SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 27, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

JoAnn M. Wahl, CLERK

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1685

CA 08-01442

PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND PINE, JJ.

KIMBERLY HOFMANN,
PLAINTIFF-RESPONDENT-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

TOWN OF ASHFORD, DUANE FULLER,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

STATE FARM MUTUAL AUTOMOBILE INS. CO.,
AS SUBROGEE OF GEORGE K. HOFMANN,
PLAINTIFF-RESPONDENT,

V

TOWN OF ASHFORD AND DUANE FULLER,
DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL F. CHELUS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (JOHN A. SHEEHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

HANDELMAN, WITKOWICZ & LEVITSKY, ROCHESTER (ERIC D. HANDELMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered February 4, 2008. The order, insofar as appealed and cross-appealed from, denied the motion of defendants Town of Ashford and Duane Fuller for summary judgment and the cross motion of plaintiff State Farm Mutual Automobile Ins. Co., as subrogee of George K. Hofmann, for partial summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the cross motion and as modified the order is affirmed without costs.

Memorandum: Kimberly Hofmann (Hofmann) and her husband commenced an action against, inter alia, the Town of Ashford (Town) and Duane Fuller seeking damages for injuries sustained by Hofmann when a snowplow owned by the Town and operated by Fuller collided with

Hofmann's vehicle at an intersection. Hofmann and her husband thereafter separated, and the action commenced by Hofmann and her husband was discontinued with respect to the husband. State Farm Mutual Automobile Ins. Co., as subrogee of Hofmann's husband (State Farm), commenced an action against the Town and Fuller (collectively, defendants), and the two actions thereafter were joined for trial. Defendants made a pretrial motion for summary judgment dismissing the complaints on the ground that the "reckless disregard" standard of care pursuant to Vehicle and Traffic Law § 1103 (b) applies, and they contended that they established as a matter of law that Fuller's conduct was not reckless. State Farm cross-moved for partial summary judgment seeking application of the negligence standard of care and contending that Vehicle and Traffic Law § 1103 (b) is not applicable to this case. Supreme Court denied the motion and the cross motion.

We conclude that the court erred in denying State Farm's cross motion, and we therefore modify the order accordingly. Vehicle and Traffic Law § 1103 (b) exempts from the provisions of title VII of the Vehicle and Traffic Law all "persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway . . . ." Such persons, teams, motor vehicles, and other equipment, however, are not relieved "from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others" (*id.*). That subdivision includes snowplows (*see Riley v County of Broome*, 95 NY2d 455, 463).

The sole issue before us is whether Fuller was "actually engaged in work on a highway" at the time of the collision (*id.*), and we conclude that he was not. Our primary consideration in interpreting a statute is to "ascertain and give effect to the intention of the Legislature" (McKinney's Cons Laws of NY, Book 1, Statutes § 92). In addition, meaning and effect should be given to all language in a statute, if possible, and "words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning" (§ 231). Here, the inclusion of the language "actually engaged in work on a highway" indicates that the exemption applies only when such work is in fact being performed at the time of the accident. To conclude otherwise would render superfluous the phrase "actually engaged." Here, the record establishes that, at the time of the collision, Fuller was not driving on part of his plow route but instead was traveling from one part of his route to another by way of a county road that he was not responsible for plowing. Further, Fuller was driving with both blades of the snowplow raised, and was not sanding or salting the road. The exemption does not apply to a driver who is traveling from one work site to another (*see Davis v Incorporated Vil. of Babylon, N.Y.*, 13 AD3d 331; *Marvin v Town of Middlesex*, 2002 NY Slip Op 50006[U], *affd* 300 AD2d 1112), and it likewise does not apply here. Defendants therefore are correct that the ordinary negligence standard of care should be applied at trial. Finally, we note that, although State Farm did not cross-appeal from that part of the order denying its cross motion and, instead, only

Hofmann cross-appealed therefrom, " 'this is one of those cases where relief to a nonappealing party is appropriate' " (*Lakewood Constr. Co. v Brody*, 1 AD3d 1007, 1009; *see generally Hecht v City of New York*, 60 NY2d 57, 61-62).

All concur except SCUDDER, P.J., and PINE, J., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part and would affirm the order denying both the motion of the Town of Ashford and Duane Fuller (collectively, defendants) and the cross motion of State Farm Mutual Automobile Ins. Co, as subrogee of George K. Hofmann. Although the majority concludes as a matter of law that the ordinary negligence standard of care rather than the "reckless disregard" standard of care pursuant to Vehicle and Traffic Law § 1103 (b) applies herein, in our view there is an issue of fact concerning which of those two standards of care applies. The record establishes that the accident occurred after Fuller had plowed two town roads and was proceeding on his plow route along a county highway in order to plow another town road that was approximately 1 to 1½ miles away. Fuller testified at his deposition that the snowplow he was operating, with the flashing lights activated, was stopped at an intersection with a stop sign on the county highway when Fuller observed the vehicle driven by Kimberly Hofmann (Hofmann) approach the intersection from the north. Fuller observed that the right turn signal on Hofmann's vehicle was activated, and Hofmann slowed as she approached the intersection. Fuller began to enter the intersection under the mistaken belief that Hofmann was turning right, whereupon Hofmann's vehicle struck the raised plow blade. The majority concludes that Fuller was not "actually engaged in work on a highway" at the time of the collision and that defendants therefore are not entitled to the reckless disregard standard of care pursuant to Vehicle and Traffic Law § 1103 (b). We cannot agree with that conclusion. In our view, because Fuller was operating the vehicle in the course of his duties, i.e., he had finished plowing one road on his route and was proceeding to the next road assigned on his route, there is an issue of fact whether he was "actually engaged in work on a highway" and thus is entitled to the application of the reckless disregard standard of care at trial rather than that of ordinary negligence (*id.; see O'Keeffe v State of New York*, 40 AD3d 607, 608). Indeed, the Court of Appeals in *Riley v County of Broome* (95 NY2d 455, 468) has explicitly stated that "[t]he statute does not require that a vehicle be located in a designated 'work area' in order to receive the protection" of the reckless disregard standard of care, and we therefore conclude that the applicable standard of care must be determined on a case-by-case basis (*cf. Davis v Incorporated Vil. of Babylon, N.Y.*, 13 AD3d 331; *Marvin v Town of Middlesex*, 2002 NY Slip Op 50006[U], *affd* 300 AD2d 1112).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

68

CA 08-00896

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, AND GORSKI, JJ.

IN THE MATTER OF PAUL BROWN, AS PRESIDENT OF BUILDING AND CONSTRUCTION TRADES COUNCIL OF BUFFALO AND VICINITY, AND BUILDING AND CONSTRUCTION TRADES COUNCIL OF BUFFALO AND VICINITY, PETITIONERS-RESPONDENTS,

V ORDER

COUNTY OF ERIE AND TOM GREENAUER DEVELOPMENT, INC., RESPONDENTS-APPELLANTS.

OPERATING ENGINEERS LOCAL 17 TRAINING FUND, INTERVENOR-RESPONDENT;

ASSOCIATED BUILDERS AND CONTRACTORS, INC., INTERVENOR-APPELLANT.
(APPEAL NO. 1.)

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (KRISTIN KLEIN WHEATON OF COUNSEL), FOR RESPONDENT-APPELLANT COUNTY OF ERIE.

BOND, SCHOENECK & KING, PLLC, BUFFALO (ROBERT A. DOREN OF COUNSEL), FOR RESPONDENT-APPELLANT TOM GREENAUER DEVELOPMENT, INC. AND INTERVENOR-APPELLANT.

CREIGHTON, PEARCE, JOHNSEN & GIROUX, BUFFALO (CATHERINE A. CREIGHTON OF COUNSEL), AND SHERMAN, DUNN, COHEN, LEIFER & YELLIG PC, WASHINGTON, D.C., FOR PETITIONERS-RESPONDENTS AND INTERVENOR-RESPONDENT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MICHELLE ARONOWITZ OF COUNSEL), AMICUS CURIAE IN SUPPORT OF PETITIONERS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Drury, A.J.), entered October 16, 2007 in a proceeding pursuant to CPLR article 78. The order, insofar as appealed from, denied the motions of respondents to dismiss the petition.

It is hereby ORDERED that said appeals are unanimously dismissed without costs (*see* CPLR 5701 [b] [1]).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

69

CA 08-00897

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, AND GORSKI, JJ.

IN THE MATTER OF PAUL BROWN, AS PRESIDENT OF BUILDING AND CONSTRUCTION TRADES COUNCIL OF BUFFALO AND VICINITY, BUILDING AND CONSTRUCTION TRADES COUNCIL OF BUFFALO AND VICINITY, AND OPERATING ENGINEERS LOCAL 17 TRAINING FUND, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, TOM GREENAUER DEVELOPMENT, INC., AND ASSOCIATED BUILDERS AND CONTRACTORS, INC., RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (KRISTIN KLEIN WHEATON OF COUNSEL), FOR RESPONDENT-APPELLANT COUNTY OF ERIE.

BOND, SCHOENECK & KING, PLLC, BUFFALO (ROBERT A. DOREN OF COUNSEL), FOR RESPONDENTS-APPELLANTS TOM GREENAUER DEVELOPMENT, INC. AND ASSOCIATED BUILDERS AND CONTRACTORS, INC.

CREIGHTON, PEARCE, JOHNSEN & GIROUX, BUFFALO (CATHERINE A. CREIGHTON OF COUNSEL), AND SHERMAN, DUNN, COHEN, LEIFER & YELLIG PC, WASHINGTON, D.C., FOR PETITIONERS-RESPONDENTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MICHELLE ARONOWITZ OF COUNSEL), AMICUS CURIAE IN SUPPORT OF PETITIONERS-RESPONDENTS.

Appeals from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Drury, A.J.), entered February 21, 2008 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, the motions are granted and the petition is dismissed.

Memorandum: In 2006, respondent County of Erie (County) enacted Local Law 2-2006 (Local Law) requiring, in relevant part, that any contractor seeking to enter into a construction contract with the County must have "in place and provide written proof" that the contractor has a "New York State Certified Worker Training Program." When the County bid a public works project in 2007, however, no bidder, including the bidder who was awarded the contract, respondent

Tom Greenauer Development, Inc. (Greenauer), submitted the requisite written proof of compliance with the Local Law.

In this CPLR article 78 proceeding, petitioners seek a determination that the contract between the County and Greenauer was invalid inasmuch as Greenauer did not have the requisite training program. According to petitioners, Kandey Company, Inc. (Kandey), a nonparty, should have been awarded the contract because it had a collective bargaining agreement with a union (hereafter, Local 17) that is a member of petitioner Building and Construction Trades Council of Buffalo and Vicinity (Council), and petitioner Operating Engineers Local 17 Training Fund (Training Fund) provides apprentice training to members of Local 17. We agree with the County and Greenauer that Supreme Court erred in denying their motions to dismiss the petition on the ground that petitioners lack standing to challenge the County's award of the contract to Greenauer.

We conclude that the County and Greenauer met their initial burden on their respective motions by asserting that petitioners lack standing because they do not have an injury in fact that falls within the zone of interest sought to be promoted or protected by the local law (*see generally Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 771-774), thus shifting the burden to petitioners to establish that they have standing. We conclude that they failed to meet that burden inasmuch as they failed to establish "that the administrative action will in fact have a harmful effect on [them] (*Matter of Dairylea Coop. v Walkley*, 38 NY2d 6, 9; *see Society of Plastics Indus.*, 77 NY2d at 774). Standing to bring a CPLR article 78 proceeding requires " '[t]he existence of an injury in fact—an actual legal stake in the matter being adjudicated' " (*Silver v Pataki*, 96 NY2d 532, 539, *rearg denied* 96 NY2d 938, quoting *Society of Plastics Indus.*, 77 NY2d at 772), and the injury in fact must be " 'distinct from that of the general public' " (*Matter of Benson v Roswell Park Cancer Inst. Corp. Merit Bd.*, 305 AD2d 1056, 1057-1058). Contrary to petitioners' contention, it is not enough that "the issue may be one of wide public concern" (*Rudder v Pataki*, 246 AD2d 183, 186, *affd* 93 NY2d 273).

Here, petitioners failed to establish that they suffered an injury in fact (*see Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 588). Petitioners cannot assert associational or organizational standing inasmuch as the Council's members, i.e., various unions, would not have had standing to bring this proceeding (*see Society of Plastics Indus.*, 77 NY2d at 775). Moreover, the allegation of petitioners that they were harmed because Local 17 was harmed is speculative, at best (*see Matter of New York State Assn. of Criminal Defense Lawyers v Kaye*, 269 AD2d 14, 17, *affd* 96 NY2d 512). Kandey is not a member of the Council or any union member of the Council, and there is no evidence that the Training Fund actually lost any contributions as a result of the County's award of the contract to Greenauer.

All concur except GORSKI, J., who dissents and votes to affirm in

the following Memorandum: I respectfully dissent and would affirm. In my view, petitioners have established an actual legal stake in the matter that is distinct from that of the general public (*see Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 771-774). The existence of an injury in fact, for the purpose of establishing standing, requires consideration of the alleged harm in light of the zone of interest to be protected by the law at issue (*see Rudder v Pataki*, 93 NY2d 273, 279-280; *Transactive Corp.*, 92 NY2d at 587; *Society of Plastics Indus.*, 77 NY2d at 776-777).

