SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 13, 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

PATRICIA L. MORGAN, CLERK

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

993

CA 08-02671

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

HOWARD A. SWEET, BARBARA L. SWEET, AND
5341 BROADWAY, LANCASTER, LLC,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

TEXACO, INC., CHEVRON, INC., AND
CHEVRONTEXACO CORP.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

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

DAMON & MOREY LLP, BUFFALO (JOHN T. KOLAGA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered October 14, 2008. The order granted in part and denied in part defendants' motion for summary judgment and plaintiffs' cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for summary judgment dismissing the fifth cause of action and dismissing that cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, indemnification and contribution from defendants for the cost of remediating a contaminated parcel of land. Defendants leased or owned the subject parcel, which was and continues to be used as a gas station, from 1950 until 1981. Plaintiff Howard A. Sweet purchased the property in 1981, and plaintiff 5341 Broadway, Lancaster, LLC (Lancaster, LLC) purchased the property from plaintiff and his wife, plaintiff Barbara L. Sweet, in 2004. The Sweet plaintiffs were the sole members of Lancaster, LLC. During the time in which defendants leased or owned the property, they installed underground storage tanks for petroleum. They controlled and maintained the storage tanks until the tanks were removed from the northeast portion of the property in 1966. In 2002, it was discovered that the subject parcel was contaminated by petroleum in areas that included the northeast portion of the property, from which the tanks had been removed. Defendants moved for summary judgment dismissing the complaint, and plaintiffs cross-moved for partial summary judgment on liability on their first

and second causes of action for, respectively, strict liability and contribution under the Navigation Law. As relevant on this appeal by defendants and cross appeal by plaintiffs, Supreme Court denied those parts of defendants' motion seeking summary judgment dismissing the first and second causes of action, as well as the seventh cause of action, for common-law indemnification, and the 10th cause of action, for a declaratory judgment. The court granted that part of plaintiffs' cross motion with respect to the second cause of action and denied that part of the cross motion with respect to the first cause of action.

We conclude that the court properly denied those parts of defendants' motion and plaintiffs' cross motion with respect to the first cause of action, for strict liability under the Navigation Law, and that part of defendants' motion with respect to the seventh cause of action, for common-law indemnification. Although plaintiffs submitted unrefuted evidence that "a certain amount of the petroleum [causing the contamination] was manufactured and discharged during [defendants'] ownership" (*State of New York v Passalacqua*, 19 AD3d 786, 789; *see* § 181 [1], [5]), there are issues of fact on the record before us based on the submissions of both plaintiffs and defendants whether plaintiffs contributed to the contamination (*see Hjerpe v Globerman*, 280 AD2d 646, 647; *see also White v Long*, 85 NY2d 564, 568-569). "Once it is established that the property owner caused or contributed to the spill, the property owner will be precluded from seeking indemnification from another discharger" (*Hjerpe*, 280 AD2d at 647).

We further conclude, however, that the court properly granted that part of plaintiffs' cross motion with respect to the second cause of action, seeking contribution under the Navigation Law. Contrary to the contention of defendants, the unrefuted evidence establishes that they were dischargers within the meaning of Navigation Law § 181 (1), and thus plaintiffs are entitled to contribution from them as a matter of law pursuant to Navigation Law § 176 (8). Defendants' contention that plaintiffs lack standing to seek contribution pursuant to Navigation Law § 176 because they lacked the requisite agency approval for remediation and because they had not yet commenced remediation is raised for the first time on appeal, as are defendants' contentions with respect to the cause of action for common-law contribution. Thus, those contentions are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

We agree with defendants, however, that the court should have granted that part of their motion with respect to the fifth cause of action, for public nuisance, and we therefore modify the order accordingly. That cause of action, alleging public nuisance, is time-barred (*see generally* CPLR 214-c [2]), inasmuch as it is undisputed that plaintiff Howard Sweet was aware upon purchasing the property in 1981 that a gas station had been operated there since the 1950s, and plaintiffs were aware of the existence and removal of the underground storage tanks in question. Prior to purchasing the property in 1981, Howard Sweet should have investigated the possibility of any petroleum contamination, and his failure to do so constitutes a lack of

"reasonable diligence" (CPLR 214-c [2]; *see Patel v Exxon Corp.* [appeal No. 2], 284 AD2d 1007, *lv dismissed* 96 NY2d 937), which also is attributable to the remaining plaintiffs by virtue of their interrelationship.

Finally, we reject the contention of defendants that the court erred in denying that part of their motion for summary judgment dismissing the 10th cause of action, seeking a declaratory judgment. Plaintiffs have been ordered to submit a plan and schedule for remediation of the contaminated parcel and thus, contrary to defendants' contention, "there is a substantial legal controversy . . . [concerning the issue of future remediation costs] that may be resolved by a declaration of the parties' legal rights" (*Ide v E.J. Del Monte Corp.*, 209 AD2d 974, 975).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1024

KA 08-01122

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE R. PEREZ, DEFENDANT-APPELLANT.

STEVEN J. GETMAN, OVID, FOR DEFENDANT-APPELLANT.

JOSE R. PEREZ, DEFENDANT-APPELLANT PRO SE.

RICHARD E. SWINEHART, DISTRICT ATTORNEY, WATERLOO (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered April 21, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree, attempted assault in the second degree, endangering the welfare of a child and harassment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) and attempted assault in the second degree (§§ 110.00, 120.05 [2]). We reject the contention of defendant that he was denied his statutory right to testify before the grand jury and thus that County Court erred in denying his motion to dismiss the indictment on that ground (*see generally People v Smith*, 18 AD3d 888, *lv denied* 5 NY3d 794). There is no evidence in the record that defendant or his attorney gave the requisite written notice to the District Attorney that defendant intended to testify before the grand jury (*see* CPL 190.50 [5] [a]). To the extent that defendant contends that he was denied effective assistance of counsel on the ground that his attorney failed to effectuate his intent to testify, we conclude that there is no indication in the record that defendant conveyed or attempted to convey his wish to testify to his attorney (*see People v Williams*, 301 AD2d 669, *lv denied* 100 NY2d 544). In any event, even if defendant had informed his attorney of his wish to testify, "an attorney's failure to secure a defendant's right to testify before the grand jury, without more, does not establish ineffective assistance of counsel or require reversal" (*People v Rojas*, 29 AD3d 405, 405-406, *lv denied* 7 NY3d 794, citing *People v Wiggins*, 89 NY2d 872). Viewing the evidence in light of the

elements of the crime of criminal possession of a weapon in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict convicting defendant of that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that the court erred in admitting testimony concerning prior threats made by defendant to the victim. The evidence was relevant to establish defendant's motive (*see People v Mosley*, 55 AD3d 1371, 1372, *lv denied* 11 NY3d 856), as well as to provide background information concerning the prior relationship between defendant and the victim (*see People v Meseck*, 52 AD3d 948, 950). "Unlike evidence of general criminal propensity, evidence that a particular victim was the focus of a defendant's continuing aggression may be highly relevant" (*People v Ebanks*, 60 AD3d 462, 462; *see People v Hanson*, 30 AD3d 537, *lv denied* 7 NY3d 848).

Defendant also contends that the cumulative effect of prosecutorial misconduct on summation deprived him of a fair trial. Inasmuch as defendant failed to object to any of the prosecutor's allegedly inappropriate remarks, his contention is unpreserved for our review (*see People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant's constitutional challenge to the persistent felony offender statute is not properly before us, inasmuch as there is no indication in the record that the Attorney General was given the requisite notice of that challenge (*see* Executive Law § 71 [3]; *People v Schaurer*, 32 AD3d 1241). In any event, that contention is likewise unpreserved for our review (*see People v Phillips*, 56 AD3d 1168, 1169, *lv denied* 11 NY3d 928), and it is without merit (*see People v Quinones*, 12 NY3d 116; *see generally People v Rivera*, 5 NY3d 61, 66-68, *cert denied* 546 US 984). We conclude that the court properly sentenced defendant as a persistent felony offender based upon his criminal history (*see People v O'Connor*, 6 AD3d 738, 740-741, *lv denied* 3 NY3d 639, 645), and that the sentence is not unduly harsh or severe.

The remaining contentions of defendant are raised in his pro se supplemental brief. Defendant failed to preserve for our review his contentions with respect to the composition of the jury pool (*see* CPL 270.10 [2]), and the court's alleged failure to administer the oath of truthfulness to prospective jurors (*see People v Hampton*, 64 AD3d 872, 877, *lv denied* 13 NY3d 796; *People v Dickens*, 48 AD3d 1034, 1034, *lv denied* 10 NY3d 958), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed to preserve for our review his challenge to the legal sufficiency of the evidence with respect to the crimes of criminal possession of a weapon in the third degree and attempted assault in the second degree (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). We have reviewed

defendant’s remaining contentions and conclude that they are without merit.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1040

CA 09-00219

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

IN THE MATTER OF ST. ANN'S HOME FOR THE AGED,
ET AL., PETITIONERS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

RICHARD F. DAINES, M.D., COMMISSIONER OF HEALTH,
STATE OF NEW YORK,
RESPONDENT-APPELLANT-RESPONDENT.

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

HARTER SECREST & EMERY LLP, ROCHESTER (THOMAS G. SMITH OF COUNSEL), FOR PETITIONERS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered October 29, 2008 in consolidated proceedings pursuant to CPLR article 78. The judgment, among other things, granted in part the petitions.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the petitions are dismissed in their entirety.

Memorandum: Respondent appeals from a judgment determining that the methodology used by the New York State Department of Health (DOH) to calculate the Medicare Part D carve-out in its Medicaid reimbursement rates to petitioners prior to September 1, 2007 was arbitrary and lacked a rational basis. Supreme Court previously had granted respondent's motion to dismiss the petitions as time-barred with the exception of those petitioners "who filed administrative rate appeals on or before March 15, 2006 or March 15, 2007." We conclude that the petitions must be dismissed in their entirety as time-barred. All petitioners, including those who did not file administrative appeals, merely challenged the methodology used by DOH in determining Medicaid reimbursement rates. They did not allege that DOH made computational errors or errors in the submission of fiscal or statistical information (*see* 10 NYCRR 86-2.13 [a]; 86-2.14 [a] [3]). Thus, their challenges were not subject to administrative rate appeals (*see Matter of Pinegrove Manor II, LLC v Daines*, 60 AD3d 767, 768). "If the issue is not appealable administratively, the time to commence a proceeding pursuant to CPLR article 78 [to review such an issue] begins to run upon receipt of the initial rate computation sheet, which is DOH's final determination" (*id.*; *see Matter of Westmount*

Health Facility v Commissioner of N.Y. State Dept. of Health, 205 AD2d 991, 993).

The filing of administrative rate appeals by the remaining petitioners whose petitions were not previously dismissed therefore did not toll the statute of limitations (*see Pinegrove Manor II, LLC*, 60 AD3d at 768), and the court thus erred in denying respondent's motion to dismiss the petitions with respect to all petitioners. The petitioners whose petitions previously were dismissed were notified of their reimbursement rates for the 2006 and 2007 fiscal years on October 31, 2005 and October 31, 2006, but their petitions were not filed until after September 1, 2007. The petitioners who filed administrative appeals received notice of their 2006 and 2007 reimbursement rates in November 2005 and November 2006, and their petitions were not filed until October and November of 2007. Thus, all petitions were filed well beyond the four-month statute of limitations (*see* CPLR 217; *Pinegrove Manor II, LLC*, 60 AD3d at 768).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1044

KAH 09-00171

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
FRANKIE MALDONADO, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MELVIN WILLIAMS, SUPERINTENDENT, WILLARD DRUG
TREATMENT CAMPUS, RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered April 2, 2008. The judgment granted the petition and directed petitioner's release to parole supervision.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus. Respondent appeals from a judgment granting the petition and directing petitioner's release to parole supervision. During the pendency of this appeal, petitioner's parole was violated, based on allegations that petitioner had absconded. We thus conclude that the appeal is moot because petitioner is being held on the violation of his parole and thus is no longer released to parole supervision (*see generally People ex rel. Mendolia v Superintendent, Green Haven Correctional Facility*, 47 NY2d 779; *People ex rel. Chamberlain v Gibson*, 302 AD2d 950; *People ex rel. Hodge v Wells*, 133 AD2d 497, 498-499, *lv denied* 70 NY2d 613; *People ex rel. Frisbie v Hammock*, 112 AD2d 721), and the exception to the mootness doctrine does not apply (*cf. Lindsay v New York State Bd. of Parole*, 48 NY2d 883, 884; *Frisbie*, 112 AD2d 721).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1054

KA 06-02131

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL F. MANGES, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 15, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree and attempted grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the indictment is dismissed, and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and attempted grand larceny in the third degree (§§ 110.00, 155.35). We agree with defendant that County Court erred in admitting in evidence a printout of electronic data that was displayed on a computer screen when defendant presented a check, the allegedly forged instrument, to a bank teller. The People failed to establish that the printout falls within the business records exception to the hearsay rule (*see* CPLR 4518 [a]), which applies here (*see* CPL 60.10). The People presented no evidence that the data displayed on the computer screen, resulting in the printout, was entered in the regular course of business at the time of the transaction (*see* CPLR 4518 [a]). Indeed, the bank teller who identified the computer screen printout testified that "anyone [at the bank] can sit down at a computer and enter information." Because the computer screen printout was the only evidence establishing the identity of the purported true account owner upon which the check was drawn, we conclude that the evidence is legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). In the absence of the printout, the People failed to establish an essential element of the crime of criminal possession of a forged

instrument, i.e., defendant's knowledge that the check presented to the bank teller was forged (*see People v Johnson*, 65 NY2d 556, 560, *rearg denied* 66 NY2d 759; *cf. People v Shabazz*, 226 AD2d 290, *lv denied* 88 NY2d 994) and, thus, they also failed to establish an essential element of the remaining crime of attempted grand larceny in the third degree, i.e., that the property was stolen.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1065

CA 08-02623

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

PALISADES COLLECTION, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BARBARA KEDIK, DEFENDANT-RESPONDENT.

SOLOMON AND SOLOMON, P.C., ALBANY (DOUGLAS M. FISHER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SCACCIA LAW FIRM, SYRACUSE (DANTE M. SCACCIA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered September 30, 2008 in an action for breach of contract and account stated. The order denied plaintiff's motion for partial summary judgment and granted defendant summary judgment dismissing the complaint.

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

Memorandum: Plaintiff, as the alleged assignee of Discover Bank (Discover), commenced this action for breach of contract and account stated seeking to recover the balance owed on a credit card issued to defendant. Supreme Court denied in part plaintiff's motion for partial summary judgment dismissing seven of the affirmative defenses, reserved decision in part, and ordered plaintiff to provide evidence that it had standing. Following plaintiff's further submissions, the court concluded that plaintiff failed to provide admissible evidence of its standing and sua sponte granted defendant summary judgment dismissing the complaint. We affirm.

To establish standing to sue, plaintiff was required to submit admissible evidence that Discover assigned its interest in defendant's debt to plaintiff (*see generally Rockland Lease Funding Corp. v Waste Mgt. of N.Y.*, 245 AD2d 779). Here, plaintiff submitted an affidavit from its agent with exhibits, including a printed copy of several pages from an electronic spreadsheet listing defendant's Discover account as one of the accounts sold to plaintiff. Contrary to the contention of plaintiff, the court properly determined that it failed to establish a proper foundation for the admission of the spreadsheet under the business record exception to the hearsay rule (*see generally Speirs v Not Fade Away Tie Dye Co.*, 236 AD2d 531).

A business record is admissible if "it was made in the regular course of any business and . . . it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter" (CPLR 4518 [a]; *see generally People v Kennedy*, 68 NY2d 569, 579-580). "A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures" (*West Val. Fire Dist. No. 1 v Village of Springville*, 294 AD2d 949, 950). Although plaintiff's agent averred that the spreadsheet was kept in the regular course of business and that the entries therein were made in the regular course of business, the agent did not establish that he was familiar with plaintiff's business practices or procedures, and he further failed to establish when, how, or by whom the electronic spreadsheet submitted in paper form was made (*see* CPLR 4518 [a]; *West Val. Fire Dist. No. 1*, 294 AD2d at 950). Furthermore, although an electronic record "shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record" (*id.*), plaintiff's agent failed to establish that the printed electronic spreadsheet submitted to the court was a true and accurate representation of the electronic record kept by plaintiff.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1071

KA 06-01298

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD D. KINARD, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered April 6, 2006. 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 affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal contempt in the first degree (Penal Law § 215.51 [c]), defendant contends that County Court erred in denying his request to proceed pro se. We reject that contention, inasmuch as the record establishes that defendant's request was not unequivocal (*see People v Bolden*, 12 AD3d 1073, *lv denied* 4 NY3d 761; see *generally People v McIntyre*, 36 NY2d 10, 17). We further reject the contention of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1125

CA 09-00494

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

DANIEL J. SCULLY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAROL M. HAAR, DEFENDANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PATRICK C. O'REILLY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (A. VINCENT BUZARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered November 5, 2008 in a divorce action. The order granted the motion of defendant to dismiss the complaint and denied the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff appeals from an order that granted defendant's motion to dismiss the complaint in this divorce action and denied plaintiff's cross motion for summary judgment seeking a divorce pursuant to Domestic Relations Law § 170 (6). We affirm. "No-fault divorce applies only where there is a previous decree of separation or a written separation agreement, as required by statute [and, here, t]he parties have neither" (*Schine v Schine*, 31 NY2d 113, 116, *rearg denied* 31 NY2d 805). Plaintiff relies on a "Parenting Plan Agreement" (agreement) executed by the parties after an earlier divorce action commenced by plaintiff was dismissed and the court in that action retained jurisdiction over ancillary issues. The agreement relates solely to matters of custody and visitation and, although it was signed and acknowledged by the parties and filed with the County Clerk by plaintiff (*see* § 170 [6]), it neither purports to be a separation agreement as that term is generally understood (*see* § 236 [B] [3]), nor makes any explicit reference to the parties' separation. We conclude, particularly in light of the circumstances in which the agreement was made, that it does not "evidenc[e] the parties' agreement to live separate and apart, [and] thus [it does not] satisfy[ ] the statutory requirement [with] respect to a separation agreement" (*Christian v Christian*, 42 NY2d 63, 70; *see Sint v Sint*, 225 AD2d 606).

All concur except PERADOTTO, J., who dissents and votes to reverse

in accordance with the following Memorandum: I respectfully dissent and would reverse because I agree with plaintiff that the 30-page "Parenting Plan Agreement" (agreement) at issue in this matter constitutes a "written agreement of separation" within the meaning of Domestic Relations Law § 170 (6).

Plaintiff and defendant were married on May 8, 1993 and have three minor children. The parties have lived apart since March 2005. On March 4, 2005, plaintiff commenced an action for divorce by summons with notice. After extensive and ultimately futile negotiations between the parties, plaintiff filed a complaint on August 11, 2006 that did not specify any misconduct on the part of defendant but requested that plaintiff be awarded custody of the parties' children. On September 15, 2006, Supreme Court granted defendant's motion to dismiss the complaint based on the insufficiency of plaintiff's allegations but, as noted by the majority, "retained jurisdiction over ancillary issues."

Thereafter, the parties entered into the agreement, the preamble to which provides that "the parties are now desirous of resolving custody and ancillary issues without a trial." The agreement, inter alia, grants sole custody of the parties' children to defendant and establishes a detailed access schedule for plaintiff. It further provides that the agreement "shall be submitted to any court in which either [p]arty may seek a judgment or decree of divorce and . . . shall be incorporated in such judgment or decree by reference." The agreement was signed by both parties, notarized, and filed with the Erie County Clerk's Office on May 11, 2007.

On May 13, 2008, just over one year after the agreement was filed, plaintiff commenced this action for divorce based on Domestic Relations Law § 170 (6), alleging that the parties had lived separate and apart pursuant to an agreement for a period of a year or more. A copy of the agreement was attached to the complaint. Defendant moved to dismiss the complaint on the ground that the agreement was not a "written agreement of separation" within the meaning of section 170 (6) because it addressed only parenting issues, it did not expressly recite the parties' intent to live separate and apart, and it was not intended to serve as a separation agreement. Plaintiff cross-moved for summary judgment on the complaint, contending that the terms of the agreement clearly established that the parties were living separate and apart.

The court granted defendant's motion to dismiss the complaint and denied plaintiff's cross motion. Although the court acknowledged that an agreement need not be in any specific form to qualify as a "written agreement of separation" pursuant to Domestic Relations Law § 170 (6), the court determined that defendant did not consent to the termination of the marriage by signing the agreement.

Domestic Relations Law § 170 (6) sets forth one of the two "no-fault" grounds for divorce in New York State. Specifically, that section provides that an action for divorce may be maintained on the ground that "[t]he husband and wife have lived separate and apart

pursuant to a written agreement of separation . . ., for a period of one or more years after the execution of such agreement" (*id.*). The section further provides that the agreement must be signed by the parties and "acknowledged or proved in the form required to entitle a deed to be recorded" (*id.*). Moreover, the agreement must be filed in the office of the clerk of the county in which either party resides (*id.*).

Here, it is undisputed that the parties have lived separate and apart since March 2005, well in excess of the statutory period (*see* Domestic Relations Law § 170 [6]). It is also undisputed that the agreement was signed by both parties, acknowledged in the requisite manner, and filed in the County Clerk's Office (*see id.*). Thus, the only issue before this Court is whether the agreement qualifies as a "written agreement of separation" pursuant to the statute (*id.*). In my view, the legislative history and intended purpose of Domestic Relations Law § 170 (6), the important public policies underlying the "no fault" divorce grounds, and the Court of Appeals' precedent confirming the limited function of the written agreement, compel the conclusion that the agreement in this case constitutes a "written agreement of separation" within the meaning of section 170 (6).

In *Gleason v Gleason* (26 NY2d 28, 35), decided shortly after the enactment of Domestic Relations Law § 170, the Court of Appeals recognized that the "real purpose" of the statute's no-fault provisions was "to sanction divorce on grounds unrelated to misconduct." As the Court explained: "Implicit in the statutory scheme is the legislative recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status and that the best interests not only of the parties but of society itself will be furthered by enabling them 'to extricate themselves from a perpetual state of marital limbo' " (*id.*).

Thus, it is the *physical separation of the parties*, not the written agreement, that supplies the ground for a divorce pursuant to Domestic Relations Law § 170 (6) (*see Christian v Christian*, 42 NY2d 63, 69; *Littlejohns v Littlejohns*, 76 Misc 2d 82, 86, *affd on opn of Korn, J.*, 42 AD2d 957). Indeed, the written agreement "is simply intended as evidence of the authenticity and reality of the separation" (*Gleason*, 26 NY2d at 35; *see Christian*, 42 NY2d at 69; *Harris v Harris*, 36 AD2d 594). As the Court of Appeals reaffirmed in *Christian*, "[t]he 'vital and operative' fact[] in subdivision (6) divorce cases[] is the actual living apart of the parties——pursuant to the separation agreement . . . Put a bit differently, the function of the document is 'merely to authenticate the fact of separation' " (42 NY2d at 69). The statutory requirement that the parties live separate and apart for the prescribed period pursuant to a written agreement is unique to New York State and "reflects legislative concern over the fraud and collusion which historically infected divorce actions involving adultery" (*id.* at 68; *see Littlejohns*, 76 Misc 2d at 86 ["the written agreement serves primarily as a means of preventing fraudulent or collusive claims of separation and so discourages 'quickie' divorces"]).

The statute does not define the term "written agreement of separation," nor does it set forth any specific provisions that are required in such an agreement (*see Littlejohns*, 76 Misc 2d at 86). In light of the limited function of the written separation agreement, i.e., to document and authenticate the physical separation of the parties, and the public policy underlying the statute, "the courts, where the parties have parted permanently, should not be excessively rigid or demanding in determining whether a writing satisfies the statutory requirement for an 'agreement of separation' " (*id.* at 87). All that a party seeking a divorce pursuant to Domestic Relations Law § 170 (6) must prove "is that there is some kind of formal document of separation" (*Gleason*, 26 NY2d at 37). As one court aptly observed: "Too great stress has been placed upon the instrument, the indicia of proof of the separation of the parties, rather than the fact of separation. It is not the decree, judgment, or agreement that is the essence of the ground for divorce. They are merely the documentary proof" (*Markowitz v Markowitz*, 77 Misc 2d 586, 587-588).

In light of the legislative history and manifest purpose of Domestic Relations Law § 170 (6) and the decisions of the Court of Appeals that liberally construe the documentation requirement, I cannot agree with the majority's conclusion that the agreement in this case does not constitute a "written agreement of separation" within the scope of the statute. The agreement clearly and unambiguously "contemplate[s] permanent separation" (*Morhaim v Morhaim*, 56 AD2d 550, 552 [Silverman, J., dissenting], *revd on dissenting mem of Silverman, J.*, 44 NY2d 785, *rearg denied* 44 NY2d 949). Implicit and recognized throughout the agreement is that the parties were in fact living apart when they entered into the agreement and that they intended to continue to live apart for years to come. The agreement lists separate addresses for plaintiff and defendant in its preamble and repeatedly references the parties' separate residences throughout the remainder of the document. In setting forth plaintiff's visitation schedule, the agreement recites that "[a]ll access shall take place away from the custodial residence of [defendant]." The article of the agreement establishing plaintiff's access schedule includes a clause that the parties are free to agree on additional access "without setting a precedent for other calendar years," thus emphasizing the long-term duration of the physical separation.

Moreover, the agreement specifically contemplates the possibility of the parties' eventual divorce and the remarriage of either or both of the parties. In particular, the agreement states that "the provisions of this [a]greement shall be submitted to any court in which either [p]arty may seek a judgment or decree of divorce and . . . shall be incorporated in such judgment or decree by reference and shall not merge . . . ." With respect to the possible remarriage of either of the parties, the agreement provides that the parties' children "shall not, for any purpose or for any reason, assume or use the name of any subsequent Husband of [defendant]." Thus, viewed as a whole, the agreement "can be consistent only with the fact of the parties' then existing and continued separation" (*Littlejohns*, 76 Misc 2d at 86).

