SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 21, 2012

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

934

CA 11-01650

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

IN THE MATTER OF THE ESTATE OF STEVEN MAKITRA, SR., DECEASED.

MEMORANDUM AND ORDER

WILLIAM T. MAKITRA, AS EXECUTOR OF THE ESTATE OF STEVEN MAKITRA, SR., DECEASED, PETITIONER-RESPONDENT;

STEVEN A. MAKITRA, JR., OBJECTANT-APPELLANT;

PATRICK MCALLISTER, ESQ., GUARDIAN AD LITEM FOR SHANE GLASS, RESPONDENT.

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

JONES & SKIVINGTON, GENESEO (DANIEL MAGILL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Steuben County (Marianne Furfure, S.), entered March 30, 2011. The decree dismissed the objections of Steven A. Makitra, Jr., revoked letters testamentary issued to Steven A. Makitra, Jr., and admitted to probate the last will and testament of Steven Makitra, Sr.

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

Memorandum: On appeal from a decree that rejected his claims that the November 2007 will of decedent was invalid, objectant contends that decedent lacked testamentary capacity when he executed the will. Objectant further contends that petitioner, decedent's nephew, exercised undue influence on decedent at the time decedent executed his will, and that Surrogate's Court improperly used the Dead Man's Statute to preclude objectant from testifying at trial. We affirm.

Decedent made his first will in 2002, naming objectant, his son, as the sole beneficiary of his estate. Some years later, in 2007, decedent executed a new will, which still left the bulk of his estate to objectant but also left some real and personal property to other family members, including petitioner. Objectant contends that decedent was not competent to execute a will in 2007 because his health was failing and he was suffering from dementia. The Surrogate properly rejected that contention. In a will contest, " '[t]he

proponent has the burden of proving that the [decedent] possessed testamentary capacity and the court must look to the following factors: (1) whether [he] understood the nature and consequences of executing a will; (2) whether [he] knew the nature and extent of the property [he] was disposing of; and (3) whether [he] knew those who would be considered the natural objects of [his] bounty and [his] relations with them' " (*Matter of Kumstar*, 66 NY2d 691, 692, *rearg denied* 67 NY2d 647). Old age and bad health, including dementia, when a will is executed are "not necessarily inconsistent with testamentary capacity . . . as the appropriate inquiry is whether the decedent was lucid and rational at the time the will was made" (*Matter of Buchanan*, 245 AD2d 642, 644, *lv dismissed* 91 NY2d 957; *see Matter of Hinman*, 242 AD2d 900, 900-901; *Matter of Buckten*, 178 AD2d 981, 982, *lv denied* 80 NY2d 752). Where there is direct evidence that the decedent possessed the understanding to make a testamentary disposition, even "medical opinion evidence assumes a relatively minor importance" (*Matter of Coddington*, 281 App Div 143, 145, *affd* 307 NY 181).

Here, there was ample evidence that decedent was of sound mind and memory when he executed his November 2007 will. Aside from the trial testimony of several disinterested witnesses to that effect, petitioner's lawyer introduced in evidence at trial a videotape that was made of decedent as he reviewed and signed the will. The tape was reviewed by the Surrogate before she rendered her decision. Based upon our review of the record, including the videotape, we perceive no reason to disturb the Surrogate's findings, which are entitled to great weight inasmuch as they "hinged on the credibility of the witnesses" (*Matter of Thorne*, 108 AD2d 865, 865; *see Buckten*, 178 AD2d at 982-983).

We also reject objectant's contention that petitioner exercised undue influence over decedent in the making of the November 2007 will. A will contestant seeking to prove undue influence must show the exercise of "a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the [decedent] to do that which was against [his] free will" (*Kumstar*, 66 NY2d at 693 [internal quotation marks omitted]). Undue influence must be proved by evidence " 'of a substantial nature' " (*Matter of Zirinsky*, 43 AD3d 946, 948, *lv denied* 9 NY3d 815, quoting *Matter of Walther*, 6 NY2d 49, 54), e.g., by evidence "identifying the motive, opportunity and acts allegedly constituting the influence, as well as when and where such acts occurred" (*Matter of Walker*, 80 AD3d 865, 867, *lv denied* 16 NY3d 711 [internal quotation marks omitted]). Objectant failed to present such evidence.

Under the November 2007 will, petitioner was to receive only a joint tenancy interest in two small lots on Geneva Street in Bath (worth an estimated $5,650), whereas objectant was to receive the entire 95-acre family homestead and all of the real property and assets of decedent's real estate business. Furthermore, although the November 2007 will benefitted decedent's nieces and nephews in addition to objectant, the will does not constitute an "unexplained departure from a previously expressed intention of the decedent"

(*Walther*, 6 NY2d at 55). Rather, as decedent explained to others, including his sister and his lawyer, he simply wanted to benefit his nieces and nephews as well as his son, and gave good reasons for doing so. One of those reasons was that the parcels of land devised to the nieces and nephews had been jointly owned by decedent and his twin brother, who predeceased decedent and was the father of the nieces and nephews to whom the parcels were devised.

We further reject objectant's contention that the Surrogate improperly used CPLR 4519, i.e., the Dead Man's Statute, to preclude objectant from testifying about his observations of decedent's mental capacity. Such testimony was properly precluded under the statute, which is designed "to protect the estate of the [decedent] from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court" (*Matter of Wood*, 52 NY2d 139, 144).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

949

KA 08-02474

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY JEAN-PHILIPPE, ALSO KNOWN AS JEFFERY JEAN-PHILIPPE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 19, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree (three counts) and reckless endangerment in the first degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, a new trial is granted on counts one through three of the indictment, and count four of the indictment is dismissed without prejudice to the People to file or re-present to another grand jury any appropriate charge under that count.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of three counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and one count of reckless endangerment in the first degree (§ 120.25). We agree with defendant that he was denied a fair trial by Supreme Court's refusal to dismiss a juror who was seen falling asleep, albeit briefly, during trial. "A determination whether a juror is unavailable or grossly unqualified, and subsequently to discharge such a juror, is left to the broad discretion of the court" (*People v Punwa*, 24 AD3d 471, 472, *lv denied* 6 NY3d 779). However, "[i]t is well established that '[a] juror who has not heard all the evidence is grossly unqualified to render a verdict' " (*People v Hymes*, 70 AD3d 1371, 1372, *lv denied* 15 NY3d 774; *see People v Williams*, 202 AD2d 1004, 1004). Here, because there were no alternate jurors at the time, the dismissal of a juror would have required a mistrial. Thus, it appears that the court attempted to rehabilitate the juror at issue thereby avoiding a mistrial, by asking the juror if she "missed any relevant or important . . . parts . . . of the testimony" and if she "heard everything that [she] need[ed] to know thus far." The court's

efforts, however, were unavailing. Once it was determined that the juror had fallen asleep and missed some portion of the trial testimony, it was incumbent upon the court to dismiss that juror, even though that dismissal would have necessitated a mistrial.

We likewise agree with defendant that the evidence is legally insufficient to support his conviction for reckless endangerment in the first degree. Specifically, there is insufficient evidence that defendant's reckless conduct occurred "under circumstances evincing a depraved indifference to human life" (Penal Law § 120.25). Although the evidence at trial established that defendant acted recklessly when he led law enforcement on a chase in heavy traffic conditions where his speed frequently exceeded the posted speed limit, ran several red lights, and collided with several vehicles before being apprehended, that evidence is insufficient to establish that defendant acted with the requisite depraved indifference to human life to support a conviction of reckless endangerment in the first degree (*see generally People v Prindle*, 16 NY3d 768, 769-771). "[T]he statutory provision that a defendant act '[u]nder circumstances evincing a depraved indifference to human life' constitutes an additional requirement of the crime--beyond mere recklessness and risk--which in turn comprises both depravity and indifference" (*People v Suarez*, 6 NY3d 202, 214). Here, at most, the evidence adduced at trial was legally sufficient to support a finding of reckless endangerment in the second degree (§ 120.20). Because there must be a new trial based on the court's failure to dismiss the grossly unqualified juror (*cf. People v Cargill*, 70 NY2d 687, 689), we dismiss count four of the indictment without prejudice to the People to file or re-present to another grand jury any appropriate charge under that count (*see generally People v Pallagi*, 91 AD3d 1266, 1270).

Finally, we reject defendant's contention that counts one through three of the indictment, i.e., the three counts of criminal possession of a forged instrument in the second degree, are multiplicitous (*see generally People v Okafore*, 72 NY2d 81, 85-88). In light of our determination, we do not address defendant's remaining contentions.

All concur except SCUDDER, P.J., who dissents in part and votes to modify in accordance with the following Memorandum: I agree with the majority's conclusion that the evidence is legally insufficient to support the conviction of reckless endangerment in the first degree (Penal Law § 120.25; *see generally People v Prindle*, 16 NY3d 768, 769-771). I also agree with the majority that the judgment with respect to the remaining counts charging defendant with three counts of criminal possession of a forged instrument in the second degree (§ 170.25) should be reversed and a new trial granted on those counts because a juror who was seen sleeping was thereby grossly unqualified to render a verdict (*see People v Hymes*, 70 AD3d 1371, 1372, *lv denied* 15 NY3d 774). I nevertheless respectfully disagree with the majority's conclusion that we should dismiss count four, i.e., reckless endangerment in the first degree, with leave to file, or re-present to another grand jury, any appropriate charge. In my view, we should modify the judgment with respect to count four by reducing the conviction to the lesser included offense of reckless endangerment in

the second degree (Penal Law § 120.20), inasmuch as the evidence is legally sufficient to support the lesser but not the greater offense (*see* CPL 470.15 [2] [a]). The evidence established that defendant led law enforcement personnel on a high-speed chase during which he disobeyed several traffic control devices, drove in the wrong direction on the roadway and was involved in multiple collisions.

We are required, upon reversing or modifying a judgment, to "take or direct such corrective action as is necessary and appropriate both to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal or modification and to protect the rights of the respondent" (CPL 470.20; *see People v Rodriguez*, 18 NY3d 667, 670-671). As noted, the majority dismisses count four of the indictment and grants leave to the People to, inter alia, file any appropriate charge. However, it is clear that the lesser included offense of reckless endangerment in the second degree is not an appropriate charge because defendant's double jeopardy rights would be violated if he were charged with that offense inasmuch as "the lesser offense . . . requires no proof beyond that which is required for conviction of the greater" (*People v Biggs*, 1 NY3d 225, 230 [internal quotation marks omitted]; *see* US Const 5th Amend; NY Const, art I, § 6; CPL 40.20). "At its core, double jeopardy precludes 'the government from prosecuting a [defendant] for the same offense after an acquittal or a conviction' " (*People v Gause*, 19 NY3d 390, 394, quoting *Matter of Suarez v Byrne*, 10 NY3d 523, 532, *rearg denied* 11 NY3d 753).

I submit that, because CPL 470.20 provides that the "particular corrective action to be taken or directed is governed *in part* by the following rules," we may fashion corrective action that is not specified in CPL 470.20 that both rectifies the injustice to defendant and protects the rights of the People (*see Rodriguez*, 18 NY3d at 671). I note that in *People v Pallagi* ([appeal No. 1] 91 AD3d 1266, 1267-1268), defendant contended both that there was a trial error that deprived her of a fair trial and legally insufficient evidence to support the conviction, and we therefore dismissed the sole count of the indictment, charging defendant with grand larceny in the fourth degree (Penal Law § 155.30 [1]), with leave to file any appropriate charge. As I noted in my dissent (*Pallagi*, 91 AD3d at 1271-1272), the corrective actions with respect to that count were in conflict, i.e., the trial error required that a new trial be granted (*see* CPL 470.20 [1]), and the insufficient evidence permitted reduction of the count to a lesser included offense (*see* CPL 470.15 [2] [a]) or required dismissal of the count (*see* CPL 470.20 [2]). Here, however, defendant is convicted of not one count, but of four counts. Notably, defendant recognizes that the permissible corrective actions are in conflict and thus contends that he should be granted a new trial on counts one, two and three, and that count four should be dismissed or reduced to the lesser included offense (*see* CPL 470.20).

I would therefore modify the judgment by reducing the conviction under count four to the lesser included offense of reckless endangerment in the second degree (*see* CPL 470.15 [2] [a]; *see e.g. People v Brink*, 78 AD3d 1483, 1483, *lv denied* 16 NY3d 742,

reconsideration denied 16 NY3d 828), and I would remit the matter to Supreme Court for resentencing on that count (*see* CPL 470.20 [4]). I otherwise agree with the majority that the judgment insofar as it convicted defendant of counts one, two and three should be reversed and that a new trial should be granted on those counts. In my view, that corrective action serves both statutory mandates, i.e., to rectify the respective injustices to defendant and to protect the rights of the People.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1087

CA 12-00901

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

IN THE MATTER OF SAMUAL J. CIVILETTO, AS EXECUTOR OF THE ESTATE OF TERESA DIMINO, ALSO KNOWN AS THERESA DIMINO, DECEASED, PETITIONER-APPELLANT-RESPONDENT.

MEMORANDUM AND ORDER

PHILIP S. INFANTINO, RESPONDENT-RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Surrogate's Court, Niagara County (Matthew J. Murphy, III, S.), entered November 10, 2011. The order denied in part the motion of petitioner for summary judgment.

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

Memorandum: Petitioner, as executor of the estate of Teresa DiMino, also known as Theresa DiMino (decedent), appeals and respondent cross-appeals from an order that granted in part and denied in part petitioner's motion for summary judgment on the petition. As relevant to this appeal and cross appeal, petitioner alleged that, prior to decedent's death, respondent withdrew more than his moiety from a money market account and a savings account, both of which were jointly held by respondent and decedent. Petitioner also alleged that respondent was improperly in possession of jewelry that belongs to decedent's estate. Surrogate's Court granted that part of petitioner's motion with respect to the jewelry and denied that part of the motion with respect to the joint accounts. Respondent does not contend on his cross appeal that the Surrogate erred in granting that part of the motion with respect to a certain refund check and thus is deemed to have abandoned that contention (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Turning first to petitioner's appeal, we conclude that the Surrogate properly determined that there are issues of fact regarding respondent's withdrawals from the joint accounts that preclude summary judgment. "The creation of a joint account vests in each tenant a present unconditional property interest in an undivided one half of the money deposited, regardless of who puts the funds on deposit"

(*Parry v Parry*, 93 AD2d 989, 990; *see Bailey v Bailey*, 48 AD3d 1123, 1124). Where, however, a joint tenant withdraws more than his or her moiety, the other tenant has an absolute right to recover such excess (*see Matter of Kleinberg v Heller*, 38 NY2d 836, 842 [Fuchsberg, J., concurring]). Although the death of a joint tenant does not divest his or her estate of the right to recover the amount of the excess withdrawal, the withdrawing tenant may successfully resist recovery by the estate if he or she can establish that the now deceased joint tenant had consented to the withdrawal (*see id.* at 842-843). In this case, the Surrogate properly concluded that there were issues of fact whether decedent had consented to or otherwise ratified respondent's withdrawals from the money market and savings accounts.

Respondent contends on his cross appeal that the Surrogate erred in granting that part of petitioner's motion with respect to the jewelry because decedent had made an inter vivos gift of the jewelry to him. We reject that contention, inasmuch as respondent failed to offer the requisite clear and convincing evidence of decedent's intent to make an inter vivos gift (*see Matter of Monks*, 247 AD2d 922, 922-923; *see also Matter of Szabo*, 10 NY2d 94, 98).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1088

CA 12-00773

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

MARK GARDNER AND JOANNE GARDNER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JONATHAN C. PERRINE, ET AL., DEFENDANTS,
AND SEALAND CONTRACTORS CORP.,
DEFENDANT-RESPONDENT.

ROSE & REH, LLC, VICTOR, MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

LAW OFFICES OF LAURIE G. OGDEN, ESQ., ROCHESTER (GARY J. O'DONNELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered December 15, 2011 in a personal injury action. The order granted the motion of defendant Sealand Contractors Corp. for summary judgment dismissing 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 against defendant Sealand Contractors Corp. is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Mark Gardner (plaintiff) when he was struck by a vehicle while attempting to repair a dislodged water valve cover on North Main Street in Canandaigua. At the time of the accident, plaintiff was an engineer employed by the New York State Department of Transportation and was overseeing the repaving work of Sealand Contractors Corp. (defendant). Plaintiff noticed the dislodged valve cover in the street and contacted a supervisor at defendant to repair the cover. According to plaintiff, the supervisor indicated that all of defendant's crews had left for the day and asked plaintiff to take care of the problem. Plaintiff parked his vehicle partially on the road and turned on the vehicle's emergency light. He attempted to fix the cover but realized that he needed a tool in the trunk of his vehicle to do so. While standing behind his vehicle retrieving the tool, plaintiff was struck by a passing vehicle.

Defendant moved for summary judgment seeking, inter alia, dismissal of the complaint against it on the ground that, even if it was negligent, its negligence provided only the occasion or

opportunity for the accident and was not a proximate cause of the accident. We conclude that Supreme Court erred in granting the motion. "To establish a prima facie case, plaintiff must show that 'defendant's negligence was a substantial cause of the events which produced the injury' " (*Kush v City of Buffalo*, 59 NY2d 26, 32-33). "An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant . . . When, however, the intervening act is a natural and foreseeable consequence of a circumstance created by defendant, liability will subsist" (*id.* at 33). "[T]hese issues generally are for the [factfinder] to resolve" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784).

Here, defendant failed to meet its initial burden of establishing that the intervening acts of plaintiff in positioning himself in the middle of the road, and the third party striking plaintiff with his vehicle, were unforeseeable and extraordinary acts. The deposition testimony and the photographs of the scene of the accident established that the water valve was in the middle of the driving lane, not in the shoulder of the street, so that it was necessary for plaintiff to stand in the middle of the road to fix the displaced cover. Plaintiff testified that he positioned his vehicle partially in the road to protect himself while at the same time giving motorists room to maneuver around him. It was therefore foreseeable that plaintiff would be standing in the road while attempting to fix the defect. It was also foreseeable that there was a risk to plaintiff of being struck by an inattentive driver as he attempted to fix the displaced cover (*see White v Diaz*, 49 AD3d 134, 140).

The court's reliance on *Barnes v Fix* (63 AD3d 1515, *lv denied* 13 NY3d 716) was misplaced. In that case, the plaintiff wife (hereafter, the plaintiff) was rear-ended by a vehicle driven by Harrison W. Caleb, Jr., but was not injured in that accident (*id.* at 1515-1516). Caleb moved his vehicle to the side of the road, while the plaintiff left her vehicle in the road and stood outside it to wait for the police (*id.* at 1515). A vehicle driven by one of the defendants, Dean E. Fix, slid out of control, and the plaintiff attempted to reenter her vehicle but was unable to do so and was injured when Fix's vehicle struck her vehicle (*id.* at 1515-1516). We held that Caleb was not liable for injuries sustained by the plaintiff in the second accident because his "negligence, if any, 'did nothing more than to furnish the condition or give rise to the occasion by which the injury was made possible and which was brought about by the intervention of a new, independent and efficient cause' " (*id.* at 1516, quoting *Gralton v Oliver*, 277 App Div 449, 452, *affd* 302 NY 864). The record on appeal in *Barnes* establishes that, as in *Gralton*, the plaintiff's vehicle was stopped in no different a position after the first accident, which was at or near a stop sign, i.e., a normal or lawful position and not a position of peril (*see Gralton*, 277 App Div at 450, 452; *see also Ventricelli v Kinney Sys. Rent A Car*, 45 NY2d 950, 952, *mot to amend remittitur granted* 46 NY2d 770). In contrast here, the alleged

negligent act of defendant placed plaintiff in an unsafe position, i.e., standing in the road with vehicles driving by him (*see Betancourt v Manhattan Ford Lincoln Mercury,* 195 AD2d 246, 247-248, *appeal dismissed* 84 NY2d 932).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1097

KA 11-01409

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK A. YOUNGS, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (AMANDA M. CHAFEE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered June 27, 2011. The judgment convicted defendant, upon a nonjury verdict, of rape 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, following a nonjury trial, of rape in the first degree (Penal Law § 130.35 [3]) and endangering the welfare of a child (§ 260.10 [1]), defendant contends that he was denied effective assistance of counsel as a result of defense counsel's failure to make a motion to dismiss the indictment based on the denial of his statutory right to a speedy trial (*see* CPL 30.30 [1] [a]). The record on appeal is inadequate to enable us to determine whether such a motion would have been successful and whether defense counsel's failure to make that motion deprived defendant of meaningful representation (*see People v Obert*, 1 AD3d 631, 632, *lv denied* 2 NY3d 764), and thus defendant's contention is appropriately raised by way of a motion pursuant to CPL article 440 (*see id.*; *see also People v Oliver*, 24 AD3d 1305, 1305, *lv denied* 6 NY3d 836). To the extent that we reached a contrary result in *People v Manning* (52 AD3d 1295), that case is no longer to be followed.

Defendant asserts that certain exhibits admitted in evidence at trial, i.e., photographs, could not be located for purposes of this appeal, thereby precluding meaningful appellate review. Those exhibits, however, were provided to us upon our request and thus defendant's contention is moot. We reject defendant's contention that New York lacked criminal jurisdiction (*see* CPL 20.20). Preliminarily, we note that preservation of that contention is not required (*see People v Carvajal*, 6 NY3d 305, 311-312). We nevertheless conclude that the People provided enough evidence to establish that "the

alleged conduct or some consequence of it must have occurred within the State" (*People v McLaughlin*, 80 NY2d 466, 471).

Defendant's contention that the evidence is legally insufficient to support the conviction of rape is not preserved for our review because defendant failed to renew his motion for a trial order of dismissal after presenting proof (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's contention that the search warrant was stale is not preserved for our review (*see People v Martinez*, 39 AD3d 1246, 1246-1247, *lv denied* 9 NY3d 878). Likewise, defendant failed to preserve for our review his contention that County Court erred in refusing to consider lesser included offenses (*see People v Buckley*, 75 NY2d 843, 846). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1101

KA 09-01630

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY STACHNIK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered April 28, 2009. 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 previously imposed upon his 2007 conviction of grand larceny in the third degree (Penal Law former § 155.35) and sentencing him to an indeterminate term of imprisonment. In appeal No. 2, defendant appeals from a 2009 judgment convicting him upon his plea of guilty of grand larceny in the third degree (*id.*) and sentencing him to an indeterminate term of imprisonment that was to run concurrently with the sentence imposed in appeal No. 1. County Court also ordered that defendant pay restitution.

Defendant contends in appeal No. 1 that he was denied effective assistance of counsel with regard to his admission to a violation of probation. Specifically, defendant contends that defense counsel was ineffective because he initially permitted defendant to agree to an illegal sentence and because, despite the court's vacatur of the illegal sentence the next day, he did not inform defendant that defendant ultimately agreed to accept the maximum permissible term of imprisonment. To the extent that it survives his admission (*see People v Allick*, 72 AD3d 1615, 1616), we reject defendant's contention. Inasmuch as the court vacated the illegal sentence, defendant failed to establish that he was prejudiced by the initial imposition of that sentence (*see generally People v Ennis*, 11 NY3d 403, 412, *cert denied* ___ US ___, 129 S Ct 2383; *People v Lott*, 55 AD3d 1274, 1275, *lv denied* 11 NY3d 898, *reconsideration denied* 12 NY3d

760). Further, the record does not support defendant's contention that he was unaware that he agreed to the maximum permissible sentence. We conclude that "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of representation, reveal that [defense counsel] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147). To the extent that defendant contends that he was denied effective assistance of counsel because defense counsel gave him incorrect information and advice in an off-the-record discussion, that contention involves matters outside the record on appeal and must be raised by way of a motion pursuant to CPL article 440 (*see People v Gianni*, 94 AD3d 1477, 1477, *lv denied* 19 NY3d 973; *People v Balenger*, 70 AD3d 1318, 1318, *lv denied* 14 NY3d 885).

Defendant next contends in appeal No. 1 that he was denied the right to be heard and the right to make a statement pursuant to CPL 410.70 before he admitted to the violation of probation. Defendant failed to preserve that contention for our review (*see Gianni*, 94 AD3d at 1477; *see also People v Randall*, 48 AD3d 1080, 1080; *see generally People v Ebert*, 18 AD3d 963, 964), and in any event defendant's contention is without merit (*see generally People v Oskroba*, 305 NY 113, 117, *rearg denied* 305 NY 696; *People v Matos*, 28 AD3d 1120, 1121-1122). Thus, we also reject defendant's alternative contention that defense counsel's alleged failure to preserve that issue for our review rendered him ineffective (*see generally People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922).

Defendant further contends in appeal No. 1 that the court abused its discretion in failing to order an updated presentence report prior to sentencing him for the violation of probation. Defendant did not request that the court order an updated presentence report or otherwise object to sentencing in the absence of such a report. Thus, defendant's contention is not preserved for our review (*see Gianni*, 94 AD3d at 1478; *People v Carey*, 86 AD3d 925, 925, *lv denied* 17 NY3d 814; *People v Obbagy*, 56 AD3d 1223, 1223, *lv denied* 11 NY3d 928; *People v Pomales*, 37 AD3d 1098, 1098, *lv denied* 8 NY3d 949). In any event, that contention is without merit. At the time it sentenced defendant on the violation of probation, the court had before it the declaration of delinquency as well as information that defendant had been arrested and was facing new grand larceny charges, which "constituted the functional equivalent of an updated [presentence] report" (*People v Fairman*, 38 AD3d 1346, 1347, *lv denied* 9 NY3d 865 [internal quotation marks omitted]; *see People v Orlowski*, 292 AD2d 819, 819, *lv denied* 98 NY2d 653). "Further, inasmuch as the same judge presided over both the original proceeding[] and the revocation proceeding[], '[t]he court was fully familiar with any changes in defendant's status, conduct or condition since the original sentencing' " (*Gianni*, 94 AD3d at 1478).

With regard to appeal No. 2, we reject defendant's contention that his waiver of the right to appeal was not knowingly, intelligently, and voluntarily entered (*see generally People v Lopez*, 6 NY3d 248, 256). We agree with defendant, however, that the court

erred in imposing a surcharge of 10% of the total amount of restitution ordered rather than the surcharge of 5% that is directed by Penal Law § 60.27 (8). Initially, we note that defendant's valid waiver of the right to appeal does not preclude our review of that issue because "[a] defendant cannot be deemed to have waived his right to be sentenced as provided by law" (*People v Gahrey M.O.*, 231 AD2d 909, 910 [internal quotation marks omitted]; *see People v Watson*, 197 AD2d 880, 880). Concerning the merits, an additional surcharge of 5% is authorized only "[u]pon the filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution . . . in a particular case exceeds 5% of the entire amount of the payment" (Penal Law § 60.27 [8]). In this case, "the record does not contain such an affidavit, and there is no showing or assertion that one was filed. Thus, the imposition of the additional 5% surcharge was not authorized," and we therefore modify the judgment in appeal No. 2 accordingly (*Gahrey M.O.*, 231 AD2d at 910).

Finally, with respect to appeal Nos. 1 and 2, defendant contends that the sentences are unduly harsh and severe. Insofar as defendant's contention relates to the sentence imposed in appeal No. 2, "[d]efendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence" (*People v Harris*, 94 AD3d 1484, 1485, *lv denied* 19 NY3d 961; *see Lopez*, 6 NY3d at 255-256; *People v Gordon*, 89 AD3d 1466, 1466, *lv denied* 18 NY3d 957). The bargained-for sentence in appeal No. 1 is not unduly harsh or severe.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1102

KA 10-00393

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY STACHNIK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered June 15, 2009. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the surcharge to 5% of the amount of restitution and as modified the judgment is affirmed.

Same Memorandum as in *People v Stachnik* ([appeal No. 1] ___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1104

CAF 11-01187

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

IN THE MATTER OF GENA S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KAREN M., RESPONDENT-APPELLANT.

JACQUELINE M. GRASSO, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.
(APPEAL NO. 1.)

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA, APPELLANT PRO SE.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 19, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of Gena S. to petitioner.

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, Genesee County, for further proceedings in accordance with the following Memorandum: Respondent mother is the mother of Gena S., Misty S. and Shaundra D. (children). In appeal Nos. 1 through 3, the mother appeals from respective orders of disposition that, inter alia, terminated her parental rights with respect to each child on the ground of permanent neglect and freed each child for adoption (dispositional orders). In appeal Nos. 4 through 6, the mother appeals from respective orders determining that the continuation of the permanency goal of placement for adoption is in the best interests of each child (permanency orders). Gena S. appeals from the orders relating to her in appeal Nos. 1 and 4.