Here, the enactment of Local Law 2-2006 (Local Law) by the Erie County Legislature is a direct result of the promotion of apprenticeship programs in accordance with the National Apprenticeship Act (29 USC § 50 *et seq.*; *see generally Associated Bldrs. & Contrs., Inc. v Reich*, 963 F Supp 35, 38 [DDC 1997]) and Labor Law § 810. The bidding requirements of the Local Law therefore are not intended to regulate the bidding process (*cf. Transactive Corp.*, 92 NY2d at 587-589) but, rather, those requirements are intended to encourage participation of both labor and industry in apprenticeship programs. By providing that potential contractors may meet bidding requirements either internally or through apprenticeship program organizations, the Local Law specifically contemplates the participation of organizations such as petitioner Building and Construction Trades Council of Buffalo and Vicinity (Council), an umbrella organization providing education and training support, and petitioner Operating Engineers Local 17 Training Fund (Training Fund), which is a joint labor-management apprenticeship program fund similar to those of the Council's other members. The admitted failure of respondent County of Erie (County) to abide by its own local law nullified the incentive for contractors to participate in labor-management apprenticeship programs, thereby divesting petitioners of their ability to participate in and promote such programs (*see Matter of New York State Assn. of Community Action Agency Bd. Members v Shaffer*, 119 AD2d 871, 874; *see generally Matter of Fischbach & Moore v New York City Tr. Auth.*, 79 AD2d 14, 20, *lv denied* 53 NY2d 604). Thus, petitioners have standing because the Council has its own specific interest in this litigation, and it represents member unions whose participation in joint labor-management funds such as the Training Fund are directly affected by the County's dispensing with the incentive bidding requirements (*see Society of Plastics Indus.*, 77 NY2d at 775; *New York State Assn. of Community Action Agency Bd. Members*, 119 AD2d at 874). Viewed in light of the intended purpose of the Local Law, I cannot agree with the majority that the alleged harm is speculative, nor is it a "[g]rievance[] generalized to the degree that [it becomes a] broad policy complaint[]" (*Rudder*, 93 NY2d at 280; *cf. Society of Plastics Indus.*, 77 NY2d at 777).

In addition, I agree with Supreme Court that the Local Law is not preempted by the Employee Retirement Income Security Act of 1974 (29 USC § 1001 *et seq.*; *see California Div. of Labor Stds. Enforcement v Dillingham Constr., N.A., Inc.*, 519 US 316, 325). Further, the failure of the County to comply with a substantive portion of a

properly enacted local law cannot be waived as a technical irregularity (*cf. Matter of Eldor Contr. Corp. v Suffolk County Water Auth.*, 270 AD2d 262). Thus, in my view, invalidation of the contract was required by the Local Law.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 08-01862

PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND PINE, JJ.

IN THE MATTER OF THE SEVENTH REPORT OF THE SENECA COUNTY SPECIAL GRAND JURY OF JANUARY 2007.

---------- MEMORANDUM AND ORDER

R. MICHAEL TANTILLO, SPECIAL DISTRICT ATTORNEY OF SENECA COUNTY, APPELLANT;

SECOND NAMED PUBLIC SERVANT, RESPONDENT.

R. MICHAEL TANTILLO, SPECIAL DISTRICT ATTORNEY OF SENECA COUNTY, CANANDAIGUA, APPELLANT PRO SE.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Seneca County Court (Dennis F. Bender, J.), dated January 28, 2008. The order accepted Report Number 7 of the January 2007 Seneca County Special Grand Jury and directed that the report be sealed and that all references to respondent be redacted.

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

Memorandum: R. Michael Tantillo, as the special prosecutor, appeals from an order of County Court directing that a grand jury report be sealed and that all references to respondent be redacted because respondent, who was a target of the investigation in question, resigned from the public office in which he had been employed. We affirm. Pursuant to CPL 190.85 (1) (a), a grand jury may submit a report "[c]oncerning misconduct, non-feasance or neglect in public office by a public servant[, as defined by Penal Law § 10.00 (15),] as the basis for a recommendation of removal or disciplinary action . . . ." Where, as here, "a public servant has voluntarily resigned from public office, a Grand Jury report no longer contains a viable recommendation of either removal or disciplinary action and is, therefore, no longer acceptable under the terms of CPL 190.85" (*Matter of Onondaga County District Attorney's Off.*, 92 AD2d 32, 34). The grand jury report thus should be sealed with respect to that public servant (*see Morgenthau v Cuttita*, 233 AD2d 111, 115, *lv denied* 89 NY2d 1042). Although respondent was subsequently employed in another public office, that subsequent position was distinct from the prior position in which he engaged in the alleged misconduct. The allegations of misconduct therefore "do not pertain to [a] person[] presently employed by the [public office in question]" (*Matter of*

Reports of Grand Jury No. 1 of County of Monroe, 71 AD2d 1060, 1060; *see Matter of Report of Apr. 1979 Grand Jury of Montgomery County*, 80 AD2d 654, 655).

All concur except FAHEY and PINE, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent. The circumstances of respondent's resignation make clear that respondent nevertheless remained a "public servant" pursuant to Penal Law § 10.00 (15) and was subject to the discipline of the grand jury pursuant to CPL 190.85 (1) (a).

In *Matter of Onondaga County District Attorney's Off.* (92 AD2d 32), this Court concluded that a court's central inquiry when examining the circumstances surrounding the resignation of a named party in a grand jury report is whether that party continues to be a "public servant" (*see id.* at 35-36). In that case, the respondent resigned as a public servant employed by the City of Syracuse (City) before the grand jury report was filed, but he was subsequently rehired by the City to perform his former duties as an independent contractor. We thus concluded that the respondent continued to function as a public servant pursuant to Penal Law § 10.00 (15) (*see id.* at 36). Here, we conclude that respondent's actions were "an obvious means of circumventing the statutory scheme" (*id.*). "To seal the Grand Jury report under the circumstances of this case would unreasonably and needlessly frustrate the sincere efforts of a conscientious Grand Jury from completing a salutary and necessary service for the public" (*id.* at 36-37; *see Matter of Report of Mar. 1980 Grand Jury of Supreme Ct. of Ulster County*, 77 AD2d 58, 60).

We therefore would reverse the order, deny respondent's motion to seal the report, and direct the filing of the report as a public record.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 08-01173

PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND PERADOTTO, JJ.

R.B. WOODCRAFT, INC., RAYMOND A. BROOKS AND KELLY E. BROOKS, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ACADIA INSURANCE COMPANY, ET AL., DEFENDANTS, STATE FARM INSURANCE COMPANY AND JOHN BRITTON, DEFENDANTS-APPELLANTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (JOSEPH A. WILSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered February 28, 2008. The order, insofar as appealed from, denied the cross motion of defendants State Farm Fire and Casualty Company, incorrectly sued as State Farm Insurance Company, and Jon Brittain, incorrectly sued as John Britton, for summary judgment dismissing the second amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of plaintiffs and granting judgment in favor of plaintiffs and against defendant State Farm Fire and Casualty Company, incorrectly sued as State Farm Insurance Company, on the second cause of action and by granting in part the cross motion of defendants State Farm Fire and Casualty Company and Jon Brittain, incorrectly sued as John Britton, and dismissing the second amended complaint against defendant Jon Brittain and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Defendant State Farm Fire and Casualty Company, incorrectly sued as State Farm Insurance Company (State Farm), issued a homeowner's insurance policy to Raymond A. Brooks and Kelly E. Brooks (plaintiffs). Both a residence and a detached pole barn were located on plaintiffs' property. When a fire destroyed the pole barn, plaintiffs submitted a claim to State Farm for the loss of the pole barn and their personal property located in it. State Farm paid the claim with respect to the personal property but refused to pay the claim with respect to the pole barn, relying on a policy exclusion for "other structures . . . used in whole or in part for business purposes . . . ."

We conclude that Supreme Court properly denied that part of the cross motion of State Farm and insurance agent Jon Brittain, incorrectly sued as John Britton (defendants), for summary judgment dismissing the second amended complaint against State Farm. Despite the absence of a cross appeal by plaintiffs (*see Hillman v Eick*, 8 AD3d 989, 991; *see generally Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110), however, we further conclude that the court erred in denying plaintiffs' motion for summary judgment in its entirety. Rather, we conclude with respect to the second cause of action that plaintiffs are entitled to summary judgment determining that State Farm is obligated to pay their claim with respect to the pole barn and to a money judgment for that claim. We therefore modify the order accordingly, and we remit the matter to Supreme Court to determine the amount owed by State Farm to plaintiffs for the loss of the pole barn and to direct the entry of judgment in favor of plaintiffs for that amount together with interest, costs, and disbursements. We reject defendants' contention that the storage of business items in the pole barn established as a matter of law that the pole barn was being used in part for business purposes. Rather, we conclude that State Farm "may not deny coverage based upon the use of the barn for the storage of business items. The phrase 'used in whole or in part for business purposes' is ambiguous in the absence of any qualifying language . . . and therefore must be construed in favor of the insureds" (*Roland v Nationwide Mut. Fire Ins. Co.*, 286 AD2d 872, 872). In light of our determination, we further modify the order by granting that part of defendants' cross motion for summary judgment dismissing the second amended complaint against Brittain.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 06-00116

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK J. BUNGO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered November 15, 2005. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, those parts of the motion seeking to suppress statements made by defendant to his parole officer are granted and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of criminal contempt in the first degree (Penal Law § 215.51 [c]), for making contact with his ex-wife in violation of an order of protection. We agree with defendant that his *Miranda* rights were violated, and thus that County Court erred in refusing to suppress two statements made by defendant to his parole officer. The first statement was made by defendant after he had been arrested and was in custody but before he had received his *Miranda* warnings, and the statement was made in response to questions that were " 'likely to elicit an incriminating response' " (*People v Wearen*, 19 AD3d 1133, 1134, *lv denied* 5 NY3d 834; *see People v Evans*, 294 AD2d 918, 919, *lv dismissed* 98 NY2d 768; *People v Rifkin*, 289 AD2d 262, *lv denied* 97 NY2d 759). The second statement was made at the Monroe County jail, before any *Miranda* warnings had been administered. The record establishes that it also was the result of custodial interrogation inasmuch as it "involve[d] the kind of inherently coercive atmosphere with which *Miranda* was most concerned" (*People v Alls*, 83 NY2d 94, 99, *cert denied* 511 US 1090; *see People v Vila*, 208 AD2d 781, *lv denied* 85 NY2d 867; *People v Connor*, 157 AD2d 739, *lv denied* 76 NY2d 732).

In light of our determination, we do not review defendant's remaining contention.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CAF 07-02313

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

IN THE MATTER OF KAHLIL S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MAMIE W.-K., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR KAHLIL S.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered October 12, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order determined that post-termination contact between respondent and her child was not in the child's best interests.

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

Memorandum: We previously modified orders terminating respondent mother's parental rights with respect to each child pursuant to Social Services Law § 384-b (4) (c) by remitting the matters to Family Court for a hearing to determine whether post-termination contact between the mother and her children was in the best interests of the children (*Matter of Kahlil S.*, 35 AD3d 1164, 1166, *lv dismissed* 8 NY3d 977; *Matter of Terrell Z.*, 35 AD3d 1166). Upon remittal, the court determined in the order that is the subject of appeal No. 1 that post-termination contact with the mother would interfere with the pending adoption of one of the children and thus was not in his best interests. In the order that is the subject of appeal No. 2, however, the court granted the mother "reasonable" post-termination visitation with the other child. Addressing first the order in appeal No. 2, we conclude that appeal No. 2 must be dismissed because the mother is not aggrieved by that part of the order granting her visitation with the child (*see generally* CPLR 5511; *Matter of Saafir A.M.*, 28 AD3d 1217; *Matter of Jefferson County Dept. of Social Servs. v Mark L.O.*, 12 AD3d 1037, *lv dismissed* 4 NY3d 794).

With respect to the order in appeal No. 1, the mother contends

that the court refused to grant her post-termination contact with that child based on the unsworn statements of the caseworkers for petitioner made during a "postdisposition review" from which the mother was excluded. We reject that contention. The record establishes that the court's determination that post-termination visitation with the mother was not in the best interests of the child is properly based on evidence presented at the dispositional hearing (*see generally Matter of Alyshia M.R.*, 53 AD3d 1060, 1061, *lv denied* 11 NY3d 707), at which the mother was afforded the opportunity to present evidence in support of post-termination visitation with the child and to controvert the evidence against her. Indeed, the mother cross-examined each of petitioner's witnesses with respect to whether her contact with the child would interfere with the adoption process (*cf. Matter of Folsom v Folsom*, 262 AD2d 875; *see generally Matter of Heintz v Heintz*, 28 AD3d 1154). Finally, the mother's contention concerning visitation between the children is raised for the first time on appeal and thus is not preserved for our review (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

270

CAF 07-02314

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

IN THE MATTER OF TERRELL Z., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MAMIE W.-K., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR TERRELL Z., JR.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered October 12, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order granted respondent post-termination contact with her child.

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

Same Memorandum as in *Matter of Kahlil S.* (___ AD3d ___ [Mar. 27, 2009]).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

273

CA 08-01089

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

IN THE MATTER OF ARNOLD KAHN, INDIVIDUALLY AND AS PRESIDENT OF PARK LANE CONDOMINIUM, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PLANNING BOARD OF CITY OF BUFFALO AND UNILAND DEVELOPMENT COMPANY, RESPONDENTS-RESPONDENTS.

RICHARD J. LIPPES & ASSOCIATES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONER-APPELLANT.

ALISA A. LUKASIEWICZ, CORPORATION COUNSEL, BUFFALO (TIMOTHY A. BALL OF COUNSEL), FOR RESPONDENT-RESPONDENT PLANNING BOARD OF CITY OF BUFFALO.

MAGAVERN MAGAVERN & GRIMM LLP, BUFFALO (RICHARD A. MOORE OF COUNSEL), FOR RESPONDENT-RESPONDENT UNILAND DEVELOPMENT COMPANY.

