler v Goord*, 49 AD3d 1342, 1343).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

70

CA 14-01230

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

NIAGARA UNIVERSITY AND NIAGARA UNIVERSITY ICE COMPLEX, INC., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

THE HANOVER INSURANCE COMPANY, DEFENDANT-RESPONDENT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

DAMON & MOREY LLP, BUFFALO (ERIC A. BLOOM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered September 25, 2013. The order granted the motion of defendant for summary judgment and dismissed the 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: Defendant, as surety, issued a performance bond on behalf of Sterling Glass Dual Pane, Inc. (Sterling) in connection with a building construction project undertaken by plaintiffs as owners of the Niagara University Academic Complex (Complex). In 2006, plaintiffs contracted with Sterling for the installation of windows in the Complex's exterior walls, and plaintiffs commenced this action in September 2010, seeking to recover damages under the performance bond based upon the failure of Sterling to complete its contract. The terms of the performance bond limited the time in which plaintiffs could commence an action to within two years "after [Sterling] ceased working." We agree with plaintiffs that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint as time-barred under the contractual limitations period. Although defendant met its initial burden by submitting evidence that Sterling completed all work on the Complex on December 21, 2007, plaintiffs raised an issue of fact concerning the date on which Sterling "ceased working" on the Complex. Plaintiffs submitted evidence establishing that Sterling worked on the Complex in June 2009 and June 2010 in furtherance of its contractual obligation to install the windows in accordance with industry standards, and thus there is an issue of fact whether Sterling "in effect continued to work on the

project" beyond December 2007 (*Construction Specialties v Hartford Ins. Co.*, 97 AD2d 808, 808; *see American Bldg. Contrs. Assoc., Inc. v Mica & Wood Creations, LLC*, 23 AD3d 322, 323).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

71

CA 14-01387

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

LEGAL SERVICES FOR THE ELDERLY, DISABLED, OR DISADVANTAGED OF WESTERN NEW YORK, INC. AND KAREN NICHOLSON, CHIEF EXECUTIVE OFFICER, AS PERMANENT GUARDIAN OF DAVID GLENN, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE AND ERIE COUNTY SHERIFF'S DEPARTMENT, DEFENDANTS-APPELLANTS.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROLAND M. CERCONE, PLLC, BUFFALO (ROLAND M. CERCONE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered December 19, 2013. The order, inter alia, denied the motion of defendants to dismiss the complaint.

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

Memorandum: David Glenn's former power of attorney commenced this action seeking damages for injuries sustained by Glenn while he was in the custody of defendant Erie County Sheriff's Department. Contrary to defendants' contention, Supreme Court properly denied their motion seeking dismissal of the complaint based upon plaintiffs' failure to appear at a hearing scheduled pursuant to General Municipal Law § 50-h (1). "It is well settled that a plaintiff who has not complied with General Municipal Law § 50-h (1) is precluded from maintaining an action against a municipality" (*McDaniel v City of Buffalo*, 291 AD3d 826, 826). "The failure to submit to . . . an examination [pursuant to section 50-h], however, may be excused in exceptional circumstances, such as extreme physical or psychological incapacity" (*Steenbuck v Sklarow*, 63 AD3d 823, 824; *see Gravius v County of Erie*, 85 AD3d 1545, 1546, *appeal dismissed* 17 NY3d 896). Here, it is undisputed that Glenn was unable to appear at the hearing because he sustained a severe brain injury and is permanently incapacitated. Furthermore, Glenn's former power of attorney was unable to appear at the hearing or reschedule the hearing for a later date because he was hospitalized with various ailments. Under these circumstances, "plaintiff[s'] failure to appear for . . . a hearing

does not warrant dismissal of the complaint" (*Steenbuck*, 63 AD3d at 825; *see Hymowitz v City of New York*, 122 AD3d 681, 682; *Twitty v City of New York*, 195 AD2d 354, 356).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

72

KA 12-02053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PERCY L. SCOTT, 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 A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 16, 2009. The appeal was held by this Court by order entered March 28, 2014, decision was reserved and the matter was remitted to Erie County Court for further proceedings (115 AD3d 1342). The proceedings were held and completed.

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 murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). We conclude that County Court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Johnson*, 109 AD3d 1191, 1191-1192, *lv denied* 22 NY3d 997; *People v Davis*, 84 AD3d 1710, 1710, *lv denied* 17 NY3d 815), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*cf. People v Noel*, 106 AD2d 854, 854-855). Further, although defendant's valid waiver of the right to appeal does not encompass his challenge to the severity of the sentence because he entered the waiver before he was advised of the maximum sentence he could receive (*see People v Rizek* [appeal No. 1], 64 AD3d 1180, 1180, *lv denied* 13 NY3d 862), we nevertheless reject that challenge.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

73

TP 14-01309

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

IN THE MATTER OF CHRISTIAN ANDRADE,
PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (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, Wyoming County [Michael M. Mohun, A.J.], entered July 15, 2014) 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: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

74

KA 13-00993

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES K. WELSHER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered September 12, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree (two counts) and petit larceny (two counts).

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

78

KA 13-01740

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD RAWSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Genesee County (Eric R. Adams, A.J.), rendered July 24, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the second degree (Penal Law § 215.50 [3]). We agree with defendant that he did not knowingly, voluntarily, and intelligently waive his right to appeal. "Despite the existence of a written appeal waiver form signed by defendant and his attorney, no questions were asked of defendant about the appeal waiver and his understanding thereof" (*People v Frysinger*, 111 AD3d 1397, 1398; *see People v Jones*, 118 AD3d 1354, 1354, *lv denied* 24 NY3d 961; *cf. People v Griffin*, 120 AD3d 1569, 1569-1570). We reject defendant's contention that the three-year period of probation is illegal because Supreme Court directed that the period would expire three years after the date of sentencing, without taking into account the three days defendant served in jail prior to sentencing. Where, as here, there is a split sentence of incarceration and probation, jail time credit must be applied to reduce both the sentence of incarceration and the term of probation (*see People v Zephrin*, 14 NY3d 296, 300). The three-year period of probation therefore will be reduced automatically by the jail time credit (*see generally* § 70.30 [3]; *Zephrin*, 14 NY3d at 301; *People v White*, 79 AD3d 1160, 1161). The sentence is not unduly harsh or severe. Finally, defendant's contention that certain provisions in the order of protection and terms of probation unduly limit his freedom of speech is not preserved for our review (*see* CPL 470.05 [2]; *see generally Matter of Gracie C. v Nelson C.*, 118 AD3d 417, 417), 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: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

80

CAF 14-00236

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

IN THE MATTER OF GABRIELLE SMITH,
PETITIONER-RESPONDENT,

V ORDER

CHESTER THOMAS, SR., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered December 6, 2013 in a proceeding pursuant to Family Court Act article 6. The order granted the petition for a modification of custody.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

83

CA 14-00707

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

RICHARD H. WARNER, INDIVIDUALLY AND AS GUARDIAN
OF MARY DOROTHY WARNER, AN INCAPACITATED PERSON,
CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 98768.)

RICHARD H. WARNER, AS EXECUTOR OF THE ESTATE OF
MARY DOROTHY WARNER, DECEASED, CLAIMANT-APPELLANT,

V

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 105712.)
(APPEAL NO. 1.)

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered July 25, 2013. The order granted the motion of defendant for summary judgment and dismissed the claims.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the claims are reinstated.

Memorandum: In appeal No. 1, claimant appeals from an order granting defendant's motion for summary judgment and dismissing two separate claims, one seeking damages for personal injuries sustained by claimant's decedent (decedent), and a second seeking damages for the wrongful death of decedent. In appeal No. 2, claimant appeals from an order that denied his motion for leave to reargue or leave to renew defendant's motion (*see generally* CPLR 2221). Addressing the order in appeal No. 1, we agree with claimant that the Court of Claims erred in granting defendant's motion. Defendant "has a duty to maintain its roadways 'in a reasonably safe condition for foreseeable uses' " (*Grevelding v State of New York*, 91 AD3d 1309, 1310, quoting *Stiuso v City of New York*, 87 NY2d 889, 891). "[W]hen a condition

renders it unsafe for persons using it in the exercise of reasonable care and such condition has existed long enough to give the State constructive notice[,] it is incumbent upon the State to take whatever action is reasonably required for the protection of travelers on the highway" (*Kenyon v State of New York*, 21 AD2d 851, 852; *see Preston v State of New York*, 6 AD3d 835, 836, *lv denied* 3 NY3d 601). Here, defendant sought dismissal of the claims on the ground that there was no significant history of accidents at the intersection where the accident occurred in which decedent was injured and, therefore, that it had not been placed on notice of a dangerous condition (*see generally Friedman v State of New York*, 67 NY2d 271, 286). The affidavits of defendant's experts, however, were not supported by the data upon which the experts based their opinions, and thus the affidavits lacked probative value in establishing defendant's entitlement to judgment as a matter of law (*see Costanzo v County of Chautauqua*, 110 AD3d 1473, 1473; *see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544). Indeed, we conclude that defendant's own submissions raised questions of fact whether defendant was on notice of a dangerous condition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We dismiss the appeal from the order in appeal No. 2. Insofar as the order in appeal No. 2 denied that part of claimant's motion for leave to reargue, no appeal lies from the order (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984) and, insofar as the order in appeal No. 2 denied that part of the motion for leave to renew, the appeal is moot in view of our determination in appeal No. 1 (*see McCabe v CSX Transp., Inc.*, 27 AD3d 1150, 1151).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

84

CA 14-00708

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

RICHARD H. WARNER, INDIVIDUALLY AND AS GUARDIAN
OF MARY DOROTHY WARNER, AN INCAPACITATED PERSON,
CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 98768.)

RICHARD H. WARNER, AS EXECUTOR OF THE ESTATE OF
MARY DOROTHY WARNER, DECEASED, CLAIMANT-APPELLANT,

V

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 105712)
(APPEAL NO. 2.)

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered March 26, 2014. The order denied the motion of claimant seeking leave to reargue and renew.

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

Same Memorandum as in *Warner v State of New York* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

92

TP 14-01063

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

IN THE MATTER OF MARK D. LYNCH, DOING BUSINESS AS SOUTHSIDE AUTO SALES, LLC AND CHRISTY A. BATTINELLI, DOING BUSINESS AS SOUTHSIDE AUTOMOTIVE, PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD, RESPONDENT.

NORMAN P. DEEP, CLINTON, FOR PETITIONERS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH 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 [Erin P. Gall, J.], entered September 12, 2013) to review a determination of respondent. The determination affirmed the findings and penalties imposed by the Administrative Law Judge.

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

Memorandum: Petitioners, the owners of a vehicle dealership and inspection station, respectively, each commenced a CPLR article 78 proceeding challenging a single determination finding them guilty of a total of 10 charges in connection with the sale and inspection of a vehicle. The dealership and inspection station shared the same location, and the same person was in charge of the sale and inspection of a certain vehicle that prompted these charges. We note at the outset that petitioners do not raise a substantial evidence issue, and thus Supreme Court erred in transferring the proceeding to this Court (*see Matter of Smeraldo v Rater*, 55 AD3d 1298, 1299). In the interest of judicial economy, however, we address the merits of the issues raised by petitioners (*see id.*).

Petitioners contend that the Administrative Law Judge (ALJ) violated their rights to due process by relying on misconduct that was not charged in the notice of violation. We reject that contention. The ALJ did not consider that misconduct in sustaining the violations against petitioners, but rather properly considered it only as an aggravating factor in support of the penalty (*see Matter of Cris*

Place, Inc. v New York State Liq. Auth., 56 AD3d 339, 339-340). We therefore conclude that petitioners were given "fair notice of the charges against [them]" (*Block v Ambach*, 73 NY2d 323, 332; *cf. Matter of Wesley v Board of Fire Commrs. of Ridge-Culver Fire Dist.*, 198 AD2d 908, 908).

We reject petitioners' further contention that the penalty of license revocations is "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237; *see Matter of Watson v Fiala*, 101 AD3d 1649, 1651). The ALJ listed several aggravating factors in recommending that the licenses be revoked, including the seriousness of the violations in selling a vehicle that had numerous mechanical problems that should not have passed inspection, and we therefore see no basis for disturbing the penalty.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

93

CA 13-01397

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

IN THE MATTER OF CHARLES WATSON,
PETITIONER-APPELLANT,

V ORDER

JOSEPH BELLNIER, DEPUTY COMMISSIONER, NEW YORK STATE CORRECTIONAL FACILITIES, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, F. RICH, DEPUTY SUPERINTENDENT, SECURITY, CAYUGA CORRECTIONAL FACILITY, C. KOENIGSMANN, CHIEF MEDICAL OFFICER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, AND D. BOTSFORD, DIRECTOR, CLASSIFICATION AND MOVEMENT, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

CHARLES WATSON, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered July 10, 2013 in a proceeding pursuant to CPLR article 78. The judgment denied the amended petition.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

97

KA 10-00076

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL JONES, DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered October 26, 2009. The appeal was held by this Court by order entered February 14, 2014, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (114 AD3d 1272). The proceedings were held and completed.

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

Memorandum: Defendant appeals from that part of an order denying his pro se motion pursuant to CPL 440.10 and 440.30 (1-a) seeking DNA testing on a rape kit, underwear, an "excised piece of cloth taken from the victim's underwear," swabs, slides, "hair, clothing or shaking[s] from the victim's clothing," and a washcloth (*see generally* CPL 450.10 [5]). We previously held this case, reserved decision, and remitted the matter to Supreme Court to rule on that part of defendant's motion seeking DNA testing of those items other than the washcloth (*People v Jones*, 114 AD3d 1272). Upon remittal, the court denied the motion in its entirety, and we now affirm.

We conclude that the court properly denied defendant's motion without a hearing because CPL 440.30 (1-a) "does not provide for retesting of DNA material" (*People v Holman*, 63 AD3d 1088, 1088, *lv denied* 13 NY3d 860; *see People v Jones*, 307 AD2d 721, 722, *lv denied* 1 NY3d 574, *reconsideration denied* 1 NY3d 629). It is uncontested that the evidence defendant seeks to have tested was already subjected to DNA testing prior to trial.

We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

98

KA 13-00489

PRESENT: SMITH, J.P., CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE BONNER, DEFENDANT-APPELLANT

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered October 23, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that his waiver of the right to appeal is not valid and challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass the challenge to the severity of the sentence because, although "it is evident that defendant waived [his] right to appeal [his] *conviction*, there is no indication in the record that defendant waived the right to appeal the harshness of [his] *sentence*" (*People v Maracle*, 19 NY3d 925, 928; *see People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 706). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

118

KAH 13-01870

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
TOMMY JACKSON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

TOMMY JACKSON, PETITIONER-APPELLANT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), dated September 9, 2013 in a habeas corpus proceeding. The judgment denied 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 70 seeking habeas corpus relief. Petitioner alleged that his imprisonment is unlawful on the grounds that the persistent felony offender statutes (Penal Law § 70.10; CPL 400.20) violate the United States and New York State Constitutions, and that he was denied effective assistance of counsel with respect to a prior conviction. As a preliminary matter, we note that petitioner's challenge to the constitutionality of the statutes was made without the requisite notice to the Attorney General (*see People v Korber*, 89 AD3d 1543, 1543-1544, *lv denied* 19 NY3d 864). In any event, Supreme Court properly denied the petition without a hearing. The allegations raised in the petition either have been, or could have been, raised in prior appeals or in motions pursuant to CPL article 440 (*see People v Jackson*, 119 AD3d 1346, 1347; *People v Jackson*, 71 AD3d 1457, 1458, *lv dismissed in part and denied in part* 17 NY3d 774; *People v Jackson*, 262 AD2d 1031, 1031-1032, *lv denied* 94 NY2d 881). Thus, habeas corpus relief is not available (*see People ex rel. Tuszynski v Stallone*, 117 AD3d 1472, 1472, *lv denied* 23 NY3d 908; *People ex rel. Lanfair v Corcoran*, 60 AD3d 1351, 1351, *lv denied* 12 NY3d 714).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

119

KAH 13-00495

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
WILLIAM ANDERSON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RANDY JAMES, SUPERINTENDENT, LIVINGSTON
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered December 13, 2012 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: On appeal from a judgment denying his petition for a writ of habeas corpus, petitioner contends that his right to due process was violated. While this appeal was pending, however, petitioner was released to parole supervision, and thus this appeal has been rendered moot (*see People ex rel. Moore v Lempke*, 101 AD3d 1665, 1665-1666, *lv denied* 20 NY3d 863). The exception to the mootness doctrine does not apply (*see People ex rel. Baron v New York State Dept. of Corr.*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

120

KA 12-00375

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SANDRA F. ELLIS, 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 Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered January 18, 2011. The judgment convicted defendant, upon her plea of guilty, of assault in the second degree.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

121

KA 13-00531

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSH HICKS, 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 R. PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered January 9, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal mischief in the second 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 his plea of guilty of attempted criminal mischief in the second degree (Penal Law §§ 110.00, 145.10) and criminal possession of stolen property in the fourth degree (§ 165.45 [5]). 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: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

128

CA 14-01268

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

LAURIE JACOBI, PLAINTIFF-APPELLANT,

V ORDER

JENNIE DENI AND FRANK DENI,
DEFENDANTS-RESPONDENTS.

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (C. DANIEL MCGILLICUDDY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LAW OFFICE OF EDWARD M. EUSTACE, WHITE PLAINS (PATRICIA A. MOONEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered September 26, 2013. The order denied the motion of plaintiff for a new trial.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

137

KA 13-01963

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

QUANAPARKER HOWARD, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Erie County Court (Kenneth F. Case, J.), entered September 19, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

138

KA 11-00413

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN R. BUSSOM, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered November 22, 2010. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree and rape in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count three of the indictment and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Monroe County, for resentencing on that count.

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]) and rape in the second degree (§ 130.30 [1]), defendant contends that the period of postrelease supervision imposed upon the latter conviction is illegal. It is well settled that "defendant's challenge to the legality of the sentence survives his waiver of the right to appeal" (*People v McLellan*, 82 AD3d 1668, 1669; *see People v Seaberg*, 74 NY2d 1, 10), and he may raise such a challenge for the first time on appeal (*see People v Gonzalez*, 99 NY2d 76, 86). Here, as the People correctly concede, the sentence is illegal insofar as the court imposed a 15-year period of postrelease supervision on the count of rape in the second degree (*see* § 70.45 [2-a] [a]). Inasmuch as the record does not establish that the court intended to impose the maximum period of postrelease supervision, we modify the judgment by vacating the sentence on count three of the indictment charging defendant with rape in the second degree, and we remit the matter to Supreme Court for resentencing on that count (*see People v Bowden*, 15 AD3d 884, 885, *lv denied* 4 NY3d 851, *reconsideration denied* 5 NY3d 786; *cf. People v*

Roman, 43 AD3d 1282, 1283, *lv denied* 9 NY3d 1009).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

139

KA 05-01142

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE PRESCOTT, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, 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 (Russell P. Buscaglia, A.J.), rendered March 7, 2005, which was affirmed by memorandum and order of this Court dated October 2, 2009 (66 AD3d 1357). By order entered September 30, 2011 (87 AD3d 1413), this Court denied defendant's application for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, the memorandum and order of this Court dated October 2, 2009. In an order dated May 7, 2013, the Court of Appeals reversed the order of this Court dated September 30, 2011, granted defendant's application for a writ of error coram nobis, vacated the memorandum and order of this Court dated October 2, 2009 and remitted the matter to this Court for a de novo determination (21 NY3d 925).

Now, upon remittitur from the Court of Appeals,

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of gang assault in the first degree (Penal Law § 120.07) and assault in the first degree (§ 120.10 [1]). We reject defendant's contention that he received ineffective assistance of counsel. Defendant has failed to demonstrate " 'the absence of strategic or other legitimate explanations' " for the decisions of defense counsel to permit defendant to waive his right to a jury trial (*People v Caban*, 5 NY3d 143, 152; *see People v Boateng*, 246 AD2d 749, 749-750, *lv denied* 91 NY2d 970), and not to allow him to testify (*see People v Collins*, 85 AD3d 1678, 1679, *lv denied* 18 NY3d 993). Defense counsel was not ineffective in failing to object to Supreme Court's decision to have defendant remain in handcuffs throughout the trial. The court stated the reasons for its decision (*see People v Best*, 19 NY3d 739, 743-744; *People v Tucker*, 261 AD2d 877, 878, *lv denied* 94 NY2d 830), and we conclude that any objection by defense counsel would

have had little or no chance of success (*see People Gilpatrick*, 63 AD3d 1636, 1637, *lv denied* 13 NY3d 835). Defense counsel was not ineffective for failing to call an expert witness to testify regarding the lack of blood found on defendant. " 'Defendant has not demonstrated that such testimony was available, that it would have assisted the [court] in its determination or that he was prejudiced by its absence' " (*People v Kilbury*, 83 AD3d 1579, 1580, *lv denied* 17 NY3d 860; *see People v Feeley*, 23 AD3d 1130, 1130-1131, *lv denied* 6 NY3d 775). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). The sentence is not unduly harsh or severe.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

145

KA 12-00166

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL R. CINTRON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Frank P. Geraci, Jr., J.), rendered January 5, 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.

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 [1]). Initially, we agree with defendant that his waiver of the right to appeal is invalid because " 'the minimal inquiry made by County 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' . . . , and because the court 'improperly conflated the rights automatically forfeited by operation of law as the consequence of a guilty plea with those rights voluntarily relinquished as the consequence of a waiver of the right to appeal' " (*People v Donaldson*, 117 AD3d 1467, 1467, *lv denied* 23 NY3d 1036).

We reject defendant's further contention that the court erred in refusing to suppress his statements and physical evidence because "the two-police-officer approach to the car was unwarranted." It is well settled that "[t]he approach of occupants of a stopped or parked vehicle to request information is analyzed under the first tier of the *De Bour* hierarchy . . . and need only be justified by an 'articulable basis,' meaning an 'objective, credible reason not necessarily indicative of criminality' " (*People v Grady*, 272 AD2d 952, 952, *lv denied* 95 NY2d 905, quoting *People v Ocasio*, 85 NY2d 982, 985; *see People v Stebbins*, 278 AD2d 942, 942, *lv denied* 96 NY2d 807; *see*

generally People v De Bour, 40 NY2d 210, 222-223).

The record of the suppression hearing establishes that the vehicle was parked when the officers approached, and there is no evidence that the driver's ability to move the vehicle was blocked by any patrol vehicles (*see Ocasio*, 85 NY2d at 984). "Further, in view of the prior drug activity that had occurred in the [parking lot] where the vehicle was parked and [the anonymous citizen's tip] of drug activity in that area, the officers possessed an objective, credible reason to approach the vehicle" and ask defendant for identification (*People v Gandy*, 85 AD3d 1595, 1596, *lv denied* 17 NY3d 859; *see People v Ramos*, 60 AD3d 1317, 1317, *lv denied* 12 NY3d 928).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

147

CA 14-01161

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

ANDRE BANKS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LPCIMINELLI, INC., E & M PAINTING, INC., CITY OF BUFFALO CITY SCHOOL DISTRICT AND CITY OF BUFFALO BOARD OF EDUCATION, DEFENDANTS-RESPONDENTS.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (CHARLES H. COBB OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (RYAN J. LUCINSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 24, 2014. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment and granted in part the cross motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action to recover damages for injuries he sustained when he attempted to lift a bundle of insulation to a coworker 10 feet above him and it fell, striking him in the head. We reject plaintiff's contention that Supreme Court erred in denying his motion seeking partial summary judgment on liability under the Labor Law § 240 (1) claim. Plaintiff's submissions in support of the motion raised a triable issue of fact whether his own actions were the sole proximate cause of his injuries (*see Tomlins v DiLuna*, 84 AD3d 1064, 1065; *see generally Cioffi v Target Corp.*, 114 AD3d 897, 898-899). In particular, there are triable issues of fact whether a boom lift or a scissor lift was readily available at the work site and whether plaintiff knew that he was expected to use the lift to hoist the material but for no good reason chose not to do so (*see Tomlins*, 84 AD3d at 1065; *see generally Gallagher v New York Post*, 14 NY3d 83, 88).

Contrary to plaintiff's further contention, the court did not err in granting that part of defendants' cross motion seeking dismissal of the Labor Law § 241 (6) claim to the extent it was premised upon

violations of 12 NYCRR 23-6.1 (c) and 23-7.1 (c). Inasmuch as the accident did not involve hoisting equipment, defendants established that those regulations were not applicable to the facts of this case (*see Toefer v Long Is. R.R.*, 4 NY3d 399, 409-410; *Georgakopoulos v Shifrin*, 83 AD3d 659, 660). Finally, in the absence of a cross appeal by defendants, we do not address their contention that the court erred in failing to dismiss the Labor Law § 241 (6) claim in its entirety (*see Harris v Eastman Kodak Co.*, 83 AD3d 1563, 1564; *Harmon v Hotel Syracuse, Inc.*, 26 AD3d 750, 751; *see generally* CPLR 5515 [1]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

152

CA 14-01265

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

MARIAN GALLMAN, PLAINTIFF-RESPONDENT,

V ORDER

T.D.M.S., LLC, ALSO KNOWN AS TDMS, LLC,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

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

HISCOCK & BARCLAY, LLP, SYRACUSE (JOHN M. NICHOLS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered September 27, 2013 in a foreclosure action. The order, among other things, granted plaintiff's motion for summary judgment.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

156

CA 14-01368

PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ.

TAG MECHANICAL SYSTEMS, INC.,
PLAINTIFF-RESPONDENT,

V ORDER

DWORKIN CONSTRUCTION CORP. (USA),
DEFENDANT-APPELLANT.

DAVID O. WRIGHT, PEEKSKILL, FOR DEFENDANT-APPELLANT.

D'ARRIGO & COTE, LIVERPOOL (ROBERT M. COTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 7, 2014. The order denied defendant's motion to dismiss the complaint.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

196

CA 14-00044

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

DUANE FLINT, PLAINTIFF-RESPONDENT,

V ORDER

JERRY L. CORNELL, DEFENDANT-APPELLANT.

LOUIS J. COLELLA, P.C., DANSVILLE (LOUIS J. COLELLA OF COUNSEL), FOR DEFENDANT-APPELLANT.

EDWARD J. DEGNAN, CANISTEO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered September 24, 2013. The order, among other things, denied defendant's motion to dismiss for want of prosecution.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

205

KA 13-00965

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES GRIGGS, 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 A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered May 15, 2013. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (three counts), assault in the first degree and criminal possession of a weapon in the second degree.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

218

CA 13-01859

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

IN THE MATTER OF CLARENCE MYLES,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered September 16, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

220

CA 14-01323

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

PAULA S. MORRIS, PLAINTIFF-RESPONDENT,

V ORDER

J. BRADFORD MORRIS, DEFENDANT-APPELLANT.

MARY S. HAJDU, LAKEWOOD, FOR DEFENDANT-APPELLANT.

J. ADAMS & ASSOCIATES, PLLC, WILLIAMSVILLE (JOAN CASILIO ADAMS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered February 7, 2014 in a divorce action. The order, among other things, granted in part plaintiff's motion for pendente lite relief and denied defendant's cross motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 20, 2014,

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1012

CA 13-01537

PRESENT: CENTRA, J.P., FAHEY, WHALEN, AND DEJOSEPH, JJ.

JULIE W. ANTINORA,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

TERRANCE J. ANTINORA,
DEFENDANT-APPELLANT-RESPONDENT.

DAVIDSON FINK, LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Monroe County (John M. Owens, J.), entered June 5, 2013 in a divorce action. The judgment, among other things, awarded plaintiff spousal maintenance.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the award of child support, ordering plaintiff to pay defendant the sum of $2,768.30 for her wasteful dissipation of assets, vacating the decretal paragraph concerning the marital residence, and ordering that the retirement account from plaintiff's premarital employer was not marital property and that defendant's Roth IRA account was marital property, and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: In this divorce action, defendant husband appeals and plaintiff wife cross-appeals from an order issued by the Referee who presided over the parties' nonjury trial. We note at the outset that the parties' notices of appeal and cross appeal recite that the husband and wife are appealing and cross-appealing from the Referee's order, rather than from the judgment of divorce entered in Supreme Court. Nevertheless, in the exercise of our discretion, we treat the notices of appeal and cross appeal as valid and deem the appeal and cross appeal as taken from the judgment (*see* CPLR 5520 [c]; *Myers v Myers*, 87 AD3d 1393, 1394).

We reject the husband's contention that the amount and duration of the spousal maintenance award were an abuse of the court's discretion (*see generally Hartog v Hartog*, 85 NY2d 36, 51-52). Contrary to the wife's contention, the husband established at trial that he was entitled to credits against any award for retroactive maintenance for his voluntary payments toward "the other party's share

of what prove[d] to be marital debt" (*Le v Le*, 82 AD3d 845, 846; *see generally Myers v Myers*, 87 AD3d 1393, 1394-1395; *Heiny v Heiny*, 74 AD3d 1284, 1285).

We agree with the husband that the court failed to articulate a proper basis for applying the Child Support Standards Act (CSSA) to the combined parental income in excess of the statutory cap, which was $136,000 at the time (*see* Domestic Relations Law § 240 [1-b] [c] [2], [3]; Social Services Law § 111-i [2] [b]; *Matter of Cassano v Cassano*, 85 NY2d 649, 654-655; *Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1181). In particular, the court failed to indicate how the children's actual needs would not be met if it had calculated child support at the statutory cap (*see generally Matter of Miller v Miller*, 55 AD3d 1267, 1268-1269). It is well settled that " 'blind application of the statutory formula to [combined parental income] over [$136,000], without any express findings or record evidence of the children's actual needs, constitutes an abdication of judicial responsibility and renders meaningless the statutory provision setting a cap on strict application of the formula' " (*Matter of Malecki v Fernandez*, 24 AD3d 1214, 1215). In addition, although not raised by the parties, we conclude that the court erred in failing to order that child support be adjusted upon termination of maintenance, pursuant to Domestic Relations Law § 240 (1-b) (b) (5) (vii) (C) (*see Martin v Martin*, 115 AD3d 1315, 1316; *Ripka v Ripka*, 77 AD3d 1384, 1386). We therefore further modify the judgment by vacating the award of child support, and we remit the matter to Supreme Court to determine the husband's present and prospective child support obligations in compliance with the CSSA, following a further hearing, if necessary (*see Martin*, 115 AD3d at 1316), and to order that child support be adjusted upon termination of maintenance.

We reject the contentions of the parties that the court erred in determining that they wastefully dissipated marital assets (*see* Domestic Relations Law § 236 [B] [5] [d] [12]). We conclude, however, that the court erred in its calculations of such wasteful dissipation in determining the equitable distribution award. In our view, the record establishes that the husband wastefully dissipated $5,862, and that the wife wastefully dissipated $11,398.59, in marital assets. The husband is thus entitled to a credit of one half of the difference of those two amounts, i.e., $2,768.30, and we therefore further modify the judgment by ordering plaintiff to pay defendant that amount (*see Sotnik v Zavilyansky*, 101 AD3d 1102, 1104).

Contrary to the wife's contention, the court did not abuse its discretion in adjusting the distributive award in lieu of requiring the husband to contribute to her attorney's fees. Inasmuch as the wife is the less monied spouse, thereby triggering the rebuttable presumption entitling her to attorney's fees, the court was required to articulate why it was not awarding attorney's fees to the wife (*see* Domestic Relations Law § 237 [a]; *Leonard v Leonard*, 109 AD3d 126, 129-130). We conclude that the court sufficiently articulated its rationale when it explained that, instead of having the husband contribute to the wife's attorney's fees, it would increase the distributive award to the wife by granting her, inter alia, the

proceeds of an unsold luxury automobile and relieving her of her share of the marital credit card debt (*see Crook v Crook*, 85 AD3d 958, 959; *Redgrave v Redgrave*, 22 AD3d 913, 914; *see generally McCarthy v McCarthy*, 172 AD2d 1040, 1040).

With respect to the value of the marital residence, we agree with the parties that the court erred in simply averaging the values set forth in the appraisals of the parties' experts without articulating its reason for doing so (*see* Domestic Relations Law § 236 [B] [5] [g]; *Capasso v Capasso*, 119 AD2d 268, 272). We therefore further modify the judgment by vacating the decretal paragraph concerning the marital residence, and we remit the matter to Supreme Court for "appropriate findings of fact and conclusions of law as required by statute" with respect to the valuation of the marital residence (*Diachuk v Diachuk*, 117 AD2d 985, 986).

Contrary to the wife's contention, in light of the husband's prior voluntary maintenance payments (*see* Domestic Relations Law § 236 [B] [6] [a]), and considering the husband's share of marital debt (*see Le*, 82 AD3d at 846; *see also Myers*, 87 AD3d at 1394-1395), we conclude that the court properly determined that she is not entitled to retroactive spousal maintenance.

We reject the wife's further contention that she is entitled to a credit for the statutory add-on expenses permitted in addition to the basic child support obligation under the CSSA, which include child care and uninsured health care expenses (*see* Domestic Relations Law § 240 [1-b] [c] [4]-[5]). Although we agree with the wife that she is entitled to a pro rata share of such payments from the husband, we also agree with the husband that he is entitled to a credit against such future expenses based on his past voluntary maintenance and child support payments (*see Lester v Lester*, 237 AD2d 872, 873), and we therefore further modify that part of the judgment awarding child support. The record establishes that the husband's pro rata share of the statutory add-on expenses is $15,008.28. In light of our decision to remit for a new determination of the husband's basic child support obligation, we cannot determine the aforementioned credit due to the husband for future add-on expenses, and we direct Supreme Court upon remittal to determine that credit after calculating the husband's basic child support obligation.

We agree with the wife, however, that the court erred in concluding that her retirement account sponsored by her premarital employer was marital property and in failing to provide for the equitable distribution of the husband's Roth IRA. At trial, the wife rebutted the presumption that her retirement account is marital property (*see generally* Domestic Relations Law § 236 [B] [1] [d] [1]; *Fields v Fields*, 15 NY3d 158, 162-163, *rearg denied* 15 NY3d 819; *Bailey v Bailey*, 48 AD3d 1123, 1124). The record establishes that her premarital employer sponsored the account, and the wife's testimony that she contributed to the account only prior to marriage was uncontroverted (*see Kenney v Lureman*, 8 AD3d 1099, 1100). We further agree with the wife that the husband did not rebut the presumption, either with account statements or with his own testimony, that his

Roth IRA is marital property (*cf. id.*), and the husband's statement of net worth, alone, is insufficient to rebut the presumption that the Roth IRA is marital property (*see Allen v Allen*, 263 AD2d 691, 692). We therefore further modify that part of the judgment concerning the parties' pension/retirement assets by ordering that the retirement account sponsored by the wife's premarital employer is the wife's separate property, and we direct Supreme Court upon remittal to provide for the equitable distribution of the husband's Roth IRA.