We address the mother's appeals first and note at the outset that her appeals from the permanency orders (appeal Nos. 4 through 6) must be dismissed. "Inasmuch as her parental rights had been terminated, [the mother] lacked standing to participate in the permanency hearing conducted by [Family Court]. [The mother] thus is not aggrieved by the permanency hearing orders and lacks standing to pursue her appeals

from the orders in [appeal Nos. 4 through 6]" (*Matter of April C.*, 31 AD3d 1200, 1201).

In her appeals from the dispositional orders (appeal Nos. 1 through 3), the mother contends that the court erred in refusing to approve her plan for the children to live with a friend of hers while the mother was incarcerated. That contention lacks merit inasmuch as the record establishes that petitioner, not the court, determined that the mother's friend was not a viable resource for the children. We further reject the mother's contention that the court improperly determined that she failed to plan for the future of the children, although she was able to do so (*see generally* Social Services Law § 384-b [7] [a]; *Matter of Star Leslie W.*, 63 NY2d 136, 142; *Matter of John B. [Julie W.]*, 93 AD3d 1221, 1222, *lv denied* 19 NY3d 806; *Matter of Giovanni K.*, 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715; *cf. Matter of Rachael N. [Christine N.]*, 70 AD3d 1374, 1374, *lv denied* 15 NY3d 708). Here, the record establishes that the mother's only viable plan for the children was that they remain in foster care until she is released from incarceration. The failure of an incarcerated parent to provide any "realistic and feasible" alternative to having the children remain in foster care until the parent's release from prison, however, supports a finding of permanent neglect (*Matter of Jamel Raheem B. [Vernice B.]*, 89 AD3d 933, 935, *lv denied* 18 NY3d 808; *see* § 384-b [7] [c]; *Matter of "Female" V.*, 21 AD3d 1118, 1119, *lv denied* 6 NY3d 708, 6 NY3d 709; *see also Matter of Gregory B.*, 74 NY2d 77, 90, *rearg denied* 74 NY2d 880). Contrary to the mother's suggestion, this is not a case in which her prolonged separation from the children was "due to litigation initiated or necessitated by [petitioner's] actions" (*Matter of Sanjivini K.*, 47 NY2d 374, 381).

We next address the appeals of Gena S. With regard to her appeal from the dispositional order, Gena contends that the court should not have terminated the mother's parental rights with respect to her. As stated by the attorney for the child representing Gena (AFC), throughout the course of this matter, "Gena's wishes could not [have been] any clearer; she consistently stated that she wants to be reunited with the mother." Gena, who was born in 1997, was approximately one month shy of her 14th birthday when the dispositional order at issue was entered on May 19, 2011, and her consent to adoption would have been required had she been 14 years old at that time (*see* Domestic Relations Law § 111 [1] [a]). Gena is now over 15 years old and, according to the AFC, she still refuses to consent to adoption. The AFC contends that Gena "has no real bond with anyone" except for the mother and Gena's sisters, and that it is highly unlikely that Gena will ever be adopted.

We may consider those new facts and allegations "to the extent [that] they indicate that the record before us is no longer sufficient" to determine whether termination of respondent's parental rights is in Gena's best interests (*Matter of Michael B.*, 80 NY2d 299, 318; *see Matter of Nichols v Nichols-Johnson*, 78 AD3d 1679, 1680; *see generally Matter of Samuel Fabien G.*, 52 AD3d 713, 714). Inasmuch as it is not clear on the record before us that termination of the

mother's parental rights with respect to Gena is in Gena's best interests, we remit the matter to Family Court for a new dispositional hearing to determine the best interests of that child. We note that the conflict between the result with respect to Gena and the results with respect to her sisters is of no moment inasmuch as termination has been upheld with respect to younger siblings in similar circumstances (*see Matter of Marc David D.*, 20 AD3d 565, 567; *Matter of Dominique A.W.*, 17 AD3d 1038, 1039, *lv denied* 5 NY3d 706).

With regard to Gena's appeal from the permanency order, we note that we have held that a permanency goal of placement for adoption is not always in the best interests of a child over the age of 14 (*see Matter of Lavalle W. [Halvorsen]*, 88 AD3d 1300, 1300-1301; *Matter of Sean S. [Halvorsen]*, 85 AD3d 1575, 1576). In view of that precedent, and the uncertainty as to what an appropriate alternative permanency goal may now be for Gena, we remit the matter to Family Court for the determination of a new permanency goal appropriate for her.

In light of our determination, we need not address Gena's contention concerning the court's refusal to grant posttermination contact between her and the mother.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1105

CAF 11-01188

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

IN THE MATTER OF MISTY S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KAREN M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILD, GENESEO, FOR MISTY S.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 19, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of Misty S. to petitioner.

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

Same Memorandum as in *Matter of Gena S.* ([appeal No. 1] ___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1106

CAF 11-01189

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

IN THE MATTER OF SHAUNDRA D.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KAREN M., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

ROBERT A. DINIERI, ATTORNEY FOR THE CHILD, CLYDE, FOR SHAUNDRA D.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 19, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of Shaundra D. to petitioner.

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

Same Memorandum as in *Matter of Gena S.* ([appeal No. 1] ___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1107

CAF 11-01190

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

IN THE MATTER OF GENA S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KAREN M., RESPONDENT-APPELLANT.

JACQUELINE M. GRASSO, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.
(APPEAL NO. 4.)

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA, APPELLANT PRO SE.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 19, 2011 in a proceeding pursuant to Family Court Act article 10-A. The order, among other things, adjudged that the permanency goal for Gena S. is placement for adoption.

It is hereby ORDERED that said appeal by respondent is unanimously dismissed, the order is reversed on the law without costs and the matter is remitted to Family Court, Genesee County, for further proceedings in accordance with the same Memorandum as in *Matter of Gena S.* ([appeal No. 1] ___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1108

CAF 11-01191

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

IN THE MATTER OF MISTY S.

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

KAREN M., RESPONDENT-APPELLANT.
(APPEAL NO. 5.)

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILD, GENESEO, FOR MISTY S.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 19, 2011 in a proceeding pursuant to Family Court Act article 10-A. The order, among other things, adjudged that the permanency goal for Misty S. is placement for adoption.

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

Same Memorandum as in *Matter of Gena S.* ([appeal No. 1] ___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1109

CAF 11-01271

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

IN THE MATTER OF SHAUNDRA D.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KAREN M., RESPONDENT-APPELLANT.
(APPEAL NO. 6.)

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

CHARLES N. ZAMBITO, COUNTY ATTORNEY, BATAVIA (PAULA A. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

ROBERT A. DINIERI, ATTORNEY FOR THE CHILD, CLYDE, FOR SHAUNDRA D.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 19, 2011 in a proceeding pursuant to Family Court Act article 10-A. The order, among other things, adjudged that the permanency goal for Shaundra D. is placement for adoption.

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

Same Memorandum as in *Matter of Gena S.* ([appeal No. 1] ___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1116

CA 12-00380

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

STEPHEN ALIKES AND JANET ALIKES,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ANDREW GRIFFITH, DOING BUSINESS AS ANDY GRIFFITH REALTOR, RE/MAX PROPERTIES AND SHARI A. REALS,
DEFENDANTS-RESPONDENTS.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (J. MICHAEL WOOD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (PAUL A. SANDERS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered November 23, 2011. The order granted the motion of defendants for summary judgment dismissing the second amended complaint.

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

Memorandum: Plaintiffs commenced this action against defendant Shari A. Reals, their former real estate agent, and defendants Andrew Griffith, doing business as Andy Griffith Realtor (Griffith), and Re/Max Properties (Re/Max) seeking damages for, inter alia, defendants' alleged failure to procure a buyer for plaintiffs' residential property. In their second amended complaint, plaintiffs asserted causes of action for breach of contract, negligent hiring and supervision, fraud and breach of fiduciary duty, and they sought, inter alia, compensatory and punitive damages. Defendants moved for summary judgment dismissing the second amended complaint. Supreme Court properly granted the motion.

On December 29, 2006, plaintiff Stephen Alikes, a retired attorney who had practiced law for over 45 years, and his wife, plaintiff Janet Alikes, a retired paralegal specializing in real estate law and a former licensed real estate broker, entered into an "Exclusive Right to Sell" listing agreement for the sale of their New York home (house) with Al Co Properties (Al Co). Reals, who was associated with Al Co at that time, was the real estate agent responsible for listing plaintiffs' property. According to plaintiffs, in late January or February 2007, Reals verbally informed

them that prospective buyers "were going to make an offer" to purchase the house. Plaintiffs allege that, as a result of those representations, they decided to buy a home in Arkansas and to move there, which they did in February 2007. In her deposition, Janet Alikes admitted that plaintiffs did not receive an "enforceable" or written purchase offer for the house before they bought the home in Arkansas and moved there.

In March 2007, Reals left Al Co and then became associated with Griffith and Re/Max. Reals allegedly brought plaintiffs' listing with her to Re/Max, and then presented plaintiffs with a written purchase offer for the house that same month. Plaintiffs issued a counteroffer and were informed by Reals that the buyers had conditionally accepted their counteroffer. It was subsequently determined, after a disciplinary proceeding brought against Reals by the New York State Department of State, Division of Licensing Services, that Reals had fabricated the purchase offer and a home inspection report. Plaintiffs subsequently commenced this action.

Contrary to plaintiffs' contention, we conclude that the court properly granted that part of defendants' motion with respect to the cause of action for fraud. "To establish a prima facie case for fraud, plaintiffs would have to prove that (1) defendant[s] made a representation as to a material fact; (2) such representation was false; (3) defendant[s] intended to deceive plaintiff[s]; (4) plaintiff[s] believed and justifiably relied upon the statement and [were] induced by it to engage in a certain course of conduct; and (5) as a result of such reliance plaintiff[s] sustained pecuniary loss" (*Ross v Louise Wise Servs., Inc*., 8 NY3d 478, 488 [internal quotation marks omitted]). Here, plaintiffs were sophisticated parties who admittedly knew that a real estate purchase contract must be in writing in order for it to be binding and enforceable (*see* General Obligations Law § 5-703 [2]). Thus, we agree with defendants that plaintiffs could not justifiably rely on the verbal statements of Reals that the alleged prospective buyers were "going to make an offer" (*see Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639). Indeed, plaintiffs' alleged reliance upon the oral statements of Reals was unreasonable as a matter of law (*see Friedler v Palyompis*, 44 AD3d 611, 612). Moreover, even assuming, arguendo, that plaintiffs' alleged reliance on Reals' statements was justified, we conclude that those statements amounted to "speculation and expressions of hope for the future" that are not "actionable representations of fact" (*Albert Apt. Corp. v Corbo Co.*, 182 AD2d 500, 501, *lv denied* 80 NY2d 924). We also conclude that plaintiffs did not in fact sustain damages as a result of those statements or as a result of the fabricated purchase offer.

We reject plaintiffs' further contention that the court erred in granting those parts of defendants' motion with respect to the breach of fiduciary duty, breach of contract and negligent hiring and supervision causes of action. An essential element of each of those causes of action is that a plaintiff has sustained damages that are proximately caused by the alleged misconduct (*see JP Morgan Chase v J.H. Elec. of N.Y., Inc*., 69 AD3d 802, 803; *Davidovici v Fritzson*, 49

AD3d 488, 489-490; *R.M. Newell Co., Inc. v Rice*, 236 AD2d 843, 844, *lv denied* 90 NY2d 807). Here, plaintiffs allege that they sustained damages as a result of having to pay "carrying costs" associated with simultaneously owning and maintaining two homes. Based on the undisputed facts of this case, however, there is no causal relationship between the alleged misconduct under any of the causes of action and any damages sustained by plaintiffs (*see Gall v Summit, Rovins & Feldesman*, 222 AD2d 225, 226, *lv denied* 88 NY2d 919). In any event, we note that such consequential damages are not ordinarily recoverable in actions arising from the breach of a real estate purchase contract (*see Di Scipio v Sullivan*, 30 AD3d 677, 678; *Tator v Salem*, 81 AD2d 727, 728).

Finally, in light of our determination that the second amended complaint must be dismissed, there is no need to address plaintiffs' contentions that they are entitled to punitive damages and an award of attorneys' fees.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1118

CA 12-00315

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

JOHN JACOBSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LEEMILTS PETROLEUM, INC., DOING BUSINESS AS
GETTY, ET AL., DEFENDANTS,
AND BOBBY PETROLEUM CORP., DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (THOMAS A. DIGATI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF JOHN J. FROMEN, ESQ., BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered June 2, 2011 in a personal injury action. The order, among other things, granted plaintiff leave to amend his summons and 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 he sustained when a fuel pump suppression system at a gas station (premises) suddenly activated, thereby causing caustic, fire-retardant chemicals to be released onto him. In his summons and complaint, plaintiff named various unknown defendants as "John Doe" in the event that the named defendants were not the owners or operators of the premises or were not responsible for the fuel pump suppression system. After the complaint was filed, plaintiff's attorney was advised by an insurance company that defendant Bobby Petroleum Corp. (Bobby) was the operator of the premises. After the relevant statute of limitations expired, plaintiff moved by order to show cause for, inter alia, leave to amend his summons and complaint to substitute Bobby for the John Doe defendant identified as being responsible for the operation of the premises. Supreme Court granted plaintiff's motion.

Bobby contends that the court erred in relying upon CPLR 1024, concerning the commencement of an action against an unknown party, as the basis for granting plaintiff's motion because that statute was referenced only in plaintiff's reply papers. We reject that contention. It is well settled that contentions raised for the first time in reply papers are not properly before the court (*see Dipizio v*

Dipizio, 81 AD3d 1369, 1370), but that was not the case here. Although plaintiff's original motion papers did not specifically refer to CPLR 1024, those papers stated that plaintiff was seeking to substitute Bobby in place of the relevant John Doe named in the complaint. Bobby, therefore, had notice that plaintiff was relying on that statute before plaintiff's reply. Contrary to Bobby's further contention, plaintiff demonstrated that he made "genuine effort[s] to ascertain [Bobby's] identit[y] prior to the running of the [s]tatute of [l]imitations" (*Luckern v Lyonsdale Energy Ltd. Partnership*, 229 AD2d 249, 253 [internal quotation marks omitted]). Bobby also contends that the description of John Doe in the summons and complaint for which it was substituted was inadequate inasmuch as it did not provide Bobby with the requisite notice that it was the intended defendant (*see Lebowitz v Fieldston Travel Bur.*, 181 AD2d 481, 482). That contention is raised for the first time on appeal and therefore is not properly before us (*see Murphy v Graham*, 98 AD3d 833, 834; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

In light of our determination that CPLR 1024 applies, we see no need to address Bobby's contention concerning the relation-back doctrine.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1137

CA 12-00644

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

MARK A. PRINE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ADAM M. SANTEE, SIMON M. COAL-ALOOR,
DEFENDANTS-RESPONDENTS,
AND ANNA TORRES, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JILL Z. FLORKOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF JOHN J. FROMEN, ESQ., BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (SCOTT R. ORNDOFF OF COUNSEL), FOR DEFENDANT-RESPONDENT ADAM M. SANTEE.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 6, 2011 in a personal injury action. The order, insofar as appealed from, denied the cross motion of defendant Anna Torres for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the cross motion of defendant Anna Torres is granted and the amended complaint and all cross claims are dismissed against her.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a four-vehicle-chain-reaction accident. Supreme Court erred in denying the cross motion of Anna Torres (defendant) for summary judgment dismissing the amended complaint and all cross claims against her. Defendant, the driver of the first of the four vehicles involved, testified at her deposition that she had her foot on the brake and that her vehicle had come to a complete stop at a red light, approximately "half of a car" length behind the vehicle in front of her, when it was rear-ended by the second vehicle in the chain. That vehicle was owned and operated by defendant Simon M. Coal-Aloor, who testified at his deposition that his vehicle was also stopped in the line of vehicles at the traffic signal, with 10 to 15 feet between the front of his vehicle and the rear of defendant's vehicle, when he was rear-ended and propelled into the rear of defendant's vehicle by plaintiff's vehicle, which was third in the chain. Plaintiff in turn testified at his deposition that the Coal-Aloor vehicle immediately in front of him came to a "sudden stop."

Plaintiff was able to bring his vehicle to a safe stop, but it was then rear-ended by a vehicle owned and operated by defendant Adam M. Santee, which was fourth in the chain. We conclude that defendant met her burden of establishing her entitlement to judgment as a matter of law (*see Piazza v D'Anna*, 6 AD3d 1161, 1162; *Betts v Marecki*, 247 AD2d 916, 916-917), and plaintiff and the other defendants failed to raise a triable issue of fact (*see Zielinski v Van Pelt* [appeal No. 2], 9 AD3d 874, 875-876). Here, defendant met her initial burden by establishing that she had brought her vehicle to a safe stop and that she did not rear-end or strike any vehicle. Plaintiff and the other defendants failed to raise any inference of negligence on the part of defendant with respect to any of the rear-end collisions that occurred behind defendant after she had brought her vehicle to a stop.

All concur except FAHEY and VALENTINO, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm the order denying the cross motion of Anna Torres (defendant) for summary judgment dismissing the amended complaint and any cross claims against her. In our view, defendant failed to meet her initial burden of establishing that she did not engage in conduct that was a proximate cause of the accident (*see Negros v Brown*, 15 AD3d 994, 995; *see also Hazzard v Burrowes*, 95 AD3d 829, 830-831; *Aguilar v Alonzo*, 66 AD3d 927, 928; *Zielinski v Van Pelt* [appeal No. 2], 9 AD3d 874, 876). The papers submitted by defendant do not demonstrate that defendant " 'maintain[ed] a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the [vehicle in front of her]' " (*Napolitano v Galletta*, 85 AD3d 881, 882), nor do those papers establish that defendant had brought her vehicle to a safe stop when it was rear-ended immediately before the accident (*see Zielinski*, 9 AD3d at 875-876). Here, although defendant did not make contact with the vehicle in front of her, the deposition testimony she submitted in support of her cross motion is silent as to the nature of her stop, i.e., whether it was sudden or controlled. Moreover, defendant did not explain the circumstances under which she stopped her automobile by submitting an affidavit in support of her motion clarifying or enhancing her deposition testimony.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1145

CA 12-00632

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

IN THE MATTER OF JAMES FRASCATI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

IRONDEQUOIT NIGHTSTICK CLUB, INC. AND
MICHAEL A. DIGIOVANNI, PRESIDENT OF
IRONDEQUOIT NIGHTSTICK CLUB, INC.,
RESPONDENTS-RESPONDENTS.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD, LLP, ROCHESTER (MATTHEW J. FUSCO OF COUNSEL), FOR PETITIONER-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (LAWRENCE J. ANDOLINA OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered January 25, 2012 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.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to set aside the November 3, 2011 election of the president of respondent The Irondequoit Nightstick Club, Inc. (club) on the ground that the election was not held in accordance with the club's bylaws. Petitioner also sought a new election for the position of president of the club. We note at the outset that the proper vehicle by which to seek a new club election is a proceeding pursuant to Not-for-Profit Corporation Law § 618, and thus we would in the usual case convert the cause of action seeking that relief to a special proceeding pursuant to that statute (*see* CPLR 103 [c]). However, because the club's next annual election was held before the issuance of our decision herein, we conclude that this appeal is moot (*see Matter of Paraskevopoulos v Stavropoulos*, 65 AD3d 1153, 1154; *Matter of Karakonstadakis v Kokonas*, 173 AD2d 706, 706-707; *see generally Litas Inv. Co. v Vebeliunas*, 148 AD2d 680, 682). We further note that this appeal does not fall within the exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707,

714-715).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1154

KA 09-01022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD EPOLITO, DEFENDANT-APPELLANT.

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

RICHARD EPOLITO, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 15, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted.

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of robbery in the second degree (Penal Law § 160.10 [2] [a]), defendant contends in his main and pro se supplemental briefs that he was deprived of a fair trial based on, inter alia, prosecutorial misconduct on summation. Although that contention is not preserved for our review (*see* CPL 470.05 [2]), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). During summation, the prosecutor improperly vouched for the credibility of prosecution witnesses (*see People v Lyon*, 77 AD3d 1338, 1139, *lv denied* 15 NY3d 954; *People v Tolbert*, 198 AD2d 132, 133, *lv denied* 83 NY2d 811). We reject the People's contention that the prosecutor's comments during summation were a proper response to the summation of defense counsel (*cf. People v Halm*, 81 NY2d 819, 821). We therefore agree with defendant that the cumulative effect of the prosecutor's improper comments during summation deprived defendant of his right to a fair trial, requiring reversal (*see People v Pagan*, 2 AD3d 879, 880).

Defendant further contends in his main brief that Supreme Court erred in denying his motion to suppress the testimony related to his identification on the ground that the photo array was unduly

suggestive. We reject that contention. Although defendant's photo was the only one in the array showing a man with "salt-and-pepper" hair, the other photos showed men who appear to be of the same race and who had facial characteristics that were similar to those of defendant (*see People v Corchado*, 299 AD2d 843, 844, *lv denied* 99 NY2d 851). Defendant's contention in his main brief with respect to the jury instruction is not preserved for our review (*see* CPL 470.05 [2]; *People v Gray*, 86 NY2d 10, 19), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

In light of our decision to grant a new trial, we do not address defendant's remaining contentions in his main and pro se supplemental briefs.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1155

KA 10-00517

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK GARCIA, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered September 1, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the first degree (two counts) and kidnapping in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentence imposed for murder in the first degree under count one of the indictment shall run concurrently with the sentence imposed for murder in the first degree under count two of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]) and kidnapping in the second degree (§ 135.20). Contrary to the contention of defendant, County Court did not abuse its discretion in denying his motion for a mistrial based on a violation of the court's *Ventimiglia* ruling (*see generally People v Ortiz*, 54 NY2d 288, 292). Any prejudice resulting from the *Ventimiglia* violation was alleviated by the court's curative instruction (*see People v Allen*, 78 AD3d 1521, 1521, *lv denied* 16 NY3d 827). In any event, the error is harmless inasmuch as there is overwhelming evidence of guilt, and there is no significant probability that the single statement by the witness affected the jury's verdict or that the absence of the error would have led to an acquittal (*see People v Orbaker*, 302 AD2d 977, 978, *lv denied* 100 NY2d 541; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Contrary to defendant's further contention, the court did not abuse its discretion in denying defense counsel's request for an adjournment of the trial to allow him additional time to prepare for trial. Defense counsel had notice of the trial date over five months in advance, thereby giving him sufficient time to prepare, and defendant did not demonstrate that he was prejudiced by the court's

denial of his request for an adjournment (*see People v Peterkin*, 81 AD3d 1358, 1360, *lv denied* 17 NY3d 799; *People v Bones*, 50 AD3d 1527, 1528, *lv denied* 10 NY3d 956). Indeed, the record demonstrates that defense counsel was well prepared to represent defendant. Additionally, defendant's contention that the court erred in refusing to suppress the identification evidence is without merit inasmuch as the lineup was not unduly suggestive (*see People v Corchado*, 299 AD2d 843, 844, *lv denied* 99 NY2d 581; *see generally People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833).

We agree with defendant, however, that the court erred in refusing to suppress the evidence obtained from a buccal swab. As the court properly determined, the taking of the swab after defendant had invoked his right to counsel was error inasmuch as defendant could not consent to the seizure in the absence of counsel (*see People v Loomis*, 255 AD2d 916, 916, *lv denied* 92 NY2d 1051). Nevertheless, the court denied the motion after concluding that the evidence was admissible under the inevitable discovery doctrine. That was error. The inevitable discovery doctrine provides that "evidence obtained *as a result of information derived from* an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence" (*People v Fitzpatrick*, 32 NY2d 499, 506, *cert denied* 414 US 1033 [emphasis added]; *see People v Turriago*, 90 NY2d 77, 85, *rearg denied* 90 NY2d 936). It thus follows that the inevitable discovery doctrine does not apply where "the evidence sought to be suppressed is the very evidence obtained in the illegal search [and seizure]" (*People v Stith*, 69 NY2d 313, 318; *see Turriago*, 90 NY2d at 86; *People v James*, 256 AD2d 1149, 1149, *lv denied* 93 NY2d 875). Here, the DNA sample from the buccal swab that defendant sought to suppress was "the very evidence that was obtained as the immediate consequence of the illegal police conduct" (*James*, 256 AD2d at 1149). While the People are correct that they could have obtained a court order to compel defendant to give a DNA sample, they should have done just that instead of relying on the inevitable discovery doctrine, which was not applicable (*see e.g. People v Doll*, 98 AD3d 356, ___). We conclude, however, that the error is harmless. As noted, the evidence of defendant's guilt is overwhelming, and we conclude that there is no reasonable possibility that the erroneously admitted evidence contributed to defendant's conviction (*see People v Vaughn*, 275 AD2d 484, 488, *lv denied* 96 NY2d 788; *see generally Crimmins*, 36 NY2d at 237).

Finally, we agree with defendant that the consecutive sentences imposed for murder in the first degree under counts one and two of the indictment are illegal, and we therefore modify the judgment by directing that the sentences on those counts run concurrently (*see People v Rosas*, 8 NY3d 493, 495; *People v Ojo*, 43 AD3d 1367, 1368, *lv denied* 10 NY3d 769, *reconsideration denied* 11 NY3d 792).

Entered: December 21, 2012 Frances E. Cafarell
Clerk of the Court

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

1162

CA 12-00739

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

SUMMER KIN, CLAIMANT-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT-APPELLANT.
(CLAIM NO. 115651.)

THE ROTHSCHILD LAW FIRM, P.C., EAST SYRACUSE (MARTIN J. ROTHSCHILD OF COUNSEL), FOR CLAIMANT-APPELLANT-RESPONDENT.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (P. DAVID TWICHELL OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Court of Claims (Nicholas V. Midey, Jr., J.), entered February 3, 2012 in a personal injury action. The order denied claimant's motion for partial summary judgment and granted in part and denied in part defendant's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting claimant's motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) cause of action and granting that part of defendant's cross motion seeking summary judgment dismissing the Labor Law § 241 (6) claim, and as modified the order is affirmed without costs.

Memorandum: Claimant commenced this action seeking damages for injuries she sustained when she fell from a ladder while working on a bridge reconstruction project. Claimant's employer had been hired by defendant, the property owner, to repair the bridge in question. At the time of the accident, claimant was using the top half of an extension ladder that lacked rubber feet in an attempt to gain access to a scaffold that had been erected under the bridge. When claimant was four or five rungs from the top of the ladder, the bottom of the ladder slid out from beneath her, causing her to fall approximately 10 feet to the ground.

Claimant asserted causes of action for common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Following discovery, claimant moved for partial summary judgment on liability with respect to her section 240 (1) cause of action, and defendant cross-moved for summary judgment dismissing the claim in its entirety. The Court of Claims denied the motion and granted that part of the cross motion for summary judgment dismissing the section 200 claim and

the common-law negligence cause of action.

With respect to claimant's appeal and that part of defendant's cross appeal concerning the section 240 (1) cause of action, we reject defendant's contention that the sole proximate cause of the accident was claimant's improper use of the top half of the extension ladder, which lacked rubber feet. We conclude that, because there is no dispute that the ladder slipped and thereby caused claimant to fall from an elevated work site, claimant met her initial burden under Labor Law § 240 (1) of establishing that the ladder was "not so placed . . . as to give proper protection to [her]" (*Kirbis v LPCiminelli, Inc*., 90 AD3d 1581, 1582 [internal quotation marks omitted]; *see Ozimek v Holiday Val., Inc*., 83 AD3d 1414, 1415; *Evans v Syracuse Model Neighborhood Corp*., 53 AD3d 1135, 1136). Thus, the burden shifted to defendant to raise an issue of fact whether claimant's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of [her] accident" (*Cahill v Triborough Bridge & Tunnel Auth*., 4 NY3d 35, 40), and defendant failed to meet that burden.

In order to raise an issue of fact whether claimant's own conduct was the sole proximate cause of the accident, defendant was required to establish that "the safety devices that [claimant] alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and [that claimant] knew [she] was expected to use them but for no good reason chose not to do so, causing an accident" (*Gallagher v New York Post*, 14 NY3d 83, 88; *see Ganger v Anthony Cimato/ACP Partnership*, 53 AD3d 1051, 1052). Although defendant established that ladders with rubber feet, i.e., the bottom halves of extension ladders, were available at the work site for claimant's use, defendant submitted no evidence that claimant knew that she was expected to use only those ladders. Indeed, claimant's supervisor testified at his deposition that he never instructed claimant or any other worker that only the bottom halves of extension ladders should be used, and he further testified that, in his view, either half of an extension ladder could safely be used if "put up correctly." In addition, claimant testified that she had previously used ladders that did not have rubber feet and that she believed that other workers had used such ladders as well. Although claimant further testified that she realized "in retrospect" that it was inappropriate to use the top half of the extension ladder, defendant submitted no evidence that claimant knew at the time of the accident that her use of the top half of the extension ladder was unsafe. Thus, we conclude that the court erred in denying claimant's motion for partial summary judgment on liability under Labor Law § 240 (1), and we therefore modify the order accordingly.