The fact that the agreement is not entitled a "separation agreement" and does not explicitly recite that the parties shall live separate and apart is of no moment (*see Sint v Sint*, 225 AD2d 606, 607). " '[T]he validity of the agreement . . . depend[s] upon the existence of the fact [of living apart], not upon a recital of it' " (*Morhaim*, 56 AD2d at 552; *see Littlejohns*, 76 Misc 2d at 85). Here, the agreement serves as " 'evidence of the authenticity and reality of the separation' " (*Christian*, 42 NY2d at 68, quoting *Gleason*, 26 NY2d at 35), thereby fulfilling the statutory purpose.

Contrary to the contention of defendant, it is irrelevant whether she intended the agreement to serve as the predicate for a subsequent divorce action pursuant to Domestic Relations Law § 170 (6). Indeed, the Court of Appeals has held that Domestic Relations Law § 170 (5), which supplies the other "no-fault" ground for divorce, i.e., that the parties have lived apart pursuant to a decree or judgment of separation for a certain period of time, applied retroactively to separation decrees rendered prior to the enactment of the statute (*Gleason*, 26 NY2d at 34-36). The Court in *Gleason* recognized that the defendant wife who prevailed in a separation action commenced prior to the enactment of section 170 (5) "had no warning that the separation decree granted to her might later furnish basis or ground for divorce by [her] 'guilty' husband" (*id.* at 40). Likewise, in *Morhaim*, the First Department noted that the six-year delay between the execution and filing of the written separation agreement in question "may indicate that the parties at the time of the execution of the agreement did not realize that the agreement might qualify as a separation agreement under the no-fault divorce statute. *But that does not alter the legal effect of the agreement or the public policy involved*" (56 AD2d at 552 [emphasis added]).

In sum, the agreement in this case "evidenced the parties' actual and continued separation and thus satisfied the requirements of the statute" (*id.*; *see Littlejohns*, 76 Misc 2d at 86-87). I therefore would reverse the order, deny defendant's motion to dismiss, reinstate the complaint, grant plaintiff's cross motion for summary judgment on the complaint, and remit the matter to Supreme Court to grant judgment in favor of plaintiff and to determine the remaining issues.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1127

CA 09-00421

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

HUEN NEW YORK, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION CLINTON CENTRAL SCHOOL DISTRICT, DEFENDANT-RESPONDENT.

GREENBERG, TRAGER & HERBST, LLP, NEW YORK CITY (KALVIN KAMIEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (JOSEPH G. SHIELDS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered January 2, 2009 in a breach of contract action. The order and judgment granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: In this breach of contract action, plaintiff appeals from an order granting defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff failed to comply with the written notice of claim requirements set forth in its two contracts with defendant. We reverse.

We note at the outset that defendant failed to raise in its brief any issue with respect to the alternative ground upon which it moved for summary judgment dismissing the complaint, i.e., that plaintiff failed to comply with the notice of claim requirement pursuant to Education Law § 3813. Although defendant was entitled to raise that issue as an alternative ground for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), defendant did not do so, despite the fact that Supreme Court indicated that it was not reaching that issue in view of the fact that it otherwise was dismissing the complaint. We thus deem any issue with respect thereto abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Turning to the merits, plaintiff, an electrical contractor, entered into two contracts with defendant for work on a capital improvement project (project) at the Clinton Central School District.

The contracts included two substantial completion dates, one in January 2003 for Phase I of the project and the other in January 2004 for Phase II of the project. As a result of various delays and other problems arising during the course of construction, the entire project was not completed until September 2004. On September 7, 2004, plaintiff presented defendant with a document entitled "notice of claims," seeking damages for increased costs incurred by plaintiff as the result of the delay. Approximately one week later, plaintiff submitted a more detailed "notice of claim" to the project architect. Thereafter, plaintiff commenced this action, alleging that defendant breached the contracts by causing unreasonable and uncontemplated delays. In support of its motion for summary judgment dismissing the complaint, defendant relied on the notice of claims provisions in article 4 of both contracts, specifically section 4.3.2. That section is entitled "Time Limits on Claims" and provides in relevant part that "[c]laims by either party must be initiated within 21 days after the occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later." The section in question further provides that "[c]laims must be initiated by written notice to the Architect and the other party." Section 4.4.1 of the contracts provides that "[a]n initial decision by the Architect shall be required as a condition precedent to . . . litigation" of any claim.

We agree with plaintiff that the notice provisions upon which defendant relies do not apply to the causes of action asserted by plaintiff. Rather, the contracts contain an express provision governing claims for damages arising out of delay in the commencement or progress of the work, and it is a well-established principle of contract interpretation that specific provisions concerning an issue are controlling over general provisions (*see DeWitt v DeWitt*, 62 AD3d 744, 745). The contracts previously contained certain provisions that were thereafter deleted in their entirety, including a provision that "[c]laims relating to time shall be made in accordance with applicable provisions of" section 4.3, which is entitled "CLAIMS AND DISPUTES." Those prior provisions were replaced with supplementary conditions to the contracts governing delays and extensions of time. The substituted section 8.3.2 provides in relevant part that, in the event that the contractor is "obstructed or delayed in the commencement, prosecution or completion of the Work, without fault on its part, by reason of failure to act, direction, order, neglect, delay or default of the Owner, the Architect, or any other contractor employed on the Project [or] by changes in the Work . . . then Contractor shall be entitled to an extension of time . . ., but no claim for extension of time on account of delay shall be allowed unless a claim in writing therefor[] is presented to Architect with reasonable diligence but in any event not later than [10] days after the commencement of such claimed delay . . . Except to the extent, if any, expressly prohibited by law, *Contractor expressly agrees not to make, and hereby waives, any claim for damages, including those resulting from increased labor or material cost, on account of any delay*, obstruction or hindrance for any cause whatsoever, whether or not foreseeable and whether or not anticipated including but not limited to the [aforementioned] causes, and agrees that the sole right and remedy therefor[] shall be

extension of time, provided the requisite condition as to [a] written claim has been met" (emphasis added).

The substituted section 8.3.4 of the contracts states that "[i]t is emphasized that no monetary recovery may be obtained by Contractor for delay," and that a contractor's exclusive remedy for delay is an extension of time "only upon compliance with the notice and proof requirements of [section] 8.3.2 . . . ."

We conclude that the deletion of the provision referring claims based on delay to the notice of claims procedure set forth in section 4.3.2 of the contracts, together with the substitution of a new claims procedure in article 8 governing delays, establishes the parties' intent to remove claims based on delay from the ambit of section 4.3. As further evidence of the parties' intent, we note that section 4.3.1 of the contracts defines a claim as "a demand or assertion by one of the parties seeking, *as a matter of right*, adjustment or interpretation of the Contract terms, payment of money, extension of time or other relief *with respect to the terms of the Contract*" (emphasis added). In light of the fact that article 8 of the contracts specifically precludes delay damage claims, except to the extent prohibited by law (*see generally Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309, *rearg denied* 68 NY2d 753), we conclude that plaintiff's request for delay damages is not a demand premised, as a matter of right, on the terms of the contract. To the contrary, plaintiff's request for delay damages seeks relief wholly outside the scope of the contracts.

Moreover, it is well settled that claims for delay damages are beyond the authority of a project architect to administer the contract (*see e.g. International Fidelity Ins. Co. v County of Rockland*, 51 F Supp 2d 285, 289; *see also Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 11). As the court in *International Fidelity Ins. Co.* reasoned in interpreting similar contractual language, "[t]he claims resolution clause in the parties' Construction Contract is a fairly standard device that has arisen in the construction industry to effect a quick resolution of disputes that arise *during construction* and that might cause delay if they are not taken care of immediately. New York courts examining such clauses have rejected the notion that project architects are empowered to resolve delay damages disputes" (51 F Supp 2d at 289).

Here, plaintiff gave the architect prompt and repeated notice of the underlying problems that arose during construction and that, according to plaintiff, caused the various delays. The architect had no authority, however, to determine plaintiff's claim for delay damages upon substantial completion of the project inasmuch as that claim is contrary to the "no damages for delay" clause in the contracts. We thus conclude that the court erred in granting defendant's motion and that the complaint should be reinstated.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1136.2

CA 09-01520

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

DESTINY USA HOLDINGS, LLC, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

CITIGROUP GLOBAL MARKETS REALTY CORP.,
DEFENDANT-APPELLANT.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, NEW YORK CITY (LESLIE G. FAGEN OF COUNSEL), AND HANCOCK & ESTABROOK, LLP, SYRACUSE, FOR DEFENDANT-APPELLANT.

DICKSTEIN SHAPIRO LLP, NEW YORK CITY (HOWARD GRAFF OF COUNSEL), AND GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered July 20, 2009 in a breach of contract action. The order, inter alia, granted plaintiff's motion for a preliminary injunction.

It is hereby ORDERED that the order so appealed from is modified on the law by vacating the 1st, 2nd, 3rd, 4th, 8th, and 10th ordering paragraphs and by providing in the 5th, 6th, and 7th ordering paragraphs that the preliminary injunction is granted upon condition that plaintiff post an undertaking in the amount of $15 million within 20 days after service of the order of this Court with notice of entry and as modified the order is affirmed without costs.

Opinion by PINE, J.: The primary issue on this appeal is whether plaintiff, Destiny USA Holdings, LLC (Destiny Holdings), is entitled to a preliminary injunction requiring defendant, Citigroup Global Markets Realty Corp. (Citigroup), to fund "pending draw requests" on a loan structured as "an advancing term loan." Citigroup contends that such relief is not available because the action is one for breach of contract and Destiny Holdings could be compensated monetarily for any damages allegedly sustained. Supreme Court disagreed and, inter alia, granted the preliminary injunction sought (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 24 Misc 3d 1222[A], 2009 NY Slip Op 51550[U]). For the reasons that follow, we conclude that the court properly determined that Destiny Holdings is entitled to a preliminary injunction requiring Citigroup to fund "pending draw requests" but that the court erred in granting other relief that was neither requested nor appropriate and in failing to set an undertaking.

Factual Background

In 2005 Citigroup agreed to provide financing for the first phase of Destiny Holding's "Destiny USA" expansion project. The first phase of the "Destiny USA" project involved the "development and construction of a shopping center/tourist destination containing at least 800,000 gross square feet and related facilities and improvements." Other phases were to include the construction of a hotel as well as retail, entertainment and dining facilities. The "Destiny USA" project was to be funded using a unique financing model for green economic development. Phase one of the project, the only phase at issue on this appeal (hereafter, Project), was to be funded using money from three sources: Destiny Holdings, proceeds from bonds issued by the City of Syracuse Industrial Development Agency (SIDA) and approximately $155 million to be loaned by Citigroup.

In February 2007 the parties entered into an Amended and Restated Building Loan, Project Loan and Security Agreement (Agreement), which detailed the development and funding of the Project. Pursuant to the Agreement, Citigroup agreed to act as both a lender and as the agent for all of the lenders. As the agent, Citigroup was responsible for approving all advances of money, regardless of whether the advances came from funds of Destiny Holdings, SIDA or Citigroup. Although the Agreement states that the money from Destiny Holdings and SIDA would be held in various escrow accounts, there is no evidence in the record that Citigroup created separate escrow accounts or in any way segregated the money that it would be loaning to the Project. Pursuant to the Agreement, loan advances were made after Destiny Holdings submitted its monthly draw request and various conditions precedent were met. Citigroup could deny a draw request if it determined that a "Deficiency" existed. A Deficiency occurred when the money required to complete construction of the "Required Improvements" exceeded the money yet to be advanced and other available funds.

In February 2007 Citigroup began disbursing the monthly advances. With respect to the 17th, 18th, and 19th draw requests, made in the summer of 2008, Citigroup alleged that there were Deficiencies and included allocations for Tenant Improvement Costs (TI Costs) in its calculations of those Deficiencies. Destiny Holdings disputed the calculations and, in November 2008, representatives of both parties met to discuss the inclusion of TI Costs in Deficiency calculations. Following that meeting, TI Costs were excluded from Deficiency calculations for the 20th through 26th draw requests.

The 27th draw request was submitted in April 2009, with a funding due date of May 5, 2009. On May 20, 2009, Citigroup sent Destiny Holdings a Deficiency notice, alleging that Destiny Holdings was deficient by over $15 million. Virtually all of the claimed Deficiency was based on the inclusion of TI Costs in calculating the Deficiency. When Destiny Holdings failed to cure the Deficiency within 10 business days, Citigroup declared the loan in default. Although Destiny Holdings submitted the 28th and 29th draw requests,

Citigroup has not funded any draw request since declaring the loan in default. Destiny Holdings contends that the Project is approximately 90% complete.

Procedural History

On June 9, 2009, Destiny Holdings commenced this action asserting six causes of action, including one for breach of contract, as well as causes of action seeking a declaratory judgment, specific performance, and both preliminary and permanent injunctions. On the same date, Destiny Holdings moved for a preliminary injunction seeking to compel Citigroup "to fund the pending loan advances . . . or, alternatively, enjoining Citigroup from refusing to fund such pending advances." Destiny Holdings also sought to compel Citigroup "to comply with the procedural requirements of the construction loan agreement when approving future loan advances - in particular, the contractually-mandated calculation of a 'Deficiency' under that agreement."

In deciding the motion for a preliminary injunction, Supreme Court: (1) determined that the Notice of Deficiency was null and void and vacated it; (2) determined that the Notice of Default was null and void and vacated it; (3) determined that the term "Deficiency" was not a budget-based term and that TI Costs could not be used in calculating whether a Deficiency existed; (4) determined that Citigroup had breached the Agreement; (5) ordered Citigroup to fund the 27th draw request; (6) ordered Citigroup to fund the 28th draw request; (7) ordered Citigroup to fund the 29th draw request; (8) ordered Citigroup to "pay all future sums due as draws or advances under the [Agreement] as they come due without further delay or interference"; (9) scheduled a hearing to determine whether there was a current Deficiency; and (10) reserved until after that hearing any decision on the nature, amount and type of performance bond.

Citigroup appeals, contending that the court erred in granting a preliminary injunction, in granting the ultimate relief sought in the complaint and in failing to require Destiny Holdings to provide a substantial undertaking.

General Provisions of Law

In order to establish its entitlement to a preliminary injunction, the party seeking the injunction must establish, by clear and convincing evidence (*see Network Fin. Planning v Prudential-Bache Sec.*, 194 AD2d 651), three separate elements: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (*Doe v Axelrod*, 73 NY2d 748, 750; *see J. A. Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 406; *Miller v Powers*, 30 AD3d 1060, 1061). Entitlement to a preliminary injunction "depends upon probabilities, any or all of which may be disproven when the action is tried on the merits" (*J. A. Preston Corp.*, 68 NY2d at 406). " 'A motion for a preliminary injunction is addressed to the sound discretion of the trial court[,] and the

decision of the trial court on such a motion will not be disturbed on appeal, unless there is a showing of an abuse of discretion' " (*Abramo v HealthNow N.Y.*, 305 AD2d 1009, 1009; *see Axelrod*, 73 NY2d at 750).

We agree with Citigroup and the dissent that provisional injunctive relief has historically been "limited to equitable actions where the defendant threatened to violate the rights of the plaintiff '*respecting the subject of the action*, which would tend to render the judgment ineffectual' " (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 545). That is because, generally, "in a pure contract money action, there is no right of the plaintiff in some specific *subject* of the action; hence, no prejudgment right to interfere in the use of the defendant's property; and no entitlement to injunctive relief pendente lite" (*id.*). In such situations, the "plaintiff has an adequate remedy in the form of monetary damages, and injunctive relief is both unnecessary and unwarranted" (*D&W Diesel v McIntosh*, 307 AD2d 750, 751).

The same reasoning applies with respect to a cause of action for specific performance. "In general, specific performance will not be ordered where money damages 'would be adequate to protect the expectation interest of the injured party' " (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415). Because money is fungible, a party seeking enforcement of an agreement to lend money would be expected to borrow money elsewhere and recover damages based on the higher costs associated with the replacement loan (*see generally Bradford, Eldred & Cuba R.R. Co. v New York, Lake Erie & W. R.R. Co.*, 123 NY 316, 325-327).

Nevertheless, exceptions to the general rules exist. For example, preliminary injunctions have been awarded where the subject of the action involves a specific fund (*see e.g. Sau Thi Ma v Xuan T. Lien*, 198 AD2d 186, *lv dismissed* 83 NY2d 847; *Bashein v Landau*, 96 AD2d 479; *see also Credit Agricole Indosuez*, 94 NY2d at 548; *Dinner Club Corp. v Hamlet on Olde Oyster Bay Homeowners Assn., Inc.*, 21 AD3d 777, 778), and specific performance has been awarded where "the subject matter of a particular contract is unique and has no established market value" (*Van Wagner Adv. Corp. v S & M Enters.*, 67 NY2d 186, 193; *see also First Natl. State Bank of N.J. v Commonwealth Fed. Sav. & Loan Assn. of Norristown*, 610 F2d 164, 171-172).

For the reasons that follow, we conclude that a departure from the general rules is warranted here.

Likelihood of Ultimate Success on the Merits

The first prong of the test for a preliminary injunction is whether Destiny Holdings has established a likelihood of ultimate success on the merits (*see Axelrod*, 73 NY2d at 750). We conclude that it has done so. The crux of this appeal is whether TI Costs may be included in the calculation of a Deficiency, as that term is defined by the Agreement. The determination of that issue rests solely on matters of contractual interpretation. It is well settled that "[t]he

interpretation of an unambiguous contractual provision is 'a function for the court' " (*Pyramid Brokerage Co. of Buffalo, Inc. v Atlas Auto Glass, Inc*., 39 AD3d 1176, 1177, quoting *Teitelbaum Holdings v Gold*, 48 NY2d 51, 56). In the event that a contract is ambiguous, its interpretation is still a matter for the court unless "determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence" (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172). We conclude that the interpretation of the provisions of the Agreement in this case is a matter for the court.

Pursuant to the Agreement,

> " 'Deficiency' means, at any given time, the amount by which the balance of (i) the Building Loan yet to be advanced by Lenders . . . plus (ii) the balance of the Project Loan yet to be advanced by Lenders . . . , plus (iii) funds available for disbursement from the Construction Account, the Equity Account and/or the Recap Account for unfunded Budget Costs in accordance with the Agreed Funding Schedule, is less than the actual sum, as estimated by [Citigroup] in its reasonable judgment . . ., which will be required to complete the construction of the Required Improvements in accordance with the Plans and Specifications, the Construction Schedule, all Legal Requirements and this Agreement, and to pay all unpaid Costs in connection therewith. Such estimate shall be binding and conclusive provided it is made in good faith and absent manifest error[;] . . .
>
> 'Plans and Specifications' means (i) the preliminary plans and specifications for the construction of the Required Improvements as identified on Schedule 6 attached hereto, (ii) the updated and revised plans and specifications to be delivered pursuant to Sections 3.5 and 5.2(f) and any other plans and specifications prepared or to be prepared by (or on behalf of) [Destiny Holdings] . . ., and (iii) all Change Orders applicable thereto. . .; the Plans and Specifications shall include, without limitation, a description of the materials, equipment and fixtures necessary for the construction of the Required Improvements . . . together with any other architectural, structural, foundation and elevator plans and specifications prepared by Architect, any mechanical, electrical, plumbing and fire protection plans and specifications prepared by any Person retained or to be retained by [Destiny Holdings], Architect or Construction Manager[;] . . .

> ‘Required Improvements’ means the demolition of any existing improvements located on the Land and the construction on the Land of a structure comprising a shopping center/tourist destination containing approximately 848,000 square feet of [Leaseable Area] together with related facilities, parking facilities, amenities and improvements substantially in accordance with the Plans and Specifications[; and] . . .
>
> ‘TI Costs’ means tenant improvement costs and allowances incurred by [Destiny Holdings] in connection with renewing existing Leases or executing new Leases for space located in the Mortgaged Property.”

“Leaseable Area” is defined in the Agreement by reference to City of Syracuse Ordinance No. 32 of 2002, pursuant to which it means

> “the area of floor space on all floors, subject to lease or other occupancy agreement or available for lease, for an initial term of at least one year, measured from the midpoint of any interior walls or the outside face of exterior walls, and expressly excluding all common areas, except those portions of common areas occupied by kiosks, pushcarts or other permanently affixed structures or facilities pursuant to lease for an initial term of at least one year.”

It is undisputed that TI Costs are not specifically included as a Required Improvement in the Plans and Specifications, although they were included in the budget for the Project. Citigroup contends that TI Costs were implicitly included as a Required Improvement to the extent that a Required Improvement is anything related to the construction of a shopping center and tourist destination. In short, Citigroup contends that excluding TI Costs from the definition of Required Improvements leaves only “a core and shell,” which is “not a shopping center and tourist destination.” Although Citigroup concedes that, at the time of the motion for a preliminary injunction, TI Costs were not included in the Plans and Specifications, Citigroup nevertheless contends that the Plans and Specifications are updated and changed on a routine basis and that the Plans and Specifications will eventually include TI Costs. On the record before us, however, TI Costs are not included as a Required Improvement in any of the Plans and Specifications. We thus conclude that Destiny Holdings has established a likelihood of ultimate success on the merits by submitting clear and convincing evidence that TI Costs should not have been included in Citigroup’s calculation of a Deficiency.

Irreparable Injury

The second prong of the test for a preliminary injunction is whether there will be irreparable injury if the provisional relief is

withheld (*see Axelrod*, 73 NY2d at 750). As noted above, irreparable injury generally cannot be established where any damages sustained are calculable, because the plaintiff in such a case would have an adequate remedy in the form of monetary damages (*see D&W Diesel, Inc.*, 307 AD2d at 751; *see also Sokoloff*, 96 NY2d at 415; *Credit Agricole Indosuez*, 94 NY2d at 545). Here, an exception to the general rule is warranted for several reasons.

First, "cases of construction mortgages are an exception" to the general rule (*Southampton Wholesale Food Term. v Providence Produce Warehouse Co.*, 129 F Supp 663, 664). "Since the law regards land as unique[,] an agreement to buy land can be specifically enforced even though the defendant's sole obligation is to pay money . . . Although the question is close, it may not be too great a stretch to include advances under a construction mortgage" (*id.*).[1] In such circumstances, the "agreement . . . is not a simple contract to lend money. It is an integral part of a contract to sell [or develop] real property" (*Bregman v Meehan*, 125 Misc 2d 332, 347; *see also 805 Third Ave Co. v New York Life Ins. Co.*, NYLJ, Sep 22, 1982, at 12, col 1; *First Natl. State Bank of N.J.*, 610 F2d at 171-173; *Selective Bldrs. v Hudson City Sav. Bank*, 137 NJ Super 500, 508, 349 AD2d 564, 569).

Second, an exception is warranted because the Project's unique character renders it difficult to calculate any damages sustained by Destiny Holdings. Citigroup stated through its Managing Director at a U.S. Green Building Council Presentation on November 8, 2007 that the Project is a "visionary project" that has created a "new financing paradigm for green economic development" that is "revolutionary." Citigroup Chairman and Chief Executive Officer Charles Prince called the use of newly-created Federal Green Bonds in financing the Project " 'groundbreaking [and] a step forward in addressing climate change in the U.S. because [the Project] incorporates sustainable design, energy conservation and renewable energy sources on a large scale' " (GreenBiz, *U.S. Green Building Council to Purchase First Green Bonds*,

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[1]As noted in *Bregman v Meehan* (125 Misc 2d 332, 346-347), "there has been a noticeable erosion of the rule that a borrower cannot obtain specific performance on an agreement to lend money. Rather, specific performance has been granted, particularly when the loan relates to the sale of real property" (*see e.g. Leben v Nassau Sav. & Loan Assn.*, 40 AD2d 830, *affd* 34 NY2d 671; *Woodruff v Germansky*, 233 NY 365; *Caplin v Penn Mut. Life Ins. Co.*, 182 App Div 269, *affd* 229 NY 545 [right to borrow against a life insurance policy]; *National Sur. Corp. v Titan Constr. Corp.*, 26 NYS2d 227, *affd* 260 App Div 911; *Spoolan Realty Corp. v Haebler*, 147 Misc 9; *Southampton Wholesale Food Term.*, 129 F Supp 663; *Cuna Mut. Ins. Socy. v Dominguez*, 9 Ariz App 172, 450 P2d 413; *Forman v Benson*, 112 Ill App 3d 1070, 446 NE2d 535; *St. Paul at Chase Corp. v Manufacturers Life Ins. Co.*, 262 Md 192, 278 A2d 12, *cert denied* 404 US 857; *City of Camden v South Jersey Port Commn.*, 4 NJ 357, 73 A2d 55; *Selective Bldrs. v Hudson City Sav. Bank*, 137 NJ Super 500, 349 A2d 564; *Jacobson v First Natl. Bank*, 129 NJ Eq 440, 20 A2d 19, *affd* 130 NJ Eq 604, 23 A2d 409; *Columbus Club v Simons*, 110 Okla 48, 236 P 12; *Vandeventer v Dale Constr. Co.*, 271 Or 691, 534 P2d 183; *Steward v Bounds*, 167 Wash 554, 9 P2d 1112; *Gideon v Putnam Dev. Co.*, 113 W Va 200, 167 SE 140).

http://www.greenerbuildings.com/news/2007/02/27/us-green-building-council-purchase-first-green-bonds [Feb. 27, 2007]). He further commented that the Project " 'is good for economic development and good for the environment' " (*id.*). Thus, the unprecedented nature and scope of the Project makes it unique, so that it has no established market value and any damages sustained could not be calculated with reasonable precision (*see Van Wagner Adv. Corp.*, 67 NY2d at 193; *AIU Ins. Co. v Robert Plan Corp.*, 44 AD3d 355, 356; *Pfizer Inc. v PCS Health Sys.*, 234 AD2d 18, 19; *Penstraw, Inc. v Metropolitan Transp. Auth.*, 200 AD2d 442).