Appeal from a judgment of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered February 21, 2008 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: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination approving the site plan for the construction of a residential tower by respondent Uniland Development Company. The record establishes that petitioner did not argue to respondent Planning Board of City of Buffalo that it violated article 8 of the Environmental Conservation Law in failing to refer the project to the City of Buffalo Environmental Management Commission, as required by the Code of the City of Buffalo. Thus, that contention was not properly before Supreme Court, nor is it properly before us. "[I]n a CPLR article 78 proceeding, the [c]ourt's review is limited to the arguments and record adduced before the agency" (*Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 607; *see also Matter of O'Donnell v Town of Schoharie*, 291 AD2d 739, 741-742; *Matter of Forjone v Bove*, 280 AD2d 948).

We reject petitioner's remaining contentions and otherwise affirm for reasons stated in the decision at Supreme Court.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

278

CA 08-01248

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

IN THE MATTER OF JOHN D. JUSTICE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TERRY KING, EXECUTIVE DIRECTOR OF
SAVING GRACE MINISTRIES, INC.,
RESPONDENT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (JESSICA M. LAZARIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN D. JUSTICE, PETITIONER-RESPONDENT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Thomas P. Franczyk, A.J.), entered April 15, 2008 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, directed respondent to provide certain documents to petitioner pursuant to the Freedom of Information Law.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondent, the executive director of Saving Grace Ministries, Inc. (SGM), to provide certain documents pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6). SGM owns and operates various residences for men who were previously incarcerated, and it has contracts with the New York State Division of Parole (DOP) to receive parolees upon their release from incarceration on a fee-for-service basis. We agree with respondent that Supreme Court erred in determining that SGM is an agency within the meaning of Public Officers Law § 86 (3) and thus is subject to FOIL requirements.

Pursuant to FOIL, the term " '[a]gency' means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof" (*id.*). Where an entity "has simply contracted with [a governmental body] on a fee-for-service basis, much as any other independent business entity might," it does not constitute an agency that is "subject to the

mandates of FOIL" (*Matter of Farms First v Saratoga Economic Dev. Corp.*, 222 AD2d 861, 862). In determining whether a nongovernmental entity is such an agency pursuant to FOIL, a court may consider whether the entity is required to disclose its annual budget, maintains offices in a public building, is subject to a governmental entity's authority over hiring or firing personnel, has a board comprised primarily of governmental officials, was created exclusively by a governmental entity, or describes itself as an agent of a governmental entity (*see generally Matter of Buffalo News v Buffalo Enter. Dev. Corp.*, 84 NY2d 488, 490-493; *Matter of Ervin v Southern Tier Economic Dev., Inc.*, 26 AD3d 633, 634-635; *Matter of Metropolitan Museum Historic Dist. Coalition v De Montebello*, 20 AD3d 28, 37-38; *Farms First*, 222 AD2d at 862).

Here, it is undisputed that the DOP and other state agencies do not maintain any authority or control over SGM's budget, that SGM retains exclusive control over hiring and firing employees, and that SGM does not occupy public offices or space. Rather, SGM is an independent entity supported in part by private donations and formed for the purpose of promoting Christian principles to men recently released from incarceration. We acknowledge that SGM works closely with the DOP, that it exists solely to serve parolees, and that it performs the functions of the DOP and enforces the DOP's rules. We nevertheless conclude that SGM does so as a private contractor, not as an agent of the DOP or any other governmental entity (*see Ervin*, 26 AD3d at 634-635). We therefore reverse the judgment insofar as appealed from and dismiss the petition.

Although not raised by the parties on appeal, we express our concern that, in deciding the issue before it, the court sua sponte relied on a source and its contents that were not submitted by either party. Specifically, the court accessed SGM's website and relied heavily on information found therein. Indeed, the court quoted from the website to support its determination that SGM is an agency subject to disclosure pursuant to FOIL. "In conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties [of] an opportunity to respond to its factual findings" (*NYC Med. & Neurodiagnostic, P.C. v Republican W. Ins. Co.*, 8 Misc 3d 33, 38; *see generally* Prince, Richardson on Evidence § 2-205 [Farrell 11th ed]). We nevertheless are able to determine this appeal on the merits based solely upon the parties' submissions.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

286

KA 07-02576

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID WILMOT, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 30, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), defendant contends that the verdict is against the weight of the evidence based on the jury's rejection of his justification defense. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The People met their burden of establishing beyond a reasonable doubt that defendant did not believe that deadly force was necessary "or that a reasonable person in the same situation would not have perceived that deadly force was necessary" (*People v Umali*, 10 NY3d 417, 425, *rearg denied* 11 NY3d 744). The jury was entitled to credit the testimony of those witnesses who did not support the justification defense (*see generally Bleakley*, 69 NY2d at 495). Defendant further contends that he was deprived of a fair trial by prosecutorial misconduct on summation. Defendant preserved for our review his contention only with respect to one of the prosecutor's comments on summation, and "we conclude that, in any event, '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Diaz*, 52 AD3d 1230, 1231, *lv denied* 11 NY3d 831).

We have reviewed defendant's remaining contentions and conclude

that they are without merit.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

287

KA 04-02793

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY WASHINGTON, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered August 6, 2004. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]) and assault in the second degree (§ 120.05 [2]). Defendant failed to renew his motion for a trial order of dismissal with respect to the count of depraved indifference murder after presenting evidence and thus failed to preserve for our review his challenge to the legal sufficiency of the evidence with respect to that count (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's contention is without merit inasmuch as the evidence is legally sufficient to support the conviction of that count (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that he was denied the right to effective assistance of counsel based solely on defense counsel's failure to renew the motion for a trial order of dismissal with respect to the murder count. We reject that contention. "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152). Here, inasmuch as we have concluded that the evidence is legally sufficient to support the conviction of the murder count, it cannot be said that defense counsel's failure to renew the motion for a trial order of dismissal with respect to that count constitutes ineffective

assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

289

KA 08-00594

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE BUSBY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Thomas P. Amodeo, A.J.), entered December 20, 2007. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). We agree with defendant that County Court's assessment of 20 points under the risk factor based on the victim's alleged mental disability is not supported by clear and convincing evidence (*see generally* § 168-n [3]). We further conclude, however, that the court properly assessed 15 points under the risk factor based on defendant's history of drug and alcohol abuse. Contrary to defendant's contention, the People presented clear and convincing evidence of defendant's history of drug abuse (*see People v Ramos*, 41 AD3d 1250, *lv denied* 9 NY3d 809; *People v Vaughn*, 26 AD3d 776, 777), and defendant presented no evidence of prolonged abstinence "in recent years" (*Vaughn*, 26 AD3d at 777; *see Ramos*, 41 AD3d 1250). Even taking into account the 20 point reduction in the total risk factor score, we note that defendant is nevertheless 20 points above the threshold for a level three risk, and the court has already granted his request for a downward departure to a level two risk. It cannot be said that the court abused its discretion in refusing to grant defendant a further downward departure to a level one risk (*see generally People v Adams*, 52 AD3d 1237, *lv denied* 11 NY3d 705; *People v Marks*, 31 AD3d 1142, 1143, *lv denied* 7 NY3d 715; *People v Guaman*, 8 AD3d 545).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

292

CA 08-02202

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

IN THE MATTER OF COUNTY OF HERKIMER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD F. DAINES, AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF HEALTH, AND NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS-APPELLANTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered July 18, 2008 in a proceeding pursuant to CPLR article 78. The judgment granted the amended petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to compel respondents to reimburse it for certain Medicaid expenditures, known as overburden expenses, made by petitioner prior to April 2005. At the time that the expenditures were made, respondents were required to reimburse petitioner for those expenditures (*see* Social Services Law § 368-a [1] [h]; *Matter of Spano v Novello*, 13 AD3d 1006, *lv denied* 4 NY3d 819). After the expenditures were made, but before petitioner submitted a claim for reimbursement, the Legislature enacted a law capping the Medicaid expenditures made by counties at the amount paid in the year 2005 ([Medicaid Cap Statute] L 2005, ch 58, part C, as amended by L 2006, ch 57, part A, § 60), with certain exceptions and with a yearly increase. Respondents denied petitioner's claim for those overburden expenditures based on the newly enacted Medicaid Cap Statute. Supreme Court properly granted the amended petition.

Contrary to the contention of respondents, they erred in applying the Medicaid Cap Statute retroactively in denying petitioner's claim. Here, petitioner had rendered services in accordance with the law in existence at the time, and those transactions were complete. The Medicaid Cap Statute "altered the substantive law governing

petitioner's conduct [and] changed the procedural scheme by which petitioner could seek re[imbursement]" (*Matter of Miller v DeBuono*, 90 NY2d 783, 791). "Generally, statutes are construed as prospective, unless the language of the statute, either expressly or by necessary implication, requires that it be given a retroactive construction" (McKinney's Cons Laws of NY, Book 1, Statutes § 51 [b]). Here, in light of the lack of legislative history or statutory language indicating that the Legislature intended that the statute in question should be applied retroactively, we conclude that the Legislature did not intend it to be retroactively applied (*see generally Dorfman v Leidner*, 76 NY2d 956, 959; *Majewski v Broadalbin-Perth Cent. School Dist.*, 231 AD2d 102, 105-106, *affd* 91 NY2d 577). Respondents therefore improperly applied the statute retroactively to petitioner's claims for reimbursement for services rendered prior to the effective date of the statute (*cf. Miller*,90 NY2d at 790; *Forti v New York State Ethics Commn.*, 75 NY2d 596, 610).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

293

CA 08-02148

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

DAVID SHUMWAY AND CATHY SHUMWAY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JUSTIN KELLEY, DEFENDANT-RESPONDENT.

E. ROBERT FUSSELL, P.C., LEROY (E. ROBERT FUSSELL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RYON D. FLEMING OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered January 23, 2008. The order, insofar as appealed from, granted in part defendant's motion for summary judgment and dismissed the first cause of action.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by David Shumway (plaintiff) at work when defendant, plaintiff's coemployee, collided with him. Defendant moved for summary judgment dismissing the complaint on the ground that workers' compensation is plaintiffs' exclusive remedy, and plaintiffs cross-moved for, inter alia, partial summary judgment on the first cause of action, alleging negligence and a derivative claim for loss of services. Plaintiffs contend on appeal that Supreme Court erred in granting that part of defendant's motion with respect to the first cause of action and, instead, should have denied defendant's motion in its entirety. We agree.

Pursuant to Workers' Compensation Law § 29 (6), workers' compensation is the exclusive remedy of an employee injured "by the negligence or wrong of another in the same employ." Here, although it is undisputed that plaintiff and defendant had the same employer, we conclude that defendant failed to meet his burden of establishing in addition that he was "acting within the scope of his employment and [was] not . . . engaged in a willful or intentional tort" (*Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 543; *see Hanford v Plaza Packaging Corp.*, 2 NY3d 348, 350). "It is well established that horseplay or frivolous activities, although involving intentional

acts, are natural diversions between coemployees during lulls in work activities and injuries sustained during them are compensable [under the Workers' Compensation Law] as an incident of the work" (*Christey v Gelyon*, 88 AD2d 769, 770; *see Briger v Toys R Us*, 236 AD2d 683; *see also Lowe v Kinn*, 199 AD2d 743, 744, *lv denied* 83 NY2d 753), thus rendering workers' compensation the injured worker's sole remedy (*see* § 29 [6]; *Le Doux v City of Rochester*, 162 AD2d 1049, 1049; *Christey*, 88 AD2d at 770). Here, defendant submitted evidence in support of the motion establishing that, although neither plaintiff nor defendant was reprimanded by the employer after this incident, physical contact or horseplay between employees at their place of employment was not a common practice on the job, nor was it condoned by the employer (*cf. Briger*, 236 AD2d 683; *Lowe*, 199 AD2d at 744; *Christey*, 88 AD2d at 769). In addition, defendant submitted his deposition testimony in which he admitted that he approached plaintiff from behind without any warning, and he thus surprised plaintiff by colliding with him. We therefore conclude that, by his own submissions, defendant failed to establish that his actions occurred within the scope of his employment (*cf. Cloutier v Longo*, 288 AD2d 942).

The further contention of plaintiffs that the court erred in denying that part of their cross motion for partial summary judgment on the first cause of action is not properly before us. " 'An appeal from only part of an order constitutes a waiver of the right to appeal from the other parts of that order' " (*Johnson v Transportation Group, Inc.*, 27 AD3d 1135, 1135).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

296

CA 08-01652

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

RYAN BELVEDERE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HOLIDAY VALLEY, INC. AND WIN-SUM SKI CORP.,
DEFENDANTS-RESPONDENTS.

MCGEE & GELMAN, BUFFALO (MICHAEL R. MCGEE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAMON & MOREY LLP, BUFFALO (STEVEN M. ZWEIG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered May 15, 2008 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 modified on the law by denying the motion in part and reinstating the complaint with the exception of the claim for punitive damages and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when a snowboard he was riding collided with a snowmobile operated by defendants' employee. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff assumed the risks associated with the sport of snowboarding. We agree with plaintiff that Supreme Court erred in granting the motion, with the exception of the claim for punitive damages, and we therefore modify the order accordingly.

"The doctrine of primary assumption of the risk generally constitutes a complete defense to an action to recover damages for personal injuries . . . and applies to the voluntary participation in sporting activities" (*Giugliano v County of Nassau*, 24 AD3d 504, 505; *see generally Morgan v State of New York*, 90 NY2d 471, 483-486; *Turcotte v Fell*, 68 NY2d 432, 437-440). "As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (*Turcotte*, 68 NY2d at 439). "[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport

generally and flow from such participation" (*Morgan*, 90 NY2d at 484).