With respect to that part of defendant's cross appeal concerning the Labor Law § 241 (6) claim, we agree with defendant that the court should have granted that part of its cross motion for summary judgment dismissing that claim, which was based on defendant's alleged violation of two provisions of the Industrial Code. 12 NYCRR 23-1.21 (b) (4) (iv), concerning the securement of ladders from which work is being performed, is inapplicable to the facts of this case because

claimant was not performing work from a ladder; instead, she was using the ladder to gain access to the scaffold from which she intended to perform the assigned work. Additionally, 12 NYCRR 23-1.21 (a) sets forth a general standard of care and is not sufficiently specific to support a section 241 (6) claim (*see generally Fisher v WNY Bus Parts, Inc.*, 12 AD3d 1138, 1140). We therefore further modify the order accordingly.

Finally, we note that claimant on her appeal has abandoned any contention with respect to the court's dismissal of her common-law negligence cause of action and her Labor Law § 200 claim (*see Gowans v Otis Marshall Farms, Inc.*, 85 AD3d 1704, 1704-1705; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1164

CA 12-00664

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

NEREIDA ROSARIO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH SWIATKOWSKI, DEFENDANT-RESPONDENT,
AND LILLIAN COTTO, DEFENDANT-APPELLANT.
(ACTION NO. 1.)

ROXANA REYES, PLAINTIFF-RESPONDENT,

V

JOSEPH SWIATKOWSKI, DEFENDANT-RESPONDENT,
AND LILLIAN COTTO, DEFENDANT-APPELLANT.
(ACTION NO. 2.)

BARTH SULLIVAN BEHR, BUFFALO (SARAH P. RERA OF COUNSEL), FOR DEFENDANT-APPELLANT.

WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered July 27, 2011 in personal injury actions. The order denied the motion of defendant Lillian Cotto for, inter alia, summary judgment dismissing the complaints against her.

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

Memorandum: Plaintiffs commenced these actions, respectively, seeking damages for injuries they sustained in a motor vehicle accident. Plaintiffs were passengers in a vehicle operated by defendant Lillian Cotto that was rear-ended by a vehicle operated by defendant Joseph Swiatkowski. Cotto appeals from an order denying her motion for, inter alia, summary judgment dismissing the complaints against her. We affirm.

A rear-end collision with a vehicle that is stopped or is in the process of stopping “creates a prima facie case of liability with respect to the [driver] of the rearmost vehicle, thereby requiring

that [driver] to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Chepel v Meyers*, 306 AD2d 235, 237). Here, in support of her motion, Cotto submitted her deposition testimony in which she stated that her foot was on the brake the entire time that she was stopped at the stop sign and that she did not "creep" past the stop sign before the accident occurred. Cotto, however, also submitted in support of her motion the deposition testimony of Swiatkowski in which he stated that he was stopped at a stop sign behind Cotto's vehicle; that Cotto's vehicle began moving forward to merge into traffic; that Swiatkowski then checked for oncoming traffic and, when he saw that the lane was clear, he proceeded forward; and that Cotto thereafter "slammed on her brakes," causing him to collide with her vehicle. We thus conclude that Cotto "failed to meet [her] initial burden of establishing [her] entitlement to judgment as a matter of law inasmuch as [she] submitted the deposition testimony in which [Swiatkowski] provided a nonnegligent explanation for the collision" (*Brooks v High St. Professional Bldg., Inc.*, 34 AD3d 1265, 1267).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1169

CA 12-00850

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

IN THE MATTER OF DEBORAH BURNS AND BRUCE HENRY,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

CARLOS CARBALLADA, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF NEIGHBORHOOD AND BUSINESS
DEVELOPMENT OF CITY OF ROCHESTER, AND CITY OF
ROCHESTER, RESPONDENTS-APPELLANTS.

ROBERT J. BERGIN, CORPORATION COUNSEL, ROCHESTER (ADAM M. CLARK OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered July 7, 2011 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul two determinations of the Municipal Code Violations Bureau (Bureau) of respondent City of Rochester (City), which separately found them guilty of a City Code violation set forth in appearance tickets, i.e., owning property that was occupied without a valid Certificate of Occupancy (CO) in violation of City Code § 90-16 (A) (2) (d). That provision provides that a CO must be obtained within a period of 90 days prior to the expiration or termination of an existing CO.

In their petition, petitioners sought annulment of the determinations "on the grounds that [their] convictions violate the Fourth Amendment and Article 1 section 12 of the New York Constitution, unlawfully deprive [p]etitioners of the beneficial enjoyment of their property and the right to derive income therefrom, and are therefore in violation of lawful procedure, affected by an error of law and were arbitrary and capricious." While petitioners had also argued before the Bureau that the appearance tickets should be dismissed on the ground that they did not sufficiently allege their commission of an offense for which a fine may be imposed, they failed to pursue that argument in their petition.

Supreme Court transferred the proceeding to this Court pursuant to CPLR 7804 (g), but we vacated the order of transfer and remitted the matter to that court because we concluded that the petition did not raise a substantial evidence issue (*Matter of Burns v Carballada,* 79 AD3d 1785). Upon remittal, the court granted the petition, holding that the determinations were affected by an error of law and were arbitrary and capricious (*see generally* CPLR 7803 [3]). Specifically, the court held that the appearance tickets were facially insufficient. Respondents now appeal.

We note as an initial matter that our dissenting colleague correctly states that petitioners did not raise a substantial evidence issue in their petition. We therefore conclude that our dissenting colleague erroneously addresses the sufficiency of the evidence at the hearings. Moreover, we agree with respondents that the court erred in annulling the determinations on facial sufficiency grounds inasmuch as petitioners also never raised that contention in their petition (*see Matter of Faison v Goord*, 298 AD2d 392, 392-393, *lv denied* 95 NY2d 510, *rearg denied* 100 NY2d 616; *cf. Matter of Roth v Syracuse Hous. Auth.*, 270 AD2d 909, 909, *lv denied* 95 NY2d 756), and we thus further conclude that our dissenting colleague also erroneously addresses the facial sufficiency of the appearance tickets. Indeed, petitioners state in their brief that they agree with respondents that the appearance tickets were, in fact, facially sufficient.

Petitioners contend, however, that the judgment should nevertheless be affirmed (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546) because, in their view, the City's CO inspection and warrant system is unconstitutional as applied. We note by way of background that, at the time petitioners were issued the relevant appearance tickets, the City required both single-family dwellings not occupied by the owner and all two-family dwellings to have a valid CO that would need to be renewed every six years (*see* City Code § 90-16 [former (G) (1) (a)]). Because the City must inspect a rental property in order to issue or renew a CO, it enacted Local Law No. 3 of 2009, which amended the City Charter to establish a procedure for issuing judicial warrants to inspect premises that are owned or occupied by uncooperative individuals (*see* City Charter § 1-9). We recently rejected a facial constitutional challenge by several tenants and a homeowner to the inspection warrants authorized by Local Law No. 3 of 2009 (*Matter of City of Rochester [449 Cedarwood Terrace],* 90 AD3d 1480, 1482-1483, *appeal dismissed* 19 NY3d 937), and we now likewise reject petitioners' current as-applied constitutional challenge to those warrants.

Petitioners, correctly noting that a landlord may not be penalized for renting property without first consenting to its warrantless search (*see Sokolov v Village of Freeport*, 52 NY2d 341, 343, 346), contend that their rights under the Fourth Amendment of the United States Constitution and article I, § 12 of the New York Constitution were violated because the City's CO inspection and warrant system prevents them from obtaining a CO without first consenting to a search of their properties. Under the City's

ordinance, however, an inspection can take place either upon consent *or* upon the issuance of a warrant (*see* City Charter § 1-11). On the record before us, petitioners have not shown that they were actually penalized for refusing to allow an inspection inasmuch as there is no evidence that they ever applied for a CO and thereafter refused to consent to the required inspection of their properties.

All concur except MARTOCHE, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent. My fundamental disagreement with the majority is based on its conclusion that the Municipal Code Violations Bureau (Bureau) of respondent City of Rochester (City) properly found petitioners guilty of owning property that was occupied without a valid Certificate of Occupancy (CO) in violation of the City Code. Although the appearance tickets described the violations as follows: "The subject property is occupied without a valid Certificate of Occupancy," in fact, the tickets issued to petitioners alleged that they violated section 90-16 (A) (2) (d) of the City Code, which provides that a CO must be obtained within a period of 90 days prior to the expiration or termination of an existing CO. As Supreme Court noted in its decision, a footnote in the City Code indicates that a prior provision imposing a penalty for failure to apply for a CO had been repealed. I therefore agree with the court that no language in the City Code section relied upon by the Bureau actually prohibits a property from being *occupied* without a valid CO.

In my view, the majority construes the petition and the arguments in petitioners' brief in an overly restrictive manner. In the petition, petitioners sought to have the determinations annulled on constitutional grounds as well as on the ground that they were "in violation of lawful procedure, affected by an error of law and were arbitrary and capricious." Notably, when the court initially transferred this proceeding to this Court pursuant to CPLR 7804 (g), we vacated the order of transfer and remitted the matter because the petition did not raise a substantial evidence issue (*Matter of Burns v Carballada*, 79 AD3d 1785). We thus necessarily considered the remaining CPLR article 78 claims to be grounds for review of administrative acts, including those asserting that the determinations were affected by an error of law and were arbitrary and capricious. The court, carrying out the mandate on remittitur, specifically held that the Bureau's determinations were without sound basis and reason and were irrational because the City Code section that it relied upon was not actually violated. I cannot conclude that the court erred in reaching that result.

Resolution of this proceeding is complicated by the fact that petitioners do not argue that the determinations were unsupported by substantial evidence, even though, in my view, the City Code permits a person charged with a violation to answer by appearing at a hearing held before a hearing examiner (*see* § 13A-5 [A] [1]), as occurred here. Thus, there having been a "hearing" on the alleged violations, petitioners' challenge to the resulting determinations should have been analyzed under the substantial evidence standard of CPLR 7803 (4). Petitioners, however, elected not to raise a substantial

evidence issue in their petition or in their briefs to this Court, either in the prior transferred proceeding or on the present appeal, and thus have prevented the judicial system from adjudicating this proceeding under the proper legal standard. The court therefore considered upon remittal the only other possible grounds for reviewing the challenged administrative determinations and reached, in my view, a reasonable conclusion that they were arbitrary and capricious because they convicted petitioners in connection with conduct that was neither "charged nor what the conviction [was] based upon."

I would therefore affirm the judgment annulling the determinations.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1185

CA 12-00811

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

KENNETH R. WIERZBOWSKI, PLAINTIFF-RESPONDENT,

V ORDER

KORYN P. WALKER, ET AL., DEFENDANTS,
AND SOUTHEAST COMMUNITY WORKS CENTER,
DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (KATHLEEN M. REILLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (DONYELLE E. CRAPSI OF COUNSEL), FOR DEFENDANT KORYN P. WALKER.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. MALINOWSKI OF COUNSEL), FOR DEFENDANT ANDREW LARRACUENTE.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 22, 2012 in a personal injury action. The order denied the motion of defendant Southeast Community Works Center for summary judgment dismissing the complaint against it.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties, and filed in the Erie County Clerk’s Office on December 5, 2012,

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1211

CA 12-00865

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

HARRY J. HAWKINS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON E. BRYANT, DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 11, 2011 in a personal injury action. The order denied defendant's motion for summary judgment and granted plaintiff's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the cross motion on the issue of serious injury and granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident when the vehicle he was driving was struck by a vehicle owned and operated by defendant. Defendant thereafter moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident within the meaning of Insurance Law § 5102 (d). Supreme Court denied defendant's motion and granted plaintiff's cross motion for summary judgment on the issues of serious injury and negligence. We note at the outset that, as plaintiff notes in his brief, he did not oppose defendant's motion with respect to the 90/180-day category of serious injury. We therefore modify the order by denying the cross motion with respect to that category of serious injury and by granting the motion to that extent.

We conclude that the court erred in granting those parts of plaintiff's cross motion for summary judgment with respect to the two remaining categories of serious injury alleged by plaintiff, i.e., permanent consequential limitation of use and significant limitation of use, but properly denied those parts of defendant's motion with

respect thereto. We therefore further modify the order accordingly. Defendant is correct that she met her initial burden by submitting medical records and reports constituting "persuasive evidence that plaintiff's alleged pain and injuries were related to . . . preexisting condition[s]" (*Carrasco v Mendez*, 4 NY3d 566, 580; *see Spanos v Fanto*, 63 AD3d 1665, 1666). As a result, plaintiff had the burden of coming forward with evidence addressing defendant's claimed lack of causation (*see Carrasco*, 4 NY3d at 580; *Briody v Melecio*, 91 AD3d 1328, 1329). We agree with defendant that the affidavit of plaintiff's treating chiropractor submitted by plaintiff fails to address the issue of causation and thus was insufficient to raise a triable issue of fact on causation (*see Smith v Besanceney*, 61 AD3d 1336, 1337-1338; *Caldwell v Grant* [appeal No. 2], 31 AD3d 1154, 1155). However, plaintiff's treating orthopedic surgeon, who reviewed the results of plaintiff's X rays and MRI scans, opined that the accident was the "competent and producing cause of [plaintiff's] spinal conditions by means of activation aggravation of his lumbar stenosis and degenerative spondylosis and causing worsening of the disc herniations in the lumbar spine." Thus, plaintiff raised a triable issue of fact with respect to causation (*see Seck v Balla*, 92 AD3d 543, 544). We further conclude that plaintiff's submissions contain the requisite objective medical findings sufficient to raise issues of fact whether plaintiff sustained a serious injury under both categories of serious injury alleged by him (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350; *Roll v Gavitt*, 77 AD3d 1412, 1413).

We further conclude that the court properly granted that part of plaintiff's cross motion for summary judgment on the issue of negligence. Plaintiff met his initial burden by establishing as a matter of law "that the sole proximate cause of the accident was defendant's failure to yield the right of way" to plaintiff and defendant failed to raise a triable issue of fact (*Kelsey v Degan*, 266 AD2d 843, 843; *see Guadagno v Norward*, 43 AD3d 1432, 1433; *see also Fratangelo v Benson*, 294 AD2d 880, 881). There is no evidence that plaintiff could have done anything to avoid the collision (*see Driscoll v Casey*, 299 AD2d 885, 885; *Bolta v Lohan*, 242 AD2d 356, 356) and we note that, in approaching the intersection, plaintiff was entitled to anticipate that defendant "would comply with the Vehicle and Traffic Law and yield the right-of-way" (*Colaruotolo v Crowley*, 290 AD2d 863, 864).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1221

KA 12-00784

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CYNTHIA GIBBONS, ALSO KNOWN AS CYNTHIA BULINSKI,
DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered April 25, 2012. The judgment convicted defendant, upon her plea of guilty, of scheme to defraud in the first degree and attempted grand larceny in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of one count of scheme to defraud in the first degree (Penal Law §§ 190.65 [1] [b]) and three counts of attempted grand larceny in the second degree (§§ 110.00, 155.40 [1]). Defendant contends that she was denied due process at sentencing because County Court relied on improper information in the presentence investigation report (PSI), i.e., statements from an alleged victim regarding facts outside of the indictment. To the extent that defendant's contention survives her valid waiver of the right to appeal (*see People v Dimmick*, 53 AD3d 1113, 1113, *lv denied* 11 NY3d 831; *People v Agha*, 43 AD3d 1383, 1383-1384; *see generally People v Seaberg*, 74 NY2d 1, 9), we reject that contention. The sentencing transcript establishes that the court did not rely upon the allegedly improper material included in the PSI in sentencing defendant (*see Dimmick*, 53 AD3d at 1113; *People v Henderson*, 305 AD2d 940, 942, *lv denied* 100 NY2d 582; *People v Anderson*, 184 AD2d 922, 923, *lv denied* 80 NY2d 901). Indeed, the court granted defendant's request to redact any references to the challenged material from the PSI and stated that it would "not consider" that information (*see People v Paragallo*, 82 AD3d 1508, 1509-1510; *People v Hinkhaus*, 194 AD2d 1043, 1043-1044). Defendant's further contention that the PSI was "tainted" in its entirety by the inclusion of the allegedly improper material and thus that the court should have ordered the preparation of a new report is unpreserved for our review inasmuch as she did not seek such relief from the court (*see generally* CPL 470.05 [2]; *People v Williams*, 94 AD3d

1527, 1527; *People v Karlas*, 208 AD2d 767, 767).

Finally, defendant's contention that the court improperly considered a letter from another alleged victim in determining defendant's sentence is without merit. "[D]efendant has made no showing, nor does the record reveal, that the sentencing court relied upon the alleged prejudicial information in arriving at defendant's sentence" (*People v Redman*, 148 AD2d 966, 967, *lv denied* 74 NY2d 745; *see also People v Young*, 186 AD2d 1072, 1072; *People v Whalen*, 99 AD2d 883, 884). We note that the letter was not contained in the PSI, and the court made no reference to it during sentencing.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1231

CA 12-00816

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

JOSEPH J. CARFI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID C. FORGET AND DAWN M. FORGET,
DEFENDANTS-RESPONDENTS.

LYNCH SCHWAB, PLLC, SYRACUSE (ANDREW J. SCHWAB OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF KAREN L. LAWRENCE, DEWITT (BARNEY F. BILELLO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered August 1, 2011 in a personal injury action. 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 affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle in which he was a passenger was struck by a vehicle owned by defendant Dawn M. Forget and operated by defendant David C. Forget. We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). We note at the outset that, although plaintiff alleged that he sustained several categories of serious injury in his bill of particulars, his appellate brief alleges only that he sustained a permanent consequential limitation of use of his cervical spine. Plaintiff therefore has abandoned his contentions with respect to the remaining categories of serious injury (*see Beaton v Jones*, 50 AD3d 1500, 1501).

Defendants met their initial burden on the motion of establishing that plaintiff did not sustain a serious injury under the permanent consequential limitation of use category, and plaintiff failed to raise a triable issue of fact to defeat the motion (*see Lux v Jakson*, 52 AD3d 1253, 1254; *McConnell v Freeman*, 52 AD3d 1190, 1191, *lv denied* 55 AD3d 1420). In support of their motion, defendants submitted the affirmed report of the orthopedic surgeon who examined plaintiff on defendants' behalf. After examining plaintiff and reviewing his medical records, the orthopedic surgeon concluded within a reasonable degree of medical

certainty that there was no objective evidence that plaintiff sustained a "causally related injury of any significance." He concluded instead that plaintiff likely sustained a cervical strain as a result of the accident. Although plaintiff was diagnosed with a herniated disc three years after the accident, the orthopedic surgeon concluded that such injury was unrelated to the accident and was consistent with degenerative disc disease. Moreover, the orthopedic surgeon concluded that plaintiff was not impaired or disabled by that condition. He noted that plaintiff exhibited no palpable spasm, motor deficits, or objective sensory deficits and that plaintiff's cervical spine flexion, extension, lateral deviation, and right-sided rotation were all within normal limits. Only plaintiff's left-sided rotation was "mildly decreased," i.e., 55 degrees compared with normal rotation of 60 to 90 degrees. Defendants also submitted excerpts from plaintiff's deposition, in which plaintiff testified that he missed only one day of work after the accident and that he did not see his primary care physician or any other doctors for pain or stiffness in his neck for approximately two and a half years after the accident.

In opposition to defendants' motion, plaintiff submitted, inter alia, the affirmation of his treating neurosurgeon, who reviewed plaintiff's pre- and post-accident imaging studies and concluded that plaintiff sustained two herniated discs as a result of the accident. Plaintiff also submitted MRI and X ray reports reflecting the existence of two herniated discs in his cervical spine. Even assuming, arguendo, that plaintiff raised a triable issue of fact as to the causation of the herniated discs, we conclude that the court properly granted defendants' motion because plaintiff failed to submit objective medical evidence establishing plaintiff's limitations or restrictions of use resulting from those injuries (*see Accurso v Kloc*, 77 AD3d 1295, 1297). It is well settled that "[p]roof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommells v Perez*, 4 NY3d 566, 574; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 n 4; *Caldwell v Grant* [appeal No. 2], 31 AD3d 1154, 1155-1156). "Whether a limitation of use or function is . . . '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" (*Dufel v Green*, 84 NY2d 795, 798; *see Accurso*, 77 AD3d at 1296).

Here, plaintiff also submitted the letter affirmation from a nontreating orthopedic surgeon in opposition to defendants' motion, which states that upon physical examination plaintiff exhibited normal flexion, "mild" restrictions in left rotation, "moderate" restrictions in extension, left lateral bending and right-rotation, and "marked" restrictions in right lateral bending. That orthopedic surgeon did not, however, quantify plaintiff's range of motion restrictions or provide a qualitative assessment "compar[ing] the plaintiff's limitations to the normal function, purpose and use of [the cervical spine]" (*Toure*, 98 NY2d at 350; *see Dann v Yeh*, 55 AD3d 1439, 1440; *Caldwell*, 31 AD3d at 1156). Although the affirmation of plaintiff's treating neurosurgeon referenced range of motion losses "documented by [him]self and various

physicians," he likewise failed to provide a quantitative or qualitative assessment thereof (*see Toure*, 98 NY2d at 350; *Caldwell*, 31 AD3d at 1156). Moreover, although both surgeons opined that plaintiff sustained a "permanent consequential loss" of function or use of his cervical spine as a result of the accident, those conclusory assertions are insufficient to raise a triable issue of fact (*see Anderson v Capital Dist. Transp. Auth.*, 74 AD3d 1616, 1617, *lv denied* 15 NY3d 709; *Barry v Future Cab Corp.*, 71 AD3d 710, 711; *Burridge v Gaines*, 294 AD2d 892, 893).

Finally, we conclude that plaintiff's submission of an affidavit in which he described his physical limitations—i.e., that he cannot turn his head "normally," operate a lawnmower, or "shovel[ ] [his] driveway"; that he has to be "careful" with his activities to prevent the onset of pain; and that prolonged standing triggers headaches and increased neck pain—is insufficient to establish a permanent consequential limitation of use inasmuch as plaintiff's experts "did not address or quantify any limitations in the activities of plaintiff resulting from [his] injuries" (*Accurso*, 77 AD3d at 1297).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1232

CA 11-02555

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

ALESSANDRO SACCHETTI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL L. GIORDANO, DPM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAMELA R. HALPIN, EAST ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (William P. Polito, J.), entered April 7, 2011. The judgment awarded plaintiff money damages upon a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as a result of defendant's alleged podiatric malpractice. Following a trial, the jury found defendant liable for plaintiff's injuries and awarded damages to plaintiff. Defendant made a posttrial motion to set aside the jury's verdict on the ground that it is not supported by legally sufficient evidence and to direct a verdict in his favor. In the alternative, defendant requested that a new trial be granted because, inter alia, the verdict is against the weight of the evidence. Supreme Court properly denied defendant's posttrial motion.

Contrary to defendant's contention, plaintiff established a prima facie case of podiatric malpractice. Indeed, "there is a valid line of reasoning supporting the jury's verdict that defendant deviated from the applicable standard of care . . . and that such deviation was a proximate cause of plaintiff's injuries" (*Winiarski v Harris* [appeal No. 2], 78 AD3d 1556, 1557; *cf*. *James v Wormuth* [appeal No. 2], 93 AD3d 1290, 1291). We reject defendant's alternative contention in support of his posttrial motion that the verdict on liability is against the weight of the evidence. We conclude that the verdict "is one that reasonable persons could have rendered after receiving conflicting evidence[and thus we] should not substitute [our] judgment for that of the jury" (*Herbst v Marshall*, 89 AD3d 1403, 1403).

Finally, contrary to defendant's contention, the jury awards for past and future lost wages are supported by legally sufficient evidence

and are not against the weight of the evidence. While plaintiff did not become a union electrician until after he was treated by defendant, " '[r]ecovery for lost earning capacity is not limited to a plaintiff's actual earnings before the [injury], . . . and the assessment of damages may instead be based upon future probabilities' " (*Huff v Rodriguez*, 45 AD3d 1430, 1433; *see Kirschhoffer v Van Dyke*, 173 AD2d 7, 10).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1233

CA 11-02556

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

ALESSANDRO SACCHETTI, PLAINTIFF-RESPONDENT,

V ORDER

MICHAEL L. GIORDANO, DPM, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAMELA R. HALPIN, EAST ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered December 1, 2011. The order denied the motion of defendant to set aside the verdict or for a new trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1235

TP 12-00646

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF TIMOTHY SZCZEPANIAK, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, RESPONDENT.

THE PARRINELLO LAW FIRM, LLP, ROCHESTER (J. MATTHEW PARRINELLO OF COUNSEL), FOR PETITIONER.

ROBERT J. BERGIN, CORPORATION COUNSEL, ROCHESTER (YVETTE CHANCELLOR GREEN 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, Monroe County [David Michael Barry, J.], entered April 4, 2012) to review a determination of respondent. The determination terminated the employment of petitioner.

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

Memorandum: Petitioner commenced this proceeding seeking to annul the determination finding him guilty of disciplinary charges and terminating him from his employment as a firefighter for respondent. We conclude that the determination is supported by substantial evidence, i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see* CPLR 7803 [4]; *see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-232). Hearsay is admissible in administrative proceedings, "and if sufficiently relevant and probative may constitute substantial evidence" (*People ex rel. Vega v Smith*, 66 NY2d 130, 139; *see Matter of Gray v Adduci*, 73 NY2d 741, 742; *Matter of Ebling v Town of Eden*, 59 AD3d 978, 978-979). The hearsay evidence admitted at the hearing consisted of attendance records for petitioner's outside employment, and that evidence was relevant and probative on the charges that petitioner worked at that outside employment while he was on sick leave or on leave from his employment with respondent and receiving benefits pursuant to section 8B-5 of the Charter of the City of Rochester. Thus, there is no merit to petitioner's contention that the determination is not supported by substantial evidence because the evidence presented was hearsay (*see Matter of Paul v Israel*, 90 AD3d 666, 666). Finally, we conclude that the penalty of termination from petitioner's employment is not " 'so

disproportionate to the offense[s] as to be shocking to one's sense of fairness,' " and thus does not constitute an abuse of discretion as a matter of law (*Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1240

KA 11-02219

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER W. TESSITORE, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN N. BAUERSFELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 3, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that the sentence is unduly harsh and severe and that the award of restitution is unlawful. Defendant's challenge to the severity of the sentence is encompassed by his valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 255-256; *People v Harris*, 94 AD3d 1484, 1485, *lv denied* 19 NY3d 961; *People v Gordon*, 89 AD3d 1466, 1466, *lv denied* 18 NY3d 957).

Defendant's challenge "to the amount of restitution is not foreclosed by his waiver of the right to appeal because the amount of restitution was not included in the terms of the plea agreement" (*People v Sweeney*, 4 AD3d 769, 770, *lv denied* 2 NY3d 807; *see People v Spencer*, 87 AD3d 1284, 1285). Defendant, however, failed to preserve his challenge to the restitution amount for our review inasmuch as he did not object to that amount at sentencing (*see People v Jorge N.T.*, 70 AD3d 1456, 1457, *lv denied* 14 NY3d 889; *People v Hannig*, 68 AD3d 1779, 1780, *lv denied* 14 NY3d 801), and in any event he affirmatively waived his right to a restitution hearing (*see People v Huffman*, 288 AD2d 907, 908, *lv denied* 97 NY2d 755).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1245

CAF 10-01939

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

IN THE MATTER OF BARON C., DAEMONI C., AND NEVEAH P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DOMINIQUE C., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR BARON C., DAEMONI C., AND NEVEAH P.

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered September 13, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the three subject children and ordered that they be freed for adoption. Contrary to the mother's contentions, the record supports Family Court's determination that a suspended judgment, i.e., a "brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311), was not in the best interests of the children (*see Matter of Jane H. [Susan H.]*, 85 AD3d 1586, 1587, *lv denied* 17 NY3d 709). "The court's determination at the dispositional hearing is entitled to great deference, particularly because it depended in large part on the court's assessment of the credibility of the witnesses" (*Matter of Alyshia M.R.*, 53 AD3d 1060, 1061, *lv denied* 11 NY3d 707). Finally, to the extent that the mother's contentions are based on matters outside the record on appeal, they are not properly before us (*see Matter of Gridley v Syrko*, 50 AD3d 1560, 1561; *Matter of Harry P. v Cindy W.*, 48 AD3d 1100, 1100).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1250

CA 12-00171

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

HERBERT KOLBE, LYNNE NICHOLAS, JOANN SEEFELDT AND PHYLLIS HARRIS, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CHRISTINE J. TIBBETTS, AS SUPERINTENDENT OF SCHOOLS OF NEWFANE CENTRAL SCHOOL DISTRICT, JAMES REINEKE, AS PRESIDENT OF NEWFANE BOARD OF EDUCATION, NEWFANE BOARD OF EDUCATION AND NEWFANE CENTRAL SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JEFFREY T. FIUT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

REDEN & O'DONNELL, LLP, BUFFALO (TERRY M. SUGRUE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered October 18, 2011. The judgment, inter alia, granted the motion of plaintiffs for summary judgment and denied the cross motion of defendants for summary judgment.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the motion is denied, the cross motion is granted, the third through sixth decretal paragraphs are vacated, and judgment is granted in favor of defendants as follows:

> It is ADJUDGED AND DECLARED that defendants are not obligated to maintain health insurance coverage equivalent to that in effect at the time each plaintiff retired.