> " 'What matters, in measuring money damages, is the volume, refinement, and reliability of the available information about substitutes for the subject matter of the breached contract. When the relevant information is thin and unreliable, there is a substantial risk that an award of money damages will either exceed or fall short of the promisee's actual loss. Of course this risk can always be reduced——but only at great cost when reliable information is difficult to obtain. Conversely, when there is a great deal of consumer behavior generating abundant and highly dependable information about substitutes, the risk of error in measuring the promisee's loss may be reduced at much smaller cost. In asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee. Conceived in this way, the uniqueness test seems economically sound[]' . . . This principle is reflected in the case law (*see*[] *e.g.*[] *Erie R.R. Co. v City of Buffalo*, 180 NY 192, 200; *St. Regis Paper Co. v Santa Clara Lbr. Co.*, 173 NY 149, 160; *Dailey v City of New York*, 170 App Div 267, 276-277, *affd* 218 NY 665), and is essentially the position of the Restatement (Second) of Contracts, which lists 'the difficulty of proving damages with reasonable certainty' as the first factor affecting adequacy of damages" (*Van Wagner Adv. Corp.*, 67 NY2d at 193).

Finally, an exception is warranted because Destiny Holdings has established the enormous potential for harm to its reputation and the reputation of the entire "Destiny USA" project. Harm to business reputation is harm for which money damages are insufficient and for which injunctive relief may be appropriate (*see e.g. Battenkill Veterinary Equine v Cangelosi*, 1 AD3d 856, 859; *Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 AD2d 631, 633).

Citigroup contends that Destiny Holdings could have sought a replacement loan and avoided the irreparable harm that it now alleges could result. While we agree with Citigroup and the dissent that the record lacks any evidence that Destiny Holdings ever attempted to secure a replacement loan, we take judicial notice of the economic conditions that prevailed when Citigroup ceased making the loan advances (*see generally City of Rochester v Union Free School Dist. No. 4 of Town of Livonia*, 255 App Div 96, 100, *affd* 280 NY 531*; Blek v Wilson*, 262 NY 253, 255, *remittitur amended* 262 NY 694), and we conclude that, for purposes of a motion for a preliminary injunction, Destiny Holdings has established a probability that funds to replace the loan proceeds were not available elsewhere.

Balance of the Equities

The third and final prong of the test for evaluating the propriety of a preliminary injunction is a balancing of the equities (*see Axelrod*, 73 NY2d at 750). " '[I]t must be shown that the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction' " (*McLaughlin, Piven, Vogel v Nolan & Co.*, 114 AD2d 165, 174, *lv denied* 67 NY2d 606; *see Credit Index v RiskWise Intl.*, 282 AD2d 246; *Klein, Wagner & Morris*, 186 AD2d at 633). " 'In ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation' " (*De Pina v Educational Testing Serv.*, 31 AD2d 744, 745; *see Seitzman v Hudson Riv. Assoc.*, 126 AD2d 211, 214-215). After reviewing "the 'enormous public interests involved' " (*Seitzman*, 126 AD2d at 214), we conclude that Destiny Holdings has established that a balancing of the equities favors granting the preliminary injunction.

Unrequested and Inappropriate Relief

We agree with Citigroup, however, that the relief granted by the court goes beyond what was actually requested and what is appropriate. In its motion for a preliminary injunction, Destiny Holdings sought to compel Citigroup "to fund the pending loan advances . . . or, alternatively, [to] enjoin[ ] Citigroup from refusing to fund such pending advances." Destiny Holdings also sought "equitable relief directing Citigroup to comply with the procedural requirements of the [Agreement] when approving future loan advances - in particular, the contractually-mandated calculation of a 'Deficiency' under that [A]greement." In the eighth ordering paragraph of its order, however, the court ordered Citigroup to "pay all future sums due as draws or advances . . . as they come due . . . ." The court exceeded the bounds of the requested relief, and we therefore conclude that the order should be modified by vacating the eighth ordering paragraph. In addition, we note that " '[a] preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits' " (*Pamela Equities Corp. v 270 Park Ave. Café Corp.*, 62 AD3d 620, 621; *see Tucker v Toia*, 54 AD2d 322,

325-326). In this case, by determining that the Notice of Deficiency and Notice of Default are null and void and in thus vacating them, by determining that the term Deficiency as used in the Agreement should not include TI Costs and by determining that Citigroup had breached the Agreement, the court erred in determining the ultimate rights of the parties. We therefore conclude that the order should be further modified by vacating the first through the fourth ordering paragraphs.

Undertaking

We further agree with Citigroup that the court erred in granting a preliminary injunction without also ordering Destiny Holdings to post an undertaking (*see* CPLR 6312 [b]; *Pamela Equities Corp.*, 62 AD3d 620; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 605; *Rust v Turgeon*, 295 AD2d 962, 963). In the interest of judicial economy, we fix the amount of the undertaking at $15 million, which we conclude is a reasonable amount to "reimburse [Citigroup] for damages sustained if it is later finally determined that the preliminary injunction was erroneously granted" (*Margolies v Encounter, Inc.*, 42 NY2d 475, 477). We therefore conclude that the order should be further modified by vacating the 10th ordering paragraph and by providing in the fifth through seventh ordering paragraphs that the preliminary injunction is granted upon condition that Destiny Holdings post an undertaking in the amount of $15 million within 20 days after service of the order of this Court with notice of entry (*see Crippen v United Petroleum Feedstocks*, 245 AD2d 152).

Conclusion

Accordingly, for the foregoing reasons, we conclude that the court did not abuse its discretion in granting Destiny Holdings a preliminary injunction but that the order should be modified by vacating the 1st, 2nd, 3rd, 4th, 8th, and 10th ordering paragraphs and by providing in the 5th, 6th, and 7th ordering paragraphs that the preliminary injunction is granted upon condition that Destiny Holdings post an undertaking in the amount of $15 million within 20 days after service of the order of this Court with notice of entry.

HURLBUTT, J.P., and PERADOTTO, J., concur with PINE, J.; FAHEY, J., dissents and votes to reverse in accordance with the following Opinion, in which GREEN, J., concurs: We respectfully dissent. There is no authority under New York law that entitles a party to a preliminary injunction requiring a lending institution to loan money. Accordingly, we conclude that Supreme Court abused its discretion in granting a preliminary injunction to plaintiff, Destiny USA Holdings, LLC (Destiny Holdings), and we would reverse the order, deny the motion seeking that relief and vacate the injunction.

I

The procedural vehicle at issue in this action is a motion for a preliminary injunction pursuant to CPLR 6301. Destiny Holdings commenced this action asserting causes of action for, inter alia,

breach of contract. Specifically, Destiny Holdings alleged that defendant, Citigroup Global Markets Realty Corp. (Citigroup), breached the parties' Amended and Restated Building Loan, Project Loan and Security Agreement (Agreement). According to Destiny Holdings, Citigroup has not funded $68.4 million of a $155 million construction loan that constitutes the private financing component of an approximately $330 million project to construct a mall near the City of Syracuse (Project). At the time it commenced the action, Destiny Holdings also moved by order to show cause for a preliminary injunction pursuant to CPLR 6301 seeking to compel Citigroup to fund pending loan advances under the Agreement and to comply with the procedural requirements of the Agreement when approving future loan advances.

II

Our dissent is rooted in the sound principle that a preliminary injunction is not available in an action for money damages only (*see generally Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 544-546), inasmuch as "monies may not be considered the 'subject' of the action within the meaning of CPLR 6301" (*Halmar Distribs. v Approved Mfg. Corp.*, 49 AD2d 841, 842). Injunctive relief is unnecessary and unwarranted where a plaintiff has an adequate remedy in the form of monetary damages (*see D&W Diesel v McIntosh*, 307 AD2d 750). In the context of construction loans, it is unheard of for courts to grant preliminary injunctive relief requiring a party to lend money. Likewise, "New York courts will not order specific performance of a contract to lend money to a plaintiff, on the ground that money is fungible, and an injured party can borrow funds elsewhere and recover damages based on the higher costs it was forced to pay to the replacement lender" (*BT Triple Crown Merger Co., Inc. v Citigroup Global Mkts. Inc.*, 19 Misc 3d 1129[A], 2008 NY Slip Op 50941[U], *8; *see generally Bradford, Eldred & Cuba R.R. Co. v New York, Lake Erie & W. R.R. Co.*, 123 NY 316, 325-327).

The logic underlying the Court of Appeals' decision in *Credit Agricole Indosuez* is instructive and guides our analysis of this case.

In *Credit Agricole Indosuez*, the plaintiffs, which were foreign banking institutions, commenced an action seeking to recover unsecured debts of the defendants totaling $30 million (94 NY2d at 543-544). The Court of Appeals denied the plaintiffs' motion for a preliminary injunction seeking, inter alia, to prevent a defendant banking institution from transferring or conveying assets necessary to satisfy any judgment awarded to the plaintiffs (*id.* at 544). The conclusion of the Court of Appeals was simple and clear: "an unsecured creditor suing to collect a debt [is] not entitled to preliminary injunctive relief to prevent the debtor's dissipation of assets prior to judgment" (*id.* at 546).

In reaching that conclusion, the Court of Appeals relied on the principles that "provisional injunctive relief [is typically] limited to equitable actions where the defendant threatened to violate the

rights of the plaintiff '*respecting the subject of the action*, which would tend to render the judgment ineffectual' " (*id.* at 545), and that a plaintiff in an action seeking a money judgment " '*has no rights as against the property of the defendant* until he [or she] obtains a judgment, and *until then he [or she] has no legal right to interfere with the defendant in the use and sale of the same*' " (*id.* at 545-546). The Court of Appeals referred to the analysis of the United States Supreme Court to support the proposition that

> "no provisional injunctive remedy [is] available [in a money action on a debt] because of 'the substantive rule that a general creditor (one without a judgment) ha[s] no cognizable interest, either at law or in equity, in the property of his debtor, and therefore [cannot] interfere with the debtor's use of that property' " (*id.* at 546, quoting *Grupo Mexicano de Desarrollo, S.A. v Alliance Bond Fund, Inc.*, 527 US 308, 319-320).

The decision in *Credit Agricole Indosuez* sets forth two exceptions to the general rule that would warrant a preliminary injunction in an action for money damages only. First, an exception would be warranted when "the equitable relief in the case was granted under procedures independent of CPLR 6301" and, second, an exception would be warranted when "the suit involve[s] claims of the plaintiff to a specific fund, rightly regarded by the court as 'the subject of the action'. . ., making a preliminary injunction appropriate under the express wording of that provision" (*id.* at 548).

The first of those exceptions is obviously inapplicable to this case, given the manner in which the relief here was granted. The second exception applies to an action seeking to recover a specific fund. While this action is clearly for a specific *sum* of money, it does not seek recovery from a specific *fund*. Indeed, there is no evidence in the record establishing the existence of any specific fund. Consequently, the second exception is also inapplicable (*see Dinner Club Corp. v Hamlet on Olde Oyster Bay Homeowners Assn., Inc.*, 21 AD3d 777, 778; *Leo v Levi*, 304 AD2d 621, 623).

III

There is little, if any, fundamental distinction between the facts of this case and those of *Credit Agricole Indosuez*. Similar to the obligation owed to the plaintiff foreign banking institutions in *Credit Agricole Indosuez*, this case involves a monetary obligation owed to Destiny Holdings by Citigroup. Just as an unsecured creditor attempting to collect a debt is not entitled to preliminary injunctive relief to prevent the dissipation of a debtor's assets prior to judgment, so too is a lendee not entitled to preliminary injunctive relief encumbering the assets of a lender in circumstances such as these. Put more simply, "monies may not be considered the 'subject' of the action within the meaning of CPLR 6301" (*Halmar Distribs.*, 49 AD2d at 842), and preliminary injunctive relief is an improper method

of enforcing the Agreement (*see generally Credit Agricole Indosuez*, 94 NY2d at 550-551).

IV

As the majority notes, a party seeking a preliminary injunction must demonstrate "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (*Doe v Axelrod*, 73 NY2d 748, 750; *see J. A. Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 406; *Miller v Powers*, 30 AD3d 1060). The "irreparable injury" element of that test generally cannot be established where the damages are calculable because, as the majority notes, the plaintiff would have an adequate remedy in the form of a determinable amount of money damages (*see D&W Diesel*, 307 AD2d at 751; *see also Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415; *Credit Agricole Indosuez*, 94 NY2d at 545).

The majority cites authority for the proposition that " 'cases of construction mortgages are an exception' " to the rule requiring the party seeking a preliminary injunction to demonstrate irreparable harm, but the majority cites no controlling authority to support that proposition. The majority also concludes that the nature of the Project and the alleged inability of Destiny Holdings to obtain a replacement loan warrants an exception to that rule. The record, however, contains no evidence that Destiny Holdings ever applied for a replacement loan. Likewise, there is no support in the record for the majority's conclusion that an "enormous potential" for harm to the reputation of Destiny Holdings exists, other than the bald assertion of a principal of Destiny Holdings that its reputation would be damaged as a result of its failure to complete the Project.

The core of the majority's argument is that the nature of the Project makes it unique and thus that Destiny Holdings would be entitled to specific performance. While the scope of the Project may be unique to the region in both its size and impact, the record clearly establishes that the Agreement itself is simply one to loan money in order to finance construction.

V

Accordingly, we conclude that the court abused its discretion in granting Destiny Holdings a preliminary injunction, and we therefore would reverse the order, deny the motion seeking that relief and vacate the injunction.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1140

KA 06-01297

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE KIMBROUGH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered February 9, 2006. The judgment convicted defendant, upon a jury verdict, of attempted aggravated assault upon a police officer or a peace officer, burglary in the third degree and criminal possession of stolen property in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted aggravated assault upon a police officer or a peace officer (Penal Law §§ 110.00, 120.11). Defendant failed to preserve for our review his contention that the conviction of that crime is not supported by legally sufficient evidence inasmuch as "his motion for a trial order of dismissal with respect to that [crime] 'was not specifically directed at the ground[s] advanced on appeal' " (*People v Townsley*, 50 AD3d 1610, 1611, *lv denied* 11 NY3d 742; *see People v Gray*, 86 NY2d 10, 19). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Finally, the sentence is not unduly harsh or severe.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1144

KA 06-00965

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONOVAN L. ZUHLKE, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered April 5, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him, following a jury trial, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]), defendant contends that the evidence is legally insufficient to support the conviction because the People failed to establish that he acted with the requisite intent for accomplice liability. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Whether an accessory shares the intent of a principal actor may be established by circumstantial evidence (*see generally People v Ozarowski*, 38 NY2d 481, 489; *People v Johnson*, 101 AD2d 684).

Here, it is undisputed that defendant knew that the other individuals in the vehicle in which he was a passenger planned to use the gun in an unlawful manner. The People presented evidence, including defendant's sworn statement, from which the jury could reasonably infer that defendant was a participant in the plan, from its inception, to acquire the gun and to locate an individual who would act as the gunman. Contrary to the contention of defendant, evidence of his flight from the scene of the shooting was admissible as circumstantial evidence of his consciousness of guilt (*see People v Lendore*, 36 AD3d 940, *lv denied* 8 NY3d 947).

Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1153

CA 09-00652

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF THE RIDGE ROAD FIRE DISTRICT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL P. SCHIANO, AS HEARING OFFICER
DESIGNATED PURSUANT TO THE COLLECTIVE BARGAINING
AGREEMENT BETWEEN RIDGE ROAD FIRE DISTRICT
AND RIDGE ROAD PROFESSIONAL FIREFIGHTERS
ASSOCIATION IAFF, LOCAL 3794, INTERNATIONAL
ASSOCIATION OF FIREFIGHTERS, AFL-CIO, RESPONDENT,
KEVIN NOWAK, AND RIDGE ROAD PROFESSIONAL
FIREFIGHTERS ASSOCIATION IAFF, LOCAL 3794,
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,
AFL-CIO, RESPONDENTS-APPELLANTS.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

COUGHLIN & GERHART, L.L.P., BINGHAMTON (MARY LOUISE CONROW OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered June 16, 2008 in a proceeding pursuant to CPLR article 78. The judgment granted the petition and annulled the determination of respondent Michael P. Schiano, as Hearing Officer.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is dismissed and the determination of respondent Michael P. Schiano, as Hearing Officer, is reinstated.

Memorandum: Respondents-appellants (hereafter, respondents) appeal from a judgment granting the petition pursuant to CPLR article 78 seeking to annul the determination of respondent Hearing Officer. The Hearing Officer had granted respondent Kevin Nowak benefits pursuant to General Municipal Law § 207-a upon finding that petitioner's determination denying Nowak benefits was not supported by substantial evidence, and Supreme Court annulled the Hearing Officer's determination upon concluding that petitioner's denial of benefits was supported by substantial evidence and that the Hearing Officer's determination was arbitrary and capricious. That was error.

Pursuant to the collective bargaining agreement (CBA) entered into between petitioner and respondent the Ridge Road Professional Firefighters Association IAFF, Local 3794, International Association of Firefighters, AFL-CIO (hereafter, Union), an employee who was denied benefits pursuant to General Municipal Law § 207-a was entitled to appeal that determination to the Board of Fire Commissioners (Board), which would then appoint a hearing officer chosen from a list of names mutually agreed upon by the Board and the Union. The CBA provided that "[i]t is the employee['s] burden to prove [that] the employee is entitled to [General Municipal Law §] 207-a benefits" and that the hearing officer shall issue a written decision containing findings of fact and conclusions of law (*cf. Matter of Poughkeepsie Professional Firefighters' Assn., Local 596, IAFF, AFL-CIO-CLC v New York State Pub. Empl. Relations Bd.*, 6 NY3d 514, 522).

Nowak applied for benefits after he experienced back pain while operating a vehicle, known as the Quint, in response to a fire alarm on November 7, 2002. It is undisputed that Nowak had sustained a prior non-work-related injury to his lower back in August 2002 and that, prior to that time, he had a history of other back injuries, both work related and non-work related. In January 2003 petitioner denied Nowak's request for benefits, and a hearing before a hearing officer thereafter was conducted pursuant to the terms of the CBA. The Hearing Officer determined that respondents presented substantial evidence that the disability was related to the performance of Nowak's duties. Although Supreme Court transferred the CPLR article 78 proceeding commenced by petitioner at that time to this Court pursuant to CPLR 7804 (g), this Court in turn vacated the order transferring the proceeding and remitted the matter to Supreme Court for a determination of the merits inasmuch as the Hearing Officer's determination "was not 'made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law' . . . [but, r]ather, the determination was the result of a hearing conducted pursuant to the terms of the [CBA]" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 41 AD3d 1219, 1220). Upon remittal, the court annulled the determination awarding benefits to Nowak upon concluding that the Hearing Officer had applied an incorrect standard of review and analysis. The Hearing Officer had analyzed the issue in terms of whether respondents presented substantial evidence to override petitioner's determination, and the court concluded that the Hearing Officer instead should have determined whether petitioner's determination was supported by substantial evidence. The court therefore remitted the matter to the Hearing Officer to apply the correct standard of review. Respondents did not take an appeal from that judgment of Supreme Court, and it therefore is not before us on this appeal (*see* CPLR 5501 [a]).

Upon remittal from Supreme Court, the Hearing Officer issued a second decision, concluding that petitioner's denial of benefits to Nowak was not supported by substantial evidence. Petitioner then commenced the instant CPLR article 78 proceeding and, as previously noted, the court granted the petition upon concluding that there was substantial evidence to support petitioner's denial of benefits to

Nowak and that the Hearing Officer's determination was arbitrary and capricious (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231).

We conclude that the court erred in determining that the denial of benefits to Nowak was supported by substantial evidence and thus that the Hearing Officer's determination to the contrary was arbitrary and capricious (*see generally Pell*, 34 NY2d at 230-231). Nowak was advised that he was denied benefits on the ground that his physician had indicated that his injury was related to the non-work-related injury in August 2002, and not a prior work-related injury sustained in November 1999. At the hearing, petitioner presented the testimony and report of a physician who reviewed Nowak's medical records and agreed that "something about that day [i.e., November 7, 2002] caused a flare up of pain." The physician further concluded, however, that the pain was related to the prior non-work-related injury sustained in August 2002, not the prior work-related injury sustained in November 1999. The court therefore determined that there was substantial evidence to support the denial of benefits. We disagree, inasmuch as petitioner also presented the testimony of the battalion chief that, after returning from the response to the fire alarm on November 7, 2002, he observed that Nowak appeared to be in pain. After determining that Nowak began experiencing back pain while operating the Quint, the battalion chief took Nowak off duty and transported him to the hospital.

It is well established that, "consistent with a liberal reading of section 207-[a], a qualified [employee] need only prove a direct causal relationship between job duties and the resulting . . . injury . . . Preexisting non-work-related conditions do not bar recovery under section 207-[a] where [the employee] demonstrates that the job duties were a direct cause of the disability" (*Matter of White v County of Cortland*, 97 NY2d 336, 340; *see Matter of Theroux v Reilly*, 1 NY3d 232, 243-244). Here, consistent with the requirements of the CBA, respondents, through the testimony of Nowak and his treating physician, demonstrated that the job duties performed by Nowak were a direct cause of his disability. Furthermore, as previously noted, petitioner presented the testimony of the battalion chief who observed Nowak after exiting the Quint and determined that Nowak began to experience pain while operating the Quint. We therefore conclude that the denial of benefits, which was based on the determination that the disability was solely related to a prior non-work-related injury, is not supported by substantial evidence (*see generally Pell*, 34 NY2d at 230-231), and we thus conclude that the court erred in determining that the Hearing Officer's determination to that effect was arbitrary and capricious. We note that, although there was testimony concerning the issue whether the seat in the Quint malfunctioned, that issue is not determinative with respect to whether the denial of benefits is supported by substantial evidence, inasmuch as Nowak's operation of the Quint was a job duty that was a direct cause of Nowak's disability

(*see White*, 97 NY2d at 340).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1156

CA 09-00354

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

ONEIDA INDIAN NATION, A SOVEREIGN NATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HUNT CONSTRUCTION GROUP, INC.,
DEFENDANT-RESPONDENT.

WILLIAMS & CONNOLLY LLP, WASHINGTON, D.C. (DENNIS M. BLACK, OF THE WASHINGTON, D.C. AND MARYLAND BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND MACKENZIE HUGHES LLP, SYRACUSE, FOR PLAINTIFF-APPELLANT.

HOWREY LLP, WASHINGTON, D.C. (JEFFREY R. GANS, OF THE WASHINGTON, D.C. AND VIRGINIA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND HANCOCK & ESTABROOK, LLP, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered November 28, 2008 in an action for breach of contract. The order, insofar as appealed from, denied in part the motion of plaintiff to dismiss the counterclaims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the second counterclaim to the extent it alleges breach of implied warranties and dismissing that counterclaim to that extent and granting those parts of the motion with respect to the fourth and fifth counterclaims and dismissing those counterclaims and as modified the order is affirmed without costs.

Memorandum: Plaintiff, the owner of the Turning Stone Casino & Resort, commenced this action seeking damages resulting from the alleged breach by defendant of its construction contract with plaintiff. Plaintiff moved to dismiss the second through fifth counterclaims on the ground that it had waived sovereign immunity only with respect to counterclaims seeking to enforce the terms of the contract and thus that Supreme Court lacked subject matter jurisdiction over the second through fifth counterclaims. We agree with plaintiff that the court erred in denying those parts of the motion seeking to dismiss the second counterclaim to the extent it alleges the breach of implied warranties; the fourth counterclaim, for quantum meruit and unjust enrichment; and the fifth counterclaim, for an account stated. We therefore modify the order accordingly.

As we stated in an earlier appeal involving the same parties and

the same construction contract, "[i]t is well settled that Indian tribes possess common-law sovereign immunity from suit akin to that enjoyed by other sovereigns . . . Absent an explicit waiver of sovereign immunity, an Indian tribe cannot be sued in either state or federal court . . ., and waivers of immunity are to be strictly construed in favor of the [t]ribe . . . It is undisputed that [plaintiff] is a federally recognized Indian tribe that enjoys sovereign immunity . . . Here, however, section 4.9.9 of the contract provides in relevant part that [plaintiff] hereby expressly, unequivocally, and irrevocably waives its sovereign immunity from suit *solely for the limited purpose of enforcement of the terms of this Agreement*" (*Hunt Constr. Group, Inc. v Oneida Indian Nation*, 53 AD3d 1048, 1049, *lv denied* 11 NY3d 709 [internal quotation marks omitted and emphasis added]). Construing the waiver provision of the contract in favor of plaintiff, as we must (*see Matter of Ransom v St. Regis Mohawk Educ. & Community Fund*, 86 NY2d 553, 561), we agree with plaintiff that it limited its waiver of sovereign immunity to claims seeking to enforce the terms of the contract.

The contract permitted the parties to mediate "[a]ll claims, disputes and other matters . . . arising out of, or relating to, [the contract], the Project, the Work, the Contract Documents or the breach thereof" and, following the initial recommendation of the mediator, the parties were entitled to "bring any action *in a court of competent jurisdiction* to resolve the dispute" (emphasis added). A court of competent jurisdiction is one that has subject matter jurisdiction over the matter. Because plaintiff waived its sovereign immunity only for claims seeking to enforce the terms of the contract, the courts of New York are not courts of competent jurisdiction with respect to any other claims. As plaintiff correctly contends, the contract is not internally inconsistent. Plaintiff agreed to mediate claims beyond those encompassed by the waiver of sovereign immunity (*cf. C & L Enters. v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 US 411, 418-419). Even assuming, arguendo, that the contract is ambiguous, we conclude that any ambiguity must be resolved in favor of plaintiff (*see generally Ransom*, 86 NY2d at 561).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1171

CA 09-00060

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

PATRICIA A. GORSKI, PLAINTIFF-RESPONDENT,

V ORDER

ALLAN T. REID AND THOMAS G. REID,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (BRIAN HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 26, 2008 in a personal injury action. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment on the issue of liability.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1172

CA 09-00061

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

PATRICIA A. GORSKI, PLAINTIFF-RESPONDENT,

V ORDER

ALLAN T. REID AND THOMAS G. REID,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (BRIAN HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 30, 2008 in a personal injury action. The order denied the motion of defendants for leave to renew their opposition to plaintiff's motion for partial summary judgment.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1177

CA 08-01871

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

KATHLEEN DOODY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH L. GOTTSHALL AND DIANE A. GOTTSHALL,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

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

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered December 11, 2007 in a personal injury action. The order granted the motion of plaintiff for partial summary judgment on the issues of negligence, proximate cause and contributory negligence and denied the cross motion of defendants for summary judgment on the issue of negligence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion seeking partial summary judgment on the issues of proximate cause and contributory negligence and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained when she was struck by a vehicle operated by Diane A. Gottshall (defendant) and owned by both defendants. It is undisputed that defendant was turning right at a red light and that plaintiff was crossing the street at the intersection with the traffic light and pedestrian signal in her favor. We conclude with respect to the order in appeal No. 1 that Supreme Court properly granted the motion of plaintiff insofar as she sought partial summary judgment on the issue of defendant's negligence. Plaintiff established as a matter of law that defendant was negligent in failing to yield the right of way to her, and defendants failed to raise a triable issue of fact (*see Voskin v Lemel*, 52 AD3d 503). The court erred, however, in granting plaintiff's motion insofar as it sought partial summary judgment on the issues of the proximate cause of the accident and plaintiff's lack of contributory negligence. Plaintiff's own submissions in support of the motion raise triable issues of fact "whether [plaintiff] exercised

reasonable care to protect herself from danger while crossing the intersection" and whether any negligence on her part contributed to the accident (*Thoma v Ronai*, 189 AD2d 635, 637, *affd* 82 NY2d 736). We therefore modify the order in appeal No. 1 accordingly.