We reject the wife's contention that the court erred in awarding the husband certain benefits under her New York State pension. In pertinent part, those benefits included postretirement cost of living adjustments, preretirement survivorship protection, postretirement joint and survivor protection, and an early retirement subsidy. It is well settled that "[v]ested rights in a noncontributory pension plan are marital property to the extent that they were acquired between the date of the marriage and the commencement of a matrimonial action, even though the rights are unmatured at the time the action is begun" (*Majauskas v Majauskas*, 61 NY2d 481, 485-486). Therefore, the court properly awarded the husband postretirement cost of living adjustments, inasmuch as they "are merely supplements and enhancements to already existing pension benefits" (*Pagliaro v Pagliaro*, 31 AD3d 728, 730; *see Lemesis v Lemesis*, 38 AD3d 1331, 1332). Additionally, the court properly required the wife to elect a preretirement and postretirement survivorship annuity option in her pension to benefit the husband, inasmuch as the wife has the option of electing a maximum payment to herself, which would deny surviving beneficiaries any payment from the pension (*see Ferriera v Ferriera*, 112 AD2d 22, 23; *Farsace v Farsace*, 97 AD2d 951, 951-952). Finally, the court properly awarded the husband a right to any early retirement subsidy elected by the wife under the pension. Although the wife has not yet had an opportunity to elect an early retirement subsidy, any enhanced retirement income received as a result of a subsidy, other than a Social Security bridge payment or separation payment, would be considered compensation and marital property subject to equitable distribution (*see Olivo v Olivo*, 82 NY2d 202, 207-209; *D'Ambra v D'Ambra* [appeal No. 2], 94 AD3d 1532, 1535).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1035

CA 13-02255

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

HEATHER RODEMS, PLAINTIFF-RESPONDENT,

V ORDER

SUNSET BEACHES, INC. AND SUNSET PALMS, LLC,
DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR LLP, BUFFALO (PHILIP C. BARTH, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (BENJAMIN J. ANDREWS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered May 29, 2013. The order, among other things, denied the cross motion of defendants for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 14, 2014, and filed in the Erie County Clerk’s Office on August 22, 2014,

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1047

KA 13-00311

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH FISHER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 24, 2009. The judgment convicted defendant, upon his plea of guilty, of felony driving while intoxicated and aggravated unlicensed operation of a motor vehicle 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 his plea of guilty of, inter alia, felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]). He was originally sentenced to a term of incarceration, but Supreme Court thereafter granted that part of defendant's motion pursuant to CPL article 440 to set aside the sentence. The court resentenced him to six months' incarceration, which by that time had been served, and a term of probation of five years. In appeal No. 2, defendant appeals from a judgment revoking that probation and imposing a sentence of incarceration.

Defendant failed to preserve for our review his contention in appeal No. 1 that he was deprived of counsel of his choice at sentencing, inasmuch as "defendant did not voice any objection to his attorney's application to be relieved as defense counsel" (*People v Tineo*, 64 NY2d 531, 536; *see People v Sims*, 105 AD3d 415, 416, *lv denied* 21 NY3d 1009), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see Sims*, 105 AD3d at 416). His contentions with respect to the original sentence were rendered moot by the order setting aside that sentence and resentencing defendant (*see generally People v Clayton*, 38 AD3d 1131, 1131-1132, *lv denied* 9 NY3d 841).

We reject defendant's contention in appeal No. 2 that the sentence imposed upon the revocation of his probation is unduly harsh and severe.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1048

KA 13-00312

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH FISHER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 14, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Same Memorandum as in *People v Fisher* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1077

CA 13-02227

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

JEFFREY'S AUTO BODY, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, SYRACUSE (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (ROBERT K. WEILER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 3, 2013. The order denied in part defendant's motion to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendant's motion seeking dismissal of the second cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs in these four appeals operate automobile repair shops, and they commenced these actions to recover payment for repairs performed on behalf of various assignors, including first-party assignors, i.e., defendants' insureds, and persons involved in accidents with defendants' insureds, i.e., third-party assignors (*see generally* 11 NYCRR 216.7 [a] [2]). Insofar as relevant in each appeal, plaintiffs asserted causes of action for breach of contract, quantum meruit, and the violation of General Business Law § 349, which prohibits deceptive business practices. Defendants moved pursuant to CPLR 603 to sever the individual claims set forth in the amended complaint in appeal No. 2 and in the complaints in appeal Nos. 1, 3, and 4, and they sought dismissal of the amended complaint and the respective complaints pursuant to CPLR 3211 (a) (5) and (7). We reject defendants' contentions with respect to severance and the causes of action for breach of contract and section 349, and we agree with Supreme Court's resolution of those issues for reasons set forth in the court's decision. We agree with defendants, however, that the court erred in denying those parts of their motions seeking dismissal of the second cause of action, alleging quantum meruit, in each appeal, and we modify the order in each appeal accordingly.

No cause of action for quantum meruit will lie where "an express

enforcible contract exist[ed] between the parties concerning the same subject matter" (*G & S Custom Homes v Holtz*, 179 AD2d 1025, 1026; *see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388). With respect to the first-party assignors, there is no cause of action for quantum meruit, inasmuch as the policies were in force at all relevant times. With respect to the third-party assignors, we conclude that there is no cause of action for quantum meruit because where, as here, "services were performed at the behest of someone other than the defendant, [a] plaintiff must look to that person for recovery" (*Heller v Kurz*, 228 AD2d 263, 264). Here, the services were performed at the behest of plaintiffs' customers, i.e., third-party assignors, and plaintiffs therefore do not have quantum meruit causes of action against defendants (*see Pekler v Health Ins. Plan of Greater N.Y.*, 67 AD3d 758, 760; *Kirell v Vytra Health Plans Long Is., Inc.*, 29 AD3d 638, 639).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1078

CA 13-02228

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

NICK'S GARAGE, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, SYRACUSE (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (ROBERT K. WEILER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 3, 2013. The order denied in part defendant's motion to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendant's motion seeking dismissal of the second cause of action in the amended complaint, and as modified the order is affirmed without costs.

Same Memorandum as in *Jeffrey's Auto Body, Inc. v Allstate Ins. Co.* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1079

CA 13-02229

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

NICK'S GARAGE, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEICO GENERAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

GOLDBERG SEGALLA LLP, SYRACUSE (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (ROBERT K. WEILER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 3, 2013. The order, among other things, denied in part defendant's motion to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendant's motion seeking dismissal of the second cause of action, and as modified the order is affirmed without costs.

Same Memorandum as in *Jeffrey's Auto Body, Inc. v Allstate Ins. Co.* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1080

CA 13-02230

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

JEFFREY'S AUTO BODY, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEICO GENERAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

GOLDBERG SEGALLA LLP, SYRACUSE (MATTHEW S. LERNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (ROBERT K. WEILER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 3, 2013. The order, among other things, denied in part defendant's motion to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendant's motion seeking dismissal of the second cause of action, and as modified the order is affirmed without costs.

Same Memorandum as in *Jeffrey's Auto Body, Inc. v Allstate Ins. Co.* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1084

CA 14-00624

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

IN THE MATTER OF DIANA SACHS AYLWARD, JOHN C. CARBONARA, GRETCHEN CERCONE, ROBERT FREEDMAN, MONTE K. HOFFMAN, PETER HOGAN, NANCY KARP, JOEL LEVIN, NORA SANTIAGO, THOMAS J. SCIME, JONATHAN D. WEIR AND PETER ALLEN WEINMANN, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ASSESSOR, CITY OF BUFFALO, BOARD OF ASSESSMENT REVIEW FOR CITY OF BUFFALO, COUNTY OF ERIE AND STATE OF NEW YORK, RESPONDENTS-RESPONDENTS.

WOLFGANG & WEINMANN, LLP, BUFFALO (JORGE S. de ROSAS OF COUNSEL), FOR PETITIONERS-APPELLANTS.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (JOEL R. KURTZHALTS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 10, 2013 in proceedings pursuant to RPTL article 7. The order, among other things, granted respondents' motion to, inter alia, inspect the interior of petitioners' homes.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by directing that the fourth and fifth ordering paragraphs shall apply only to exterior inspections, and as modified the order is affirmed without costs in accordance with the following Memorandum: Petitioners commenced these proceedings pursuant to RPTL article 7 seeking reductions in the value of the assessments of their respective properties. On a prior appeal, we reversed orders denying petitioners' motions to preclude respondents from conducting interior inspections of their homes and remitted the matter for further proceedings (*Matter of Aylward v City of Buffalo*, 101 AD3d 1743). Petitioners now appeal from an order granting respondents' motion pursuant to CPLR 408, 3120, and 3126 for, inter alia, interior and exterior inspections of the subject properties and document discovery. We note at the outset that, although petitioners' notice of appeal is from the order in its entirety, they do not raise in their brief any contentions concerning that part of the order granting exterior inspections. We therefore deem any issues with respect thereto abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We agree with petitioners that Supreme Court erred in granting respondents' discovery requests insofar as they sought interior inspections of petitioners' homes and in ordering preclusion if petitioners refused to permit interior inspections. We therefore modify the order accordingly. "Because discovery tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding, discovery is granted only where it is demonstrated that there is need for such relief" (*Matter of Town of Pleasant Val. v New York State Bd. of Real Prop. Servs.*, 253 AD2d 8, 15). Here, in order for "respondents to establish their entitlement to conduct . . . interior inspection[s] of the petitioner[s'] home[s] for purposes of appraisal, in the absence of the petitioner[s'] consent, . . . respondents bore the burden of demonstrating that [each] 'particular inspection [was] reasonable' " (*Matter of Jacobowitz v Board of Assessors for Town of Cornwall*, 121 AD3d 294, 301), and " 'that interior inspections were necessary to prepare their defense' " (*id.* at 304, quoting *Aylward*, 101 AD3d at 1744). We agree with petitioners that respondents failed to make the required showing that interior inspections were reasonable and necessary to prepare their defense (*see id.*; *cf. Matter of Wendy's Rests., LLC v Assessor, Town of Henrietta*, 74 AD3d 1916, 1917). Respondents submitted an affidavit from an expert appraiser who averred that there "is not an adequate substitute for [interior] inspection available to produce a Self-Contained Appraisal Report" as required for trial purposes in tax certiorari litigation. The expert also averred, however, that an interior inspection of a property being appraised "is not always required" pursuant to the Uniform Standards of Professional Appraisal Practice. Furthermore, neither interior inspections nor a "self-contained appraisal report" is required by statute or court rule (*see* CPLR 3140; 22 NYCRR 202.59). Thus, we conclude that the appraiser's general averments failed to set forth "personal knowledge of the facts and circumstances indicating that access to the interior of the [homes] was necessary to accurately arrive at the fair market value thereof" (*Jacobowitz*, 121 AD3d at 304).

In addition to establishing that their request for interior inspections was reasonable and necessary to prepare their defense, respondents were also required to show that their interest in conducting them outweighed petitioners' Fourth Amendment privacy rights (*see id.* at 306-307; *Camara v Municipal Court of City & County of San Francisco*, 387 US 523, 536-537). In determining whether respondents made such a showing, the court was required to "balanc[e] respondents' need for interior inspections [of the homes] against the invasion of petitioners' privacy interests that such inspections would entail" (*Aylward*, 101 AD3d at 1744; *see generally Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954). Upon our review of the record, we conclude that respondents failed to establish that their interest in interior inspections outweighed petitioners' Fourth Amendment privacy rights (*see Jacobowitz*, 121 AD3d at 307).

Petitioners further contend that the court abused its discretion in granting document discovery regarding capital improvements and construction costs since the time of purchase, contending that such information is too remote and irrelevant to value at the time of

assessment. Petitioners asserted a different contention during oral argument of the motion and, thus, their present contention that the request is overly broad is improperly raised for the first time on appeal (*see Ciesinski*, 202 AD2d at 985).

Finally, we reject petitioners' contention that the court abused its discretion in ordering them to provide prior surveys of the subject properties. Contrary to petitioners' contention, they failed to establish that the surveys had previously been provided, which is the sole ground raised by petitioners in opposition to respondents' request.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1111

CA 13-02084

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

THE NEW KAYAK POOL CORPORATION,
NOW KNOWN AS KAYAK POOL CORPORATION
AND KAYAK KATALOGUE CORP.,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

KAVINOKY COOK LLP, AND HODGSON RUSS, LLP,
DEFENDANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (MICHAEL B. POWERS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

HAGERTY & BRADY, BUFFALO (MICHAEL A. BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT HODGSON RUSS, LLP.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered August 28, 2013. The order, among other things, granted defendants' motions for summary judgment.

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

Memorandum: Plaintiffs commenced this legal malpractice action against defendants, Kavinoky Cook LLP (Kavinoky) and Hodgson Russ, LLP (Hodgson), each having represented plaintiff The New Kayak Pool Corporation, now known as Kayak Pool Corporation (Kayak Pool) in a federal trademark infringement action. Seven months after Hodgson was substituted for Kavinoky as legal counsel for Kayak Pool, the federal action settled, and Kayak Pool received, inter alia, injunctive relief and $150,000 in full settlement of all its claims in that action. The settlement check was issued by an insurance company, and plaintiffs now allege that Kavinoky and Hodgson committed malpractice by failing to inquire as to the federal defendants' insurance coverage. Plaintiffs further allege that, had Kayak Pool been aware that the federal defendants had insurance coverage, Kayak Pool would not have settled for only $150,000.

Following discovery in this action, plaintiffs moved for partial summary judgment on liability, and each of the defendants moved for summary judgment dismissing the amended complaint and all cross claims

asserted against them. We conclude that Supreme Court properly granted defendants' motions.

As a preliminary matter, we note that Kavinoky previously moved for summary judgment, and the order denying that motion was affirmed by this Court (*New Kayak Pool Corp. v Kavinoky Cook LLP*, 74 AD3d 1852, 1852-1853). Contrary to plaintiffs' contention, which is improperly raised for the first time on appeal (*see Glenshaw Glass Co. v Great Atl. & Pac. Tea Co.*, 63 AD2d 893, 894), Kavinoky was not barred by the doctrine of law of the case from filing a second motion for summary judgment. Discovery was not completed at the time of the first motion, and "[w]here, as here, the second motion is based upon new information obtained during disclosure, the second motion is not repetitive of the first and the court may rule on the merits of the second motion" (*Schriptek Mktg. v Columbus McKinnon Corp.*, 187 AD2d 800, 801-802, *lv denied* 81 NY2d 704; *see Taillie v Rochester Gas & Elec. Corp.*, 68 AD3d 1808, 1809-1810). In any event, "a subsequent summary judgment motion may be properly entertained when it is substantively valid and when the granting of the motion will further the ends of justice while eliminating an unnecessary burden on the resources of the courts" (*Valley Natl. Bank v INI Holding, LLC*, 95 AD3d 1108, 1108; *see Town of Angelica v Smith*, 89 AD3d 1547, 1549).

Contrary to plaintiffs' contention, the court properly granted defendants' motions because a necessary element of a cause of action for legal malpractice is that the attorney's negligence caused "a loss that resulted in actual and ascertainable damages" (*Lincoln Trust v Spaziano*, 118 AD3d 1399, 1401; *see Oot v Arno*, 275 AD2d 1023, 1023-1024), and defendants established as a matter of law that plaintiffs' claims of damages are entirely speculative. Thus, defendants are entitled to summary judgment because they met their burden of establishing that plaintiffs are "*unable to prove* at least one of the essential elements of [their] legal malpractice cause of action" (*Boglia v Greenberg*, 63 AD3d 973, 974 [emphasis added]; *see Grace v Law*, 108 AD3d 1173, 1174-1175, *affd* 24 NY3d 203; *Wilk v Lewis & Lewis, P.C.*, 75 AD3d 1063, 1065). "Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action" (*Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843, 848, *lv denied* 20 NY3d 857). Here, as in *Lincoln Trust*, plaintiffs' theory of damages "is too speculative to survive defendants' motion[s] for summary judgment" (*Lincoln Trust*, 118 AD3d at 1401), and plaintiffs "failed to submit nonspeculative evidence in support of [their] damages claims" in opposition to defendants' motions (*G & M Realty, L.P. v Masyr*, 96 AD3d 689, 690). Indeed, defendants established that the damages claimed by plaintiffs are " '*incapable* of being proven with any reasonable certainty' " (*Zarin v Reid & Priest*, 184 AD2d 385, 388 [emphasis added]).

We understand the concern of our dissenting colleague that we are awarding defendants summary judgment based on gaps in plaintiffs' proof (*see Val Tech Holdings, Inc. v Wilson Manifolds, Inc.*, 119 AD3d 1327, 1329) but, as noted, the inability of plaintiffs to establish actual damages is a sufficient basis to grant summary judgment to

defendants in this legal malpractice action (*see e.g. Country Club Partners, LLC v Goldman*, 79 AD3d 1389, 1392; *Charos v Esseks, Hefter & Angel*, 216 AD2d 511, 511).

Contrary to plaintiffs' contention with respect to Kavinoky, the court properly determined that Kavinoky's failure to determine the existence of the federal defendants' insurance coverage was not a proximate cause of plaintiffs' alleged damages, which is a necessary element of a cause of action for legal malpractice (*see Oot*, 275 AD2d at 1023). As noted by the court, "[i]t is undisputed that Kavinoky was discharged as [Kayak Pool's] counsel, and Hodgson was substituted in as [Kayak Pool's] counsel, prior to the time that any settlement negotiations began and that Kavinoky had no role whatsoever in those negotiations." Moreover, although plaintiffs substituted Hodgson as their legal counsel only after the attorney who had initially represented plaintiffs left Kavinoky to join Hodgson (*see New Kayak Pool Corp.*, 74 AD3d at 1852-1853), Kavinoky established that a different attorney at Hodgson overtook responsibility for representing plaintiffs once Hodgson was substituted as counsel. Therefore, despite the connection between the two law firms, there was no actual continuity of legal representation. Even if we were to assume, arguendo, that Kavinoky, through the actions of the first attorney, was negligent in failing to investigate the matter of insurance coverage, we note that Hodgson, through the newly assigned attorney, had over seven months in which to conduct its own investigation before settling the federal action on behalf of Kayak Pool. We thus conclude that Kavinoky established as a matter of law "that its actions did not proximately cause the plaintiffs' alleged damages, and that subsequent counsel had a sufficient opportunity to protect the plaintiffs' rights by pursuing any remedies it deemed appropriate on their behalf" (*Katz v Herzfeld & Rubin, P.C.*, 48 AD3d 640, 641; *see e.g. Somma v Dansker & Aspromonte Assoc.*, 44 AD3d 376, 377; *Golden v Cascione, Chechanover & Purcigliotti*, 286 AD2d 281, 281; *cf. Tooma v Grossbarth*, 121 AD3d 1093, 1096-1097; *Grant v LaTrace*, 119 AD3d 646, 647), and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

All concur except FAHEY, J., who dissents and votes to modify in accordance with the following Memorandum: I respectfully dissent and would modify the order by denying the motions of defendants Kavinoky Cook LLP (Kavinoky) and Hodgson Russ, LLP (Hodgson) for summary judgment dismissing the amended complaint and all cross claims against them. In my view, there are triable issues of fact whether Kavinoky's negligence was a proximate cause of the injuries complained of, and whether plaintiffs suffered ascertainable damages as a result of the alleged negligence of Kavinoky and Hodgson.

Plaintiff was represented by defendants for approximately 4½ years. It is alleged that during that period neither defendant determined the amount of insurance coverage available in the underlying action.

Turning first to Kavinoky's motion, Kavinoky contends that there is no link between its negligence in failing to determine whether the

defendants in the federal trademark infringement action had insurance coverage with respect to that action and the damages allegedly sustained by plaintiff The New Kayak Pool Corporation, now known as Kayak Pool Corporation (Kayak Pool) as a result of the settlement of that lawsuit without knowledge of that insurance coverage. In that vein, Kavinoky specifically contends that, because Hodgson succeeded Kavinoky as the law firm representing Kayak Pool before that settlement occurred, Kavinoky is disconnected from that failure to investigate the insurance coverage available to the defendants in the federal action. This issue essentially turns on the question whether Hodgson "*had sufficient time and opportunity to adequately protect [the] rights*" of Kayak Pool (*Maksimiak v Schwartzapfel Novick Truhowsky Marcus, P.C.*, 82 AD3d 652, 652 [emphasis added]). Put differently, the operative question is whether Hodgson, as the successor to Kavinoky, had sufficient time and opportunity to perform the act, i.e., determining whether the defendants in the federal action had insurance coverage, that Kavinoky was allegedly negligent in failing to perform (*cf. e.g. Alden v Brindisi, Murad, Brindisi, Pearlman, Julian & Pertz ["The People's Lawyer"]*, 91 AD3d 1311, 1311; *Perks v Lauto & Garabedian*, 306 AD2d 261, 261-262). Indeed, Kavinoky seeks to avoid liability for its negligence in failing to investigate the insurance coverage question based on its theory that Hodgson's failure to engage in precisely the same activity interrupted the link between Kavinoky's negligence and the alleged injury of plaintiffs. Such interruption, of course, may but does not automatically sever such a causal link (*see Maheshwari v City of New York*, 2 NY3d 288, 295) and, "[a]s a general rule, issues of proximate cause[, including superseding cause,] are for the trier of fact" (*Hahn v Tops Mkts., LLC*, 94 AD3d 1546, 1548 [internal quotation marks omitted]; *see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784, 829; *Prystajko v Western N.Y. Pub. Broadcasting Assn.*, 57 AD3d 1401, 1403).

Here, in my view, the question whether Kavinoky's negligence was a cause of the injuries complained of is for a trier of fact. The record establishes that in the 3½ years after this action was commenced Kavinoky worked this matter so extensively as to bill between $350,000 and approximately $770,000 in legal fees; that the representation of Kayak Pool in the federal action was transferred to Hodgson on June 20, 2003; and that the federal action ultimately settled on February 5, 2004. The record, however, also contains evidence that almost immediately after Hodgson began to represent Kayak Pool in the federal action, and potentially even before, there was an order for a settlement conference in that matter. Moreover, the record contains evidence that, after receiving the settlement conference notice, Kayak Pool instructed Hodgson to settle the matter "at as little [further] cost as possible." In view of that evidence, whether Hodgson had sufficient time and opportunity to investigate the issue of the insurance coverage available to the defendants in the federal action is for a trier of fact to decide, along with which law firm, if any, is responsible for the oversight.

As to the damages question, I note that the analysis of this issue applies equally to Kavinoky and Hodgson. To establish legal

malpractice by defendants, plaintiffs "must demonstrate that [defendants] failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that [defendants'] breach of this duty caused [plaintiffs] to sustain actual and ascertainable damages" (*Harris Beach PLLC v Eber Bros. Wine & Liq. Corp.*, 121 AD3d 1524, 1525 [internal quotation marks omitted]). "In the context of [these] motion[s] by [defendants] for . . . summary judgment, *the burden was on [defendants] to present evidence . . . in admissible form* establishing that [plaintiffs are] unable to prove at least one of [the] essential elements of a malpractice cause of action" (*id.* [internal quotation marks omitted] [emphasis added]).

Regarding damages, Kavinoky relies on, inter alia, *Sevey v Friedlander* (83 AD3d 1226, 1227, *lv denied* 17 NY3d 707), which stands for the proposition that a defendant in a legal malpractice action makes a prima facie showing that the plaintiff is unable to prove damages by demonstrating that the settlement was favorable to the plaintiff. Kavinoky relies on an expert's affidavit, who contends that, based on his review of the record, there was "no evidence to indicate that [the defendants in the federal action], or [their] insurer, would have made a different settlement offer if discovery on insurance coverage had occurred in this case." Hodgson's appellate attorney took a similar approach in arguing this appeal, noting that plaintiffs "obtained no discovery from [the defendants in the federal action, their insurer, or their attorney, and thus] presented nothing more than their assumption [that Kayak Pool] would have received more in [the] settlement [of the underlying action]."

In my view, that approach is basically a "gaps in proof" tack by which defendants cannot meet their initial burdens on their motions for summary judgment (*see Val Tech Holdings, Inc. v Wilson Manifolds, Inc.*, 119 AD3d 1327, 1329; *see also Harris Beach PLLC*, 121 AD3d at 1525-1526). It is defendants' burden to show that knowledge of insurance coverage would not affect settlement, not plaintiffs' burden.

I also note that the reason for the absence of evidence on damages is clear: although many hours were billed by Kavinoky before the transfer to Hodgson, very little discovery had been done and, apparently, none had been done on the issue of damages. Given the absence of evidence as to the value of Kayak Pool's claim and the possibility that the threat of the bankruptcy of the defendants in the federal action motivated the settlement, I cannot agree with Kavinoky that the record establishes that Kayak Pool was well-disposed in that action. To the extent Hodgson contends that the impetus for the settlement was the injunctive relief and that Kayak Pool resolved the underlying matter favorably by obtaining that injunctive relief, I conclude that defendants still are not entitled to summary judgment because there is at least a factual question as to whether the injunctive relief drove the settlement, or whether the settlement was motivated by the desire for injunctive relief *and* a collectible sum of money designed to offset Kayak Pool's legal fees in the underlying matter.

Put more simply, and more bluntly, in the absence of discovery on damages I question how defendants could meet their initial burden on these parts of their motions by demonstrating that the settlement was favorable to Kayak Pool. The absence of discovery on the damages question in the federal action does not mean that defendants are entitled to summary judgment here. Rather, it means that defendants are responsible both for conducting that discovery in this action and for affirmatively proving their present contention that plaintiffs did not sustain ascertainable damages as a result of defendants' negligence. Defendants have not met that burden, and thus I would deny their respective motions for summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1141

CA 14-00496

PRESENT: CENTRA, J.P., FAHEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

JOSEPH A. LAUTO, JR., PLAINTIFF-RESPONDENT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

CATHOLIC HEALTH SYSTEM, INC., DOING BUSINESS AS
KENMORE MERCY HOSPITAL, DEFENDANT-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROLAND M. CERCONE, PLLC, BUFFALO (ROLAND M. CERCONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 31, 2013. The order and judgment awarded plaintiff Joseph A. Lauto, Jr., money damages upon a jury verdict.

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

Memorandum: In this medical malpractice case involving a surgical instrument left in plaintiff's body during a surgery, defendant appeals from an order and judgment awarding Joseph A. Lauto, Jr. (plaintiff), damages, upon a jury verdict, of $115,000 for past pain and suffering. Supreme Court denied defendant's posttrial motion for remittitur with respect to the award. Contrary to defendant's contention, we conclude that the award is not excessive and does not deviate materially from what would be reasonable compensation (*see* CPLR 5501 [c]; *see also Hotaling v Corning Inc.*, 12 AD3d 1064, 1066).

Even assuming, arguendo, that the court erred in precluding defendant's nursing staff from providing opinion testimony at trial, as defendant contends, we conclude that the error is harmless. Defendant contends that it was prejudiced by the court's error because it was unable to elicit the opinions of the nursing staff with respect to the possible negligence of the surgeon who performed the surgery, the operating room procedures, and the surgical instrument that was left in plaintiff's body. We reject that contention. First, a nurse would not be allowed to provide opinion testimony on the standard of care to be applied to a medical doctor (*see Elliot v Long Is. Home, Ltd.*, 12 AD3d 481, 482; *Dombrowski v Moore*, 299 AD2d 949, 951). Second, there were two nurses who testified at trial, but the record

establishes that neither of them had any independent recollection of the surgery. We therefore conclude that the testimony of the nurses would have had no probative value in aiding the jury to determine whether defendant should be held liable for medical malpractice (*see generally Friedmann v New York Hosp.-Cornell Med. Ctr.*, 65 AD3d 850, 850-851).

We reject defendant's further contention that the court erred in denying its request to have the surgeon listed on the verdict sheet so that the jury could apportion any potential liability to him. Inasmuch as the case was discontinued against the surgeon before trial, apportioning any potential liability to him would have required defendant to establish that the surgeon "breached a duty to the plaintiff, and that the breach proximately caused the plaintiff's injuries" (*McNally v Corwin*, 30 AD3d 482, 485). We conclude that defendant failed to meet that burden and, thus, the court did not err in denying defendant's request (*see id.*).

Defendant also contends that the doctrine of res ipsa loquitur should not have been charged to the jury because plaintiff could not establish who had exclusive control over the surgical instrument. Contrary to defendant's contention, it was not necessary for plaintiff to establish as a prerequisite to the application of the doctrine of res ipsa loquitur which individual, i.e., the surgeon or one of the nurses, had exclusive control over the surgical instrument (*see Schmidt v Buffalo Gen. Hosp.*, 278 AD2d 827, 828, *lv denied* 96 NY2d 710; *see also Backus v Kaleida Health*, 91 AD3d 1284, 1286; *see generally LaPietra v Clinical & Interventional Cardiology Assoc.*, 6 AD3d 1073, 1074).

Finally, defendant failed to preserve its contention that the court erred in denying its application to question plaintiff about other medical conditions that may have been related to plaintiff's joint pain allegedly caused by defendant's medical malpractice (*see* CPLR 5501 [a] [3]).

All concur except DEJOSEPH, J., who concurs in the result in the following Memorandum: I concur in the result reached by the majority, but I write separately to address defendant's contention, with which I agree, that Supreme Court erred in precluding its nursing staff from providing opinion testimony at trial. Although I agree with the majority that the error is harmless, I note that "CPLR 3101 (d) (1) applies only to experts retained to give opinion testimony at trial, and not to treating physicians, other medical providers, or other fact witnesses" (*Rook v 60 Key Ctr.*, 239 AD2d 926, 927) and, thus, the court's reliance upon CPLR 3101 (d) (1) in precluding opinion testimony from the nurses was misplaced.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1146

CA 13-01886

PRESENT: CENTRA, J.P., FAHEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, BY
ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF STATE
OF NEW YORK, PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ONE SOURCE NETWORKING, INC., AND SARA ANN FAGAN,
RESPONDENTS-APPELLANTS-RESPONDENTS.

WOODS OVIATT GILMAN, LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (David A. Murad, J.), entered January 15, 2013. The order and judgment, among other things, granted the petition in part.

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

Memorandum: Respondent One Source Networking, Inc. (One Source) is an automobile loan brokerage firm, which was started by respondent Sara Ann Fagan. When a consumer needed an automobile loan, automobile dealers with whom One Source worked sent the consumer's credit application to One Source. One Source sent the consumer's loan application to a bank and, once the bank approved the loan, One Source contacted the consumer to discuss the terms of the loan. Although a warranty was not a precondition to obtaining a loan, One Source employees allegedly told consumers either that they were required to purchase a warranty in order to obtain their loans, and/or that a warranty was included with their loans and that they would be charged therefor. It was not until the closing of a loan that a consumer was allegedly informed that he or she could waive the "extended service contract[]," i.e., the warranty. In April 2011, the Attorney General, on behalf of petitioner, brought a special proceeding against respondents to enjoin them from engaging in deceptive business practices related to their sale of warranties to consumers.

After a bench trial, by order and judgment entered January 15, 2013, Supreme Court found, inter alia, that respondents "violated General Business Law § 349 and Executive Law § 63 (12) by engaging in

a deceptive scheme designed to cause consumers to purchase unnecessary extended warranties on the vehicle[s] being purchased." In addition, the court permanently enjoined respondents "from engaging in the deceptive acts and practices," and granted restitution to six identified consumers. The court then appointed a referee to hold a hearing to "determine how much of the charge for the warranties should be ascribed to [r]espondents' deceptive scheme." We affirm.

Respondents contend that the court erred in finding that they violated Executive Law § 63 (12) inasmuch as that provision does not create an independent cause of action. Respondents are correct that section 63 (12) does not create an independent cause of action (*see Matter of People v Frink Am.*, 2 AD3d 1379, 1380; *see also People v Charles Schwab & Co., Inc.*, 109 AD3d 445, 449). Rather, that section is only a mechanism by which a petitioner may show that injunctive relief and restitution are proper in the event that the petitioner establishes that a respondent violated other statutes (*see Frink Am.*, 2 AD3d at 1380). We nevertheless reject respondents' contention. There was no finding by the court that section 63 (12) alone provides for an independent cause of action, i.e., without resort to another statute. Instead, the court properly determined that the Attorney General, on behalf of petitioner, could avail himself of the remedies set forth in section 63 (12) in light of the allegations that respondents violated General Business Law § 349 (*see State of New York v Wolowitz*, 96 AD2d 47, 63; *see also Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 343-348; *see generally Matter of Lefkowitz v Bull Inv. Group*, 46 AD2d 25, 28, *lv denied* 35 NY2d 647).

We conclude that the court's determination that respondents violated General Business Law § 349 is supported by a fair interpretation of the evidence (*see generally Mercone v Monroe County Deputy Sheriffs' Assn., Inc.*, 90 AD3d 1698, 1699; *Fryling v Omer Constr. Co.*, 286 AD2d 983, 983). Pursuant to section 349, deceptive business acts or practices are unlawful, and a " '[petitioner] under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the [consumer] suffered injury as a result of the deceptive act' " (*Electrical Waste Recycling Group, Ltd. v Andela Tool & Mach., Inc.*, 107 AD3d 1627, 1629, *lv dismissed* 22 NY3d 1111). With respect to the second element, an act or practice that is deceptive or misleading in a material way is defined as a representation or omission "likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Gaidon*, 94 NY2d at 344 [internal quotation marks omitted]; *see Matter of People v Applied Card Sys., Inc.*, 27 AD3d 104, 107, *lv dismissed* 7 NY3d 741; *see generally Guggenheimer v Ginzburg*, 43 NY2d 268, 273). Contrary to respondents' contention, we conclude that petitioner established that second element, i.e., that One Source's actions were likely to mislead a reasonable consumer. One Source's actions were misleading in a material way in light of the fact that the consumers at issue were dependent on One Source to find them the financing to purchase their vehicles, and they were willing to pay for a warranty in order to obtain their loans.

Respondents further contend that One Source did not violate General Business Law § 349 because the testifying consumers signed documents indicating that they did not have to purchase a warranty in order to obtain their loans. We reject that contention and agree with the court that the documents and disclosures presented to the consumers at their respective closings were "inadequate to dispel the deceptiveness of the sales practice." The cases relied on by respondents stand for the general proposition that a party claiming that he or she did not read certain documents, without any valid excuse for failing to read them, is still bound by the terms of those documents (*see e.g. Patterson v Somerset Invs. Corp.*, 96 AD3d 817, 817). That proposition is inapplicable to the case at bar because One Source employees used the word "warranty" with consumers when they discussed the loans over the telephone, and that was the only information that the consumers obtained about the warranties until they signed the paperwork at their closings. Notably, none of the consumers who testified were given any paperwork to review prior to their closings. The cases relied upon by respondents do not involve situations where, as here, consumers were told one thing verbally over the telephone, i.e., that they were required to purchase a warranty in order to obtain their loans, and/or that a warranty would be included with their loans and that they would be charged therefor, and something else in writing at the closing using different terminology, i.e., that the "extended service contract[]" could be waived. In any event, we conclude that respondents cannot refute the Attorney General's allegations of deceptive business practices by relying on their closing documents inasmuch as the cause of action is based on One Source's practice of telling consumers verbally that a warranty was essentially a precondition to obtaining a loan when in fact that was not the case (*see DeAngelis v Timberpeg E., Inc.*, 51 AD3d 1175, 1178).