Memorandum: Plaintiffs, retirees of defendant Newfane Central School District (District), commenced this breach of contract/declaratory judgment action seeking, inter alia, a declaration that their rights with respect to health insurance benefits are governed by each collective bargaining agreement (CBA) that was in effect at the time each plaintiff retired. Supreme Court granted plaintiffs' motion seeking summary judgment and denied defendants' cross motion for summary judgment.

Each CBA in effect at the time of plaintiffs' respective retirements set forth a nominal copay for prescriptions in accordance

with the health care plan that was in effect at that time. In December 2009, each plaintiff was notified that, pursuant to the CBA effective January 1, 2010, the copay for prescriptions would be significantly increased. Plaintiffs alleged in their complaint that they are not obligated to pay the higher rate but, rather, are obligated to pay only the rate that was in effect at the time of their respective retirements.

The language at issue is contained in section 6.5. of each CBA, and that section is entitled "**Retirement Benefits**." In each CBA, section 6.5.3 provides in relevant part that full-time employees who retire from the District under the New York State Employees' Retirement System may receive credit for group health insurance premiums based on accumulated sick leave. In the CBAs in effect from 1990 through 1994 and 1994 through 1996, the language at issue states that "[t]he coverage provided shall be the coverage which is in effect for the unit at such time as it is provided to the employee." In the subsequent CBAs, the language at issue states that "[t]he coverage provided shall be the coverage which is in effect for the unit at such time as the employee retires." Section 6.4 in each of the CBAs provides that retired employees shall be eligible to "continue group health insurance" upon the payment of a monthly premium to the District. Section 6.4 also sets forth the health plans available to the employees covered by the respective CBAs.

We agree with defendants that the court erred in determining that the unequivocal language of the respective CBAs required that the prescription copay amount set forth in section 6.4 could not be altered based upon the language in section 6.5.3, providing that unused sick leave could be used to pay for health care coverage. The unambiguous language in section 6.5.3 provides that, at the time of his or her retirement, the retiree is entitled to the same coverage that is provided to the bargaining unit. The language does not specify that an equivalent level of coverage will continue during retirement (*cf. Williams v Village of Endicott*, 91 AD3d 1160, 1161; *Della Rocco v City of Schenectady*, 252 AD2d 82, 84, *lv dismissed* 93 NY2d 1000; *see generally Hudock v Village of Endicott,* 28 AD3d 923, 923). In *Williams* (91 AD3d at 1161), the CBA provided that the defendant " 'shall keep in full force and effect medical coverage and hospital coverage for each member of the bargaining unit, with benefits *to be of a value at least equivalent to those presently in force*' " (emphasis added). In *Della Rocco* (252 AD2d at 84), the CBA provided that the defendant "would provide insurance coverage '*equivalent to the plan presently in effect* for each member of the Department and his [or her] family, and for retired members and their families' " (emphasis added). In *Hudock* (28 AD3d at 923), the CBA provided that the annual cost toward the premium would remain the same. Here, the respective CBAs do not provide that the level of health coverage will not be reduced or that the annual cost will not increase.

Inasmuch as the benefits for represented employees were likewise reduced, defendants have complied with the statutory requirement that

they not reduce plaintiffs' coverage below the level of coverage provided to active employees (*see* L 1994, ch 729, as extended by L 2009, ch 30). In light of our determination, we need not address defendants' remaining contentions.

All concur except LINDLEY and WHALEN, JJ., who dissent and vote to modify in accordance with the following Memorandum: We respectfully dissent. We disagree with the majority's determination that the language in section 6.5.3 of each collective bargaining agreement (CBA) is unambiguous. The relevant language of that section provides that full-time employees who retire from defendant Newfane Central School District (District) under the New York State Employees' Retirement System plan shall be entitled to credit toward group health insurance premiums for accumulated sick leave. That section further provides that, in the event of the retiree's death, the benefit shall transfer to the surviving spouse. As noted by the majority, one version of the CBA states that "[t]he coverage provided shall be the coverage which is in effect for the unit at such time as it is provided to the employee," while the other version states that "[t]he coverage provided shall be the coverage which is in effect for the unit at such time as the employee retires." The language in section 6.5.3 regarding the level of coverage for retirees conflicts with language found in section 6.4 of the CBA. Section 6.4 provides that retired employees shall be eligible to "continue group health insurance" upon payment of a monthly premium to the District. In section 6.5.3, the word "benefit" is used to describe the sick-leave accrual and the word "coverage" is used to describe the particular plan, or health insurance. The words "benefit" and "coverage" may have been included in the same paragraph in order to distinguish between the two words and to establish different rights for retirees. Section 6.5.3 may have given retirees additional rights to health insurance coverage in addition to those provided in section 6.4. " 'A contract is ambiguous if the language used lacks a definite and precise meaning, and there is a reasonable basis for a difference of opinion' " (*Williams v Village of Endicott*, 91 AD3d 1160, 1162). Given the conflict between section 6.5.3 and section 6.4, we believe that an ambiguity exists. We have held that, "[i]n the event that a contract is ambiguous, its interpretation is still a matter for the court unless 'determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence' " (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 218, quoting *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172). The parties submitted conflicting evidence regarding the intended meaning of the provisions at issue here, and a determination as to such intended meaning cannot be made absent additional extrinsic evidence. We therefore conclude that the matter should be remitted to Supreme Court for a hearing at which parol evidence may be presented to establish the parties' intent.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1255

CA 12-00242

PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND WHALEN, JJ.

TY ELECTRIC CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND DELMONTE, DEFENDANT-APPELLANT.

MICHAEL J. CROSBY, HONEOYE FALLS, FOR DEFENDANT-APPELLANT.

GATES & ADAMS, P.C., ROCHESTER (MAX G. KINSKY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered November 16, 2011. The order affirmed an order of the Rochester City Court (Ellen M. Yacknin, J.), entered May 26, 2011 awarding money damages to plaintiff.

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

Memorandum: Plaintiff, an electrical contractor, commenced this action in City Court to recover the sum due on unpaid bills in connection with work performed at defendant's home. On a theory of quantum meruit, City Court awarded plaintiff $7,681.98 plus disbursements, statutory costs, and statutory interest. Defendant appealed to County Court, which affirmed the order of City Court.

Defendant contends that City Court did not have subject matter jurisdiction pursuant to UCCA 202 because quantum meruit is an equitable doctrine. Under the circumstances of this case, we reject that contention. "Generally, the determinant as to whether a claim is at law or at equity is the nature of the relief which, under the facts alleged, could fairly compensate the party bringing the claim . . . If money damages alone could achieve that end, the action is generally at law" (*Hudson View II Assoc. v Gooden*, 222 AD2d 163, 168). In this case, plaintiff sought only money damages on the theory of quantum meruit, as compensation for the work performed. Thus, we conclude that City Court had subject matter jurisdiction. Contrary to defendant's further contention, plaintiff met its burden of establishing the reasonable value of its services (*see Crane-Hogan Structural Sys., Inc. v State of New York*, 88 AD3d 1258, 1260). "In construction contract cases, '[t]he customary method of calculating damages on a [quantum meruit] basis . . . is actual job costs plus an allowance for overhead and profits minus amounts paid' " (*id.*, quoting *Najjar Indus. v City of New York*, 87 AD2d 329, 331-332, *affd* 68 NY2d

943; *see Whitmyer Bros. v State of New York*, 47 NY2d 960, 962), and plaintiff established that amount.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1258

KA 11-01646

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE T.J., 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Erie County Court (Sheila A. DiTullio, J.), rendered June 20, 2011. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from an adjudication revoking the term of probation previously imposed upon his conviction of robbery in the second degree (Penal Law § 160.10 [1]) and sentencing him to a term of imprisonment. Defendant contends that County Court erred in resentencing him in the absence of an updated presentence report. Defendant waived that contention, however, inasmuch as he explicitly waived the preparation of an updated report (*see People v Servey*, 96 AD3d 1428, 1428-1429, *lv denied* 19 NY3d 1001; *People v Motzer*, 96 AD3d 1635, 1636).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1259

KA 10-01870

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LASEAN J. BROWN, DEFENDANT-APPELLANT.

SCOTT T. GODKIN, UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (MATTHEW P. WORTH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered February 23, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts) and criminal sale of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). Inasmuch as the confidential informant involved in the drug transactions giving rise to defendant's conviction was identified and testified at trial, defendant's contention that County Court erred in denying that part of his pretrial omnibus motion seeking disclosure of the identity of the informant is academic (*see People v Ingram*, 217 AD2d 986, 987; *see generally People v Goggins*, 34 NY2d 163, 168-169, *cert denied* 419 US 1012). We reject defendant's further contention that the court erred in denying that part of his omnibus motion seeking a *Darden* hearing. Because the informant testified before the grand jury and at trial, the objectives of a *Darden* hearing, i.e., confirmation that the informant existed and provided information to the police concerning the drug sales at issue, were met (*see People v Kimes*, 37 AD3d 1, 15-16, *lv denied* 8 NY3d 881, *reconsideration denied* 9 NY3d 846; *see generally People v Wilson*, 48 AD3d 1099, 1100, *lv denied* 10 NY3d 845).

We reject defendant's contention that the court's denial of his challenge for cause to one of the prospective jurors requires reversal (*see* CPL 270.20 [2]). Defendant did not use a peremptory challenge as to the prospective juror at issue and did not exhaust all of his

peremptory challenges before the completion of jury selection. Thus, the court's denial of defendant's challenge is not a basis for reversal (*see* CPL 270.20 [2]; *People v Flocker*, 223 AD2d 451, 452, *lv denied* 88 NY2d 847). We note in any event that the prospective juror at issue was not in fact seated as a juror. Finally, under the circumstances of this case, we conclude that the court did not abuse its discretion in denying defendant's request, made on the morning that the trial was scheduled to commence, for an adjournment to permit his new attorney to prepare his defense (*see People v Povio*, 284 AD2d 1011, 1011, *lv denied* 96 NY2d 923). "[T]he right to counsel does not include the right to delay" (*People v Arroyave*, 49 NY2d 264, 273 [internal quotation marks omitted]).

We have reviewed defendant's remaining contention and conclude that it does not warrant reversal or modification of the judgment.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1260

KA 11-01996

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE ABNER, 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 (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Erie County Court (Kenneth F. Case, J.), entered September 9, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that he received ineffective assistance of counsel because his attorney failed to challenge the requirement that he register as a sex offender. We reject that contention. At the time of defendant's SORA hearing, any challenge to the registration requirement in the context of a SORA proceeding was foreclosed by our decision in *People v Carabello* (309 AD2d 1227, 1228), where we held, consistent with the other Departments of the Appellate Division, that a challenge to the registration requirement "constitutes a challenge to a determination of an administrative agency" and must therefore be raised in a CPLR article 78 proceeding. We note that defendant does not contend that his attorney was ineffective for failing to commence a CPLR article 78 proceeding on his behalf (*cf. People v Reitano*, 68 AD3d 954, 955, *lv denied* 14 NY3d 708). Approximately nine months after defendant's SORA hearing, the Court of Appeals reversed the First Department's decision in *People v Liden* (79 AD3d 598, *revd* 19 NY3d 271) and thereby abrogated our ruling in *Carabello,* holding that "[a] determination by the Board of Examiners of Sex Offenders that a person who committed an offense in another state must register in New York is reviewable in a proceeding to determine the offender's risk level" (19 NY3d at 273). In our view, defense counsel cannot be deemed ineffective for merely failing to anticipate the change in the law brought about by *Liden* (*see generally People v Schrock*, 99 AD3d 1196, 1196; *Matter of State*

of New York v Campany, 77 AD3d 92, 99, *lv denied* 15 NY3d 713).

We also reject defendant's contention that County Court failed to make adequate findings of fact supporting its determination that defendant is a level three risk. The court's " 'oral findings are supported by the record and sufficiently detailed to permit intelligent review; thus, remittal is not required despite defendant's accurate assertion regarding the court's failure to render an order setting forth the findings of fact . . . upon which its determination is based' " (*People v Gosek*, 98 AD3d 1309, 1310).

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1261

KA 11-01656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD F. STILLWAGON, II, ALSO KNOWN AS DONALD F. STILLWAGON, ALSO KNOWN AS DONALD STILLWAGON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 6, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that the conviction is not supported by legally sufficient evidence that the victim, a police officer, sustained a physical injury or that defendant had the requisite intent inasmuch as he was intoxicated. We reject those contentions. The victim testified that defendant bit him in the forearm while he and two other officers were trying to place defendant on the ground during the course of an arrest and that, despite his efforts to "shake [defendant's] head loose," defendant's mouth was "locked right onto [his] arm." It was not until the victim punched defendant that defendant ceased biting him. The victim sought emergency medical treatment for the bite wound and missed several days of work. In the days following the incident, the victim experienced a "throbbing" pain that he treated with an over-the-counter painkiller. We conclude that the evidence is legally sufficient to establish that the victim sustained a physical injury, i.e., that the pain was "more than slight or trivial" (*People v Chiddick*, 8 NY3d 445, 447; *see People v Block*, 168 AD2d 940, 940, *lv denied* 77 NY2d 875). "The question whether defendant's intoxication destroyed his ability to form the requisite intent is one for the jury" (*People v Engelsen*, 92 AD3d 1289, 1290), and the evidence is legally sufficient to support the jury's conclusion that defendant had the requisite intent to prevent the victim from performing his lawful duty (*see generally People v New*,

171 AD2d 1006, 1006, *lv denied* 77 NY2d 998; *Block*, 168 AD2d at 940). Moreover, 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 failed to preserve for our review his contention that he was denied a fair trial by alleged instances of prosecutorial misconduct (*see People v Cox*, 21 AD3d 1361, 1363, *lv denied* 6 NY3d 753). In any event, any "improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Gonzalez*, 206 AD2d 946, 947, *lv denied* 84 NY2d 867). Finally, we reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to object to the prosecutor's comments on summation and defense counsel's failure to object when the prosecutor elicited testimony regarding the victim's medical treatment. 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; *People v Brown*, 67 AD3d 1369, 1370, *lv denied* 14 NY3d 886).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1262

KA 11-00210

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID MORRIS, 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 (SETH T. MOLISANI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered August 31, 2010. The judgment convicted defendant, upon a nonjury verdict, of attempted assault in the third degree and attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of attempted assault in the third degree (Penal Law §§ 110.00, 120.00 [1]) and attempted assault in the second degree (§§ 110.00, 120.05 [1]), arising from two separate incidents in which he choked his girlfriend to the point that she was rendered unconscious. Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We note in particular that the victim's breathing did not spontaneously resume after the second incident, i.e., with respect to the charge of attempted assault in the second degree, until after she was resuscitated. Thus, viewing the evidence with respect to that charge in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence that defendant choked the victim to the point of unconsciousness and continued choking her until she started to turn blue, while telling her that he was going to kill her, and that she did not begin breathing until after she was resuscitated, is legally sufficient to establish that he intended to cause serious physical injury to the victim. Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, County Court properly

refused to suppress the statement he made to the police while handcuffed and seated in a patrol vehicle, when he was in custody and before he received *Miranda* warnings. The evidence at the *Huntley* hearing "supports the court's determination that defendant spontaneously made that statement [inasmuch as] it was not the product of express questioning or its functional equivalent" (*People v Cheatom*, 57 AD3d 1447, 1447, *lv denied* 12 NY3d 782 [internal quotation marks omitted]; *see People v Moss*, 89 AD3d 1526, 1527, *lv denied* 18 NY3d 885).

We note that there is a discrepancy between the sentencing minutes, in which the court directed that the indeterminate term of imprisonment imposed on the felony run consecutively to the definite sentence imposed on the misdemeanor, and the certificate of conviction, which directs that the sentences run concurrently. The record does not reflect whether defendant was resentenced. We need not modify the judgment with respect to the sentence or remit the matter for resentencing, however, because, as "the People correctly concede, . . . the court erred in directing that the definite sentence[] imposed on the misdemeanor count[] shall run consecutively to the indeterminate sentence imposed on the felony count (*see* Penal Law § 70.35)" (*People v Shorter*, 6 AD3d 1204, 1205-1206, *lv denied* 3 NY3d 648). We therefore affirm the judgment, as reflected in the certificate of conviction, which directs that the definite sentence shall run concurrently with the indeterminate sentence (*see People v Leabo*, 84 NY2d 952, 953; *People v Newman*, 87 AD3d 1348, 1350, *lv denied* 18 NY3d 926). Finally, the sentence is not unduly harsh or severe.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1263

KA 12-00109

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLEK E. HOLMES, DEFENDANT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 5, 2011. The judgment convicted defendant, upon his plea of guilty, of failure to register change of address, failure to personally verify his address, disseminating indecent material to a minor in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of, inter alia, disseminating indecent material to minors in the first degree (Penal Law § 235.22). Defendant contends that the indictment is jurisdictionally defective because it accuses him of acts, i.e., sending sexually explicit text messages to a 16-year-old girl, that do not constitute a crime. According to defendant, the act of sending telephone text messages does not involve the use of "any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another" as required by Penal Law § 235.22 (1).

As a preliminary matter, we agree with defendant that he was not required to preserve his contention for our review, nor is it waived as a result of his guilty plea, inasmuch as it concerns a nonwaivable jurisdictional defect (*see People v Iannone*, 45 NY2d 589, 600-601; *cf. People v Cox*, 275 AD2d 924, 924-925, *lv denied* 95 NY2d 962; *see also People v Case*, 42 NY2d 98, 99). We conclude, however, that defendant's contention lacks merit. "The common-law policy that a penal provision should be strictly construed has been expressly abolished by the Legislature" (*People v Teicher*, 52 NY2d 638, 647; *see* Penal Law § 5.00). Instead, "penal statutes are to be interpreted 'according to the fair import of their terms to promote justice and effect the objects of the law' . . . and are not to be given

hypertechnical or strained interpretations" (*Teicher*, 52 NY2d at 647, quoting § 5.00; *see People v Ditta*, 52 NY2d 657, 660). The term computer is broadly defined in the Penal Law as "a device or group of devices which, by manipulation of electronic, magnetic, optical or electrochemical impulses, pursuant to a computer program, can automatically perform arithmetic, logical, storage or retrieval operations with or on computer data, and includes any connected or directly related device, equipment or facility which enables such computer to store, retrieve or communicate to or from a person, another computer or another device the results of computer operations, computer programs or computer data" (§ 156.00 [1]). "Computer data" is defined as "a representation of information, knowledge, facts, concepts or instructions which are being processed, or have been processed in a computer and may be in any form, including magnetic storage media, punch cards, or stored internally in the memory of the computer" (§ 156.00 [3]).

Although the issue whether a telephone is included in the statutory definition of "computer" has not been addressed by an appellate court in this state, in *People v Johnson* (148 Misc 2d 103), the court concluded that it is. The court reasoned that "[t]he instrumentality at issue here is not merely a telephone . . . , but rather a telephone inextricably linked to a sophisticated computerized communication system . . . This telephone system, of which the telephone itself is the essential first component, does comport with the statutory definition of 'computer' that is, the system is a 'group of devices which, by manipulation of electronic . . . impulses . . . can automatically perform . . . logical, storage or retrieval operations with or on computer data' . . . The system also meets the definitional inclusion of 'any connected or directly related device, equipment or facility which enables such computer to . . . communicate to or from a person' " (*id.* at 106-107).

In light of the foregoing and the fact that the Court of Appeals has approved of constructions of Penal Law § 235.22 that "criminalize the use of any 'sexually explicit *communications*' intended to lure children into sexual contact" (*People v Kozlow*, 8 NY3d 554, 561, quoting *People v Foley*, 94 NY2d 668, 674, *cert denied* 531 US 875), we conclude that sending telephone text messages falls within the conduct proscribed by section 235.22. Thus, the indictment is not jurisdictionally defective.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1264

KA 11-00011

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER A. GARDNER, III, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered December 10, 2010. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree and resisting arrest.

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 assault in the second degree (Penal Law § 120.05 [3]) and resisting arrest (§ 205.30). Defendant first contends that his plea was not knowingly, intelligently and voluntarily entered because he never admitted during the plea colloquy that he intended to prevent a police officer from performing a lawful duty or that he in fact caused injury to an officer. "That contention is actually a challenge to the factual sufficiency of the plea allocution, which is encompassed by defendant's valid waiver of the right to appeal" (*People v Thomas*, 72 AD3d 1483, 1483). In any event, defendant also failed to preserve that contention for our review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Lewandowski*, 82 AD3d 1602, 1602). "Although defendant's initial factual allocution may have negated an essential element of the crime, this case does not fall within the exception to the preservation rule because the court conducted the requisite further inquiry and defendant did not thereafter raise any further objections" (*People v Jennings*, 8 AD3d 1067, 1068, *lv denied* 3 NY3d 676).

We reject defendant's further contention that he was denied effective assistance of counsel. Assuming, arguendo, that defendant's contention otherwise survives the guilty plea and his waiver of the right to appeal, we conclude that he received meaningful

representation (*see generally People v Ford*, 86 NY2d 397, 404). To the extent that defendant contends that defense counsel's alleged failure to communicate with him constituted ineffective assistance, it is based upon matters outside the record and thus may only be raised by way of a motion pursuant to CPL article 440 (*see People v Frazier*, 63 AD3d 1633, 1634, *lv denied* 12 NY3d 925).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1265

KA 09-01179

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. COLON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered October 3, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of criminal sexual act in the first degree (Penal Law § 130.50 [3]), defendant contends that reversal is required because Supreme Court failed to advise him at the time of his plea that his sentence would include a period of postrelease supervision (PRS). We agree.

Defendant was indicted on six felony offenses, including two counts of criminal sexual act in the first degree, a class B felony. Defendant entered a plea of not guilty to all counts of the indictment. On the day the case was scheduled for a pretrial hearing, the court, following a conference in chambers, placed the People's plea offer on the record. According to the court, the offer required defendant to plead guilty to a class B felony in satisfaction of the indictment on the condition that he receive a sentence of no less than 20 years in prison. The prosecutor confirmed that this accurately conveyed the People's offer, but added that he was also asking for an order of protection in favor of the victims. The court then addressed defendant directly, stating that, although the prosecutor was asking for a sentence of between 20 and 25 years, the court "would consider the sentence of 20 years in the New York State Department of Corrections." Neither the court nor the prosecutor stated that the offer required a term of PRS. Defense counsel requested an

adjournment to permit his client to consider the offer. At the next scheduled court appearance, the court again placed the People's plea offer on the record. Again, no mention was made of PRS. Defendant rejected the offer.

On the day that defendant's jury trial was scheduled to commence, the prosecutor reiterated the People's plea offer in slightly different terms, stating that defendant would be required to plead guilty to one class B violent felony offense in satisfaction of all charges, in return for a sentence promise of at least 20 but not more than 25 years' imprisonment and a mandatory period of five years of PRS. The court informed defendant that it "would strongly consider the 20 years rather than the 25 years" if defendant pleaded guilty, but the court did not mention that its sentence commitment included a mandatory period of PRS, or that the court would impose a period of PRS as part of its sentence.

Following a one-hour recess, the purpose of which was to give defendant time to discuss the offer with his attorney, the court reiterated the terms of the plea offer and sentence promise, but again did not mention PRS. Defense counsel then stated that defendant wished to accept the offer provided that defendant could enter an *Alford* plea, which neither the People nor the court opposed. The court then began a plea colloquy with defendant, reviewing the rights he would be forfeiting by pleading guilty.

During the colloquy, the court asked defendant, "Has anybody promised you anything other than what we placed on the record all morning, the first time around 9:30 and right now around 25 after 11:00; anybody promised you anything else?" Defendant answered "no." Later in the colloquy the court asked defendant, "Do you understand that I made a promise to you that upon your guilty plea I'm going to consider the sentence range from 20 to 25, but right now my position is because of everything I heard, I'm leaning toward 20." Defendant answered "yes." The court did not mention any period of PRS, nor did the prosecutor or defense counsel. The court subsequently accepted defendant's guilty plea to one count of criminal sexual act in the first degree, and at sentencing imposed a determinate term of imprisonment of 20 years plus five years of PRS. This appeal ensued.

As the Court of Appeals has repeatedly advised, "[a] trial court has the constitutional duty to advise a defendant of the direct consequences of a guilty plea, including any period of postrelease supervision (PRS) that will be imposed as part of the sentence" (*People v Cornell*, 16 NY3d 801, 802, citing *People v Catu*, 4 NY3d 242, 244-245). "Although the court is not required to engage in any particular litany when allocuting the defendant, due process requires that the record must be clear that the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant" (*id.* [internal quotation marks omitted]). "[T]he failure of a court to advise of postrelease supervision requires reversal of the conviction" (*id.*). "Further, 'where a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge

the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion' " (*id.*, quoting *People v Louree*, 8 NY3d 541, 545-546).

We conclude that the record does not make clear, as required by *Cornell* and *Catu*, that defendant was aware when he pleaded guilty that the terms of the court's promised sentence included a period of PRS. Although the prosecutor at one point described a period of PRS as mandatory, the court did not state that it would impose a period of PRS as part of its sentence; rather, the court repeated several times its promise to sentence defendant to no more than 25, and as few as 20, years' imprisonment. It is also true, as the People note, that the attorney who represented defendant at the time of the plea subsequently testified at a later hearing that he advised defendant that there would be a mandatory period of 5 years' PRS if he were convicted after trial. That attorney did not testify, however, that he advised defendant that he would be sentenced to PRS if he pleaded guilty or that the court's sentence promise included PRS. Under the circumstances, it cannot be said that defendant necessarily was aware that he would be sentenced to a period of PRS if he pleaded guilty. Indeed, defendant may reasonably have believed that the court's repeated failure to mention a period of PRS indicated that it was not a part of the sentence promised (*see People v Cornell*, 75 AD3d 1157, 1158, *affd* 16 NY3d 801). In any event, the fact that either the prosecutor or defense counsel mentioned a period of PRS earlier in the plea bargaining process "does not excuse the court from fulfilling its constitutional duty" (*id.*).

In sum, because the record here is not clear with respect to defendant's knowledge of the terms of his sentence, the guilty plea must be vacated even in the absence of a postallocution motion to withdraw the plea or to vacate the judgment of conviction specifically directed at the *Catu* error (*see Cornell*, 16 NY3d at 802). We do not agree with the People that the "rationale for dispensing with the preservation requirement is not presently applicable" because defendant was advised by the court prior to the imposition of sentence that he would be subjected to a term of PRS (*People v Murray*, 15 NY3d 725, 727). In any event, even assuming, arguendo, that the preservation requirement applies, we would nonetheless exercise our power to address defendant's challenge to the voluntariness of his plea as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1266

CAF 12-00006, CAF 12-00077

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

IN THE MATTER OF ANDIE M., FREDERICK M.
AND VONYEE M.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

KIMBERLY M. AND ANDREW M.,
RESPONDENTS-APPELLANTS.

MEMORANDUM AND ORDER

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

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

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

JAMES E. CORL, ATTORNEY FOR THE CHILDREN, CICERO, FOR ANDIE M. AND VONYEE M.

Appeals from an order of the Family Court, Onondaga County (Bryan R. Hedges, J.), entered December 13, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, transferred guardianship and custody of Andie M. and Vonyee M. to petitioner.

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

Memorandum: Respondent parents appeal from an order that, inter alia, terminated their parental rights with respect to two of their children pursuant to Social Services Law § 384-b on the ground of permanent neglect, committed the custody and guardianship of those children to petitioner, and freed them for adoption. Contrary to respondents' contention, Family Court did not abuse its discretion in declining to enter a suspended judgment (*see Matter of Arella D.P.-D.*, 35 AD3d 1222, *lv denied* 8 NY3d 809; *Matter of Kyle S.*, 11 AD3d 935, 936). Although the record establishes that respondents had made progress in improving, inter alia, the deplorable conditions and other problems existing in the family home, the progress "was not sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status" (*Matter of Maryline A.*, 22 AD3d 227, 228). Under the circumstances, freeing the children for adoption by the foster parents with whom they had been residing was plainly in their best interests (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148; *Matter of Arron*

Brandend C., 267 AD2d 107, 108; *Matter of Amanda R.*, 215 AD2d 220, 220-221, *lv denied* 86 NY2d 705). Finally, the court properly denied posttermination visitation to respondents. It is now well settled that a court lacks the authority to direct continuing contact between parents and their children once parental rights have been terminated pursuant to Social Services Law § 384-b (*see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 426, 437-438).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1267

CAF 12-00007

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

IN THE MATTER OF SERENITY G.