We conclude with respect to the order in appeal No. 2, issued following the trial on damages, that the court properly set aside the verdict and ordered a new trial "on its own initiative . . . in the interest of justice" based upon the misconduct of defendants' attorney (CPLR 4404 [a]). During the course of the trial, defendants' attorney failed to abide by the court's rulings, made inflammatory remarks concerning plaintiff's counsel and expert witnesses, repeatedly expressed his personal opinions regarding the cause and severity of plaintiff's injuries and made arguments to the jury on summation that were not supported by the evidence. We therefore agree with the court that the misconduct of defendants' attorney deprived plaintiff of a fair trial (*see Stewart v Olean Med. Group, P.C.*, 17 AD3d 1094, 1096-1097; *Kennedy v Children's Hosp. of Buffalo* [appeal No. 3], 288 AD2d 918). Based on our conclusion that plaintiff is entitled to a new trial on damages, there is no need to address the merits of plaintiff's post-trial motion concerning the amount of the jury's verdict on damages inasmuch as that motion is moot.

We further conclude, however, that the court erred in disqualifying defendants' attorney and his firm from representing defendants at the retrial. A party is entitled to be represented by counsel of his or her own choosing, and defendants, at a minimum, should have been afforded a reasonable opportunity to be heard on the issue of disqualification (*see generally S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443). In addition, defendants were entitled to a reasonable opportunity to be heard before the court imposed upon them "the costs incurred in the trial for the live medical experts consisting of transportation, and time charged, which will need to be duplicated in the second damages trial" (*see* 22 NYCRR 1000.16 [a]; *Deeb v Tougher Indus.*, 216 AD2d 667, 668; *Benatovich v Koessler*, 209 AD2d 984). We therefore modify the order in appeal No. 2 accordingly.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1178

CA 08-01872

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

KATHLEEN DOODY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH L. GOTTSHALL AND DIANE A. GOTTSHALL,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

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

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered May 13, 2008 in a personal injury action. The order, inter alia, set aside the jury verdict on damages and ordered a new trial on the court's own initiative and in the interest of justice.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the post-trial motion and by vacating those parts disqualifying defendants' attorney and his law firm and imposing costs upon defendants and as modified the order is affirmed without costs.

Same Memorandum as in *Doody v Gottshall* ([appeal No. 1] ___ AD3d ___ [Nov. 13, 2009]).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1182

CA 09-00457

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

JACQUELINE A. DALTON AND SCOTT DALTON, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF JACQUELINE A. DALTON, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARTIN K. MEMMINGER, JR., ET AL., DEFENDANTS, VILLAGE OF DEPEW AND DEPEW UNION FREE SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.

COHEN & LOMBARDO, P.C., BUFFALO (FRANK T. HOUSH OF COUNSEL), FOR DEFENDANT-APPELLANT VILLAGE OF DEPEW.

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), AND HURWITZ & FINE, P.C., BUFFALO (PAUL J. SUOZZI OF COUNSEL), FOR DEFENDANT-APPELLANT DEPEW UNION FREE SCHOOL DISTRICT.

THE HIGGINS KANE LAW GROUP, P.C., BUFFALO (TERRENCE P. HIGGINS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

BARTH SULLIVAN BEHR, BUFFALO (DOUGLAS P. HAMBERGER OF COUNSEL), FOR DEFENDANTS.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered September 25, 2008 in a personal injury action. The order, among other things, denied the motion of defendant Depew Union Free School District to dismiss the complaint against it.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on September 25, 2009 and filed in the Erie County Clerk's Office on October 27, 2009,

It is hereby ORDERED that said appeal taken by defendant Village of Depew is unanimously dismissed upon stipulation and the order is modified on the law by granting the motion and dismissing the complaint against defendant Depew Union Free School District and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Jacqueline A. Dalton (plaintiff) when she was struck by a vehicle while attempting to cross a state highway on foot, on her way to Depew High School. Prior to the start of the

school day, plaintiff had crossed the road to smoke a cigarette outside a local pizza parlor located across the street from the school, and she was returning to school when she was struck by the vehicle. Despite the existence of a traffic signal, crosswalk, and a crossing guard at an intersection a short distance down the road, plaintiff did not cross the street at that intersection. According to plaintiffs, Depew Union Free School District (defendant) was negligent in failing, inter alia, to supervise its students in a proper manner and to ensure the safety of students crossing the street.

We agree with defendant that Supreme Court erred in denying its motion to dismiss the complaint against it, and we therefore modify the order accordingly. It is well settled "that a student who leaves school grounds is not entitled to the protection of the school district . . ., and that is the case herein. 'A school's duty to its students is co-extensive with the school's physical custody and control over them . . ., and when a student is injured off school premises the school district cannot be held liable for the breach of a duty that generally extends only to the boundaries of the school property' " (*Davis v Marzo*, 55 AD3d 1404, 1404-1405; *see Pratt v Robinson*, 39 NY2d 554, 560; *Molina v Conklin*, 57 AD3d 860, 861-862).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1199

CA 09-00456

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

MARK HARRIS, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

HUEBER-BREUER CONSTRUCTION CO., INC.,
DEFENDANT-RESPONDENT-APPELLANT,
COLONIE MASONRY CORP. OF ALBANY, INC., COLLEGE
OF THE SENECAS, HOBART COLLEGE, WILLIAM SMITH
COLLEGE AND HOBART AND WILLIAM SMITH COLLEGE,
DEFENDANTS-RESPONDENTS.

THE CAREY FIRM, LLC, BUFFALO (SHAWN W. CAREY OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (GABRIELLE MARDANY HOPE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT AND DEFENDANTS-RESPONDENTS COLLEGE OF THE SENECAS, HOBART COLLEGE, WILLIAM SMITH COLLEGE AND HOBART AND WILLIAM SMITH COLLEGE.

LAW OFFICES OF MICHAEL M. EMMINGER, SYRACUSE (P. DAVID TWICHELL OF COUNSEL), LAW OFFICE OF ANDREA G. SAWYERS, MELVILLE, FOR DEFENDANT-RESPONDENT COLONIE MASONRY CORP. OF ALBANY, INC.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered July 31, 2008 in a personal injury action. The order, among other things, granted in part the motion of defendant Hueber-Breuer Construction Co., Inc. for summary judgment and denied plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendant Colonie Masonry Corp. of Albany, Inc. with respect to the common-law negligence, Labor Law §§ 200, 240 (1) and § 241 (6) causes of action insofar as the latter cause of action is based on the alleged violations of 12 NYCRR 23-1.7 (f), 23-5.1 (e) (1) and 23-5.3 (f) and reinstating those causes of action to that extent against that defendant, and by denying those parts of the motion of defendants Hueber-Breuer Construction Co., Inc., College of the Senecas, Hobart College, William Smith College and Hobart and William Smith College with respect to the Labor Law § 240 (1) and § 241 (6) causes of action insofar as the latter cause of action is based on the alleged violations of 12 NYCRR 23-1.7 (f), 23-5.1 (e) (1) and 23-5.3 (f) and reinstating those causes of action to that extent against those

defendants and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while working at a construction site. Defendant Hueber-Breuer Construction Co., Inc. (Hueber) was the general contractor on the project, the College defendants owned the building under construction, and defendant Colonie Masonry Corp. of Albany, Inc. (Colonie) was a masonry subcontractor. Plaintiff was allegedly injured when he attempted to descend a multi-level scaffold from the roof of the building to the ground. According to plaintiff, while descending from one tier of the scaffold to a lower tier to access a building window, he observed that the lower tier was not fully planked, and he injured his neck in attempting to prevent himself from falling as he stepped onto the lower tier.

We agree with plaintiff on his appeal that Supreme Court erred in granting those parts of the motions of defendants seeking summary judgment dismissing the Labor Law § 240 (1) cause of action, and we therefore modify the order accordingly. Defendants' own submissions raised triable issues of fact whether the injury to plaintiff " 'was proximately caused by the failure of a safety device to afford him proper protection from an elevation-related risk,' " despite the fact that he did not fall to the ground (*Franklin v Dormitory Auth. of State of N.Y.*, 291 AD2d 854, 854; *see also Lacey v Turner Constr. Co.*, 275 AD2d 734, 735). The court, however, properly denied plaintiff's cross motion seeking partial summary judgment on liability with respect to that cause of action. Although plaintiff established his entitlement to judgment as a matter of law with respect thereto, we conclude that defendants raised triable issues of fact whether safe alternative means of descending from the roof were available to plaintiff and whether his failure to use those alternative means was the sole proximate cause of his injury (*see Montgomery v Federal Express Corp.*, 4 NY3d 805; *cf. Willard v Thomas Simone & Son Bldrs., Inc.*, 45 AD3d 1276, 1277-1278).

We further conclude that the court erred in granting those parts of the motions of defendants seeking summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it is based on the alleged violations of 12 NYCRR 23-1.7 (f), 23-5.1 (e) (1) and 23-5.3 (f), and we therefore further modify the order accordingly. We agree with plaintiff that defendants failed to establish as a matter of law that they did not violate those regulations or that any alleged violations were not a proximate cause of plaintiff's injuries (*see Clapp v State of New York* [appeal No. 2], 19 AD3d 1113). We agree with the court, however, that 12 NYCRR 23-1.7 (b) does not apply to the accident because plaintiff did not fall into a hazardous opening (*see Bennion v Goodyear Tire & Rubber Co.*, 229 AD2d 1003).

The court erred in granting those parts of the motion of Colonie seeking summary judgment dismissing the Labor Law § 240 (1) and § 241 (6) causes of action against it on the additional ground that Colonie is not subject to the liability under those statutes based on its status as a subcontractor. Colonie failed to meet its initial burden

of establishing as a matter of law that it was not an agent of Hueber or the Colleges (*see Predmore v EJ Constr. Group, Inc.*, 51 AD3d 1405, 1406, *lv dismissed* 10 NY3d 952). Even assuming, arguendo, that Colonie established its entitlement to judgment as a matter of law dismissing those causes of action against it, we conclude that the submissions of plaintiff, Hueber and the College defendants "raise triable issues of fact whether [Colonie] had the authority 'to supervise or control plaintiff or the injury-producing work' " and thus whether Colonie is subject to liability as an agent of the owner or general contractor (*Predmore*, 51 AD3d at 1406). Based on our determination herein that the Labor Law § 241 (6) cause of action is viable only to the extent that it is based on the alleged violations of 12 NYCRR 23-1.7 (f), 23-5.1 (e) (1) and 23-5.3 (f), we conclude that the issues of fact concerning Colonie's liability as an agent with respect to Labor Law § 241 (6) are limited to the alleged violations of those regulations. The court also erred in granting those parts of the motion of Colonie seeking summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against it, and we therefore further modify the order accordingly. There are triable issues of fact whether Colonie "possessed the requisite supervisory control over that portion of the work activity bringing about the injury to enable it to prevent the creation of the unsafe condition or plaintiff's exposure to it" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 353).

Finally, we reject the contention of Hueber on its cross appeal that the court erred in denying that part of its motion seeking summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against it. By its own submissions, Hueber raised a triable issue of fact whether it had supervisory control over plaintiff's work (*see Riordan v Robert F. Hyland & Sons, Inc.*, 43 AD3d 1329).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1222

CA 08-00587

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

NOCO ENERGY CORP., CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 103873.)

WOLFGANG & WEINMANN, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR CLAIMANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MICHAEL S. BUSKUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Philip J. Patti, J.), entered February 11, 2008 in an eminent domain proceeding. The judgment, following a trial, awarded claimant damages in the amount of $617,650, plus interest.

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

Memorandum: Claimant commenced this eminent domain proceeding seeking damages for defendant's appropriation of its property. Following a trial, the Court of Claims awarded claimant damages in the amount of $617,650, plus interest. We reject claimant's contention that the award is not supported by the weight of the evidence. "In a condemnation case, the court's award should be upheld where it is within the range of expert testimony or otherwise supported by the evidence and adequately explained by the court" (*Transitown Plaza Assoc. v State of New York*, 1 AD3d 997, 997; *see Kupiec v State of New York*, 45 AD3d 1416, 1417). Here, the court's award was based in part on the value of the property, if vacant, and that value was within the range of the values presented by the appraisers for both claimant and defendant, as was the final award of the value of the property, with improvements. We reject claimant's further contention that no range of values was created because the experts differed on the issue of the highest and best use of the property, if vacant. Even assuming, arguendo, that the parties' appraisers did so disagree, we conclude that the valuation of claimant's appraiser was "based on a mixed highest and best use" (*West Seneca Cent. School Dist. v State of New York*, 60 AD2d 760, 760; *cf. 1250 Cent. Park Ave. v State of New York*, 58 AD2d 688, 689; *Roffle v State of New York*, 40 AD2d 575).

In addition, we reject claimant's contention that the court

failed to provide an adequate explanation for its findings. Indeed, we conclude that, despite the failure of the court to include in its findings the mathematical computations used in determining the value of the property, the court's findings nevertheless were "sufficiently explicit to permit intelligent review" (*Moran v State of New York*, 29 AD2d 705, 705). Such review is possible where a court supports its variances from an expert's valuations either by "explicit computation *or* criticism of [the expert's] comparables or adjustments" (*Lawyers Coop. Publ. Co. v State of New York*, 45 AD2d 927, 927 [emphasis added]). Here, the court adequately explained each adjustment made by the court to the experts' comparable sales, and those adjustments are supported by the record (*cf. Moran v State of New York*, 44 AD2d 894, 895). Contrary to claimant's further contention, the court did not abuse its discretion in granting defendant's request to reopen the case for the submission of additional evidence before the court issued its decision (*see generally* Court of Claims Act § 9 [8]; *Tebor v State of New York*, 92 AD2d 749). Finally, in light of our decision, we need not address claimant's remaining contention.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1228

CAF 09-00917

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

IN THE MATTER OF SAMANTHA T.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

ORDER

ARDETH L. HOUDE, LAW GUARDIAN, ROCHESTER, FOR RESPONDENT-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (PAUL N. HUMPHREY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered on November 12, 2008 pursuant to Family Court Act article 7. The order, insofar as appealed from, placed respondent in the care and custody of the Monroe County Department of Human Services, Division of Social Services, for a period of up to 12 months.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see generally Matter of Matthew C.*, 37 AD3d 1092; *Matter of Kale F.*, 269 AD2d 832; *Matter of Alice P.*, 254 AD2d 770).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1230

KA 08-01375

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KEON HART, 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 (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered May 23, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1231

KA 06-02482

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OSCAR E. GARCIA-GUAL, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered June 21, 2006. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his sentence is unduly harsh and severe. We agree with defendant that, in reviewing his contention, it is inappropriate for this Court to address whether the sentencing court abused its discretion (*see generally People v Delgado*, 80 NY2d 780, 782). Pursuant to CPL 470.15 (2) (c), we may modify a judgment "by reversing it with respect to the sentence" in the event that the sentence is illegal and, pursuant to CPL 470.15 (6) (b), we may reverse or modify a judgment as a matter of discretion in the interest of justice in the event that "the sentence, though legal, was unduly harsh or severe." We also agree with the further contention of defendant that the fact that he received the bargained-for sentence does not preclude him from seeking our discretionary review of his sentence pursuant to CPL 470.15 (6) (b) (*see People v Smith*, 32 AD3d 553, 554; *see generally People v Pollenz*, 67 NY2d 264; *People v Thompson*, 60 NY2d 513, 519-520). To the extent that prior decisions of this Court, including *People v McGovern* (265 AD2d 881, *lv denied* 94 NY2d 882), suggest a rule to the contrary, those decisions are not to be followed. Nevertheless, we conclude that defendant's sentence is neither unduly harsh nor severe.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1232

KA 07-01972

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GRADY L. JOHNSON, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered October 21, 2005. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1233

KA 07-00893

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DONALD F. BROWN, DEFENDANT-APPELLANT.

ROBERT J. GALLAMORE, OSWEGO, FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered October 17, 2006. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and robbery in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1234

KA 07-01130

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ASTIN BENTON, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered April 13, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1235

KA 08-00839

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY JAMES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered March 28, 2008 pursuant to the 2005 Drug Law Reform Act. The order, inter alia, granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and imposed a new sentence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting those parts vacating the sentence imposed February 24, 2004 and imposing a new sentence and as modified the order is affirmed, the sentence imposed February 26, 2008 is vacated, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and imposing a determinate term of imprisonment of 6½ years plus a five-year period of postrelease supervision. We previously reversed the sentence imposed following defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v James*, 48 AD3d 1244).

We reject defendant's contention that the new sentence imposed is harsh and excessive. The court upon remittal properly set forth its reasons for the new sentence, taking into consideration defendant's criminal history, the magnitude of the narcotics conspiracy and defendant's role in it, the advantageous terms of the original plea bargain, and the fact that defendant's sentence had previously been reduced from the sentence included in the original plea bargain. We note that the new sentence is only six months longer than the shortest

sentence defendant could receive pursuant to Penal Law § 70.71 (3) (b) (ii), and we conclude that the court properly exercised its discretion in determining the length of the new sentence (*see generally People v Murray*, 58 AD3d 1073, 1076, *lv denied* 12 NY3d 786; *People v Ensley*, 53 AD3d 929). We reject defendant's further contention that the new sentence was unauthorized as a matter of law, inasmuch as the new sentence falls within the sentencing parameters of Penal Law § 70.71 (3) (b) (ii).

For the reasons set forth in our decision in *People v Graves* (___ AD3d ___ [Oct. 9, 2009]), however, we conclude that the court erred in imposing the new sentence without first affording defendant the opportunity to appeal from the order specifying the new sentence that the court would impose and to withdraw his application for resentencing following our determination of that appeal. We therefore modify the order by deleting those parts vacating the original sentence and imposing a new sentence, vacate the new sentence imposed, and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (*see People v Boatman*, 53 AD3d 1053, 1054).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1237

CAF 08-01195

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

IN THE MATTER OF RODNEY J. THAYER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROSEMARY THAYER, RESPONDENT-APPELLANT.

IN THE MATTER OF ROSEMARY THAYER,
PETITIONER-APPELLANT,

V

RODNEY J. THAYER, RESPONDENT-RESPONDENT.

IN THE MATTER OF RODNEY J. THAYER,
PETITIONER-RESPONDENT,

V

ROSEMARY THAYER, RESPONDENT-APPELLANT.

IN THE MATTER OF ROSEMARY THAYER,
PETITIONER-APPELLANT,

V

RODNEY J. THAYER, RESPONDENT-RESPONDENT.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

PETER J. DIGIORGIO, JR., LAW GUARDIAN, UTICA, FOR AUTUMN L.T. AND RODNEY J.T., JR.

ABBIE GOLDBAS, LAW GUARDIAN, UTICA, FOR ASHLEY T. AND NICHOLAS T.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered May 5, 2008 in a proceeding pursuant to Family Court Act article 6. The order granted the parties joint custody of their four children, with primary physical residence with petitioner-respondent, Rodney J. Thayer.

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

Memorandum: Respondent-petitioner mother appeals from an order granting the parties joint custody of their four children, with primary physical residence with petitioner-respondent father and visitation to the mother. Following a lengthy hearing, Family Court determined that the father would provide greater stability to the children and that it would be in their best interests to reside together with him. That determination, based in large part upon the court's firsthand assessment of the character and credibility of the parties, is entitled to great deference (*see Matter of Thayer v Ennis*, 292 AD2d 824). We decline to disturb that determination, inasmuch as it is supported by a sound and substantial basis in the record (*see Matter of Krug v Krug*, 55 AD3d 1373).

The mother failed to preserve for our review her contentions with respect to the tape recordings made by the father (*see generally Matter of Graham v Thering*, 55 AD3d 1319, *lv denied* 11 NY3d 714). In any event, the record establishes that the tape recordings did not influence the court's determination, and thus any error with respect thereto is harmless (*see generally id.*; *Matter of Mathieu v Grosser*, 5 AD3d 1069).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1238

CAF 08-00175

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

IN THE MATTER OF SHAD S., JR.

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

AMY C.Y., RESPONDENT-APPELLANT.

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 SHAD S., JR.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered December 28, 2007 in a proceeding pursuant to Social Services Law § 384-b. The order revoked an extended suspended judgment and terminated respondent's parental rights.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Erie County, for a new dispositional hearing in accordance with the following Memorandum: Respondent mother appeals from an order that, inter alia, revoked an extended suspended judgment entered upon a finding of permanent neglect and terminated her parental rights with respect to the child. We note at the outset that the mother's contention that Family Court failed to consider the tolling provisions of Family Court Act § 633 (e) when it set the expiration date of the extended suspended judgment is raised for the first time on appeal and thus is not properly before us (*see* CPLR 5501 [a] [3]; *see also Matter of James E.*, 17 AD3d 871, 873). In any event, we conclude that the expiration date of the extended suspended judgment is of no moment inasmuch as the mother is alleged to have violated the terms and conditions of that suspended judgment. If the agency establishes "by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Ronald O.*, 43 AD3d 1351, 1352; *see* Family Ct Act § 633 [f]; *Matter of Terry L.G.*, 6 AD3d 1144). Here, petitioner met that burden with respect to the extended suspended judgment (*see Ronald O.*, 43 AD3d at 1352; *Terry L.G.*, 6 AD3d 1144). Petitioner presented evidence at the hearing establishing that the mother failed to obtain suitable housing, failed to attend two out of three appointments with the child's psychologist and failed to provide

required documentation concerning her employment and mental health treatment in a timely manner. In addition, petitioner established that the mother failed to demonstrate the parenting skills necessary to understand the child's unique educational situation.

Nevertheless, we further conclude under the circumstances of this case that, "based on new facts and allegations[that] this Court may properly consider . . ., including that the child is [no longer in a preadoptive home] and will not consent to adoption . . ., it is not clear that termination of the mother's parental rights is in the child's best interests" (*Matter of Danielle Joy K.*, 60 AD3d 948, 949, *lv dismissed* 12 NY3d 865; *see Matter of Kayshawn Raheim E.*, 56 AD3d 471, 473, *lv denied* 12 NY3d 702, 703). We therefore reverse the order and remit the matter to Family Court for a new dispositional hearing to determine the child's best interests.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1239

CAF 08-01101

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

IN THE MATTER OF ELSWORTH L.W.,
PETITIONER-APPELLANT,

V ORDER

PAMELA D. AND ROBERT D.,
RESPONDENTS-RESPONDENTS.

JAMES P. DAVIS, BUFFALO, FOR PETITIONER-APPELLANT.

PAMELA D. AND ROBERT D., RESPONDENTS-RESPONDENTS PRO SE.

JEFFREY M. HARRINGTON, LAW GUARDIAN, LACKAWANNA, FOR SAMANTHA P.D.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered April 8, 2008 in a paternity proceeding. The order dismissed the petition.

Now, upon reading and filing the stipulation of discontinuance signed by petitioner, respondents, the attorney for petitioner and the Law Guardian on August 12, 2009,

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1240

CA 09-00455

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

IN THE MATTER OF THE APPLICATION OF ROSANNA E. HECKL, OLIVIA J. COREY, CHRISTOPHER M. COREY, AND THOMAS J. COREY, PETITIONERS-RESPONDENTS, MEMORANDUM AND ORDER

FOR THE APPOINTMENT OF A PERSONAL NEEDS AND PROPERTY MANAGEMENT GUARDIAN OF AIDA C., AN ALLEGED INCAPACITATED PERSON, RESPONDENT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (ERICKA N. BENNETT OF COUNSEL), FOR RESPONDENT-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered December 1, 2008 in a proceeding pursuant to Mental Hygiene Law article 81. The order awarded petitioners attorneys' fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the amount of attorneys' fees awarded and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: On a recent appeal, we modified an order and judgment entered in this proceeding commenced by the children of the alleged incapacitated person (IP) (*Matter of Aida C.*, ___ AD3d ___ [Oct. 2, 2009]). Petitioners also have moved pursuant to Mental Hygiene Law § 81.16 (f) for "reasonable compensation" for their attorneys, seeking both attorneys' fees and disbursements. We note at the outset that Supreme Court awarded only the precise amount of attorneys' fees sought, despite the fact that the order specifies that the IP must "pay the fees and disbursements" of petitioners' attorneys. Petitioners did not cross-appeal from the order with respect to the court's failure to award the amount of disbursements sought, and the IP on appeal addresses only the issue of attorneys' fees. We thus also address only the issue of attorneys' fees.