We reject respondents' further contention that there was no proof to support the judgment against Fagan individually because there was no evidence that Fagan personally participated in the fraudulent practice. "Because Executive Law § 63 (12) allows the Attorney General to seek relief against 'any person,' there is no impediment to imposing personal liability against a corporate officer if it is established that he [or she] personally participated in or had actual knowledge of the fraud or illegality" (*Frink Am.*, 2 AD3d at 1381). Taking into account the court's superior ability to assess the credibility of witnesses, the court's determination that Fagan had actual knowledge of and participated in the warranty-selling practice is supported by a fair interpretation of the evidence, and there is no basis for this Court to disturb that finding (*see Mercone*, 90 AD3d at 1699; *Fryling*, 286 AD2d at 983).

On the cross appeal, the Attorney General contends on behalf of petitioner that the court erred in determining that only the six testifying consumers were entitled to restitution. He notes that the petition was "on behalf of all [consumers] aggrieved by One Source's fraudulent marketing of warranties" and further asserts that his use of a representative sample of consumers was appropriate. We reject those contentions. The court did not determine that the Attorney

General did not have the authority to seek damages for a larger class of victims but, rather, that he failed to meet his burden of establishing the total number of victims and their possible range of damages. The court noted that the Attorney General had received "five banker boxes of files" from respondents in the fall of 2009 and "had 18 months" to review the files prior to trial, but offered no further proof with respect to victims beyond the six victims who testified.

It is well settled that a court "may order restitution to all injured consumers, including those not identified by name in the petition" (*People v Beach Boys Equip. Co.*, 273 AD2d 850, 851), and the decision to award restitution lies within the court's discretion (*see State of New York v Princess Prestige Co.*, 42 NY2d 104, 108). We conclude that the court's determination here does not constitute an abuse of discretion (*see e.g. Matter of State of New York v Ford Motor Co.*, 136 AD2d 154, 158, *affd* 74 NY2d 495).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1152

CA 14-00495

PRESENT: CENTRA, J.P., FAHEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS COSTANZA, DEFENDANT-APPELLANT.

NICHOLAS COSTANZA, THIRD-PARTY PLAINTIFF,

V

PARIS-KIRWAN ASSOCIATES, INC., ANGELO LOVULLO AND DAVID SCHLAFER, THIRD-PARTY DEFENDANTS.

RONALD J. PASSERO, ROCHESTER, FOR DEFENDANT-APPELLANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 12, 2013. The order and judgment, insofar as appealed from, granted plaintiff's motion for summary judgment and denied that part of defendant's cross motion seeking leave to serve an amended answer to include his proposed third affirmative defense.

It is hereby ORDERED that the order and judgment insofar as appealed from, is reversed on the law without costs, plaintiff's motion is denied, and that part of defendant's cross motion seeking leave to serve an amended answer to include his proposed third affirmative defense is granted.

Memorandum: On appeal from an order and judgment awarding plaintiff money damages for defendant's breach of contract and attorneys' fees, defendant contends that Supreme Court erred in granting plaintiff's motion for summary judgment and in denying his cross motion seeking leave to amend his answer to plaintiff's second amended complaint by asserting a certain affirmative defense therein. We agree, and we therefore reverse the order and judgment insofar as appealed from, deny plaintiff's motion, and grant that part of defendant's cross motion seeking leave to assert his proposed third affirmative defense.

In or about October 1999, defendant became a general partner and a 50% owner of Estate Vehicle Sales (EVS), a motor vehicle dealership. On January 21, 2000, EVS entered into an agreement with United Pacific Insurance Company, a surety company and subsidiary of Reliance Group Holdings, Inc. (collectively, United/Reliance), for a $10,000 motor vehicle dealer bond. Although the bond was issued and to be honored by United/Reliance, the bond paperwork was delivered to EVS by third-party defendant Paris-Kirwan Associates, Inc. (Paris-Kirwan), an agency that dealt with EVS. As part of the application for the bond, and as part of the consideration given for the bond, defendant entered into an agreement in which he agreed to indemnify United/Reliance for, inter alia, "losses, costs, damages and expenses, including attorney's and counsel fees" that United/Reliance "may sustain or incur by reason of the issuance of [the] [b]ond[]."

In May 2000, plaintiff purchased substantially all of United/Reliance's surety business, including the rights and obligations of United/Reliance pursuant to the bond and the indemnity agreement. A Paris-Kirwan employee subsequently transmitted to plaintiff a change request seeking to increase the bond value from $10,000 to $25,000; in response, on October 15, 2001, plaintiff issued a rider increasing the bond value.

Multiple judgments were rendered against EVS between August 2005 and July 2007, and the New York State Department of Motor Vehicles (DMV) made claims on the bond based upon each of the judgments. Plaintiff issued multiple payments to the DMV totaling $25,000 in full satisfaction of its obligations under the bond before seeking indemnity from defendant with respect to those payments.

After defendant refused its request for indemnification, plaintiff commenced this action seeking, inter alia, an award of damages and attorneys' fees relative to defendant's alleged breach of the indemnity agreement, and it subsequently served two amended complaints. Plaintiff moved for summary judgment on the second amended complaint, and defendant cross-moved for an order granting leave to amend his answer to the second amended complaint to assert, inter alia, a proposed third affirmative defense premised on the fact that his "individual liability under the indemnity agreement was terminated before the acts or omissions underlying the DMV claims occurred."

Turning first to plaintiff's motion for summary judgment, even assuming, arguendo, that plaintiff met its initial burden, we conclude that defendant raised an issue of fact in opposition thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendant submitted evidence that in July 2001, i.e., before the judgments were rendered against EVS, he advised third-party defendant Angelo Lovullo, a Paris-Kirwan employee, that defendant was no longer involved in the business of running a motor vehicle dealership and instructed Lovullo to cancel the bond. Defendant also tendered evidence raising an issue of fact whether Paris-Kirwan was an agent of plaintiff at the time of that purported directive (*see generally Travelers Ins. Co. v Raulli & Sons, Inc.*, 21 AD3d 1299, 1300-1301; *Bennion v Allstate Ins. Co.*, 284

AD2d 924, 925). Specifically, defendant submitted evidence that the chief executive officer of Paris-Kirwan signed the bond, that the asset transfer agreement between United/Reliance and plaintiff lists Paris-Kirwan as an agent of plaintiff, and that Lovullo believed that Paris-Kirwan was a "licensed . . . agent[]" of plaintiff that had authority to bind plaintiff "[i]n some situations." We also note that in their joint answer to the third-party complaint, Paris-Kirwan and Lovullo did not deny the allegation advanced in the third-party complaint that Lovullo was a partner of Paris-Kirwan at all times relevant to this matter.

Turning next to defendant's cross motion for leave to amend his answer to the second amended complaint, we conclude that the court erred in denying that part of defendant's cross motion for an order granting leave to amend his answer to assert the proposed third affirmative defense. " 'Generally, [l]eave 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' " (*McGrath v Town of Irondequoit*, 120 AD3d 968, 969; *see* CPLR 3025 [b]). Here, we conclude that the proposed third affirmative defense is not patently lacking in merit, and plaintiff has not made any showing of prejudice to foreclose defendant from asserting it (*see McGrath*, 120 AD3d at 969; *cf. Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959).

All concur except DeJoseph, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent. In my view, Supreme Court properly granted plaintiff's motion for summary judgment and denied defendant's cross motion seeking leave to amend his answer to plaintiff's second amended complaint, and I would therefore affirm.

At the outset, I see no dispute between the parties that plaintiff met its burden of showing entitlement to summary judgment. The court correctly determined that the plaintiff satisfied said burden by submitting the indemnity agreement signed by defendant, a sworn itemized statement of loss and expenses, and copies of payment drafts (*see American Home Assur. Co. v Gemma Constr. Co.*, 275 AD2d 616, 620, *lv dismissed* 96 NY2d 791, 96 NY2d 959).

Defendant contends that the court made an improper credibility determination in rejecting his allegations of fact concerning alleged conversations between defendant and an account executive of Paris-Kirwan Associates, Inc. (Paris-Kirwan), and that there is a question of fact whether Paris-Kirwan is an agent of plaintiff such that the claimed conversation relieved defendant of any indemnification obligation. I reject that contention.

Under New York law, "a broker is normally the agent of the insured" (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 442 n 3). "[A] broker will be held to have acted as the insurer's agent where there is some evidence of 'action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred' " (*Rendeiro v State-Wide Ins. Co.*, 8 AD3d 253, 253; *see Bennion v Allstate Ins. Co.*, 284 AD2d 924, 925). The

existence of an express agency agreement may raise a question of fact whether a broker is an insurer's agent (*see Travelers Ins. Co. v Raulli & Sons, Inc.*, 21 AD3d 1299, 1300). Here, defendant, in his third-party complaint, referred to Paris-Kirwan and their employees as his "insurance agent and or agency and or his broker" and as his "insurance agent/or agency" in his verified bill of particulars (*cf. id.* at 1299). Furthermore, there is no express agency agreement designating Paris-Kirwan as plaintiff's agent in the record before this Court, and defendant's contention that an express agency agreement exists is entirely speculative (*see generally Trahwen, LLC v Ming 99 Cent City #7, Inc.*, 106 AD3d 1467, 1468, *lv dismissed* 21 NY3d 1066).

The record evidence as a whole—particularly in light of a lack of an express agency agreement, the speculative nature of any perceived agency, and the evidence that Paris-Kirwan's authority regarding motor vehicle bonds was limited insofar as it could not cancel such bonds—does not give rise to the inference that Paris-Kirwan had "general authority to represent" plaintiff (*Bennion*, 284 AD2d at 925). The evidence therefore fails to raise a question of fact whether alleged conversations with a Paris-Kirwan sales agent could bind plaintiff such that defendant was released from his indemnity obligation.

Turning now to defendant's cross motion seeking leave to amend his answer, defendant asserts that we should grant the cross motion only "if [we] determine[] that [the court] erred in granting the summary judgment motion." Inasmuch as I conclude that the court properly granted summary judgment in favor of plaintiff, I see no reason to address the cross motion.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1219

CA 13-02141

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

INCREDIBLE INVESTMENTS LIMITED, ON ITS OWN AND ON BEHALF OF ONE NIAGARA, LLC, PLAINTIFF-RESPONDENT,

V ORDER

PAUL GRENGA, INDIVIDUALLY, AND AS PRESIDENT OF WHITESTAR DEVELOPMENT CORP., AND AS CLAIMED CURRENT MANAGER OF ONE NIAGARA, LLC, WHITESTAR DEVELOPMENT CORP., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 1.)

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY P. SANDERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered March 8, 2013. The order, among other things, granted plaintiff's motion for partial summary judgment and denied defendants' cross motion for summary judgment.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1220

CA 13-02142

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

INCREDIBLE INVESTMENTS LIMITED, ON ITS OWN AND ON BEHALF OF ONE NIAGARA, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PAUL GRENGA, INDIVIDUALLY, AND AS PRESIDENT OF WHITESTAR DEVELOPMENT CORP., AND AS CLAIMED CURRENT MANAGER OF ONE NIAGARA, LLC, WHITESTAR DEVELOPMENT CORP., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 2.)

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY P. SANDERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered June 6, 2013. The order, among other things, granted the motion of defendants Paul Grenga and Whitestar Development Corp. for reargument and upon reargument reaffirmed its prior decision.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of plaintiff dated October 22, 2012, granting the cross motion of defendants dated December 10, 2012 insofar as the cross motion sought dismissal of the complaint against defendants-appellants and dismissing the complaint against defendants-appellants and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action in April 2012 seeking a declaration that the proxy set forth in Rider 1 of the Operating Agreement of One Niagara, LLC expired pursuant to Section 4.6 of the agreement, which provides in relevant part that "[n]o proxy shall be valid after the expiration of eleven months from the date of its execution unless otherwise expressly provided in the proxy." Supreme Court erred in granting plaintiff's motion for summary judgment and instead should have granted that part of defendants' cross motion seeking summary judgment dismissing the complaint against defendants-appellants (defendants). We conclude that this action is barred by res judicata because plaintiff's claim that the proxy has

expired could have been raised in the federal court action previously commenced by plaintiff against defendants.

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347). " '[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' " (*id.*). The doctrine of res judicata therefore "applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269).

Here, plaintiff commenced the federal action in June 2009, and the third cause of action of its amended complaint sought to set aside the proxy as having been obtained by fraud. In December 2011, plaintiff moved for leave to serve a second amended complaint to include the allegation that the proxy expired 11 months after it was granted. The federal court denied that motion, concluding that there was no good cause for the delay in seeking leave to amend the complaint because plaintiff made an identical argument in the defense of a state court action commenced against plaintiff by defendants in August 2007. In particular, plaintiff alleged in its seventh affirmative defense in the prior state action that the proxy had expired. The federal court then dismissed the third cause of action.

Plaintiff contends that the facts of this action are different from those alleged in the federal court action because it was not until July 2010, after the federal action was commenced, that defendant Paul Grenga used the proxy to elect himself as manager of One Niagara, LLC. As noted, however, prior to commencing the federal court action, plaintiff asserted in a state court action between the parties that the proxy had expired. Although defendants do not contend that the prior state court action bars this action, the fact that plaintiff asserted in the prior state court action that the proxy had expired undermines plaintiff's contention that it had no reason to challenge the validity of the proxy on that basis until July 2010, when the proxy was first exercised. Moreover, we note that plaintiff did not seek leave to amend its complaint in federal court until December 2011, some 17 months after Grenga used the proxy to elect himself as manager. In any event, we conclude that this action and the federal court action arise out of the same transaction, i.e., the Operating Agreement and the Rider that granted the proxy. Thus, when plaintiff challenged the validity of the proxy in the federal court action, it should have raised all grounds for invalidating the proxy, and this action is therefore barred by res judicata (*see generally Parker*, 93 NY2d at 347).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1231

KA 12-00650

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL R. WATKINS, DEFENDANT-APPELLANT.

LESLEY C. GERMANOW, FULTON, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered November 21, 2011. The judgment convicted defendant, upon a jury verdict, of attempted assault in the first degree, assault in the second degree, 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: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]) and assault in the second degree (§ 120.05 [2]) arising from a shooting at the home of defendant's former girlfriend. We reject defendant's contention that he was denied a fair trial as the result of County Court's questioning of a police investigator. The court was "entitled to question [the investigator] to clarify [her] testimony and to facilitate the progress of the trial" (*People v Williams*, 107 AD3d 1516, 1517, *lv denied* 21 NY3d 1047 [internal quotation marks omitted]), and we conclude that, during the questioning, the court exhibited no partiality, bias or hostility against defendant (*see People v Jamison*, 47 NY2d 882, 883).

Contrary to defendant's contention, the court properly refused to suppress evidence obtained by the police without a warrant from defendant's cell phone service provider. The provider disclosed information to the police concerning defendant's location through the use of a technique commonly known as "pinging" (*see generally People v Wells*, 45 Misc 3d 793, 796-797; *People v Moorer*, 39 Misc 3d 603, 610-615). Even assuming, arguendo, that the use of that technique constituted a search implicating the protections of the Federal and State Constitutions (*see* US Const, 4th Amend; NY Const, art I, § 12), we conclude that the People established that exigent circumstances

justified the police in proceeding without a warrant (*see generally People v McBride*, 14 NY3d 440, 446, *cert denied* ___ US ___, 131 S Ct 327; *People v Stevens*, 57 AD3d 1515, 1515-1516, *lv denied* 12 NY3d 822).

Contrary to defendant's further contention, the court properly admitted in evidence a 911 recording containing the statements of a witness present at the shooting under the excited utterance exception to the hearsay rule (*see People v Mulligan*, 118 AD3d 1372, 1372-1373). We agree with defendant, however, that the court erred in failing to redact that portion of the recording containing hearsay statements of the victim that were relayed to the 911 operator by the witness (*see id.* at 1373; *People v Fenner*, 283 AD2d 516, 517-518, *lv denied* 96 NY2d 939). Inasmuch as there is overwhelming evidence of defendant's guilt and no significant probability that the error contributed to his conviction, we conclude that the error is harmless (*see Mulligan*, 118 AD3d at 1373; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant failed to preserve for our review his contention that the evidence of physical injury is insufficient to support his conviction of assault in the second degree (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that defendant's remaining challenges to the legal sufficiency of the evidence lack merit.

Finally, we reject defendant's contentions that he was denied a fair trial by the cumulative effect of the alleged errors (*see People v McKnight*, 55 AD3d 1315, 1317, *lv denied* 11 NY3d 927), and that the sentence is unduly harsh and severe.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1232

CA 13-02197

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO,

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IN THE MATTER OF ADIRONDACK HEALTH-UIHLEIN LIVING CENTER, ET AL., PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, M.D., COMMISSIONER OF HEALTH, STATE OF NEW YORK, ROBERT L. MEGNA, AS DIRECTOR OF BUDGET, AND ANDREW M. CUOMO, GOVERNOR, STATE OF NEW YORK, RESPONDENTS-DEFENDANTS-APPELLANTS.

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

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

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered November 20, 2013 in a CPLR article 78 proceeding and declaratory judgment action. The order, insofar as appealed from, granted those parts of the amended petition seeking to prohibit respondents-defendants from enforcing 10 NYCRR 86-2.40 (m) (10).

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and those parts of the amended petition seeking to prohibit respondents-defendants from enforcing 10 NYCRR 86-2.40 (m) (10) are dismissed.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to compel respondents to reimburse them for Medicaid payments owed to them pursuant to 10 NYCRR 86-2.40 (m) (10), and challenging "the legality and constitutionality" of that regulation "both facially and as applied" to them. Supreme Court granted the petition and determined that respondents' enforcement of the regulation is "arbitrary and capricious and otherwise unlawful under both state and federal law." We granted respondents' application for leave to appeal from the interlocutory order (*see* CPLR 5701 [b] [1]; [c]), and we now reverse the order insofar as appealed from.

We note at the outset that a CPLR article 78 proceeding is not the proper vehicle for that part of petitioners' challenge to the

facial unconstitutionality of the regulation, and we thus convert the article 78 proceeding to a hybrid article 78 proceeding/declaratory judgment action (*see* CPLR 103 [c]; *92-07 Rest. v New York State Liq. Auth.*, 80 AD2d 603, 604; *see generally Matter of Kovarsky v Housing & Dev. Admin. of City of N.Y.*, 31 NY2d 184, 191).

Petitioners-plaintiffs (hereafter, petitioners) are 80 residential health care facilities, as defined in Public Health Law § 2801 (3), that participate in the Medicaid program (*see* 42 USC § 1396 *et seq.*). The Medicaid reimbursement rates for residential health care facilities are "calculated, in part, on the individual facility's 'case mix,' which . . . correspond[s] roughly to the severity of the patients' illnesses and the intensity of the required care" (*Matter of Jewish Home & Infirmary of Rochester v Commissioner of N.Y. State Dept. of Health*, 84 NY2d 252, 257) and, "as a facility's case mix index increases, so does its reimbursement rate" (*Matter of Nazareth Home of the Franciscan Sisters v Novello*, 7 NY3d 538, 544, *rearg denied* 7 NY3d 922).

In January 2013, the New York State Department of Health (DOH) adopted a regulation providing that, in the event that a facility reported an increase in its case mix index (CMI) of greater than five percent, "the impact of the payment of the Medicaid rate adjustment attributable to such a change in the reported case mix may be limited to reflect no more than a five percent change in such reported data, pending a prepayment audit of such reported . . . data" (10 NYCRR 86-2.40 [m] [10]; *see* NY Reg, Jan. 2, 2013, at 16). Respondents-defendants (hereafter, respondents) concede that, after the regulation was promulgated, DOH began withholding from petitioners all reimbursements attributable to any increase in case mix. As limited by their brief, respondents do not appeal from that part of the order directing them to pay case mix adjustments up to the five percent threshold.

We agree with respondents that DOH had statutory authority to promulgate 10 NYCRR 86-2.40 (m) (10) under Public Health Law § 2808 (2-c) (d) and that the regulation was not " 'out of harmony' with an applicable statute" (*Weiss v City of New York*, 95 NY2d 1, 5, quoting *Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471, 480-481). Although section 2808 (2-c) (d) does not explicitly authorize prepayment audits of residential health care facilities, "an agency can adopt regulations that go beyond the text of that legislation, provided that they are not inconsistent with the statutory language or its underlying purposes" (*Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254). Moreover, we reject petitioners' contention that DOH usurped the role of the legislature by adopting 10 NYCRR 86-2.40 (m) (10). DOH has "inherent authority to protect the quality and value of services rendered by [Medicaid] providers" (*Matter of Medicon Diagnostic Labs. v Perales*, 74 NY2d 539, 545) and, therefore, we conclude that DOH did not "stretch[ ] [the enabling statute] beyond its constitutionally valid reach" by adopting a regulation that allows a prepayment audit of Medicaid claims under certain circumstances

(*Boreali v Axelrod*, 71 NY2d 1, 9; *see generally Ellicott Group, LLC v State of N.Y. Exec. Dept. Off. of Gen. Servs.*, 85 AD3d 48, 53-54).

We further agree with respondents that 10 NYCRR 86-2.40 (m) (10) "has a rational basis and is not unreasonable, arbitrary or capricious" (*Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d 326, 331). Contrary to petitioners' contention, DOH is not required to rely upon empirical studies when it adopts a regulation. "Although documented studies often provide support for an agency's rule making, such studies are not the *sine que non* of a rational determination" (*id.* at 332). Thus, "the commissioner [of DOH] . . . is not confined to factual data alone but also may apply broader judgmental considerations based upon the expertise and experience of the agency he [or she] heads" (*Matter of Catholic Med. Ctr. of Brooklyn & Queens v Department of Health of State of N.Y.*, 48 NY2d 967, 968-969). Here, DOH adopted 10 NYCRR 86-2.40 (m) (10) to "[e]nsure the accuracy and integrity of Medicaid rates that are adjusted for case mix data" (NY Reg, Jan. 2, 2013, at 16), and we conclude that adoption of the regulation was within DOH's authority in order to " 'assure[] that the funds which have been set aside for (providing medical services to the needy) will not be fraudulently diverted into the hands of an untrustworthy provider of services' " (*Medicon Diagnostic Labs.*, 74 NY2d at 545, quoting *Schaubman v Blum*, 49 NY2d 375, 379).

Petitioners contend that respondents acted arbitrarily and capriciously in adopting 10 NYCRR 86-2.40 (m) (10) because regulations previously adopted by DOH served the same purpose. We reject that contention. Although there are other regulations concerning audits of claims for Medicaid reimbursement in other contexts (*see* 10 NYCRR 86-2.40 [m] [8]; *see also* 10 NYCRR 86-2.7), we conclude that they do not render the prepayment audit provision in the challenged regulation arbitrary and capricious (*see generally Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239). Contrary to petitioners' further contention, we conclude that the regulation challenged herein "provides an adequate objective, intelligible standard for administrative action" (*Matter of Big Apple Food Vendors' Assn. v Street Vendor Review Panel*, 90 NY2d 402, 408).

We agree with respondents that petitioners do not have standing to challenge 10 NYCRR 86-2.40 (m) (10) under federal law on the ground that it is a material change to the New York State Medicaid Plan. States participating in the Medicaid program must produce a Medicaid Plan (*see* 42 USC § 1396a; Social Services Law § 363-a [1]), and must "amend [the] plan and submit it for federal approval . . . to reflect '[m]aterial changes in State law, organization, or policy, or in the State's operation of the Medicaid program' " (*New Jersey Primary Care Assn., Inc. v New Jersey Dept. of Human Servs.*, 722 F3d 527, 538, quoting 42 CFR 430.12 [c] [1] [ii]). Under federal law, however, health care providers "lack a private right of action to enforce the requirement of federal approval of state plan amendments" (*New Jersey Primary Care Assn., Inc.*, 722 F3d at 539; *see generally Community Health Care Assn. of N.Y. v Shah*, 770 F3d 129, 148).

Petitioners contend that Social Services Law § 363-a confers a private right of action upon residential health care facilities under state law. We reject that contention because "[r]ecognition of a private cause of action in favor of [petitioners] based upon [respondents'] alleged violation of the statute . . . would not be consistent with the legislative scheme" (*Yates v Genesee County Hospice Found.*, 278 AD2d 928, 929, *lv denied* 96 NY2d 714; *see generally Sheehy v Big Flats Community Day*, 73 NY2d 629, 633).

We agree with respondents that 10 NYCRR 86-2.40 (m) (10) does not violate petitioners' rights to substantive due process. Even assuming, arguendo, that petitioners have "a cognizable property interest" in receiving Medicaid reimbursements prior to an audit (*Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 627), we conclude that petitioners failed to establish that "there is absolutely no reasonable relationship to be perceived between the regulation and the achievement of a legitimate governmental purpose" (*Brightonian Nursing Home v Daines*, 21 NY3d 570, 576). Respondents have a legitimate governmental purpose of assuring that Medicaid funds " 'will not be fraudulently diverted into the hands of an untrustworthy provider of services' " (*Medicon Diagnostic Labs.*, 74 NY2d at 545, quoting *Schaubman*, 49 NY2d at 379), and a regulation requiring a prepayment audit of certain Medicaid claims is reasonably related to that purpose (*see generally Brightonian Nursing Home*, 21 NY3d at 576).

Contrary to petitioners' further contention, 10 NYCRR 86-2.40 (m) (10) does not violate their right to procedural due process. Again, even assuming, arguendo, that petitioners have a constitutionally protected property interest in receiving Medicaid reimbursements prior to an audit, we conclude that the regulation "adequately safeguard[s] the private interests of petitioners, and minimize[s] the risk of erroneous deprivation while serving the substantial government interest in safeguarding the integrity of the Medicaid program" (*Medicon Diagnostic Labs.*, 74 NY2d at 547).

Petitioners contend that 10 NYCRR 86-2.40 (m) (10) violates their right to equal protection on the ground that there is no rational basis for distinguishing between facilities reporting an increase in CMI of greater than five percent from facilities reporting an increase that falls below that threshold. We reject that contention. As the proponents of an equal protection claim, petitioners had the burden of demonstrating that the implementation of a five percent threshold "lacks a rational basis" (*Bay Park Ctr. for Nursing & Rehabilitation, LLC v Shah*, 111 AD3d 1227, 1230; *see generally Port Jefferson Health Care Facility v Wing*, 94 NY2d 284, 290). We conclude, however, that petitioners failed to meet that burden (*see Montgomery v Daniels*, 38 NY2d 41, 64-65).

Finally, we conclude that respondents did not improperly apply 10 NYCRR 86-2.40 (m) (10) retroactively (*see generally Forti v New York State Ethics Commn.*, 75 NY2d 596, 608-609).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1238

CA 13-02246

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

GARY J. SMITH, EUGENE L. SMITH AND SANDRA COLE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

STEPHENS MEDIA GROUP-WATERTOWN, LLC,
DEFENDANT-APPELLANT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR DEFENDANT-APPELLANT.

HRABCHAK, GEBO & LANGONE, P.C., WATERTOWN (MARK G. GEBO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 6, 2013. The order, among other things, denied defendant's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion in part and dismissing the claim pursuant to Town Law § 268 (2), and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking enforcement of Town of Rutland Code § 130-48 (E) (1) (g), which requires that "[t]he minimum setback distance of a communications tower from all property lines shall be equal to 100% of the height of the communications tower." Plaintiffs allege that the size of the parcel owned by defendant is insufficient to permit its 370-foot radio transmission tower to meet the minimum setback distance. Plaintiffs seek, inter alia, injunctive relief enjoining the alleged violation.

Supreme Court properly granted plaintiffs' cross motion seeking leave to amend the complaint to substitute Karen P. Smith as a plaintiff in the place of Eugene L. Smith (*see United Fairness, Inc. v Town of Woodbury*, 113 AD3d 754, 755; *Midland Mtge. Co. v Imtiaz*, 110 AD3d 773, 775). The court also properly denied defendant's motion seeking summary judgment dismissing the complaint on the ground that plaintiffs impermissibly assert a private cause of action to enjoin the alleged zoning violation. A private action to enjoin such a violation generally requires a showing of special damages, and we agree with defendant that plaintiffs have not presented evidence of such damages (*see Guzzardi v Perry's Boats*, 92 AD2d 250, 253). Nevertheless, as the owners of property adjacent to the alleged

violation, plaintiffs have standing to maintain an action enjoining the alleged violation without proving special damages inasmuch as they are within the "zone of interest" protected by the ordinance at issue (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 409-410; *see Zupa v Paradise Point Assn., Inc.*, 22 AD3d 843, 844).

The court erred, however, in denying that part of defendant's motion seeking summary judgment dismissing plaintiffs' claim pursuant to Town Law § 268 (2), and we therefore modify the order accordingly. That statute permits a town to "institute any appropriate action or proceedings" to prevent or restrain the violation of its zoning laws (*id.*). It further provides that, "upon the failure or refusal of the proper local officer, board or body of the town to institute any such appropriate action or proceeding for a period of ten days after written request by a resident taxpayer of the town so to proceed, any three taxpayers of the town residing in the district wherein such violation exists, who are jointly or severally aggrieved by such violation, may institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do" (*id.*). Plaintiffs concededly failed to show that the written request contemplated by the statute was made, and they thus failed to satisfy a condition precedent to maintaining their claim pursuant to the statute (*see Guzzardi*, 92 AD2d at 254; *cf. Phair v Sand Land Corp.*, 56 AD3d 449, 450; *see generally Little Joseph Realty v Town of Babylon*, 41 NY2d 738, 741). Contrary to plaintiffs' contention, the written record of their oral request in the minutes of the Town Board meeting does not satisfy the requirement of a written request (*see generally Wilson v Incorporated Vil. of Hempstead*, 120 AD3d 665, 666).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1269

KA 14-00932

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL WHITE, DEFENDANT-RESPONDENT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR APPELLANT.

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

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), dated March 17, 2014. The order granted the motion of defendant to vacate a judgment of conviction and ordered a new trial.

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

Memorandum: The People appeal from an order granting defendant's motion pursuant to CPL 440.10 (1) (g) to vacate the judgment convicting him, following a nonjury trial in 2006, of rape in the first degree (Penal Law § 130.35 [1]) and sexual abuse in the first degree (§ 130.65 [1]) based on newly discovered evidence. At trial, the People presented evidence that, when the complainant was examined at the hospital shortly after she was allegedly raped, a quantity of semen was found in her vagina. Although it could not be determined at the time whether defendant was the source of the semen, the prosecutor argued during her summation that the presence of semen corroborated the complainant's testimony that defendant raped her. County Court found defendant guilty as charged, and we affirmed (*People v White*, 43 AD3d 1407, *lv denied* 9 NY3d 1010).

In April 2013, after defendant was released from prison, more sophisticated DNA testing showed that the semen from the complainant's vagina did not come from defendant; instead, it came from the complainant's then-boyfriend. Defendant thereafter moved to vacate the judgment of conviction pursuant to CPL 440.10 (1) (g), contending that the DNA test results constitute newly discovered evidence. We note that CPL 440.10 (1) (g-1), concerning forensic DNA testing performed after the entry of judgment, had not yet been enacted (*see generally People v Hicks*, 114 AD3d 599, 601). The People opposed the motion solely on the ground that the DNA evidence, if admitted at a retrial, would probably not lead to a different result. According to

the People, the absence of defendant's DNA in the complainant's vagina did not exonerate him because he may have worn a condom or he may not have ejaculated when he raped the complainant.

In granting defendant's motion, the court stated, "[g]iven the exculpatory nature of the newly-discovered evidence, it is the opinion of this court, which sat as the trier of fact, that the cumulative effect of such evidence would probably change the result if a new trial were granted." The court noted in its decision that, during her summation, "the prosecutor *successfully argued* that the presence of (unidentified) male DNA in the vaginal swabs of complainant's rape kit corroborated her testimony and helped establish defendant's guilt, based on the assumption that where male DNA is found in the vaginal swabs of a woman who had not bathed between the time of the alleged rape and the examination, the source of that male DNA is that of the rapist" (emphasis added). We now affirm.

"It is well settled that on a motion to vacate a judgment of conviction based on newly discovered evidence, the movant must establish, inter alia, that there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[] (6) which does not merely impeach or contradict the record evidence" (*People v Smith*, 108 AD3d 1075, 1076, *lv denied* 21 NY3d 1077 [internal quotation marks omitted]; *see People v Salemi*, 309 NY 208, 215-216, *cert denied* 350 US 950). "The power to grant an order for a new trial on the ground of newly discovered evidence is purely statutory. Such power may be exercised only when the requirements of the statute have been satisfied, the determination of which rests within the sound discretion of the court" (*Salemi*, 309 NY at 215; *see People v Pugh*, 236 AD2d 810, 811, *lv denied* 89 NY2d 1099).

Here, the People contend that the court erred in granting defendant's motion because the DNA evidence will probably not change the result at a new trial. We reject that contention. The only evidence against defendant at trial was the testimony of the complainant and a lab report showing that semen was found in her vagina shortly after she reported the alleged rape. The complainant's sister and mother both testified for the defense, and there was evidence that defendant was not physically capable of having committed the crime of rape. Moreover, as noted, the prosecutor argued during her summation that the presence of semen in the complainant's vagina corroborated her testimony that defendant raped her, and the court accepted that argument. We now know, based on the more sophisticated DNA testing not previously available, that the presence of semen in the complainant's vagina does not in fact corroborate her testimony. Although the People assert that the absence of defendant's semen in the complainant's vagina is not probative because he may have worn a condom or not ejaculated, that assertion is based on sheer speculation inasmuch as the complainant did not testify at trial that defendant wore a condom or failed to ejaculate.