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

ORENA G., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered December 6, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect. We affirm. Initially, we note that the mother failed to preserve for our review her contention that Family Court erred in considering postpetition conduct prior to the dispositional hearing (*see Matter of Darren HH. [Amber HH.]*, 68 AD3d 1197, 1198, *lv denied* 14 NY3d 703; *Matter of "Baby Girl" Q.*, 14 AD3d 392, 393, *lv denied* 5 NY3d 704).

Also contrary to the mother's contention, petitioner established by clear and convincing evidence that she permanently neglected the subject child (*see* Social Services Law § 384-b [3] [g] [i]; [4] [d]). It is undisputed that the child was removed from the mother's care two days after her birth and was never returned to the mother's care. Petitioner met its initial burden of establishing by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the mother's relationship with the child (*see* § 384-b [7] [a]; *see generally Matter of Star Leslie W.*, 63 NY2d 136, 142; *Matter of Rachael N. [Christine N.]*, 70 AD3d 1374, 1374, *lv*

denied 15 NY3d 708). The mother thereafter failed to establish that she had a meaningful plan for the child's future, including that she has addressed the problems that caused the removal of the child (*see Matter of Justain R.*, 93 AD3d 1174, 1175; *Rachael N.*, 70 AD3d at 1374). Although the mother attended some of the parenting classes to which she was referred, petitioner presented evidence that she was "inconsistently applying the knowledge and benefits she obtained from the services provided[and was] arguing with various service providers and professionals," and petitioner thus established that the mother failed to articulate a realistic plan for the child's return to her care (*Matter of Douglas H.*, 1 AD3d 824, 825, *lv denied* 2 NY3d 701).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1268

CA 12-00868

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

CHAMBERLAIN, D'AMANDA, OPPENHEIMER & GREENFIELD LLP, PLAINTIFF,

V MEMORANDUM AND ORDER

REBECCA P. WILSON, DEFENDANT-APPELLANT.

J. RICHARD WILSON AND STEPHEN M. JACOBSTEIN, RESPONDENTS.

M W MOODY LLC, NEW YORK CITY (MARK WARREN MOODY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered August 10, 2011. The order, among other things, denied in part the motion of defendant to compel disclosure from J. Richard Wilson and Stephen M. Jacobstein.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the condition in the third ordering paragraph and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order that, inter alia, denied her motion to compel insofar as it sought disclosure from her ex-husband, nonparty respondent J. Richard Wilson, and conditioned disclosure from her ex-husband's attorney, nonparty respondent Steven M. Jacobstein, upon her stipulation not to seek to "re-open" the divorce from her ex-husband.

Contrary to defendant's contention, the ex-husband did not waive his objection to the disclosure sought by failing to seek a protective order in a timely manner. The party seeking disclosure is obligated to move to compel such disclosure when confronted with a refusal to disclose; "no longer may the party who served a discovery notice rely upon the recipient's failure to seek a protective order" (*Pyron v Banque Francaise du Commerce Exterieur*, 256 AD2d 204, 205).

Defendant further contends that Supreme Court erred in both denying her motion to compel to the extent that it sought disclosure from her ex-husband, a nonparty to the underlying action between

defendant and her former attorneys, and in imposing a condition on the disclosure from the ex-husband's attorney. "The supervision of discovery, the setting of reasonable terms and conditions for disclosure, and the determination of whether a particular discovery demand is appropriate, are all matters within the sound discretion of the trial court" (*Kooper v Kooper*, 74 AD3d 6, 17). While we conclude that the Court did not abuse its discretion under the circumstances of this case by refusing to compel disclosure from defendant's ex-husband (*see* CPLR 3101 [a] [4]; *cf.* CPLR 3101 [a] [1]), we do agree with defendant that the court abused its discretion by conditioning disclosure from her ex-husband's attorney "upon defendant supplying [the attorney] with a stipulation not to seek re-opening [of] any aspect of the divorce, within five (5) days of this Order." We therefore modify the order by vacating that condition.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1269

CA 12-00626

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

LISA A. JOHNSON, INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF VALERION JOHNSON,
AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

CHARLES G. JOHNSON, ROCHESTER (CARA M. BRIGGS OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTOPHER S. CIACCIO, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered December 5, 2011. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her son when a fellow student assaulted him at a city transit bus stop across the street from their school building after school's dismissal. Defendant moved for summary judgment dismissing the complaint on the grounds that it had no duty to supervise students off school premises after dismissal from school; that the assault could not have been foreseen or prevented; and that the level of supervision that it provided was not a proximate cause of the injuries to plaintiff's son. We agree with defendant that Supreme Court erred in denying its motion.

The duty of a school district to its students "is strictly limited by time and space," i.e., it "exists only so long as a student is in its care and custody during school hours, and terminates when the child has departed from the school's custody" (*Norton v Canandaigua City School Dist.*, 208 AD2d 282, 285, *lv denied* 85 NY2d 812, *rearg denied* 86 NY2d 839; *see Harker v Rochester City School Dist.*, 241 AD2d 937, 938, *lv denied* 90 NY2d 811, *rearg denied* 91 NY2d 957). Here, defendant established its entitlement to judgment as a matter of law with respect to the element of duty by demonstrating that plaintiff's son was safely dismissed from school grounds before the assault, which occurred beyond the boundaries of school property

(*see Bowers v City of New York*, 294 AD2d 526, 527, *lv denied* 98 NY2d 613). The evidence that plaintiff submitted in opposition to summary judgment was insufficient as a matter of law to raise a triable issue of fact on that element, i.e., whether plaintiff's son was within defendant's custody and control at the time of the assault such that it owed him a duty of adequate supervision. Plaintiff's assertion that defendant knew or should have known of the assailant's alleged violent propensities before or on the day of the assault is therefore insufficient to raise the triable issue of fact necessary to defeat the motion (*see Harker*, 241 AD2d at 938).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1273

CA 11-02247

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

IN THE MATTER OF RUBEN VELEZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK
STATE DIVISION OF PAROLE,
RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered June 17, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: Inasmuch as petitioner has been released to parole supervision, his appeal from the judgment denying his CPLR article 78 petition seeking release to parole has been rendered moot (*see People ex rel. Baron v New York State Dept. of Corrections*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807; *People ex rel. Graham v Fischer*, 70 AD3d 1381, 1381-1382; *People ex rel. Mitchell v Unger*, 63 AD3d 1591, 1591), and the exception to the mootness doctrine does not apply herein (*see Baron*, 94 AD3d at 1410; *Graham*, 70 AD3d at 1381-1382; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1279

TP 12-00943

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF RUFUS SPEARS, PETITIONER,

V ORDER

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

RUFUS SPEARS, PETITIONER PRO SE.

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, Cayuga County [Thomas G. Leone, A.J.], entered May 16, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1280

TP 12-00999

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF ZEBADIAH HART, PETITIONER,

V ORDER

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

ZEBADIAH HART, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH 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 May 29, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1281

TP 12-01070

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF ALBERTO RODRIGUEZ, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT.

ALBERTO RODRIGUEZ, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered June 6, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1283

KA 12-00369

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JURIMAUL K. EDWARDS, 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 (RYAN D. HAGGERTY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered February 9, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and unlawful possession of marihuana.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Erie County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: On appeal from a judgment convicting him, following his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]) and unlawful possession of marihuana (§ 221.05), defendant contends that County Court erred in refusing to suppress evidence seized as the result of an unlawful search and seizure. We reject that contention. Defendant was stopped at a traffic checkpoint in the City of Buffalo where, according to the testimony of the officer in charge of the checkpoint, the police were checking for registration, inspection, seat belt and other traffic related infractions. Every vehicle that went through the checkpoint was stopped. When defendant's vehicle was stopped, a police officer smelled marihuana in the vehicle and, after defendant was asked to leave the vehicle, the officer observed marihuana in plain view in the vehicle.

We reject defendant's contention that the "main purpose" of the checkpoint was general crime control. Rather, the evidence at the suppression hearing established that the checkpoint was established as a "safety" checkpoint (*People v Dugan*, 57 AD3d 300, 300, *lv denied* 11 NY3d 924). We further conclude that the checkpoint was effective in advancing that interest (*see People v Scott*, 63 NY2d 518, 528-529). Finally, we conclude that the degree of intrusion on liberty and

privacy interests was minimal (*see id*. at 526-527; *Dugan*, 57 AD3d at 300). Unlike in *People v Trotter* (28 AD3d 165, *lv denied* 6 NY3d 839), where the checkpoint was conducted as part of a longer campaign to address general crime concerns, there is no evidence here to suggest that the checkpoint was part of a broader program of general crime control, or that it was "no more than a 'key pragmatic tool' " in a larger campaign to control crime (*id.* at 170).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1284

KA 11-01292

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL R. JACOBS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Ontario County Court (William F. Kocher, J.), rendered June 1, 2011. Defendant was resentenced upon his conviction of assault in the first degree and assault in the second degree.

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

Memorandum: In 2001 defendant was convicted following a jury trial of assault in the first degree (Penal Law § 120.10 [3]), assault in the second degree (§ 120.05 [1]) and various misdemeanors. With respect to the two assault counts, defendant was sentenced to concurrent determinate terms of incarceration of 25 years and 5 years, respectively. In 2002 the judgment of conviction was affirmed (*People v Jacobs*, 298 AD2d 954, *lv denied* 99 NY2d 559). In 2011 County Court resentenced defendant on the assault counts by imposing periods of postrelease supervision (PRS) in addition to the determinate terms of incarceration originally imposed. Defendant now appeals from the resentence only with respect to the count of assault in the second degree. He contends that, because he was resentenced more than five years after the original sentence was imposed, he had a legitimate expectation of finality in the sentence that was imposed on his conviction of that count and, therefore, under the authority of *People v Williams* (14 NY3d 198, *cert denied* ___ US ___, 131 S Ct 125), he could not be resentenced to a period of PRS on that count. We reject defendant's contention.

Defendant is correct that, when he was resentenced in 2011, he had been incarcerated for more than the five-year period of his determinate sentence for assault in the second degree. He was still in custody, however, as a result of the 25-year sentence for assault in the first degree. "[A]lthough defendant had served longer than [five] years at the time resentencing proceedings were commenced, he

had neither completed his sentence, as calculated under Penal Law § 70.30 (1) (a), nor been released. Under that statute, the maximum terms of the determinate sentence[s] . . . merge, and are satisfied by discharge of the term that has the longest unexpired time to run . . . Accordingly, the resentencing was lawful in all respects because defendant is still serving the single merged sentence" (*People v Wilson*, 92 AD3d 512, 512-513, *lv denied* 18 NY3d 999; *see People v Almestica*, 97 AD3d 834, 835; *People v Brinson*, 90 AD3d 670, 671-672, *lv granted* 18 NY3d 992; *People v Scott*, 81 AD3d 988, 988, *lv denied* 16 NY3d 863; *People v Johnson*, 79 AD3d 1072, 1072-1073, *lv denied* 16 NY3d 832; *see generally People v Buss*, 11 NY3d 553, 557).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1285

KA 11-00859

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN C., DEFENDANT-APPELLANT.

GENESEE VALLEY LEGAL AID, GENESEO (KELLEY PROVO OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Livingston County Court (Dennis S. Cohen, J.), rendered March 17, 2011. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant was adjudicated a youthful offender based upon his plea of guilty of attempted criminal contempt in the first degree (Penal Law §§ 110.00, 215.51 [b] [v]), a class A misdemeanor, and was sentenced to three years of probation. On appeal from an adjudication revoking the sentence of probation and sentencing him to one year of incarceration, defendant contends that the People failed to establish by a preponderance of the evidence that defendant violated the terms and conditions of his probation. We reject that contention (*see* CPL 410.70 [1], [3]; *People v Maldonado*, 44 AD3d 793, 793-794, *lv denied* 9 NY3d 1035).

Two conditions of defendant's probation were that he must not commit further crimes or offenses and must not possess mood-altering substances without a prescription. Defendant's father found two pills on defendant's person and, after a pat search, a police officer found in defendant's pocket a package labeled "Manhattan Spice." County Court properly determined, based upon a preponderance of the evidence, that defendant violated the terms and conditions of his probation. Although there was no expert testimony with respect to the pills, nor was testing performed on the pills, both the police officer who conducted the pat search and a probation supervisor testified that, based upon their training and experience, the pills that were received in evidence were Adderall, and one of the pills was labeled to that effect. The probation supervisor testified that defendant did not

have a prescription for Adderall. The police officer testified that Manhattan Spice was a legal, mind-altering drug, and the labeled package of that drug was admitted in evidence.

We also reject defendant's contention that his sentence is illegal. Because defendant was adjudicated a youthful offender under CPL 720.20 (1) (a), the six-month limitation in Penal Law § 60.02 (1) did not apply and he was properly sentenced to one year of imprisonment (*see* § 70.15 [1]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1286

KA 08-02655

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMION W. CLARKE, DEFENDANT-APPELLANT.

PETER J. PULLANO, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered September 5, 2008. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, he was not denied effective assistance of counsel based on defense counsel's failure to request that the jury be charged with the issue whether a prosecution witness was an accomplice (*see generally People v Baldi*, 54 NY2d 137, 147). Even assuming, arguendo, that an accomplice charge was warranted (*see generally People v Caban*, 5 NY3d 143, 152-153), we conclude that "there was substantial corroboration for the accomplice testimony, and defendant would have derived no benefit from an accomplice charge" (*People v Leffler*, 13 AD3d 164, 165, *lv denied* 4 NY3d 800). Because " 'the failure of [County Court] to give [an accomplice charge] is of no moment [where, as here,] the testimony of the witness was in fact amply corroborated' " (*People v Peoples*, 66 AD3d 1419, 1419, *lv denied* 14 NY3d 843; *see People v Freeman*, 78 AD3d 1505, 1506, *lv denied* 15 NY3d 952), defense counsel was not ineffective for failing to request such a charge (*see Leffler*, 13 AD3d at 165).

Viewing the evidence in light of the elements of the crime of manslaughter in the first degree 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). "Although a different result would not have been unreasonable, the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said

that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801). Finally, the sentence is not unduly harsh or severe.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1287

CAF 11-01519

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF DAWN FREY, PETITIONER-RESPONDENT,

V ORDER

WARREN MIMS, RESPONDENT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

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

AYOKA A. TUCKER, ATTORNEY FOR THE CHILD, BUFFALO, FOR ALEXUS M.

Appeal from an order of the Family Court, Erie County (E. Jeannette Ogden, A.J.), dated June 29, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, conditionally granted petitioner's request to relocate with the subject child to Metairie, Louisiana.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1288

CAF 11-01338

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF KAYLENE S. AND NADIA M.-S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRAUNA S., RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC. (CHARLES D. HALVORSEN OF COUNSEL), FOR KAYLENE S. AND NADIA M.-S.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 16, 2011 in proceedings pursuant to Social Services Law § 384-b and Family Court Act article 10. The order, among other things, terminated respondent's parental rights over Kaylene S. on the ground of mental illness, and adjudged that respondent had derivatively neglected Nadia M.-S.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights on the ground of mental illness with respect to one of her older children and entering a finding of derivative neglect with respect to her youngest child. The mother contends that petitioner failed to lay a proper foundation for the testimony of its expert witnesses. That contention is unpreserved for our review (*see generally Matter of Brayanna G.*, 66 AD3d 1375, 1375, *lv denied* 13 NY3d 714; *Wall v Shepard*, 53 AD3d 1050, 1050). In any event, it lacks merit inasmuch as an adequate foundation was laid for the testimony (*see generally Matter of Devonte M.T. [Leroy T.]*, 79 AD3d 1818, 1818). We agree with Family Court that petitioner met its burden of demonstrating by clear and convincing evidence that the mother is presently and for the foreseeable future unable to provide proper and adequate care for the older child at issue by reason of mental illness (*see* Social Services Law § 384-b [4] [c]; [6] [a]; *see e.g. Matter of Demariah A. [Rebecca B.]*, 71 AD3d 1469, 1469, *lv denied* 15 NY3d 701). Contrary to the mother's contention, the court did not err in allowing a psychologist to testify based on an evaluation that he conducted several years earlier in connection with a matter involving one of the

mother's other children (*see Matter of Aubrey A. [Rebecca B.]*, 96 AD3d 1459, 1459; *Matter of Robert K.*, 56 AD3d 353, 353, *lv denied* 12 NY3d 704; *see generally Matter of Dominique M.*, 62 AD3d 503, 503). The psychologist's testimony was detailed and supported his opinion that it was unlikely that the mother's condition would improve over time. That testimony was substantiated by the testimony of a second expert who had interviewed the mother in connection with the instant petitions and opined that, due to her mental illness, she was unable to parent the child for the present and foreseeable future. Contrary to the mother's further contention, the court was free to accept the testimony of petitioner's experts over that of her expert (*see generally Matter of Kimberly J.*, 216 AD2d 940, 941, *lv denied* 87 NY2d 801).

The court did not err in entering a finding of derivative neglect with respect to the mother's youngest child. The credible evidence supports a finding that the mother's untreated and ongoing mental illness resulted in an inability to care for her youngest child in the foreseeable future (*see Matter of Henry W.*, 30 AD3d 695, 696; *see also Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1746-1747). Indeed, the record reflects that the mother "demonstrated a fundamental defect in [her] understanding of the duties and obligations of parenthood and created an atmosphere detrimental to the physical, mental and emotional well-being of [that child]" (*Matter of Derrick C.*, 52 AD3d 1325, 1326, *lv denied* 11 NY3d 705 [internal quotation marks omitted]; *see Matter of Cory S. [Terry W.]*, 70 AD3d 1321, 1322).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1289

TP 12-00264

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF CHARLES E. WATSON, INDIVIDUALLY AND DOING BUSINESS AS C.E.W. MOTORS, PETITIONER,

V MEMORANDUM AND ORDER

BARBARA J. FIALA, NEW YORK STATE COMMISSIONER OF MOTOR VEHICLES, RESPONDENT.

LEONARD A. ROSNER, ROCHESTER, FOR PETITIONER.

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 judgment (denominated order) of the Supreme Court, Monroe County [William P. Polito, J.], entered January 18, 2012) to review the determinations of respondent. The determinations revoked petitioner's inspection station license and his certified inspector license.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs, the determinations are confirmed and the petition is dismissed in its entirety.

Memorandum: Respondent charged petitioner, individually and doing business as C.E.W. Motors, with violating Vehicle and Traffic Law § 303 (e) (3) and 15 NYCRR 79.17 (b) (1) and 79.24 (i), concerning an inspection petitioner performed on a "concealed identity vehicle." Petitioner appeared before the Administrative Law Judge (ALJ) without the benefit of counsel and, following a hearing, the ALJ found petitioner guilty of all three charges. Finding that "[petitioner's] testimony exhibited the most complete and thorough disregard of the State laws and the Commissioner's regulations when performing New York State inspections that [he had] hear[d] in . . . 19 years," the ALJ revoked the inspector's card issued to petitioner as well as C.E.W. Motors' inspection station license.

Petitioner hired an attorney and filed administrative appeals challenging the ALJ's determinations. In each of the administrative appeals, petitioner sought review of "both the findings and the revocation" of his inspector's card and license. He contended that vacatur was justified because he proceeded without the benefit of counsel, there was insufficient evidence supporting the

"conviction(s)," and the penalty imposed was disproportionately severe. Petitioner did not file a transcript of the administrative hearing with his administrative appeals, although he had received notifications informing him that it was his obligation to do so.

The Administrative Appeals Board (Board) affirmed the determinations, noting that petitioner's administrative appeals raised "issues of fact [that] would require transcript review." With respect to petitioner's challenges to the penalty, the Board affirmed the penalties, finding that they "were not an abuse of discretion."

Petitioner commenced this CPLR article 78 proceeding to challenge the Board's determinations. Although petitioner contended in the petition that he was challenging only the penalty, he also contended that the determinations should be vacated because they were "unsupported by substantial evidence." We thus conclude that Supreme Court properly addressed the merits of petitioner's challenge to the penalty and thereafter properly transferred the matter to this Court. We now affirm the judgment and confirm the determinations.

Petitioner contends that the determinations should be vacated because he appeared at the administrative hearing without the benefit of counsel. That contention lacks merit. "Aside from certain narrow exceptions . . . , the right to counsel . . . does not extend to civil actions or administrative proceedings . . . Due process considerations in such cases require only that a party to an administrative hearing be afforded the opportunity to be represented by counsel. Here, the record indicates that [petitioner] was provided with an adequate opportunity to obtain legal representation" (*Matter of Baywood Elec. Corp. v New York State Dept. of Labor*, 232 AD2d 553, 554).

Contrary to petitioner's further contention, the penalty of revocation is not "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [internal quotation marks omitted]). To the extent that petitioner may be deemed to contend that the determinations are not supported by substantial evidence, that contention cannot be addressed due to petitioner's failure to file a transcript of the administrative hearing (*see Matter of Brady v Department of Motor Vehs.*, 98 NY2d 625, 626; *Matter of Cipry Auto., Inc. v New York State Dept. of Motor Vehs.*, 72 AD3d 816, 817; *see generally* Vehicle and Traffic Law §§ 228 [5]; 398-f [3] [b] [3]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1290

CA 12-00785

PRESENT: SCUDDER, P.J., CENTRA, WHALEN, AND MARTOCHE, JJ.

KENNETH EARL TUPER, AS COTRUSTEE OF THE TUPER LIVING TRUST, AND THE TUPER LIVING TRUST, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PATRICIA P. TUPER, AS COTRUSTEE OF THE TUPER LIVING TRUST, DEFENDANT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (GRETA KOLCON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered May 3, 2011. The order dismissed plaintiffs' complaint.

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

Memorandum: Plaintiffs, Kenneth Earl Tuper, as cotrustee of the Tuper Living Trust, and the Tuper Living Trust (Trust), commenced this action against defendant, Patricia P. Tuper, as cotrustee of the Trust, seeking, inter alia, damages for defendant's alleged breach of fiduciary duty and breach of contract. The facts of this case are fully set forth in our decision on a prior appeal (*Tuper v Tuper*, 34 AD3d 1280). After a nonjury trial, Supreme Court dismissed the complaint. We affirm.

" 'On our review of a verdict after a bench trial, we independently review the weight of the evidence and may grant the judgment warranted by the record' " (*Charles T. Driscoll Masonry Restoration Co., Inc. v County of Ulster*, 40 AD3d 1289, 1291; *see Blakesley v State of New York*, 289 AD2d 979, 979, *lv denied* 98 NY2d 605). Contrary to plaintiffs' contention, we conclude upon our independent review of the record that the weight of the evidence supports the court's determination that defendant did not breach her fiduciary duty. "The elements of [a breach of fiduciary duty] cause of action are 'the existence of a fiduciary duty, misconduct by the defendant[] and damages that were directly caused by the defendant['s] misconduct' " (*McGuire v Huntress* [appeal No. 2], 83 AD3d 1418, 1420; *see Colello v Colello*, 9 AD3d 855, 859). Plaintiffs failed to

establish that defendant engaged in any misconduct or that there were any damages. Patricia Tuper's conduct in commencing a divorce action and an action seeking partition of the real property in the Trust were not in violation of her duties as cotrustee because she commenced those actions in her individual capacity, not as cotrustee. In addition, the Trust specifically authorized a cotrustee to seek partition of the property, and defendant did not act in bad faith or in disregard of the purposes of the Trust in doing so, particularly in view of the evidence that Kenneth Tuper removed her name from the Trust accounts and prevented her from accessing them. The court also properly dismissed the breach of contract cause of action inasmuch as it was duplicative of the breach of fiduciary duty cause of action (*see Pergament v Roach*, 41 AD3d 569, 571; *see also JMF Consulting Group II, Inc. v Beverage Mktg. USA, Inc.*, 97 AD3d 540, 542-543, *lv denied* ___ NY3d ___ [Oct. 30, 2012]). Because the court properly dismissed the first two causes of action, there remained no basis for the latter two causes of action, seeking an injunction and an accounting. Thus, those causes of action were properly dismissed as well.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1291

CA 12-00478

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF HOPEWELL VOLUNTEER FIRE DEPARTMENT, INC. AND CHRISANNTHA CONSTRUCTION CORP., PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

COLLEEN C. GARDNER, IN HER OFFICIAL CAPACITY AS NEW YORK STATE COMMISSIONER OF LABOR, RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENT-APPELLANT.

SCICCHITANO & PINSKY, PLLC, SYRACUSE (BRADLEY M. PINSKY OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered May 26, 2011 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of petitioners 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, respondent is granted summary judgment and the petition is dismissed.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, determinations that the prevailing wage provisions of Labor Law § 220 were not applicable to the construction of an addition to a firehouse by petitioner Hopewell Volunteer Fire Department, Inc. and that respondent was prohibited from implementing or enforcing section 220 against petitioners. We conclude that Supreme Court erred in granting petitioners' motion for summary judgment on the petition and, indeed, we conclude that the court should have granted summary judgment in favor of respondent pursuant to CPLR 3212 (b) and dismissed the petition. "Those who wish to challenge agency determinations under [CPLR] article 78 may not do so until they have exhausted their administrative remedies" (*Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 195). "[Q]uestions regarding the applicability of Labor Law § 220 'cannot be answered without the development of a factual record and an examination of all the circumstances of the project, tasks which the Legislature has assigned, in the first instance, to respondent' " (*Matter of Christa Constr., LLC v Smith*, 63 AD3d 1331, 1331; *see* § 220 [8]). Here, "no final agency determination has been reached; in

fact, no such determination can be made until a fact-finding hearing has been held. Absent exceptional circumstances, it is only after such a hearing is held, and a final determination made, that an aggrieved party may bring a CPLR article 78 proceeding to challenge the legality of the determination" (*Matter of Pyramid Co. of Onondaga v Hudacs*, 193 AD2d 924, 925). We reject petitioners' contention that the exhaustion of administrative remedies is not necessary because the Department of Labor (DOL) was acting "wholly beyond its grant of power" (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57). Here, as in *Christa*, the court "erroneously focused on its own conclusion that the project at issue was not subject to the prevailing wage law, as opposed to DOL's broad jurisdiction to determine prevailing wages on public works projects in the first instance" (*id.* at 1332; *see generally Pyramid Co. of Onondaga*, 193 AD2d at 925-926). In light of our determination, we do not consider respondent's remaining contention.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1293

CA 12-01130

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

EUGENE PALLADINO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CNY CENTRO, INC., CHARLES WATSON, AS BUSINESS AGENT OF AMALGAMATED TRANSIT UNION, LOCAL 580 AND AMALGAMATED TRANSIT UNION, LOCAL 580, DEFENDANTS-APPELLANTS.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (CRAIG M. ATLAS OF COUNSEL), FOR DEFENDANT-APPELLANT CNY CENTRO, INC.

BLITMAN & KING LLP, SYRACUSE (KENNETH L. WAGNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS CHARLES WATSON, AS BUSINESS AGENT OF AMALGAMATED TRANSIT UNION, LOCAL 580 AND AMALGAMATED TRANSIT UNION, LOCAL 580.

ROBERT LOUIS RILEY, SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 12, 2012. The order, insofar as appealed from, denied in part the motions of defendants for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motions are granted in their entirety and the amended complaints are dismissed.

Memorandum: Defendants appeal from an order that granted only in part their respective motions seeking summary judgment dismissing the amended complaints against them. We agree with defendants that Supreme Court should have granted their motions in their entirety. Defendants Amalgamated Transit Union, Local 580 (Union) and Charles Watson, as business agent of the Union, contend that the Union is a voluntary unincorporated association and that plaintiff has failed even to plead that the Union's conduct was authorized or ratified by the entire membership of the association. We agree (*see Martin v Curran*, 303 NY 276, 282; *Zanghi v Laborers' Intl. Union of N. Am., AFL-CIO*, 8 AD3d 1033, 1034, *lv denied* 4 NY3d 703). Thus, we further agree with those defendants that plaintiff's contention that the Union breached its duty of fair representation is "fatally defective" (*Walsh v Torres-Lynch*, 266 AD2d 817, 818). In light of our conclusion, we do

not address defendants' remaining contentions.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1294

CA 11-02541

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

CRAIG MELVIN, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 107704.)