In an affirmation submitted in support of the motion, one of petitioners' attorneys stated that he had attached to the court's copy of the motion a summary of the fees sought from petitioners and a breakdown of all time entries, as billed to petitioners. The attorney did not provide that information to the attorney for the IP despite

his request for such information, however, because the aforementioned appeal from the order and judgment was pending before this Court. The court nevertheless awarded petitioners the amount of attorneys' fees sought, based upon their submissions to the court. That was error. Although the court may properly award attorneys' fees based upon the submissions of the parties where there is no factual dispute regarding the number of hours and the hourly rates charged (*see Podhorecki v Lauer's Furniture Stores*, 201 AD2d 947), here the IP's attorney was unable to review the submissions in order to determine whether the fee requested should in fact be disputed. We conclude in any event that the court erred in awarding attorneys' fees "without providing 'a clear and concise explanation for its award in a written decision with reference to the following factors: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney's experience, ability, and reputation, (3) the amount involved and the benefit flowing to the [IP] as a result of the attorney's services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved' " (*Matter of Nebrich*, 23 AD3d 1018, 1018-1019; *see Matter of Lillian A.*, 56 AD3d 767, 768-769; *Matter of Enid B.*, 7 AD3d 704, 705). Thus, we modify the order accordingly, and we remit the matter to Supreme Court to determine the amount of reasonable attorneys' fees following a hearing, if necessary.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1241

CA 09-00587

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

THOMAS JOHNSON, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE STATE INSURANCE FUND, DEFENDANT-APPELLANT.

GREGORY J. ALLEN, ALBANY, HERZFELD & RUBIN, P.C., NEW YORK CITY (DAVID B. HAMM OF COUNSEL), FOR DEFENDANT-APPELLANT.

SLIWA & LANE, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 26, 2008 in a declaratory judgment action. The judgment, among other things, granted judgment in favor of plaintiff declaring that defendant is obligated to pay all costs and fees incurred by plaintiff in the defense of a prior appeal taken by defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the declaration and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that defendant is not obligated to pay the costs and fees incurred by plaintiff in the defense of the prior appeal taken by defendant

and as modified the judgment is affirmed without costs.

Memorandum: We agree with defendant that Supreme Court erred in granting judgment in plaintiff's favor declaring that defendant is obligated to pay all costs and fees incurred by plaintiff in the defense of an appeal taken by defendant from a prior judgment (*Thomas Johnson, Inc. v State Ins. Fund*, 50 AD3d 1544). The prior judgment, inter alia, granted that part of plaintiff's cross motion seeking summary judgment declaring that plaintiff is entitled to an attorney of its own choosing, at defendant's expense, in the underlying personal injury action. "[I]t is well settled that an insured may not be awarded attorney fees incurred in the prosecution of a declaratory [judgment] action against the insurer to determine coverage" (*Penn Aluminum v Aetna Cas. & Sur. Co.*, 61 AD2d 1119, 1120), unless the insured was "cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations" (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21), and that is not the

case here. Moreover, the fact that defendant took an appeal in a declaratory judgment action commenced by plaintiff is of no moment (*see generally Crouse W. Holding Corp. v Sphere Drake Ins. Co.*, 248 AD2d 932, *affd* 92 NY2d 1017). We therefore modify the judgment accordingly.

We have examined defendant's remaining contention and conclude that it is without merit.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1242

CA 09-00730

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

GLEN MORGAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID JACOBS AND KIRST CONSTRUCTION, INC.,
DEFENDANTS-APPELLANTS.

KIRST CONSTRUCTION INC., THIRD-PARTY PLAINTIFF,

V

H & H ROOFING, INC., THIRD-PARTY
DEFENDANT-APPELLANT.

MATTAR, D'AGOSTINO & GOTTLIEB, LLP, BUFFALO (DENNIS J. BISCHOF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LEWIS SCARIA & COTE, LLC, WHITE PLAINS (LORI B. LEWIS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order and judgment of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered February 24, 2009. The order and judgment, insofar as appealed from, denied those parts of the motions of defendants and third-party defendant seeking summary judgment dismissing the Labor Law § 241 (6) claim.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he attempted to start a roof-cutting machine while employed by third-party defendant on a renovation project. Supreme Court erred in denying that part of the motion of defendant David Jacobs and defendant-third-party plaintiff (hereafter, defendants), as well as that part of the motion of third-party defendant seeking summary judgment dismissing the Labor Law § 241 (6) claim. That claim is premised on the alleged violation by defendants of the obligation imposed on them by 12 NYCRR 23-9.2 (a) to maintain power-operated

equipment “in proper operating condition.” That portion of the regulation is “not specific enough to permit recovery under section 241 (6)” (*Misicki v Caradonna*, 12 NY3d 511, 520).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1243

CA 08-02299

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

DR. JOHN CHONG-HWAN WEE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UNITED MEMORIAL MEDICAL CENTER, BARBARA HANCOCK, STEVEN BUFFA, LORI GOERGEN AND ROSANN LOWDER, DEFENDANTS-RESPONDENTS.

JOHN CHONG-HWAN WEE, PLAINTIFF-APPELLANT PRO SE.

RICOTTA & VISCO, ATTORNEYS & COUNSELORS AT LAW, BUFFALO (JOHN VISCO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Mark H. Dadd, A.J.), entered August 18, 2008. The order, insofar as appealed from, denied plaintiff's motion for leave to reconsider and to settle the record on appeal.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reconsider is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: Because "[n]o appeal lies from that part of the order denying [plaintiff's] motion insofar as it sought leave to . . . reconsider" (*B.M.H. Mgt., Inc. v 81 & 3 of Watertown, Inc.*, 16 AD3d 1074, 1074, *lv denied* 5 NY3d 746; *see Hutchings v Hutchings*, 155 AD2d 973), we dismiss that part of the appeal challenging the denial of plaintiff's motion seeking leave to reconsider an earlier order. We otherwise affirm.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1245

CA 09-00368

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

BRADLEY MOLL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRANDWOOD, LLC, DEFENDANT-RESPONDENT.

BRANDWOOD, LLC, THIRD-PARTY PLAINTIFF,

V

BRENON BOYS, INC., DOING BUSINESS AS LEO BRENON TOP SOIL, THIRD-PARTY DEFENDANT-RESPONDENT.

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

GOERGEN & MANSON, WILLIAMSVILLE (JOSEPH G. GOERGEN, II, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO (STEPHEN P. BROOKS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 17, 2008 in a personal injury action. The order granted the motions of defendant and third-party defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his foot was caught in a soil shredding machine owned by his employer, third-party defendant. The soil had been excavated in connection with a housing development construction project on property owned by defendant-third-party plaintiff (hereafter, defendant), and third-party defendant had purchased the soil from defendant. A contractor hired by defendant had placed the soil in piles, and third-party defendant used its front loader to load the soil into its soil shredder. The processed soil was then removed from the site in third-party defendant's trucks and sold as top soil. Plaintiff was employed as a truck driver, and one of his duties was to stand on a platform and observe the soil that was placed into the hopper to be shredded, removing any objects that should not be in the

shredding machine. While performing that duty, plaintiff was injured when his foot became caught between the conveyor belt and the drum of the shredding machine. We note at the outset that plaintiff does not contend on appeal that Supreme Court erred in granting those parts of the motions of defendant and third-party defendant for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action, and he thus has abandoned any issues concerning the propriety of the order with respect to those causes of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

With respect to plaintiff's remaining cause of action, alleging the violation of Labor Law § 241 (6), we conclude that the court properly granted those parts of the motions of defendant and third-party defendant for summary judgment dismissing that cause of action. Pursuant to section 241 (6), "[a]ll areas in which construction, excavation or demolition work is being performed shall be so . . . operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places." Defendant and third-party defendant established that plaintiff was not employed in construction or excavation work (*see* 12 NYCRR 23-1.4 [b] [13], [19] - [21]) but, rather, he was employed in connection with the removal of top soil from the site, and plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Thus, although construction work was being performed on defendant's property, plaintiff's work in connection with the removal of top soil from the property was not part of that construction work (*see Piazza v Shaw Contract Flooring Servs., Inc.*, 39 AD3d 1218, 1219).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1247

CA 08-02617

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

JOAN KIERSZNOWSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GREGORY B. SHANKMAN, M.D., P.C., ET AL.,
DEFENDANTS,
AND YALE MATERIALS HANDLING CORPORATION,
DEFENDANT-RESPONDENT.

BOTTAR LEONE, PLLC, SYRACUSE (AARON J. RYDER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (JOHN P. FREEDENBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered September 22, 2008 in a personal injury action. The order granted the motion of defendant Yale Materials Handling Corporation for summary judgment and dismissed the complaint against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell from the operator's platform of a forklift truck in the course of her employment as an inventory control clerk. The accident occurred when plaintiff elevated the operator's platform approximately 12 feet above the floor and took a step back, unaware that a supplemental platform fabricated by her employer had become detached from the forklift truck. The forklift truck was equipped with a tether and safety belt and the tether was attached to the forklift truck, but plaintiff admittedly failed to fasten the safety belt correctly. According to plaintiff, the forklift truck was defectively designed by Yale Materials Handling Corporation (defendant), and defendant failed to provide adequate warnings with respect to the danger of falling from the operator's platform.

Supreme Court properly granted the motion of defendant seeking summary judgment dismissing the complaint against it. We note at the outset that plaintiff has failed to address any issues with respect to those parts of the motion seeking summary judgment dismissing the causes of action for breach of express and implied warranties, and we thus deem any such issues abandoned (*see Ciesinski v Town of Aurora*,

202 AD2d 984). With respect to the remaining two causes of action, for strict products liability and negligence, defendant met its initial burden by submitting the affidavit of the engineer responsible for the design of the forklift truck, who averred that the forklift truck met all applicable safety standards relating to its design (*see Wesp v Carl Zeiss, Inc*., 11 AD3d 965, 967). Plaintiff failed to raise a triable issue of fact in opposition to the motion by submitting the affidavit of her expert. It does not appear on the record before us that plaintiff's expert "has any experience or personal knowledge in the design, manufacture or use of forklift trucks, nor is the expert's conclusion that the forklift truck was defective and unsafe . . . supported by foundational facts, such as a deviation from industry standards or statistics showing the frequency of injuries caused by using such a forklift truck" (*Geddes v Crown Equip. Corp*., 273 AD2d 904, 905; *see Wesp*, 11 AD3d at 967).

With respect to the cause of action for failure to warn, defendant met its initial burden by establishing that plaintiff was aware of the hazards of operating the forklift truck without properly wearing her safety belt and ensuring that the supplemental platform was securely attached to the forklift truck. Under the circumstances, defendant had no duty to warn plaintiff because " 'a warning would have added nothing to [her] appreciation of the danger' " (*Theoharis v Pengate Handling Sys. of N.Y.*, 300 AD2d 884, 886, quoting *Liriano v Hobart Corp.*, 92 NY2d 232, 242). In any event, we conclude that the warning label affixed to the forklift truck adequately communicated the dangers at issue (*see id*.).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1250

TP 09-00909

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

IN THE MATTER OF MICHAEL SANTANA, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (SUSAN K. JONES OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered April 23, 2009) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1251

TP 09-00911

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

IN THE MATTER OF RICKIE DRAWHORN, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (SUSAN K. JONES OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered April 23, 2009) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1252

TP 09-00792

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

IN THE MATTER OF IVORY SHIRE, PETITIONER,

V ORDER

NORMAN B. BEZIO, DIRECTOR, SPECIAL HOUSING DISCIPLINARY, RESPONDENT.

IVORY SHIRE, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Livingston County [Robert B. Wiggins, A.J.], dated March 30, 2009) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1253

TP 09-00908

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

IN THE MATTER OF FRANKLYN FRIAS, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (SUSAN K. JONES OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered April 23, 2009) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1254

KA 08-01037

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LYNDA BUTLER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered November 9, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1255

KA 07-01183

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DELAMAR BROWN, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered November 6, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that he was denied a fair trial by prosecutorial misconduct during the cross-examination of a defense witness and on summation. Defendant failed to preserve that contention for our review (*see People v Bankston*, 63 AD3d 1616; *People v Haynes*, 35 AD3d 1212, 1213, *lv denied* 8 NY3d 946) and, in any event, it is without merit. The prosecutor properly attempted to impeach a defense witness whose testimony differed from his testimony as a prosecution witness in defendant's earlier trial, which resulted in a hung jury. The prosecutor's comments on summation were fair response to defense counsel's summation (*see People v Halm*, 81 NY2d 819, 821; *People v Seeler*, 63 AD3d 1595, 1596). Defendant also failed to preserve for our review his contention that certain alleged errors by County Court deprived him of a fair trial (*see* CPL 470.05 [2]), 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]).

By failing to move for a trial order of dismissal, defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, that challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). The testimony of the main prosecution witnesses was not incredible as a matter of law inasmuch as it was not "manifestly untrue, physically impossible, contrary to experience, or

self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925; *see People v Walker*, 50 AD3d 1452, 1452-1453, *lv denied* 11 NY3d 795, 931). Also, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The credibility of the witnesses was an issue for the jury to determine, and we perceive no basis for disturbing that determination (*see People v Massey*, 61 AD3d 1433, *lv denied* 13 NY3d 746; *People v Scott*, 60 AD3d 1396, 1397, *lv denied* 12 NY3d 821).

Defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to object to the prosecutor's comments on summation and failure to move for a trial order of dismissal. We reject that contention, inasmuch as such an objection and motion would have had no chance of success (*see People v Caban*, 5 NY3d 143, 152; *People v Francis*, 63 AD3d 1644). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant failed to preserve for our review his further contention that the court erred in its *Ventimiglia* ruling (*see People v McClain*, 250 AD2d 871, 872, *lv denied* 92 NY2d 901), 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 the contention of defendant, the court did not abuse its discretion in denying his request for expert fees for an investigator inasmuch as he failed to establish that those fees were necessary (*see People v Koberstein*, 262 AD2d 1032, 1033, *lv denied* 94 NY2d 798; *People v Drumgoole*, 234 AD2d 888, 889-890, *lv denied* 89 NY2d 1011; *People v Barber*, 154 AD2d 882, *lv denied* 75 NY2d 810, 917; *see generally* County Law § 722-c). Finally, the sentence is not unduly harsh or severe.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1258

KA 05-02127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS L. WILEY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 18, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the first degree, murder in the second degree (three counts) and criminal possession of a weapon in the third degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the fines imposed for criminal possession of a weapon in the third degree under the fifth, sixth, and seventh counts of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of murder in the first degree (Penal Law § 125.27 [1] [a] [xi]; [b]), three counts each of murder in the second degree (§ 125.25 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Viewing the evidence in light of the elements of murder in the first and second degrees as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to those counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's further contention, the evidence is legally sufficient to support the count of murder in the first degree inasmuch as the evidence establishes that defendant committed three murders "in a similar fashion" (§ 125.27 [1] [a] [xi]; *see also People v Shulman*, 6 NY3d 1, 34-35, *cert denied* 547 US 1043; *see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that his statements to the police were involuntary on the ground that his interview amounted to "psychological coercion." We reject that contention (*see generally People v Whorley*, 286 AD2d 858, 859, *lv denied* 97 NY2d 689). In

addition, the fact that the police were not truthful when they informed defendant that they had found evidence of a crime in the dumpster outside of his apartment did not render his statement involuntary, i.e., the police did not thereby create "a substantial risk that the defendant might falsely incriminate himself" (CPL 60.45 [2] [b] [i]; *People Hamelinck*, 222 AD2d 1024, *lv denied* 87 NY2d 921).

Defendant failed to preserve for our review his further contention that his written statement to the police should have been "severely redacted" before County Court admitted it in evidence (*see* CPL 470.05 [2]). Indeed, we note that defendant agreed to admit in evidence a partially redacted statement that contained references to his prior "institutionalization." We decline to exercise our power to review defendant's contention that the statement should have been "severely redacted" as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We agree with defendant, however, that the court erred in imposing a fine on each count of criminal possession of a weapon in the third degree (*see* Penal Law § 80.15). The People failed to establish that the possession of the kitchen knives used to commit the murders were acts "separate and distinct" from the murders (*People v Smith*, 294 AD2d 822, 823, *lv denied* 99 NY2d 620 [internal quotation marks omitted]). We therefore modify the judgment accordingly.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1259

KA 08-00012

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LYNDA BUTLER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Niagara County Court (Angelo J. Morinello, A.J.), rendered November 2, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1260

CAF 08-02343

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

IN THE MATTER OF ASA A., RESPONDENT-APPELLANT.
---------- MEMORANDUM AND ORDER
MONROE COUNTY ATTORNEY, PETITIONER-RESPONDENT.

ROBERT A. DINIERI, LAW GUARDIAN, CLYDE, FOR RESPONDENT-APPELLANT.

DANIEL M. DELAUS, COUNTY ATTORNEY, ROCHESTER (ALECIA J. SPANO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered September 25, 2008 in a proceeding pursuant to Family Court Act article 3. The order, insofar as appealed from, adjudged that respondent is a juvenile delinquent.

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 crimes of assault in the second degree (Penal Law § 120.05 [3]) and assault in the third degree (§ 120.00 [2]). Contrary to respondent's sole contention on appeal, we conclude that the evidence is legally sufficient to establish that the police officer involved sustained a physical injury within the meaning of Penal Law § 10.00 (9) (*see People v Chiddick*, 8 NY3d 445, 447-448; *People v Coombs*, 56 AD3d 1195, 1196, *lv denied* 12 NY3d 782; *Matter of Shawn L.*, 233 AD2d 953).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1261

CAF 08-01357

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

IN THE MATTER OF MICHAEL JACOBS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KATHLEEN CHADWICK, RESPONDENT-RESPONDENT.

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

TYSON BLUE, MACEDON, FOR RESPONDENT-RESPONDENT.

NANCY M. LORD, LAW GUARDIAN, LYONS, FOR MICHAELA J.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered January 16, 2008 in a proceeding pursuant to Family Court Act article 6. The order denied the petition.

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

Memorandum: Petitioner father appeals from an order denying his petition seeking visitation with the parties' daughter. Contrary to the contention of the father, Family Court properly based its determination on the mental health evaluation of the child, concluding that forced visitation with the father, who is incarcerated, would be harmful to the child's emotional and psychological well-being and thus would not be in the best interests of the child (*see Matter of Christina F.F. v Stephen T.C.*, 48 AD3d 1112, *lv denied* 10 NY3d 710). During the course of this proceeding, the father was incarcerated based upon his conviction of assault in the first degree, arising from his having attacked and beaten the child's older sister. The record establishes that the father had engaged in a pattern of domestic violence in the presence of the child who is the subject of this appeal, that she suffered from posttraumatic stress disorder, and that she did not wish to visit the father (*see Matter of Piwowar v Glosek*, 53 AD3d 1121).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1262

CA 08-02448

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

MYRNA WALKER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT WALKER, DEFENDANT-APPELLANT.

SHANLEY LAW OFFICES, MEXICO (P. MICHAEL SHANLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN M. MURPHY, JR., PHOENIX, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered April 3, 2008. The order, among other things, determined that the oral stipulation of the parties made in open court concerning the division of a parcel of real property did not express the true intent of the parties.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Oswego County, for further proceedings in accordance with the following Memorandum: As we noted when this case was previously before us on appeal (*Walker v Walker*, 42 AD3d 928, *lv dismissed* 9 NY3d 947), defendant moved for an order that, inter alia, directed plaintiff to comply with an oral stipulation of the parties made in open court concerning the division of a parcel of real property. The stipulation was incorporated but not merged in the parties' judgment of divorce. On the prior appeal, we concluded that Supreme Court erred in ordering the parcel to be divided in accordance with a survey map procured by plaintiff inasmuch as the stipulation was ambiguous, and we therefore reversed the order and remitted the matter to Supreme Court for a hearing to determine the intent of the parties at the time of the stipulation with respect to the division of the parcel in question. On remittal, the court determined, inter alia, that the oral stipulation did not express the true intent of the parties, and the court "again implement[ed]" the order that was the subject of the prior appeal.

We reject defendant's contention that the oral stipulation was clear on its face. To the contrary, the court properly determined that there was no meeting of the minds, inasmuch as the parties introduced conflicting evidence with respect to their intended division of the property at the time they entered into the stipulation and thereby established that there was a mutual mistake (*see Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d

446, 453). We agree with defendant, however, that the court abused its discretion in dividing the parcel in accordance with the survey map procured by plaintiff. The court, in effect, reformed the parties' oral stipulation by adopting plaintiff's interpretation of the stipulation based on the survey map, despite the fact that defendant rejected that interpretation. "It is well established that in order to reform a written agreement, it must be demonstrated that the parties came to an understanding but, in reducing it to writing, through mutual mistake or through mistake on one side and fraud on the other, omitted some provision agreed upon or inserted one not agreed upon" (*Slutzky v Gallati*, 97 AD2d 561, *lv denied* 61 NY2d 602). "Reformation is not a mechanism to interject into the writings terms or provisions not agreed upon or suggested by one party but rejected by the other" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 29, *lv dismissed in part and denied in part* 80 NY2d 1005, *rearg denied* 81 NY2d 782), and a court may not "substitute by reformation an agreement which it thinks is proper but to which the parties had never assented" (*Corcoran v Corcoran*, 73 AD2d 1037, 1038). Where, as here, the parties lack the requisite meeting of the minds when they enter into an oral stipulation, the appropriate relief is rescission of the stipulation and restoration of the parties to their pre-stipulation positions (*see County of Orange v Grier*, 30 AD3d 556, 556-557).

In the absence of a valid agreement concerning the division of the parcel in question, such division "must be based upon the equitable consideration and application" of the factors enumerated in Domestic Relations Law § 236 (B) (5) (d) (*Cooper v Cooper*, 217 AD2d 904, 905). We therefore reverse the order and remit the matter to Supreme Court for equitable distribution of the parcel in accordance with Domestic Relations Law § 236 (B) (5) (d) (*see generally Parsons v Parsons*, 101 AD2d 1017).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1263

CA 09-01014

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

PINO ALTO PARTNERS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-RESPONDENT,

ORDER

V

ERIE COUNTY WATER AUTHORITY, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, BUFFALO (DAVID T. ARCHER OF COUNSEL), AND RALPH C. LORIGO, WEST SENECA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered January 15, 2009. The order, insofar as appealed from, granted in part plaintiff's motion for class certification.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court (*Pino Alto Partners v Erie County Water Auth.*, 21 Misc 3d 1114[A], 2008 NY Slip Op 52070[U]).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1264

CA 09-00411

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

HENRIETTA PIPING, INC., PLAINTIFF-RESPONDENT,
ET AL., PLAINTIFF,

V ORDER

ANTETOMASO & MICCA GROUP, LLC,
DEFENDANT-APPELLANT.

LOUIS J. MICCA, PITTSFORD, FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered May 15, 2008 in a breach of contract action. The judgment awarded plaintiff Henrietta Piping, Inc. a money judgment upon a jury verdict.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1265

CA 08-02292

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

DALE J. MORRIS, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF STEPHANIE MORRIS, AN INFANT, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 106569.)

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), AND BURDEN, GULISANO & HICKEY, LLC, FOR CLAIMANT-APPELLANT.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, ALBANY (BENJAMIN F. NEIDL COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered October 9, 2008 in a personal injury action. The judgment dismissed the claim after a trial on liability.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1266

CA 09-00795

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

DARRELL WESSELDINE, PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF ONEIDA, DEFENDANT-RESPONDENT.

MICHELE E. DETRAGLIA, UTICA, FOR PLAINTIFF-APPELLANT.

DAVID R. DIODATI, NEW HARTFORD, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered September 18, 2008 in a personal injury action. The judgment dismissed the complaint.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1267

CA 09-00764

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

ROBERT DINEEN, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

DANIEL RECHICHI, CHRISTINE RECHICHI,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

PULOS AND ROSELL, LLP, HORNELL (WILLIAM W. PULOS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BEVERLEY S. BRAUN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered July 1, 2008 in a personal injury action. The order granted the motion of defendants Daniel Rechichi and Christine Rechichi for summary judgment dismissing the complaint against them and denied the cross motion of plaintiff for partial summary judgment.

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

Opinion by PERADOTTO, J.: In this appeal, we are asked to determine whether Daniel Rechichi and Christine Rechichi (defendants) are entitled to the exemption from liability afforded to owners of one- and two-family dwellings under Labor Law § 240 (1) and § 241 (6) where plaintiff seeks damages for injuries he sustained while repairing a barn on defendants' property, which did not contain a single-family dwelling at the time of the accident. Under the circumstances of this case, we conclude that Supreme Court properly determined that the homeowner exemption applies to defendants because they intended to build a single-family residence on the property at the time of the accident and the barn was used solely for residential purposes.

Facts and Procedural History

Defendants and two other defendants who are not parties to this appeal are the joint owners of approximately 130 acres of property bordering County Route 113 in Hammondsport. When defendants purchased the undeveloped property in 2001, they planned to build a home, a barn and a pond on a six-acre parcel of the property. In February 2003,

defendants hired plaintiff, a self-employed carpenter, to construct a pole barn on the property. On June 17, 2003, plaintiff fell from a ladder while inspecting the roof of the barn for leaks. At the time of the accident, the barn was the only structure located on the property, although defendants subsequently constructed a single-family home on the property.

Plaintiff commenced this action asserting causes of action for violations of Labor Law §§ 200, 240 (1) and § 241 (6), as well as common-law negligence. Defendants moved for summary judgment dismissing the complaint against them on the grounds that they are entitled to the homeowner exemption under Labor Law § 240 (1) and § 241 (6) and that they are not liable under the Labor Law § 200 and common-law negligence causes of action because they did not direct or control plaintiff's work. Plaintiff cross-moved for partial summary judgment on the Labor Law § 240 (1) cause of action and consented to dismissal of the section 200 cause of action. The court granted defendants' motion and denied plaintiff's cross motion. The court determined with respect to sections 240 (1) and 241 (6) of the Labor Law that defendants were entitled to the homeowner exemption therein because the record established that they intended to use the barn as storage for their personal belongings, not for any commercial purpose, and that the barn was part of defendants' plan to construct a personal residence. We note at the outset, inasmuch as plaintiff does not challenge the dismissal of his common-law negligence cause of action, any issue with respect thereto is deemed abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984).

Discussion

Sections 240 (1) and 241 of the Labor Law both exempt from liability "owners of one[-] and two-family dwellings who contract for but do not direct or control the work . . . ." Here, it is undisputed that defendants did not direct or control plaintiff's work, and defendants concede that plaintiff is a covered worker under Labor Law § 240 (1) and § 241 (6). Thus, the sole question presented on this appeal is whether defendants are entitled to the benefit of the statutory exemption for owners of one- and two-family dwellings (*see* § 240 [1]; § 241 [6]), despite the fact that plaintiff was injured during the construction of a barn and defendants' residence had not yet been constructed at the time of the accident. Although this case involves somewhat novel facts, we conclude that the court properly determined that defendants are entitled to the benefit of the homeowner exemption and are therefore exempt from liability under Labor Law § 240 (1) and § 241 (6).