Under the circumstances, and considering that the case against

defendant rested solely on the lab report and the complainant's testimony, which was sharply challenged at trial, we conclude that the court did not abuse its discretion in determining that the newly discovered DNA evidence will probably change the result if a new trial is granted (*see Hicks*, 114 AD3d at 602-603).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1278

CA 14-00949

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

KENNETH W. SISEMORE, II AND AMANDA SISEMORE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CASEY DONALD LEFFLER AND MULLANE MOTORS, INC.,
DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered December 23, 2013. The order denied the motion of defendants to, inter alia, strike portions of plaintiffs' second supplemental bill of particulars.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Kenneth W. Sisemore, II (plaintiff) in a motor vehicle accident. Defendants appeal from an order denying their motion in limine, which sought to strike certain portions of plaintiffs' second supplemental bill of particulars regarding the need for a future surgery and future loss of earnings. According to defendants, the second supplemental bill of particulars amounted to an improper amendment rather than merely a "supplement" and therefore required leave of court. Defendants also sought to preclude plaintiffs' experts from testifying at trial due to insufficient expert disclosure. Alternatively, defendants contended that the second supplemental bill of particulars and expert disclosure were not timely served. Initially, we note that this order denying defendants' motion in limine is appealable because "the order in question is '[a]n order deciding . . . a motion [that] clearly involves the merits of the controversy . . . and affects a substantial right' " (*Muhammad v Fitzpatrick*, 91 AD3d 1353, 1353-1354).

We conclude that Supreme Court properly denied the motion. "Where 'the plaintiff[s] seek[] to allege continuing consequences of the injuries suffered and described in previous bills of particulars, rather than new and unrelated injuries, the contested bill of

particulars is a supplemental bill of particulars, rather than an amended bill of particulars' " (*Restuccio v Caffrey*, 114 AD3d 836, 837; *see Kellerson v Asis*, 81 AD3d 1437, 1438). Here, plaintiffs' second supplemental bill of particulars alleged that plaintiff may require surgery in the future, which could involve anterior C5-6 and C6-7 discectomy and fusion. In addition, plaintiffs alleged "future cumulative economic loss" of between approximately $1,299,555.00 and $1,699,464.00. Plaintiffs had alleged in their prior bills of particulars that plaintiff may require surgery and that there would be a claim for future lost earnings. Thus, the portions of the second supplemental bill of particulars at issue were "an anticipated sequelae" of the injuries and damages previously alleged and did not allege new claims (*Kellerson*, 81 AD3d at 1438).

Contrary to defendants' further contention, the court properly refused to preclude plaintiffs' experts from testifying at trial due to insufficient expert disclosure. "[P]reclusion [of expert testimony] for failure to comply with CPLR 3101 (d) is improper unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (*Marchione v Greenky*, 5 AD3d 1044, 1045 [internal quotation marks omitted]; *see Carlson v Porter*, 53 AD3d 1129, 1132, *lv denied* 11 NY3d 708), and here defendants failed to provide any evidence of a willful or intentional failure to disclose by plaintiffs or any evidence of prejudice (*see Marchione*, 5 AD3d at 1045).

Finally, defendants' alternative contention that plaintiffs' second supplemental bill of particulars and expert disclosure were not timely served in view of the scheduled date of trial was rendered moot because the trial was adjourned.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1280

CA 14-00948

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

RAYMOND PINK AND MICHELLE PINK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MATTHEW RICCI, DEFENDANT-RESPONDENT,
MARK WILBUR, CHRISTIN WILBUR, ROME YOUTH
HOCKEY ASSOCIATION, INC., WHITESTOWN
YOUTH HOCKEY ASSOCIATION, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (DAVID E. LEACH OF COUNSEL), FOR DEFENDANTS-APPELLANTS MARK WILBUR AND CHRISTIN WILBUR.

ROEMER WALLENS GOLD & MINEAUX LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL), FOR DEFENDANTS-APPELLANTS ROME YOUTH HOCKEY ASSOCIATION, INC. AND WHITESTOWN YOUTH HOCKEY ASSOCIATION, INC.

CONWAY & KIRBY, PLLC, LATHAM (ANDREW W. KIRBY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered January 6, 2014. The order, inter alia, denied the motion of defendants Rome Youth Hockey Association, Inc., and Whitestown Youth Hockey Association, Inc. for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting in part the motion of defendants Rome Youth Hockey Association, Inc. and Whitestown Youth Hockey Association, Inc. and dismissing the complaint against defendant Whitestown Youth Hockey Association, Inc. and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Raymond Pink (plaintiff) when defendant Matthew Ricci allegedly struck him during a fight that also involved fellow spectators at a youth hockey game. Ricci thereafter pleaded guilty to assault in connection with the fight. On the first of the prior appeals, we concluded, inter alia, that Supreme Court (Shaheen, J.), properly granted plaintiffs' motion to compel Ricci to respond both to

their discovery demands, which included requests for copies of all court and police records from the criminal proceedings against Ricci, and to questioning during his deposition concerning those records (*Pink v Ricci*, 74 AD3d 1773, 1774). We also concluded that Ricci, through cross claims he asserted against the remaining defendants, waived his statutory privilege of confidentiality with respect to those records (*id.*). On the subsequent prior appeals, we concluded, inter alia, that Supreme Court (Shaheen, J.) erred in granting plaintiffs' cross motion for summary judgment on liability, and that the court erred in granting the respective cross motions of defendants Mark Wilbur and Christin Wilbur (Wilburs) and defendants Rome Youth Hockey Association, Inc. (RYHA) and Whitestown Youth Hockey Association, Inc. (WYHA; collectively, hockey associations) for summary judgment on their cross claims against Ricci for contribution (*Pink v Ricci*, 100 AD3d 1446, 1447-1448).

The hockey associations and the Wilburs now appeal from an order of Supreme Court (MacRae, J.) that, inter alia, denied their respective motion and cross motion for summary judgment dismissing the complaint and cross claims against them. Contrary to the contention of the hockey associations, there is an issue of fact whether the duty of RYHA to plaintiffs included the duty to protect plaintiffs from Ricci's conduct (*see generally Barry v Gorecki*, 38 AD3d 1213, 1215). "Foreseeability . . . determines the scope of [a] duty once it is determined to exist" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232) and, given the hostile environment in the arena before the fight, there is an issue of fact whether RYHA knew or should have known of the likelihood of the fight (*see Jacqueline S. v City of New York*, 81 NY2d 288, 294, *rearg denied* 82 NY2d 749). Here, the tensions in the stands built throughout the game such that we conclude that a trier of fact should determine whether RYHA had a duty to intercede and protect plaintiff (*see Jayes v Storms*, 12 AD3d 1090, 1090-1091; *Ash v Fern*, 295 AD2d 869, 870; *Cittadino v DeGironimo*, 198 AD2d 801, 802). We further conclude, however, that the court erred in denying that part of the motion of the hockey associations seeking summary judgment dismissing the complaint against WYHA, and we therefore modify the order accordingly. Here, the record establishes that WYHA did not own the arena and, unlike RYHA, WYHA did not lease even part of that facility. We thus conclude that WYHA is entitled to summary judgment because it owed no duty of care to plaintiffs (*see generally Parslow v Leake*, 117 AD3d 55, 60).

Finally, we conclude that the court properly denied the Wilburs' cross motion for summary judgment. The Wilburs contend that their conduct merely furnished the occasion for Ricci's assault of plaintiff, but on this record we conclude that the court properly declined to make that determination as a matter of law. Indeed, questions of proximate cause generally are for the jury (*see Prystajko v Western N.Y. Pub. Broadcasting Assn.*, 57 AD3d 1401, 1403; *see also McCarville v Burke*, 255 AD2d 892, 893).

All concur except LINDLEY, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part. I agree with the majority that Supreme Court

properly denied the cross motion of defendants Mark Wilbur and Christin Wilbur for summary judgment dismissing the complaint and cross claims against them. I also agree with the majority that the court should have granted summary judgment to defendant Whitestone Youth Hockey Association, Inc., which, as the visiting team at the youth hockey game during which the fight in the stands occurred, clearly owed no duty of care to Raymond Pink (plaintiff). I disagree with the majority, however, with respect to the potential liability of defendant Rome Youth Hockey Association, Inc. (RYHA). In my view, the court also should have granted summary judgment to RYHA because it too owed no duty to protect plaintiff from being assaulted by another spectator at the hockey game.

It is well settled that "a possessor of land, whether he be a landowner or a leaseholder [such as RYHA], is not an insurer of the visitor's safety" (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519; *see Maheshwari v City of New York*, 2 NY3d 288, 294). "Thus, even where there is an extensive history of criminal conduct on the premises, the possessor cannot be held to a duty to take protective measures unless it is shown that he either knows or has reason to know from past experience 'that there is a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor' (Restatement, Torts 2d, § 344, Comment *f*). Only if such conditions are met may the possessor of land be obliged to 'take precautions . . . and to provide a reasonably sufficient number of servants to afford a reasonable protection' (*id.*)" (*Nallan*, 50 NY2d at 519; *see Gray v Forest City Enters.*, 244 AD2d 974, 974).

Here, there is no evidence that there were any prior fights among spectators at a youth hockey game involving teams from RYHA. In fact, plaintiffs have not cited a single instance in New York State history in which a spectator was injured during a fight at a youth hockey game. Thus, in my view, it was not foreseeable that a spectator would be assaulted by another spectator at a youth hockey game sponsored or hosted by RYHA, and RYHA therefore had no duty to protect plaintiff from being assaulted. In the words of Judge Cardozo, "[t]he risk reasonably to be perceived defines the duty to be obeyed" (*Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 344, *rearg denied* 249 NY 511; *see Powers v 31 E 31 LLC*, 24 NY3d 84, 94).

The majority appears to agree that, prior to the game, it was not foreseeable that a fight would break out in the stands. It thus follows that RYHA had no duty to provide security at the arena, or otherwise to take steps at that time to protect spectators from being assaulted by other spectators. The majority nevertheless concludes that, because "the tensions in the stands built throughout the game," an issue of fact exists whether RYHA knew or should have known of the likelihood of a fight. There is no evidence in the record, however, that any representative from RYHA was in the arena at the time so as to put RYHA on notice that a fight could ensue, and in any event by that time it would have been too late to arrange for security personnel to intervene.

The cases relied upon by the majority — *Jayes v Storms* (12 AD3d

1090), *Ash v Fern* (295 AD2d 869) and *Cittadino v DeGironimo* (198 AD2d 801) — are distinguishable because they involved fights at bars or restaurants where the owners of the establishments, or their employees, had observed the assailants' increasingly disruptive behavior over a period of time. Here, as noted, no one from RYHA observed the behavior of the spectators in the stands before plaintiff was assaulted. Plaintiffs cite no cases in New York or any other state where a youth athletic association has been deemed to have a duty to protect spectators from being assaulted by other spectators, and I could find none. I do not think this should be the first case to so hold. In sum, I conclude that, given the absence of prior fights among spectators at youth hockey games, it was not foreseeable that plaintiff would be assaulted by another spectator, and, thus, RYHA had no duty to protect him from that unanticipated harm.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1281

CA 14-00221

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

THOMAS D. AYERS, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

SNYDER CORP., DEFENDANT-APPELLANT-RESPONDENT.
(ACTION NO. 1.)

THOMAS D. AYERS, PLAINTIFF-RESPONDENT-APPELLANT,

V

CENTER FOR TRANSPORTATION EXCELLENCE, LLC AND
SNYDER CORP., DEFENDANTS-APPELLANTS-RESPONDENTS.
(ACTION NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (JAMES D. DONATHEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 12, 2013. The order granted the motions of plaintiff for summary judgment in lieu of complaint and granted the cross motion of defendants for a stay of enforcement.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the stay of enforcement of the judgments entered in favor of plaintiff, and as modified the order is affirmed without costs.

Memorandum: By motions for summary judgment in lieu of complaint pursuant to CPLR 3213, plaintiff commenced these consolidated actions seeking to enforce two promissory notes issued to him by defendants, and defendants asserted counterclaims for breach of fiduciary duty and fraud. Supreme Court granted plaintiff's motions but also granted defendants' cross motion to stay enforcement of the judgments pending resolution of the counterclaims. We conclude that the court properly granted plaintiff's motions for summary judgment in lieu of complaint but erred in granting defendants' cross motion. In their counterclaims, defendants assert that plaintiff, as chief executive officer of Snyder Transportation, LLC, doing business as First Call (First Call), fraudulently concealed that he had submitted forged

Daily Trip Logs to the Attorney General's Medicaid Fraud Control Unit. As plaintiff correctly contends, however, First Call is not a party to this action, and defendants were not harmed by plaintiff's alleged breach of fiduciary duty and fraud. Thus, there was no basis for the court to conclude that plaintiff is not entitled to payment on the promissory notes. With respect to the stay, CPLR 3212 (e) (2) provides that, where the court grants partial summary judgment to a party, the court may also direct that "the entry of summary judgment shall be held in abeyance pending the determination of any remaining cause of action." The court's discretion, however, "is not unlimited, and is to be exercised only if there exists some articulable reason for concluding that the failure to impose conditions might result in some prejudice, financial or otherwise, to the party against whom the partial summary judgment is granted should that party subsequently prevail on the unsettled claims" (*Robert Stigwood Org. v Devon Co.*, 44 NY2d 922, 923). Here, as the court properly determined, defendants sustained no damages as a result of plaintiff's alleged misconduct, and, thus, there is no basis upon which to stay enforcement of the judgments entered in favor of plaintiff.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1289

KA 13-01569

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN W. BROWN, DEFENDANT-APPELLANT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Dennis S. Cohen, J.), dated August 8, 2013. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order adjudicating him a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). The record establishes, however, that defendant consented to that adjudication after consulting with defense counsel and, thus, "[t]he appeal must be dismissed as no appeal lies from an order entered upon the consent of the appealing party" (*People v Welch*, 30 AD3d 392, 393; *see People v Dennis*, 64 AD3d 760, 760). To the extent that defendant contends that he consented to the order because he was denied effective assistance of counsel, we note that County Court has the "inherent power to relieve a party from a judgment 'for sufficient reason, in furtherance of justice' " (*Matter of Delfin A.*, 123 AD2d 318, 320, quoting *Ladd v Stevenson*, 112 NY 325, 332). Consequently, defendant's remedy "is to move in [County] Court to vacate the order, at which time he can present proof in support of his allegations of [ineffective assistance of counsel, proof of] which is completely absent from this record" (*Matter of Farquhar v Pitt*, 192 AD2d 806, 806; *see e.g. People v Byrd*, 57 AD3d 442, *lv denied in part and dismissed in part* 12 NY3d 791 [appeal from order denying motion to vacate prior order on ground of, inter alia, denial of right to counsel]; *see generally Matter of Hauser v Pruitt*, 35 AD3d 740, 740; *Matter of Andresha G.*, 251 AD2d 1005, 1005).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1290

KA 08-00031

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON BROOKS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JASON BROOKS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered September 27, 2007. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for resentencing.

Memorandum: In appeal No. 1, defendant appeals from a judgment that revoked the sentence of probation imposed upon his previous conviction of robbery in the third degree (Penal Law § 160.05), for which he was sentenced to an indeterminate term of imprisonment. In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (§ 120.10 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]), for which he was sentenced to a determinate term of incarceration plus a period of postrelease supervision. In both appeals, defendant contends in his main brief that he was denied effective assistance of counsel based on a conflict of interest allegedly arising from defense counsel's simultaneous representation of defendant and a prosecution witness against him. We conclude that, on this record, defendant "has not sustained his burden of establishing ineffectiveness, but that he is not precluded from raising this issue in a CPL article 440 proceeding that would permit further factual development of the circumstances pertaining to the claimed conflict" (*People v Sanchez*, 21 NY3d 216, 220; *see People v Jackson*, 108 AD3d 1079, 1079, *lv denied* 22 NY3d 997; *People v Pagan*, 12 AD3d 1143, 1144, *lv denied* 4 NY3d 766). Furthermore, we reject defendant's contention in both appeals, raised

in his pro se supplemental brief, that Supreme Court erred in refusing to assign new counsel on his motion to withdraw his plea. Contrary to defendant's contention, the record establishes that defense counsel did not take a position that was adverse to defendant's motion or become a witness against defendant (*see People v Rossborough*, 105 AD3d 1332, 1333, *lv denied* 21 NY3d 1045; *People v Strasser*, 83 AD3d 1411, 1411-1412; *People v Dickerson*, 66 AD3d 1371, 1372, *lv denied* 13 NY3d 859).

Defendant further contends that the certificate of conviction in appeal No. 1 should be amended to reflect that his sentence on the violation of probation is to run concurrently with, rather than consecutively to, the sentence imposed upon the conviction in appeal No. 2. We note, however, that there is a discrepancy between the sentencing minutes and the certificate of conviction in appeal No. 1, and we conclude that such discrepancy requires vacatur of the sentences imposed in both appeals. Although the sentencing minutes are silent with respect to whether the sentence in appeal No. 1 is to run consecutively to the sentence in appeal No. 2, the certificate of conviction in appeal No. 1 states that the sentences are to be served consecutively. Where the record is silent on the consecutive or concurrent nature of the sentences, such sentences are deemed to run concurrently by operation of law (*see* Penal Law § 70.25 [1] [a]). We note, however, that the court indicated numerous times during the sentencing proceeding that it intended to order the sentences to run consecutively in accordance with the plea agreement. Consequently, "[i]nasmuch as the record leaves open the possibility that the court's failure to specify at sentencing that those sentences are to run consecutively was accidental (*cf. People v Vasquez*, 88 NY2d 561, 580–581 [1996])" (*People v Bradford*, 118 AD3d 1254, 1257), we modify the judgment by vacating the sentences imposed in both appeals, and we remit the matter to Supreme Court for resentencing (*see People v Jacobson*, 60 AD3d 1326, 1329, *lv denied* 12 NY3d 916; *People v Sinkler*, 288 AD2d 844, 845, *lv denied* 97 NY2d 761).

By pleading guilty, defendant forfeited his contention in appeal No. 2 that the absence of counsel at his arraignment requires reversal of his conviction (*see People v Green*, 48 AD3d 1056, 1057, *lv denied* 10 NY3d 934). In any event, even assuming, arguendo, that the absence of counsel at the arraignment could be raised after a plea, we conclude that any error does not require reversal inasmuch as defendant was not prejudiced by the absence of counsel at the arraignment (*see Green*, 48 AD3d at 1057; *People v Young*, 35 AD3d 958, 960, *lv denied* 8 NY3d 929; *People v Witherspoon*, 253 AD2d 502, 502-503, *lv denied* 92 NY2d 1041).

Defendant failed to preserve for our review his contention in appeal No. 2 that he was not aware that the sentence would include a period of postrelease supervision and, thus, that he was deprived of due process by the imposition thereof. It is well settled that a "defendant cannot be expected to object to a constitutional deprivation of which [he] is unaware . . . And, in that circumstance, the failure to seek to withdraw the plea or to vacate the judgment does not preclude appellate review of the due process claim" (*People v*

Turner, 24 NY3d 254, 258). Here, however, defense counsel stated at the time of the plea that the sentence promise included a period of postrelease supervision, the court reiterated that part of the sentence promise on two other court dates prior to sentencing, the prosecutor restated it on a third date, and defendant noted his awareness of that condition of the plea during argument of his motion to withdraw his plea, which was not based on the imposition of postrelease supervision that defendant now challenges. Thus, although a defendant need not preserve a challenge to the imposition of postrelease supervision during the sentencing proceeding if he or she was not made aware of that part of the sentence before its imposition (*see People v Louree*, 8 NY3d 541, 546), "here defendant was advised of what the sentence would be, including its [postrelease supervision] term, [on at least three appearances prior to] the sentencing proceeding[, and he personally noted his awareness of that condition]. Because defendant could have sought relief from the sentencing court in advance of the sentence's imposition, *Louree*'s rationale for dispensing with the preservation requirement is not presently applicable" (*People v Murray*, 15 NY3d 725, 727). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1291

KA 11-01988

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC BLACKSHEAR, DEFENDANT-APPELLANT.

DONALD R. GERACE, 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 May 5, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (three counts), robbery in the first degree (two counts), burglary in the first degree (two counts), burglary in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentence imposed under count eight of the indictment for criminal possession of a weapon in the second degree shall run concurrently with the sentences imposed under counts five and six for burglary in the first degree, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury verdict of three counts of murder in the second degree (Penal Law § 125.25 [1], [3]), two counts of robbery in the first degree (§ 160.15 [2], [4]), two counts of burglary in the first degree (§ 140.30 [1], [4]), burglary in the second degree (§ 140.25 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). The charges stemmed from an incident in which defendant and two others broke into the residence of the victim, shot the victim, and stole both money and personal items from the residence. One of the others (codefendant) was tried jointly with defendant; the other (accomplice) testified, pursuant to a plea agreement, for the People at defendant’s and codefendant’s trial.

Defendant contends that County Court improperly received in evidence items other than cash that the accomplice stole during the incident because the charges in the indictment were limited to cash. That contention is not preserved for our review (*see* CPL 470.05 [2]). In any event, the contention is without merit inasmuch as admission of the other items in evidence did not allow the People to amend the

indictment improperly (*see People v Dawson*, 79 AD3d 1610, 1611, *lv denied* 16 NY3d 894; *see generally People v Grega*, 72 NY2d 489, 497-498).

Defendant contends that the testimony of the accomplice is not supported by sufficient corroborative evidence (*see* CPL 60.22 [1]). We reject that contention. One of the victims testified that the man who held her captive in her bedroom during the incident was wearing the same type of clothing and shoes as the accomplice testified to wearing. Another witness testified that the accomplice displayed to him items stolen during the crime. A third witness testified that the accomplice told her, when he appeared at her house with defendant and codefendant after the incident, that he needed to get rid of phones that were stolen during the crime. The testimony of those witnesses, among others, "tended to connect [defendant] to the crime and harmonized with the narrative provided by the accomplice[] . . . , such that the jury [could have been] reasonably satisfied that the accomplice[] w[as] telling the truth" (*People v Davis*, 114 AD3d 1287, 1287 [internal quotation marks omitted]).

In addition to the evidence described above, a witness testified that defendant came to her apartment shortly after the incident carrying a .44 caliber revolver, the same caliber as the weapon used in the murder, according to the trial testimony of a firearms examiner. Furthermore, the witness heard defendant say that he had shot the victim and "c[ouldn't] believe what [he] did today." The People also presented evidence, which the jury reasonably could have credited, that defendant's DNA was found on a $100 bill that they alleged was stolen from the murder victim. Thus, contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that the court was required to instruct the jury on the People's heightened burden of proof in cases based entirely on circumstantial evidence, inasmuch as defendant did not request that instruction or object to the court's failure to give it (*see People v Recore*, 56 AD3d 1233, 1234, *lv denied* 12 NY3d 761; *People v Ponder*, 19 AD3d 1041, 1042-1043, *lv denied* 5 NY3d 809). In any event, the contention is without merit. The instruction is not warranted where the charges "are supported by both circumstantial and direct evidence" (*People v Stanford*, 87 AD3d 1367, 1369, *lv denied* 18 NY3d 886; *see People v Daddona*, 81 NY2d 990, 992). Here, defendant's guilt was supported by some direct evidence, i.e., eyewitness testimony and admissions made by defendant.

Defendant also failed to preserve for our review his contention that the court improperly failed to discharge a sworn juror as "grossly unqualified" (CPL 270.35 [1]; *see People v Buford*, 69 NY2d 290, 298). In any event, when the court was made aware during the

trial that one of the jurors might have failed to disclose that she had previously been convicted of a misdemeanor and that she might have been familiar with the murder victim's family, the court conducted " 'a probing and tactful inquiry' into the facts of the situation" (*People v Harris*, 99 NY2d 202, 213, quoting *Buford*, 69 NY2d at 299). Defense counsel thereafter stated that he was satisfied with the court's inquiry and did not ask that the juror be disqualified. Moreover, there is nothing in the record establishing that the court, which had the opportunity of observing and speaking with the juror firsthand, did not properly conclude that the juror was qualified to serve.

Finally, we reject defendant's contention that all the terms of imprisonment should run concurrently (*see People v Yong Yun Lee*, 92 NY2d 987, 988-989), but we agree with defendant that the court erred in ordering the term of imprisonment imposed for criminal possession of a weapon in the second degree to run consecutively with the terms of imprisonment imposed for burglary in the first degree (*see People v Hamilton*, 4 NY3d 654, 659; *see generally People v Laureano*, 87 NY2d 640, 643). We therefore modify the sentence accordingly.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1295

KA 14-00714

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

BRANDON E. HOFFERT, DEFENDANT-RESPONDENT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE (CALEB J. PETZOLDT OF COUNSEL), FOR APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Lewis County Court (Daniel R. King, J.), dated February 14, 2014. The order, insofar as appealed from, dismissed the second count of the indictment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to dismiss the count of sexual abuse in the first degree is denied, that count of the indictment is reinstated and the matter is remitted to Lewis County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the second count of the indictment, which charged defendant with sexual abuse in the first degree (Penal Law § 130.65 [1]). Other counts of the indictment charged defendant with, inter alia, burglary in the second degree (§ 140.25 [2]), forcible touching (§ 130.52), and criminal obstruction of breathing (§ 121.11), all arising from the same incident. Insofar as relevant here, the evidence before the grand jury included the victim's testimony that she had previously been in a relationship with defendant and that, on the day in question, defendant sent her text messages demanding to know whether she had another man at her house, entered her house without her permission while she slept, choked and beat her, demanded to know whether she had recently had sex, and forcibly placed his fingers in her vagina after saying " 'I'm going to see if you had sex.' " We agree with the People that County Court erred in granting that part of defendant's motion to dismiss the count charging sexual abuse in the first degree on the ground that the evidence before the grand jury was not legally sufficient to establish a prima facie case of that crime, and we therefore reinstate that count.

" 'Legally sufficient evidence' means competent evidence which,

if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" (CPL 70.10 [1]). Thus, "[o]n a motion to dismiss an indictment based on legally insufficient evidence, the issue is whether the evidence before the [g]rand [j]ury establishes a prima facie case" (*People v Olivo*, 262 AD2d 953, 954). In deciding a motion to dismiss a count of an indictment for legally insufficient evidence, a "reviewing court's inquiry is limited to 'whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crime[],' and whether 'the [g]rand [j]ury could rationally have drawn the guilty inference' . . . That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry 'as long as the [g]rand [j]ury could rationally have drawn the guilty inference' " (*People v Bello*, 92 NY2d 523, 526).

As relevant here, "[a] person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact . . . [b]y forcible compulsion" (Penal Law § 130.65 [1]), and sexual contact is defined as "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party" (§ 130.00 [3]). Consequently, the People were required to submit sufficient evidence from which the grand jury could have inferred that defendant touched the victim's vagina for the purpose of gratifying his or the victim's sexual desire. It is well settled that, "[b]ecause the question of whether a person was seeking sexual gratification is generally a subjective inquiry, it can be inferred from the conduct of the perpetrator" (*People v Beecher*, 225 AD2d 943, 944; *see People v Willis*, 79 AD3d 1739, 1740, *lv denied* 16 NY3d 864). Here, we conclude that the evidence before the grand jury, viewed in the light most favorable to the People, was sufficient to permit the grand jury to infer that defendant touched the sexual and intimate parts of the victim's body by forcible compulsion for the purpose of gratifying his sexual desire (*see generally People v Scerbo*, 74 AD3d 1730, 1732, *lv denied* 15 NY3d 757; *People v Fuller*, 50 AD3d 1171, 1174-1175, *lv denied* 11 NY3d 788; *People v Watson*, 281 AD2d 691, 697, *lv denied* 96 NY2d 925). To require, as defendant suggests, that the reviewing court accept the explanation that defendant proffered for his conduct, "would skew a reviewing court's inquiry and restrict, if not extinguish, the [g]rand [j]ury's unassailable authority to consider logical inferences that flow from the facts presented to it" (*Bello*, 92 NY2d at 527).

The People's further contention is academic in light of our determination.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1296

KA 08-00032

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON BROOKS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JASON BROOKS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered September 27, 2007. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree and attempted murder in the second degree.

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

Same Memorandum as in *People v Brooks* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1298

CA 13-00767

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

DARRYL GAITER AND HELEN GAITER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO BOARD OF EDUCATION AND
MARTIN LUTHER KING SCHOOL #39,
DEFENDANTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF ERIC B. GROSSMAN, WILLIAMSVILLE (ERIC B. GROSSMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered February 4, 2013. The order awarded plaintiffs money damages after a nonjury trial.

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

Memorandum: On appeal from an order awarding damages to plaintiffs in this personal injury action, defendants contend that the award of damages deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]). We must dismiss the appeal because defendants failed to include the "partial judgments," i.e., relevant and necessary documents of the record, in the record on appeal (*see Copp v Ramirez*, 62 AD3d 23, 28, *lv denied* 12 NY3d 711; *Desmarat v Basile*, 288 AD2d 336, 337; *Reiss v Reiss*, 280 AD2d 315, 315). In any event, defendants' contention is not preserved for our review (*see Homan v Herzig* [appeal No. 2], 55 AD3d 1413, 1413-1414; *see also Barnes v Dellapenta*, 111 AD3d 1287, 1288).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1309

KA 10-00820

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELIO P. TILLAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered November 23, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree (three counts) and criminally using drug paraphernalia in the second degree (four 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, inter alia, criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). We reject defendant's contention that County Court erred in refusing to suppress evidence obtained through the use of an eavesdropping warrant. The warrant application established probable cause for the issuance of the warrant, and contained a sufficient showing that normal investigative procedures had been tried and had failed or reasonably appeared to be unlikely to succeed (*see* CPL 700.15 [1], [4]; *People v Lazo*, 16 AD3d 1153, 1153-1154, *lv denied* 4 NY3d 887; *People v Truver*, 244 AD2d 990, 991).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1314

CAF 13-01337

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

IN THE MATTER OF JENNIFER BROWN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE GANDY, RESPONDENT-APPELLANT.
(PROCEEDING NO. 1.)

IN THE MATTER OF TYRONE GANDY,
PETITIONER-APPELLANT,

V

JENNIFER BROWN, RESPONDENT-RESPONDENT.
(PROCEEDING NO. 2.)

COLUCCI & GALLAHER, P.C., BUFFALO (REGINA A. DELVECCHIO OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

EVELYNE O'SULLIVAN, EAST AMHERST, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered July 16, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, designated the location of supervised visitation.

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

Memorandum: The father, the respondent in proceeding No. 1 and the petitioner in proceeding No. 2, appeals from an order that, among other things, directed that supervised visitation with his child take place at a location in North Tonawanda. The father agreed that the prior order of visitation would be modified to require that visitation occur in a supervised setting, but he requested that such visitation occur at a location in Buffalo. Family Court properly concluded that the standard to be applied in determining the location of visitation is the best interests of the child (*see Matter of Gold v Gold*, 53 AD3d 485, 488). We see no basis to disturb the court's determination that the North Tonawanda location would better serve the child's best

interests, " 'inasmuch as it was based on the court's credibility assessments of the witnesses and is supported by a sound and substantial basis in the record' " (*Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744). The father's challenges to the testimony of the expert witness concerning fetal alcohol syndrome are not preserved for our review (*see Matter of Lashawn Shanteal R.*, 14 AD3d 467, 467), and they lack merit in any event.

With respect to the father's contention that he was denied effective assistance of counsel at the hearing, we note at the outset 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 Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [internal quotation marks omitted]). Thus, to the extent that previous decisions of this Court have required a showing of actual prejudice to prevail on a claim of ineffective assistance of counsel under the New York Constitution, those cases are no longer to be followed (*see e.g. Matter of Jada G. [Marcella G.]*, 113 AD3d 1138, 1138; *Matter of Alisa E. [Wendy F.]*, 98 AD3d 1296, 1296; *Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17 NY3d 704). We nevertheless reject the father's contention inasmuch as he did not " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" at the hearing (*People v Benevento*, 91 NY2d 708, 712; *see Matter of Reinhardt v Hardison*, 122 AD3d 1448, 1449).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1318

CA 14-00822

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

THOMAS M. SULLIVAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TROSER MANAGEMENT, INC., DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 29, 2014. The order granted the motion of plaintiff for partial summary judgment determining that defendant had exercised the option to purchase the stock of plaintiff at a value to be determined after trial.

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

Memorandum: Defendant appeals from an order granting plaintiff's motion for partial summary judgment, determining that defendant has exercised its option to purchase plaintiff's shares of stock pursuant to the parties' Buy-Sell Agreement at whatever price is set by Supreme Court at trial. We agree with defendant that the court erred in granting the motion. Contrary to plaintiff's contention and the court's determination, defendant did not unequivocally exercise its option to purchase the stock by virtue of a letter its attorney sent to opposing counsel on July 14, 2005. That letter reads, in relevant part: "Pursuant to paragraph 6 of the Buy-Sell Agreement entered into between the parties, dated November 13, 1986, [defendant] elects to purchase the stock issued to [plaintiff] at a purchase price of $120,615 in accordance with the formula set forth in paragraph 9 of said Buy-Sell Agreement." Pursuant to the express language of that letter, defendant's counsel did not make an open-ended offer to purchase the stock at any price; rather, counsel offered to purchase the stock at the "Purchase Price" pursuant to paragraph 9 of the Buy-Sell Agreement. We determined in a prior appeal, however, that the "Purchase Price" cannot be determined per the method set forth in paragraph 9 because the parties never agreed upon the value of the stock, which was the basis for determining the "Purchase Price" (*Sullivan v Troser Mgt., Inc.*, 75 AD3d 1059, 1060-1061). Thus, it is

not possible for defendant to exercise its option to purchase plaintiff's stock at the "Purchase Price." In sum, we conclude that defendant's offer to purchase the stock for $120,615 in accordance with its calculation of the "Purchase Price," which offer was rejected by plaintiff, does not constitute an unequivocal exercise of its option to purchase the stock such that defendant is obligated to purchase the stock at whatever price is set by the court at trial. For similar reasons, we further conclude that defendant is not judicially or equitably estopped from contesting plaintiff's claim that it has exercised its option to purchase the stock (*see generally Lorenzo v Kahn*, 100 AD3d 1480, 1482-1483; *Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 893).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1320

CA 14-00177

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

JESSE CAUDILL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER INSTITUTE OF TECHNOLOGY,
DEFENDANT-RESPONDENT.

E. MICHAEL COOK, P.C., ROCHESTER (MICHAEL S. STEINBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a second amended order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered September 11, 2013. The second amended order granted that part of the motion of defendant for summary judgment dismissing the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (e) (1).