We conclude that defendants met their burden of establishing their entitlement to judgment as a matter of law by submitting the deposition testimony of plaintiff in which he testified that he was aware of the presence of snowmobiles on several trails at Holiday Valley, where he was snowboarding (*see Manoly v City of New York*, 29 AD3d 649, 650; *Giugliano*, 24 AD3d at 505). Plaintiff, however, raised a triable issue of fact precluding summary judgment based on his expert's affidavit, in which the expert asserted that the person operating the snowmobile was doing so in a negligent manner (*see Huneau v Maple Ski Ridge, Inc.*, 17 AD3d 848, 849).

With respect to the claim for punitive damages, we conclude that defendants established the absence of any conduct that could be viewed as " 'so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others' " (*Gauger v Ghaffari*, 8 AD3d 968), and plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

297

CA 08-02203

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

IN THE MATTER OF COUNTY OF NIAGARA,
PETITIONER-RESPONDENT,

V ORDER

RICHARD F. DAINES, AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF HEALTH, AND NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS-APPELLANTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 9, 2008 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs (*see Matter of County of Herkimer v Daines*, ___ AD3d ___ [Mar. 27, 2009]).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

298

CA 08-01318

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN
ROBERT E. PURCELL, CLAIMANT-APPELLANT,

AND MEMORANDUM AND ORDER

MARJAMA & BILINSKI, FORMERLY KNOWN AS WALL,
MARJAMA & BILINSKI, LLP, RESPONDENT-RESPONDENT.

ROBERT E. PURCELL, CLAIMANT-APPELLANT PRO SE.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ROBERT J. SMITH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered April 14, 2008 in a proceeding pursuant to CPLR article 75. The order and judgment, inter alia, granted the motion of respondent to confirm the arbitration award and the supplemental arbitration award.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating the fourth ordering and decretal paragraph and by granting claimant interest on the arbitration award and the supplemental arbitration award at the rate of 9% per annum commencing October 25, 2007 and as modified the order and judgment is affirmed without costs.

Memorandum: Claimant, a former partner in respondent law firm, sought arbitration with respect to his entitlement to certain fees under his partnership agreement with respondent. The arbitrator initially conducted a hearing and thereafter issued an award to claimant on September 25, 2007. That award left one issue unresolved, however, and, following a further hearing conducted by telephone, the arbitrator issued a supplemental award to claimant on October 25, 2007, addressing the remaining issue. Supreme Court properly granted respondent's motion to confirm the arbitrator's initial and supplemental awards and denied claimant's cross motion to vacate them. Claimant failed to establish any grounds for setting the awards aside (*see generally* CPLR 7511 [b] [1]). It cannot be said that the arbitrator's "interpretation of the agreement . . . is violative of a strong public policy, . . . is totally irrational, or exceeds a specifically enumerated limitation on his power" (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308). Although the supplemental award of the arbitrator was untimely, claimant suffered no prejudice thereby and thus is not entitled to vacatur of the supplemental award on that

ground (*see generally Matter of Jones v Progressive Cas. Ins. Co.*, 237 AD2d 358).

We reject claimant's contention that the court erred in deducting $1,725 from the total award. The arbitrator determined in his initial award that claimant was responsible to respondent for the reimbursement of that amount, representing claimant's share of the arbitrator's fees and costs. We also reject claimant's contention that the court erred in deducting $6,335.99 from the total award. The arbitrator determined in his initial award that, pursuant to the partnership agreement, claimant was obligated to pay his share of any of respondent's long-term obligations submitted in evidence that were "called in." In moving to confirm the awards, respondent submitted evidence that one of the long-term obligations was called in, and claimant's share of that amount was $6,335.99.

We agree with claimant, however, that the court erred in deducting $1,294.42 from the total award, and we therefore modify the order and judgment accordingly. That amount represented claimant's alleged share of the cost of the conference room rental for the arbitration. The arbitrator did not address any issue with respect to the cost of the conference room rental in either his initial or supplemental award, and thus the court erred in modifying the awards of the arbitrator by deducting that amount (*see generally* CPLR 7511 [c]). Finally, we further modify the order and judgment by granting claimant prejudgment interest on the initial and supplemental awards commencing October 25, 2007, the date of the arbitrator's supplemental award (*see* CPLR 5002; *Board of Educ. of Cent. School Dist. No. 1 of Towns of Niagara, Wheatfield, Lewiston & Cambria v Niagara-Wheatfield Teachers Assn.*, 46 NY2d 553, 558; *Matter of Goldberger v Fischer*, 54 AD3d 955, 956).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

299

CA 08-01467

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

JOHN P. MERGLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CSX TRANSPORTATION, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (J. CHRISTINE CHIRIBOGA OF COUNSEL), FOR DEFENDANT-APPELLANT.

DORAN & MURPHY, LLP, BUFFALO (COLLEEN M. MURPHY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered March 20, 2008 in a personal injury action. 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, a locomotive engineer employed by defendant, commenced this action pursuant to the Federal Employers' Liability Act (45 USC § 51 *et seq.*) seeking damages for injuries he sustained when a series of railroad cars struck the locomotive that he was operating. Defendant contends that Supreme Court erred in allowing plaintiff to present evidence of future lost wages because he failed to provide an adequate disclosure of the basis for those wages, i.e., the future medical treatments that would require his absence from work. We reject that contention. Plaintiff set forth his alleged injuries and medical treatments in his verified bill of particulars and provided defendant with timely authorizations in compliance with the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d *et seq.*), thus allowing defendant to obtain plaintiff's medical records (*see* 22 NYCRR 202.17 [b] [2]).

We reject the further contention of defendant that the court erred in denying that part of its post-trial motion to set aside the verdict on future lost wages on the ground that the award was not supported by sufficient evidence. It cannot be said that there was "no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" with respect to that part of the verdict (*Cohen v Hallmark Cards*, 45 NY2d 493, 499). Lost wages "must be established with reasonable certainty, focusing, in

part, on the plaintiff's earning capacity both before and after the accident" (*Johnston v Colvin*, 145 AD2d 846, 848) and, here, plaintiff presented evidence establishing that his future earning capacity will be affected by his required absence from work for future medical treatments.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

300

CA 08-01521

PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ.

JOHN P. MERGLER, PLAINTIFF-RESPONDENT,

V ORDER

CSX TRANSPORTATION, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (J. CHRISTINE CHIRIBOGA OF COUNSEL), FOR DEFENDANT-APPELLANT.

DORAN & MURPHY, LLP, BUFFALO (COLLEEN M. MURPHY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered October 30, 2007 in a personal injury action. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see generally Karagiannis v New York State Thruway Auth.*, 209 AD2d 995).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

301

CA 08-01971

PRESENT: MARTOCHE, J.P., SMITH, FAHEY, AND PINE, JJ.

MAHENDER R. GORIGANTI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SYRACUSE ORTHOPEDIC SPECIALISTS, P.C.,
DEFENDANT-RESPONDENT.

ALI, PAPPAS & COX, P.C., SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (EDWARD G. MELVIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered April 21, 2008 in an action for, inter alia, an accounting. The order, insofar as appealed from, granted that part of defendant's motion for partial summary judgment dismissing the fourth cause of action seeking an accounting and payment of severance benefits.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, an accounting and severance benefits from defendant, his former employer, allegedly owed to plaintiff pursuant to the terms of the parties' employment agreement and income allocation plan. Defendant moved for partial summary judgment dismissing the complaint with the exception of the third cause of action, and Supreme Court granted the motion. As limited by his brief, plaintiff challenges only that part of the order dismissing the fourth cause of action, which seeks "a proper accounting and full payment of his severance benefits." We affirm.

Pursuant to the income allocation plan, a "Covered Employee" shall receive severance benefits in the event that his or her employment is terminated "for any qualifying reason . . . ." The qualifying reasons include "retirement of the Covered Employee from the 'full-time' private practice of orthopedic surgery or physiatry . . . and . . . termination of a Covered Employee's employment without cause by Covered Employee . . . or by the Practice . . . provided, in either case, that the Covered Employee relocates his practice of *orthopedic surgery* to an area more than 25 miles away from any office from which the Practice practices any of the same services at the time

of termination" (emphasis added).

It is undisputed that plaintiff was a "Covered Employee" who practiced physiatry and that he relocated his practice of physiatry within 25 miles of defendant's practice. Plaintiff first contends, however, that he is not subject to that restrictive covenant because it unambiguously applies only to orthopedic surgeons. We reject plaintiff's contention. Rather, we conclude that the restrictive covenant is ambiguous because its terms are " 'reasonably susceptible of more than one interpretation' " (*Kibler v Gillard Constr., Inc.*, 53 AD3d 1040, 1042; *see Chimart Assoc. v Paul*, 66 NY2d 570, 573), and we further conclude that the court properly resolved the ambiguity in favor of defendant as a matter of law. "[W]here, as here, a contract is ambiguous, its interpretation remains the exclusive function of 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' " (*Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 88, *lv denied* 97 NY2d 603, quoting *Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172). Here, defendant met its initial burden with respect to the fourth cause of action by establishing that, pursuant to the intention of the parties, plaintiff was to be covered by the terms of the restrictive covenant. In support of the motion, defendant submitted a letter that was sent to plaintiff before he executed the income allocation plan, informing him that he was bound by the terms of the restrictive covenant. Defendant also submitted excerpts from plaintiff's deposition testimony in which plaintiff acknowledged that he received that letter and never disputed its terms.

Contrary to the alternative contention of plaintiff, he failed to raise a triable issue of fact with respect to the applicability of the restrictive covenant. Although the record contains the deposition testimony of plaintiff in which he stated that he did not believe that he was bound by the terms of the restrictive covenant when he executed the income allocation plan, it is well settled that evidence of "[u]ncommunicated subjective intent alone cannot create an issue of fact where otherwise there is none" (*Wells v Shearson Lehman/American Express*, 72 NY2d 11, 24).

Finally, plaintiff's further contention that the court erred in failing to address the reasonableness of the restrictive covenant is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Contrary to plaintiff's contention, the reasonableness of the restrictive covenant is an issue that " 'could have been obviated or cured by factual showings or legal countersteps' in the trial court" (*Oram v Capone*, 206 AD2d 839, 840).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

302

KA 07-01686

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN CULLEN, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHARLES M. THOMAS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered August 10, 2007. The appeal was held by this Court by order entered July 3, 2008, decision was reserved and the matter was remitted to Cayuga County Court for further proceedings (53 AD3d 1105). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision and remitted the matter to County Court for compliance with Correction Law § 168-n (3), based on the court's failure "to set forth the findings of fact and conclusions of law upon which it based its determination" (*People v Cullen*, 53 AD3d 1105, 1106). We conclude that, upon remittal, the court properly determined that defendant is a level three risk pursuant to the Sex Offender Registration Act (§ 168 *et seq.*), based on the requisite findings of fact and conclusions of law. Defendant contends that the court erred in refusing to grant his request for a downward departure from his presumptive risk level. We reject that contention inasmuch as " 'defendant failed to present clear and convincing evidence of special circumstances justifying a downward departure' " (*People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708). We reject the further contention of defendant that the court erred in assessing points against him based on the first victim's physical helplessness. That victim was asleep at the time of the sexual assault, and the "definition of physically helpless is broad enough to include a sleeping victim" (*People v Harris*, 46 AD3d 1445, 1446, *lv denied* 10 NY3d 707; *see* Penal Law § 130.00 [7]). Although we agree with defendant that the People failed to present clear and convincing evidence that his conduct while confined or under supervision was unsatisfactory (*see* Correction Law § 168-n [3]), we nevertheless conclude that the erroneous assessment of 10 points under

that risk factor does not alter defendant's presumptive classification as a level three risk.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

313

CAF 08-01069

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

IN THE MATTER OF DWAYNE J.R., JR.,
RESPONDENT-APPELLANT.
---------- MEMORANDUM AND ORDER
CHAUTAUQUA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

LYLE T. HAJDU, LAW GUARDIAN, LAKEWOOD, FOR RESPONDENT-APPELLANT.

STEPHEN M. ABDELLA, COUNTY ATTORNEY, MAYVILLE (SCOTT F. HARLEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered April 9, 2008 in a proceeding pursuant to Family Court Act article 3. The order, inter alia, placed respondent in the custody of the New York State Office of Children and Family Services for a period of five years.

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

Memorandum: Respondent appeals from an order adjudicating him to be a juvenile delinquent based on the finding that he committed an act that, if committed by an adult, would constitute the crime of murder in the second degree (Penal Law § 125.25 [1]). Family Court conducted a dispositional hearing and determined that petitioner established by a preponderance of the evidence that respondent required a restrictive placement (*see* Family Ct Act § 353.5 [1]). We reject respondent's contention that the court abused its discretion in failing to order a less restrictive placement (*see Matter of Christopher QQ.*, 40 AD3d 1183, 1184). The court properly considered the background of the 14-year-old respondent; his need for intensive psychotherapy, supervision and educational services; the particularly brutal and violent nature of the murder; the need for the protection of the community in light of the unexpected nature of respondent's actions; and the willing participation of respondent in the murder of the 18-year-old victim, whom he did not know (*see* § 353.5 [2]; *Christopher QQ.*, 40 AD3d at 1184; *Matter of Lamar J.F.*, 8 AD3d 1091). Inasmuch as the court determined that a restrictive placement was warranted and that respondent committed an act that, if committed by an adult, would constitute a class A felony, the court properly ordered an initial placement in the custody of the New York State Office of Children and Family Services for a period of five years (*see* § 353.5 [4] [a] [i]), and did not abuse its discretion in directing that respondent initially be confined in a secure facility for a period of 18 months

(*see* § 353.5 [4] [a] [ii]). We note that the court reduced the initial period of secure confinement by the period of time respondent spent in juvenile detention, which was approximately three months.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

319

CA 08-01918

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

GLENN M. HELLMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRUCE HELLMAN, STOCKWOOD LLC,
AND MAYNARDS ELECTRIC SUPPLY, INC.,
DEFENDANTS-RESPONDENTS.