The homeowner exemption, which was added to Labor Law § 240 (1) and § 241 in 1980, was "intended by the Legislature to shield homeowners from the harsh consequences of strict liability under the provisions of the Labor Law[and] reflect[s] the legislative determination that the typical homeowner is no better situated than the hired worker to furnish appropriate safety devices and to procure suitable insurance protection" (*Bartoo v Buell*, 87 NY2d 362, 367).

The Memorandum of the Law Revision Commission states in support of the amendments that:

> "It is unrealistic to expect the owner of a one[-] or two[-]family dwelling to realize, understand and insure against the responsibility sections 240 and 241 now place upon him [or her] . . . [S]uch owners ought to be secure in the reasonable assumption that if they have no direction or control over the work, they cannot be held strictly liable" (Mem of Law Rev Commn, Bill Jacket, L 1980, ch 670).

The Law Review Commission summarized its position with respect to the amendments in its Recommendation to the 1980 Legislature:

> "In short, owners of one[-] and two[-]family dwellings cannot be expected to be in a position, as respects the work, which is dominant over that of the person doing the work . . . This should be true even in the extreme case where the injured worker is a self-employed, self-proclaimed 'contractor' without insurance" (Recommendation of Law Rev Commn, Bill Jacket, L 1980, ch 670).

The statutes do not define "dwelling." In light of the remedial purpose of the amendments, however, the Court of Appeals has cautioned against applying "an overly rigid interpretation of the homeowner exemption and [instead has] employed a flexible 'site and purpose' test to determine whether the exemption applies" (*Bartoo*, 87 NY2d at 367-368). Under that test, "whether the exemption is available to an owner in a particular case turns on the site and purpose of the work" (*Cannon v Putnam*, 76 NY2d 644, 650; *see also Trala v Egloff*, 258 AD2d 924).

As an initial matter that, although plaintiff's accident occurred during the construction of a barn rather than a residence, that fact does not by itself bar application of the homeowner exemption. The courts have not limited the application of the homeowner exemption solely to work performed on the residential structure itself. Indeed, a barn, a garage, or other ancillary structure located on property that also contains a residence clearly falls within the definition of a "dwelling" as interpreted by the courts, so long as the structure serves a residential purpose (*see e.g. Lista v Newton*, 41 AD3d 1280, 1281-1282 [barn used to store the property of the defendant and to shelter horses owned by her daughter]; *Crowningshield v Kim*, 19 AD3d 975, 975-977, *lv denied* 5 NY3d 711 [barn used to store, inter alia, the personal items of the defendants unrelated to their farm business]; *Lyon v Kuhn*, 279 AD2d 760, 761 [outbuilding used as a garage to store the defendant's possessions]; *Farrell v Okeic*, 266 AD2d 892 [barn used to store the personal belongings of the defendant, including tools and equipment, and his mother's household furniture]). As the Court of Appeals reasoned in *Bartoo*, "the fact that the work

was performed on the barn and not on the residential home itself does not alter the analysis; the barn, located on [the defendant's] property and used in part for personal storage purposes, is akin to a garage and should be considered an extension of the dwelling within the scope of the homeowner exemption" (87 NY2d at 369). Here, defendant husband testified at his deposition that he used the barn to store household goods, a tractor, an all-terrain vehicle (ATV) and other personal items unrelated to his upholstery business.

Here, however, the issue before us is whether the homeowner exemption applies to property that is intended for use as a single-family residence but on which no dwelling has yet been constructed at the time of the plaintiff's accident, and the plaintiff is injured during the construction of an ancillary structure. Although defendants have not cited, nor has our research uncovered, any case law addressing facts similar to those presented here, we conclude that "the remedial purposes and protective goals underlying the 1980 amendments to Labor Law § 240 (1) and § 241 are best served by extending the dwelling-owner exemption to defendant[s'] situation" (*Cannon*, 76 NY2d at 651). In our view, the fact that defendants hired plaintiff to build the barn prior to building their home does not deprive them of the benefit of the homeowner exemption inasmuch as the record establishes that defendants intended to build a single-family dwelling on the property and had taken steps to effectuate that plan prior to plaintiff's accident.

It is well established that the "site and purpose" test "must be employed on the basis of the homeowners' intentions at the time of the injury underlying the action" (*Allen v Fiori*, 277 AD2d 674, 675; *see Davis v Maloney*, 49 AD3d 385; *Pastella v R.S. Hulbert Bldrs.*, 305 AD2d 998, 999; *Moran v Janowski*, 276 AD2d 605, 606). Here, defendant husband testified at his deposition that, when he and defendant wife purchased the property in 2001, they planned to construct a home, a barn, and a pond on the property. That plan is documented in a February 2003 application for a building permit to construct the barn, which contains a diagram depicting a barn, a pond, and a circular driveway leading to a structure labeled "[h]ouse in future." Similarly, a March 2003 application for sketch plat review lists the pole barn as the only existing structure and lists "[r]esidential [h]ouse" as the proposed structure. The accompanying survey map depicts the six-acre parcel on County Route 113 containing, inter alia, the site of defendants' future home. Moreover, prior to plaintiff's accident, defendants installed a driveway to provide access to their future house, applied for a proposed subdivision to construct a residence on the property, sought financing for their new home, and entered into a contract to sell their existing residence. We thus conclude that defendants met their burden of establishing the applicability of the homeowner exemption under the facts of this case (*see Cansdale v Conn*, 63 AD3d 1622, 1623; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In opposition to the motion, plaintiff failed to raise a triable issue of fact with respect to the residential character of the property or the use of the barn for non-residential purposes (*see*

Cansdale, 63 AD3d at 1623; *see generally Zuckerman*, 49 NY2d at 562). To the contrary, plaintiff submitted evidence of the actions of defendants subsequent to the accident, which were wholly consistent with their expressed intent to build a home on the property. On July 15, 2003, defendants applied for a permit to build a two-story residential home on the property. Construction of the home commenced in September 2003, and defendants moved into their home in spring 2004. Plaintiff submitted no evidence that any portion of the property was utilized for commercial purposes at the time of the accident, let alone that the barn was used " 'exclusively for commercial purposes' " (*see Cansdale*, 63 AD3d at 1623, quoting *Bartoo*, 87 NY2d at 368). Plaintiff's assertion in an affidavit that, because defendants "had a tractor, loader and ATV with a pond nearby, it made sense this might be a barn for agricultural, commercial or recreational use" was purely speculative and thus was insufficient to raise a triable issue of fact concerning the applicability of the homeowner exemption (*see generally Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 934).

To the extent that plaintiff contends that the status of defendant husband as a small business owner removes him from the class of unsophisticated persons that the homeowner exemption is designed to protect, we note that there is no "separate 'degree of sophistication' " analysis under Labor Law §§ 240 and 241 (*Sweeney v Sanvidge*, 271 AD2d 733, 735, *lv dismissed* 95 NY2d 931). In any event, that contention lacks merit (*see Allen*, 277 AD2d at 675).

Conclusion

Accordingly, based on our determination that defendants are entitled to the benefit of the homeowner exemption under Labor Law § 240 (1) and § 241 (6), we conclude that the order should be affirmed.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1268

CA 09-01029

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

JOSEPH JACOBI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN K. FISH, ET AL., DEFENDANTS,
ROTO-ROOTER, INC., ROTO-ROOTER SERVICES
COMPANY, INC., DAVID M. TWARDOWSKI, INDIVIDUALLY
AND DOING BUSINESS AS ROTO-ROOTER SERVICES DMT,
AND PAUL J. MIAZGA, INDIVIDUALLY AND DOING
BUSINESS AS ROTO-ROOTER SERVICES PJM,
DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (HEATH J. SZYMCZAK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered September 2, 2008 in a personal injury action. The order granted the motion of defendants-respondents for summary judgment and denied the cross motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his vehicle collided with a van owned and operated by defendant Brian K. Fish, who was employed by defendants-respondents (hereafter, defendants). According to plaintiff, Fish was acting within the scope of his employment at the time of the collision and defendants therefore are vicariously liable for his negligence based on the doctrine of respondeat superior. Supreme Court granted the motion of defendants for summary judgment dismissing the complaint against them and denied plaintiff's cross motion for partial summary judgment on liability based on the doctrine of respondeat superior. We affirm.

We conclude that defendants met their initial burden by establishing as a matter of law that Fish was not acting within the scope of his employment at the time of the collision and thus that they did not exercise control over Fish at the time of the collision (*see Lundberg v State of New York*, 25 NY2d 467, 470-471, *rearg denied*

26 NY2d 883), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "The doctrine of respondeat superior as it relates to an employee using his or her vehicle applies only where the employee is under the control of his or her employer from the time that the employee enters his or her vehicle at the start of the workday until the employee leaves the vehicle at the end of the workday as in the case, for example, of a traveling salesperson or repairperson" (*Swierczynski v O'Neill* [appeal No. 2], 41 AD3d 1145, 1146-1147, *lv denied* 9 NY3d 812).

In support of their motion, defendants submitted evidence establishing that the collision occurred after Fish had notified the dispatcher that he was finished working for the day. Indeed, it is undisputed that the accident occurred after Fish had driven a co-worker home, in accordance with a personal arrangement between Fish and the co-worker (*see Howard v Hilton*, 244 AD2d 912, *lv denied* 91 NY2d 809).

Although an employer may be held vicariously liable for an employee's negligence when traveling to or from work if there was a "dual purpose" to the travel, i.e., the employment created "the need to be on the particular route on which the accident occurred" (*Cicatello v Sobierajski*, 295 AD2d 974, 975; *see Swartzlander v Forms-Rite Bus. Forms & Print. Serv.*, 174 AD2d 971, 972, *affd* 78 NY2d 1060), that is not the case herein. Defendants established that they did not direct employees to drive together and that Fish and his co-worker agreed to carpool in order to conserve gasoline. It was that cost-sharing agreement between Fish and his co-worker that necessitated the travel at the time of the collision, rather than Fish's employment with defendants.

Thus, "[a]lthough the issue whether an employee is acting within the scope of his or her employment generally is one of fact, it may be decided as a matter of law in a case such as this, in which the relevant facts are undisputed" (*Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1131-1132, *lv denied* 11 NY3d 708).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1269

CA 08-01817

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

FRANK PARLATO, JR., INDIVIDUALLY AND AS MANAGER OF ONE NIAGARA, LLC AND AS PRESIDENT OF WHITESTAR DEVELOPMENT CORP., AND WHITESTAR DEVELOPMENT CORP., AS MEMBER OF ONE NIAGARA, LLC, PLAINTIFFS-RESPONDENTS,

V ORDER

INCREDIBLE INVESTMENTS LIMITED, SHMUEL SHMUELI, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. (APPEAL NO. 1.)

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), AND LORENZO & COHEN, FOR DEFENDANTS-APPELLANTS.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (PAUL A. GRENGA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 21, 2008. The order, insofar as appealed from, granted in part plaintiffs' motion for a preliminary injunction.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1270

CA 08-01818

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

FRANK PARLATO, JR., INDIVIDUALLY AND AS MANAGER OF ONE NIAGARA, LLC AND AS PRESIDENT OF WHITESTAR DEVELOPMENT CORP., AND WHITESTAR DEVELOPMENT CORP., AS MEMBER OF ONE NIAGARA, LLC, PLAINTIFFS-RESPONDENTS,

V ORDER

INCREDIBLE INVESTMENTS LIMITED, SHMUEL SHMUELI, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. (APPEAL NO. 2.)

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), AND LORENZO & COHEN, FOR DEFENDANTS-APPELLANTS.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (PAUL A. GRENGA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 15, 2008. The order adjourned the motions of defendants-appellants to vacate a preliminary injunction.

It is hereby ORDERED that said appeals are unanimously dismissed without costs (*see Fisher v Ives*, 251 AD2d 1022).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1271

CA 08-01819

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

FRANK PARLATO, JR., INDIVIDUALLY AND AS MANAGER OF ONE NIAGARA, LLC AND AS PRESIDENT OF WHITESTAR DEVELOPMENT CORP., AND WHITESTAR DEVELOPMENT CORP., AS MEMBER OF ONE NIAGARA, LLC, PLAINTIFFS-RESPONDENTS,

V ORDER

INCREDIBLE INVESTMENTS LIMITED, SHMUEL SHMUELI, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. (APPEAL NO. 3.)

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), AND LORENZO & COHEN, FOR DEFENDANTS-APPELLANTS.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (PAUL A. GRENGA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 7, 2008. The order granted the motions of defendants-appellants to vacate a preliminary injunction unless plaintiffs posted an undertaking on or before a certain date.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1272

KA 05-01417

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRELL L. MANNING, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 21, 2005. The appeal was held by this Court by order entered June 13, 2008, the decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (52 AD3d 1295). The proceedings were held and completed.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed a sentence of incarceration is unanimously dismissed and the judgment is otherwise affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]) and harassment in the second degree (§ 240.26 [1]). We previously held the case, reserved decision and remitted this matter to County Court for assignment of new counsel and "a hearing to determine whether any period of time between the commencement of the criminal action and the People's announcement of readiness for trial is excludable," to enable this Court to decide the issue whether defense counsel was ineffective in failing to make a speedy trial motion (*People v Manning*, 52 AD3d 1295, 1296). At the hearing conducted in accordance with our remittal, trial counsel for defendant testified that he did not make a speedy trial motion because he had not identified any speedy trial issue. The People submitted evidence establishing that they announced their readiness for trial within six months from the commencement of the criminal action. That evidence had not been included in the original record on appeal but trial counsel for defendant was aware that the People had in fact timely announced their readiness for trial. Although defendant objected to the admission of that evidence as exceeding the scope of our remittal, we conclude that the court properly admitted that evidence to reflect the information known by defendant's trial counsel at the time of trial (*see People v Marzug*, 280 AD2d 974, *lv denied* 96

NY2d 904). Based on the evidence presented at the hearing upon remittal, we thus conclude that defense counsel was not ineffective for failing to make a speedy trial motion and that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

We reject defendant's contention that the court erred in admitting the preliminary hearing testimony of the complainant in evidence at trial. The People established that they exercised the required due diligence in attempting to secure the complainant's appearance at the trial but that the complainant was unavailable, and thus the admission of her preliminary hearing testimony at trial was permissible (*see* CPL 670.10 [1] [b]; *People v Arroyo*, 54 NY2d 567, 569, *cert denied* 456 US 979; *People v Mastrangelo*, 203 AD2d 942, 943, *lv denied* 83 NY2d 910, 912). Contrary to the further contention of defendant, the court did not err in its *Molineux* ruling inasmuch as the testimony concerning defendant's prior convictions was relevant on the issue of intent and its probative value exceeded its potential for prejudice (*see People v Freece*, 46 AD3d 1428, *lv denied* 10 NY3d 811; *People v Miles*, 36 AD3d 1021, 1022-1023, *lv denied* 8 NY3d 988; *see generally People v Molineux*, 168 NY 264, 293-294). Defendant failed to preserve for our review his contention that the witness presenting that testimony went beyond the court's *Molineux* ruling (*see People v Sabb*, 11 AD3d 350, 351, *lv denied* 4 NY3d 748; *see also People v Gill*, 54 AD3d 965, *lv denied* 11 NY3d 897), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We dismiss the appeal to the extent that defendant challenges the severity of the sentence inasmuch as defendant has completed serving his sentence and that part of the appeal therefore is moot (*see People v Griffin*, 239 AD2d 936). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1273

KA 07-01444

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SUZANNE B. WICKSALL, DEFENDANT-APPELLANT.

CHRISTINE M. COOK, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered July 26, 2006. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the seventh degree (two counts).

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1274

KA 09-00993

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALBERT J. COVELL, DEFENDANT-APPELLANT.

BRYAN G. BROCKWAY, RANDOLPH, FOR DEFENDANT-APPELLANT.

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered July 21, 2008. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree and reckless driving.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Lococo*, 92 NY2d 825, 827).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1275

KA 08-02091

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER E. STRAUTS, DEFENDANT-APPELLANT.

CARL M. DARNALL, FAIRPORT, FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered July 21, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of two counts of felony driving while intoxicated (Vehicle and Traffic Law § 1192 [2], [3]; § 1193 [1] [c] [former (ii)]) and sentencing him to an indeterminate term of imprisonment. We reject the contention of defendant that the People failed to establish by a preponderance of the evidence that he violated the conditions of his probation (*see People v Bergman*, 56 AD3d 1225, *lv denied* 12 NY3d 756). The People established that defendant failed to complete three drug and alcohol treatment programs, missed several probation appointments, and failed to pay the mandatory fines and a surcharge in a timely manner, all in violation of the conditions of his probation. "Although defendant offered excuses for his various violations, County Court was entitled to discredit those excuses and instead to credit the testimony of the People's witnesses" (*People v Donohue*, 64 AD3d 1187, 1188). Further, the court did not abuse its discretion in denying defendant's request for an adjournment of the violation of probation hearing to obtain medical records (*cf. Chamberlain v Dundon* [appeal No. 2], 61 AD3d 1378, 1379). Finally, the sentence is not unduly harsh or severe.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1276

KA 08-02537

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DARAIN R. CRUZ, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DARAIN R. CRUZ, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered November 6, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Lococo*, 92 NY2d 825, 827).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1277

KA 06-00413

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALEXANDER L. PONDER, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 3, 2006. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree (two counts).

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1278

KA 08-02530

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAOUL DILLON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered November 16, 2004. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [1]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. The inclusion of a waiver of the right to appeal as a condition of the plea bargain is neither improper nor against public policy (*see People v Lopez*, 6 NY3d 248, 255; *People v Seaberg*, 74 NY2d 1, 8-10). Contrary to defendant's contention, County Court "did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Bentley*, 63 AD3d 1624, 1625, *lv denied* 13 NY3d 742; *see People v Williams*, 49 AD3d 1281, 1282, *lv denied* 10 NY3d 940; *People v Bilus*, 44 AD3d 325, *lv denied* 9 NY3d 1031; *cf. People v Moyett*, 7 NY3d 892). Defendant's challenge to the severity of the sentence is encompassed by the valid waiver of the right to appeal (*see Lopez*, 6 NY3d at 255-256).

We agree with defendant, however, that the judgment of conviction must be reversed and his plea vacated because the court failed to advise him prior to his entry of the plea that his sentence would include a period of postrelease supervision (*see People v Hill*, 9 NY3d 189, 191-192, *cert denied* ___ US ___, 128 S Ct 2430; *People v Catu*, 4 NY3d 242; *People v Walker* [appeal No. 1], ___ AD3d ___ [Oct. 2,

2009]). Where, as here, " 'a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion' " (*People v Boyd*, 12 NY3d 390, 393, quoting *People v Louree*, 8 NY3d 541, 545-546), and that challenge survives defendant's waiver of the right to appeal (*see People v Cullen*, 62 AD3d 1155, 1156, *lv denied* 13 NY3d 795; *People v Woods*, 46 AD3d 345).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1280

CAF 08-01076

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

IN THE MATTER OF LORELEI M.

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

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

STASIA ZOLADZ VOGEL, DERBY, FOR RESPONDENTS-APPELLANTS.

BARBARA L. WIDRIG, MAYVILLE, FOR PETITIONER-RESPONDENT.

RONALD A. SZOT, LAW GUARDIAN, DUNKIRK, FOR LORELEI M.

Appeal from an order of the Family Court, Chautauqua County (Margaret O. Szczur, J.), entered April 8, 2008 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudicated the subject child to be a neglected child.

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

Memorandum: In this neglect proceeding pursuant to Family Court Act article 10, respondent parents appeal from an order adjudicating their daughter to be a neglected child. Contrary to the parents' contention, petitioner presented evidence establishing that the physical, mental or emotional condition of the child has been impaired or is in imminent danger of becoming impaired as a result of her parents' failure to exercise a minimum degree of care in providing her with adequate food and medical care (*see* § 1012 [f] [i] [A]). Petitioner established that the child failed to thrive because she was undernourished, and that her condition was "of such a nature as would ordinarily not . . . exist except by reason of the acts or omissions of the parent[s]" (§ 1046 [a] [ii]; *see Matter of Kayla C.*, 19 AD3d 692; *Matter of Camara R.*, 263 AD2d 710, 712; *Matter of Female W.*, 182 AD2d 589).

We have examined the parents' remaining contentions and conclude that they are either unpreserved or without merit.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1282

CAF 08-01695

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

IN THE MATTER OF AMANDA M.K.

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

TAMMY K., RESPONDENT-APPELLANT.

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

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

ARLENE BRADSHAW, LAW GUARDIAN, SYRACUSE, FOR AMANDA M.K.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered July 3, 2008 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject child is a neglected child.

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

Memorandum: Family Court properly determined that respondent mother neglected the child who is the subject of this proceeding based upon evidence that her four other children were determined to be neglected by her. "[T]he evidence demonstrated that the prior determination[s] of neglect [were] sufficiently proximate in time to the birth of the subject child that the conditions which led to the older children's removal continued to exist, and that [the mother] suffers from such an impaired level of parental judgment as to create a substantial risk of harm to any child in her care" (*Matter of Suzanne RR.*, 48 AD3d 920, 922; *see Matter of Hunter YY.*, 18 AD3d 899, 900).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1283

CAF 09-00125

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

IN THE MATTER OF ROBERTO C., JR.

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

ROBERTO C., RESPONDENT-RESPONDENT;
BRIAN W. AND SHARON W., INTERVENORS-RESPONDENTS.

MICHAEL N. KALIL, ESQ., LAW GUARDIAN, APPELLANT.

MICHAEL N. KALIL, LAW GUARDIAN, UTICA, APPELLANT PRO SE.

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

COHEN & COHEN, LLP, UTICA (RICHARD A. COHEN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, FOR INTERVENORS-RESPONDENTS.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered December 29, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order dismissed the petition seeking to terminate the parental rights of respondent.

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

Memorandum: The Law Guardian appeals from an order dismissing without prejudice a petition seeking the termination of respondent father's parental rights pursuant to Social Services Law § 384-b (4) (d) on the ground of permanent neglect. The Law Guardian contends that Family Court erred in finding that petitioner failed to establish that it made the requisite diligent efforts to encourage and strengthen the father's parental relationship with the child (§ 384-b [7] [a]), and that, in any event, petitioner was not required to satisfy the diligent efforts standard because the father, who is incarcerated, failed to cooperate with petitioner's efforts to assist him in planning for the child's future (§ 384-b [7] [e] [ii]). We reject the Law Guardian's contentions.

The court properly determined that petitioner failed to use diligent efforts to strengthen and encourage the father's parental relationship with the child (*see generally Matter of Gregory B.*, 74 NY2d 77, 86, *rearg denied* 74 NY2d 880; *Matter of Alaina E.*, 59 AD3d

882, 884, *lv denied* 12 NY3d 710; *Matter of Jonathan R.*, 30 AD3d 426, *lv denied* 7 NY3d 711). Because the father was incarcerated and the father's parents were initially rejected as a resource, the permanency planning goal was to return the child to the mother. The father was in agreement with that goal, and petitioner's efforts consequently were directed toward reuniting the child with the mother. With respect to the father, petitioner merely implemented visitation between the father and the child, and provided the father with permanency hearing reports setting forth the mother's progress (*see Matter of Shi'ann FF.*, 47 AD3d 1133; *Matter of Joseph Jerome H.*, 224 AD2d 224; *cf. Matter of Amanda C.*, 281 AD2d 714, 715-716, *lv denied* 96 NY2d 714).

We reject the Law Guardian's contention that petitioner was not required to use diligent efforts to encourage and strengthen the father's parental relationship with the child because the father failed to cooperate with petitioner's efforts to assist him in planning for the child's future (*see* Social Services Law § 384-b [7] [e] [ii]; *Matter of Jose Q.*, 58 AD3d 956, 957-958). Although the father initially had agreed with the permanency planning goal of returning the child to the mother, it thereafter became apparent that the goal was no longer feasible. At that time, the father presented his parents as a custodial option, and petitioner then found the father's parents to be appropriate as a custodial resource for the child. Thus, contrary to the Law Guardian's contention, the father did not fail to cooperate with petitioner in planning for the future of his child.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1288

CA 09-00797

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

BARBARA JANICKI, PLAINTIFF-RESPONDENT,

V ORDER

REXFORD L. THOMAS, JR., M.D., DEFENDANT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

STAMM, REYNOLDS & STAMM, WILLIAMSVILLE (BRADLEY J. STAMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered September 24, 2008 in a medical malpractice action. The order denied the motion of defendant for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on August 24, 2009,

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1289

CA 08-01958

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

NANCY KILGORE, PLAINTIFF-APPELLANT,

V ORDER

BEVERLY SCOTT, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

FINKELSTEIN & PARTNERS, LLP, NEWBURGH (VICTORIA LIGHTCAP OF COUNSEL), FOR PLAINTIFF-APPELLANT.

O'SHEA MCDONALD & STEVENS, LLP, ROME (TIMOTHY BRIAN O'SHEA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Robert F. Julian, J.), entered February 22, 2008 in a personal injury action. The order denied the motion of plaintiff to set aside the jury verdict and to grant a new trial.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1290

CA 08-02621

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

NANCY KILGORE, PLAINTIFF-APPELLANT,

V ORDER

BEVERLY SCOTT, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

FINKELSTEIN & PARTNERS, LLP, NEWBURGH (VICTORIA LIGHTCAP OF COUNSEL), FOR PLAINTIFF-APPELLANT.

O'SHEA MCDONALD & STEVENS, LLP, ROME (TIMOTHY BRIAN O'SHEA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered August 26, 2008 in a personal injury action. The judgment, upon a jury verdict, dismissed the complaint.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1291

CA 09-01011

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

IN THE MATTER OF GERSTER SALES & SERVICE, INC., RONALD A. GERSTER AND TRANE U.S. INC., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

POWER AUTHORITY OF STATE OF NEW YORK, STATE UNIVERSITY OF NEW YORK, WENDEL ENERGY SERVICES, LLC, MCQUAY INTERNATIONAL, DAIKIN INDUSTRIES, LTD. AND MLP PLUMBING & MECHANICAL, INC., RESPONDENTS-RESPONDENTS.