It is hereby ORDERED that the second amended order so appealed from is unanimously reversed on the law without costs and that part of defendant's motion for summary judgment dismissing the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (e) (1) is denied.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he allegedly stepped on a "softball"-sized rock or clump of hard dirt while descending an earthen ramp into a trench. In support of his Labor Law § 241 (6) claim, plaintiff alleged the violation of 12 NYCRR 23-1.7 (e) (1), which addresses tripping hazards in passageways. Defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved for leave to amend his bill of particulars to add 12 NYCRR 23-1.23 as additional support for his Labor Law § 241 (6) claim. In an order entered September 4, 2013, Supreme Court granted plaintiff's cross motion and granted those parts of defendant's motion with respect to the negligence claim as well as the claims asserted under Labor Law §§ 200 and 240 (1). The court denied that part of defendant's motion with respect to the Labor Law § 241 (6) claim insofar as it is based on the newly alleged violation of 12 NYCRR 23-1.23 and reserved decision on that part of defendant's motion with respect to the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (e) (1). While that order is not contained in the record on appeal, it was submitted to this Court on

earlier motions related to this appeal, and we may take judicial notice of our records (*see Matter of Liliana G. [Orena G.]*, 91 AD3d 1325, 1326-1327; *see also Samuels v Montefiore Med. Ctr.*, 49 AD3d 268, 268). No notice of appeal was filed with respect to that order.

By a second amended order, entered September 11, 2013, the court granted that part of defendant's motion for summary judgment dismissing the Labor Law § 241 (6) claim only insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (e) (1). Plaintiff filed a notice of appeal with respect to the second amended order.

On this appeal, plaintiff challenges both the order and second amended order, contending that his attorney "reasonably interpreted the [second amended] order under appeal as incorporating the previous order[] by reference, at least implicitly." We reject that contention. In the second amended order, the court merely noted that it had previously granted various parts of defendant's motion for summary judgment, granted plaintiff's cross motion to amend the bill of particulars and reserved decision on that part of the motion with respect to the Labor Law § 241 (6) claim. The second amended order does not specifically incorporate the earlier order and, indeed, does not specify the date of the earlier order. In our view, "the reference to the terms of the [prior] order . . . did not effectively incorporate that prior order's [provisions]" (*Matter of Melissa G.*, 306 AD2d 919, 919-920), and we thus conclude that we cannot consider any issues related to that earlier order (*see Weichert v Delia*, 1 AD3d 1058, 1058-1059, *lv denied* 1 NY3d 509; *Lehoczky v New York State Elec. & Gas Corp.*, 149 AD2d 862, 863). "Although minor defects in a notice of appeal may be disregarded ([*see*] CPLR 2001) and an appellate court may treat a notice of appeal which contains 'an inaccurate description of the judgment or order appealed from' as valid (CPLR 5520 [c]), these provisions cannot be used to 'amend a notice of appeal so as to insert therein an order from which no appeal has in fact ever been taken' " (*Lehoczky*, 149 AD2d at 863; *see generally Weichert*, 1 AD3d at 1058-1059).

We agree with plaintiff, however, that the court erred in granting that part of defendant's motion for summary judgment seeking dismissal of the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (e) (1). That section provides, in pertinent part, that "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping" (12 NYCRR 23-1.7 [e] [1]). Although a single rock or clump of dirt does not constitute an "accumulation[] of dirt and debris," we agree with plaintiff that it may nevertheless constitute another "obstruction[] or condition[] which could cause tripping" (12 NYCRR 23-1.7 [e] [1]). We thus conclude that defendant failed to meet its initial burden of establishing that there was no violation of 12 NYCRR 23-1.7 (e) (1). While defendant on appeal relies exclusively on cases interpreting 12 NYCRR 23-1.7 (e) (2), such reliance is misplaced inasmuch as that section concerns working areas rather than the "passageways" at issue in section 23-1.7 (e) (1) (*see Canning v Barney's N.Y.*, 289 AD2d 32, 34).

Finally, defendant contends that the court properly granted that part of its motion seeking dismissal of the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (e) (1) because plaintiff's allegations concerning the cause of his fall are speculative. We reject that contention. Defendant, as the moving party, was required "to establish in the first instance that . . . [its] violation [of the regulation] was not a proximate cause of the accident" (*Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349). In support of its motion, defendant submitted a transcript of plaintiff's deposition, wherein plaintiff repeatedly alleged that the object on the ramp caused his fall. We thus conclude that defendant failed to meet its initial burden of establishing as a matter of law that any alleged violation of 12 NYCRR 23-1.7 (e) (1) was not a proximate cause of the accident (*see e.g. Babiack v Ontario Exteriors, Inc.*, 106 AD3d 1448, 1449-1450; *Ganger v Anthony Cimato/ACP Partnership*, 53 AD3d 1051, 1053). This is not a situation in which the plaintiff "did not know what caused [him] to fall," and it is not " 'just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance' " (*McGill v United Parcel Serv., Inc.*, 53 AD3d 1077, 1077).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1322

CA 14-00594

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

IN THE MATTER OF SMALL SMILES LITIGATION

KELLY VARANO, AS PARENT AND NATURAL GUARDIAN OF INFANT JEREMY BOHN, PLAINTIFF-RESPONDENT,

V ORDER

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA, N.Y., LLC, FORBA, LLC, NOW KNOWN AS LICSAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAC NY, LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, SMALL SMILES DENTISTRY OF SYRACUSE, LLC, DANIEL E. DEROSE, MICHAEL A. DEROSE, D.D.S., EDWARD J. DEROSE, D.D.S., ADOLPH R. PADULA, D.D.S., WILLIAM A. MUELLER, D.D.S., MICHAEL W. ROUMPH, NAVEED AMAN, D.D.S., KOURY BONDS, D.D.S., AND YAQOOB KHAN, D.D.S., DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), AND SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE, FOR DEFENDANTS-APPELLANTS FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA, N.Y., LLC, AND SMALL SMILES DENTISTRY OF SYRACUSE, LLC.

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C., ALBANY (LIA B. MITCHELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS FORBA, LLC, NOW KNOWN AS LICSAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAC NY, LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, DANIEL E. DEROSE, MICHAEL A. DEROSE, D.D.S., EDWARD J. DEROSE, D.D.S., ADOLPH R. PADULA, D.D.S., WILLIAM A. MUELLER, D.D.S., AND MICHAEL W. ROUMPH.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, ALBANY (MELISSA A. MURPHY-PETROS OF COUNSEL), FOR DEFENDANTS-APPELLANTS NAVEED AMAN, D.D.S., KOURY BONDS, D.D.S., AND YAQOOB KHAN, D.D.S.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 3, 2013. The order granted the motion of plaintiff for a new trial.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1323

CA 14-00896

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

IN THE MATTER OF SMALL SMILES LITIGATION

KELLY VARANO, AS PARENT AND NATURAL GUARDIAN OF INFANT JEREMY BOHN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA, N.Y., LLC, FORBA, LLC, NOW KNOWN AS LICSAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAC NY, LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, SMALL SMILES DENTISTRY OF SYRACUSE, LLC, DANIEL E. DEROSE, MICHAEL A. DEROSE, D.D.S., EDWARD J. DEROSE, D.D.S., ADOLPH R. PADULA, D.D.S., WILLIAM A. MUELLER, D.D.S., MICHAEL W. ROUMPH, NAVEED AMAN, D.D.S., KOURY BONDS, D.D.S., AND YAQOOB KAHN, D.D.S., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, ALBANY (MATTHEW S. LERNER OF COUNSEL), AND SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE, FOR DEFENDANTS-APPELLANTS FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, FORBA, N.Y., LLC, AND SMALL SMILES DENTISTRY OF SYRACUSE, LLC.

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C., ALBANY (LIA B. MITCHELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS FORBA, LLC, NOW KNOWN AS LICSAC, LLC, FORBA NY, LLC, NOW KNOWN AS LICSAC NY, LLC, DD MARKETING, INC., DEROSE MANAGEMENT, LLC, DANIEL E. DEROSE, MICHAEL A. DEROSE, D.D.S., EDWARD J. DEROSE, D.D.S., ADOLPH R. PADULA, D.D.S., WILLIAM A. MUELLER, D.D.S., AND MICHAEL W. ROUMPH.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, ALBANY (MELISSA A. MURPHY-PETROS OF COUNSEL), FOR DEFENDANTS-APPELLANTS NAVEED AMAN, D.D.S., KOURY BONDS, D.D.S., AND YAQOOB KHAN, D.D.S.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 21, 2014. The order granted the motions of defendants for leave to renew and, upon renewal, adhered to the order entered December 3, 2013 granting the motion of

plaintiff for a new trial.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her infant son as a result of, inter alia, allegedly unnecessary dental treatment, performed at a "Small Smiles" dental clinic in Syracuse, New York, allegedly without informed consent or with fraudulently obtained consent. This action was coordinated for purposes of discovery with two other actions in Supreme Court, Onondaga County. Although there are four groups of defendants involved in the three actions (*Matter of Small Smiles Litig.*, 109 AD3d 1212, 1212-1213), the only groups relevant to the instant appeal are defendants-appellants (defendants). Supreme Court granted plaintiff's motion pursuant to CPLR 4404 (a) to set aside the verdict on the ground of improper outside influence on the jury during trial, vacated the judgment and ordered a new trial (*Varano v FORBA Holdings, LLC*, 42 Misc 3d 303) and, by the order on appeal, the court granted defendants' motions pursuant to CPLR 2221 (e) for leave to renew and, upon renewal, adhered to its original determination (*Varano v FORBA Holdings, LLC*, 42 Misc 3d 1232[A], 2014 NY Slip Op 50312[U]). We reverse.

It is well settled that the decision whether to grant a motion for a new trial pursuant to CPLR 4404 (a) is committed to the trial court's discretion and will not be disturbed absent an abuse of that discretion (*see Singer v Krul*, 90 AD3d 1378, 1379, *lv dismissed* 18 NY3d 953; *see generally Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381). Here, we agree with defendants that the court abused its discretion in the manner in which it investigated and determined the issue whether there had been improper outside influence on the jury that "was such as would be likely . . . to influence the verdict" (*Schrader v Joseph H. Gertner, Jr., Inc.*, 282 App Div 1064, 1064 [internal quotation marks omitted]; *see Payne v Burke*, 236 App Div 527, 528-529). Shortly after the trial had concluded and the jury was discharged, the court received notice of an allegation from one juror that a person attending the trial had been "stalking" the impaneled jurors on lunch breaks and during other recess periods. The juror described the individual's behavior as "creepy." It was later learned that the individual was a representative of an insurance company monitoring the progress of the trial because it insured many of the defendants. As a result of the "stalking" allegation, the court conducted its own investigation and ultimately set aside the verdict, which had been entirely in defendants' favor, and ordered a new trial. We agree with defendants that the court abused its discretion in conducting an in camera interview of the complaining juror without notifying counsel, without seeking counsels' consent to that procedure (*see generally United States v Bufalino*, 576 F2d 446, 451, *cert denied* 439 US 928), and without providing counsel with an opportunity to be heard or to participate, even in some restricted manner, in the interview of the juror (*see generally Remmer v United States*, 347 US 227, 229-230). Further, the court limited its investigation to one juror, and we conclude that the court abused its

discretion in failing to conduct a more expanded investigation, including, at a minimum, conducting an interview of all of the jurors (*see generally Kraemer v Zimmerman*, 249 AD2d 159, 160). Lastly, the court abused its discretion in prohibiting counsel from contacting any jurors until after plaintiff's motion to set aside the verdict was decided. This unnecessary prohibition essentially precluded defendants from obtaining and submitting any meaningful opposition to plaintiff's motion, the practical result being that the granting of plaintiff's motion was a foregone conclusion.

As a result of the limited scope of the investigation made into the alleged "stalking" of the jurors during trial, we cannot determine on this record if any such outside influence " 'likely . . . influence[d] the verdict' " (*Schrader*, 282 App Div at 1065). We therefore reverse the order and remit the matter to Supreme Court to decide plaintiff's motion following an evidentiary hearing on that issue.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1324

CA 13-02003

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

FRANKLIN TATE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY L. BROWN, DEFENDANT-RESPONDENT.

LOUIS ROSADO, BUFFALO, FOR PLAINTIFF-APPELLANT.

BURGIO KITA CURVIN & BANKER, BUFFALO (JAMES BURGIO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered July 31, 2013. The order and judgment, inter alia, granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion and reinstating the complaint, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries he allegedly sustained when the vehicle in which he was a passenger was struck from behind by a vehicle owned and operated by defendant. Although plaintiff asserted in his bill of particulars that he sustained a serious injury under two categories of serious injury, he thereafter asserted that he sustained a serious injury under only one category, i.e., a significant limitation of use of a body function or system (*see* Insurance Law § 5102 [d]). Supreme Court granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury, and denied plaintiff's cross motion for summary judgment on the issues of serious injury and negligence, i.e., the issue of liability (*see generally Ruzycki v Baker*, 301 AD2d 48, 51). We agree with plaintiff that the court erred in granting defendant's motion, and we therefore modify the order and judgment accordingly. Initially, we conclude that defendant failed to meet his initial burden of presenting evidence in admissible form establishing that plaintiff did not sustain a serious injury that was causally related to the accident in question (*see Fisher v Hill*, 114 AD3d 1193, 1193-1194, *lv denied* 23 NY3d 909*; see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In support of his motion, defendant submitted the reports of four physicians who examined plaintiff on behalf of defendant. In one of those reports, the physician noted

that MRIs taken of plaintiff show that he has herniated and bulging discs and has range of motion limitations with respect to his cervical and lumbar spine, which were quantified and determined to be not insignificant. The physician stated with respect to causation that, "[b]ased on the history provided by the [plaintiff], it is apparent that the injuries sustained and the reported accident, are causally related."

In the second report submitted by defendant, the orthopedic surgeon likewise noted the herniated and bulging discs and concluded that plaintiff had range of motion limitations in his cervical spine. The orthopedic surgeon further concluded that "there is a causal relationship between the accident of record and the [plaintiff's] reported symptomatology." Thus, as noted, neither physician opined that plaintiff's injuries were not causally related to the subject accident. Although the two other physicians who examined plaintiff on defendant's behalf concluded that he did not sustain a serious injury in the accident and that his claimed limitations arise from preexisting injuries, the conflict between the reports of those physicians and those of the other two physicians who examined plaintiff on defendant's behalf creates an issue of fact. Defendant therefore failed to meet his initial burden of establishing his entitlement to judgment as a matter of law, and "the burden never shifted to plaintiff to raise a triable issue of fact" (*Houston v Geerlings*, 83 AD3d 1448, 1450; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Plaintiff has abandoned that portion of his cross motion seeking summary judgment on the issue of serious injury. We agree with defendant, however, that the court properly denied that part of plaintiff's cross motion for summary judgment on the issue of negligence. It is well settled that "a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle" (*Pitchure v Kandefer Plumbing & Heating*, 273 AD2d 790, 790; *see Leal v Wolff*, 224 AD2d 392, 393). "In order to rebut the presumption [of negligence], the driver of the rear vehicle must submit a non[]negligent explanation for the collision" (*Pitchure*, 273 AD2d at 790; *see Herdendorf v Polino*, 43 AD3d 1429, 1429). " 'One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle' . . . , and such an explanation 'is sufficient to overcome the inference of negligence and preclude an award of summary judgment' " (*Brooks v High St. Professional Bldg., Inc.*, 34 AD3d 1265, 1266; *see Danner v Campbell*, 302 AD2d 859, 859). Here, defendant testified at his deposition that the vehicle in which plaintiff was a passenger stopped "suddenly" in the traffic lane in front of him, and that he could not stop in time to avoid a collision, while the driver of plaintiff's vehicle offered contrary testimony at her deposition. Thus, there is an issue of fact sufficient to defeat that part of plaintiff's cross motion.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1330

KA 13-01958

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY D. SCHEIFLA, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Kenneth F. Case, J.), entered October 3, 2013. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). The Board of Examiners of Sex Offenders determined that defendant was a level one risk with a total risk factor score of 60, but recommended an upward departure to a level two risk. County Court recalculated defendant's presumptive risk level, assigning points for risk factors 3 (more than three victims) and 7 (relationship with the victim, i.e., a stranger), bringing defendant to a total risk factor score of 110, which is a level three risk. The court then ordered a downward departure from a level three risk to a level two risk. We affirm.

Defendant contends that there was insufficient evidence for the court to assess points against defendant for risk factors 3 and 7. We disagree. The People provided clear and convincing evidence of risk factors 3 and 7, based on the number of images and videos depicting child pornography that were in defendant's possession (*see People v Poole*, 90 AD3d 1550, 1550-1551; *see generally* Correction Law § 168-n [3]; *People v Johnson*, 11 NY3d 416, 420; *People v Vaillancourt*, 112 AD3d 1375, 1375-1376, *lv denied* 22 NY3d 864).

We further conclude that the court had the discretion to order a downward departure from its recalculated presumptive risk level (*see generally People v Johnson*, 120 AD3d 1542, 1542, *lv denied* 24 NY3d 910). It is well settled that " '[a] departure from the presumptive

risk level is warranted where there exists an aggravating or mitigating factor of a kind or to a degree, not otherwise adequately taken into account by the [SORA] guidelines' " (*People v Moore*, 115 AD3d 1360, 1360-1361; *see People v Scott*, 111 AD3d 1274, 1275, *lv denied* 22 NY3d 861). Here, the record establishes that defendant identified an appropriate mitigating factor in favor of a downward departure not adequately accounted for by the SORA guidelines, and that defendant proved by the preponderance of the evidence the facts necessary to support that downward departure from his recalculated presumptive risk level (*see Johnson*, 120 AD3d at 1542).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1331

KA 13-00183

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW T. SPEARS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered January 23, 2013. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]). The charge stemmed from an incident in which defendant stole money and cell phones from the victim and struck the victim in the head with a firearm.

Defendant contends that the conviction is not supported by legally sufficient evidence because the People failed to prove that the firearm was loaded, and because an unloaded firearm does not constitute a "dangerous instrument" within the meaning of Penal Law § 160.15 (3). Defendant failed to preserve that contention for our review (*see People v Gray*, 86 NY2d 10, 19). In any event, the contention lacks merit inasmuch as we previously have determined that a "gun . . . used as a bludgeon" is a dangerous instrument (*People v Wooden*, 275 AD2d 935, 935, *lv denied* 96 NY2d 740; *see* § 10.00 [13]). Moreover, viewing the evidence in the light most favorable to the People, we conclude that " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of [robbery in the first degree] proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349).

Defendant's related contention that his failure to preserve the above sufficiency contention should be excused because he was denied effective assistance of counsel is raised for the first time in his reply brief and is therefore not properly before us (*see Matter of*

Sedita v Sacha, 99 AD3d 1259, 1260). In any event, we note that defense counsel's alleged failure to preserve a meritless issue for our review does not constitute ineffective assistance of counsel (*see People v Stachnik*, 101 AD3d 1590, 1591, *lv denied* 20 NY3d 1104).

Defendant contends that his conviction is against the weight of the evidence because, inter alia, there was no evidence that he used an operable and loaded firearm, and because some of the People's witnesses were not credible. As we note above, the People were not required to prove that the firearm was operable or loaded in order to prove the dangerous instrument element of the crime (*see Wooden*, 275 AD2d at 935), and we see no reason to disturb the jury's credibility determinations (*see People v Curry*, 82 AD3d 1650, 1651, *lv denied* 17 NY3d 805; *People v Gritzke*, 292 AD2d 805, 805-806, *lv denied* 98 NY2d 697). Viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that the verdict is repugnant inasmuch as he failed to object to the alleged repugnancy of the verdict before the jury was discharged (*see People v Ali*, 89 AD3d 1417, 1420, *lv denied* 18 NY3d 922; *see also People v Lurcock*, 219 AD2d 797, 798, *lv denied* 88 NY2d 881). In any event, we conclude that the contention lacks merit (*see People v Tucker*, 55 NY2d 1, 7, *rearg denied* 55 NY2d 1039; *People v McLaurin*, 50 AD3d 1515, 1516; *see also People v Clanton*, 19 AD3d 1035, 1035-1036, *lv denied* 5 NY3d 804).

The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they are either unpreserved or lacking in merit.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1336

KA 13-00745

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LONNIE SPEARS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered November 13, 2012. The judgment convicted defendant, upon a jury verdict, 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 a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant was indicted for his alleged involvement in a robbery and burglary, but the jury convicted him only of the single weapons count.

Defendant made only a general motion to dismiss the indictment for "facial insufficiency," and he thus failed to preserve for our review the contentions he now advances on appeal (*see People v Gray*, 86 NY2d 10, 20-21; *People v Morris*, 217 AD2d 941, 941, *lv denied* 87 NY2d 849; *see generally* CPL 200.50 [7]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). In addition, defendant's contention that the indictment did not adequately specify the county in which the alleged crime occurred is raised for the first time in his reply brief and is therefore not properly before us (*see Matter of Sedita v Sacha*, 99 AD3d 1259, 1260).

Defendant contends that the evidence is not legally sufficient to support the conviction inasmuch as the People failed to adduce any evidence at trial that the firearm at issue was operable and loaded with live ammunition. That contention is not preserved for our review (*see Gray*, 86 NY2d at 19) and, in any event, lacks merit. Although the firearm was never recovered, we conclude that the People supplied the necessary proof through circumstantial evidence, i.e., "eyewitness

testimony and surrounding circumstances" (*People v Samba*, 97 AD3d 411, 414, *lv denied* 20 NY3d 1065). Viewing the evidence in light of the elements of the crime as charged to the jury, we reject defendant's further contention that the verdict is against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349; *People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his further contention that the verdict is repugnant inasmuch as he failed to object to the alleged repugnancy of the verdict before the jury was discharged (*see People v Ali*, 89 AD3d 1417, 1420, *lv denied* 18 NY3d 922; *see also People v Lurcock*, 219 AD2d 797, 798, *lv denied* 88 NY2d 881). In any event, we conclude that the contention lacks merit (*see People v Tucker*, 55 NY2d 1, 7, *rearg denied* 55 NY2d 1039; *People v McLaurin*, 50 AD3d 1515, 1516; *see also People v Clanton*, 19 AD3d 1035, 1035-1036, *lv denied* 5 NY3d 804).

The sentence is not unduly harsh or severe. We have examined defendant's remaining contentions and conclude that they lack merit.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1339

CAF 13-01941

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF BENTLEIGH O.

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

JACQUELINE O., RESPONDENT-APPELLANT,
AND TINA S., RESPONDENT.

TRACY L. PUGLIESE, CLINTON, FOR RESPONDENT-APPELLANT.

JACQUELYN M. ASNOE, HERKIMER, FOR PETITIONER-RESPONDENT.

JOSEPH M. CIRILLO, ATTORNEY FOR THE CHILD, MOHAWK.

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), entered September 25, 2013 in a proceeding pursuant to Family Court Act article 10. The order determined the subject child to be abused and neglected.

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

Memorandum: Respondent mother appeals from an order adjudicating her child to be an abused and neglected child. After the child was hospitalized for, inter alia, multiple rib fractures, a partially collapsed lung, and eye and ear injuries, petitioner commenced this proceeding alleging that the mother was responsible for the injuries. At the fact-finding hearing, Family Court admitted in evidence, over the mother's objection, medical records from the child's treatment at two hospitals.

As petitioner and the Attorney for the Child concede, the court admitted the medical records in evidence without a proper certification as required by Family Court Act § 1046 (a) (iv) (*see Matter of Kadyn J. [Kelly M.H.]*, 109 AD3d 1158, 1159; *Matter of John QQ.*, 19 AD3d 754, 755-756). That statute provides that, where certification of medical records is completed "by someone other than the head of the hospital[,] . . . [it] *shall* be accompanied by a photocopy of a delegation of authority signed by *both* the head of the hospital . . . and by such other employee" (§ 1046 [a] [iv] [emphasis added]; *see John QQ.*, 19 AD3d at 755-756). Here, the certification was not accompanied by the necessary delegation of authority and, thus, the court erred in admitting the medical records in evidence.

Under the circumstances, however, we deem the court's evidentiary error to be harmless (*see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401-1402, *lv denied* 21 NY3d 862; *see generally Palmer v Wright & Kremers*, 62 AD2d 1170, 1171). Even excluding the medical records from consideration, we conclude that the court's finding of abuse is supported by a preponderance of the evidence in the record (*see* Family Ct Act § 1046 [b] [i]; *Arianna M.*, 105 AD3d at 1401). The record contains detailed testimony from the two treating physicians who examined the child at each hospital and described the child's extensive injuries. Moreover, other testimony established that the mother twice forcibly squeezed the child's chest, which was consistent with the nonaccidental nature of the child's injuries (*see Matter of Eric CC.*, 237 AD2d 655, 656-657). Also, inasmuch as the mother declined to testify, "the court [was] permitted to draw the strongest possible negative inference" against her (*Matter of Jasmine A.*, 18 AD3d 546, 548; *see Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545, *lv denied* 18 NY3d 808).

Finally, we reject the mother's contention that she was denied effective assistance of counsel. "It is axiomatic 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 Kelsey R.K. [John J.K.]*, 113 AD3d 1139, 1140, *lv denied* 22 NY3d 866 [internal quotation marks omitted]). Here, "the record establishes that, viewed in the totality of the proceedings, [the mother] received meaningful representation" (*Matter of Jeffrey V.*, 82 NY2d 121, 126; *see Matter of Shannon F.*, 121 AD3d 1595, 1596, *lv denied* ___ NY3d ___ [Jan. 8, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1341

CA 14-00818

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

LITTLETON CONSTRUCTION LTD., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HUBER CONSTRUCTION, INC. AND LITTLETON/HUBER JOINT VENTURE, DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (MICHAEL B. POWERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FREID AND KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered December 3, 2013. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment dismissing the amended complaint.

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 amended complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking, inter alia, damages for a breach of contract claim. Defendants moved for summary judgment dismissing the amended complaint, and Supreme Court granted the motion, except with respect to plaintiff's claim for a share of certain management/overhead fees. We reverse the order insofar as appealed from and grant defendants' motion in its entirety.

In November 2007, plaintiff and defendant Huber Construction, Inc. (Huber) entered into a joint venture, i.e., defendant Littleton/Huber Joint Venture, for a series of renovation projects at the Buffalo Public Schools. The memorandum of understanding and amending rider (collectively, MOU) governing the joint venture state that Huber alone is entitled to a nine percent management/overhead fee on all joint venture projects. Plaintiff claims that it is entitled to a share of management/overhead fees proportional to the work it performed on behalf of the joint venture, and that claim is based on a provision in an operating agreement allegedly executed by plaintiff and Huber, but which Huber asserts is fraudulent. Plaintiff concedes on appeal that the operating agreement is "a cut and paste" of prior documents executed by the parties, but asserts that the operating agreement is nonetheless valid inasmuch as it, too, was duly executed by plaintiff and Huber.

We agree with defendants that they met their initial burden of establishing that the operating agreement at issue is fraudulent (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Huber's president tendered an affidavit in which he averred that he had never signed or even seen the operating agreement at issue, and that Huber had never had a copy of it. He further averred that, despite those facts, the signatures, dates, and notary stamp on the allegedly fraudulent operating agreement were identical to those on the MOU that he had in fact signed. Huber also submitted copies of the MOU and the allegedly fraudulent operating agreement in order to establish the discrepancy in how each document treated management/overhead fees. We conclude that defendants' submissions were sufficient to meet their initial burden of establishing that the operating agreement at issue was forged and is therefore void (*see Orlosky v Empire Sec. Sys.*, 230 AD2d 401, 403; *Ticor Tit. Guar. Co. v E.F.D. Capital Group*, 210 AD2d 841, 841-842, *lv denied* 85 NY2d 809; *see also Opals on Ice Lingerie v Body Lines, Inc.*, 320 F3d 362, 370). Defendants also tendered other evidence on their motion in support of their position that the operating agreement was forged. The bid specification sheets for each of the school projects, which plaintiff's owner reviewed and/or signed, included a nine percent "[o]verhead" fee payable to Huber. In addition, plaintiff's owner admitted that Huber never agreed in writing to any sharing of management/overhead fees. In opposition to defendants' motion, plaintiff failed to raise a triable issue of fact either that the allegedly fraudulent operating agreement was not forged, or that the MOU was ambiguous with respect to management/overhead fees, thereby requiring extrinsic evidence to determine the parties' intentions concerning such fees (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Hart v Kinney Drugs, Inc.*, 67 AD3d 1154, 1157-1158). We therefore agree with Huber that it is entitled to the management/overhead fees pursuant to the terms of the MOU, and that plaintiff's claim for such fees, based on the fraudulent operating agreement, is without merit.

In light of our decision, we do not consider defendants' remaining contention.

All concur except FAHEY and WHALEN, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm. In support of their motion for summary judgment dismissing the amended complaint, defendants submitted, inter alia, deposition testimony from plaintiff's owner, in which he stated that he signed the allegedly fraudulent operating agreement. "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505). Consequently, we cannot conclude as a matter of law that the operating agreement at issue is a forgery.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1344

CA 14-00367

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF ADIRONDACK HEALTH-UIHLEIN LIVING CENTER, ET AL., PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, M.D., COMMISSIONER OF HEALTH, STATE OF NEW YORK, ROBERT L. MEGNA, AS DIRECTOR OF BUDGET, AND ANDREW M. CUOMO, GOVERNOR, STATE OF NEW YORK, RESPONDENTS-DEFENDANTS-APPELLANTS.

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

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

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered February 3, 2014 in a CPLR article 78 proceeding and declaratory judgment action. The order, insofar as appealed from, directed respondents to make future case mix adjustment payments in January and July of each calendar year.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the sixth decretal paragraph is vacated.

Memorandum: In a related appeal, after converting this CPLR article 78 proceeding to a hybrid CPLR article 78 proceeding/declaratory judgment action, this Court holds that Supreme Court erred in determining that the enforcement of 10 NYCRR 86-2.40 (m) (10) by respondents-defendants (respondents) is arbitrary and capricious and otherwise unlawful under both state and federal law, and we therefore reverse the order insofar as appealed from (*Matter of Adirondack Health-Uihlein Living Ctr. v Shah*, ___ AD3d ___ [Feb. 6, 2015] [*Adirondack I*]). During the pendency of the appeal in *Adirondack I*, petitioners-plaintiffs (petitioners) moved for, inter alia, an order compelling respondents to make future case mix adjustment payments in January and July of each calendar year (*see* 10 NYCRR 86-2.40 [m] [6]), and the court granted that part of the motion. We subsequently granted respondents leave to appeal, and we now reverse the order insofar as appealed from. We agree with respondents

that the plain meaning of the regulation is that, in January and July of every year, the Department of Health is required to use case mix information to recalculate the Medicaid reimbursement rates for residential health care facilities, but it does not set forth a schedule for issuing Medicaid reimbursement payments associated with those case mix adjustments to the facilities (*see generally Matter of Heinlein v New York State Off. of Children & Family Servs.*, 60 AD3d 1472, 1473).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1346

CA 14-00767

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF ROBERT A. ANDERSON, JR., PATRICIA E. BETTIS, AS EXECUTOR OF THE ESTATE OF RUSSELL F. BETTIS, DECEASED, DANIELLE D. FAMA, SARA N. FORGIONE, MARIO RICOTTA, AND DONNA M. GILREATH, AS EXECUTOR OF THE ESTATE OF NINA M. SPACONE, DECEASED, ON BEHALF OF THEMSELVES AND CERTAIN OTHER RETIRED EMPLOYEES OF NIAGARA FALLS CITY SCHOOL DISTRICT, FORMERLY IN THE CSEA BARGAINING UNIT,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

NIAGARA FALLS CITY SCHOOL DISTRICT, CYNTHIA A. BIANCO, AS SUPERINTENDENT, AND NIAGARA FALLS CITY SCHOOL DISTRICT BOARD OF EDUCATION,
RESPONDENTS-APPELLANTS.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (JAMES C. ROSCETTI OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

STEVEN A. CRAIN AND DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (PAUL S. BAMBERGER OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 15, 2013 in a CPLR article 78 proceeding. The judgment granted the petition.

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

Memorandum: Petitioners, retirees of respondent Niagara Falls City School District (District), commenced this CPLR article 78 proceeding after respondents transferred them from one health insurance plan to another, i.e., from a Blue Cross/Blue Shield Traditional Plan (Traditional Plan) to a Blue Cross/Blue Shield Forever Blue Medicare Plan (Forever Blue Plan), thereby reducing their health insurance benefits while failing to effectuate a similar reduction in benefits for active employees. While they were employed by the District, petitioners, some of whom are now deceased, were covered by a collective bargaining agreement (CBA) between the District and the Civil Service Employees Association, Inc., Local 1000 (CSEA), but the CBA does not provide what kind of health insurance

plan would be available to petitioners during retirement. Prior to July 1, 2011, the Traditional Plan was available to petitioners, but on or about that date, respondents ceased to offer the Traditional Plan and transferred petitioners to the Forever Blue Plan. Petitioners alleged that respondents' actions were arbitrary, capricious, and unlawful, and in violation of chapter 504 of the Laws of 2009 (hereafter, moratorium statute), and sought, inter alia, to compel respondents to make the Traditional Plan available to them again. In opposition to the petition, respondents asserted that the coverage provided under the Forever Blue Plan is the "exact same coverage" as the Traditional Plan, with the exception of "one difference, there is a minor increase in the co-pays under the new current plan." In order to compensate for that increase, respondents deposited $600 per year into a medical reimbursement account for each petitioner. Supreme Court granted the petition in its entirety, and we affirm.

Citing *Kolbe v Tibbetts* (22 NY3d 344), respondents contend that petitioners do not have a viable cause of action under the moratorium statute. Specifically, respondents contend that the holding of the Court of Appeals in *Kolbe* precludes a cause of action under the moratorium statute where the disputed benefit stems from a CBA or other contract. We reject that contention. The moratorium statute sets a minimum baseline or "floor" for retiree health benefits, and that "floor" is measured by the health insurance benefits received by active employees (*see id.* at 357-358). In other words, the moratorium statute does not permit an employer to whom the statute applies to provide retirees with lesser health insurance benefits than active employees (*see Matter of Jones v Board of Educ. of Watertown City Sch. Dist.*, 30 AD3d 967, 970). As relevant herein, we perceive two factors that distinguish this case from *Kolbe*. First, here, unlike in *Kolbe* (*id.* at 357-358), petitioners allege that their health insurance benefits have been diminished below the "floor" of the corresponding benefits for active employees. In our view, that distinguishing factor is the precise trigger that permits petitioners to assert a cause of action under the moratorium statute. Second, the issue in *Kolbe* was whether the respondents therein could reduce or eliminate retiree benefits regardless of the language in the governing CBAs, so long as they made the same modification to active employees (*id.* at 357), and resolving that issue involved an interpretation of the contractual provisions of the governing CBAs. In rejecting the respondents' position in *Kolbe*, the Court of Appeals held that the moratorium statute was "not meant to eviscerate contractual obligations" (*id.* at 358). In the instant case, however, petitioners do not allege that respondents have violated a provision of their CBA and, thus, no issue of contract interpretation is presented here. In sum, the petitioners in *Kolbe* were attempting to vindicate the negotiated rights bestowed on them in the governing CBAs; here, petitioners are attempting to vindicate the rights bestowed on them under the moratorium statute.