GREENE & REID, PLLC, SYRACUSE (EUGENE W. LANE OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from a judgment of the Court of Claims (Nicholas V. Midey, Jr., J.), entered August 31, 2011. The judgment dismissed the claim after trial.

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

Memorandum: Claimant, an inmate at a state correctional facility operated by defendant, State of New York (State), commenced this action alleging that the State was negligent and thus was liable for injuries he sustained when he was assaulted by a fellow inmate. Following a nonjury trial on the issue of liability, the Court of Claims determined that the State was not negligent and dismissed the claim. Claimant now appeals, and we affirm.

"The State's duty to an incarcerated person encompasses protection from the foreseeable risk of harm at the hands of other prisoners. Because the State is not an insurer of an inmate's safety, it will be liable in negligence for an assault by another inmate only upon a showing that it failed to exercise adequate care to prevent that which was reasonably foreseeable" (*Schittino v State of New York*, 262 AD2d 824, 825, *lv denied* 94 NY2d 752; *see Sanchez v State of New York*, 99 NY2d 247, 252-253; *Newton v State of New York*, 283 AD2d 992, 993).

Here, the court found that it was not reasonably foreseeable that a hotpot would be used to assault claimant. The court also found that it was not reasonably foreseeable that the inmate assailant would assault claimant inasmuch as the inmate assailant had not been cited for any violent behavior for over three years and there was no history of violence between the two inmates (*cf. Blake v State of New York*,

259 AD2d 878, 879; *Littlejohn v State of New York*, 218 AD2d 833, 834-835). "Where, as here, the court's decision is based upon a fair interpretation of the evidence, it will not be disturbed on appeal" (*Newton*, 283 AD2d at 993). Thus, the claim was properly dismissed.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1295

CA 12-00938

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

AXA EQUITABLE LIFE INSURANCE COMPANY, AXA NETWORK, LLC AND AXA ADVISORS, LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD KALINA, PATRICK LYNCH, CARL DATTELLAS, GARY CRONISER, WILLIAM ZAIKA, CHRISTOPHER KEEGAN AND DIVERSIFIED WEALTH STRATEGIES, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

PADUANO & WEINTRAUB, NEW YORK CITY (LEONARD WEINTRAUB OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN T. MCCANN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered July 11, 2011. The order, insofar as appealed from, granted the cross motion of plaintiffs to expedite discovery.

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

Memorandum: Plaintiffs, which are financial services firms, commenced this breach of contract action against the individual defendants, who are former financial advisors for plaintiffs, and defendant Diversified Wealth Strategies, LLC, the limited liability corporation formed by the individual defendants. Defendants moved to stay the action and to compel arbitration before the Financial Industry Regulatory Authority (FINRA) on the ground that plaintiff AXA Advisors, LLC (AXA Advisors) was a FINRA member firm and the individual defendants were all FINRA representatives, thus rendering arbitration mandatory. Plaintiffs cross-moved to dismiss the claims of AXA Advisors pursuant to CPLR 3217 (b) or, in the alternative, for expedited discovery prior to the submission of those claims to arbitration. In appeal No. 1, defendants appeal from an order that granted the motion but also granted the cross motion seeking the alternative relief of expedited discovery. In appeal No. 2, defendants appeal from an order denying their motion for leave to reargue and granting plaintiffs' cross motion to compel discovery. In

appeal No. 3, defendants appeal from an order denying their motion for a protective order, granting plaintiffs' further cross motion to compel discovery, and sua sponte staying the pending FINRA arbitration until Supreme Court was satisfied that discovery was completed.

Addressing first appeal No. 1, we agree with defendants that the court erred in granting the cross motion seeking, in the alternative, to expedite discovery prior to the submission of claims of AXA Advisors to arbitration. A court may order disclosure "to aid in arbitration" (CPLR 3102 [c]), but there must exist " 'extraordinary circumstances' " to warrant court-ordered disclosure (*De Sapio v Kohlmeyer*, 35 NY2d 402, 406; *see Matter of Travelers Indem. Co. v United Diagnostic Imaging, P.C.*, 73 AD3d 791, 791-792; *Matter of Goldsborough v New York State Dept. of Correctional Servs.*, 217 AD2d 546, 547, *appeal dismissed* 86 NY2d 834). It is contemplated that disclosure devices will be used sparingly in arbitration and, indeed, "[t]he availability of disclosure devices is a significant differentiating factor between judicial and arbitral proceedings" (*De Sapio*, 35 NY2d at 406). "The test is necessity rather than convenience" (*Matter of State Farm Mut. Auto. Ins. Co. v Wernick*, 90 AD2d 519, 519; *see International Components Corp. v Klaiber*, 54 AD2d 550, 551). Here, plaintiffs failed to establish extraordinary circumstances to require discovery prior to arbitration (*see Matter of Progressive Specialty Ins. Co. v Alexis*, 90 AD3d 933, 933-934). They made no showing that the discovery that they are allowed under the FINRA rules would be inadequate for them to establish their case (*see Travelers Indem.* Co., 73 AD3d at 792; *International Components Corp.*, 54 AD2d at 551).

With respect to appeal No. 2, we dismiss the appeal from the order insofar as it denied leave to reargue inasmuch as no appeal lies from such an order (*see generally Lindsay v Funtime, Inc.*, 184 AD2d 1036, 1036; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984). With respect to the remainder of the order, we agree with defendants that, in light of our determination in appeal No. 1, the court erred in granting the cross motion to compel discovery. We therefore modify the order in appeal No. 2 accordingly.

With respect to appeal No. 3, plaintiffs contend as a preliminary matter that the appeal should be dismissed as time-barred. Defendants had until May 11, 2012 in which to take an appeal, i.e., 35 days after being served by mail on April 6, 2012 with a copy of the order with notice of entry (*see* CPLR 2103 [b] [2]; 5513 [a]). An appeal is taken by serving the notice of appeal on the opposing party and filing the notice of appeal (*see* CPLR 5515 [1]). A complete failure to comply with CPLR 5515 deprives this Court of jurisdiction to entertain the appeal (*see Dalton v City of Saratoga Springs*, 12 AD3d 899, 899). Where, however, the "appellant either serves or files a timely notice of appeal . . . , but neglects through mistake or excusable neglect to do another required act within the time limited, the court . . . may grant an extension of time for curing the omission" (CPLR 5520 [a]). Here, the record establishes that the notice of appeal was not filed until June 1, 2012, and was therefore untimely, but the record does not indicate when the notice of appeal was served on plaintiffs. The

record is therefore inadequate to enable us to review plaintiffs' contention. In light of our determination in appeal No. 1 that extraordinary circumstances did not exist here, we conclude that the court erred in granting the cross motion to compel discovery and that the stay of the pending arbitration should be vacated. Defendants' motion for a protective order is moot.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1296

CA 12-00939

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

AXA EQUITABLE LIFE INSURANCE COMPANY, AXA NETWORK, LLC AND AXA ADVISORS, LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD KALINA, PATRICK LYNCH, CARL DATTELLAS, GARY CRONISER, WILLIAM ZAIKA, CHRISTOPHER KEEGAN AND DIVERSIFIED WEALTH STRATEGIES, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

PADUANO & WEINTRAUB, NEW YORK CITY (LEONARD WEINTRAUB OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN T. MCCANN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered February 29, 2012. The order, among other things, denied the motion of defendants for leave to reargue and granted the cross motion of plaintiffs to compel discovery.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is modified on the law by denying the cross motion and as modified the order is affirmed without costs.

Same Memorandum as in *AXA Equit. Life Ins. Co. v Kalina* ([appeal No. 1] ___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1297

CA 12-00976

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

AXA EQUITABLE LIFE INSURANCE COMPANY, AXA NETWORK, LLC AND AXA ADVISORS, LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD KALINA, PATRICK LYNCH, CARL DATTELLAS, GARY CRONISER, WILLIAM ZAIKA, CHRISTOPHER KEEGAN AND DIVERSIFIED WEALTH STRATEGIES, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 3.)

PADUANO & WEINTRAUB, NEW YORK CITY (LEONARD WEINTRAUB OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN T. MCCANN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered April 6, 2012. The order, among other things, denied the motion of defendants for a protective order, granted the cross motion of plaintiffs to compel discovery and stayed the pending arbitration.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion is denied and the stay is vacated.

Same Memorandum as in *AXA Equit. Life Ins. Co. v Kalina* ([appeal No. 1] ___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1298

CA 12-01193

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

MAURICE M. PUGH AND KEISHA PUGH,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

DAVID J. TANTILLO AND CIRO P. TANTILLO,
DEFENDANTS-RESPONDENTS-APPELLANTS.

ALEXANDER & CATALANO, LLC, SYRACUSE (JAMES L. ALEXANDER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered January 19, 2012. The order denied the motion of defendants for summary judgment, and denied in part the cross motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Maurice M. Pugh (plaintiff) when the vehicle he was driving was rear-ended by a vehicle driven by defendant David J. Tantillo and owned by defendant Ciro P. Tantillo. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and plaintiffs cross-moved for partial summary judgment on the issues of liability and serious injury. Plaintiffs appeal and defendants cross-appeal from an order that denied defendants' motion and granted only that part of plaintiffs' cross motion seeking summary judgment on the issue of negligence. We affirm. We note at the outset that defendants do not contend that Supreme Court erred in granting that part of plaintiffs' cross motion on the issue of negligence, and we further note that the parties have abandoned any contentions with respect to the 90/180-day category of serious injury set forth in plaintiffs' bill of particulars (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We conclude that the court properly denied defendants' motion for summary judgment with respect to the permanent consequential limitation of use and significant limitation of use categories of

serious injury. "[D]efendants' own submissions raise triable issues of fact whether plaintiff sustained a qualifying injury under" those two categories (*Feggins v Fagard*, 52 AD3d 1221, 1223; *see Strong v ADF Constr. Corp.*, 41 AD3d 1209, 1210).

We further conclude that the court properly denied plaintiffs' cross motion for summary judgment on the issues whether plaintiff sustained a qualifying injury under those two categories of serious injury (*see Monette v Trummer* [appeal No. 2], 96 AD3d 1547, 1548-1549). Plaintiffs submitted the affirmation of plaintiff's treating physician who stated that plaintiff had two herniated discs in his cervical spine that required surgical treatment, but "[p]roof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommells v Perez*, 4 NY3d 566, 574). Although plaintiff's treating physician provided measurements of the range of motion of plaintiff's cervical spine, he did not provide an assessment that " ' compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system' " (*Leahey v Fitzgerald*, 1 AD3d 924, 925-926, quoting *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350). "Inasmuch as plaintiff[s'] expert made 'no meaningful comparison so as to differentiate serious injuries from mild or moderate ones, his [affirmation] was thus insufficient to establish a significant limitation of use' " or a permanent consequential limitation of use (*Monette*, 96 AD3d at 1549).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1300.1
KA 11-00715

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS L. MASON, DEFENDANT-APPELLANT.

MARY J. FAHEY, SYRACUSE, FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered March 28, 2011. The judgment convicted defendant, upon a jury verdict, of official misconduct.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Seneca County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him, following a second jury trial, of one count of official misconduct (Penal Law § 195.00 [1]). Following the first trial, County Court set aside the verdict finding him guilty of that offense based on the People's failure to disclose *Brady* and *Rosario* material. Defendant was thereafter convicted of the same offense following the second jury trial. Defendant contends that the court erred in admitting DNA evidence at his first and second trials. We reject that contention. The victim testified at both trials that defendant, a correction officer working at the correctional facility where the victim was housed, took the victim to a secluded area where he engaged in sexual conduct with the victim and thereafter ejaculated. Forensic investigators took swabs from the area, and two of the swabs tested positive for the presence of sperm. DNA profiles generated from the two swabs were compared to profiles generated from buccal swabs taken from defendant and the victim. Both samples were "consistent with DNA [of defendant] also mixed with DNA from at least one DNA donor, with [defendant] being . . . the major contributor." The victim was excluded as a potential donor with respect to both samples. Contrary to defendant's contention, the DNA evidence does not constitute *Molineux* evidence, i.e., evidence that defendant engaged in a sexual act with another inmate at a different time. Rather, it constitutes direct evidence of his guilt of the instant offense. As the court properly noted, "[a]lthough the two samples were obtained from the same location and thus they are mixed, it doesn't follow necessarily that the two samples arrived th[ere] through sexual acts committed at

the same time." In our view, "[i]t cannot be trivialized as mere coincidence that [defendant's semen] was . . . recovered at the scene" of the alleged sexual encounter (*People v Gonzalez*, 193 AD2d 360, 361). We thus conclude that the DNA evidence is direct and relevant evidence of the instant offense (*see generally People v Scarola*, 71 NY2d 769, 777; *People v Mirenda*, 23 NY2d 439, 453).

Defendant further contends that the verdict following the first trial was "against the weight of the evidence," but his sole contention with respect to "weight" is that the jury in the first trial could not have justifiably found him guilty of official misconduct yet have acquitted him of two counts of criminal sexual act in the third degree (Penal Law § 130.40 [1]) arising out of the same incident. The People, in response, contend that defendant's challenge to the weight of the evidence at the first trial is not properly before this Court. As a preliminary matter, we reject the People's contention. A defendant who has been found guilty upon a retrial may still challenge the weight of the evidence at the first trial on the premise that, "if the verdict were against the weight of the evidence at the first trial, a retrial would [have been] barred" (*People v Scerbo*, 74 AD3d 1730, 1733, *lv denied* 15 NY3d 757; *see People v Romero*, 7 NY3d 633, 644 n 2). In our view, however, defendant is not actually challenging the weight of the evidence but, rather, is contending that the verdict in the first trial was either repugnant or inconsistent. That contention is not preserved for our review and thus is not properly before us inasmuch as defendant failed to object to the inconsistency of the verdict "*after* the verdict [was] rendered, but *before* the jury [was] discharged" (*People v Johnson*, 93 AD3d 408, 409, *lv denied* 19 NY3d 974, *petition for cert filed* Aug. 16, 2012 [emphasis added]; *see generally People v Alfaro*, 66 NY2d 985, 987). Although defendant raised the theoretical possibility of an inconsistent verdict after the court took a partial verdict under the authority of CPL 310.70 (1) (b), the court properly concluded that defendant's objection was premature. When the final verdict in the first trial was ultimately rendered, defendant failed to renew his objection (*see e.g. People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Russell*, 71 NY2d 1016, 1017-1018, *rearg dismissed* 79 NY2d 975; *People v Hardy*, 38 AD3d 1169, 1169-1170, *lv denied* 9 NY3d 865). In any event, we conclude that the verdict was neither repugnant nor inconsistent because "there is a possible theory under which a split verdict could be legally permissible" (*People v Muhammad*, 17 NY3d 532, 540; *see generally People v Trappier*, 87 NY2d 55, 58; *People v Tucker*, 55 NY2d 1, 7, *rearg denied* 55 NY2d 1039). "[T]he apparently illogical nature of the verdict——as opposed to its impossibility——[must be] viewed as a mistake, compromise or the exercise of mercy by the jury, none of which undermine[s] a verdict as a matter of law" (*Muhammad*, 17 NY3d at 540; *see People v Harris*, 98 AD3d 420, 420; *People v Abraham*, 94 AD3d 1332, 1333).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1300.2

CAE 12-01973

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF THOMAS W. REED, II,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. WALSH, ET AL., RESPONDENTS,
AND LORI C. GARDNER, RESPONDENT-APPELLANT.

SCHLATHER, STUMBAR, PARKS & SALK, ITHACA (DIANE V. BRUNS OF COUNSEL), FOR RESPONDENT-APPELLANT.

JAMES WALSH, BALLSTON SPA, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered August 27, 2012 in a proceeding pursuant to the Election Law. The order denied the motion of Lori C. Gardner to vacate an order entered June 21, 2012.

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

Memorandum: Petitioner filed a designating petition that purported to nominate him as the Independence Party's candidate for the office of Representative in Congress from the 23rd Congressional District of New York. After the New York State Board of Elections (Board) determined that the petition did not contain a sufficient number of valid signatures, petitioner commenced the instant proceeding to validate his designating petition. Supreme Court, after a hearing, granted the petition and ordered the Board to place petitioner's name on the ballot for the general congressional election on the Independence Party line. The court thereafter denied respondent Lori C. Gardner's motion to vacate that order, and she now appeals.

"An 'appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment' " (*Wisholek v Douglas*, 97 NY2d 740, 742, quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714). Here, the general election at issue took place on November 6, 2012, and, in contrast to our authority to order a new primary election (*see* Election Law § 16-102 [3]; *Matter of Corrigan v Board of Elections of Suffolk County*, 38 AD2d 825, 826-827, *affd* 30 NY2d 603), we lack the authority to "remove the successful candidate from office or order a new general election"

(*Matter of Hanington v Coveney*, 62 NY2d 640, 641; *see Matter of Conroy v Levine*, 62 NY2d 934, 935; *Matter of Uciechowski v Hill*, 205 AD2d 825, 825). The appeal is therefore moot, and, inasmuch as the exception to the mootness doctrine is not implicated here, we dismiss the appeal (*see Hanington*, 62 NY2d at 641-642; *People ex rel. Geer v Common Council of Troy*, 82 NY 575, 576; *Uciechowski*, 205 AD2d at 825).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1300

CA 10-02020

PRESENT: SCUDDER, P.J., CENTRA, VALENTINO, WHALEN, AND MARTOCHE, JJ.

YVONNE CLARK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY CLARK, DEFENDANT-RESPONDENT.

LISA M. FAHEY, ESQ., ATTORNEY FOR THE CHILDREN, APPELLANT.

LISA M. FAHEY, ATTORNEY FOR THE CHILDREN, EAST SYRACUSE, APPELLANT PRO SE.

Appeal from a judgment of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered May 14, 2010. The judgment, inter alia, granted custody of the parties' children to defendant.

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

Memorandum: The Attorney for the Children (AFC) appeals from a judgment that, inter alia, granted custody of the three children to defendant. We conclude that Supreme Court, having properly considered the various factors involved in determining the best interests of the children (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174; *Fox v Fox*, 177 AD2d 209, 210), properly granted custody to defendant. We note that the children's preferences "are not determinative" (*Matter of VanDusen v Riggs*, 77 AD3d 1355, 1356). Here, the court's findings were based on its assessment of the credibility of the witnesses, and we accord great deference to the court's determination (*see Matter of McLeod v McLeod*, 59 AD3d 1011, 1011).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1301

TP 12-01223

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

IN THE MATTER OF JOHN RICHARD, PETITIONER,

V ORDER

HAROLD GRAHAM, SUPERINTENDENT, RESPONDENT.

JOHN RICHARD, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered June 29, 2012) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1302

TP 12-01172

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

IN THE MATTER OF SHAMEL DAVIS, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, 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 (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 [Mark H. Dadd, A.J.], entered June 20, 2012) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1303

KA 09-01821

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS CARNO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered August 4, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a forged instrument in the second degree (Penal Law § 170.25), defendant contends that the waiver of the right to appeal is invalid and that the sentence is unduly harsh and severe. We agree with defendant that the waiver of the right to appeal is invalid. Although the record establishes that defendant executed a written waiver of the right to appeal, there was no colloquy between County Court and defendant regarding the waiver of the right to appeal to ensure that it was knowingly, voluntarily and intelligently entered (*see People v Cooper*, 85 AD3d 1594, 1594, *affd* 19 NY3d 501). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1306

KA 11-00197

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALBERT SANTANA, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE (ANNALEIGH PORTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Joseph E. Fahey, J.), entered September 16, 2010. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of murder in the second degree, attempted robbery in the first degree (two counts), criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from an order denying his CPL 440.10 motion to vacate the judgment of conviction after trial. Defendant moved to vacate the judgment on the ground that he was denied effective assistance of counsel because, inter alia, defense counsel did not properly advise defendant with respect to a plea offer. Although we agree with the People that "the motion papers 'do not contain sworn allegations substantiating or tending to substantiate' defendant's claims of ineffective assistance of counsel" (*People v Vigliotti*, 24 AD3d 1216, 1216; *cf. People v Frazier*, 87 AD3d 1350, 1351; *People v Howard*, 12 AD3d 1127, 1128; *see generally People v Vaughan*, 20 AD3d 940, 942, *lv denied* 5 NY3d 857), County Court did not decide that issue adversely to defendant, and thus we decline to affirm the order on that ground (*see generally People v Concepcion*, 17 NY3d 192, 197-198).

We conclude, however, that the court properly denied the motion without a hearing on the ground that the allegations in support of the motion are made solely by defendant, that those allegations are unsupported by other evidence and that, under all the circumstances, there is no reasonable possibility that such allegations are true (*see*

CPL 440.30 [4] [d]). "Considering all of the circumstances, including that defendant's motion was decided by a judge who, having presided over defendant's trial, was familiar with the facts . . . , we cannot conclude that [the] [c]ourt abused its discretion in denying the motion without a hearing" (*People v Hoffler*, 74 AD3d 1632, 1635, *lv denied* 17 NY3d 859; *see People v Smiley*, 67 AD3d 713, 714, *lv denied* 13 NY3d 942; *People v DeJesus*, 39 AD3d 1196, 1197, *lv denied* 9 NY3d 874).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1307

KAH 11-02008

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JAMES KEYES, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SIBATU KHAHAIFA, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), dated July 18, 2011 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner's appeal from the judgment dismissing his petition for a writ of habeas corpus has been rendered moot inasmuch as he has been released to parole supervision (*see People ex rel. Baron v New York State Dept. of Corrections*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807; *see also People ex rel. Graham v Fischer*, 70 AD3d 1381, 1381-1382), and the exception to the mootness doctrine does not apply herein (*see Baron*, 94 AD3d at 1410; *Graham*, 70 AD3d at 1382; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). Moreover, "[a]lthough this Court has the power to convert a habeas corpus proceeding into a CPLR article 78 proceeding . . . , we decline to do so because we do not consider it appropriate on this record" (*People ex rel. Brown v McCoy*, 266 AD2d 805, 805, *lv denied* 94 NY2d 760).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1308

KAH 11-01927

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
KENNETH MOORE, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN LEMPKE, SUPERINTENDENT, FIVE POINTS
CORRECTIONAL FACILITY, AND ANDREA EVANS,
CHAIRWOMAN, NEW YORK STATE DIVISION OF PAROLE,
RESPONDENTS-RESPONDENTS.

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered July 14, 2011 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: This appeal by petitioner from a judgment dismissing his petition seeking a writ of habeas corpus has been rendered moot by his release to parole supervision (*see People ex rel. Hampton v Dennison*, 59 AD3d 951, 951, *lv denied* 12 NY3d 711). Contrary to petitioner's contention, no exception to the mootness doctrine is present under the circumstances of this case (*see id.*; *People ex rel. Limmer v McKinney*, 23 AD3d 806, 807).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1309

CAF 11-02417

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

IN THE MATTER OF REBECCA STYLES,
PETITIONER-RESPONDENT,

V ORDER

ALAN DAVID TOMASKI, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered October 27, 2011 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objection to the order of the Support Magistrate.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1311

CAF 11-02042

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

IN THE MATTER OF SUZALYN E. HOFFMEIER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS BYRNES, RESPONDENT-RESPONDENT.

EMILY KARR-COOK, ELMIRA, FOR PETITIONER-APPELLANT.

CAROLYN KELLOGG JONAS, ATTORNEY FOR THE CHILDREN, WELLSVILLE, FOR JAYDEN C. AND CHRISTOPHER B.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered September 28, 2011 in a proceeding pursuant to Family Court Act article 6. The order denied the petitions to modify a prior order of custody.

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

Memorandum: Petitioner mother commenced this proceeding seeking to modify a prior order of custody that, inter alia, granted physical custody of the subject children to respondent father and visitation to her. The prior order was based upon a full evidentiary hearing and had been entered approximately two months prior to the filing of the instant petitions. We reject the mother's contention that Family Court erred in concluding that she failed to establish a change in circumstances sufficient to warrant a review of the prior custody determination.

We note at the outset that, although the order on appeal does not mention "changed circumstances," the court concluded, in the decision upon which the order is based, that the mother failed to establish a change in circumstances sufficient to warrant a review of the existing custody arrangement. It is well settled that "where an order and decision conflict, the decision controls" (*Matter of Triplett v Scott*, 94 AD3d 1421, 1421 [internal quotation marks omitted]; *see Matter of King v King*, 309 AD2d 1207, 1208), and we thus conclude that the court made the requisite threshold finding that the mother failed to establish a change in circumstances sufficient to warrant an inquiry into whether the best interests of the children would be served by altering their existing custody arrangement (*see Matter of Chrysler v Fabian*, 66 AD3d 1446, 1447, *lv denied* 13 NY3d 715; *cf. Matter of Carey v Windover*, 85 AD3d 1574, 1574, *lv denied* 17 NY3d 710; *Matter of Moore*

v Moore, 78 AD3d 1630, 1630, *lv denied* 16 NY3d 704).

With respect to the merits, we note that the only parenting problems that arose in the two months between the issuance of the prior order and the filing of the mother's instant petitions had been resolved prior to the hearing thereon. Thus, we agree with the court that the mother failed to establish a sufficient change in circumstances such that reconsideration of the existing custody arrangement was required (*see Matter of Clark v Ingraham*, 88 AD3d 1079, 1079-1080).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1313

CA 12-01212

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

DONOVAN HUMPHREY, PLAINTIFF-APPELLANT,

V ORDER

EDWARD CAMPANY, ET AL., DEFENDANTS,
BEN PENNETTA, DEFENDANT-RESPONDENT.

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

SLIWA & LANE, BUFFALO (STANLEY J. SLIWA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered April 5, 2012. The order, among other things, denied plaintiff's motion for a protective order.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1316

CA 12-00950

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

BRENDA FRANK, AS PARENT AND NATURAL GUARDIAN
OF ALAINA FRANK, AN INFANT,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

THE ROCHESTER GENERAL HOSPITAL, DOING BUSINESS
AS ROCHESTER GENERAL HOSPITAL,
DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANTS.

HOGAN WILLIG, AMHERST (JENNIFER L. FAY OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

BROWN & TARANTINO, LLC, ROCHESTER (JEFFREY S. ALBANESE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 9, 2011. The order denied the motion of plaintiff to strike the answer of defendant The Rochester General Hospital, doing business as Rochester General Hospital, and ordered that an adverse inference charge shall be given at trial.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Coleman v Putnam Hosp. Ctr.*, 74 AD3d 1009, *lv dismissed* 15 NY3d 857, 16 NY3d 884).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1321

KA 11-01582

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. LUPER, 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 (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 28, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). Although County Court's colloquy was brief, defendant signed a detailed written waiver of the right to appeal (*see People v Ramos*, 7 NY3d 737, 738), and he acknowledged to the court that he understood that he was foregoing the right to appeal (*cf. People v Bradshaw*, 18 NY3d 257, 267). The valid waiver encompasses any challenge by defendant to the severity of the sentence (*see Lopez*, 6 NY3d at 255).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1326

KA 10-02447

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHIAL E. FOSTER, DEFENDANT-APPELLANT.

LAWRENCE BROWN, BRIDGEPORT, FOR DEFENDANT-APPELLANT.

MICHIAL E. FOSTER, DEFENDANT-APPELLANT PRO SE.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Walter W. Hafner, Jr., A.J.), rendered November 19, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of murder in the second degree (Penal Law § 125.25 [1]), arising from the murder of the mother of his children on May 29, 1996. The remains of the victim's body were not located for more than 11 years, when they were observed by a passerby in a wooded area. Defendant was thereafter convicted of the murder and, on defendant's appeal from that judgment, we reversed the judgment, suppressed certain statements made to a jailhouse informant, and granted a new trial (*People v Foster*, 72 AD3d 1652, *lv dismissed* 15 NY3d 750).

We reject defendant's contention in his main and pro se supplemental briefs that the verdict from the second trial is against the weight of the evidence. Defendant contends that evidence that the victim was at the hospital at 11:20 a.m. to feed her son, who was born prematurely, and testimony from the victim's sister and brother-in-law that they stopped at the victim's house at approximately 11:30 a.m., where they spoke to defendant, establishes that it was "impossible" for him to have killed the victim in the time frame alleged by the prosecution. The witnesses further testified, however, that they were unsure of the time of their arrival at the victim's house, but that they stopped "around lunchtime" following a medical appointment. When they arrived, they found the 3½-year-old daughter of defendant and the

victim (daughter) in defendant's van, where she was crying. When they entered the house, they observed that defendant was "sweating profusely" and "breathing heavily." The daughter, who was 17 years old at the time of the second trial, testified that she had observed defendant on top of her mother on the bed; that her mother stopped moving; that defendant rolled her mother in a colorful blanket; and that defendant placed the daughter in the van. The daughter testified that the victim's body, which defendant told her was "just a bunch of trash," was in the back of the van and that defendant drove to a wooded area. He took the daughter out of the car, carried the victim over his shoulder, and left the victim near water and cattails. A jailhouse informant testified that defendant told him that the best way to dispose of a body was to wrap it in a blanket and bury it in a shallow grave in a marshy area. Viewing that 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 an acquittal would have been unreasonable, and thus that the verdict is not against the weight of the evidence (*see id.* at 348; *People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's contention in his main and pro se supplemental briefs, he was not deprived of effective assistance of counsel. With respect to defense counsel's alleged failure to cross-examine the daughter about discrepancies in her testimony in the first and second trials, defendant failed to establish the "absence of a strategic or other legitimate explanation for defense counsel's alleged shortcomings" (*People v Smith*, 93 AD3d 1345, 1346, *lv denied* 19 NY3d 967). The other challenges raised by defendant concerning defense counsel's representation also are without merit, and thus we conclude that he received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). We have reviewed the remaining contentions in defendant's pro se supplemental brief and conclude that none requires reversal or modification.