MAGAVERN MAGAVERN & GRIMM LLP, BUFFALO (JAMES L. MAGAVERN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

TERRYL BROWN CLEMONS, WHITE PLAINS (EILEEN P. FLYNN OF COUNSEL), FOR RESPONDENT-RESPONDENT POWER AUTHORITY OF STATE OF NEW YORK.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PAUL GROENWEGEN OF COUNSEL), FOR RESPONDENT-RESPONDENT STATE UNIVERSITY OF NEW YORK.

PHILLIP M. FRIES, AMHERST, FOR RESPONDENT-RESPONDENT WENDEL ENERGY SERVICES, LLC.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (THOMAS D. KELEHER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS MCQUAY INTERNATIONAL AND DAIKEN INDUSTRIES, LTD.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (DANIEL E. SARZYNSKI OF COUNSEL), FOR RESPONDENT-RESPONDENT MLP PLUMBING & MECHANICAL, INC.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John M. Curran, J.), entered March 4, 2009 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul respondent university's determination awarding a contract to respondent Wendel Energy Services, LLC for the installation of new air cooling equipment in

certain state university buildings. According to petitioners, their cooling equipment had been improperly excluded during the bidding process. We conclude that petitioners' appeal from the judgment dismissing the petition as time-barred must be dismissed as moot. The evidence in the record before us establishes that the contract in question had been awarded prior to the commencement of the proceeding and it is undisputed that the project is now completed (*see Matter of Fallati v Town of Colonie*, 222 AD2d 811; *Matter of Caprari v Town of Colesville*, 199 AD2d 705; *cf. Matter of Michalak v Zoning Bd. of Appeals of Town of Pomfret*, 286 AD2d 906). "Since petitioner[s] did not seek injunctive relief during the pendency of this appeal, we find the controversy herein to be rendered moot" (*Fallati*, 222 AD2d at 813; *see Lukas v Ascher*, 299 AD2d 262). We reject petitioners' contention that the appeal is not moot because, inter alia, the petition also sought money damages. Inasmuch as the primary relief sought, i.e., annulling the determination awarding the contract and rebidding the contract, "is no longer possible, money relief cannot be incidentally granted" (*Matter of United Pioneer Corp. v Office of Gen. Servs. of State of N.Y.*, 155 AD2d 849, 850).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1292

CA 09-00340

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

WENDY D. AND MICHAEL S., INDIVIDUALLY
AND AS PARENTS AND NATURAL GUARDIANS OF
JOHN DOE, AN INFANT, PLAINTIFFS-RESPONDENTS,

V ORDER

DEAN E. GOFF, DEFENDANT,
AND YOUNG MEN'S CHRISTIAN ASSOCIATION OF
LOCKPORT, NEW YORK, DEFENDANT-APPELLANT.

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

WALSH, ROBERTS & GRACE, BUFFALO (JAMES R. WALSH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered January 15, 2009 in a personal injury action. The order, among other things, granted plaintiffs' motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for plaintiffs-respondents and defendant-appellant on August 24 and 25, 2009,

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1294

TP 09-00910

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

IN THE MATTER OF JACK VIGLIOTTI, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered April 6, 2009) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1295

TP 09-00784

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

IN THE MATTER OF RONNIE SHORT, PETITIONER,

V ORDER

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

RONNIE SHORT, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Anthony F. Shaheen, J.], entered April 7, 2009) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1297

TP 09-00916

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

IN THE MATTER OF CARLTON BURTON, PETITIONER,

V ORDER

SUSAN CONNELL, SUPERINTENDENT, ONEIDA CORRECTIONAL FACILITY, RESPONDENT.

CARLTON BURTON, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Samuel D. Hester, J.], entered April 21, 2009) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1298

KA 08-02280

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MURTADA S. EBRAHIM, DEFENDANT-APPELLANT.

RONALD C. VALENTINE, PUBLIC DEFENDER, LYONS (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ROSEANN B. MACKECHNIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered September 26, 2008. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree and offering a false instrument for filing in the first degree.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1299

KA 09-00007

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERT RASMUSSEN, JR., DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (MELISSA L. CIANFRINI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), entered March 28, 2008. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1301

KA 06-03042

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAURA A. KRAFT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY 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 (Patricia D. Marks, J.), rendered June 28, 2006. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony, and various traffic infractions.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1303

KA 06-02480

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN GAYDEN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered June 14, 2006. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree and robbery in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the motion seeking to suppress statements made by defendant to investigating officers on November 2, 2005 is granted and a new trial is granted on counts one, two and three of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the first degree (Penal Law § 140.30 [4]) and two counts of robbery in the first degree (§ 160.15 [4]). Under the circumstances of this case, we agree with defendant that the People failed to establish that he consented to accompany certain investigating officers to the police station and that his subsequent detention at the police station on November 2, 2005 constituted a de facto arrest that was not supported by probable cause. We note at the outset that the People do not contend on appeal that there was in fact probable cause for the alleged de facto arrest and instead rely solely on the theory that defendant consented to accompany the investigating officers to the police station. We therefore do not address the issue of probable cause.

We conclude that Supreme Court erred in refusing to suppress the statements made by defendant to the investigating officers on that date (*see generally* CPL 140.10 [1] [b]; *People v Hicks*, 68 NY2d 234, 239-240). On the night of October 13, 2005, defendant was treated at a hospital for a gunshot wound. He reported to the police that he was wounded when he was robbed by two assailants. At approximately the same time that defendant was being treated at the hospital, a burglary

victim arrived at the hospital and reported to the police that the gun of one of the burglars accidentally fired and hit a second burglar. The victim could not positively identify defendant as that second burglar during a showup identification at the hospital. Over two weeks later, when the investigating officers met with defendant at his residence and asked him to show the officers the location where he was allegedly robbed, defendant agreed to do so. He accompanied the officers to an intersection two miles from the home of the burglary victim. The officers then transported defendant to the police station, whereupon they informed him that they did not believe his version of the events of the night of October 13th. After defendant waived his *Miranda* rights, the officers asked him questions that resulted in the inculpatory statements that he moved to suppress.

Even according great weight to the determination of the suppression court, "with its peculiar advantages of having seen and heard the witnesses" (*People v Prochilo*, 41 NY2d 759, 761), we conclude that the evidence at the suppression hearing does not support the court's determination that defendant voluntarily accompanied the investigating officers to the police station and thus that he was not in custody when he made the statements (*cf. People v Yukl*, 25 NY2d 585, 592, *cert denied* 400 US 851). "In determining the scope of consent, a suppression court must look to the exchange between the parties——both the request and the response——and any attendant circumstances" (*People v Gomez*, 5 NY3d 416, 420). Although it is undisputed that defendant agreed to accompany the investigating officers to the intersection where he allegedly had been shot, the People failed to present any evidence at the suppression hearing on the issue whether defendant, who had no other means of transportation to travel back to his home, in fact consented to accompany the officers to the police station (*see People v Rosa*, 30 AD3d 905, 908, *lv denied* 7 NY3d 851). Therefore, viewing the circumstances in the light of " 'what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position,' " we agree with defendant that his detention was in fact the equivalent of an arrest, requiring probable cause (*Hicks*, 68 NY2d at 240, quoting *Yukl*, 25 NY2d at 589). In view of our determination, we do not address defendant's challenge to the severity of the sentence.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1304

KA 08-01632

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLOYD M. MAYNARD, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RACHEL E. PILKINGTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered June 12, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that Supreme Court erred in refusing to suppress evidence seized from his residence during a search conducted by his parole officer. We reject that contention. Defendant was on parole at the time of the search, having been released from the drug treatment program in which he participated following his conviction of attempted criminal possession of a controlled substance in the fifth degree. The search was initiated by the parole officer based upon his observation that defendant was living beyond his means and his belief that defendant therefore may have been selling drugs. We thus conclude that the search was "rationally and reasonably related to the performance of the parole officer's duty" (*People v Huntley*, 43 NY2d 175, 181; *see People v Johnson*, 49 AD3d 1244, *lv denied* 10 NY3d 865).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1305

KA 09-00912

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

LARRY SMITH, JR., DEFENDANT-RESPONDENT.

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

THOMAS J. CASEY, WILLIAMSVILLE (ARTHUR G. BAUMEISTER, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), entered February 11, 2009. The order granted defendant's motion to suppress certain evidence.

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

Memorandum: The People appeal from an order granting defendant's motion to suppress evidence seized as the result of a traffic stop. We conclude that County Court properly suppressed the evidence on the ground that the police officer made a mistake of law in stopping defendant's vehicle, which had in fact performed a legal pass on the right pursuant to Vehicle and Traffic Law § 1123 (a) (1) and (2). "Where the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal" (*Matter of Byer v Jackson*, 241 AD2d 943, 944-945; *see People v Smith*, 1 AD3d 965; *see also People v Gonzalez*, 88 NY2d 289, 295-296).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1306

CA 09-00144

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

JEFFREY M. GRINER, PLAINTIFF-RESPONDENT,

V ORDER

MARLENE MORGAN FRANKEL, AS ADMINISTRATOR WITH THE WILL ATTACHED OF THE ESTATE OF SAMUEL NATHAN FRANKEL, DECEASED, AS EXECUTOR OF THE ESTATE OF FRANCES I. CHAMELI, DECEASED, AND ACEA M. MOSEY IN HER CAPACITY AS PUBLIC ADMINISTRATOR OF THE ESTATE OF JOHN M. CHAMELI, DECEASED, DEFENDANTS-APPELLANTS.

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

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered May 16, 2008 in a personal injury action. The judgment awarded plaintiff money damages against defendants upon a jury verdict.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1308

CA 09-00397

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

BASS DEVELOPMENT OF NEW YORK, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEIL D. BAISCH, ET AL., DEFENDANTS,
AND SODUS MARINA, LLC, DEFENDANT-APPELLANT.

BOYLAN, BROWN, CODE, VIGDOR & WILSON, LLP, ROCHESTER (MARK A. COSTELLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Kenneth R. Fisher, J.), entered May 30, 2008. The order, insofar as appealed from, denied in part the motion of defendant Sodus Marina, LLC seeking partial summary judgment dismissing the first cause of action against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the first cause of action against defendant Sodus Marina, LLC is dismissed in its entirety.

Memorandum: Plaintiff commenced this action seeking, inter alia, specific performance of a contractual addendum for the conveyance of "two separate dock condominium units," as well as related easements and rights-of-way. Supreme Court denied in part the motion of Sodus Marina, LLC (defendant) seeking partial summary judgment dismissing the first cause of action against it (*Bass Dev. of N.Y., Inc. v Baisch*, 20 Misc 3d 522), and we agree with defendant that the court should have granted the motion in its entirety. Plaintiff has no equitable interest in any portion of the townhouse and marina project (project) inasmuch as the addendum does not constitute a valid purchase and sale agreement for real property (*see generally Nesbitt v Penalver*, 40 AD3d 596, 597-598; *EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 55, *lv dismissed* 3 NY3d 656, *lv denied* 3 NY3d 607). Further, we conclude that specific performance is not an available remedy under the circumstances of this case. The addendum provided that plaintiff would accept either conveyance of the real property or $50,000 as payment for its services on the project, and thus plaintiff has an adequate remedy at law (*see T.F. Demilo Corp. v E.K. Constr. Co.*, 207 AD2d 480, 481; *see generally Pecorella v Greater Buffalo Press*, 107

AD2d 1064, 1065).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1309

CA 09-00953

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

IN THE MATTER OF PASTOR KEITH H. SCOTT, SR., ET AL., PETITIONERS, DORA RICHARDSON, JOSEPHINE RUSH, JOHN MCKENDRY, AND SHELLEY MCKENDRY, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, COMMON COUNCIL OF CITY OF BUFFALO, BYRON BROWN, IN HIS OFFICIAL CAPACITY AS MAYOR OF CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF PUBLIC WORKS, DEPARTMENT OF ECONOMIC DEVELOPMENT PERMITS AND INSPECTION, BUFFALO SEWER AUTHORITY AND BUFFALO MUNICIPAL WATER FINANCE AUTHORITY, RESPONDENTS-RESPONDENTS.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR PETITIONERS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (ADAM S. WALTERS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered July 7, 2008 in a CPLR article 78 proceeding. The judgment dismissed the second amended petition.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court (*Scott v City of Buffalo*, 20 Misc 3d 1135[A], 2008 NY Slip Op 51738[U]). We write only to note that the contentions of petitioners concerning Executive Law § 12 and the constitutionality of a transfer of property between respondent City of Buffalo and the Seneca Nation of Indians are raised for the first time on appeal, and we therefore do not consider them (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We further note that, on a prior appeal before this Court, petitioners raised the issue now raised concerning the number of votes necessary to approve the transfer of property by respondent Common Council of the City of Buffalo, and we previously decided that issue (*Matter of Scott v City of Buffalo*, 38 AD3d 1287). Our reconsideration of that issue on this appeal is thus foreclosed (*see Mobil Oil Corp. v City of Syracuse Indus. Dev. Agency*, 224 AD2d 15,

19, *appeal dismissed* 89 NY2d 860, *lv denied* 89 NY2d 811).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1314

KA 07-02093

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RHONDA L. NICKELL, DEFENDANT-APPELLANT.

JOHN A. HERBOWY, UTICA, FOR DEFENDANT-APPELLANT.

JOHN H. CRANDALL, SR., DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered June 1, 2006. The judgment convicted defendant, upon her plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1315

KA 08-00629

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER E. MARCH, DEFENDANT-APPELLANT.

CHRISTINE M. COOK, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered January 15, 2008. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree, assault in the first degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1316

KA 09-00178

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KENNETH L. EDWARDS, JR., ALSO KNOWN AS
KENNETH L. EDWARDS, ALSO KNOWN AS KENNETH EDWARDS,
DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (MELISSA L. CIANFRINI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 23, 2008. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1317

KA 08-01007

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GIOVANNI CAPOCCETTA, ALSO KNOWN AS JOHN CAPOCCETTA, DEFENDANT-APPELLANT.

ABBIE GOLDBAS, UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered August 24, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to the contention of defendant, the record establishes that his waiver of the right to appeal was knowingly, intelligently and voluntarily entered (*see People v Lopez*, 6 NY3d 248, 256). The valid waiver by defendant of the right to appeal encompasses his challenge to the factual sufficiency of the plea allocution, and in any event, defendant failed to preserve that challenge for our review (*see People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789; *People v Jackson*, 50 AD3d 1615, 1615-1616, *lv denied* 10 NY3d 960).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1318

KA 08-01550

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

NICHOLAS ROGERS, 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 (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 26, 2008. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree, criminal contempt in the second degree and forgery in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1319

KA 08-01673

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY WILSON, 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 (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 22, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree (two counts).

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1320

KA 08-02138

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAMIAN DREWERY, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (BROOKS T. BAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered July 28, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1321

KA 06-00554

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMELL LEWIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW J. CLARK 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 (Frank P. Geraci, Jr., J.), rendered October 12, 2005. The judgment convicted defendant, after a nonjury trial, of murder in the second degree.

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

Memorandum: The sole contention of defendant in this appeal from a judgment convicting him following a nonjury trial of murder in the second degree (Penal Law § 125.25 [1]) is that he was denied effective assistance of counsel. We reject that contention (*see generally People v Flores*, 84 NY2d 184, 186-187*; People v Baldi*, 54 NY2d 137, 147). Defense counsel's failure to make various motions that had little or no chance of success does not constitute ineffective assistance of counsel (*see People v McDuffie*, 46 AD3d 1385, 1386, *lv denied* 10 NY3d 867; *People v Dashnaw*, 37 AD3d 860, 863, *lv denied* 8 NY3d 945; *People v Johnson*, 11 AD3d 979, 979-980, *lv denied* 3 NY3d 757). In addition, defense counsel's failure to object to County Court's *Sandoval* ruling or to seek a compromise ruling did not constitute ineffective assistance of counsel inasmuch as the court in this nonjury trial " 'is presumed to have evaluated the evidence [of defendant's past criminal conduct] only for the purpose of impeaching . . . defendant's credibility and not as evidence of guilt of the crime charged' " (*People v Maryon*, 20 AD3d 911, 912-913, *lv denied* 5 NY3d 854).

Contrary to defendant's further contention, neither defense counsel's failure to object to the prosecutor's allegedly improper remarks during summation nor defense counsel's limited cross-examination of certain witnesses deprived defendant of effective assistance of counsel, particularly in the context of this nonjury trial (*see Maryon*, 20 AD3d at 913; *see also People v Walker*, 50 AD3d

1452, 1453, *lv denied* 11 NY3d 795, 931).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1322

KA 07-02484

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALTON DAVIS, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 22, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts), rape in the first degree, robbery in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]). We agree with defendant that Supreme Court erred in permitting the prosecutor to elicit the testimony of a police detective on redirect examination concerning pretrial statements made by the victim that bolstered her trial testimony. We nevertheless conclude that reversal is not required based on that error. "Although the prosecutor's redirect examination was far too extensive to be justified under the opening the door theory . . ., the erroneous admission of the testimony is harmless" (*People v Echols*, 209 AD2d 1000, 1000, *lv denied* 85 NY2d 972, 86 NY2d 734 [internal quotation marks omitted]). The evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see generally People v Crimmins*, 36 NY2d 230, 241-242). We reject defendant's contention that the court abused its discretion in admitting certain photographs in evidence. The photographs depicting injuries sustained by the victim were relevant, and "to arouse the emotions of the jury and to prejudice the defendant" was not their sole purpose (*People v Pobliner*, 32 NY2d 356, 370, *rearg denied* 33 NY2d 657, *cert denied* 416 US 905). Contrary to defendant's further contentions, the photographs of the crime scene were properly authenticated by the victim (*see People v Lee*, 301 AD2d 671), and the court did not abuse its discretion in denying defendant's motions for a mistrial (*see generally People v Ortiz*, 54

NY2d 288, 292).

We reject the contention of defendant that defense counsel was ineffective in failing to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as defendant failed to demonstrate that such a challenge would be meritorious (*see People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922). 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). Finally, we reject the contention of defendant that Penal Law § 70.08, the persistent violent felony offender statute pursuant to which he was sentenced, is unconstitutional (*see People v Crowder*, 47 AD3d 724, *lv denied* 10 NY3d 839).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1323

KA 09-01003

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEVEN L. YOUNGS, DEFENDANT-APPELLANT.

LADUCA LAW FIRM, LLP, ROCHESTER (JOHN J. LADUCA OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUSAN H. LINDENMUTH, DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

Appeal from an order of the Yates County Court (W. Patrick Falvey, J.), dated November 14, 2008. 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 for reasons stated in the decision at County Court.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1324

KAH 08-01265

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
LARRY ROSS, PETITIONER-APPELLANT,

V ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered May 20, 2008 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1325

CA 09-00563

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

JENNIFER SCHWARTZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE D. VUKSON, AS EXECUTOR OF THE ESTATE OF MICHAEL J. VUKSON, DECEASED, DEFENDANT-APPELLANT.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (LOUIS B. DINGELDEY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

BERGEN & SCHIFFMACHER, LLP, BUFFALO (JOSEPH R. BERGEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 30, 2008 in a personal injury action. The order granted the motion of plaintiff for partial summary judgment on liability.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries she allegedly sustained when the vehicle driven by her collided with the vehicle driven by defendant's decedent. The complaint, as amplified by the bill of particulars, alleges that plaintiff sustained a serious injury under four specified categories of serious injury (*see* Insurance Law § 5102 [d]). Plaintiff thereafter moved for partial summary judgment on liability, specifically addressing the issues of negligence and serious injury (*see generally Ruzycki v Baker*, 301 AD2d 48, 51-52). In her motion, however, plaintiff addressed only two of the four categories of serious injury set forth in the bill of particulars, i.e., the permanent consequential limitation of use and the significant limitation of use categories of serious injury and, in granting the motion, Supreme Court did not address either of the two statutory categories.

We agree with defendant that the court erred in granting that part of plaintiff's motion with respect to the issue of negligence. Plaintiff met her initial burden with respect to that issue by submitting her deposition testimony in which she testified that the accident occurred when decedent backed his vehicle out of his son's driveway into the street and in front of her vehicle, which she was

operating at a reasonable speed in the proper lane of travel. Plaintiff was " 'entitled to anticipate that other vehicles [would] obey the traffic laws that require them to yield' " (*Rak v Kossakowski*, 24 AD3d 1191, 1192). Defendant raised a triable issue of fact, however, by submitting an affidavit in which he stated that decedent's vehicle never left the driveway, and that the tire tracks left by plaintiff's vehicle prior to the accident were on the shoulder of the street, outside the proper lane of travel. Contrary to plaintiff's contention, the questioning of defendant during his deposition did not concern the subject matter addressed in his affidavit. Thus, under the circumstances of this case, we conclude that the statements of defendant in his affidavit do not contradict his deposition testimony, and the submission of defendant's affidavit in opposition to the motion is not merely an attempt to raise a feigned issue of fact (*cf. Shpizel v Reo Realty & Constr. Co.*, 288 AD2d 291; *see generally Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253).

We also agree with defendant that the court erred in granting that part of plaintiff's motion with respect to serious injury under the permanent consequential limitation and significant limitation of use categories of serious injury. Although plaintiff established that she sustained a herniated disc and has a significant limitation of use of her spine, on the record before us there is an issue of fact whether plaintiff's injuries were the result of a preexisting degenerative condition and plaintiff's morbid obesity (*see generally Covert v Samuel*, 53 AD3d 1147, 1148-1149; *Chmiel v Figueroa*, 53 AD3d 1092, 1093). Finally, there is a further issue of fact whether plaintiff's injuries are fully healed (*see generally Dann v Yeh*, 55 AD3d 1439, 1440; *Frizzell v Giannetti*, 34 AD3d 1202, 1203; *Sandt v New York Racing Assn.*, 289 AD2d 218, 219).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1326

CA 08-02282

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

STANLEY E. KALWARA, PLAINTIFF,

V ORDER

SAMUEL L. LAMANNA, ET AL., DEFENDANTS.

SAMUEL L. LAMANNA AND CYNTHIA LAMANNA,
THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

KENNETH FASOLO, ALSO KNOWN AS KENNETH FASOLO, SR., THIRD-PARTY DEFENDANT, BANKER'S TITLE AND ABSTRACT LLC, THIRD-PARTY DEFENDANT-RESPONDENT, AND ABN AMRO MORTGAGE GROUP, INC., THIRD-PARTY DEFENDANT-APPELLANT.

FEIN SUCH & CRANE LLP, ROCHESTER (DAVID P. CASE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

LONGERETTA LAW FIRM, UTICA (JOHN A. LONGERETTA OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (PATRICK B. SARDINO OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

DUANE MORRIS LLP, PHILADELPHIA, PENNSYLVANIA (BRETT L. MESSINGER OF COUNSEL), FOR DEFENDANT FIRST HORIZON LOAN CORPORATION, NOW KNOWN AS FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK NATIONAL ASSOCIATION.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Robert F. Julian, J.), entered February 1, 2008. The order and judgment, insofar as appealed from, denied the cross motion of third-party defendant ABN AMRO Mortgage Group, Inc. for summary judgment dismissing the third-party complaint against it.

Now, upon reading and filing the stipulation to withdraw appeal signed by the attorneys for the parties and filed on September 29, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed

without costs upon stipulation.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1327

CA 09-00837

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

TERESA HYATT, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF REBECCA HYATT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY G. MESSANA AND KATHY L. MESSANA, DEFENDANTS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (NICHOLAS L. MINEO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SIEGEL, KELLEHER & KAHN, LLP, BUFFALO (MICHAEL A. IACONO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered March 3, 2009 in a personal injury action. The order denied defendants' motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her daughter when she was struck at an intersection by a vehicle operated by Kathy L. Messana (defendant). At the time of the accident, plaintiff's daughter was 12 years old and was riding her bicycle to school, in a school zone. The street on which she was riding her bicycle was controlled by a stop sign, but the street on which defendant was driving was not.

Supreme Court properly denied defendants' motion seeking summary judgment dismissing the complaint. "Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v Schmieder*, 46 NY2d 471, 474). Plaintiff's daughter was subject to the duties applicable to the driver of a vehicle pursuant to the Vehicle and Traffic Law when she rode her bicycle on the street (*see* Vehicle and Traffic Law § 1231; *Baker v Nassau County Police Activity League*, 265 AD2d 515), and defendants established that plaintiff's daughter violated Vehicle and Traffic Law § 1142 (a) when she entered the intersection without yielding the right-of-way to defendant. In view of her age, however, it is for a jury to determine whether such statutory violation constitutes

negligence (*see generally Poczkalski v Cartwright*, 65 AD2d 945; 1A NY PJI3d 2:49, at 341).

In addition, defendant was under a duty to exercise a high degree of care while driving in a school zone (*see* 8B NY Jur 2d, Automobiles and Other Vehicles § 1111), and defendants' own submissions raise triable issues of fact whether defendant violated that duty. "Giving plaintiff 'the benefit of every favorable inference' . . ., as we must, we conclude that the evidence indicates that [her daughter] may have been positioned directly in front of defendant's motor vehicle prior to impact" (*Spicola v Piracci*, 2 AD3d 1368, 1369). That evidence, together with defendant's admitted failure to see plaintiff's daughter prior to the impact, raises a triable issue of fact whether defendant "failed to see that which through proper use of [her] senses [s]he should have seen" (*Baker*, 265 AD2d at 516; *see Spicola*, 2 AD3d at 1369).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1328

CA 09-01105

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN
THE BUFFALO TEACHERS FEDERATION, INC.,
PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

BOARD OF EDUCATION OF BUFFALO CITY SCHOOL
DISTRICT, RESPONDENT-APPELLANT.