With respect to the merits of the instant case, the court properly determined that respondents' actions were arbitrary, capricious, and unlawful, and in violation of the moratorium statute,

because there was a substantial reduction in health insurance benefits for petitioners or their dependents without a corresponding reduction of benefits for active employees (*see Jones*, 30 AD3d at 970). Contrary to respondents' contention, we conclude that petitioners met their burden of establishing the unlawful reduction of their benefits by the affidavit of a health insurance benefits specialist who reviewed the two plans at issue, set forth a table comparing their benefits, and opined that, while active employees experienced an improvement in their health insurance benefits starting July 1, 2011, petitioners concomitantly experienced a "substantial diminution" in their health insurance benefits (*cf. Matter of Bryant v Board of Educ.*, *Chenango Forks Cent. Sch. Dist.*, 21 AD3d 1134, 1137-1138). In opposition, respondents merely asserted in conclusory fashion that the Forever Blue Plan provided the "exact same coverage" as the Traditional Plan, and such conclusory assertions were insufficient to overcome petitioners' proof.

Respondents' remaining contention is improperly raised for the first time on appeal and we therefore do not address it (*see NYCTL 1997-1 Trust v Vila*, 19 AD3d 382, 382).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1358

CAF 14-00847

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

IN THE MATTER OF ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF ALLAN CHRISTMAN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHARLES CHRISTMAN, SR., RESPONDENT-RESPONDENT.

TRACY L. PUGLIESE, CLINTON, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered August 7, 2013 in a proceeding pursuant to Family Court Act article 4. The order denied the objection of petitioner to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following Memorandum: Petitioner appeals from an order denying its objection to the order of the Support Magistrate, which determined that respondent father was relieved of any obligation to support his child because he established that the child was emancipated (*see generally Matter of Parker v Stage*, 43 NY2d 128, 133-135). We reverse.

It is well established that " '[a] parent is obligated to support his or her child until the age of 21 (*see* Family Ct Act § 413) unless the child becomes emancipated' " (*Matter of Cedeno v Knowlton*, 98 AD3d 1257, 1257), and that "[t]he Legislature has imposed a statutory duty upon parents to support their children who are welfare recipients in order to save the general public the cost of supporting them" (*Matter of Henry v Boyd*, 99 AD2d 382, 387, *affd* 65 NY2d 645; *see* § 415). "[U]nder the doctrine of constructive emancipation, 'a child of employable age who actively abandons the noncustodial parent by refusing all contact and visitation' may forfeit any entitlement to support" (*Matter of Burr v Fellner*, 73 AD3d 1041, 1041). "[I]f a minor has abandoned a parent as outlined in *Matter of Roe v Doe* [29 NY2d 188, 192], that parent is not obligated to reimburse [petitioner] for any public assistance expended for the support of that child" (*Basi v Basi*, 136 AD2d 945, 947, *lv dismissed* 72 NY2d 952). The burden of proving emancipation is on the party asserting it (*see Matter of Gold v Fisher*, 59 AD3d 443, 444; *see also Schmitt v Schmitt*, 107 AD3d 1529, 1530).

Here, at the time period relevant to the instant support petition, the father was no longer the child's custodial parent when the child became eligible for public assistance. The record establishes that the child had lived with his biological mother for years before he moved into his own apartment and started receiving public assistance. The father failed to present any evidence that the child had abandoned a relationship with him, and, to the contrary, the record establishes that the father had given the child monetary support after the child moved out of his home and that the father had spoken to the child throughout these proceedings (*cf. Basi*, 136 AD2d at 947). Thus, the father failed to meet his burden of proving that the child was emancipated, and Family Court erred in denying petitioner's objection to the order of the Support Magistrate.

The subject child is now 21 and, thus, the father owes no continued support obligation toward him (*see generally* Family Ct Act § 413 [1] [a]). Because the father was not relieved of his duty to support his child before he turned 21, however, petitioner is entitled to retroactive support dating back to the time that the child became eligible for public assistance, inasmuch as the record establishes that the child was still receiving public assistance when petitioner filed the support petition (*see* § 449 [2]; *cf. Matter of Onondaga County Commr. of Social Servs. v Smith*, 19 AD3d 1066, 1067). Because the record is insufficient for us to determine the father's retroactive support obligation (*see Matter of Tufano v Sheridan*, 249 AD2d 313, 314), we reverse the order and remit the matter to Family Court for that purpose, and to determine "whether payment should be made in one lump sum or in installments" following a hearing if necessary (*McCoy v McCoy*, 254 AD2d 732, 733; *see Schmitt*, 107 AD3d at 1530).

Finally, we deny petitioner's request for an order directing the father to add the child to his health insurance inasmuch as the father cannot be compelled to support his now 21-year-old child in the absence of an express agreement to the contrary (*see Ciampa v Ciampa*, 47 AD3d 745, 748; *see generally* Family Ct Act § 413 [1] [a]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1363

CA 14-00842

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

TAKISHA MOYE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOEL A. GIAMBRA AND MICHELLE M. GIAMBRA,
DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (RYAN C. MAHONEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 10, 2014 in a personal injury action. The order, among other things, granted defendants' cross motion 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 seeking damages for injuries she allegedly sustained as a result of her exposure to lead paint as a child in an apartment in which she resided. The complaint alleges two causes of action against defendants, the landlords of the subject property, i.e., negligent ownership and maintenance of the premises, and negligent abatement of the lead paint hazards. Plaintiff moved for, inter alia, partial summary judgment on the "issues of liability (notice, negligence and substantial factor)," and defendants cross-moved for summary judgment dismissing the complaint. Supreme Court properly granted the cross motion. "In order for a landlord to be held liable for a lead paint condition, it must be established that the landlord had actual or constructive notice of the hazardous condition and a reasonable opportunity to remedy it, but failed to do so" (*Spain v Holl*, 115 AD3d 1368, 1369; *see Pagan v Rafter*, 107 AD3d 1505, 1506; *see generally Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646). We agree with defendants that they met their burden on the cross motion with respect to the cause of action for negligent ownership and maintenance of the premises by establishing that they did not have actual or constructive notice of the hazardous lead paint condition, and plaintiff failed to raise a triable issue of fact (*see Spain*, 115 AD3d at 1369; *see generally Chapman v Silber*, 97 NY2d 9, 15). We further agree with defendants that they met their burden with respect to the negligent abatement cause of action by

establishing that they abated the lead paint hazard in a reasonable manner, and plaintiff failed to raise a triable issue of fact (*cf*. *Pagan*, 107 AD3d at 1506-1507).

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1366

CA 14-00217

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

IN THE MATTER OF TECHNIPLEX III, A PARTNERSHIP, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN AND VILLAGE OF EAST ROCHESTER, RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

LACY KATZEN LLP, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (DANIEL P. PURCELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 24, 2013 in a proceeding pursuant to RPTL article 7. The order, among other things, granted the petitions in part and ordered respondents to correct the assessment rolls and to refund the tax overpayments with interest.

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

Memorandum: Petitioners, related commercial entities with common ownership, commenced these RPTL article 7 proceedings seeking review of the real property tax assessments for three commercial properties located in respondents Town and Village of East Rochester for the tax years 2009, 2010, and 2011. In each of the appeals, respondents appeal from an order granting the respective petitions in part and ordering respondents to correct the assessment rolls and to refund the tax overpayments with interest. We affirm the orders in each appeal.

Contrary to the contention of respondents in all three appeals, we conclude that petitioners met their initial burden of presenting "substantial evidence that the propert[ies were] overvalued" (*Matter of Roth v City of Syracuse*, 21 NY3d 411, 417), thereby rebutting the "presumption of validity [that] attaches to the valuation of property made by the taxing authority" (*id.*; *see Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, 23 NY3d 168, 174-175). "In the context of tax assessment cases, the 'substantial evidence' standard merely requires that petitioner demonstrate the existence of a valid and credible dispute regarding valuation" (*Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 188; *see Matter of East*

Med. Ctr., L.P. v Assessor of Town of Manlius, 16 AD3d 1119, 1120). "The ultimate strength, credibility or persuasiveness of petitioner's arguments are not germane during this threshold inquiry" (*FMC Corp.*, 92 NY2d at 188; *see Matter of W.O.R.C. Realty Corp. v Board of Assessors*, 100 AD3d 75, 88, *lv denied* 20 NY3d 862). Here, petitioners submitted appraisals by a qualified expert who valued the subject properties utilizing the income capitalization approach to valuation, which is "generally regarded as the preferred method for determining the value of income-producing propert[ies]" such as those at issue in this case (*41 Kew Gardens Rd. Assoc. v Tyburski*, 70 NY2d 325, 331; *see Matter of OCG L.P. v Board of Assessment Review of the Town of Owego*, 79 AD3d 1224, 1226). Further, the appraisals "contained documentation and calculations to support the underlying methodolog[y] and the ultimate valuation" (*Matter of United Parcel Serv. v Assessor of Town of Colonie*, 42 AD3d 835, 838; *see* 22 NYCRR 202.59 [g] [2]). "The fact that some aspects of [the expert]'s valuation methodology may be subject to question goes to the weight to be accorded the appraisal[s] and not to 'the threshold issue of whether petitioner[s] produced substantial evidence to rebut the presumption of validity' " (*OCG L.P.*, 79 AD3d at 1226; *see FMC Corp.*, 92 NY2d at 187-188).

We further conclude with respect to all three appeals that petitioners met their ultimate burden of establishing by a preponderance of the evidence that the three properties were overvalued and thus that the challenged assessments were excessive (*see generally Board of Mgrs. of French Oaks Condominium*, 23 NY3d at 174-175; *FMC Corp.*, 92 NY2d at 188). Contrary to respondents' contention, Supreme Court did not err in relying upon actual rents rather than market rents in determining the value of the subject properties (*see Matter of Conifer Baldwinsville Assoc. v Town of Van Buren*, 68 NY2d 783, 785). It is well established that "valuation [is] largely a question of fact, and the [trial] courts have considerable discretion in reviewing the relevant evidence as to the specific propert[ies] before them" (*Matter of Consolidated Edison Co. of N.Y., Inc. v City of New York*, 8 NY3d 591, 597). "As a general rule, actual rental income is often the best indicator of value" (*Matter of Schoeneck v City of Syracuse*, 93 AD2d 988, 988, citing *Matter of Merrick Holding Corp. v Board of Assessors of County of Nassau*, 45 NY2d 538, 543), although actual income " 'may be disregarded where it does not reflect full value' " (*Matter of North Country Hous. v Board of Assessment Review for Vil. of Potsdam*, 298 AD2d 667, 668; *see Merrick Holding Corp.*, 45 NY2d at 543; *Matter of Schachenmayr v Board of Assessors of Town of N. Elba*, 263 AD2d 731, 734). Here, there is no evidence that the rents petitioners charged were arbitrary or the result of collusion or self-dealing (*see Merrick Holding Corp.*, 45 NY2d at 543; *North Country Hous.*, 298 AD2d at 668-669), and respondents "failed to establish that the actual income was not reflective of the market for the years under review" (*Matter of County Dollar Corp. v City of Yonkers*, 97 AD2d 469, 475, *lv dismissed* 61 NY2d 603, *rearg denied* 61 NY2d 905; *see Matter of Troy Realty Assoc. v Board of Assessors of City of Troy*, 227 AD2d 813, 814).

In addition to their general objection to the use of actual as

opposed to market rents, respondents object to the valuation of two specific leased spaces at issue in appeal Nos. 1 and 2. In appeal No. 1, respondents contend that the court undervalued the subject property (Techniplex III) because it did not assign a market value to the restaurant located on the property. We reject that contention. The restaurant is operated by Tim Donut U.S. Limited (Tim Donut) pursuant to a 30-year ground lease with petitioners. During the tax years at issue, Tim Donut leased the land underlying the restaurant for $30,000 per year. Tim Donut owned the restaurant and therefore paid no rent for the building itself. Nevertheless, respondents' appraiser valued Techniplex III by estimating what the market rent would be if petitioners were leasing both the land and the building. He did so by comparing the rents paid by other fast-food restaurants "where[ ] the land and buildings are leased in their entirety."

"The ultimate purpose of valuation . . . is to arrive at a fair and realistic value of the property involved" (*Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356, *rearg denied* 81 NY2d 784; *see Matter of Commerce Holding Corp. v Board of Assessors of Town of Babylon*, 88 NY2d 724, 729). The income capitalization approach to valuation "rests on the proposition that the value of income-producing property is the amount a willing buyer, desiring but not compelled to purchase it as an investment, would be prepared to pay for it under ordinary conditions to a seller who desires, but is not compelled, to sell . . . That amount will depend on the net income the property will likely produce inasmuch as the purchase price represents the present worth of anticipated future benefits" (*Matter of Hempstead Country Club v Board of Assessors*, 112 AD3d 123, 136 [internal quotation marks omitted]). Here, the " 'net income the property will likely produce' " (*id.*), at least for the next 30 years, is the amount of the ground lease. We therefore conclude that the court did not abuse its discretion in valuing the property based upon the ground lease payments rather than the theoretical market value of the land and building leased as a unit (*see generally Commerce Holding Corp.*, 88 NY2d at 729; *Matter of Alexander's Dept. Store of Val. Stream v Board of Assessors*, 227 AD2d 549, 549-550).

We likewise reject respondents' contention in appeal No. 2 that the court undervalued the subject property (Techniplex I) because it failed to assign a market value to space leased by Excellus BlueCross BlueShield (Excellus). During the tax years at issue, Excellus was the property's largest tenant, occupying some 53,000 square feet on the first floor of the building and 16,000 square feet on the second floor of the building. Excellus leased the second floor space "rent free," paying only its proportionate share of the associated operating expenses and real estate taxes. Contrary to respondents' contention, the record establishes that the actual rent petitioners received from Excellus was reflective of the market value of the leased space during the tax years at issue. Petitioners' property manager testified that the East Rochester commercial market is "very challenging" and less attractive to tenants than other Monroe County suburbs. Petitioners' appraiser similarly testified that East Rochester was in a "transitioning to decline phase," with a shrinking population base, the lowest median home prices in suburban Monroe County, and no major

commercial or industrial development in two decades.

Petitioners' property manager further testified that Techniplex I presented additional challenges in securing tenants. The building was originally developed as a retail mall in the early 1970s and was thereafter converted to commercial office space with minimal exterior windows and door access. As a result, the property manager testified that petitioners have had to make "considerable concessions" to induce tenants to lease space in Techniplex I, including free or reduced rent and subsidized tenant improvements. After a long-term tenant vacated the property in mid-2004, Techniplex I remained largely vacant until September 2005, when Excellus moved in. Petitioners ultimately offered Excellus the second floor space rent free in order to induce it to lease space in Techniplex I. Inasmuch as the record establishes that the lease "result[ed] from arm's length bargaining carried out in good faith," we conclude that the court did not err in using the actual rent received from Excellus in determining the valuation of Techniplex I (*Merrick Holding Corp.*, 45 NY2d at 543; *see Alexander's Dept. Store of Val. Stream*, 227 AD2d at 549-550; *County Dollar Corp.*, 97 AD2d at 473).

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1367

CA 14-00218

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

IN THE MATTER OF TECHNIPLEX ASSOCIATES, L.P.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN AND VILLAGE OF EAST ROCHESTER,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

LACY KATZEN LLP, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (DANIEL P. PURCELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 24, 2013 in a proceeding pursuant to RPTL article 7. The order, among other things, granted the petitions in part and ordered respondents to correct the assessment rolls and to refund the tax overpayments with interest.

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

Same Memorandum as in *Matter of Techniplex III, a Partnership v Town & Vil. of E. Rochester* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1368

CA 14-00220

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

IN THE MATTER OF MCA GROUP, LLC,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN AND VILLAGE OF EAST ROCHESTER,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 3.)

LACY KATZEN LLP, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (DANIEL P. PURCELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 24, 2013 in a proceeding pursuant to RPTL article 7. The order, among other things, granted the petitions in part and ordered respondents to correct the assessment rolls and to refund the tax overpayments with interest.

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

Same Memorandum as in *Matter of Techniplex III, a Partnership v Town & Vil. of E. Rochester* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1370

CA 14-01028

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

WILLIAM JACQUES, PLAINTIFF-APPELLANT,

V ORDER

LECESSE CONSTRUCTION SERVICES, LLC,
DEFENDANT-RESPONDENT.

DAVIDSON FINK LLP, ROCHESTER (ANDREW M. BURNS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JOSEPH S. NACCA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 19, 2013 in a breach of contract action. The order denied the motion of plaintiff for summary judgment and granted the cross motion of defendant for leave to amend its affirmative defenses.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1371

CA 13-01998

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

RIVERVIEW DEVELOPMENT LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF OSWEGO, COMMON COUNCIL OF CITY OF OSWEGO, HONORABLE THOMAS W. GILLEN, AS MAYOR OF CITY OF OSWEGO, AND SRE MIDTOWN GARAGE ACQUISITIONS, LLC, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

THE STEELE LAW FIRM, P.C., OSWEGO (KIMBERLY A. STEELE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, OSWEGO (DOUGLAS M. MCRAE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF OSWEGO, COMMON COUNCIL OF CITY OF OSWEGO AND HONORABLE THOMAS W. GILLEN, AS MAYOR OF CITY OF OSWEGO.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (ROBERT K. WEILER OF COUNSEL), FOR DEFENDANT-RESPONDENT SRE MIDTOWN GARAGE ACQUISITIONS, LLC.

Appeal from an order and judgment (one paper) of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered August 12, 2013. The order and judgment denied the application of plaintiff for a preliminary injunction and granted the cross motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: These consolidated appeals involve a dispute over the sale of a parking garage in defendant City of Oswego (City), and the three plaintiffs are related entities who collectively seek, inter alia, a “declaration” that the resolution and the purchase and sale agreement for the sale of the parking garage is null and void pursuant to General Municipal Law § 51 because the sale “causes waste of public property” and, inter alia, constitutes “a fraud upon the taxpayers of the City.” In appeal No. 1, the plaintiff therein appeals from an order and judgment that, inter alia, granted defendants’ cross motion for summary judgment dismissing the complaint as, inter alia, time-barred. In appeal No. 2, the plaintiffs therein appeal from an order and judgment granting defendants’ cross motion to dismiss the complaint as, inter alia, time-barred.

The garage, which is adjacent to a retail shopping center known

as Midtown Plaza that is owned by defendant SRE Midtown Garage Acquisitions, LLC (SRE), has been leased to SRE for use by Midtown Plaza shoppers and has also provided free public parking. However, the garage is almost 50 years old and in August 2012, concrete fell from the deck, causing property damage. In November 2012, an engineering firm performed a structural condition assessment for the City and recommended, inter alia, "discontinued public access and parking" on the upper level until permanent repairs are made. The engineering firm estimated that the total cost of needed repairs and upgrades would be $3,983,700.

In early December 2012, SRE offered to purchase the garage as part of its plan to develop the entire City block comprising the garage and Midtown Plaza. On December 10, 2012, defendant Common Council of the City passed a resolution authorizing defendant Mayor of the City to execute a purchase and sale agreement with SRE for the garage. The resolution was approved the next day, on December 11, 2012, and the City and SRE thereafter executed a purchase and sale agreement.

We conclude in appeal Nos. 1 and 2 that Supreme Court properly determined that the four-month statute of limitations set forth in CPLR 217 applies to the causes of action asserted by plaintiffs in their respective complaints and that the actions are time-barred. The causes of action under General Municipal Law § 51 have no specific limitations period, and we must "examine the substance of th[e] action to identify the relationship out of which the claim[s] arise[] and the relief sought" (*Solnick v Whalen*, 49 NY2d 224, 229; *see Hartnett v New York City Tr. Auth.*, 86 NY2d 438, 443-444; *Matter of Doorley v DeMarco*, 106 AD3d 27, 33). "If the rights of the parties may be resolved in a different form of proceeding for which a specific limitations period applies, then we must use that period" (*Doorley*, 106 AD3d at 33). Ultimately, "the nature of the remedy rather than the theory of liability is the salient consideration in ascertaining the applicable [s]tatute of [l]imitations" (*Clowes v Pulver*, 258 AD2d 50, 53, *lv dismissed* 94 NY2d 858). Here, plaintiffs are challenging the resolution authorizing defendant Mayor to execute a purchase and sale agreement for the garage. The resolution was an administrative act, rather than a legislative act, inasmuch as it applies only to the City and SRE (*see Town of Webster v Village of Webster*, 280 AD2d 931, 933). It is well established that the proper vehicle for challenging an administrative act is a CPLR article 78 proceeding, and thus the four-month statute of limitations under CPLR 217 applies (*see Matter of Resnick v Town of Canaan*, 38 AD3d 949, 953).

Contrary to plaintiffs' further contention, the limitations period "was triggered on . . . the date on which the [Common] Council adopted the resolution" authorizing the sale (*Matter of Gach v City of Long Beach*, 218 AD2d 801, 801; *see Matter of Long Is. Pine Barrens Socy., Inc. v County of Suffolk*, 55 AD3d 610, 612). The "determination to be reviewed" became final and binding on plaintiffs on December 11, 2012 when the resolution went into effect (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34, *rearg denied* 5 NY3d 824). It was at that

juncture that the City "reached a definitive position . . . that inflict[ed] actual, concrete injury . . . [that could not] be prevented or significantly ameliorated by further administrative action or by steps available to the complaining part[ies]" (*Best Payphones, Inc.*, 5 NY3d at 34; *see Long Is. Pine Barrens Socy., Inc.*, 55 AD3d at 612; *Gach*, 218 AD2d at 801-802).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1372

CA 14-00551

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

GEO HOTEL CO., INC., ALSO KNOWN AS GEO HOTEL, INC., ALSO KNOWN AS GEO HOTEL CORP., AND CANALVIEW DEVELOPMENT, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF OSWEGO, COMMON COUNCIL OF CITY OF OSWEGO, HONORABLE THOMAS W. GILLEN, AS MAYOR OF CITY OF OSWEGO, AND SRE MIDTOWN ACQUISITIONS, LLC, ALSO KNOWN AS SRE MIDTOWN GARAGE ACQUISITIONS, LLC, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

THE STEELE LAW FIRM, P.C., OSWEGO (KIMBERLY A. STEELE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, OSWEGO (DOUGLAS M. MCRAE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF OSWEGO, COMMON COUNCIL OF CITY OF OSWEGO AND HONORABLE THOMAS W. GILLEN, AS MAYOR OF CITY OF OSWEGO.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (ROBERT K. WEILER OF COUNSEL), FOR DEFENDANT-RESPONDENT SRE MIDTOWN ACQUISITIONS, LLC, ALSO KNOWN AS SRE MIDTOWN GARAGE ACQUISITIONS, LLC.

Appeal from an order and judgment (one paper) of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered March 11, 2014. The order and judgment, inter alia, granted the cross motion of defendants to dismiss the complaint.

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

Same Memorandum as in *Riverview Dev. LLC v City of Oswego* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1373

KA 13-01618

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDY JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS 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 April 25, 2013. The judgment convicted defendant, upon his plea of guilty, of reckless assault of a child.

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 reckless assault of a child (Penal Law § 120.02) in connection with a medical diagnosis determining that the child victim had sustained serious physical injury as a result of shaken baby syndrome. Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was made knowingly, intelligently and voluntarily (*see People v Lopez*, 6 NY3d 248, 256). County Court explained that defendant was waiving "almost all issues as to sentence and punishment" including the length of the sentence, and the written waiver of the right to appeal set forth both the specific rights that defendant was waiving and those that were not encompassed by the waiver. The court ascertained that defendant had reviewed the written waiver with his attorney, that he understood it, and that he had no questions for his attorney or the court before signing it (*see People v Ramos*, 7 NY3d 737, 738; *People v Bridenbaker*, 112 AD3d 1379, 1379; *cf. People v Bradshaw*, 18 NY3d 257, 262). We therefore conclude that defendant's valid waiver of the right to appeal encompasses his contention that the sentence is unduly harsh and severe (*see Lopez*, 6 NY3d at 256; *People v Connolly*, 114 AD3d 1231, 1231-1232, *lv denied* 23 NY3d 961). In any event, that contention is without merit.

Based upon defendant's explanation during his plea colloquy of his actions, i.e., that he had quickly grabbed the victim from the

basinet on one occasion and had played with him by "tossing" him in a spinning motion, the court conducted a presentence hearing to obtain information regarding shaken baby syndrome. The People presented the testimony of the victim's treating physician, who is board certified in emergency pediatric care and pediatric child abuse. She explained that the injuries required more force to cause an acceleration and deceleration of the victim's head than would have occurred by the actions defendant described. She denied on cross-examination that certain medical conditions that the victim had were a contributing factor to his injuries. She acknowledged, however, that one of those medical conditions, i.e., macrocephali, was a source of controversy in the medical community with respect to shaken baby syndrome but she explained that there was no medical evidence to support the theory that macrocephali contributed to a symptom of shaken baby syndrome, i.e., subdural hematomas. In any event, the treating physician explained that the victim lacked spinal fluid between the skull and the brain, which is the condition that some physicians believe causes tension on the veins between the skull and the brain, thereby causing the veins to rupture, resulting in subdural hematomas. She also denied that the victim's retinal hemorrhages were related to premature retinopathy because that condition had healed before the victim sustained the retinal hemorrhages.

Following the hearing, the court denied defense counsel's request for an adjournment of sufficient duration to permit him to consult with an expert to explore the possibility whether the treating physician's testimony could be contradicted, noting that defense counsel had effectively cross-examined the treating physician. Contrary to defendant's contention, we conclude that the court did not abuse or improvidently exercise its discretion in denying the requested adjournment of sentencing (*see People v Walker*, 115 AD3d 1357, 1357, *lv denied* 23 NY3d 1069).

We reject defendant's further contention that he was denied effective assistance of counsel based upon defense counsel's failure to consult with, or provide the testimony of, an expert to rebut the testimony of the victim's treating physician with respect to shaken baby syndrome. Defendant has failed to meet his burden of establishing that "such expert testimony was available, that it would have assisted the [court] in its determination or that he was prejudiced by its absence" (*People v Woolson*, 122 AD3d 1353, 1354 [internal quotation marks omitted]; *see People v West*, 118 AD3d 1450, 1451, *lv denied* 24 NY3d 1048). Moreover, the record establishes that defense counsel consulted with medical professionals and effectively cross-examined the treating physician. Viewing "the evidence, the law, and circumstances of [this] case, . . . in totality and as of the time of the representation" (*People v Baldi*, 54 NY2d 137, 147), we conclude that defendant received meaningful representation (*cf. People v Oliveras*, 21 NY3d 339, 348).

In appeal No. 2, defendant contends that the court erred in ordering restitution in the amount of $7,378 to be paid to the Genesee County Department of Social Services (DSS) for the cost of providing foster care for the victim. Inasmuch as that item of restitution

affects the legality of the sentence, the contention is not encompassed in the waiver of the right to appeal (*see People v Boatman*, 110 AD3d 1463, 1463-1464, *lv denied* 22 NY3d 1039; *see generally People v Seaburg*, 74 NY2d 1, 9). We agree with defendant that the court erred in determining that DSS was the victim's "guardian" (*see* Executive Law § 621 [6]), and therefore qualified to obtain restitution for the cost of providing foster care as a "victim" pursuant to Penal Law § 60.27. We therefore modify the order accordingly.

It is well established that restitution may be required for expenses that "were not voluntarily incurred, but stem from legal obligations that are directly and causally related to the crime" (*People v Cruz*, 81 NY2d 996, 998; *see People v McCarthy*, 83 AD3d 1533, 1535, *lv denied* 17 NY3d 819; *People v McDaniel*, 219 AD2d 861, 861). Here, however, the foster care expenses are the result of the placement of the victim in the care and custody of DSS pursuant to a proceeding in Family Court (*see* Family Ct Act § 1055 [1]), and thus DSS is performing its statutory duty pursuant to Social Services Law § 398 (2) (b). We note that the Legislature has specifically provided that certain governmental agencies and entities are entitled to restitution when performing their statutory duties (*see* Penal Law § 60.27 [9], [10], [13]). Section 60.27 (9), for example, was enacted to permit restitution to police agencies for unrecovered funds used in undercover drug purchases following the decision in *People v Rowe* (152 AD2d 907, 909, *affd* 75 NY2d 948, 949). In *Rowe*, we determined that, absent legislative intent to include a city police department as a "victim," such funds could not be recovered by means of a court order of restitution. Similarly, here, in the absence of legislative intent that DSS is a "victim" pursuant to Penal Law § 60.27, we decline to impose an obligation on defendant to pay restitution for the expenditure of public funds for providing foster care for the victim.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1374

KA 13-01850

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDY JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), 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.), entered September 26, 2013. The order directed defendant to pay restitution of $18,828.75, plus surcharge, to the Genesee County Department of Social Services.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part directing defendant to pay restitution to Genesee County Department of Social Services for expenses of foster care placement in the amount of $7,378.00 and the surcharge thereon in the amount of $368.90, and as modified the order is affirmed.

Same Memorandum as in *People v Johnson* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1393

CA 14-00673

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

ROGER D. CRAIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BILL E. MANNISE AND CYNTHIA L. MANNISE,
DEFENDANTS-RESPONDENTS.

WILLIAM E. MANNISE AND CYNTHIA L. MANNISE,
THIRD-PARTY PLAINTIFFS,

V

MICHAEL ARCURI, THIRD-PARTY DEFENDANT.

MELVIN & MELVIN, PLLC, SYRACUSE (THOMAS BEZIGIAN, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered January 16, 2014. The judgment granted the motion of defendants seeking summary judgment dismissing the complaint and summary judgment on their counterclaim, declared that defendants are the lawful owners of the disputed property and denied plaintiff's cross motion for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the complaint is reinstated, the cross motion is granted in part, and judgment is granted in favor of plaintiff on the first cause of action as follows:

> It is ORDERED, ADJUDGED AND DECLARED that plaintiff is the lawful owner of the disputed property.

Memorandum: Plaintiff commenced this action pursuant to RPAPL article 15 seeking to compel a determination of claims to real property, i.e., the "disputed parcel" comprising approximately one quarter of an acre, which is described in the deed to plaintiff's parcel and also is described in the deed to defendants' parcel (hereafter, disputed property). The underlying relevant facts are not in dispute. The parties own adjacent parcels of property in Onondaga County. Plaintiff acquired title to his parcel in 1976 from his

parents, who had purchased it in 1953. Defendants purchased their parcel from third-party defendant, who transferred title by warranty deed in April 2008. Third-party defendant had purchased the parcel in October 2002 through an in rem foreclosure proceeding and thus acquired title by tax deed from the County of Onondaga. Plaintiff's abstract of title demonstrates that the disputed property, which is vacant, has consistently been part of plaintiff's parcel. However, in 1959, the disputed property was included, in error, in a deed transferring defendants' parcel to a predecessor in interest, and that error was repeated thereafter each time the parcel now owned by defendants was transferred. The Onondaga County tax map shows the disputed property as part of defendants' parcel and not as part of plaintiff's parcel. In 2003, plaintiff's attorney advised third-party defendant that he must cease and desist from doing work on the disputed property and provided him, by letter, with an explanation that, in 1959 "the description in th[e] deed included land east of the creek, and the seller did not own any land east of the creek . . . Nevertheless, the creek has always been the correct westerly boundary of [plaintiff's] land."

Defendants moved for summary judgment dismissing the complaint on the ground that the instant action is barred by the six year statute of limitations (*see* CPLR 213 [1]), inasmuch as plaintiff was aware of the tax deed transferring the property to third-party defendant on October 15, 2002, and plaintiff failed to commence the action until June 9, 2009. Plaintiff cross-moved for summary judgment on his complaint and to dismiss defendants' counterclaim seeking a declaration pursuant to RPAPL article 15 that they are the "lawful and rightful" owners of the disputed property. Supreme Court determined that plaintiff was required to commence the action within six years of the date of the tax deed, reasoning that the tax deed was voidable, not void. The court therefore granted the motion and denied the cross motion, declaring that defendants are the lawful owners of the disputed property. That was error.

"It is well settled that an owner in possession has a right to invoke the aid of a court of equity at any time while he is so the owner and in possession, to have an apparent, though in fact not a real incumbrance discharged from the record and such right is never barred by the [s]tatute of [l]imitations. It is a continuing right which exists as long as there is an occasion for its exercise" (*Ford v Clendenin*, 215 NY 10, 16; *see Schoener v Lissauer*, 107 NY 111, 116-117; *Miner v Beekman*, 50 NY 337, 343). Indeed, "[a] [s]tatute of [l]imitations is one of repose designed to put an end to stale claims and was never intended to compel resort to legal remedies by one who is in complete enjoyment of all he claims . . . The logic of such a view is inescapably correct, for otherwise, the recording of the deed resulting from such a proceeding would transform the owner's absolute title in fee simple into a right of action only, the exercise of which is subject to time limitation" (*Cameron Estates, Inc. v Deering*, 308 NY 24, 31, *rearg denied* 308 NY 808 [internal citations omitted]; *see Orange & Rockland Util. v Philwold Estates*, 52 NY2d 253, 261; *see also Welch v Prevost Landowners*, 202 AD2d 803, 804-805; *Piedra v Vanover*, 174 AD2d 191, 196).

We conclude that, inasmuch as plaintiff and his predecessors in interest have always held title and have been in continuous possession of the disputed property, the tax deed to defendants' predecessor in interest was void with respect to the disputed property because the County of Onondaga could not convey an interest in land that it did not have (*see generally Washington Temple Church of God in Christ, Inc. v Global Props. & Assoc., Inc.*, 55 AD3d 727, 727-728). Indeed, "[a] purchaser who fails to use due diligence in examining the title is chargeable, as a matter of law, with notice of the facts which a proper inquiry would have disclosed" (*id.* at 728). Here, due diligence on the part of defendants would have disclosed the error in the 1959 transfer of the disputed property.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1402

KA 13-00520

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

MICHAEL T. REITZ, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered January 4, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), assault in the first degree (two counts) and endangering the welfare of a child (three counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts each of burglary in the first degree (Penal Law § 140.30 [2], [3]) and assault in the first degree (§ 120.10 [1], [2]), defendant contends that he was denied the effective assistance of counsel. We reject that contention. Although we agree with defendant that defense counsel should not have questioned him about a prior conviction after County Court's *Sandoval* ruling precluded the People from doing so, we conclude that defense counsel's error was "not so egregious and prejudicial that [it] deprived defendant of his right to a fair trial" (*People v Morrison*, 48 AD3d 1044, 1045, *lv denied* 10 NY3d 867; *see People v Hobot*, 84 NY2d 1021, 1024; *cf. People v Webb*, 90 AD3d 1563, 1564, *amended on rearg* 92 AD3d 1268).