HARTER SECREST & EMERY LLP, ROCHESTER (JEFFREY J. CALABRESE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (RICHARD A. MCGUIRK OF COUNSEL), FOR DEFENDANT-RESPONDENT BRUCE HELLMAN.

EVANS & FOX LLP, ROCHESTER (JARED P. HIRT OF COUNSEL), FOR DEFENDANT-RESPONDENT STOCKWOOD LLC.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered March 17, 2008. The order denied plaintiff's motion for summary judgment and granted the cross motions of defendants Bruce Hellman and Stockwood LLC for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motions and reinstating the complaint against defendants Bruce Hellman and Stockwood LLC and as modified the order is affirmed without costs.

Memorandum: Plaintiff and Bruce Hellman (defendant) are the sole and equal shareholders and directors of defendant Maynards Electric Supply, Inc. (Maynards). Defendant, purportedly acting on behalf of Maynards, entered into a lease pursuant to which Maynards was to lease premises from defendant Stockwood LLC (Stockwood). Plaintiff thereafter commenced this action seeking, inter alia, a determination that the lease is void on the ground that defendant lacked the authority to enter into it without the consent of Maynards' Board of Directors (Board), i.e., both plaintiff and defendant. Supreme Court denied the motion of plaintiff for summary judgment and granted the cross motions of defendant and Stockwood for summary judgment dismissing the complaint against them (*Hellman v Hellman*, 19 Misc 3d 695, 723). We conclude that the court should have denied the cross motions along with the motion, and we therefore modify the order accordingly.

The record establishes that, pursuant to the bylaws of "Maynard's Holding Corp.," the president, i.e., defendant, was vested with "the management of the business of the corporation," and he thus had the presumptive authority to enter into contracts on the corporation's behalf in the course of the business of the corporation (*see generally Goldston v Bandwidth Tech. Corp.*, 52 AD3d 360, 362-363, *lv dismissed* 11 NY3d 904; *Odell v 704 Broadway Condominium*, 284 AD2d 52, 56-57). The record further establishes that defendant previously had signed leases on behalf of the corporation, although plaintiff contends in this instance that he did not agree to the lease and also did not agree that defendant had the authority to bind the corporation to it. Plaintiff also established in opposition to the cross motions that the previous leases signed by defendant were the subject of Board resolutions granting defendant the authority to sign them, or they were signed by defendant "by authority of the Board of Directors of [the] corporation." We thus conclude that plaintiff raised an issue of fact whether, pursuant to past practice, defendant had the authority to lease property without prior authorization by the Board (*see Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923; *see also 56 E. 87th Units Corp. v Kingsland Group, Inc.*, 30 AD3d 1134, 1134-1135). In light of our determination, we do not reach the parties' remaining contentions.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

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

323

CA 08-01154

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ.

EVOLUTION IMPRESSIONS, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES D. LEWANDOWSKI, DAVID HICKEY,
GREGORY MAREK, GIORGIO BRACAGLIA, AND
1 SOURCE PARTNERS, INC., DEFENDANTS-RESPONDENTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ODORISI LAW FIRM, EAST ROCHESTER (TERRENCE C. BROWN-STEINER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered July 26, 2007. The order denied the application of plaintiff for contempt sanctions.

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

Memorandum: Plaintiff appeals from an order denying its application for contempt sanctions based on defendants' failure to comply with the terms of the permanent injunction in an order and judgment entered on defendants' default. We conclude that this appeal must be dismissed as moot. On a prior appeal, we granted in its entirety that part of defendants' motion seeking to vacate the default order and judgment (*Evolution Impressions, Inc. v Lewandowski*, ___ AD3d ___ [Feb. 6, 2009]). Thus, inasmuch as the "underlying order [and judgment] upon which the contempt was based is abolished, 'the infraction of it is abolished also, and nothing remains on which a [civil contempt order] can be based' " (*Village of Honeoye Falls v Elmer*, 69 AD2d 1010, 1011).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

338

CA 08-01989

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

DALE LAKE AND KAREN LAKE, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE GATES HOSPITAL, KATHRYN FELICE, R.N., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (VICTOR ALAN OLIVERI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STAMM, REYNOLDS & STAMM, WILLIAMSVILLE (BRADLEY J. STAMM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered May 14, 2008 in a medical malpractice action. The order granted the motion of plaintiffs and directed Gibson, McAskill & Crosby, LLP to withdraw as counsel for defendants Kaleida Health, doing business as Millard Fillmore Gates Hospital, and Kathryn Felice, R.N.

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

Memorandum: Supreme Court abused its discretion in granting plaintiffs' motion seeking to disqualify Gibson, McAskill & Crosby, LLP from representing defendants-appellants (hereafter, defendants) based on an alleged conflict of interest. Even assuming, arguendo, that plaintiffs have standing to bring the motion (*see generally Maxon v Woods Oviatt Gilman LLP*, 45 AD3d 1376), we conclude that they failed to meet their burden of making "a clear showing that disqualification is warranted" (*Olmoz v Town of Fishkill*, 258 AD2d 447, 447; *see generally S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445). Moreover, the motion should have been denied on the ground that plaintiffs were aware or should have been aware of the facts underlying the alleged conflict of interest for more than two years before bringing the motion, and "to allow disqualification at this advanced stage of [the] litigation would severely prejudice defendant[s]" (*McDade v McDade*, 240 AD2d 1010, 1011).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

341

CA 08-02010

PRESENT: HURLBUTT, J.P., SMITH, FAHEY, GREEN, AND PINE, JJ.

PATRICK M. SCIORTINO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ANTHONY J. SCIORTINO, JR., DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARK A. LEO, DEFENDANT, ONEIDA COUNTY DEPARTMENT OF EMERGENCY SERVICES, ONEIDA COUNTY SHERIFF'S DEPARTMENT AND COUNTY OF ONEIDA, DEFENDANTS-APPELLANTS.

GORMAN, WASZKIEWICZ, GORMAN & SCHMITT, UTICA (BARTLE J. GORMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, P.C., UTICA (STEPHANIE A. PALMER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered August 8, 2008 in a wrongful death action. The order denied the motion of defendants Oneida County Department of Emergency Services, Oneida County Sheriff's Department and County of Oneida for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint against defendants Oneida County Department of Emergency Services, Oneida County Sheriff's Department and County of Oneida is dismissed.

Memorandum: Plaintiff commenced this action, individually and as administrator of the estate of Anthony J. Sciortino, Jr. (decedent), alleging that the County of Oneida and its Department of Emergency Services and Sheriff's Department (collectively, County defendants) were negligent in failing to protect decedent from the assault of defendant Mark A. Leo in response to decedent's telephone call to the Sheriff's Department. We agree with the County defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint against them.

"A municipality may not be held liable for failing to provide police protection absent a special relationship between the municipality and the injured party giving rise to a special duty on the part of the municipality to exercise reasonable care for the protection of the injured party" (*Sachanowski v Wyoming County*

Sheriff's Dept., 244 AD2d 908, 908, *lv denied* 92 NY2d 801; *see Mastroianni v County of Suffolk*, 91 NY2d 198, 203; *Cuffy v City of New York*, 69 NY2d 255, 260-261). Here, the County defendants established that they had no special relationship with decedent, and plaintiff failed to raise an issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). An essential element of a special relationship is "knowledge on the part of a municipality's agents that inaction could lead to harm" (*Cuffy*, 69 NY2d at 260), i.e., "notice of palpable danger, as where it is so obvious that a layman would ascertain it without inquiry, or where a person unambiguously communicated" the danger to the municipality's agent (*Kovit v Estate of Hallums*, 4 NY3d 499, 508, *rearg denied* 5 NY3d 783). The evidence submitted by the County defendants establishes that decedent did not mention any immediate danger in his telephone call, and plaintiff failed to submit any evidence from which it may be inferred that the telephone operator at the Sheriff's Department should have known that such a danger existed. Another essential element of a special relationship is the injured party's "justifiable reliance on the municipality's affirmative undertaking" of a duty to act on behalf of the injured party (*id.*). Here, the County defendants established that there was no such justifiable reliance by decedent on any alleged affirmative undertaking, and plaintiff failed to raise an issue of fact whether "defendant[s]' conduct lulled [decedent] into a false sense of security, induced him to either relax his own vigilance or forego other viable avenues of protection, and thereby placed himself in a worse position than he would have been in had defendant[s] never assumed the [alleged affirmative undertaking]" (*Finch v County of Saratoga*, 305 AD2d 771, 773; *see Grieshaber v City of Albany*, 279 AD2d 232, 236, *lv denied* 96 NY2d 719). "Indeed, the record establishes that [decedent] 'voluntarily placed [himself] in a worse position than [he] was in' " before calling the Sheriff's Department (*Farley v County of Erie*, 16 AD3d 1134, 1136, *lv denied* 5 NY3d 711).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

355

TP 08-01945

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

IN THE MATTER OF BARBARA HEINLEIN, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES AND GLADYS CARRION, COMMISSIONER, RESPONDENTS.

BRICKWEDDE LAW FIRM, SYRACUSE (RICHARD J. BRICKWEDDE OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [James H. Dillon, J.], entered September 11, 2008) to review a determination of respondents. The determination, inter alia, suspended and revoked petitioner's group family day care license.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the petition is granted.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that she violated 18 NYCRR 416.15 (a) (10) and to vacate the penalty imposed, i.e., the suspension and revocation of her group family day care license. We agree with petitioner that the determination that she violated 18 NYCRR 416.15 (a) (10) by refusing to admit an employee of respondent agency into her home on one occasion and by threatening another employee of respondent agency on another occasion is not supported by substantial evidence. That regulation provides in relevant part that "[a] group family day care home must admit inspectors and other representatives of the [agency] onto the grounds and premises at any time during the hours of operation of the home." It is undisputed that the day care license of petitioner was suspended when she refused to admit respondent agency's employee into her home, and thus her home had no "hours of operation" at that time (*id.*). Further, the purported threat made by petitioner, while ill-advised, did not violate the regulation. We reject respondents' interpretation of the regulation, which would impose upon petitioner broader obligations than are supported by the plain language of the regulation. "Although it is true that an agency's interpretation of its own regulation is

generally entitled to deference, courts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language" (*Matter of Visiting Nurse Serv. of N.Y. Home Care v New York State Dept. of Health*, 5 NY3d 499, 506). Finally, although we are annulling the determination that petitioner violated the regulation, we note in any event that, even assuming, arguendo, that she violated the regulation, we conclude that the penalty of revocation in these circumstances is "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck*, 34 NY2d 222, 237; *see Matter of Grady v New York State Off. of Children & Family Servs.*, 39 AD3d 1157).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

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

361

CA 08-01468

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

LUCILLE BINKOWSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
DEFENDANT-RESPONDENT.

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

KEVIN A. RICOTTA, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (K. JOHN BLAND OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered April 11, 2008. The order granted defendant's motion to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action against defendant, her employer's workers' compensation carrier, seeking damages resulting from the breach of an alleged oral agreement between plaintiff and defendant concerning the offset of future benefit payments following plaintiff's settlement with a third party. In her complaint, plaintiff alleged that she paid $18,916 to satisfy defendant's lien on the settlement and that defendant's representative orally promised plaintiff that her workers' compensation benefits would resume after 9.36 years rather than the 13.6-year period set forth in the Notice of Decision of the Workers' Compensation Board. We conclude that Supreme Court properly granted defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (5) on the ground that the action is barred by the statute of frauds. Defendant established that its alleged oral agreement with plaintiff by its terms could not be performed within one year and thus is barred by the statute of frauds (*see* General Obligations Law § 5-701 [a] [1]; *Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d 554, 561-562, *rearg denied* 4 NY3d 795).

Contrary to plaintiff's contentions, no exception applies to defeat the affirmative defense of the statute of frauds. Plaintiff alleged in opposition to the motion that defendant's amended answer, in which it denied the existence of the oral agreement, was unverified. Plaintiff thus contended that there is a triable issue of

fact whether defendant admitted the existence of the oral agreement. "[D]efendant's admission of the existence and essential terms of the oral agreement '[would be] sufficient to take the agreement outside the scope' " of the statute of frauds (*Concordia Gen. Contr. v Peltz*, 11 AD3d 502, 503). Contrary to plaintiff's contention, we conclude that the court properly considered the verified copy of the amended answer submitted by defendant in its reply papers. The reply papers merely responded to plaintiff's opposition to the motion and raised no new theories or contained new information. "Given that the object of [a motion to dismiss] is to expedite matters by eliminating claims from the trial calendar when appropriate to do so . . ., we see no procedural infirmity in allowing defendant to resubmit [a verified] cop[y] of the same [amended answer,] especially since it cannot be argued that in these circumstances a substantial right of plaintiff has been prejudiced" (*Arbour v Commercial Life Ins. Co.*, 240 AD2d 1001, 1002; *cf. Seefeldt v Johnson*, 13 AD3d 1203, 1203-1204).