By failing to object to remarks by the prosecutor on summation to defendant's use of a blanket to wrap the victim's body, defendant failed to preserve for our review his contention in his main brief that he was deprived of a fair trial by prosecutorial misconduct arising from those remarks (*see People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967). In any event, the remarks of the prosecutor were fair comment on the evidence (*see People v McEathron*, 86 AD3d 915, 916, *lv denied* 19 NY3d 975). Although there was no blanket found with the remains of the victim's body, there were fibers in that location that were consistent with a woven material; the daughter testified that defendant had wrapped her mother in a colorful blanket; another witness testified that a colorful blanket owned by the victim was missing from the victim's home; and the jailhouse informant testified that defendant told him that a body should be wrapped in a blanket and disposed of in a shallow grave.

We reject defendant's further contention in his main brief that County Court erred in admitting "implied hearsay," i.e., testimony of various witnesses concerning the events surrounding statements made by the daughter regarding her mother's disappearance, in the absence of testimony concerning the statements themselves. We note that, at

defendant's first trial, statements made by the daughter regarding her mother's disappearance were admitted as excited utterances, while at the second trial, over which a different judge presided, the statements were held to be inadmissible. Where, as here, the court did not abuse its discretion with respect to that evidentiary ruling at the second trial, it will not be disturbed (*see generally People v Carroll*, 95 NY2d 375, 385). We also reject defendant's contention in his main brief that the court abused its discretion in denying his motion for a mistrial when a witness testified regarding a hearsay statement made by the victim. "The court's prompt curative instruction minimized any prejudice caused by the improper testimony" (*People v Roman*, 17 AD3d 1166, 1166, *lv denied* 5 NY3d 768).

Finally, we reject defendant's contention in his main brief that the grand jury proceedings were rendered defective because evidence presented to the grand jury was later suppressed or determined not to be admissible. To the extent that defendant's contention addresses statements that he made to the jailhouse informant that were subsequently suppressed, we conclude that the suppression "simply diminish[ed] the quantum of proof against defendant but [did] not negate any elements of the charged crime[]" (*People v Gordon*, 88 NY2d 92, 96; *see People v Swamp*, 84 NY2d 725, 732). Defendant failed to preserve for our review his further contention that the indictment was based upon incompetent evidence consisting of statements made by defendant's daughter that were not admitted at the second trial but were admitted at the first trial (*see* CPL 470.05 [2]). In any event, that contention is without merit. We conclude that the statements were properly admitted at the first trial as an exception to the hearsay rule, and thus they do not constitute "inherently incompetent evidence" (*Swamp*, 84 NY2d at 732), despite the subsequent determination that the statements were not admissible at the second trial. Furthermore, the People adequately instructed the grand jury that statements made by the daughter were being admitted based upon an exception to the hearsay rule (*see People v Perry*, 199 AD2d 889, 893, *lv denied* 83 NY2d 856).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1329

KA 12-00112

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEEGAN ROBERTSON, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

BARRY PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from an order of the Seneca County Court (W. Patrick Falvey, A.J.), entered October 31, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). We reject defendant's contention that County Court erred in assessing 30 points against him under risk factor 3, for having three or more victims. "[I]t is well settled that, in determining the number of victims for SORA purposes, the hearing court is not limited to the crime of which defendant was convicted" (*People v Gardiner*, 92 AD3d 1228, 1229, *lv denied* 19 NY3d 801). Here, the court properly considered "reliable hearsay evidence," including defendant's statements to the police, in determining the number of victims (§ 168-n [3]; *see People v Christie*, 94 AD3d 1263, 1263, *lv denied* 19 NY3d 808).

The court also properly denied defendant's request for a downward departure from his presumptive risk level based upon his young age at the time of the underlying offenses. A departure from the presumptive risk level is warranted where "there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]; *see People v Cummings*, 81 AD3d 1261, 1262, *lv denied* 16 NY3d 711). Here, the guidelines adequately addressed defendant's age when he committed his first sex crime, and the court properly assessed 10 points under risk factor 8 because, at age 20 or less, he committed a sex offense that resulted in an adjudication or a

conviction of a sex crime.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1332

KA 09-01249

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLOYD ALSTON, DEFENDANT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 9, 2008. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]). We agree with defendant that the record fails to establish that his waiver of the right to appeal was knowing and voluntary (*see generally People v Lopez*, 6 NY3d 248, 256). We conclude that the single reference by Supreme Court to the signed written waiver, i.e., whether defendant understood what he had signed, is not sufficient to establish that defendant understood that he was waiving a right that otherwise would have survived the guilty plea (*see People v Cooper*, 19 NY3d 501, 510; *People v Norton*, 96 AD3d 1651, 1651-1652, *lv denied* 19 NY3d 999). We therefore conclude that defendant's contention that the court erred in refusing to suppress identification evidence on the ground that the photo array was unduly suggestive is not encompassed by the waiver (*see People v Adger*, 83 AD3d 1590, 1591, *lv denied* 17 NY3d 857). We further conclude, however, that defendant's contention is without merit. The court properly determined that the People met their initial burden of establishing that the police conduct with respect to the photo array procedure was reasonable and that defendant failed to meet his ultimate burden of proving that the photo array was unduly suggestive (*see People v Santiago*, 96 AD3d 1495, 1496; *see generally People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833). The subjects depicted in the array were sufficiently similar in appearance so that the viewer's eye was not drawn to a particular photo " 'in such a way as to indicate that the police were urging a particular

selection' " (*People v Weston*, 83 AD3d 1511, 1511, *lv denied* 17 NY3d 823).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1337

CA 12-01085

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

TIANA SYKES, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

STAN ROTH, DEFENDANT-RESPONDENT-APPELLANT.

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (KATHRYN A. DALY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 10, 2012. The order, inter alia, denied the preclusion motion of defendant and denied the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that said cross appeal is unanimously dismissed and the order is modified on the law by granting the cross motion in part and dismissing the second and third affirmative defenses insofar as they allege that plaintiff failed to mitigate her damages prior to the time she could be held responsible for her actions and that plaintiff's mother was negligent and the order is otherwise affirmed.

Memorandum: Plaintiff commenced this personal injury action alleging that defendant is liable for injuries she sustained as the result of the presence of lead paint in an apartment her mother rented from defendant from plaintiff's birth until she was two years of age. Supreme Court properly denied that part of plaintiff's cross motion seeking partial summary judgment on liability, including the issues of "notice, negligence and causation." Even assuming, arguendo, that plaintiff met her initial burden of establishing as a matter of law that defendant had actual or constructive notice of the dangerous condition and thus that defendant was negligent, we conclude that defendant raised an issue of fact whether he had notice of the presence of the lead paint on an exterior, second-floor porch, which he subsequently removed at the direction of the Monroe County Department of Health (DOH) (*see generally Chapman v Silber*, 97 NY2d 9, 15). We reject plaintiff's contention that, pursuant to Real Property Law § 235-b, there is a presumption that defendant had notice of the dangerous condition. That section provides that, when entering into a lease agreement, the landlord warrants that the premises are habitable; it does not constitute "controlling legislation" warranting

a determination that defendant had notice of the dangerous condition (*Chapman*, 97 NY2d at 15).

We conclude however, that the court erred in denying that part of plaintiff's cross motion seeking to dismiss the second affirmative defense insofar as it alleges that plaintiff failed to mitigate her damages prior to the time she could be held responsible for her actions (*see Cunningham v Anderson*, 85 AD3d 1370, 1372, *lv dismissed in part and denied in part* 17 NY3d 948; *M.F. v Delaney*, 37 AD3d 1103, 1104-1105), and the third affirmative defense insofar as it alleges culpable conduct on the part of plaintiff's mother, which sounds in negligent parental supervision (*see M.F.*, 37 AD3d at 1105; *Ward v Bianco*, 16 AD3d 1155, 1156).

Defendant's cross appeal from that part of the order denying his motion to preclude the admission of computer records from the DOH is dismissed. Because the pretrial ruling does not limit a theory of liability, but only determines the admissibility of evidence, that part of the order is not appealable (*see George C. Miller Brick Co., Inc. v Stark Ceramics, Inc.*, 2 AD3d 1341, 1342-1343; *see also Mayes v Zawolik*, 55 AD3d 1386, 1387).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1338

CA 11-02004

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

IN THE MATTER OF ELLIOTT JAMES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CATTARAUGUS COUNTY, RESPONDENT-RESPONDENT.

ELLIOTT JAMES, PETITIONER-APPELLANT PRO SE.

THOMAS C. BRADY, COUNTY ATTORNEY, LITTLE VALLEY, FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered September 19, 2011 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.

Memorandum: In this proceeding pursuant to CPLR article 78, petitioner appeals from a judgment that dismissed his petition to compel respondent to return money and property seized in the course of a prior criminal investigation. Petitioner was convicted of attempted criminal possession of a controlled substance in the fourth degree in 1994, and the judgment of conviction was reversed by this Court in 1995 (*People v James*, 217 AD2d 969). We note at the outset that, although a CPLR article 78 proceeding is an "appropriate vehicle for petitioner to seek the return of his property" (*Matter of Marshall v Soares*, 94 AD3d 1258, 1259; *see Boyle v Kelly*, 42 NY2d 88, 91), "the requirement that a notice of claim be timely filed where the gravamen [of the proceeding] is the wrongful retention by a municipality of money or property after the dismissal of a criminal action in the course of which the money or property had been seized . . . may not be evaded by resort to a CPLR article 78 proceeding instead of an action in tort for conversion, or by an action upon the equitable principle of unjust enrichment" (*Matter of Abramowitz v Guido*, 61 AD2d 1045, 1045; *see Smith v Scott*, 294 AD2d 11, 17; *Matter of Ganci v Tuthill*, 216 AD2d 390, 390-391). Inasmuch as petitioner failed to file a notice of claim, the petition was properly dismissed.

We further conclude in any event that petitioner's claims are barred by the doctrine of laches. A petitioner "may not delay in making a demand [for the return of money or property] in order to indefinitely postpone the time within which to institute the

proceeding. The petitioner must make his or her demand within a reasonable time after the right to make it occurs" (*Matter of Barresi v County of Suffolk*, 72 AD3d 1076, 1076, *lv denied* 15 NY3d 705; *see Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-497, *rearg denied* 46 NY2d 1076). Inasmuch as petitioner "proffered absolutely no excuse for his [more than 14-year] delay in making the demand" for the return of his money and property, the proceeding is barred by the doctrine of laches (*Matter of Schwartz v Morgenthau*, 23 AD3d 231, 233, *affd* 7 NY3d 427; *see Matter of Thomas v City of Buffalo Inspections Dept.*, 275 AD2d 1004, 1004; *Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839, *lv denied* 94 NY2d 758). We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1339

CA 12-01101

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

HEATHER MOUSAW, PLAINTIFF-APPELLANT,

V ORDER

CITY OF OLEAN, DEFENDANT-RESPONDENT.

FRANCIS M. LETRO, BUFFALO (RONALD J. WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered September 9, 2011. 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 affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1347

CAF 11-01696

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

IN THE MATTER OF THE ADOPTION OF JORDAN.

TERESA J., PETITIONER-RESPONDENT;

ORDER

TANYA H., RESPONDENT-APPELLANT.

IN THE MATTER OF TANYA H., PETITIONER-APPELLANT,

V

TERESA J., RESPONDENT-RESPONDENT.

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

SCHELL & SCHELL, P.C., FAIRPORT (GEORGE A. SCHELL OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

JOSEPH S. DRESSNER, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR JORDAN.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered July 28, 2011 in an adoption proceeding. The order, inter alia, dispensed with the consent of Tanya H. to the adoption of the subject child.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1358

CA 12-01030

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

ALLEN-BAILEY TAG & LABEL, INC. AND L.C. PARTNERS, LLC, PLAINTIFFS-APPELLANTS,

V ORDER

DAVID E. BEARDSLEY AND LAURIE A. BEARDSLEY, DEFENDANTS-RESPONDENTS.

UNDERBERG & KESSLER LLP, ROCHESTER (PAUL F. KENEALLY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SANTIAGO BURGER ANNECHINO LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Matthew A. Rosenbaum, J.), entered April 5, 2012. The order, among other things, granted in part defendants' cross motion for summary judgment.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1359

CA 12-00490

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

KATHLEEN KOHLBRENNER, PLAINTIFF-APPELLANT,

V ORDER

CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY, CNY CENTRO, INC., AND CENTRO OF ONEIDA, INC., DEFENDANTS-RESPONDENTS.

THE GOLDEN LAW FIRM, UTICA (LAWRENCE W. GOLDEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (MARK R. SCHLEGEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered December 21, 2011. 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 affirmed without costs for reasons stated at Supreme Court.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1361

CA 11-02326

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

DR. JOHN CHONG-HWAN WEE, PLAINTIFF-APPELLANT,

V ORDER

NATIONAL GRID, JOHN J. WEISBECK,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

JOHN CHONG-HWAN WEE, PLAINTIFF-APPELLANT PRO SE.

HISCOCK & BARCLAY, LLP, ROCHESTER (JENNIFER CASTALDO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Eric R. Adams, A.J.), entered September 16, 2011. The order denied plaintiff's motion for reconsideration.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1364

KA 10-00551

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAMEL X. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 9, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (three counts), criminal possession of a controlled substance in the third degree (four counts), criminal possession of a controlled substance in the fourth degree and unlawful possession of marihuana.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the period of postrelease supervision imposed on each count to a period of one year and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, three counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and four counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). As part of the plea agreement, Supreme Court stated that it would sentence defendant to concurrent five-year terms of imprisonment with a one-year period of postrelease supervision. We agree with defendant that the court erred in enhancing the sentence by imposing a 1½-year period of postrelease supervision that was not included in the plea agreement (*see generally People v Pickett*, 90 AD3d 1526, 1527). Although defendant failed to preserve his contention for our review "because [he] did not object to the enhanced sentence, nor did he move to withdraw the appeal or to vacate the judgment of conviction" (*People v Sprague*, 82 AD3d 1649, 1649, *lv denied* 17 NY3d 801), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We therefore modify the judgment by reducing the period of postrelease supervision to one year. As modified, the

sentence is not unduly harsh or severe.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1365

KA 11-01669

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER ZIMMERMAN, 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 an order of the Niagara County Court (Matthew J. Murphy, III, J.), dated August 1, 2011. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Contrary to defendant's contention, County Court properly assessed 15 points for his history of drug or alcohol abuse as recommended in the risk assessment instrument prepared by the Board of Examiners of Sex Offenders. The court's determination to accept that recommendation is supported by the requisite clear and convincing evidence (*see generally* § 168-n [3]), including defendant's admission of drug and alcohol use as set forth in the presentence report and in his initial statement to the police (*see People v Mundo*, 98 AD3d 1292, 1292; *People v Longtin*, 54 AD3d 1110, 1111, *lv denied* 11 NY3d 714).

Contrary to the further contention of defendant, the court properly granted the People's request for an upward departure from the presumptive level two risk based on his score on the risk assessment instrument and assessed him as a level three risk. An upward departure is warranted where, as here, " 'there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines' " (*People v McCollum*, 41 AD3d 1187, 1188, *lv denied* 9 NY3d 807; *see People v Perrah*, 99 AD3d 1257, 1257). The court properly relied upon the facts of the underlying conviction, which involved sexual acts with children in a park during the daytime, and defendant's prior history of sexual

acts with children, in determining that an upward departure to a level three risk was warranted (*see* Correction Law §§ 168-*l* [6] [c]; 168-n [3]; *People v Howe*, 49 AD3d 1302, 1302).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1369

KA 08-01359

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAKESHA JIMMESON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY 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 (Stephen R. Sirkin, A.J.), rendered April 16, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting her, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that Supreme Court erred in refusing to permit her to present evidence of a prior altercation involving defendant and the victim to demonstrate the character of defendant as well as that of the victim. We reject that contention. Character evidence " 'is strictly limited to testimony concerning the [party's] reputation' " in the community (*People v Mancini*, 213 AD2d 1038, 1039, *lv denied* 85 NY2d 976; *see People v Kuss*, 32 NY2d 436, 443, *rearg denied* 33 NY2d 644, *cert denied* 415 US 913), and thus "a character witness may not testify to specific acts" in order to establish character (*Mancini*, 213 AD2d at 1039; *see People v Ciccone*, 90 AD3d 1141, 1144, *lv denied* 19 NY3d 863). The court also properly refused to allow defendant to present evidence of the prior altercation in order to impeach the trial testimony of two prosecution witnesses. "It is well established that the party who is cross-examining a witness cannot . . . call other witnesses to contradict a witness' answers concerning collateral matters solely for the purposes of impeaching that witness' credibility" (*People v Pavao*, 59 NY2d 282, 288-289; *see People v Caswell*, 49 AD3d 1257, 1258, *lv denied* 11 NY3d 735). Finally, defendant failed to preserve for our review her present contention that evidence of the prior altercation was admissible to establish that she did not have a motive to assault the victim and that the two prosecution witnesses had a motive to

fabricate their trial testimony (*see* CPL 470.05 [2]; *People v Coapman*, 90 AD3d 1681, 1683, *lv denied* 18 NY3d 956). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1375

CAF 11-02266

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

IN THE MATTER OF EMERALD L.C.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAVID C., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

PATRICIA M. MCGRATH, LOCKPORT, FOR RESPONDENT-APPELLANT.

BARBARA L. WIDRIG, MAYVILLE, FOR PETITIONER-RESPONDENT.

ROBERT W. SCHNIZLER, ATTORNEY FOR THE CHILD, JAMESTOWN, FOR EMERALD L.C.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 20, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent David C., Jr. permanently neglected the subject child, Emerald L.C. and transferred custody and guardianship of the subject child to petitioner.

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

Memorandum: Petitioner commenced these proceedings pursuant to Social Services Law § 384-b seeking to terminate the parental rights of respondent father with respect to five of his children based on permanent neglect. In these consolidated appeals, the father appeals from orders that terminated his parental rights with respect to those children. We note at the outset that the father's contention that Family Court failed to make the requisite finding that petitioner exercised diligent efforts to reunite him with the subject children is belied by the record.

The father further contends that petitioner failed to exercise diligent efforts to reunite him with the subject children. Although the father raises that contention for the first time on appeal and thus failed to preserve it for our review (*see generally Matter of Christian A.*, 6 AD3d 1177, 1177-1178, *lv denied* 3 NY3d 604), we nevertheless address it because "proof by the child-care agency that it has satisfied its statutory obligation is a threshold consideration and a necessary prerequisite to any determination of permanent neglect" (*Matter of Sheila G.*, 61 NY2d 368, 385-386). We conclude,

however, that the father's contention lacks merit. The court properly concluded that there was copious evidence that petitioner exercised diligent efforts to reunite the family, but the father "refused to acknowledge and treat the underlying sexual abuse problem that led to the child[ren]'s placement in foster care" (*Matter of Gloria Melanie S.*, 47 AD3d 438, 438). "Clearly, petitioner was not required to forego requiring [the father's] participation in a sex offender program or to formulate an alternative plan to accommodate his refusal to admit his role in the abuse" (*Matter of James X.*, 37 AD3d 1003, 1006).

Finally, inasmuch as the father did not request a suspended judgment, he failed to preserve for our review his further contention that the court should have granted that relief (*see Matter of Atreyu G. [Jana M.]*, 91 AD3d 1342, 1343, *lv denied* 19 NY3d 801).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1376

CAF 11-02267

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

IN THE MATTER OF DAVID F.C., III.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAVID C., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

PATRICIA M. MCGRATH, LOCKPORT, FOR RESPONDENT-APPELLANT.

BARBARA L. WIDRIG, MAYVILLE, FOR PETITIONER-RESPONDENT.

ROBERT W. SCHNIZLER, ATTORNEY FOR THE CHILD, JAMESTOWN, FOR DAVID F.C., III.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 20, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent David C., Jr. permanently neglected the subject child, David F.C., III and transferred custody and guardianship of the subject child to petitioner.

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

Same Memorandum as in *Matter of Emerald L.C.* (___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1377

CAF 11-02268

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

IN THE MATTER OF AQUILA S.C.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAVID C., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

PATRICIA M. MCGRATH, LOCKPORT, FOR RESPONDENT-APPELLANT.

BARBARA L. WIDRIG, MAYVILLE, FOR PETITIONER-RESPONDENT.

ROBERT W. SCHNIZLER, ATTORNEY FOR THE CHILD, JAMESTOWN, FOR AQUILA S.C.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 20, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent David C., Jr. permanently neglected the subject child, Aquila S.C. and transferred custody and guardianship of the subject child to petitioner.

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

Same Memorandum as in *Matter of Emerald L.C.* (___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1378

CAF 11-02269

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

IN THE MATTER OF AMBER S.C.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAVID C., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

PATRICIA M. MCGRATH, LOCKPORT, FOR RESPONDENT-APPELLANT.

BARBARA L. WIDRIG, MAYVILLE, FOR PETITIONER-RESPONDENT.

ROBERT W. SCHNIZLER, ATTORNEY FOR THE CHILD, JAMESTOWN, FOR AMBER S.C.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 20, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent David C., Jr. permanently neglected the subject child, Amber S.C. and transferred custody and guardianship of the subject child to petitioner.

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

Same Memorandum as in *Matter of Emerald L.C.* (___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1379

CAF 11-02270

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

IN THE MATTER OF SERENITY C.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAVID C., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 5.)

PATRICIA M. MCGRATH, LOCKPORT, FOR RESPONDENT-APPELLANT.

BARBARA L. WIDRIG, MAYVILLE, FOR PETITIONER-RESPONDENT.

ROBERT W. SCHNIZLER, ATTORNEY FOR THE CHILD, JAMESTOWN, FOR SERENITY C.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 20, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent David C., Jr. permanently neglected the subject child, Serenity C. and transferred custody and guardianship of the subject child to petitioner.

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

Same Memorandum as in *Matter of Emerald L.C.* (___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1391.1

CA 12-00263

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

RICARDO WRIGHT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES J. SHAPIRO, JAMES J. SHAPIRO, P.A.,
DEFENDANTS-APPELLANTS,
CHIKOVSKY & ASSOCIATES, P.A., ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, ROCHESTER (PATRICK B. NAYLON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BANSBACH ZOGHLIN P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered October 27, 2011. The order, insofar as appealed from, denied the motion of defendants James J. Shapiro and James J. Shapiro, P.A., for summary judgment dismissing the second amended complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendants James J. Shapiro and James J. Shapiro, P.A. is granted, and the second amended complaint is dismissed against those defendants.

Memorandum: James J. Shapiro and James J. Shapiro, P.A. (defendants) appeal from an order denying their motion for summary judgment dismissing the second amended complaint against them and granting plaintiff's cross motion to compel the deposition of James Shapiro. We note at the outset that, although defendants' notice of appeal is from the order in its entirety, they do not address plaintiff's cross motion in their brief and thus, as limited by their brief, are deemed to have appealed only from the denial of their motion. We further note that the appeal taken by defendant Chikovsky & Associates, P.A. has been deemed abandoned and dismissed by its failure to perfect the appeal in a timely fashion (*see* 22 NYCRR 1000.12 [b]).

We agree with defendants that Supreme Court erred in denying their motion. By establishing that plaintiff could not have prevailed in his underlying personal injury action, defendants met their initial burden of establishing their entitlement to summary judgment with respect to the first cause of action against them, for legal malpractice (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8

NY3d 438, 442), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We note that the court erred in concluding, based on our decision in *Wright v Shapiro* (16 AD3d 1042), that the doctrine of law of the case precluded summary judgment following discovery. Furthermore, plaintiff's theory of liability premised on respondeat superior is barred by his discontinuation of that action on the merits against the employee, thus eliminating the triable issue of fact we discussed in our subsequent decision in *Wright v Shapiro* (35 AD3d 1253). Therefore, the court should have granted defendants' motion with respect to the first cause of action in that regard (*see Town of Angelica v Smith*, 89 AD3d 1547, 1549-1550).

Inasmuch as the second cause of action is premised upon the legal malpractice cause of action, which we are hereby dismissing against defendants, we further conclude that the court erred in denying defendants' motion with respect to the second cause of action against them.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1392

KA 10-01078

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONIQUE BOYD, DEFENDANT-APPELLANT.

LEONARD, CURLEY & WALSH PLLC, ROME (MARK C. CURLEY 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 December 19, 2008. The judgment convicted defendant, upon his plea of guilty, of rape 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 his plea of guilty of rape in the first degree (Penal Law § 130.35 [1]). "Although the contention of defendant that he was coerced into pleading guilty and thus that the plea was not voluntarily entered survives the waiver of the right to appeal, 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" (*People v Russell*, 55 AD3d 1314, 1314-1315, *lv denied* 11 NY3d 930; *see People v Ali*, 96 NY2d 840, 841, *revg* 277 AD2d 138; *People v Jackson*, 90 AD3d 1692, 1693, *lv denied* 18 NY3d 958; *People v Dozier*, 59 AD3d 987, 987-988, *lv denied* 12 NY3d 815). In any event, defendant's contention lacks merit. While we agree with defendant that it would have been impermissibly coercive for County Court to inform him that it would impose the maximum sentence if defendant chose to go to trial rather than to enter a plea (*see e.g. People v Flinn*, 60 AD3d 1304, 1305; *People v Stevens*, 298 AD2d 267, 268, *lv dismissed* 99 NY2d 585), here the court merely informed defendant that he could "face" 25 years in state prison were he to be convicted after trial. We thus conclude that "the court's statement was a proper explanation of defendant's sentence exposure in the event that defendant chose not to plead guilty" (*Dozier*, 59 AD3d at 988; *see Jackson*, 90 AD3d at 1693; *People v Bravo*, 72 AD3d 697, 698, *lv denied* 15 NY3d 747; *People v Boyde*, 71 AD3d 1442, 1443, *lv denied* 15 NY3d

747).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1393

KA 10-00617

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

J.B. THOMPKINS, JR., ALSO KNOWN AS HORACE THOMPKINS, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (John R. Schwartz, A.J.), rendered April 8, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed as moot (*see People v Griffin*, 239 AD2d 936).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1394

KA 11-02141

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDOUIN ST. JEAN, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), dated September 23, 2011. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court's determination of his risk level is not supported by the requisite clear and convincing evidence (*see* § 168-n [3]). We reject that contention. "The statements in the case summary and presentence report with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points under the risk factor for history of drug or alcohol abuse" (*People v Ramos*, 41 AD3d 1250, 1250, *lv denied* 9 NY3d 809). Defendant, who admitted to a probation officer that he occasionally overconsumed alcohol, used marihuana three to four times a week, and used ecstasy whenever he could obtain it, believed that he had a substance abuse problem. The court was entitled to reject defendant's contention at the hearing that his use of alcohol and drugs did not constitute "substance abuse" inasmuch as that contention conflicted with his prior statements as set forth in the presentence report (*see People v Woodard*, 63 AD3d 1655, 1656, *lv denied* 13 NY3d 706).

Defendant failed to preserve for our review his contention that a downward departure from his presumptive risk level was warranted (*see People v Gardiner*, 92 AD3d 1228, 1229, *lv denied* 19 NY3d 801). In any event, defendant's contention is without merit inasmuch as defendant failed to present "clear and convincing evidence of special circumstances justifying a downward departure" (*People v McDaniel*, 27

AD3d 1158, 1159, *lv denied* 7 NY3d 703).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1395

KA 08-02529

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEONARD JACKSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered September 25, 2008. The judgment convicted defendant, after a nonjury trial, of rape in the second degree and criminal sexual act in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of rape in the second degree (Penal Law § 130.30 [1]) and criminal sexual act in the second degree (§ 130.45 [1]), and acquitting him of rape in the first degree (§ 130.35 [1]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although Supreme Court rejected the victim's testimony that the acts of anal and vaginal intercourse were forced, the court "was entitled to 'accept some of the victim['s] testimony while rejecting other portions of it' " (*People v Simonetta*, 94 AD3d 1242, 1244, *lv denied* 19 NY3d 1029), and thus the court was justified in finding, beyond a reasonable doubt, that defendant engaged in anal and vaginal intercourse with the 13-year-old victim (*see Danielson*, 9 NY3d at 348).