We likewise reject defendant's contention that his conviction of assault in the first degree under Penal Law § 120.10 (1) and (2) is not supported by legally sufficient evidence of serious physical injury and serious disfigurement, respectively. With respect to section 120.10 (1), "[t]he element of serious physical injury was satisfied by evidence supporting the conclusion that the wound[] inflicted by defendant caused serious disfigurement to [the] victim['s] face[]" (*People v Matos*, 121 AD3d 545, 546; *see People v Snyder*, 100 AD3d 1367, 1368; *see generally People v Stewart*, 18 NY3d 831, 832). With respect to section 120.10 (2), a person is guilty of

assault in the first degree if he or she "[w]ith intent to disfigure another person seriously and permanently . . . causes such injury" (*id.*), and "[a] person is 'seriously' disfigured when a reasonable observer would find [his or] her altered appearance distressing or objectionable" (*People v McKinnon*, 15 NY3d 311, 315). Here, the evidence at trial established that the victim sustained a four-inch-long wound to her cheek that left a permanent scar. "[V]iewed as a whole, and especially considering the prominent location of the wound on the face, [the evidence at trial] support[s] the inference that at the time of trial the scar[] remained seriously disfiguring under the *McKinnon* standard" (*People v Coote*, 110 AD3d 485, 485, *lv denied* 22 NY3d 1198; *see Matos*, 121 AD3d at 546; *People v Gumbs*, 107 AD3d 548, 548, *lv denied* 22 NY3d 1156, *cert denied* ___ US ___, 135 S Ct 143).

Viewing the evidence in light of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "[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]), and "[i]t was within the jury's province to reject the testimony of defendant's alibi witnesses" (*People v Smith*, 278 AD2d 837, 837, *lv denied* 96 NY2d 835).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1405

KA 14-00815

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK SCHEIDELMAN, DEFENDANT-APPELLANT.

FRANK POLICELLI, 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 (Michael L. Dwyer, J.), rendered July 17, 2013. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is reversed as a matter of discretion in the interest of justice and on the law, and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [3]). We reject defendant's contention that the verdict is contrary to the weight of the evidence because the People's witnesses were not credible. Contrary to defendant's contention, the testimony of those witnesses was not "so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982). We note that "[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]), and we see no basis for disturbing the jury's credibility determinations in this case. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that he was deprived of a fair trial by the cumulative effect of numerous instances of prosecutorial misconduct, including eliciting inadmissible evidence, conducting an improper cross-examination of defendant, and making improper comments during summation. Although defendant failed to preserve his challenges for our review (*see generally People v Santiago*, 22 NY3d 740, 749-750), we exercise our power to review them as a matter of

discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v McClary*, 85 AD3d 1622, 1624), inasmuch as "we are mindful of our 'overriding responsibility' to ensure that 'the cardinal right of a defendant to a fair trial' is respected in every instance" (*People v Wlasiuk*, 32 AD3d 674, 675, *lv dismissed* 7 NY3d 871, quoting *People v Crimmins*, 36 NY2d 230, 238; *see People v Ballerstein*, 52 AD3d 1192, 1193). Based upon that review, we agree with defendant that he was deprived of a fair trial, and we therefore reverse the judgment and grant a new trial.

Initially, we agree with defendant that the prejudice created when the prosecutor questioned defendant about his homosexuality and his former homosexual relationship with the victim's uncle, apparently at a time when the uncle was a young man, far outweighed the minimal probative value that such evidence may have had (*see People v Mercado*, 188 AD2d 941, 943-944), especially in light of the charges here, wherein defendant was accused of having sexual contact with a boy. By asking those questions, the prosecutor improperly "cross-examine[d] the defendant about a [sexual] practice, not rising to the level of a crime, which had no logical bearing on the question of credibility" (*People v Moore*, 156 AD2d 394, 394).

In addition, the prosecutor cross-examined defendant at length regarding the criminal records of several people who resided in his home, and also regarding assistance he provided to those people, such as bailing one of them out of jail and hiring an attorney to defend that man on criminal charges. None of those people testified, nor was their credibility or criminal history otherwise relevant. Also, as noted above, the prosecutor cross-examined defendant regarding a prior homosexual relationship between defendant and the victim's uncle. By "pursu[ing] a cross-examination [that can be] accurately described as based upon 'twin themes of guilt by association and criminal propensity' " (*People v Louissant*, 240 AD2d 433, 433), the prosecutor deprived defendant of a fair trial (*see People v Morgan*, 111 AD3d 1254, 1255-1256; *People v Parker*, 178 AD2d 665, 666).

The prosecutor also engaged in misconduct by introducing evidence that one of the people who lived with defendant told a child to stay out of defendant's room "because you don't know what [defendant] can do." That evidence "was irrelevant to any issue in the case and only could have prejudiced defendant by suggesting to the jury that he was an erratic and potentially dangerous person who had the propensity to commit the crime at issue" or some other criminal act (*People v Cornell*, 110 AD3d 1443, 1445, *lv denied* 22 NY3d 1087; *see generally People v Cass*, 18 NY3d 553, 559; *People v Molineux*, 168 NY 264, 291-292).

Next, the prosecutor improperly elicited testimony from a police investigator that he had received training establishing that underaged victims of sexual crimes frequently disclosed the crime in minimal detail at first, and provided more thorough and intimate descriptions of the event later. That testimony dovetailed with the People's position concerning the way in which the victim revealed this incident (*cf. People v Gayden*, 107 AD3d 1428, 1428-1429, *lv denied* 22 NY3d

1138). Thus, we conclude that the investigator's testimony "was the precise equivalent of affirming the credibility of the People's witness through the vehicle of an opinion that [sexual abuse is frequently committed] as the victim had related. It is always within the sole province of the jury to decide whether the testimony of any witness is truthful or not. The jurors were fully capable of using their ordinary experience to test the credibility of the victim-witness; and the receipt of the [investigator]'s testimony in this regard was improper and indeed constituted usurpation of the function of the jury . . . Where, as here, the sole reason for questioning the 'expert' witness is to bolster the testimony of another witness (here the victim) by explaining that his version of the events is more believable than the defendant's, the 'expert's' testimony is equivalent to an opinion that the defendant is guilty" (*People v Ciaccio*, 47 NY2d 431, 439), and the prosecutor improperly elicited that testimony.

Moreover, by eliciting that testimony, the prosecutor improperly introduced expert testimony regarding the Child Sexual Abuse Accommodation Syndrome. Although such testimony is admissible in certain situations (*see People v Spicola*, 16 NY3d 441, 465-467, *cert denied* ___ US ___, 132 S Ct 400), here it was elicited from a police investigator under the guise that it was part of the investigator's training. The prosecutor failed to lay a foundation establishing that the investigator was qualified to provide such testimony (*cf. People v Hicks*, 2 NY3d 750, 751). Furthermore, the evidence does not establish that the investigator had "extensive training and experience [that] rendered [him] qualified to provide such [testimony]" (*People v Lewis*, 16 AD3d 173, 173, *lv denied* 4 NY3d 888; *cf. People v Bassett*, 55 AD3d 1434, 1436, *lv denied* 11 NY3d 922).

Finally, the prosecutor further engaged in misconduct by commenting on the evidence that was improperly elicited, as well as by additional comments during summation, such as the prosecutor's comment that there was "a very sexually charged atmosphere there on the second floor of [defendant's] house" (*see generally Mercado*, 188 AD2d at 943-944). She also commented that wrestling with the victim "[c]ould be a form of foreplay," without any evidence supporting that suggestive and emotionally charged statement.

In sum, "[w]e conclude that 'the cumulative effect of the prosecutor's cross-examination and summation errors deprived defendant of a fair trial' " (*People v Hicks*, 100 AD3d 1379, 1380).

All concur except FAHEY, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent and would affirm the judgment. I agree with the majority that the verdict is not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 349; *see generally People v Bleakley*, 69 NY2d 490, 495). The People's case turned primarily on the testimony of the victim, who cast defendant as a supervisory figure at a children's sleepover held at defendant's home. The victim specifically testified that defendant invited the children to sleep in his bedroom and that, while the victim was on defendant's bed, defendant inserted his hand into the victim's pants

and squeezed the victim's penis. The People also presented the testimony of the victim's older brother, who similarly recalled that defendant invited the subject children to sleep in defendant's bedroom, and that defendant put his hand into the victim's pants while defendant and the victim were lying face-to-face on defendant's bed.

By contrast, defendant, the longtime supervisor of the Town of Trenton, testified that the children, whom he characterized as rambunctious, entered his bedroom uninvited. Defendant resided with one of the children present for the sleepover and, while defendant indicated that he was comfortable with the presence of that child in his bed, he was uncomfortable with the presence of the victim in that location. Consequently, when the victim "hopped" into defendant's bed, defendant told the victim to leave the bed and told the child with whom defendant was comfortable that such child could take the victim's place. On cross-examination, defendant acknowledged that he had previously engaged in a sexual relationship with the father of the child with whom defendant was comfortable, and that the father of that child also lived with defendant. At no point did defendant admit to touching the victim but, under these circumstances, I agree with the majority that the jury was entitled to resolve what was essentially a contest of credibility between the prosecution's witnesses and defendant against defendant (*see People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942).

The same circumstances, however, lead me to conclude that this is not a case in which we should exercise our power to review defendant's remaining contentions, which are not preserved for our review, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and grant defendant a new trial. In my view, the jury was justified in finding defendant guilty beyond a reasonable doubt even in the absence of the evidence and comments that defendant now challenges (*see Danielson*, 9 NY3d at 348). Indeed, even assuming, arguendo, that defendant's contentions with respect to the admission of disputed evidence and what defendant contends were the prosecutor's improper comments have merit, I cannot agree with the majority that defendant was deprived of a fair trial by the cumulative effect of what I view those alleged errors to be.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1407

KA 09-01858

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMISON ADSIT, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MISHA A. COULSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered August 14, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sexual act 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 criminal sexual act in the second degree (Penal Law § 130.45 [2]), defendant contends that the evidence is legally insufficient to support the conviction. We reject that contention. Specifically, defendant contends that the evidence is legally insufficient with respect to the issue whether the victim "is incapable of consent by reason of being mentally disabled" (*id.*), which "means that [she] suffers from a mental disease or defect which renders . . . her incapable of appraising the nature of . . . her conduct" (§ 130.00 [5]). "An ability to 'appraise' is, of course, a qualitative matter, all the more so when the appraisal is one to be made of the 'nature' of 'conduct[,'] with the variety of factors that the one 'appraising' may have to take into account for such purposes. Cognitive understanding is involved. In a case such as the one before us, it includes [the victim] being substantially able to understand what she was doing" (*People v Easley*, 42 NY2d 50, 56).

Here, the People presented the testimony of a paramedic, physician's assistant, nurse, nursing assistant, and psychiatrist establishing that the victim had suffered a seizure and was incoherent both upon her admission to the hospital and the next day, when the incident giving rise to the charge occurred. The psychiatrist, who reviewed the victim's medical records and examined her, opined that she was suffering from a mental defect that rendered her incapable of

appraising the nature of sexual activity. The defense presented the testimony of an expert witness who conducted a forensic evaluation of the medical, police and ambulance records and opined that the records were inconclusive with respect to the victim's ability to appraise the nature of her sexual conduct. Viewing the evidence in the light most favorable to the prosecution, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that the victim lacked the mental capacity to appraise the nature of her sexual conduct and thus was unable to consent to defendant's actions (*see People v Dixon*, 66 AD2d 971, 972; *see generally People v Cratsley*, 86 NY2d 81, 86-88; *Easley*, 42 NY2d at 55-57). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Finally, we reject defendant's contention that he was denied the right to effective assistance of counsel. The record establishes that defense counsel made a clear and cogent opening statement directed at the People's inability to prove that the victim was incapable of appraising the nature of her conduct, conducted meaningful cross-examination, lodged objections consistent with the defense theory, presented the testimony of an expert who highlighted inconsistencies in the victim's medical records with respect to her coherency and awareness, and obtained an acquittal on the top count of the indictment. Defense counsel's isolated comments on the paucity of DNA evidence were not tantamount to the assertion of an inconsistent defense that no oral sexual conduct occurred. Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1408

KA 13-00422

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK DANIELS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered January 18, 2013. The judgment convicted defendant, upon a nonjury verdict, of robbery in the second degree (two counts), grand larceny in the third degree and reckless driving.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count four of the indictment and imposing a definite sentence of 30 days' imprisonment on that count, to run concurrently with the sentences imposed on counts one, two, and three, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [2] [a]), and one count each of grand larceny in the third degree (§ 155.35 [1]) and reckless driving (Vehicle and Traffic Law § 1212), in connection with a bank robbery and the flight therefrom, which resulted in injuries to two innocent civilians.

We reject defendant's contention that the evidence is legally insufficient to support the robbery and grand larceny convictions. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences that could lead the court in this nonjury trial to find that defendant forcibly stole money in excess of $3,000 from the bank. "Although the employees of the bank robbed by defendant . . . could not specifically identify defendant, the element of identity was established by a compelling chain of circumstantial evidence that had no reasonable explanation except that defendant was . . . the perpetrator[]" (*People v Brown*, 92 AD3d 1216, 1217, *lv denied* 18 NY3d 992). That evidence included the stolen GPS unit and prerecorded bait money in defendant's bag that he dropped

when apprehended by the police, clothing removed from defendant at the hospital that matched the bank employees' descriptions, and the presence of defendant's DNA on clothing found in the middle of defendant's route in fleeing from the bank. Furthermore, viewing the evidence in the light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence with respect to the robbery and grand larceny convictions (*see generally People v Bleakley*, 69 NY2d 490, 495; *People v Kirton*, 36 AD3d 1011, 1013-1014, *lv denied* 8 NY3d 947).

Finally, although not raised by defendant, we note that the sentence imposed on count four of the indictment, i.e., a one-year definite term of imprisonment for reckless driving, an unclassified misdemeanor, is illegal (*see* Vehicle and Traffic Law § 1801 [1]; Penal Law § 70.15 [3]), and we cannot allow that illegal sentence to stand (*see generally People v VanValkinburgh*, 90 AD3d 1553, 1554). "In the interest of judicial economy, we exercise our inherent authority to correct the illegal sentence" (*People v Perrin*, 94 AD3d 1551, 1551). We therefore modify the judgment by vacating the sentence imposed on count four and imposing a definite sentence of 30 days' imprisonment on that count, to run concurrently with the sentences imposed on the remaining counts of the indictment (Vehicle and Traffic Law § 1801 [1]). We otherwise conclude that the sentences imposed on the remaining counts are not unduly harsh or severe.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1410

CAF 13-00239

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

IN THE MATTER OF MICHAEL HILL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FARAH FLYNN, RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

TERESA M. PARÉ, ATTORNEY FOR THE CHILD, CANANDAIGUA.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered January 22, 2013. The order, inter alia, denied the cross petition of respondent seeking permission to relocate with the parties' child to Tennessee.

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, denied her cross petition seeking permission to relocate with the parties' child to Tennessee. Initially, we reject the contention of the Attorney for the Child that the appeal is moot based on a subsequent order entered in a different proceeding in which Family Court merely reiterated its determination denying the mother's request to relocate with the child.

Upon our review of the evidence at the fact-finding hearing, we conclude that the court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741) in determining that the mother failed to meet her burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests, and that its determination has "a sound and substantial basis in the record" (*Matter of Murphy v Peace*, 72 AD3d 1626, 1627).

In considering the factors set forth in *Tropea*, the court properly determined that the child's relationship with the father would be adversely affected by the proposed relocation because of the distance between Yates County and Tennessee, and that the mother failed to establish that the child's life would "be enhanced economically, emotionally and educationally" by the proposed relocation (*id.* at 741). Indeed, we note that the main factor upon

which the mother relied in her request for the relocation was economic necessity, but she failed to establish that the employment that she was offered in Tennessee would last for any significant period of time, and she also failed to establish that she did not have similar opportunities in New York (*see Matter of Knight v Knight*, 105 AD3d 741, 742; *Matter of Rose v Buck*, 103 AD3d 957, 961; *cf. Matter of Butler v Hess*, 85 AD3d 1689, 1690, *lv denied* 17 NY3d 713).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1413

CA 14-00792

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

IN THE MATTER OF BRUCE J. HENRY,
PETITIONER-APPELLANT,

V ORDER

TOWN OF BARRINGTON ZONING BOARD OF APPEALS,
CONSISTING OF MEMBERS TOM MURRIN, SID MANN,
RIP EWELL, CAROLYN MERRITT AND ROBERT SCHARF,
RESPONDENT-RESPONDENT.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Yates County (W. Patrick Falvey, A.J.), entered July 29, 2013 in a CPLR article 78 proceeding. The judgment denied the petition.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1415

CA 14-00883

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

GARY M. DISCHIAVI AND LINDA DISCHIAVI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

WILLIAM S. CALLI, JR., AS ADMINISTRATOR OF
THE ESTATE OF WILLIAM S. CALLI, DECEASED,
ROBERT CALLI, CALLI, CALLI AND CULLY, CALLI,
CALLI AND CULLY, LLP, CALLI AND CALLI, LP,
ANDREW S. KOWALCZYK, JOSEPH STEPHEN DEERY, JR.,
THOMAS S. SOJA, CALLI, KOWALCZYK, TOLLES,
DEERY AND SOJA, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

LUIBRAND LAW FIRM, PLLC, LATHAM (KEVIN A. LUIBRAND OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KERNAN AND KERNAN, P.C., UTICA (LEIGHTON R. BURNS OF COUNSEL), FOR DEFENDANT-RESPONDENT WILLIAM S. CALLI, JR., AS ADMINISTRATOR OF THE ESTATE OF WILLIAM S. CALLI, DECEASED.

GEORGE F. ANEY, HERKIMER, FOR DEFENDANT-RESPONDENT ROBERT CALLI.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN FELTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ANDREW S. KOWALCZYK, JOSEPH STEPHEN DEERY, JR. AND CALLI, KOWALCZYK, TOLLES, DEERY AND SOJA.

GETNICK LIVINGSTON ATKINSON & PRIORE, LLP, UTICA (MICHAEL E. GETNICK OF COUNSEL), FOR DEFENDANT-RESPONDENT THOMAS S. SOJA.

Appeal from an order of the Supreme Court, Oneida County (James P. McClusky, J.), dated March 3, 2014. The order, insofar as appealed from, granted the motions of defendants-respondents to preclude plaintiffs from introducing certain evidence at trial.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motions are denied.

Memorandum: In this legal malpractice action, plaintiffs appeal from that part of an order granting the motions of defendants-respondents (hereafter, defendants) to preclude plaintiffs from introducing certain evidence at trial. We agree with plaintiffs that Supreme Court erred in granting the motions, and we therefore reverse

the order insofar as appealed from.

This case has been before us on two prior occasions (*Dischiavi v Calli* [appeal No. 2], 68 AD3d 1691 [*Dischiavi I*]; *Dischiavi v Calli*, 111 AD3d 1258 [*Dischiavi II*]), both involving, inter alia, the motions of various defendants for summary judgment. In both appeals, at least some defendants sought summary judgment dismissing the legal malpractice cause of action based upon the expiration of the statute of limitations, and we rejected that contention in both prior appeals. Specifically, in *Dischiavi I*, we concluded that, "[w]ith respect to the legal malpractice cause of action, there is a triable issue of fact whether plaintiffs are entitled to the toll provided by the continuous representation doctrine" (68 AD3d at 1694). Again in *Dischiavi II*, we affirmed that part of the order on appeal that denied the various defendants' motions for summary judgment on the ground "that plaintiffs raised a triable issue of fact whether the doctrine of continuous representation tolled the statute of limitations" (111 AD3d at 1260-1261).

The matter progressed toward trial after this Court issued its decision in *Dischiavi II*. In the order on appeal, the court granted defendants' motions to preclude plaintiffs from introducing evidence that any of the defendants represented plaintiffs with respect to any issue other than an issue in the context of a medical malpractice action against a physician. The effect of that order was to limit plaintiffs to introducing evidence that, in 1994, one of the defendants made a statement to Gary M. Dischiavi (plaintiff) indicating that the medical malpractice action was not viable.

We note at the outset that, although the parties do not address the appealability of this order determining a motion in limine, we conclude that plaintiffs may appeal from the order at issue (*see Franklin Corp. v Prahler*, 91 AD3d 49, 54). "Generally, an order ruling [on a motion in limine], even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" (*Innovative Transmission & Engine Co., LLC v Massaro*, 63 AD3d 1506, 1507 [internal quotation marks omitted]; *see Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 224). This Court has noted, however, that "there is a distinction between an order that 'limits the admissibility of evidence,' which is not appealable . . . , and one that 'limits the legal theories of liability to be tried' or the scope of the issues at trial, which is appealable" (*Scalp & Blade*, 309 AD2d at 224). Here, the order precluded the introduction of the vast majority of the evidence on the issue whether defendants continued to represent plaintiffs so as to toll the statute of limitations, and thus it is appealable because it limits the scope of the issues at trial (*see generally O'Donnell v Ferguson*, 100 AD3d 1534, 1535-1536; *Catanese v Furman,* 27 AD3d 1050, 1051).

With respect to the substantive issue, we note that, after our determinations in *Dischiavi I* and *Dischiavi II* that there was a triable issue of fact whether the doctrine of continuous representation tolled the statute of limitations, the court granted

those parts of defendants' motions in limine seeking to preclude plaintiffs from offering evidence to establish that there had been such representation. Although the court has broad discretion to determine the admissibility of evidence, we agree with plaintiffs that the court abused that discretion here. Defendants are correct that, "in the context of a legal malpractice action, the continuous representation doctrine tolls the [s]tatute of [l]imitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice" (*Shumsky v Eisenstein*, 96 NY2d 164, 168). The continuous representation doctrine is derived from the continuous treatment doctrine in medical malpractice cases (*see Mercone v Monroe County Deputy Sheriffs' Assn., Inc.*, 90 AD3d 1698, 1699; *Pollicino v Roemer & Featherstonhaugh*, 260 AD2d 52, 54), however, and as the Court of Appeals explained later in *Shumsky*, "[i]ncluded within the scope of continuous treatment is a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment" (*id.* at 170 [internal quotation marks omitted]). Thus, the statute of limitations in a legal malpractice action is tolled where, as here, a "defendant continuously represented the plaintiffs during [the relevant] period by performing legal services related to the matter out of which the malpractice claim arose" (*Kuritzky v Sirlin & Sirlin*, 231 AD2d 607, 608).

Furthermore, in both prior appeals we concluded that there was a triable issue of fact whether the statute of limitations was tolled because, in opposition to the various defendants' motions for summary judgment, plaintiffs raised a triable issue of fact whether one or more of the defendants continued to represent plaintiffs on a related matter (*Dischiavi I*, 68 AD3d at 1694; *Dischiavi II*, 111 AD3d at 1260-1261). We reached that conclusion because, in opposition to defendants' motions for summary judgment, plaintiffs "adduced persuasive evidence establishing that [defendants] performed continuing legal services [throughout the time during which the statute is alleged to have been tolled] to correct [their] alleged failure to effectively" commence an action to recover damages for plaintiff's injuries (*N&S Supply v Simmons*, 305 AD2d 648, 650). Here, the evidence that defendants sought to preclude was highly relevant to the issue whether the actions in question involved "an attempt by the attorney to rectify an alleged act of malpractice" that would constitute continuing representation sufficient to toll the statute of limitations (*Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506-507; *see Weiss v Manfredi*, 83 NY2d 974, 977, *rearg denied* 84 NY2d 848; *DeStaso v Condon Resnick, LLP*, 90 AD3d 809, 812-813).

Consequently, we reverse the order insofar as appealed from and deny the motions.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1416

CA 14-00213

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

JEFF CONIBER, DOING BUSINESS AS JEFF CONIBER TRUCKING, PLAINTIFF-RESPONDENT,

V ORDER

CENTER POINT TRANSFER STATION, INC., MATTHEW W. LOUGHRY AND KENNETH LOUGHRY, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered April 29, 2013. The order, insofar as appealed from, denied in part the motion of defendants to compel discovery responses.

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

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1417

CA 14-00214

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

JEFF CONIBER, DOING BUSINESS AS JEFF CONIBER TRUCKING, PLAINTIFF-RESPONDENT,

V ORDER

CENTER POINT TRANSFER STATION, INC., MATTHEW W. LOUGHRY AND KENNETH LOUGHRY, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered December 3, 2013. The order denied the motion of defendants for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation signed by the attorneys for the parties and filed on December 18, 2014,

It is hereby ORDERED that said appeal from the order insofar as it denied those parts of the motion for summary judgment seeking to dismiss the second and fifth causes of action is unanimously dismissed upon stipulation and the order is affirmed without costs.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1418

CA 14-00600

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

JEFF CONIBER, DOING BUSINESS AS JEFF CONIBER TRUCKING, PLAINTIFF-RESPONDENT,

V ORDER

CENTER POINT TRANSFER STATION, INC., MATTHEW W. LOUGHRY AND KENNETH LOUGHRY, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 20, 2014. The order, insofar as appealed from, denied the motion of defendants for leave to reargue and renew.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984) and the order is affirmed without costs.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1419

CA 13-00982

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

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

V MEMORANDUM AND ORDER

JAMES PARROTT, RESPONDENT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON 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, Oswego County (Norman W. Seiter, Jr., J.), entered March 29, 2013 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that respondent is a dangerous sex offender requiring confinement.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a nonjury trial, that he is a dangerous sex offender (*see* § 10.03 [e]) and committing him to a secure treatment facility. We affirm. We reject respondent's contention that the use of hearsay by petitioner's experts denied him due process. Although Supreme Court erred in admitting certain basis hearsay evidence, i.e., evidence regarding victim statements about offenses for which respondent was not charged (*see Matter of State of New York v Charada T.*, 23 NY3d 355, 361-362), the court in this nonjury trial is " 'presumed to be able to distinguish between admissible evidence and inadmissible evidence . . . and to render a determination based on the former' " (*Matter of State of New York v Mark S.*, 87 AD3d 73, 80, *lv denied* 17 NY3d 714). Moreover, there is " 'no reasonable possibility' " that, had the testimony been excluded, the court would have reached a different determination (*Charada T.*, 23 NY3d at 362).

We reject respondent's further contention that the evidence is not legally sufficient to establish that he requires confinement. Petitioner's proof consisted of the reports and testimony of two psychologists who evaluated respondent. They opined that respondent suffers from pedophilia, antisocial personality disorder and

psychopathy, and that as a result of those mental abnormalities respondent has serious difficulty controlling his predisposition to sexually offend against children such that confinement is necessary. Upon our review of the record, we conclude that the experts' reports and testimony established by the requisite clear and convincing evidence that respondent "has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.07 [f]; *see Matter of State of New York v Bass*, 119 AD3d 1356, 1357). To the extent respondent contends that the determination is against the weight of the evidence, we reject that contention (*see Matter of State of New York v Kennedy*, 121 AD3d 1601, 1601). The court was "in the best position to evaluate the weight and credibility of the conflicting [expert] testimony presented" (*Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1144), and we see no reason to disturb the court's decision to credit the testimony of petitioner's experts (*see Kennedy*, 121 AD3d at 1601).

We also reject respondent's contention that his due process rights are violated by confinement because his expert testified that the imposition of a regimen of strict and intensive supervision treatment is the least restrictive alternative; there is no requirement that the court address the least restrictive alternative (*see Bass*, 119 AD3d at 1357-1358; *Matter of State of New York v Gooding*, 104 AD3d 1282, 1282, *lv denied* 21 NY3d 862; *see generally Matter of State of New York v Michael M.*, ___ NY3d ___, ___ [Dec. 17, 2014]). We reject respondent's further contention that he was denied effective assistance of counsel, which is premised upon his claim that he should not have admitted that he had a mental abnormality without some concession by petitioner. We conclude that respondent would not have succeeded if he disputed that issue, and a respondent "is not denied effective assistance of trial counsel merely because counsel [did] not make . . . an argument that ha[d] little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Viewing the evidence, the law, and the circumstances of this case as a whole and at the time of the representation, we conclude that respondent received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147; *Matter of State of New York v Campany*, 77 AD3d 92, 100, *lv denied* 15 NY3d 713).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1421

CA 13-02000

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

DAVID H. KERNAN, KATHARINE H. KERNAN, EDWARD W. KERNAN, WILLIAM KERNAN, JR., ANGELA K. WISLER AND WARNICK J. KERNAN, PLAINTIFFS-RESPONDENTS,

V ORDER

TRAJANKA WILLIAMS, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

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

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered January 10, 2013. The order granted the motion of plaintiffs for summary judgment and denied as moot the cross motion of defendant to add necessary parties.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Fiberglass Fabricators, Inc. v C.O. Falter Constr. Corp.*, 117 AD3d 1540, 1541).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1422

CA 13-02001

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

DAVID H. KERNAN, KATHARINE H. KERNAN, EDWARD W. KERNAN, WILLIAM KERNAN, JR., ANGELA K. WISLER AND WARNICK J. KERNAN, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TRAJANKA WILLIAMS, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

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

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered February 19, 2013. The judgment declared the rights of the parties with respect to certain underwater land in North Bay.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first decretal paragraph and the phrase "interference with the plaintiffs' ownership rights" in the third decretal paragraph and as modified the judgment is affirmed without costs in accordance with the following Memorandum: Plaintiffs commenced this action pursuant to RPAPL article 15 seeking, inter alia, a declaration that plaintiffs own the underwater land in North Bay, as owners of the adjacent upland property on Carleton Island in the Town of Cape Vincent. According to plaintiffs, defendant improperly directed them to remove a water pipe that was allegedly intruding on defendant's underwater land in North Bay inasmuch as the quitclaim deed purporting to grant defendant ownership to the underwater property in North Bay and South Bay is a nullity. Plaintiffs thereafter moved for summary judgment, seeking a declaration that defendant has no ownership interest in any underwater land in North Bay or South Bay, and seeking to enjoin defendant from entering plaintiffs' property. Supreme Court granted plaintiffs' motion and denied as moot defendant's cross motion, in which defendant sought to add necessary parties pursuant to CPLR 1001. This appeal by defendant ensued.

We reject defendant's contention that the court erred in granting plaintiffs' motion, although we note that the court granted relief to plaintiffs beyond that requested in their motion papers by concluding

that plaintiffs owned the underwater land adjacent to their upland in North Bay. Indeed, plaintiffs expressly stated in support of their motion that "[t]hey do not seek, or need, any determination by the Court of the extent of their underwater rights or where they might end." We therefore modify the judgment by vacating the first decretal paragraph and the phrase "interference with the plaintiffs' ownership rights" in the third decretal paragraph, so that such paragraph reads, "The conduct of defendant in denying plaintiffs the right to use underwater land in North Bay adjacent to the plaintiffs' adjoining upland property was and still is wrongful and unlawful."

Contrary to defendant's initial contention, the court properly considered the deeds submitted by plaintiffs in support of their motion. All of those deeds, with the exception of defendant's own quitclaim deed, are more than 10 years old and therefore are "prima facie evidence of their contents" (CPLR 4522; *see Bergstrom v McChesney*, 92 AD3d 1125, 1126; *Town of Skaneateles v Lang*, 179 AD2d 1032, 1032). With respect to defendant's quitclaim deed, plaintiffs' attorney swore to its authenticity (*see generally Sloninski v Weston*, 232 AD2d 913, 914, *lv denied* 89 NY2d 809, *rearg denied* 89 NY2d 1086), and defendant herself relies on that deed in opposition to plaintiffs' motion.

With respect to the merits, even with navigable waterways, "when land under water has been conveyed by the state to the owner of the adjacent uplands, the lands under water so conveyed become appurtenant to the uplands, and will pass by a conveyance of the latter without specific description" (*Archibald v New York Cent. & Hudson Riv. R.R. Co.*, 157 NY 574, 579; *see Matter of City of New York [W. 10th St. Realty Corp.]*, 256 NY 222, 224-226; *Smith v Bartlett*, 180 NY 360, 362, 366). Here, regardless of whether title to the underwater land merges and passes with title to adjacent uplands, or is conveyed separately, plaintiffs met their initial burden. Although the State initially conveyed uplands and underwater land to Charles Smyth by separate deeds, the underwater land thereafter passed appurtenant to Smyth's uplands, including by deeds to plaintiffs and several other landowners on North Bay, but not to defendant. Even if the underwater land could be conveyed only separately, it would have passed to Smyth's heirs and devisees, not directly to defendant.

In opposition, defendant failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although there were discrepancies in both plaintiffs' and defendant's chains of title, including allegations as to Smyth's identity, defendant has failed to submit evidence establishing or, indeed, even to allege, that she owned uplands adjacent to the underwater land at issue or that she acquired title to the land through a chain of title tracing back to an heir or devisee of the original grantee of the underwater land.

Finally, we conclude that defendant is not entitled to the relief sought in her cross motion, i.e., to add necessary parties pursuant to CPLR 1001. We are not determining herein which owners of uplands have title to the underwater land at issue, and thus the other landowners,

the allegedly necessary parties, cannot be "inequitably affected" by our decision (CPLR 1001 [a]; *see generally Matter of Castaways Motel v Schuyler*, 24 NY2d 120, 125, *adhered to on rearg* 25 NY2d 692; *cf. Halfond v White Lake Shores Assn., Inc.*, 114 AD3d 1315, 1318).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1430

CAF 13-01836

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

IN THE MATTER OF LACEY-SOPHIA T.-R.

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

ARIELA (T.)W., RESPONDENT-APPELLANT.

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

ARTHUR C. STEVER, IV, WATERTOWN, FOR PETITIONER-RESPONDENT.

JULIA R. CLEMENT, ATTORNEY FOR THE CHILD, HENDERSON HARBOR.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered September 25, 2013 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected her child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother contends that, following a hearing, petitioner failed to establish by a preponderance of the evidence that she neglected the subject child. We agree with the mother, and we therefore reverse the order and dismiss the petition.

Petitioner alleged that, on May 30, 2012, the 20-year-old mother left the 1½ -year-old child in the care of the couple with whom the mother and child lived so that the mother could take a trip to Syracuse. Petitioner alleged that the mother did not return as planned and was not available by telephone until June 2, 2012, when she called the couple from the State of Virginia. Petitioner further alleged that the mother did not make an appropriate plan to care for the child during her absence and did not return to care for the child until the police and petitioner intervened on June 5, 2012; that while living with the couple, she went out “partying and drinking”; that she called the child negative and derogatory names and was seen to have physically handled the child roughly on at least one occasion; and that she had possible mental health issues. In support of the petition, a caseworker testified at the hearing that the mother left the child with responsible people with whom she and the child lived; that the mother admitted that she drank alcohol but denied drinking to

the point of intoxication; that the mother admitted that she had been in therapy but denied any mental health concerns; and that the child was removed from the mother's care based upon concerns regarding the mother's instability, possible mental health concerns that were not treated, substance misuse, and because she had left the child with the caregivers "with no real plan for the caregivers to have the child for such a long time."