Plaintiff further contends that the agreement may be enforced under the doctrines of promissory estoppel or part performance. Neither contention is availing. "Promissory estoppel is made out by a 'clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his [or her] reliance' " (*Chemical Bank v City of Jamestown*, 122 AD2d 530, 530, *lv denied* 68 NY2d 608). In light of defendant's denial of the alleged promise, plaintiff has failed to establish the existence of a clear and unambiguous promise and thus the doctrine of promissory estoppel does not apply (*see Rogowsky v McGarry*, 55 AD3d 815; *Chemical Bank*, 122 AD2d at 530). With respect to the doctrine of part performance, that doctrine removes oral agreements from the scope of the statute of frauds "only if plaintiff's actions can be characterized as 'unequivocally referable' to the agreement alleged . . . [T]he actions alone must be 'unintelligible or at least extraordinary,' explainable only with reference to the oral agreement" (*Anostario v Vicinanzo*, 59 NY2d 662, 664; *see James v Western N.Y. Computing Sys.*, 273 AD2d 853, 854-855). Inasmuch as defendant had a lien on plaintiff's settlement with the third party (*see* Workers' Compensation Law § 29 [1]), it cannot be said that plaintiff's agreement to pay the lien is unequivocally referable to the alleged oral agreement, nor is the payment "explainable only with reference to" that alleged agreement (*Anostario*, 59 NY2d at 664; *see James*, 273 AD2d at 855).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

366

CA 08-00184

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

MATTHEW PERRINO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FRANCIS T. MAGUIRE, DDS, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

BROWN & TARANTINO, LLC, BUFFALO (NICOLE S. MAYER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered January 2, 2008 in a dental malpractice action. The order denied the motion of defendant Francis T. Maguire, DDS for partial 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 those parts of the complaint concerning the alleged negligent acts or omissions of defendant Francis T. Maguire, DDS prior to March 22, 2002 are dismissed.

Memorandum: On September 22, 2004, plaintiff commenced this dental malpractice action against, inter alia, Francis T. Maguire, DDS (defendant), an orthodontist, alleging that he failed to monitor, diagnose and treat plaintiff for conditions related to a keratocyst in his mouth. We conclude that Supreme Court erred in denying defendant's motion pursuant to CPLR 214-a for partial summary judgment dismissing as time-barred "all claims and allegations arising from [defendant's] conduct prior to March 22, 2002."

The record establishes that in 1996 plaintiff's general dentist detected a cyst in plaintiff's mouth that was impacting one of plaintiff's teeth and preventing it from properly erupting. Plaintiff met with defendant in July of that year concerning the impacted tooth. Plaintiff also met with an oral surgeon concerning removal of the cyst, and defendant consulted with the oral surgeon's partner inasmuch as the cyst had to be removed before defendant could commence any orthodontic work on plaintiff. The oral surgeon removed the cyst and bonded a chain to plaintiff's impacted tooth to enable defendant to pull the tooth into proper alignment. Defendant received a copy of

the pathology report, which identified the cyst as an odontogenic keratocyst and noted that "[c]ysts of this type are prone to recur." From January 1997 through May 2002, defendant provided general orthodontic care to plaintiff and attempted to align the formerly impacted tooth. On September 30, 2002, plaintiff's then general dentist discovered a second keratocyst.

We conclude that defendant met his burden of establishing that those parts of the complaint concerning his alleged negligent acts or omissions prior to March 22, 2002 are time-barred (*see* CPLR 214-a; *Schreiber v Zimmer*, 17 AD3d 342, 343). We further conclude that plaintiff failed to raise a triable issue of fact whether the statute of limitations was tolled by the continuous treatment doctrine (*see Massie v Crawford*, 78 NY2d 516, 519-520, *rearg denied* 79 NY2d 978; *Nailor v Oberoi*, 237 AD2d 898). Although plaintiff continued to treat with defendant for general orthodontic care during the period in which the second keratocyst remained undiagnosed, defendant never established a course of treatment with respect to that second keratocyst, which is "the condition that [gave] rise to the lawsuit" (*Nykorchuck v Henriques*, 78 NY2d 255, 259; *see DeMarco v Santo*, 43 AD3d 1285; *Leifer v Parikh*, 292 AD2d 426; *Merriman v Sherwood*, 204 AD2d 998). The statement of plaintiff's expert in the expert's affirmation that, because defendant treated a symptom of plaintiff's original cyst, it necessarily followed that defendant was treating the recurrent keratocyst condition, is insufficient to raise an issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). That statement "is speculative and based on assumptions that are not supported by the record" (*Cannarozzo v County of Livingston*, 13 AD3d 1180, 1181). In addition, we reject plaintiff's contention that defendant continuously treated plaintiff for the recurrent keratocyst condition based upon a "coordinated treatment plan" with the oral surgeon. Even assuming, arguendo, that defendant's consultations with the oral surgeon's partner constituted a "coordinated treatment plan" for plaintiff's keratocyst condition, we conclude that any such plan concerned only the original keratocyst and terminated once plaintiff's oral surgeon completed surgery to remove that original keratocyst.

Contrary to plaintiff's contention, there is no evidence that defendant attempted to monitor plaintiff's recurrent keratocyst condition, and thus there is no evidence of a course of treatment related to that condition (*see DeMarco*, 43 AD3d at 1286; *Sofia v Jimenez-Rueda*, 35 AD3d 1247; *Sinclair v Cahan*, 240 AD2d 152). The evidence submitted by plaintiff establishes only that defendant conducted routine, periodic orthodontic examinations and treatment, and such evidence is insufficient to establish that defendant embarked on a course of treatment for plaintiff's recurrent keratocyst condition (*see Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296; *DeMarco*, 43 AD2d at 1286; *Leifer*, 292 AD2d at 427-428).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

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

367

CA 08-00185

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

MATTHEW PERRINO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRANCIS T. MAGUIRE, DDS, DEFENDANT,
AND JEFFREY R. KUNTZ, DDS, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JENNIFER L. NOAH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered January 2, 2008 in a dental malpractice action. The order granted the motion of defendant Jeffrey R. Kuntz, DDS for partial summary judgment.

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

Memorandum: On September 22, 2004, plaintiff commenced this dental malpractice action alleging, inter alia, that Jeffrey R. Kuntz, DDS (defendant) failed to monitor, diagnose and treat plaintiff "for conditions related to a keratocyst in [his] mouth." Defendant moved for partial summary judgment dismissing as time-barred those parts of the complaint concerning his alleged negligent acts or omissions prior to March 22, 2002 (*see* CPLR 214-a). We conclude that Supreme Court properly granted the motion.

Defendant met his initial burden by establishing that more than 2½ years elapsed between the date of the acts or omissions in question and the commencement of the action (*see id.*; *Schreiber v Zimmer*, 17 AD3d 342, 343), and plaintiff failed to raise a triable issue of fact whether the statute of limitations was tolled by the continuous treatment doctrine (*see Massie v Crawford*, 78 NY2d 516, 519-520, *rearg denied* 79 NY2d 978; *Nailor v Oberoi*, 237 AD2d 898). Although plaintiff was treated by defendant for general dental purposes during the period in which the recurrent keratocyst remained undiagnosed, plaintiff failed to raise a triable issue of fact whether defendant engaged in a course of treatment for that condition (*see Nykorchuck v Henriques*, 78 NY2d 255, 259; *DeMarco v Santo*, 43 AD3d 1285; *Leifer v Parikh*, 292 AD2d 426, 427-428). Even assuming, arguendo, that

defendant was aware of plaintiff's original keratocyst, we conclude that his awareness of that condition does not, by itself, establish that he engaged in a course of treatment for the recurrent keratocyst (*see Nykorchuck*, 78 NY2d at 258-259; *DeMarco*, 43 AD3d 1285).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

372

KA 05-01528

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DRUE JARVIS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Dennis M. Kehoe, A.J.), rendered May 16, 2005. The judgment convicted defendant, upon a jury verdict, of murder in the first degree and murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]) and murder in the second degree (§ 125.25 [3]). Contrary to defendant's contention, County Court properly refused to charge the affirmative defense of extreme emotional disturbance. "[Defendant's] behavior immediately before and after the killing was inconsistent with the loss of control associated with the affirmative defense" (*People v Murden*, 190 AD2d 822, 822, *lv denied* 81 NY2d 1017; *see People v Roche*, 98 NY2d 70, 76-77; *People v McGrady*, 45 AD3d 1395, *lv denied* 10 NY3d 813). Viewing the evidence in the light most favorable to defendant, we conclude that there was not "sufficient credible evidence . . . presented for the jury to find, by a preponderance of the evidence, that the elements of the affirmative defense [had] been established" (*People v White*, 79 NY2d 900, 902-903).

As the People correctly concede, however, that part of the judgment convicting defendant of murder in the second degree must be reversed and count two of the indictment dismissed because it is an inclusory concurrent count of murder in the first degree (*see* CPL 300.40 [3] [b]; *see People v Miller*, 6 NY3d 295, 300-303; *People v Jackson*, 41 AD3d 1268, 1270, *lv denied* 10 NY3d 812, 11 NY3d 789). We

therefore modify the judgment accordingly. Finally, although defendant requests that we disavow our prior decisions holding that there is no requirement that the police electronically record interrogations, we decline to do so (*see People v Dukes* [appeal No. 1], 53 AD3d 1101, *lv denied* 11 NY3d 831).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

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

375

KA 06-03350

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG M. LYNCH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 7, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, manslaughter in the first degree and burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [3]), manslaughter in the first degree (§ 125.20) and burglary in the second degree (§ 140.25 [2]). We reject the contention of defendant that County Court erred in refusing to suppress both his statements to the police and physical evidence recovered by the police after those statements were made. Based on the record of the suppression hearing, it cannot be said that the court erred in concluding as a matter of law that the questioning and detention of defendant by officers of the New York State Division of Parole (DOP) was in furtherance of parole purposes and related to their duties as parole officers (*see People v Johnson*, 63 NY2d 888, 890, *rearg denied* 64 NY2d 647; *cf. People v Huntley*, 43 NY2d 175, 181-182). Likewise, the arrest and detention of defendant in the absence of a parole violation warrant, although in violation of Executive Law § 259-i (3) (a) (i), does not require suppression of the statements made and evidence recovered as a result of defendant's detention by the DOP. The technical violation of the Executive Law did not infringe upon defendant's constitutional right to be free from unreasonable searches and seizures, and thus the application of the exclusionary rule is not warranted under these circumstances (*see People v Lopez*, 288 AD2d 70, 71, *lv denied* 97 NY2d 706; *People v Dyla*, 142 AD2d 423, 439-442, *lv denied* 74 NY2d 808; *see generally People v Rodriguez*, 270 AD2d 956, *lv denied* 95 NY2d 870).

We reject the further contention of defendant that he was deprived of his right to a fair trial by prosecutorial misconduct. The prosecutor's description of the defense theory as "outrageous" was within the wide rhetorical bounds afforded the prosecutor (*see generally People v Ashwal*, 39 NY2d 105, 109-110). In addition, defendant was not denied a fair trial when the prosecutor made an isolated comment that in effect insulted and denigrated defense counsel by referring to the belief of defense counsel that he could convince the jury that the victim was unintentionally killed (*see generally People v Walker*, 234 AD2d 962, 963, *lv denied* 89 NY2d 1042). The record does not support defendant's contention that the prosecutor acted as an unsworn witness (*see generally People v DeJesus*, 46 AD3d 325, *lv denied* 10 NY3d 763), and defendant failed to preserve for our review his further contention that the prosecutor improperly shifted the burden of proof to defendant (*see* CPL 470.05 [2]). 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]).

Contrary to defendant's contention, the court properly admitted in evidence photographs of the victim's body. Photographs "should be excluded 'only if [their] *sole purpose* is to arouse the emotions of the jury and to prejudice the defendant' " (*People v Wood*, 79 NY2d 958, 960; *see People v Davis*, 39 AD3d 1241, 1242, *lv denied* 9 NY3d 864). Here, the photographs were probative of the serious nature of the injuries sustained by the victim and were thus admissible to establish that defendant intentionally killed the victim (*see generally Davis*, 39 AD3d at 1242).

We further reject the contention of defendant that the court abused its broad discretion with respect to evidentiary rulings by refusing to allow him to present the testimony of the Buffalo Police Commissioner and by allowing the People to present DNA evidence (*see generally People v Aska*, 91 NY2d 979, 981). We agree with defendant that the court erred in determining that it lacked the discretion to comply with the jury's request for a readback of defense counsel's summation (*see* CPL 310.30). Nevertheless, reversal based on that error is not required because " '[t]he test is whether the failure to respond [to the jury's request] seriously prejudiced the defendant' " (*People v Lourido*, 70 NY2d 428, 435), and here there was no such prejudice.

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: March 27, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

382

CA 08-02175

PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND GORSKI, JJ.

CARL R. ENDRES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHELBA D. JOHNSON TRUCKING, INC. AND JERRY WILLIAM WHITE, DEFENDANTS-RESPONDENTS.