We also conclude that defendant's sentence is not unduly harsh or severe based on the court's imposition of consecutive sentences. Where "the crimes are committed through separate and distinct acts, even though part of a single transaction, consecutive sentences are possible regardless of whether the statutory elements of the offenses overlap" (*People v Salcedo*, 92 NY2d 1019, 1021; *see People v Hurlbert*, 81 AD3d 1430, 1432, *lv denied* 16 NY3d 896). Here, as noted, defendant

engaged in the separate and distinct acts of vaginal and anal intercourse with the victim.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1396

KA 11-01586

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BOBBIE J. MONAGHAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered June 21, 2011. The judgment convicted defendant, upon her plea of guilty, of vehicular manslaughter in the first degree and vehicular assault 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 [1]) and vehicular assault in the first degree (§ 120.04 [1]), defendant contends that her sentence is unduly harsh and severe. We reject that contention. We note as an initial matter that defendant's waiver of the right to appeal does not encompass her challenge to the severity of the sentence because she purportedly waived her right to appeal before County Court advised her of the maximum sentence she could receive (*see People v Farrell*, 71 AD3d 1507, 1507, *lv denied* 15 NY3d 804; *People v Rizek* [appeal No. 1], 64 AD3d 1180, *lv denied* 13 NY3d 862). Nevertheless, we reject defendant's challenge to the severity of the sentence.

Defendant further contends that she received ineffective assistance of counsel. To the extent that such contention survives her plea of guilty and waiver of the right to appeal (*see People v Gimenez*, 59 AD3d 1088, 1089, *lv denied* 12 NY3d 816), it is not properly before us because it involves matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Johnson*, 81 AD3d 1428, 1428, *lv denied* 16 NY3d 896).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1397

CAF 11-01325

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

IN THE MATTER OF SCOTT T. SWINSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STAR DOBSON, RESPONDENT-APPELLANT.

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

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHARLES H. CIESZESKI, ATTORNEY FOR THE CHILD, FULTON, FOR JORDAN S.

Appeal from an order of the Family Court, Oswego County (Spencer J. Ludington, A.J.), entered June 20, 2011 in a proceeding pursuant to Family Court Act article 6. The order granted the petition.

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

Memorandum: Respondent mother appeals from an order that, following a hearing, granted the petition seeking to modify the custody provisions of a stipulated order and awarded primary physical custody of the parties' child to petitioner father and visitation to the mother. Contrary to the mother's contention, we conclude that Family Court's best interests determination is supported by a sound and substantial basis in the record and that the court did not abuse its discretion in awarding primary physical custody to the father (*see generally Eschbach v Eschbach*, 56 NY2d 167, 173-174; *Matter of Misty D.B. v David M.S.*, 38 AD3d 1317, 1317; *Matter of Green v Mitchell*, 266 AD2d 884, 884). Although the court noted some concern about the mother's unstable work schedule and its resultant effect on the child, the court was not thereby giving the mother "a Hobson's choice between livelihood and parenthood" (*Linda R. v Richard E.*, 162 AD2d 48, 55). Rather, the court paid particular attention to the express wishes of the child and the realities of each parent's home environment. The court addressed all of the appropriate factors before determining that the father should be awarded primary physical custody (*see Fox v Fox,* 177 AD2d 209, 210), and we afford the court's determination "great deference" (*Green*, 266 AD2d at 884).

The mother further contends that the Attorney for the Child (AFC)

should have substituted his own judgment for that of the child. The mother failed to preserve for our review that contention concerning the AFC's representation inasmuch as she made no motion to remove the AFC (*see Matter of Juliet M.*, 16 AD3d 211, 212). In any event, the mother's contention lacks merit. "An [AFC] must 'zealously advocate the child's position' . . . and, if the child is 'capable of knowing, voluntary and considered judgment,' must follow the child's wishes 'even if the attorney for the child believes that what the child wants is not in the child's best interests' " (*Matter of Gloria DD. [Brenda DD.]*, 99 AD3d 1044, 1046, quoting 22 NYCRR 7.2 [d] [2]; *see Matter of Mark T. v Joyanna U.*, 64 AD3d 1092, 1093-1094). There are only two circumstances in which an AFC is authorized to substitute his or her own judgment for that of the child: "[w]hen the [AFC] is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]; *see Mark T.*, 64 AD3d at 1094). Neither exception is implicated in this matter (*cf. Matter of Alyson J. [Laurie J.]*, 88 AD3d 1201, 1203, *lv denied* 18 NY3d 803). We thus conclude that the AFC properly advocated for the wishes of his client.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1407

CAF 11-01487

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

IN THE MATTER OF ELSA R. AND MIRACLE R.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-APPELLANT-RESPONDENT;

MEMORANDUM AND ORDER

GLORIA R., RESPONDENT-RESPONDENT-APPELLANT.

ARDETH L. HOUDE, ESQ., ATTORNEY FOR THE CHILD,
ELSA R., APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

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

ARDETH L. HOUDE, ATTORNEY FOR THE CHILD ELSA R., ROCHESTER, APPELLANT PRO SE.

Appeal and cross appeals from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered June 25, 2011 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights and granted respondent posttermination visitation with the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second through seventh ordering paragraphs and as modified the order is affirmed without costs.

Memorandum: Petitioner commenced this proceeding seeking to terminate the parental rights of respondent mother with respect to the two children at issue. The mother admitted that she permanently neglected the children and, after a dispositional hearing, Family Court terminated her parental rights and ordered six yearly posttermination supervised visits between the mother and the children. Petitioner now appeals, and the mother and the Attorney for the Child (AFC) for one of the children cross-appeal.

We reject the contention of the mother and AFC on their cross-appeals that the court abused its discretion in refusing to enter a suspended judgment. The record supports the court's determination that a suspended judgment, i.e., "a brief grace period designed to prepare the parent to be reunited with the child[ren]" (*Matter of*

Michael B., 80 NY2d 299, 311), was not in the children's best interests (*see Matter of Nicholas B.*, 83 AD3d 1596, 1597-1598, *lv denied* 17 NY3d 705; *Matter of Danielle N.*, 31 AD3d 1205, 1205). We agree with petitioner on its appeal, however, that the court erred in ordering posttermination visitation (*see Matter of Hailey ZZ.,* 19 NY3d 422, 438), and we therefore modify the order accordingly. Contrary to the contention of the mother and AFC, we conclude that *Hailey ZZ.* should be applied retroactively. The Court of Appeals in *Hailey ZZ.* did not announce a "new" rule of law (*see People v Favor*, 82 NY2d 254, 262-263, *rearg denied* 83 NY2d 801), and thus we apply the general rule "that cases on direct appeal will . . . be decided in accordance with the law as it exists at the time the appellate decision is made" (*id.* at 260; *see Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184, 191, *rearg denied* 56 NY2d 567, *cert denied* 459 US 837).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1409

CAF 11-02504

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

IN THE MATTER OF JOHN EATON AND MARK TAVANI,
PETITIONERS-RESPONDENTS,

V ORDER

CHRISTOPHER P. BOSSE, RESPONDENT-APPELLANT.

CHARU NARANG, SACKETS HARBOR, FOR RESPONDENT-APPELLANT.

KRYSTAL M. HARRINGTON, ATTORNEY FOR THE CHILD, LOWVILLE, FOR JOHNATHON S.T.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered November 23, 2011 in a proceeding pursuant to Family Court Act article 6. The order awarded petitioners custody of the subject child.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1410

CAF 11-02240

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

IN THE MATTER OF CINDY M. PHELPS AND AUGUSTUS T. PHELPS, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

EUGENE DEXTER HUNTER, RESPONDENT-APPELLANT.

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

ROBERT F. RHINEHART, SYRACUSE, FOR PETITIONERS-RESPONDENTS.

KAREN J. DOCTER, ATTORNEY FOR THE CHILD, FAYETTEVILLE, FOR SHAKIR E.H.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered October 7, 2011 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded sole legal and physical custody of the subject child to petitioners.

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

Memorandum: Respondent father appeals from an order granting the nonparent petitioners sole legal and physical custody of the father's minor child. We affirm for reasons stated in the amended findings of fact and decision at Family Court. We add only that there is no merit to the father's contention that the Court Attorney Referee lacked jurisdiction to hear and determine the matter (*see generally* CPLR 4317 [a]). The father signed the requisite consent and, although he signed that consent before being informed of his right to counsel pursuant to Family Court Act § 262 (a), he and his attorney willingly participated in the subsequent proceedings without objection and with the full knowledge that the Court Attorney Referee would adjudicate the merits of the petition (*see Matter of Carlos G. [Bernadette M.]*, 96 AD3d 632, 633; *1199 Hous. Corp. v Jimco Restoration Corp.*, 77 AD3d 502, 502; *Dodge v Lynch*, 55 AD3d 314, 315, *lv denied* 11 NY3d 713; *cf. Matter of Gale v Gale*, 87 AD3d 1011, 1012; *Matter of Osmundson v Held-Cummings*, 306 AD2d 950, 950-951).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1412

CA 12-00738

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

CAROL FOTI, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT ROMEYN NOFTSIER, JR., ALICE NOFTSIER,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

CAPONE LAW FIRM, LLP, WATERTOWN (ANDREW NICHOLAS CAPONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Lewis County (Charles C. Merrell, A.J.), dated September 29, 2011. The order granted plaintiff an easement by necessity across the property of defendants Robert Romeyn Noftsier, Jr. and Alice Noftsier.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1419.1

CA 11-02012

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND VALENTINO, JJ.

DANA JUHASZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEPHEN JUHASZ, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 12, 2011. The order, among other things, denied that part of the motion of plaintiff seeking a money judgment.

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

Memorandum: We conclude that Supreme Court properly denied that part of plaintiff's motion seeking the difference between pendente lite support paid during the pendency of the divorce action and the amounts of maintenance and child support that were ultimately awarded. Plaintiff's contentions concerning retroactive support "were previously raised and decided against [her] or could have been raised on a prior appeal in this matter . . . 'Therefore, reconsideration of these [contentions] is barred by the doctrine of law of the case' " (*Matter of Suzuki-Peters v Peters*, 37 AD3d 726, *lv denied* 9 NY3d 814, quoting *Palumbo v Palumbo*, 10 AD3d 680, 682, *lv dismissed* 3 NY3d 765).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1422

KA 12-00169

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GORDY A. AKINPELU, ALSO KNOWN AS GORDY L. AKINPELU, ALSO KNOWN AS GORDY AKINPELU, DEFENDANT-APPELLANT.

FARES A. RUMI, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 19, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the second degree.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1437

CA 12-00640

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

MARGARET A. SEEGER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE MARKETPLACE, ET AL., DEFENDANTS,
AND J.C. PENNEY COMPANY, INC.,
DEFENDANT-RESPONDENT.

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (JON E. BONAVILLA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (CHRISTOPHER E. WILKINS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered December 9, 2011. The order and judgment granted the motion of defendant J.C. Penney Company, Inc. for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion of defendant J.C. Penney Company, Inc. is denied and the complaint against it is reinstated.

Memorandum: Plaintiff was shopping at a store operated by J.C. Penney Company, Inc. (defendant) just before its closing on December 24, 2004 when she began to feel faint and ultimately collapsed to the floor. She was placed in a wheelchair and escorted to her car, which was located in a parking lot of the mall where the store was located. Eventually, she attempted to drive away from the parking lot and subsequently crashed into the side of the mall. She thereafter commenced this action against several entities, including the mall and its owners and managers as well as defendant. Supreme Court granted defendant's motion for summary judgment dismissing the complaint against it on the ground that plaintiff's act of starting and operating her vehicle was the supervening cause of her injuries. The court further concluded that plaintiff had failed to establish any negligence on defendant's part. We reverse.

As a general matter, "one does not owe a duty to come to the aid of a person in peril, whether the peril is medical or otherwise" (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 92 AD3d 148, 159). However, "one who assumes a duty to act . . . may thereby

become subject to the duty of acting carefully" (*id.* [internal quotation marks omitted]; *see Filiberto v Herk's Tavern, Inc.*, 37 AD3d 1007, 1009, *lv denied* 8 NY3d 815). Where a party voluntarily assumes a duty to act, the party may not place the person to whom the duty is owed "in a position of peril equal to that from which [the person] was rescued," nor may the party change the person's "position for the worse by unreasonably putting the person back into the same peril, or into a new one" (*Parvi v City of Kingston*, 41 NY2d 553, 559-560; *see Gauthier v Super Hair*, 306 AD2d 850, 851-852).

Here, defendant failed to meet its burden of establishing its entitlement to judgment as a matter of law. The evidence demonstrates that an employee of defendant opted to render assistance to plaintiff by voluntarily obtaining the wheelchair by which the employee then transported plaintiff to her car in the parking lot. Thus, by intervening when she appeared to be in ill health, defendant's employee voluntarily assumed a duty to plaintiff as a matter of law and, as a result, defendant became obligated to act with due care in her regard based upon the doctrine of respondeat superior (*see Maldonado v County of Suffolk*, 10 AD3d 387, 388). Whether plaintiff's subsequent actions were reasonable and whether they were the proximate cause of her injuries should be resolved by the finder of fact, not on a motion for summary judgment (*see Parvi*, 41 NY2d at 560).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1446

KA 11-00850

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVE HOLD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 25, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a forged instrument in the second degree (five counts).

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

Memorandum: Defendant appeals from a judgment convicting him, following a nonjury trial, of five counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). Contrary to defendant's contention, viewing the evidence in the light most favorable to the People, we conclude that it is legally sufficient to establish that he had knowledge that the five checks were forged instruments (*see generally People v Danielson*, 9 NY3d 342, 349). All of the checks were both written to and endorsed by defendant, and the People presented photographic evidence of defendant at the teller counter at the time four of the checks were cashed. The account holder testified that several checks had been taken from her home and that she had not written any checks to defendant, whom she did not know. The evidence established that defendant cashed two different checks at separate branches of the same bank, within one hour. Defendant was arrested when he attempted to cash a fifth check and bank personnel ascertained that the account holder had not written the check to defendant. "Guilty knowledge of forgery may be shown circumstantially by conduct and events" and, here, defendant's conduct and the events support the determination that defendant knew that the checks were forged (*People v Johnson*, 65 NY2d 556, 561, *rearg denied* 66 NY2d 759; *see People v Moore*, 41 AD3d 1202, 1203-1204, *lv denied* 9 NY3d 879; *cf. People v Green*, 53 NY2d 651, 652; *People v Manges*, 67 AD3d 1328, 1329).

Viewing the evidence in light of the elements of the crime of criminal possession of a forged instrument in the second degree in this nonjury trial (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1447

KA 11-01492

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD ODUM, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered May 31, 2011. The order denied the appeal of defendant from an order of Gates Town Court (Peter P. Pupatelli, J.), dated October 4, 2010, determining 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 of Monroe County Court that affirmed an order of Gates Town Court determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that he was an acquaintance of the victim and that the People therefore failed to establish the basis for the assessment of 20 points under risk factor 7, i.e., his relationship with the victim. The evidence established that "the victim met defendant for the first time [shortly before] the day of the incident, did not know his legal name, and apparently knew no other personal information about him. Thus, the court properly concluded that 'defendant was a stranger to the victim' " (*People v Gaines*, 39 AD3d 1212, 1212-1213, *lv denied* 9 NY3d 803).

Assuming, arguendo, that, by seeking a downward departure from his presumptive risk level on a different ground, defendant preserved for our review his contention that a downward departure to level one is warranted because of his lack of contact with the criminal justice system since the time of the offense, we conclude that his contention is without merit. Defendant failed "to present clear and convincing evidence of special circumstances justifying a downward departure" (*People v Regan*, 46 AD3d 1434, 1435; *see People v Bennett*, 90 AD3d 1664, 1664, *lv denied* 18 NY3d 810; *People v Ratcliff*, 53 AD3d 1110,

1110, *lv denied* 11 NY3d 708).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1451

KA 11-00969

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL LEGGETT, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., 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 December 2, 2009. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of robbery in the second degree (Penal Law § 160.10 [1]). Defendant made only a general motion for a trial order of dismissal at the close of the People's case (*see People v Gray*, 86 NY2d 10, 19), and at the close of all the proof (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678), and thus he failed to preserve for our review his contention that the conviction is based upon legally insufficient evidence. In any event, that contention is without merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant, acting with his codefendant who was actually present, forcibly stole money from the victim (*see generally People v Danielson*, 9 NY3d 342, 349; *People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that, although a different result would not have been unreasonable, the jury did not fail to give the conflicting evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495). Here, the issue whether defendant participated in the robbery was based upon the credibility determination of the jury and, upon our independent assessment of the evidence, we conclude that there is no reason to disturb that determination (*see generally People v Delamota*, 18 NY3d 107, 116-117).

Defendant did not object to comments made by the prosecutor during summation and thus also failed to preserve for our review his

contention that he was deprived of a fair trial by those comments (*see* CPL 470.05 [2]; *People v Brown*, 94 AD3d 1461, 1462, *lv denied* 19 NY3d 995). In any event, we conclude that the remarks were within the broad bounds of permissible rhetorical comment (*see Brown*, 94 AD3d at 1462).

We reject defendant's contention that County Court abused its discretion with respect to its *Sandoval* determination (*see People v Thomas*, 96 AD3d 1670, *lv denied* 19 NY3d 1002). The court imposed the minimum term of incarceration allowed (*see* Penal Law § 70.06 [6] [b]), and thus defendant's contention that the term of incarceration imposed is unduly harsh and severe is without merit. Finally, to the extent that defendant contends that the period of postrelease supervision imposed is unduly harsh and severe, we decline to exercise our power to modify that portion of the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1455

CAF 11-02333

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

IN THE MATTER OF ERICA WILLIAMS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SHAWN EPPS, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-RESPONDENT.

PATRICIA M. MCGRATH, ATTORNEY FOR THE CHILD, LOCKPORT, FOR RYLIE E.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 21, 2011 in a proceeding pursuant to Family Court Act article 6. The order denied the petition for relocation.

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

Memorandum: In appeal No. 1, petitioner mother appeals from an order denying her petition seeking permission for the parties' child to relocate with her to Atlanta, Georgia. We conclude that Family Court properly denied the petition. Although the mother testified that she was offered a position as a hair stylist at a salon in Atlanta, there was little evidence adduced concerning the salary, benefits, hours of work, and other incidentals of the employment. In addition, as of the time of the hearing, the child had regular and meaningful access with respondent father, as well as with the child's maternal and paternal extended family. Inasmuch as the mother "failed to establish that the lives of the mother and the child would be 'enhanced economically [or] educationally by the move' " (*Matter of Holtz v Weaver*, 94 AD3d 1557, 1558, quoting *Matter of Tropea v Tropea*, 87 NY2d 727, 741), and the credible evidence supports the court's determination that the child's relationship with the father and other relatives in the Buffalo area would be adversely affected by the proposed relocation (*see Matter of Webb v Aaron*, 79 AD3d 1761, 1761-1762), the mother failed to meet her burden of establishing that relocation is in the child's best interests (*see Tropea*, 87 NY2d at 740-741; *Matter of Seyler v Hasfurter*, 61 AD3d 1437, 1437).

In appeal No. 2, the mother appeals from an order dismissing her

violation petition. The mother raises no issues with respect to that order in her brief, and we therefore deem any such issues abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1456

CAF 11-02334

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

IN THE MATTER OF ERICA WILLIAMS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SHAWN EPPS, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-RESPONDENT.

PATRICIA M. MCGRATH, ATTORNEY FOR THE CHILD, LOCKPORT, FOR RYLIE E.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 21, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the violation petition.

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

Same Memorandum as in *Matter of Williams v Epps* ([appeal No. 1] ___ AD3d ___ [Dec. 21, 2012]).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1458

CA 11-02584

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

IN THE MATTER OF JOSE MARRERO-NIEVES,
PETITIONER-APPELLANT,

V ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE
DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

JOSE MARRERO-NIEVES, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered November 15, 2011 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Ansari v Travis*, 9 AD3d 901, *lv denied* 3 NY3d 610).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1459

CA 12-00265

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

IN THE MATTER OF THE APPLICATION
OF CATHERINE H., DAUGHTER,
PETITIONER-RESPONDENT,

ORDER

FOR THE APPOINTMENT OF A GUARDIAN OF THE
PERSON AND/OR PROPERTY OF DOLORES H., A
PERSON ALLEGED TO BE INCAPACITATED.

SUSAN H., APPELLANT.

SUSAN H., APPELLANT PRO SE.

CHRIS T. BRUNEA, BOWMANSVILLE, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered April 7, 2011 in a proceeding pursuant to Mental Hygiene Law article 81. The order, among other things, granted the cross motion of Catherine H. for referral of all accounting issues to Surrogate's Court, Erie County.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1461

CA 12-01015

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

IN THE MATTER OF THE ARBITRATION BETWEEN
LIVINGSTON COUNTY, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, LIVINGSTON
COUNTY EMPLOYEES LOCAL 826 AND LIVINGSTON
COUNTY EMPLOYEES UNIT, RESPONDENTS-RESPONDENTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (DAVID W. LIPPITT OF COUNSEL), FOR PETITIONER-APPELLANT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (William P. Polito, J.), entered February 3, 2012 in a proceeding pursuant to CPLR article 75. The order denied the petition to stay arbitration.

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

Memorandum: Petitioner appeals from an order denying the petition to stay arbitration in this CPLR article 75 proceeding. Petitioner and respondents are parties to a collective bargaining agreement (CBA) and were involved in a grievance that proceeded through various steps in the grievance process and ultimately resulted in petitioner's denial of the grievance by a written decision issued on October 4, 2011. Respondents gave petitioner notice of intent to submit the grievance to arbitration by letter dated October 27, 2011, which was received by the Livingston County Administrator on October 28, 2011.

Pursuant to article 24, section 1 of the CBA, "[c]ompliance with the time limits for submitting a notice of intent to arbitrate . . . shall be a condition precedent to arbitration. Failure to submit a notice of intent to submit a grievance to arbitration . . . shall thus bar the grievance from proceeding to arbitration." That section further provides that respondents must notify petitioner of their intent to submit a grievance to arbitration no later than 15 working days after a written decision was issued at the second step of the

grievance process. Petitioner sought a stay of arbitration based on respondents' failure to comply with that notice requirement, and Supreme Court denied the petition. That was error. Although the CBA here contains a broad arbitration agreement, the CBA also contains an express provision establishing the condition precedent at issue (*see Matter of Kachris [Sterling]*, 239 AD2d 887, 887-888; *see also Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 7-8). Where, as here, the condition precedent is expressly made part of the CBA, the issue of compliance with the condition is for the court in the first instance (*see Matter of Raisler Corp. [New York City Hous. Auth.]*, 32 NY2d 274, 279).

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1488

CA 12-01120

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

RONALD EVANGELISTA, WILLIAM WOOD, JR., MARK GERBINO, GERALD CONNOR, FREDERICK COWLEY, PETER WALSH, JOHN GERBINO, RICHARD GERBINO AND RONALD REINSTEIN, PLAINTIFFS-RESPONDENTS,

V ORDER

CITY OF ROCHESTER AND ROBERT J. DUFFY, AS MAYOR OF CITY OF ROCHESTER, DEFENDANTS-APPELLANTS.

ROBERT J. BERGIN, CORPORATION COUNSEL, ROCHESTER (ADAM M. CLARK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (LUCINDA ODELL LAPOFF OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 26, 2011. The order, among other things, granted in part plaintiffs' motion for summary judgment.

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

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

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

1491

CA 12-00513

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

MARK HESS AND GAIL HESS, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF MARILYN HESS, AN INFANT, PLAINTIFFS-APPELLANTS,

V ORDER

GARY NELSON AND LYNN NELSON, DEFENDANTS-RESPONDENTS.

THE CAREY FIRM, LLC, GRAND ISLAND (DALE J. BAUMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (TARA E. WATERMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered December 16, 2011. 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 affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: December 21, 2012

Frances E. Cafarell
Clerk of the Court

MOTION NO. (702/97) KA 12-01928. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARCUS MOSBY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, CARNI, AND WHALEN, JJ. (Filed Dec. 21, 2012.)

MOTION NOS. (1546-1547/98) KA 12-01290. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANKLIN B. BROWN, DEFENDANT-APPELLANT. KA 12-01291. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANKLIN B. BROWN, DEFENDANT-APPELLANT. –- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (277/00) KA 98-05147. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD WALLACE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (1316/06) KA 04-02937. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CONSTANTINE L. JACKSON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (1370/08) KA 05-02072. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVID M. LORET, DEFENDANT-APPELLANT. -- Motion for reargument

denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (124/09) KA 06-03044. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CONSTANTINE JACKSON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (1564/09) KA 08-01370. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEPHEN LE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, VALENTINO, AND MARTOCHE, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (1585/09) KA 07-02429. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AHMIR COLE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, AND LINDLEY, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (240/11) KA 07-00717. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAPHAEL CASTILLO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (556/11) KA 10-00758. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V DARYL L. BURTON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND SCONIERS, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (1076/12) KA 10-01834. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MURAD BEYAH, DEFENDANT-APPELLANT. –- Motion for rehearing or leave to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (405/12) TP 11-01530. -- IN THE MATTER OF RAMON ALVAREZ, PETITIONER, V BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (617/12) CA 11-02181. -- IN THE MATTER OF TOM THOMAS AND THOMAS ESTATES WEST, PETITIONERS-APPELLANTS, V CYNTHIA L. BOHEEN DAVIS, ASSESSOR, AND BOARD OF ASSESSMENT REVIEW OF TOWN OF CLARENDON, ORLEANS COUNTY, RESPONDENTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND MARTOCHE, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (911/12) CA 12-00059. -- IN THE MATTER OF THE ARBITRATION

BETWEEN NICHOLAS GIANGUALANO, MARY ANN ALLAN, RICHARD S. ALLAN, GARY L. ALLAN, KENNETH N. ALLAN, JEFFREY R. ALLAN AND ELIZABETH E. CHAIRES, PETITIONERS-RESPONDENTS, AND JAY B. BIRNBAUM AND ILENE L. FLAUM, AS CO-TRUSTEES OF TRUST "B" UNDER THE LAST WILL AND TESTAMENT OF BERNARD B. BIRNBAUM, DECEASED, RESPONDENTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: PERADOTTO, J.P. CARNI, LINDLEY, AND MARTOCHE, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (1013/12) CA 12-00556. -- PHILIP F. HANLON, PLAINTIFF-RESPONDENT, V MICHAEL D. HEALY, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND MARTOCHE, JJ. (Filed Dec. 21, 2012.)

MOTION NO. (1159/12) CAF 11-01576. -- IN THE MATTER OF JAKOB B.-K. AND NIKOLY B.-K. CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; STEPHEN K., RESPONDENT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed Dec. 21, 2012.)

KA 12-01971. –- THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT, V ISMAEL J. CRUZ, ALSO KNOWN AS JUNIOR, ALSO KNOWN AS JUNE, DEFENDANT-RESPONDENT. –- Motion to dismiss granted. Memorandum: The matter is remitted to Supreme Court, Monroe County, to dismiss sua sponte or on application by the

District Attorney or the attorney who appeared for defendant-respondent that portion of the indictment as it pertains to defendant-respondent (*see People v Matteson,* 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Dec. 21, 2012.)

KA 10-01955. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KHARYE JARVIS, DEFENDANT-APPELLANT. –- Motion for reargument denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Dec. 21, 2012.)

KA 11-00491. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRUCE J. KNAAK, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, William F. Kocher, J. - Rape, 1st Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ. (Filed Dec. 21, 2012.)

KA 09-02215. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RUSSELL C. PROUT, JR., DEFENDANT-APPELLANT. –- Motion to dismiss granted. Memorandum: The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Dec. 21, 2012.)

KA 11-00354. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TASHA E. ROSBROOK, DEFENDANT-APPELLANT. -- Appeal dismissed (*see* CPL 450.60 [3]). Counsel's motion to be relieved of assignment granted. (Appeal from Judgment of Watertown City Court, Kim H. Martusewicz, A.J. - Criminal Possession of a Forged Instrument, 3rd Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ. (Filed Dec. 21, 2012.)

KA 11-00355. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TASHA E. ROSBROOK, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Jefferson County Court, Kim H. Martusewicz, J. - Criminal Possession of Stolen Property, 4th Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ. (Filed Dec. 21, 2012.)

KA 11-02533. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JUSTIN WOODRUFF, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, Craig J. Doran, J. - Criminal Possession of Stolen Property, 4th Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ. (Filed Dec. 21, 2012.)