Both the man and woman with whom the mother and child had lived, and who the parties stipulated were appropriate caregivers, testified with respect to their relationship with the mother. Each of them testified that they knew where the mother was when she went out; that she stayed out all night once or twice but she never came home intoxicated; and that the mother never struck the child, although she was sometimes frustrated with the child. The couple assisted the mother with child care and worked with her on how to care for the child. The woman, a nurse, testified that, on several occasions, the mother appeared to be overwhelmed by the child and that the mother had stated that the couple should have custody of the child. The couple was helping the mother to "get on her feet" and encouraged her to go to Syracuse for an employment opportunity, knowing that she would be gone for several days. They did not know, however, that the mother would be leaving the state, and they were concerned that they lacked any rights with respect to the child in case of a medical emergency. The police were called because the mother's grandmother appeared at the couple's house while the mother was away and demanded that they give her the child, and they knew that the mother did not want her grandmother to care for the child. The mother contacted the couple daily by telephone while she was away. The mother conceded to the caseworker that she should not have gone to Virginia, but noted that she was out of state for only 24 hours. At the close of petitioner's case, the mother moved to dismiss the petition on the ground that there was no evidence that the child was harmed by her actions or was at imminent risk of harm. The Attorney for the Child joined in the motion to dismiss the petition, and Family Court reserved decision. The mother then testified on her own behalf. Following the hearing, the court denied the mother's motion to dismiss the petition and determined that the mother neglected the child.

"[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]). "Where a motion is made by the respondent at the close of the petitioner's case to dismiss a neglect petition, [the court] must determine whether the petitioner presented a prima facie case of neglect . . . , viewing the evidence in [the] light most favorable to the petitioner and affording it the benefit of every inference which could be reasonably drawn from the proof presented" (*Matter of Christian Q.*, 32 AD3d 669, 670).

We conclude that, viewing the evidence in the light most favorable to petitioner, the evidence established that the mother left the child with appropriate caregivers, who agreed to care for the child for several days; however, she left the state for approximately 24 hours, and she failed to provide a medical authorization in case of an emergency. Further, although the male caregiver was unable to reach the mother during the confrontation with the mother's grandmother, petitioner's evidence established that the mother had borrowed a telephone and had remained in contact with the caregivers each day that she was away. The evidence also established that the mother was inexperienced as a parent and that the couple with whom she lived was assisting her with parenting skills and in obtaining appropriate housing, as well as medical and other benefits.

We conclude that petitioner failed to establish that, as a result of the mother's actions, the child was in imminent danger, i.e., "near or impending [danger], not merely possible" (*Nicholson*, 3 NY3d at 369). We further conclude that petitioner failed to present any evidence connecting the mother's alleged mental health condition to any actual or potential harm to the child (*see Matter of Joseph A. [Fausat O.]*, 91 AD3d 638, 640; *see also Matter of Jesus M. [Jamie M.]*, 118 AD3d 1436, 1437, *lv denied* 24 NY3d 904). We therefore conclude that petitioner failed to establish by a preponderance of the evidence that the child's physical, mental or emotional condition had been impaired or was in imminent danger of becoming impaired as a result of the mother's failure to exercise a minimum degree of care for the child (*see* Family Ct Act § 1012 [f] [i] [A], [B]; *Matter of Afton C. [James C.]*, 17 NY3d 1, 8-9; *cf. Matter of Elijah NN.*, 66 AD3d 1157, 1159, *lv denied* 13 NY3d 715).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1436

CA 14-00242

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

CHRISTOPHER JOHNSON, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF ZACHARY JOHNSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GUTHRIE MEDICAL GROUP, P.C., ET AL., DEFENDANTS, INGRID STERLING, M.D., PRE-EMPTION FAMILY MEDICINE, J. MICHAEL BELL, M.D., P.C., CYNTHIA SKOVRINSKI, MS, FNPC, AND RICHARD J. AMSEL, M.D., DEFENDANTS-APPELLANTS.

LEVENE GOULDIN & THOMPSON, LLP, VESTAL (LAUREN KILEY SALEEBY OF COUNSEL), FOR DEFENDANT-APPELLANT INGRID STERLING, M.D.

HIRSCH & TUBIOLO, P.C., ROCHESTER (BRYAN S. KORNFIELD OF COUNSEL), FOR DEFENDANTS-APPELLANTS PRE-EMPTION FAMILY MEDICINE, J. MICHAEL BELL, M.D., P.C. AND RICHARD J. AMSEL, M.D.

DONAHUE, SABO, VARLEY & HUTTNER, LLP, ALBANY (KENNETH G. VARLEY OF COUNSEL), FOR DEFENDANT-APPELLANT CYNTHIA SKOVRINSKI, MS, FNPC.

CONWAY & KIRBY, PLLC, LATHAM (DANA BONIEWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 16, 2013. The order, among other things, denied the motions of defendants Ingrid Sterling, M.D., Pre-Emption Family Medicine, J. Michael Bell, M.D., P.C., Cynthia Skovrinski, MS, FNPC, and Richard J. Amsel, M.D., to preclude certain testimony.

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

Memorandum: Plaintiff commenced this medical malpractice action in July 2006, alleging, inter alia, that defendants Ingrid Sterling, M.D., Pre-Emption Family Medicine, J. Michael Bell, M.D., P.C., Cynthia Skovrinski, MS, FNPC, and Richard J. Amsel, M.D. (collectively, defendants) failed to timely diagnose his son, born April 6, 2001, with melanoma. Following removal of the child's stage IV tumor in August 2004, further surgery was required to remove lymph nodes and his fifth finger to the wrist. Thereafter, the child underwent one month of a high-dose treatment with Interferon-alpha

(IFN-a), followed by 11 months of a low-dose IFN-a treatment. In July 2013, plaintiff served a fifth and sixth supplemental bill of particulars and expert disclosure, alleging that the treatment with IFN-a caused long-term cognitive deficits, resulting in future loss of earnings and future life care expenses for the child. In various motions, defendants moved to strike the fifth and sixth bills of particulars; to preclude the expert disclosure; and to preclude expert testimony regarding the alleged causal relationship between IFN-a treatment and long-term cognitive deficits or, in the alternative, for a *Frye* hearing (*see Frye v United States*, 293 F 1013). Supreme Court denied the motions. Defendants, as limited by their briefs, contend that the court erred in denying the motions to preclude expert testimony or for a *Frye* hearing.

As a preliminary matter, we note that the court's pretrial order is appealable inasmuch as it "clearly involves the merits of the controversy" with respect to medical causation of alleged long-term cognitive defects, and "affects a substantial right" of the parties (*Muhammad v Fitzpatrick*, 91 AD3d 1353, 1353-1354; *see* CPLR 5701 [a] [2] [iv], [v]; *Parker v Mobil Oil Corp.*, 16 AD3d 648, 650, *affd* 7 NY3d 434, *rearg denied* 8 NY3d 828).

With respect to the merits, we conclude that the court did not abuse its discretion in denying that part of defendants' motions seeking to preclude the expert testimony of a physician and a neuropsychologist. Defendants supported their motions with the expert affidavit of a board-certified neuropsychologist, who opined that the theory of causation for the child's cognitive deficits espoused by plaintiff's experts, i.e., that the IFN-a treatment caused those deficits, is not generally accepted in the scientific community. Defendants' expert acknowledged that chemotherapy can cause damage to healthy brain tissue and result in cognitive/neuropsychological deficits, but he disputed that IFN-a is a chemotherapeutic agent. In response, plaintiff provided, inter alia, the redacted affidavit of his undisclosed expert, a board-certified physician in pediatrics and pediatric hematology-oncology, who opined with a reasonable degree of medical certainty that the child's neurocognitive, educational, and emotional disabilities were caused by the use of IFN-a to treat melanoma and that such theory of causation is "supported in the scientific community." Plaintiff's undisclosed expert disputed the assertion of defendants' expert that IFN-a is not a chemotherapeutic agent. Plaintiff's undisclosed expert supported his/her theory of causation with numerous articles discussing the negative cognitive effects experienced by adults during and after treatment with IFN-a and the negative long-term effects of chemotherapy treatment on the developing brains of children. Plaintiff's undisclosed expert conceded that there are no studies regarding the long-term cognitive effects on children from IFN-a treatment.

We conclude that the court properly denied that part of defendants' motions seeking a *Frye* hearing inasmuch as "the theory of causation set forth by plaintiff's expert[s] . . . is not premised on novel science but, rather, is premised on generally accepted scientific principles and existing data . . . *Frye* is not concerned

with the reliability of a certain expert's conclusions, but instead with whether the expert[']s deductions are based on principles that are sufficiently established to have gained general acceptance as reliable" (*DieJoia v Gacioch*, 42 AD3d 977, 979 [internal quotation marks omitted]). Instead, we consider whether there is a proper foundation for the evidence to be admitted at trial (*see Parker*, 7 NY3d at 447). Here, we conclude that the court did not abuse its discretion in determining that there is a proper foundation for that evidence (*see Jackson v Nutmeg Tech., Inc.*, 43 AD3d 599, 602). The experts laid a foundation for the theory that the child's cognitive deficits were caused by treatment with IFN-a with generally accepted medical principles of the cognitive effects on adults treated with IFN-a, a chemotherapeutic agent, and the cognitive effects of chemotherapy on the developing brain of a child. " '[T]he underlying support for the theory of causation [need not] consist of cases or studies considering circumstances exactly parallel to those under consideration in the litigation. It is sufficient if a synthesis of various studies or cases reasonably permits the conclusion[s] reached by the plaintiff's expert[s]' . . . 'The fact that there was no textual authority directly on point' . . . 'is relevant only to the weight to be given to the testimony, but does not preclude its admissibility' " (*DieJoia*, 42 AD3d at 979-980).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1439

CA 14-00538

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

IN THE MATTER OF OBI IFEDIGBO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO PUBLIC SCHOOLS, RESPONDENT-RESPONDENT.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY P. SANDERS OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 1, 2013 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding alleging, inter alia, that respondent acted arbitrarily in creating the new position of Director of Facilities Planning, Design, and Construction in 2010, in failing immediately to place petitioner in that position and in eliminating his position in 2012. Respondent moved to dismiss the petition and, on notice, that motion was converted to a motion for summary judgment. We conclude that Supreme Court properly granted the converted motion for summary judgment, thereby dismissing the petition in its entirety.

Respondent established as a matter of law that its actions in 2010 and in 2012 "had a rational basis and [were] not arbitrary" (*Matter of Mills v Nyquist*, 63 AD2d 1060, 1060, *affd* 47 NY2d 809; *see generally Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact' . . . Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Pell*, 34 NY2d at 231).

Respondent established that its decision to reorganize its Facilities Department in 2010 was made as a result of a third-party

study that identified redundancy within the Department and the decision of one employee to retire. At the time of the employee's retirement, petitioner and that employee held the same job position, Assistant Superintendent of Plant (ASP), but the two men had different responsibilities and performed different work. Petitioner "concentrated primarily on current plant maintenance and repair," and the other employee "concentrated primarily on future plant planning and construction."

Rather than replace the retiring employee, respondent opted to eliminate the second ASP position and replace it with the new Director of Facilities position "[t]o create a better definition of responsibilities between the two positions." According to the job specifications for the new position, the Director of Facilities had the added responsibilities of preparing estimates for construction projects as well as preparing contracts and evaluating proposals for construction or consulting services. The new position also had additional work activities, including: directing the development of office standards for design, specifications and contracts; working with outside consultants to acquire professional design, architectural and engineering services; defining the scope of work and establishing project schedules and deadlines; developing both short- and long-term capital planning and budgeting for effective utilization of school buildings and administrative facilities; and preparing and submitting budgets for capital improvements and maintenance for school facilities. The job specifications for that position mirrored the work that was then being performed by the retiring employee.

In addition to the knowledge and skills required for the ASP, the Director of Facilities also needed to have comprehensive knowledge of budget planning and administration. The new position required possession of a professional architecture or engineering license in contrast to the ASP position, which deemed possession of such a license to be the equivalent of the required work experience. The promotional requirements for the Director of Facilities included "[c]ontinuous and permanent status in any city department for **three** years as an **Associate Architect or Associate Engineer**." There is no dispute that the retiring employee had served as an architect for the city.

In our view, respondent established that the determination to eliminate the retiring employee's ASP position and to create a new position that was more in line with the tasks and responsibilities that had been assigned to the retiring employee was part of a rational reorganization plan (*see Matter of Penn Yan, Vil. of v Travis*, 248 AD2d 963, 964; *see also Matter of Belvey v Tioga County Legislature*, 257 AD2d 967, 968-969; *Matter of Bianco v Pitts*, 200 AD2d 741, 741-742; *cf. Matter of Gallagher v Board of Educ. for Buffalo City School Dist.*, 81 AD3d 1408, 1409-1410). We further conclude that the determination to add, as a promotional requirement, prior experience as an Associate Architect or Associate Engineer in any city department was neither arbitrary nor capricious. There is no dispute that the retiring employee had such experience. Moreover, both the ASP and Director of Facilities job specifications required, as a minimum

"promotional" qualification, some type of prior experience with either the Board of Education or the City of Buffalo. While there were different requirements for an open competitive applicant, the Department of Civil Service decided to offer only the promotional examination for the new position.

Petitioner submitted nothing in opposition to the motion to establish that either the determination to create the new position or the determination concerning the job specifications for that new position was "without foundation in fact . . . [or] without sound basis in reason" (*Pell*, 34 NY2d at 231).

With respect to the elimination of petitioner's position 20 months later, we conclude that respondent established that there was an economic justification for its action. "It is well established that a public employer may abolish civil service positions for the purposes of economy or efficiency . . . , but it may not act in bad faith in doing so . . . , nor may it abolish positions as a subterfuge to avoid the statutory protection afforded civil servants before they are discharged . . . A petitioner challenging the abolition of his or her position must establish that the employer in question acted in bad faith" (*Matter of Arnold v Erie County Med. Ctr. Corp.*, 59 AD3d 1074, 1076-1077, *lv dismissed* 12 NY3d 838 [internal quotation marks omitted]; *see Matter of Harman v Erie 1 BOCES Bd. of Educ.*, 204 AD2d 1037, 1037). Respondent established that, in March 2012, all of its departments were directed to cut their budgets by ten percent. In opposition to the motion, petitioner failed to "eliminate bona fide reasons for the elimination of his position, show that no savings were accomplished or [show] that someone was hired to replace him" (*Matter of Mucci v City of Binghamton*, 245 AD2d 678, 679, *appeal dismissed* 91 NY2d 921, *lv denied* 92 NY2d 802*; see Matter of Linney v City of Plattsburgh*, 49 AD3d 1020, 1021).

Petitioner's reliance is misplaced on cases where a new position was created or new employees were hired at the same time as a position was eliminated (*see e.g. Gallagher*, 81 AD3d at 1408-1409; *Matter of Johnston v Town of Evans*, 125 AD2d 952, 953, *lv dismissed* 69 NY2d 900, *lv denied* 69 NY2d 608, 70 NY2d 612). In this case, the new position was created 20 months *before* petitioner's position was eliminated. Moreover, it should be noted that no new position was created to replace petitioner's position and that the duties that petitioner carried out "were subsequently carried out by other existing employees" (*Matter of Piekielniak v Axelrod*, 92 AD2d 968, 969, *lv denied* 59 NY2d 603).

The crux of petitioner's contentions is that respondent's sole reason for making the job specifications for the new position so narrow was "to make it so that [petitioner] wouldn't be eligible" for it while, at the same time, "hiding this plan" to eliminate his position in the future. In our view, petitioner's allegations are not supported by any evidence in the record on appeal. "[C]onclusory and unsupported allegations [are] insufficient to overcome respondent's bona fide reasons for eliminating petitioner's . . . position" (*Linney*, 49 AD3d at 1021-1022).

Based on our determination, we do not address respondent's remaining contention.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1441

CA 14-00972

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

SUE JONES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DEAN LEFFEL, INDIVIDUALLY AND DOING BUSINESS AS DE ASSOCIATES, DEFENDANT-RESPONDENT.

DAVID W. POLAK ATTORNEY AT LAW, P.C., WEST SENECA (DAVID W. POLAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (JOSEPH A. CANEPA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered August 1, 2013. The order granted defendant's motion 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 seeking damages for injuries she allegedly sustained when her vehicle was struck by a vehicle owned and operated by defendant. We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

With respect to two of the three categories of serious injury allegedly sustained by plaintiff, i.e., a permanent consequential limitation of use and a significant limitation of use, the Court of Appeals has held that "[w]hether a limitation of use or function is significant or consequential (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [internal quotation marks omitted]). In support of his motion, defendant submitted, inter alia, the affirmed report of a neurologist who examined plaintiff on defendant's behalf and reviewed her medical records. The neurologist opined that plaintiff sustained a cervicothoracic strain in the accident, i.e., a "soft tissue injur[y] from which an individual could be expected to make a full recovery . . . in a matter of weeks" (*see Heller v Jansma*, 103 AD3d 1160, 1161). He found no objective evidence that plaintiff sustained a cervical disc herniation or other acute injury as a result

of the accident and opined that there was "no objective evidence . . . [of] permanency." "Defendant thereby established that plaintiff sustained only a mild injury as a result of the accident and that there was no objective medical evidence that plaintiff sustained a significant or permanent injury" (*Beaton v Jones*, 50 AD3d 1500, 1501; *see French v Symborski*, 118 AD3d 1251, 1251, *lv denied* 24 NY3d 904; *Roll v Gavitt*, 77 AD3d 1412, 1412). Plaintiff failed to raise an issue of fact with respect to either of those categories (*see Caldwell v Grant* [appeal No. 2], 31 AD3d 1154, 1156; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although plaintiff submitted objective proof of injury in the form of evidence of muscle spasms and trigger point activity detected upon palpation of her cervical and thoracic spine (*see Toure*, 98 NY2d at 350; *Harrity v Leone*, 93 AD3d 1204, 1206; *Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1544), she "failed to submit objective medical evidence establishing [her] limitations or restrictions of use resulting from those injuries" (*Carfi v Forget*, 101 AD3d 1616, 1618; *see Caldwell*, 31 AD3d at 1156).

With respect to the 90/180-day category of serious injury, we conclude that defendant met his burden by submitting plaintiff's deposition testimony, which established that she was not prevented "from performing substantially all of the material acts which constituted [her] usual daily activities" for at least 90 out of the 180 days following the accident (*Licari v Elliott*, 57 NY2d 230, 238), and plaintiff failed to raise a triable issue of fact (*see Yoonessi v Givens*, 39 AD3d 1164, 1166; *Hunter v Siegel, Kelleher & Kahn*, 38 AD3d 1199, 1201; *see generally Zuckerman*, 49 NY2d at 562).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1446

KA 13-00679

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TITO ROOSEVELT, ALSO KNOWN AS SAMUEL GAMBLIN,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DAVID J. RUDROFF 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 Erie County Court (Michael F. Pietruszka, J.), rendered March 18, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, forgery in the second degree and false personation.

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 following a jury trial of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of promoting prison contraband in the first degree (§ 205.25 [2]). In appeal No. 1, defendant contends that reversal is required because County Court erred in refusing to suppress statements he made to the police following his arrest on the weapons offense. We reject defendant's contention that reversal is required. According to the evidence at the suppression hearing, a police officer on patrol with his partner in the City of Buffalo observed defendant standing in the doorway of a corner store looking outside and from side to side. The officer testified that, when defendant made eye contact with him, defendant's eyes "got big" and he ran toward the rear of the store. The officer and his partner exited their vehicle and, upon entering the store, they encountered defendant, who was on his way out. Defendant was sweating and appeared to be nervous. The officer directed a third officer to detain defendant outside while he and his partner searched the store for guns or drugs. Within minutes, the officer found a loaded .38 caliber handgun in a cardboard box that contained gallon jugs of water. The box was on the shelf of the aisle where the officer had seen defendant walking as he headed for the

exit. The officer and his partner then reviewed the store's surveillance video, which showed defendant placing an object into the box in question minutes earlier. After viewing the video, the officer sent a radio message to the third officer directing him to arrest defendant.

At the police station, defendant waived his *Miranda* rights and admitted that he possessed the gun, explaining that he intended to use the gun to shoot a man in the store who had shot his brother. In seeking to suppress his statements to the police but not the weapon itself, defendant contended that he was unlawfully detained outside the store before the police discovered the weapon and that his statements therefore constituted fruit of the poisonous tree.

We agree with defendant that the police unlawfully detained him outside the store while they searched inside for contraband, inasmuch as, at that time, there did not exist reasonable suspicion to believe that he was committing, had committed or was about to commit a crime (*see generally People v Moore*, 6 NY3d 496, 498-499; *People v De Bour*, 40 NY2d 210, 223). Defendant's behavior in the store as observed by the officer justified, at most, a level two common-law inquiry. The People assert that, once the police independently found the loaded weapon in the store approximately five minutes after defendant was initially detained, the degree of suspicion ripened to probable cause, and defendant was lawfully arrested. Thus, the People conclude, there is no basis to suppress defendant's subsequent statements as the product of an unlawful arrest (*see People v Stevenson*, 273 AD2d 826, 827). Because the suppression court did not rely on that ground in denying defendant's motion, however, we cannot affirm on that basis (*see People v Concepcion*, 17 NY3d 192, 197-198).

Nevertheless, we conclude that any error in failing to suppress defendant's statements is harmless inasmuch as the proof of guilt is overwhelming and there is no reasonable possibility that the jury would have acquitted defendant if his statements had been suppressed (*see People v Brown*, 120 AD3d 954; *see generally People v Crimmins*, 36 NY2d 230, 237). The store surveillance video clearly showed defendant place an object into the box in which the loaded firearm was found minutes later by the police. Although one cannot discern from the video that the object that defendant placed into the box was a gun — defendant suggests on appeal that it could have been a cell phone — the box contained no objects other than the gun and the jugs of water. Moreover, the evidence at trial showed that defendant could not be excluded as a contributor to DNA recovered from the gun. According to the People's DNA expert, the probability of randomly selecting an unrelated person as a possible contributor to the DNA profile was at least one in 995 for individuals in the United States.

We reject defendant's further contention in appeal No. 1 that the evidence is legally insufficient to support the conviction of the weapons offense. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant possessed a

loaded and operable firearm (*see generally People v Bleakley*, 69 NY2d 490, 495). Further, viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We have reviewed defendant's remaining contentions in appeal No. 1 and conclude that none require reversal or modification of the judgment. Finally, in view of our determination affirming the judgment in appeal No. 1, there is no basis to grant his request to reverse the judgment in appeal No. 2 and vacate his plea of guilty (*cf. People v Fuggazzatto*, 62 NY2d 862, 863).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1447

KA 13-00678

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TITO ROOSEVELT, ALSO KNOWN AS SAMUEL GAMBLIN,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DAVID J. RUDROFF 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 Erie County Court (Michael F. Pietruszka, J.), rendered March 18, 2013. The judgment convicted defendant, upon his plea of guilty, of promoting prison contraband in the first degree.

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

Same Memorandum as in *People v Roosevelt* ([appeal No. 1] ___ AD3d ___ [Feb. 6, 2015]).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1448

KA 10-01824

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GORDON L. MONTGOMERY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (CHRISTOPHER M. KVAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Charles F. Crimi, Jr., A.J.), rendered July 23, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the fifth degree, criminal possession of a forged instrument in the second degree and identity theft in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of stolen property in the fifth degree (Penal Law § 165.40), criminal possession of a forged instrument in the second degree (§ 170.25) and identity theft in the first degree (§ 190.80 [3]). The conviction is based upon defendant's possession of a "convenience check" issued against the victim's credit card account, and his use of the convenience check to purchase merchandise. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict finding that defendant was the person who committed the crimes is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The People presented evidence that included a store surveillance video and the testimony of a police officer familiar with defendant who identified defendant after he viewed the video. The officer testified that he recognized defendant from his facial features and distinctive bowlegged gait. In addition, the People presented evidence that defendant and the victim had post office boxes at the same post office, and the jury was able to compare the handwriting on the change of address form defendant submitted to the post office with the handwriting on the convenience check. "[W]hile a different verdict may not have been unreasonable, upon independently 'weigh[ing] the

probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony,' we conclude that the verdict is not against the weight of the evidence" (*People v Cascio*, 79 AD3d 1809, 1811, *lv denied* 16 NY3d 893; *see People v Miller*, 93 AD3d 882, 882-883, *lv denied* 19 NY3d 975, *reconsideration denied* 20 NY3d 1063).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1461

CA 14-00509

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

IN THE MATTER OF CHRISTOPHER PRATT,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, DEPARTMENT
OF CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.) entered February 26, 2014 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Robles v Evans*, 100 AD3d 1455, 1455).

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1463

CA 14-00046

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

R.L. FLOYD, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE THRUWAY AUTHORITY,
DEFENDANT-APPELLANT.
(CLAIM NO. 105256.)

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered August 27, 2013. The interlocutory judgment determined that defendant is 100% liable for claimant's injuries.

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

Memorandum: Defendant appeals from an interlocutory judgment entered in favor of claimant after a trial on the issue of liability. Claimant, a painter working on a large-scale bridge painting project on the north Grand Island Bridge, was struck and injured by a falling rigging cable while preparing to return to his work area. Claimant subsequently commenced this action seeking damages for the violation of Labor Law § 240 (1) as well as common-law negligence, but the latter claim was previously dismissed and is not at issue herein.

Contrary to defendant's contention, the Court of Claims properly denied its motion seeking summary judgment dismissing the Labor Law § 240 (1) claim. Initially, we note that defendant may challenge the propriety of the order denying its motion for summary judgment on this appeal from the interlocutory judgment (*see e.g. Fusco v Hobbes*, 16 AD3d 1031, 1032; *see generally Burke v Crosson*, 85 NY2d 10, 15-16). Likewise, although defendant previously had cross-moved for summary judgment and "successive summary judgment motions generally are disfavored" (*Giardina v Lippes*, 77 AD3d 1290, 1291, *lv denied* 16 NY3d 702), we are not precluded from addressing defendant's present motion, particularly in view of the fact that it was made after further discovery (*see id.*).

We note with respect to the merits of defendant's motion that it is axiomatic that Labor Law § 240 (1) "applies to both 'falling worker' and 'falling object' cases" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267), and that section 240 (1) guards "workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured' " (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514; *see Micoli v City of Lockport*, 281 AD2d 881, 882). To recover under section 240 (1), a worker injured by a falling object must thus establish both (1) that the object was being hoisted or secured, *or* that it " 'required securing for the purposes of the undertaking,' " and (2) that the object fell because of the absence or inadequacy of a safety device to guard against a risk involving the application of the force of gravity over a physically significant elevation differential (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663, quoting *Outar v City of New York*, 5 NY3d 731, 732; *see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603-605). Here, we conclude that defendant failed to meet its initial burden on the motion because the evidence it submitted in support thereof "failed to eliminate all triable issues of fact as to whether the object that struck [claimant] was an object that was 'being hoisted or secured' . . . , or required securing for the purposes of the undertaking pursuant to Labor Law § 240 (1)" (*Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 843; *see Gonzalez v TJM Constr. Corp.*, 87 AD3d 610, 611).

We further conclude that the court properly granted claimant judgment on liability after conducting a trial. Viewing the evidence in the light most favorable to sustain the judgment following this nonjury trial (*see Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170), we conclude that there is a fair interpretation of the evidence supporting the court's determination that defendant violated Labor Law § 240 (1) (*see Sung Kyu-To v Triangle Equities, LLC*, 84 AD3d 1058, 1060; *Costa v Piermont Plaza Realty, Inc.*, 10 AD3d 442, 444; *Bornschein v Shuman*, 7 AD3d 476, 478). We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

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

1465

CA 14-00735

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

MIDFIRST BANK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EUGENE A. EDDY AND JOY E. EDDY,
DEFENDANTS-RESPONDENTS.

FRENKEL LAMBERT WEISS WEISMAN & GORDON, LLP, BAY SHORE (JOSEPH F. BATTISTA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered July 8, 2013. The order denied plaintiff's motion to vacate a prior order and judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion to vacate the order and judgment dated November 15, 2012 is granted, that order and judgment is vacated, the complaint is reinstated and plaintiff is granted 30 days from service of the order of this Court with notice of entry to file and serve either a motion or an ex parte application, as appropriate, for a judgment of foreclosure and sale.

Memorandum: Plaintiff commenced this action in October 2011 to foreclose on a mortgage that was secured by property owned by defendants. Defendants failed to answer or appear and, upon plaintiff's motion, Supreme Court issued an order of reference pursuant to RPAPL 1321. The order of reference, dated July 3, 2012, directed the Referee to file his report on or before October 3, 2012, and directed plaintiff to "submit either a Motion or [an] Ex Parte Application, as appropriate, for a Judgment of Foreclosure and Sale on or before November 3, 2012." The order also provided that plaintiff's failure "to adhere to the deadlines set forth in this . . . Order, without good cause shown, shall be deemed an abandonment of the action pursuant to 22 NYCRR [] 202.48 and shall result in the Court's dismissal of the complaint." Plaintiff did not submit a motion or an ex parte application for a judgment of foreclosure and sale by November 3, 2012, and by order and judgment dated November 15, 2012 (dismissal order), the court dismissed the complaint sua sponte. The Referee thereafter issued his report on February 5, 2013.

The court erred in denying plaintiff's motion seeking to vacate the dismissal order. The court improperly dismissed the complaint sua sponte pursuant to 22 NYCRR 202.48, and no extraordinary circumstances

are present in this case that otherwise would warrant the court's exercise of its power to dismiss a complaint sua sponte (*see Midfirst Bank v Bellinger*, 117 AD3d 1520, 1521-1522).

We therefore reverse the order, grant plaintiff's motion, vacate the dismissal order and reinstate the complaint. We further direct plaintiff to "submit [to Supreme Court] either a Motion or [an] Ex Parte Application, as appropriate, for a Judgment of Foreclosure and Sale" within 30 days of service of the order of this Court with notice of entry.

Entered: February 6, 2015

Frances E. Cafarell
Clerk of the Court

MOTION NO. (935/87) KA 14-01601. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD LYON, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, AND LINDLEY, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (219/96) KA 14-02140. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WALTER DOUGLAS WILKINS, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (1300/00) KA 98-05521. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN J. JOHNSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (1200/02) KA 01-01201. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DENNIS TIMMONS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, AND WHALEN, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (1607/09) KA 07-00939. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBBIE D. OWENS, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND LINDLEY, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (1608/09) KA 08-00914. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBBIE D. OWENS, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND LINDLEY, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (852/14) CA 13-00659. -- IN THE MATTER OF THE STATE OF NEW YORK, PETITIONER-RESPONDENT, V ROY CASTLEBERRY, RESPONDENT-APPELLANT. -- Motions for reargument and leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (952/14) CA 14-00366. -- ONEBEACON INSURANCE COMPANY, PLAINTIFF-APPELLANT-RESPONDENT, V UNILAND PARTNERSHIP OF DELAWARE, L.P., DEFENDANT-RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (970/14) CA 13-01004. -- JOHN A. MCINTOSH, PLAINTIFF-APPELLANT, V GENESEE VALLEY LASER CENTRE AND HOLLY B. HAHN, M.D., DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, LINDLEY, VALENTINO, AND DEJOSEPH, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (996/14) CA 13-01391. -- DEVON FAISON AND TIERRA FAISON, AN INFANT, BY HER PARENT AND NATURAL GUARDIAN, KIMBERLY BARNETT,

PLAINTIFFS-APPELLANTS-RESPONDENTS, V LEE LUONG, JAMES L. CUYLER AND GEORGIA CUYLER, DEFENDANTS-RESPONDENTS-APPELLANTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, SCONIERS, AND VALENTINO, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (997/14) CA 13-01392. -- DEVON FAISON AND TIERRA FAISON, AN INFANT, BY HER PARENT AND NATURAL GUARDIAN, KIMBERLY BARNETT, PLAINTIFFS-RESPONDENTS, V LEE LUONG, DEFENDANT, JAMES L. CUYLER AND GEORGIA CUYLER, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, SCONIERS, AND VALENTINO, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (998/14) CA 13-01394. -- DEVON FAISON AND TIERRA FAISON, AN INFANT, BY HER PARENT AND NATURAL GUARDIAN, KIMBERLY BARNETT, PLAINTIFFS-APPELLANTS-RESPONDENTS, V LEE LUONG, DEFENDANT-RESPONDENT-APPELLANT, JAMES L. CUYLER, ET AL., DEFENDANTS. (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, SCONIERS, AND VALENTINO, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (1011/14) CA 14-00269. -- HAMILTON EQUITY GROUP, LLC, AS ASSIGNEE OF HSBC BANK USA, NATIONAL ASSOCIATION, PLAINTIFF-RESPONDENT, V BRIAN KUMAHOR, INDIVIDUALLY AND DOING BUSINESS AS BKUMAHOR CONSULTING,

DEFENDANT-APPELLANT, ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, WHALEN, AND DEJOSEPH, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (1015/14) CA 14-00062. -- IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE FINAL ACCOUNT OF JPMORGAN CHASE BANK N.A., PETITIONER-RESPONDENT, AS TRUSTEE OF THE TRUST CREATED UNDER THE LAST WILL AND TESTAMENT OF LUCY GAIR GILL, DECEASED, DATED OCTOBER 26, 1975, FOR THE BENEFIT OF MARY GILL ROBY, ET AL., ELIZABETH LEE ROBY, KATHRYN STARR ROBY JOHNSON, AND WILLIAM S. ROBY, III, OBJECTANTS-APPELLANTS. -- Motion for reargument and renewal denied. PRESENT: CENTRA, J.P., FAHEY, WHALEN, AND DEJOSEPH, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (1042/14) CA 13-01495. -- JENNIFER L. RECH, PLAINTIFF-RESPONDENT, V MICHAEL B. RECH, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, VALENTINO, WHALEN, AND DEJOSEPH, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (1103/14) KA 13-00307. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANGEL MALDONADO, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND VALENTINO, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (1228/14) KA 13-00522. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CURLIE GREEN, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed Feb. 6, 2015.)

MOTION NO. (1240/14) CA 14-00275. -- JERRY SWENEY, PLAINTIFF-RESPONDENT, V COUNTY OF NIAGARA AND NIAGARA COUNTY JAIL, DEFENDANTS-APPELLANTS. COUNTY OF NIAGARA, THIRD-PARTY PLAINTIFF-RESPONDENT, V INTER-COMMUNITY MEMORIAL HOSPITAL OF NEWFANE, INC., AND EASTERN NIAGARA HOSPITAL, INC., THIRD-PARTY DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ. (Filed Feb. 6, 2015.)

KAH 14-00109. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. FRANK GARCIA, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel’s motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment [denominated order] of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ. (Filed Feb. 6, 2015.)