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

LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (JERRY MARTI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered August 7, 2008 in a personal injury action. The order granted defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system categories of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when a tractor-trailer driven by defendant Jerry William White and owned by defendant Shelba D. Johnson Trucking, Inc. collided with the vehicle driven by plaintiff. 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). We note at the outset that, in opposition to the motion, plaintiff abandoned his claims with respect to three of the six categories of serious injury alleged in the complaint, as amplified by the bill of particulars, i.e., significant disfigurement, fracture, and permanent loss of use (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 297; *Feggins v Fagard*, 52 AD3d 1221, 1222). We thus conclude that Supreme Court properly granted the motion with respect to those categories. We further conclude that the court properly granted the motion with respect to the 90/180 category of serious injury inasmuch as defendants established their entitlement to summary judgment with respect thereto, and plaintiff failed to submit

any evidence that his activities were subject to a "medically imposed restriction[]" during the relevant time period (*Tuna v Babendererde*, 32 AD3d 574, 576; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We agree with plaintiff, however, that the court erred in granting the motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury, and we therefore modify the order accordingly. Contrary to the contention of defendants, the report of a physician who examined plaintiff at their request failed to offer any basis upon which to conclude that plaintiff's 50% reduction in lumbar flexion and extension was caused by plaintiff's alleged degenerative disease and was not exacerbated by the accident (*see McKenzie v Redl*, 47 AD3d 775, 776; *see also Umar v Ohrnberger*, 46 AD3d 543). That report also "failed to address the significance of the absence of any prior complaints of similar pain," despite indicating that plaintiff had informed the physician that he had been relatively free from pain immediately prior to the accident (*Ashquabe v McConnell*, 46 AD3d 1419). Thus, defendants failed to present "persuasive evidence that plaintiff's alleged pain and injuries [with respect to the permanent consequential limitation of use and significant limitation of use categories] were related to a preexisting condition" and were not exacerbated by the accident (*Carrasco v Mendez*, 4 NY3d 566, 580; *see Ashquabe*, 46 AD3d 1419). Contrary to defendants' further contention that there was an unexplained gap in plaintiff's treatment, we conclude that the record fails to establish that plaintiff in fact ceased all therapeutic treatment (*see generally Pommells v Perez*, 4 NY3d 566, 574; *Brown v Dunlap*, 4 NY3d 566, 577).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

400

KA 08-00356

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKIE SCOTT, 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 (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered February 7, 2008. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree, robbery in the first degree and menacing 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 attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), robbery in the first degree (§ 160.15 [4]) and menacing in the second degree (§ 120.14 [1]), arising out of three separate incidents. Contrary to defendant's contention, the evidence is legally sufficient to support the conviction of attempted murder and assault (*see generally People v Bleakley*, 69 NY2d 490, 495).

Viewing the evidence in light of the elements of attempted murder and assault as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict with respect to those crimes is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that County Court erred in refusing to suppress the in-court identification of an eye-witness to the shooting incident who had identified him in a photo array because the police compiled the photo array based upon their own suspicion of the perpetrator rather than a description given by the shooting victim. We reject that contention. The record of the suppression hearing supports the court's determination that the photo array was " 'not so suggestive as to create the substantial likelihood that defendant

would be misidentified' " (*People v Johnson*, 52 AD3d 1286, 1286, *lv denied* 11 NY3d 738; *see People v Munoz*, 223 AD2d 370, *lv denied* 88 NY2d 990).

Contrary to the further contention of defendant, the court properly denied his motion to sever the menacing count. That count was properly joinable with the remaining counts of the indictment pursuant to CPL 200.20 (2) (b) inasmuch as proof of each count "would be material and admissible as evidence in chief upon a trial" of the other counts (*id.*; *see People v Lee*, 275 AD2d 995, 996, *lv denied* 95 NY2d 966).

We reject the contention of defendant that he was denied a fair trial by prosecutorial misconduct on summation. "Although the prosecutor improperly made a 'safe streets' comment by urging the jury to do justice" in order to prevent the escalation of crime in the neighborhood where the shooting occurred, we conclude that the prosecutor's "isolated comment was not so egregious as to deprive defendant of a fair trial" (*People v Tolliver*, 267 AD2d 1007, 1008, *lv denied* 94 NY2d 908). "The remaining comments challenged by defendant were fair comment on the evidence or fair responses to the comments of defense counsel and did not constitute [prosecutorial] misconduct" (*id.*; *see People v Halm*, 81 NY2d 819, 821).

Finally, the sentence is not unduly harsh or severe.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

405

CA 08-02158

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

JO-ANN EVANS-SMITH AND DAVID F. SMITH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WILMORITE, INC., EASTVIEW MALL HOLDINGS, LLC,
DEFENDANTS-RESPONDENTS,
KAUFMANN'S CAROUSEL, INC., MAY DEPARTMENT STORES
INTERNATIONAL, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (VICTOR ALAN OLIVERI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

UNDERBERG & KESSLER LLP, CANANDAIGUA (MARGARET E. SOMERSET OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

GOLDBERG SEGALLA LLP, ROCHESTER (MELANIE S. WOLK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered August 20, 2008 in a personal injury action. The order denied the motion of defendant May Department Stores Company, incorrectly sued as Kaufmann's Carousel, Inc. and May Department Stores International, Inc., for summary judgment on its contractual indemnification cross claim against defendants Wilmorite, Inc. and Eastview Mall Holdings, LLC.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Jo-Ann Evans-Smith (plaintiff) when she slipped and fell on an icy sidewalk outside an entrance to Kaufmann's Department Store at Eastview Mall. Supreme Court erred in denying the motion of defendant May Department Stores Company, incorrectly sued as Kaufmann's Carousel, Inc. and May Department Stores International, Inc. (hereafter, Kaufmann's) seeking summary judgment on its cross claim for contractual indemnification against defendants Wilmorite, Inc. and Eastview Mall Holdings, LLC (hereafter, Wilmorite). Kaufmann's met its initial burden of establishing its entitlement to judgment under the terms of the Third Amended and Restated Construction, Operation and Reciprocal Easement Agreement (Third REA).

The indemnification provision in the Third REA requires Wilmorite to indemnify Kaufmann's for, inter alia, liability for bodily injury arising out of accidents occurring on any part of the "common facilities," including sidewalks. The Third REA further provides that Wilmorite is obligated to maintain the common facilities and, pursuant to that obligation, it agreed that "all sidewalks shall be kept reasonably free of snow [and] ice." Thus, based upon the terms of the Third REA, Kaufmann's is entitled to contractual indemnification from Wilmorite (*see Goodman v CF Galleria at White Plains, LP*, 39 AD3d 588, 590). Evidence that Kaufmann's performed snow and ice removal in the area of plaintiff's fall does not raise an issue of fact with respect "to any potential active negligence of [Kaufmann's] which was a proximate cause of the incident in question" (*id*.). Nor does that evidence raise an issue of fact with respect to the maintenance obligation of Wilmorite under the Third REA, particularly "in light of the no-waiver provision contained in the agreement" (*id*.).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

422

KA 08-01043

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PERADOTTO, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN NAGEL, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered April 8, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amended order of restitution dated June 30, 2008 and reinstating the order of restitution dated April 21, 2008 and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that the plea was involuntary because County Court failed to make a sufficient inquiry into the effect of his medication on his mental state (*see People v Lear*, 19 AD3d 1002, *lv denied* 5 NY3d 807; *People v Ames*, 184 AD2d 1083, *lv denied* 80 NY2d 1025). Defendant further contends that the court erred in ordering restitution in the amount of $189 at sentencing and further erred when it later amended its restitution order to $283.50. Defendant failed to preserve for our review his contention with respect to the original order of restitution by failing to request a hearing or to object to the amount of restitution ordered at the time of sentencing (*see People v Peck*, 31 AD3d 1216, 1216-1217, *lv denied* 9 NY3d 992; *People v Lovett*, 8 AD3d 1007, 1008, *lv denied* 3 NY3d 673, 677). The People correctly concede, however, that there is no basis in the record for the restitution amount contained in the amended order of restitution, which was signed by the court more than two months after sentencing (*cf. Peck*, 31 AD3d at 1216-1217). We therefore modify the judgment by vacating the amended order of restitution and reinstating the original order of

restitution.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

424

KA 07-01773

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PERADOTTO, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAREES JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered August 22, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [3]) and sentencing him to an indeterminate term of incarceration of two to four years. As defendant contends, and the People correctly concede, the sentence is illegal. Defendant was convicted of a class D nonviolent felony offense and thus the minimum term should have been no more than one third of the maximum term imposed, i.e., 1a years (*see* § 70.00 [3] [b]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing (*see People v Adams*, 45 AD3d 1346; *People v Fingland*, 273 AD2d 925). Because the illegal sentence requires that the case be remitted, we need not address defendant's further contention concerning the sentence.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

428

CA 08-01951

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PERADOTTO, AND GORSKI, JJ.

BARBARA A. BIELLI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GIRARD BIELLI, DEFENDANT-APPELLANT.

LEIGH E. ANDERSON, BUFFALO, FOR DEFENDANT-APPELLANT.

BARBARA A. KILBRIDGE, BUFFALO, FOR PLAINTIFF-RESPONDENT.

PAMELA THIBODEAU, LAW GUARDIAN, SNYDER, FOR DANIEL B. AND ALEXANDRA B.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 11, 2007 in a divorce action. The order, among other things, granted the parties joint custody of their children and designated plaintiff as the primary residential custodian.

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

Memorandum: Supreme Court properly granted the parties joint custody of their children, with primary physical residence with plaintiff mother. The record supports the court's determination that the mother is better suited to nurture the children and to provide for their emotional support (*see Matter of Angel M.S. v Thomas J.S.*, 41 AD3d 1227). The father failed to preserve for our review his contention that the court should have conducted an in-camera interview of the children (*see Matter of Nielsen v Nielsen*, 225 AD2d 1050, *lv denied* 88 NY2d 805) and, in any event, that contention is without merit. An in-camera interview is not warranted where, as here, a court has before it sufficient information to determine the wishes of the children (*see generally Matter of Lincoln v Lincoln*, 24 NY2d 270, 272). Finally, in the absence of a cross appeal by the mother, the propriety of the court's denial of her request for, inter alia, attorney's fees and printing costs for the defense of the appeal is not properly before us.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

442

KA 06-00964

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CASH J.Y., DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Monroe County Court (Alex R. Renzi, J.), rendered September 28, 2005. Defendant was adjudicated a youthful offender upon a jury verdict that found him guilty of robbery in the second degree and grand larceny in the fourth degree.

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

Memorandum: Defendant was adjudicated a youthful offender following his conviction of robbery in the second degree (Penal Law § 160.10 [1]) and grand larceny in the fourth degree (§ 155.30 [5]). On appeal from that adjudication, defendant contends that County Court erred in refusing to suppress statements that he made to the police as well as identification testimony, both of which were allegedly obtained as the result of an unlawful seizure. We reject that contention. Contrary to the contention of defendant, the police officer who stopped the vehicle driven by defendant had the requisite reasonable suspicion to do so. The record of the suppression hearing establishes that the police officer was responding to a series of radio dispatches stating that there had been a robbery involving three black males, one of whom was carrying a unique jacket, and that, within minutes of the robbery and within blocks of the location where it occurred, the police officer observed a black male carrying the identified jacket. That male ran across the yards of some residences and then ran behind another residence before entering a waiting vehicle in which defendant was in the driver's seat. As that vehicle drove away, the police officer observed three people inside. It is well settled that the police may stop an automobile "when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Spencer*, 84 NY2d 749, 753, *cert denied* 516 US 905; *see People v Robinson*, 97 NY2d 341, 351). Here, there was reasonable

suspicion to believe that at least one occupant of the vehicle had committed a crime.

We further conclude that the original police officer and other responding police officers had reasonable suspicion to stop and detain defendant for a showup identification "based on the totality of the circumstances, including 'a radio transmission providing a general description of the perpetrators of [the] crime . . . [,] the . . . proximity of the defendant to the site of the crime, the brief period of time between the crime and the discovery of the defendant near the location of the crime, and the [officer's] observation of the defendant [and the other perpetrators of the crime], who matched the radio-transmitted description' " (*People v Casillas*, 289 AD2d 1063, 1064, *lv denied* 97 NY2d 752; *see People v Owens*, 39 AD3d 1260, *lv denied* 9 NY3d 849; *People v Evans*, 34 AD3d 1301, *lv denied* 8 NY3d 845).

Defendant failed to preserve for our review his contention that the conduct of the police officers constituted a de facto arrest for which they lacked probable cause (*see People v Andrews*, 57 AD3d 1428; *see also People v Massey*, 49 AD3d 462, *lv denied* 10 NY3d 866), 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]).

Contrary to defendant's final contention, we conclude that, although the indictment charged defendant with taking the victim's jacket and necklace, the court properly instructed the jury that it could convict defendant of grand larceny in the fourth degree based on the taking of either the jacket or the necklace (*see People v Charles*, 61 NY2d 321, 327-328*; People v Frascone*, 271 AD2d 333). "[B]ecause the nature of the property stolen was not a material element of the charge which required only proof that 'property' was stolen," the court did not err in its instruction (*Charles*, 61 NY2d at 328; *see Frascone*, 271 AD2d 333).

Entered: March 27, 2009 JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

446

KA 06-00752

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY J. BORCYK, DEFENDANT-APPELLANT.

FELIX V. LAPINE, ROCHESTER (PETER J. PULLANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered July 6, 2005. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). According to the testimony of prosecution witnesses, the victim died by manual strangulation and scratched her neck in an effort to remove someone else's hands from her neck. In addition, the DNA of defendant, who repeatedly denied having met the victim, was found beneath the fingernails of the victim's right hand and in semen collected from the victim's vagina. The jury was entitled to credit that testimony and to discredit the testimony of a witness who offered conflicting accounts of whether he saw persons other than defendant remove the body of the victim from her home (*see generally id.*).

On the record before us, we also reject the contention of defendant that he was denied effective assistance of counsel. Defendant has not shown that a suppression motion, if made, would have been successful and thus has failed to establish that defense counsel was ineffective in failing to make such a motion (*see People v Rivera*, 45 AD3d 1487, 1488, *lv denied* 9 NY3d 1038). Moreover, defense counsel had a discernible strategy in acknowledging that defendant's DNA was collected from the victim (*see People v Rivera*, 71 NY2d 705, 708-709;

People v Gaffney, 30 AD3d 1096, 1097, *lv denied* 7 NY3d 789), and was not ineffective for failing to object when the prosecutor elicited testimony with respect to what defendant inaccurately describes as his invocation of the right to counsel. The remaining instance of alleged ineffective assistance of counsel, i.e., that defense counsel was ineffective in failing to present evidence that the police examined the vehicle driven by defendant at the time of the victim's death and found no evidence that the victim had been in that vehicle, involves matters outside the record on appeal and thus is properly raised by way of a motion pursuant to CPL article 440 (*see People v Barnes*, 56 AD3d 1171; *People v Jenkins*, 25 AD3d 444, 445-446, *lv denied* 6 NY3d 834).

Finally, defendant failed to preserve for our review his contentions that the People improperly elicited testimony concerning his purported invocation of the right to counsel and that County Court's *Sandoval* ruling constitutes an abuse of discretion (*see* CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

447

CAF 07-02204

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PINE, JJ.

IN THE MATTER OF LILIAN I., RITTA U.,
WINNIE M., AND YVETTE S.
---------- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

FRANK B., RESPONDENT-APPELLANT.

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

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

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR LILIAN I., RITTA U., WINNIE M., AND YVETTE S.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 26, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that the subject children are permanently neglected children and terminated respondent's parental rights.

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

Memorandum: On appeal from an order terminating his parental rights with respect to four of his children on the ground of permanent neglect, respondent father contends that petitioner failed to establish that it made the requisite diligent efforts to reunite him with the children (*see* Social Services Law § 384-b [7] [a], [f]; *Matter of Sheila G.*, 61 NY2d 368, 373). We reject that contention (*see Matter of Brittany K.*, ___ AD3d ___ [Feb. 6, 2009]; *Matter of Ja-Nathan F.*, 309 AD2d 1152). Petitioner established that it made arrangements for supervised visitation between the father and the children; suggested three different parenting programs in which the father could participate to meet the requirements of his "return plan"; offered to enlist the services of an individual who spoke the father's native language to assist during visitation; encouraged the father to apply for public assistance in order to obtain sufficient income to support the children; and encouraged the father to help his son to comply with the order of protection that prohibited that son's contact with the children in question (*see Matter of Abraham C.*, 55 AD3d 1442, 1443, *lv denied* ___ NY3d ___ [Feb. 11, 2009]; *Matter of Steven S.*, 12 AD3d 1181).

Contrary to the further contention of the father, we conclude that Family Court properly determined that he failed to plan for the future of the children. " '[T]o plan for the future of the child[ren]' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child[ren]" (Social Services Law § 384-b [7] [c]). "At a minimum, [a] parent[] must 'take steps to correct the conditions that led to the removal of the child[ren] from [his or her] home' " (*Matter of Nathaniel T.*, 67 NY2d 838, 840; *see Stephen S.*, 12 AD3d 1181; *Ja-Nathan F.*, 309 AD2d 1152). Here, the record establishes that the father believed that he had not done anything to warrant the removal of the children from his home and, according to the testimony of the director of the supervised visitation program, he stated that he did not know why they were removed. He ultimately blamed the removal of the children on his eldest daughter, who alleged that she had been sexually abused by the father's son who was the subject of the order of protection. "Because [the father] failed to make any progress in overcoming the problems that initially endangered the children and continued to prevent their safe return, the court properly found that [he] was unable to make an adequate plan for [his] children's future" (*Matter of Rebecca D.*, 222 AD2d 1092).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

449

TP 08-02097

PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PINE, JJ.

IN THE MATTER OF OZNOR CORPORATION, DOING BUSINESS AS CLAWSON'S GROCERY, PETITIONER,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, MONROE DEPARTMENT OF PUBLIC HEALTH AND ITS PRESIDENT, CAROL ANN PODGORSKI, IN HER OFFICIAL CAPACITY, RESPONDENTS.

JEANNE M. COLOMBO, ROCHESTER, FOR PETITIONER.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (PAUL D. FULLER OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [William P. Polito, J.], dated October 6, 2008) to annul a determination of respondents. The determination, among other things, found that petitioner violated article 13-F of the Public Health Law.

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 that it violated the Public Health Law by selling tobacco to a minor. Initially, we note that the petition raises no substantial evidence issue, and thus Supreme Court erred in transferring the proceeding to this Court pursuant to CPLR 7804 (g). Nevertheless, we consider the merits of the petition in the interest of judicial economy (*see Matter of Ryder v Daines*, 57 AD3d 1411; *Matter of Rauch v DeBuono*, 265 AD2d 797).

We reject the contention of petitioner that its constitutional rights were violated by virtue of the fact that the formal notice of violation was signed by an inspector from the Monroe County Department of Health who did not observe the violation (*see Matter of Fay's Inc. v New York State Dept. of Health*, 241 AD2d 815). Also contrary to the contention of petitioner, its right to due process in this administrative proceeding was not violated inasmuch as the record establishes that it received adequate notice of the allegations against it and an opportunity to be heard (*see generally Matter of Tax Foreclosure No. 35*, 127 AD2d 220, *affd* 71 NY2d 863). We have considered petitioner's remaining contentions and conclude that they

are without merit.

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

468

KA 07-02187

PRESENT: HURLBUTT, J.P., MARTOCHE, CARNI, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY WOODS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 21, 2007. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree (two counts), rape in the first degree, and attempted criminal sexual act 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 following a jury trial of two counts of criminal sexual act in the first degree (Penal Law § 130.50 [1]), rape in the first degree (§ 130.35 [1]), and attempted criminal sexual act in the first degree (§§ 110.00, 130.50 [1]). County Court (Michael F. Pietruszka, J.) did not err in denying the request of defendant for a judicial subpoena duces tecum to enable him to obtain the victim's medical records. Defendant failed to make the requisite factual showing that it was reasonably likely that the records would contain information bearing upon the victim's credibility (*see People v Chatman*, 186 AD2d 1004, *lv denied* 81 NY2d 761).

Contrary to the further contention of defendant, Supreme Court (Deborah A. Haendiges, J.) did not err in denying his motion for a mistrial based upon the victim's testimony, which defendant characterizes as a reference to an "uncharged sexual incident." The record establishes that the victim made no reference to forcible compulsion by defendant and, in any event, the court gave a curative instruction that the jury is presumed to have followed (*see People v Cruz*, 272 AD2d 922, 923, *affd* 96 NY2d 857).

The court also did not err in refusing to redact portions of defendant's statements to the police in which defendant allegedly made

references to his past criminal history. The record establishes that there was in fact no reference by defendant to his past criminal history but, rather, his reference was to the rape for which he was under arrest at the time.

We reject defendant's further contention that the court abused its discretion in refusing to instruct the jury that evidence of the victim's previous sexual conduct with defendant could be deemed evidence that the sexual activity between defendant and the victim in this case was consensual. The court properly permitted defendant to offer such evidence (*see* CPL 60.42), and defense counsel on summation referred extensively to that evidence. As the Court of Appeals has noted, courts "have long presumed that jurors have 'sufficient intelligence' to make elementary logical inferences presupposed by the language of a charge, and hence that defendants are not 'entitled to select the phraseology' that makes such inferences all the more explicit" (*People v Samuels*, 99 NY2d 20, 25-26), and here it cannot be gainsaid that jurors are aware that prior sexual encounters that are consensual are relevant in evaluating the victim's credibility in cases involving sexual encounters that are allegedly nonconsensual.

Defendant further contends that the verdict with respect to counts one through four is against the weight of the evidence. Viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The sentence is not unduly harsh or severe.

We note, however, that the certificate of conviction incorrectly reflects that defendant was convicted of two counts of sodomy in the first degree and one count of attempted sodomy in the first degree, and it therefore must be amended to reflect that he was convicted of two counts of criminal sexual act in the first degree and one count of attempted criminal sexual act in the first degree (*see People v Martinez*, 37 AD3d 1099, *lv denied* 8 NY3d 947).

Entered: March 27, 2009 JoAnn M. Wahl
Clerk of the Court

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

472

CAF 08-00698

PRESENT: HURLBUTT, J.P., MARTOCHE, CARNI, GREEN, AND PINE, JJ.

IN THE MATTER OF KENDALL DANNER-NEPAGE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHAD NEPAGE, RESPONDENT-RESPONDENT.

PALOMA A. CAPANNA, PENFIELD, FOR PETITIONER-APPELLANT.

THEODORE W. STENUF, LAW GUARDIAN, MINOA, FOR EMILY D.

Appeal from an order of the Family Court, Oswego County (David J. Roman, J.), entered January 31, 2008 in a proceeding pursuant to Family Court Act article 6. The order denied petitioner's motion to vacate the default order entered September 24, 2007.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the order entered September 24, 2007 is vacated, and the matter is remitted to Family Court, Oswego County, for a hearing on the petitions.

Memorandum: "In view of the unintentional nature of the default, the reasonable nature of the excuse, . . . and the judicial preference for resolving cases on their merits," we conclude that Family Court abused its discretion in denying petitioner's motion to vacate the September 2007 default order (*Cavagnaro v Frontier Cent. School Dist.*, 17 AD3d 1099; *see Petrosino v Petrosino*, 24 AD3d 1210, 1212). Petitioner established a reasonable excuse for her failure to appear as well as a meritorious defense to respondent's petition for custody of the parties' minor daughter (*see Matter of Bey v Perez*, 39 AD3d 631; *see generally* CPLR 5015 [a] [1]).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

487

KA 07-02357

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID D. JOHNSON, DEFENDANT-APPELLANT.

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

DAVID D. JOHNSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered September 26, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the first degree (Penal Law § 140.30 [1]). Contrary to the contention of defendant, he knowingly, intelligently and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256; *People v Seaberg*, 74 NY2d 1, 11). That valid waiver of the right to appeal encompasses defendant's challenges to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737), Supreme Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833; *People v Garner*, 52 AD3d 1265, *lv denied* 11 NY3d 736), and the factual sufficiency of the plea allocution (*see People v Spikes*, 28 AD3d 1101, 1102, *lv denied* 7 NY3d 818; *People v Bland*, 27 AD3d 1052, *lv denied* 6 NY3d 892; *People v White*, 24 AD3d 1220, *lv denied* 6 NY3d 820).

Defendant further contends that his plea was not knowingly, voluntarily or intelligently entered because the court failed to apprise him of his right to have his guilt proven beyond a reasonable doubt. Although that contention survives the waiver by defendant of his right to appeal, he failed to preserve it for our review by moving to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Davis*, 45 AD3d 1357, *lv denied* 9 NY3d 1005). In any event, defendant's contention is without merit. It is well settled that there is no "uniform

mandatory catechism of pleading defendants" (*People v Nixon*, 21 NY2d 338, 353, *cert denied sub nom. Robinson v New York*, 393 US 1067; *see People v Harris*, 61 NY2d 9, 16-17), and a plea is not invalid "solely because the [court] failed to specifically enumerate all the rights to which the defendant was entitled" (*Harris*, 61 NY2d at 16), including the right to have his or her guilt proven beyond a reasonable doubt at trial (*see People v Ramirez*, 159 AD2d 392, *lv denied* 76 NY2d 863).

The further contention of defendant in his pro se supplemental brief that his plea was coerced is belied by his statement during the plea proceeding that he was not threatened, forced or coerced into pleading guilty (*see People v Worthy*, 46 AD3d 1382, *lv denied* 10 NY3d 773).

To the extent that the contention of defendant, in his main and pro se supplemental briefs, that he was denied effective assistance of counsel survives his guilty plea and his waiver of the right to appeal (*see People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), it is lacking in merit (*see generally People v Ford*, 86 NY2d 397, 404).

Defendant further contends in his main brief that the court erred in denying his pro se motion for a hearing pursuant to CPL 420.40 based on his alleged inability to pay the mandatory surcharge. That contention is encompassed by his waiver of the right to appeal (*see People v Camacho*, 4 AD3d 862, *lv denied* 2 NY3d 761; *People v Smith*, 309 AD2d 1282, 1283) and, in any event, lacks merit. Defendant failed to offer "credible and verifiable information establishing that the surcharge would work an unreasonable hardship on defendant over and above the ordinary hardship suffered by other indigent inmates" (*People v Abdus-Samad*, 274 AD2d 666, 667, *lv denied* 95 NY2d 862; *see People v Cheatom*, 57 AD3d 1447; *Camacho*, 4 AD3d 862).

Defendant failed to preserve for our review the contention in his pro se supplemental brief that the People committed a *Brady* violation by failing to produce marihuana that was allegedly found at the scene of the crime (*see People v Kearney*, 39 AD3d 964, 966, *lv denied* 9 NY3d 846; *People v Little*, 23 AD3d 1117, 1118, *lv denied* 6 NY3d 777; *People v Harris*, 1 AD3d 881, 882, *lv denied* 2 NY3d 740). In any event, that contention is without merit because defendant failed to establish the existence of the marihuana (*see People v Mellerson*, 15 AD3d 964, 965, *lv denied* 5 NY3d 791), and its potential exculpatory value is purely speculative (*see People v Smith*, 306 AD2d 861, 862, *lv denied* 100 NY2d 599).

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

489

CAF 07-02719

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND GORSKI, JJ.

IN THE MATTER OF LATEESHA MCELRATH,
PETITIONER-RESPONDENT,

V ORDER

TOMMIE WIMBERLY, III, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (James H. Dillon, J.), entered November 30, 2007 in a proceeding pursuant to Family Court Act article 4. The order revoked a suspended sentence and committed respondent to the custody of the Erie County Correctional Facility for six months.

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

Entered: March 27, 2009

JoAnn M. Wahl
Clerk of the Court