ALISA A. LUKASIEWICZ, CORPORATION COUNSEL, BUFFALO (DENISE M. MALICAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

JAMES R. SANDNER, LATHAM (ROBERT W. KLINGENSMITH, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order (denominated judgment) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered August 8, 2008 in a proceeding pursuant to CPLR article 75. The order, inter alia, granted the petition seeking to vacate an arbitration award.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is denied, the cross petition is granted and the arbitration award is confirmed.

Memorandum: Respondent appeals from an order in this CPLR article 75 proceeding that, inter alia, granted the petition seeking to vacate an arbitration award and denied its cross petition to confirm the award. We reverse. Contrary to petitioner's contention, the arbitration award was not irrational, inasmuch as it cannot be said that "there is no proof whatever to justify the award" (*Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City School Dist. of City of Buffalo*, 50 AD3d 1503, 1505, *lv denied* 11 NY3d 708 [internal quotation marks omitted]). Indeed, "[a]n arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached' " (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479, *cert dismissed* 548 US 940; *see also Buffalo Teachers Fedn., Inc.*, 50 AD3d at 1505). Here, the arbitrator determined that, although respondent violated its collective bargaining agreement with petitioner by failing to provide petitioner with written notice of disciplinary proceedings against a tenured teacher, no remedy was warranted because petitioner had actual notice of the proceedings before the teacher's employment was terminated. Although the arbitration award referred to matters outside the record that was before the arbitrator, the arbitrator's

conclusion that petitioner was aware of the disciplinary proceedings is not irrational because it is supported by documentary evidence that was in the record before the arbitrator (*see Buffalo Teachers Fedn., Inc.*, 50 AD3d at 1505). In fact, the record contains a stipulation by the parties that petitioner's grievance on behalf of the tenured teacher was dated July 10, 2003 but that respondent did not terminate the employment of the tenured teacher until July 16, 2003.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1334

CA 08-01914

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ.

IN THE MATTER OF CURT GUTHRIE,
PETITIONER-APPELLANT,

V ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS
CORRECTIONAL FACILITY, ET AL.,
RESPONDENTS-RESPONDENTS.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered August 19, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Moissett v Travis*, 97 NY2d 673; *see also Matter of Schwartz v Dennison*, 40 AD3d 218).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1337

KA 08-02255

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEFFREY D. MURAWSKI, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (RAY A. KYLES OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered January 11, 2008. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Semple*, 23 AD3d 1058, 1059, *lv denied* 6 NY3d 852).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1338

KA 08-00479

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CAROL TELLO, DEFENDANT-APPELLANT.

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, J.), rendered February 27, 2008. The judgment convicted defendant, upon her plea of guilty, of rape in the second degree and criminal sexual act in the second degree.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1339

KA 08-01988

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KELLI M. ALLEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Sperrazza, J.), rendered July 21, 2008. The judgment convicted defendant, upon her plea of guilty, of robbery in the third degree (three counts).

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1340

KA 08-02003

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HAROLD FERRUCCI, 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 (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered July 16, 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 affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1341

KA 07-02034

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANSOM Z. SMITH, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLEY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered March 29, 2005. The judgment convicted defendant, upon his plea of guilty, of sexual abuse 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 sexual abuse in the first degree (Penal Law § 130.65 [3]). He contends that his guilty plea was not knowingly, intelligently and voluntarily entered because Supreme Court failed to inform him that he would be certified as a sex offender pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*) as a consequence of his plea. Even assuming, arguendo, that defendant was not required to preserve that contention for our review (*see generally People v Louree*, 8 NY3d 541, 545-546), we conclude that it lacks merit. Certification as a sex offender "is a collateral consequence of the plea and thus the failure to advise defendant of that consequence does not undermine the voluntariness of the plea" (*People v Smith*, 37 AD3d 1141, 1142, *lv denied* 9 NY3d 851, 926).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1342

KA 08-02006

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLO J. CARTER, DEFENDANT-APPELLANT.

WILLIAM F. COUGHLIN, PUBLIC DEFENDER, MAYVILLE (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (TRACEY A. BRUNECZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered August 18, 2008. The judgment convicted defendant, upon his plea of guilty, of 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 sentence and as modified the judgment is affirmed, and the matter is remitted to Chautauqua County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We agree with defendant that County Court erred in imposing an enhanced sentence because it "did not advise defendant that a harsher sentence than he bargained for could be imposed if [he] failed to appear at sentencing" (*People v Ortiz*, 244 AD2d 960, 961; *see People v Sundown*, 305 AD2d 1075). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the sentence promised or to afford defendant the opportunity to withdraw his plea (*see People v Walker*, 45 AD3d 1401).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1343

KA 07-00536

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER PARKER, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered July 24, 2006. The judgment convicted defendant, upon his plea of guilty, of attempted 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 attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [4]). Although defendant is correct that County Court at sentencing failed to address his request to be adjudicated a youthful offender (*see generally* CPL 720.20 [1]), we conclude that any error in the court's failure to do so is harmless because the record establishes that defendant was not in fact eligible for youthful offender treatment (*see generally People v Orcutt*, 51 AD3d 1404, 1405). Defendant was convicted of an armed felony (*see* CPL 720.10 [2] [a] [ii]), and the exceptions set forth in CPL 720.10 (3) do not apply (*see Orcutt*, 51 AD3d at 1405; *cf. People v Tyquan S.*, 54 AD3d 1062). Specifically, " 'defendant offered the sentencing court no evidence of mitigating circumstances relating to the manner in which the subject [crime was] committed, and his role in the [crime] was not minor. Accordingly, he could not be adjudicated a youthful offender' " (*People v Crawford*, 55 AD3d 1335, 1336, *lv denied* 11 NY3d 896).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1344

KA 08-02106

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS J. JORDAN, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 24, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]) and assault in the second degree (§ 120.05 [2]), defendant contends that his plea of guilty to attempted robbery was illegal under CPL 195.20 and 220.20 because that crime was not a lesser included offense of any charge on which he was held for grand jury action and thus that his plea must be vacated because the superior court information (SCI) was jurisdictionally defective. We reject that contention. Defendant was held for grand jury action on a charge of attempted robbery in the first degree under subdivision (2) rather than subdivision (3) of Penal Law § 160.15, but he was charged in the SCI with the commission of a crime under subdivision (3) and was ultimately convicted under that subdivision. Pursuant to CPL 195.20, however, "the offenses named in an SCI may include any offense for which the defendant was held for action of a grand jury and any offense or offenses properly joinable therewith pursuant to [CPL] 200.20" (*People v Kohl*, 19 AD3d 1155, 1156 [internal quotation marks omitted]). A defendant is "held for the action of the [g]rand [j]ury on the lesser included offenses as well as a greater offense charged in the felony complaint" (*People v Menchetti*, 76 NY2d 473, 477; *see People v Goforth*, 36 AD3d 1202, 1203, *lv denied* 8 NY3d 946). Here, the record establishes that defendant was held for grand jury action

on a charge of assault in the first degree (Penal Law § 120.10 [1]), and the count of assault in the second degree charged in the SCI is a lesser included offense of assault in the first degree (*see* CPL 1.20 [37]; *see generally People v Glover*, 57 NY2d 61, 63). Inasmuch as the count of attempted robbery in the first degree under subdivision (3) of Penal Law § 160.15 was joinable with the count of assault in the second degree charged in the SCI (*see* CPL 200.20 [2] [a]; *see also* CPL 40.10 [2]), defendant's instant jurisdictional challenge is without merit.

We agree with defendant, however, that the plea must be vacated because it was not knowingly, intelligently and voluntarily entered. " '[W]here a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion' " (*People v Boyd*, 12 NY3d 390, 393, quoting *People v Louree*, 8 NY3d 541, 545-546; *see People v Maracle* [appeal No. 2], 60 AD3d 1336). Here, the record establishes that County Court failed to advise defendant of the postrelease supervision component of the sentence to be imposed on the conviction of attempted robbery, and incorrectly advised defendant of the duration of the period of postrelease supervision that would follow defendant's term of incarceration on the conviction of assault. Contrary to the People's contention, harmless error analysis does not apply in the event that the court fails to advise a defendant of a period of postrelease supervision (*see People v Hill*, 9 NY3d 189, 192, *cert denied* ___ US ___, 128 S Ct 2430). Although defendant correctly contends that his waiver of the right to appeal is invalid (*see People v Lopez*, 6 NY3d 248, 256; *People v Moorer*, 63 AD3d 1590), that is of no moment inasmuch as defendant's contention with respect to postrelease supervision would survive even a valid waiver of the right to appeal (*see People v Dillon*, ___ AD3d ___ [Nov. 13, 2009]; *People v Cullen*, 62 AD3d 1155, 1156, *lv denied* 13 NY3d 795). Thus, the judgment must be reversed, the plea vacated, and the matter remitted to County Court for further proceedings on the SCI (*see People v Rivera*, 51 AD3d 1267).

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

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1346

KA 09-00968

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER E. ABEEL, DEFENDANT-RESPONDENT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (TRAVIS J. BARRY OF COUNSEL), FOR APPELLANT.

Appeal from an order of the Steuben County Court (Marianne Furfure, J.), entered March 10, 2009. The postverdict order granted defendant's motion to dismiss the indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is denied, the indictment and the verdict are reinstated, and the matter is remitted to Steuben County Court for sentencing.

Memorandum: The People appeal from a postverdict order, following a jury trial, granting defendant's motion to dismiss the indictment pursuant to CPL 290.10 (1). Defendant was charged with grand larceny in the third degree (Penal Law § 155.35) in an indictment alleging that he stole $3,125. While neither the indictment nor the bill of particulars narrowed the prosecution's theory any further, the People proceeded at trial on the theory that defendant stole the money by making a false promise (*see* § 155.05 [2] [d]). At trial, the People introduced evidence that defendant bid a construction project at St. James Episcopal Church (Church), estimating the costs of both materials and labor, and that defendant was awarded the contract. Before beginning any repair work, he received $3,125, which was his estimate of the cost of materials for the project. The People further presented evidence that defendant never began to work on the project and never returned the money.

As the People correctly contend, County Court erred in granting the motion inasmuch as the evidence is legally sufficient to support a conviction of larceny by false promise. "A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he [or she] . . . will in the future engage in particular conduct, and when he [or she] does not intend to engage in such conduct" (Penal Law § 155.05 [2] [d]). It is well established that, "[i]n any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be

performed may not be established by or inferred from the fact alone that such promise was not performed" (*id.*). Rather, the defendant's "intent must be inferred from the facts and circumstances" (*People v Carey*, 103 AD2d 934, 934). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that " '[t]he inference of wrongful intent logically flow[s] from the proven facts,' and there is a 'valid line of reasoning [that] could lead a rational trier of fact . . . to conclude that the defendant committed the charged crime,' i.e., larceny by false promise" (*People v Barry*, 34 AD3d 1258, *lv denied* 8 NY3d 919, quoting *People v Norman*, 85 NY2d 609, 620; *see People v Miller*, 23 AD3d 699, 701, *lv denied* 6 NY3d 815).

The evidence presented by the People established that defendant bid on and was awarded a construction project for the Church and that, at the time he received the $3,125, he had a present intent not to perform that work (*see Norman*, 85 NY2d at 623). Defendant received the money on May 2, 2007. On that date or shortly thereafter, defendant spent all of the money received from the Church "on past-due personal and business bills without using any of it to purchase materials for [the Church's repair work]" (*id.*; *see People v Patterson*, 135 AD2d 883, 884). Defendant failed to return calls from Church officials and, when questioned by the investigating Trooper, defendant "offered a series of dubious excuses for failing to [perform the work]" (*Norman*, 85 NY2d at 623). Indeed, viewing the evidence in the light most favorable to the People, defendant gave "patently false statement[s]" to the investigating Trooper by claiming that he had been in jail for three months and that he had used the money to pay his employees' wages (*id.*). The People presented testimony establishing that defendant was in jail for only 18 days and that he did not use any of the money received from the Church to pay employee wages.

In granting defendant's motion, the court concluded that the People had impermissibly changed the theory of the prosecution. We cannot agree. Throughout the trial, the People submitted evidence that defendant promised to perform repair work and received a sum of money based on that promise. In his comments on summation, however, the prosecutor discussed that promise as well as a second promise, which was that defendant promised to use the money for the sole purpose of buying the materials for the project. The prosecutor argued that, when defendant received the money, he had no intention to use the money for such materials. We agree with the court that there is no evidence that defendant made any promise concerning the manner in which he would spend the money received. He estimated only that the cost of the materials for the project would be $3,125, and he requested that money up front.

There are of course cases in which the evidence at trial or the prosecutor's comments on summation impermissibly change the theory of the prosecution (*see People v Greaves*, 1 AD3d 979, 980-981). In such cases, the courts have concluded that, "[i]n presenting theories different from those set forth in the indictment and bill of

particulars . . ., the People violated defendant's 'fundamental and nonwaivable' right to be tried on only those crimes charged in the indictment . . . as limited by the bill of particulars" (*id.* at 980). Here, however, the People did not change their theory of the prosecution. Neither the indictment nor the bill of particulars specified any particular promise upon which the prosecution was based, and we conclude that "defendant received the requisite fair notice of the accusations against him" (*People v McCallar*, 53 AD3d 1063, 1065, *lv denied* 11 NY3d 833 [internal quotation marks omitted]; *see generally People v Grega*, 72 NY2d 489, 495; *People v Wilson*, 61 AD3d 1269, 1271-1272). Although the prosecutor mentioned both promises on summation, he stressed that "most basically," defendant promised "to do the job." The fact that defendant used the materials money for other purposes is evidence supporting the inference that, when defendant received the money, he had no intention to perform the work.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1348

CAF 08-01570

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF THOMAS M. BELL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARIE CARROL RAYMOND, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR PETITIONER-APPELLANT.

DARLENE O'KANE, LAW GUARDIAN, SYRACUSE, FOR SARA M.B.

Appeal from an order of the Family Court, Onondaga County (George M. Raus, Jr., R.), entered June 13, 2008 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking modification of a custody order.

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

Memorandum: Petitioner father appeals from an order that summarily dismissed his petition seeking modification of an existing custody order, which was based on a written stipulation between the parties. The petition alleged that modification was warranted because respondent mother had been arrested for "DUI (drugs)" and endangering the welfare of a child. We agree with the father that Family Court erred in dismissing the petition without conducting a hearing, inasmuch as the father "made a sufficient evidentiary showing of a change in circumstances to warrant a hearing" (*Matter of Mayer v Londraville*, 26 AD3d 758; *cf. Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1349

CA 09-00976

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

OSCAR PEREZ AND ILBA PEREZ,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GRECIAN GARDEN APARTMENTS, LLC,
DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (VALERIE L. BARBIC OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (JAMES E. MASLYN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 2, 2008 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Oscar Perez (plaintiff) when he slipped and fell on an icy sidewalk outside an apartment complex owned by defendant. Defendant moved for summary judgment dismissing the complaint on the grounds that plaintiff's fall occurred during an ongoing ice storm and that it had no duty to correct the icy condition of the premises during the storm. Supreme Court erred in denying the motion. Defendant established its entitlement to judgment as a matter of law by submitting evidence that freezing rain was falling when plaintiff fell (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "It is well settled that '[a] landowner is not responsible for a failure to remove snow and ice until a reasonable time has elapsed after cessation of the storm' " (*Brierley v Great Lakes Motor Corp.*, 41 AD3d 1159, 1160). Plaintiffs by their submissions in opposition to the motion failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1351

CA 08-02670

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF THE ESTATE OF ANNE M. COSTANTINO, DECEASED.

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

LYNN REITZ, PETITIONER-RESPONDENT;

JOANNE QUIRION, OBJECTANT-APPELLANT;

AND DAVID S. BRODERICK, NIAGARA COUNTY PUBLIC ADMINISTRATOR AND FIDUCIARY OF ESTATE OF ANNE M. COSTANTINO, DECEASED, RESPONDENT-RESPONDENT.

KENNETH A. DUKE, BUFFALO, FOR OBJECTANT-APPELLANT.

STANLEY J. COLLESANO, LLC, BUFFALO (SEAN A. FITZGERALD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Niagara County (Sara S. Sperrazza, S.), entered February 28, 2007. The order approved the final account of respondent David S. Broderick, Niagara County Public Administrator, as modified by the allowance of attorney's fees and disbursements to petitioner's attorney.

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

Memorandum: Anne M. Costantino (decedent) and objectant, one of her daughters, opened three joint bank accounts with right of survivorship. After decedent died, respondent, as Niagara County Public Administrator and the fiduciary of decedent's estate, determined that the accounts were convenience accounts and that the sum of $5,499.68 removed by objectant from the joint accounts rightfully belonged to the estate. Objectant previously appealed from an order granting in part the motion of petitioner, who was also decedent's daughter, seeking summary judgment dismissing the objections filed by objectant to the petition for judicial settlement of the account of proceedings. We modified the order "by providing that the issues to be determined at the hearing with respect to objection No. 4[, concerning the expenditures presently at issue,] are whether a joint tenancy with right of survivorship was created and, if it is determined that no such tenancy was created, whether the expenditures in question were on behalf of decedent's estate" (*Matter of Costantino*, 31 AD3d 1097, 1099).

Following a hearing, Surrogate's Court determined that the accounts were indeed convenience accounts, that the expenditures made by objectant were for her personal benefit and that a setoff against objectant's share of the estate was appropriate. Because the work of petitioner's attorney had increased the size of the estate to the benefit of all beneficiaries, the Surrogate also awarded attorney's fees and disbursements to petitioner's attorney as an estate expense.

We agree with objectant that the Surrogate erred in applying the doctrine of judicial estoppel in determining that the accounts were convenience accounts. Although objectant had not listed the joint accounts as assets during unrelated divorce proceedings, her "silence . . . is not sufficient to establish taking a position in the matrimonial action that was contrary to her current contention" (*Mikkelson v Kessler*, 50 AD3d 1443, 1444). Furthermore, objectant testified that the matrimonial proceeding ended in a settlement and, generally, "a settlement does not constitute a judicial endorsement of either party's claims or theories and thus does not provide the prior success necessary for judicial estoppel" (*Manhattan Ave. Dev. Corp. v Meit*, 224 AD2d 191, 192, *lv denied* 88 NY2d 803 [internal quotation marks omitted]; *see Bates v Long Is. R.R. Co.*, 997 F2d 1028, 1032, *cert denied* 510 US 992; *cf. State Farm Mut. Auto Ins. Co. v Chandler*, 35 AD3d 588).

Nevertheless, we conclude that the Surrogate properly determined that the accounts were convenience accounts. Petitioner rebutted the presumption of Banking Law § 675 by establishing " 'that the joint account[s] had been opened in that form as a matter of convenience only' " (*Matter of Stalter*, 270 AD2d 594, 596, *lv denied* 95 NY2d 760; *see Matter of Friedman*, 104 AD2d 366, 367, *affd* 64 NY2d 743; *Matter of Camarda*, 63 AD2d 837, 838). Contrary to the final contentions of objectant, the Surrogate did not impose any sanctions for her purported misconduct in the unrelated matrimonial proceeding (*see* CPLR 3126), nor did the Surrogate abuse her discretion in awarding compensation to petitioner's attorney for services he performed that ultimately benefitted the estate (*see* SCPA 2110 [1]; *Matter of Cohen*, 52 AD3d 1080, 1081; *Matter of Bellinger*, 55 AD2d 448, 451-452).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1352

CA 09-00570

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

SALVATORE MONDELLO, SR., AND SALVATORE MONDELLO, JR., AS INDIVIDUALS AND DOING BUSINESS AS MONDELLO CONSTRUCTION, PLAINTIFFS-APPELLANTS,

V ORDER

THOMAS FARRELL AND ROSEMARY FARRELL, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF ROBERT A. DURR, SYRACUSE (ROBERT A. DURR OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (TIMOTHY J. PERRY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 28, 2008 in a breach of contract action. The order granted defendants' motion for summary judgment dismissing the amended complaint.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1353

CA 08-01233

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

SHEILA WILKOWSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BIG LOTS STORES, INC., SOUTH OGDEN ASSOCIATES, DONALD H. SMITH, DOING BUSINESS AS SOUTH OGDEN ASSOCIATES, GARY S. SMITH, DOING BUSINESS AS SOUTH OGDEN ASSOCIATES, AND HAROLD J. SMITH, DOING BUSINESS AS SOUTH OGDEN ASSOCIATES, DEFENDANTS-RESPONDENTS.

THE LAW OFFICE OF KENNETH P. BERNAS, BUFFALO (KENNETH P. BERNAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAMON MOREY LLP, BUFFALO (MICHAEL L. AMODEO OF COUNSEL), FOR DEFENDANT-RESPONDENT BIG LOTS STORES, INC.

SUGARMAN LAW FIRM, LLP, BUFFALO (MICHAEL A. RIEHLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SOUTH OGDEN ASSOCIATES, DONALD H. SMITH, DOING BUSINESS AS SOUTH OGDEN ASSOCIATES, GARY S. SMITH, DOING BUSINESS AS SOUTH OGDEN ASSOCIATES, AND HAROLD J. SMITH, DOING BUSINESS AS SOUTH OGDEN ASSOCIATES.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered May 5, 2008 in a personal injury action. The order granted the motion of defendants South Ogden Associates, Donald H. Smith, doing business as South Ogden Associates, Gary S. Smith, doing business as South Ogden Associates, and Harold J. Smith, doing business as South Ogden Associates, and the cross motion of defendant Big Lots Stores, Inc. for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell outside a store leased by defendant Big Lots Stores, Inc. (Big Lots) and owned by the remaining defendants (collectively, South Ogden defendants). According to plaintiff, defendants were negligent in causing snow and ice to accumulate on the property although, according to her deposition testimony, she recalled only that she slipped on a wet surface. Supreme Court properly granted the motion of the South Ogden defendants and that part of the cross motion of Big Lots for summary judgment dismissing the complaint and all cross claims. In support of

their respective motion and cross motion, defendants submitted the deposition testimony of plaintiff, who testified that the entranceway to the store where she fell was “slippery” and “wet” but that she did not know what caused her to fall. She further testified that it was “drizzling” outside at the time of the accident. Defendants also submitted the deposition testimony of the store manager, who testified that it had been raining that day and that the rain had turned to ice in the parking lot. The store manager did not testify, however, that ice had formed in the entranceway to the store. Based on that evidence, defendants met their initial burden by establishing that they lacked either actual or constructive notice of any allegedly dangerous condition and that they did not create it (*see Wilson v Walgreen Drug Store*, 42 AD3d 899, 900), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Even assuming, arguendo, that the slippery, wet substance on which plaintiff slipped and fell was in fact black ice, we conclude that defendants established as a matter of law that any such ice “ ‘formed so close in time to the accident that [it] could not reasonably have been expected to notice and remedy the condition’ ” (*Kimpland v Camillus Mall Assoc., L.P.*, 37 AD3d 1128, 1129).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1356

CA 08-00993

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

GARY BEITER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARY ANNE BEITER, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

CERULLI, MASSARE & LEMBKE, ROCHESTER (EDWARD J. MASSARE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered April 2, 2008 in a divorce action. The order, among other things, granted those parts of defendant's motion to vacate and amend the qualified domestic relations order.

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

Memorandum: Plaintiff appeals from an order that, inter alia, granted those parts of defendant's motion to vacate and amend the qualified domestic relations order (QDRO) to reflect the parties' stipulation that defendant would receive her share of plaintiff's pension benefits upon plaintiff's retirement in accordance with the formula set forth in *Majauskas v Majauskas* (61 NY2d 481). At the time the parties' divorce action was commenced, plaintiff was ineligible to receive pension benefits until he had completed at least 25 years of service and had attained the age of 55 years. Subsequently, the terms of the pension plan were modified so that plaintiff could receive benefits after only 20 years of service.

We reject the contention of plaintiff that the change in his pension plan, which occurred after the commencement of the divorce action, resulted in new benefits that became his separate property. "[A] pension is a form of deferred compensation" for services performed at some earlier date (*Olivo v Olivo*, 82 NY2d 202, 207), and "[c]ompensation received after dissolution of the marriage for services rendered during the marriage is marital property" (*DeLuca v DeLuca*, 97 NY2d 139, 144). "Thus, that portion of a pension based on years of employment during the marriage is marital property" (*Olivo*, 82 NY2d at 207; *see Majauskas*, 61 NY2d at 485-486), and a change in the length of service required before an employee is eligible to receive the benefits earned during the marriage is "a modification of

an asset[,] not the creation of a new one" (*Olivo*, 82 NY2d at 210). Therefore, Supreme Court properly amended the QDRO because defendant's share of plaintiff's pension benefits "should have been calculated against the pension actually obtained by [plaintiff]" (*id.*), and not in accordance with the terms of the pension plan in effect when the divorce action was commenced.

We further reject plaintiff's contentions that those parts of defendant's motion to vacate and amend the QDRO are barred by laches or equitable estoppel. "The defense of laches requires both delay in bringing an action and a showing of prejudice to the adverse party" (*Summers v City of Rochester*, 60 AD3d 1271, 1273) and, here, plaintiff has failed to demonstrate that he was prejudiced by any delay (*see Matter of Mergenhagen*, 50 AD3d 1486, 1487). Further, "in the absence of evidence that a party was misled by another's conduct or that the party significantly and justifiably relied on that conduct to its disadvantage, 'an essential element of estoppel [i]s lacking' " (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 106-107).

Contrary to plaintiff's contention, those parts of defendant's motion to vacate and amend the QDRO did not in effect constitute commencement of an action for breach of contract, and thus those parts of the motion were not barred by the six-year statute of limitations applicable to breach of contract actions (*see generally Duhamel v Duhamel* [appeal No. 2], 4 AD3d 739, 740-741). "Where a QDRO is inconsistent with the provisions of a stipulation or judgment of divorce, courts possess the authority to amend the QDRO to accurately reflect the provisions of the stipulation pertaining to the pension benefits" (*Berardi v Berardi*, 54 AD3d 982, 985-986; *see generally Irato v Irato*, 288 AD2d 952). Moreover, "because a QDRO is derived from the bargain struck by the parties at the time of the judgment of divorce, there is no need to commence a separate 'action' in order for the court to formalize the agreement between the parties in the form of a QDRO" (*Duhamel*, 4 AD3d at 741).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1357

CA 09-01094

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

GARY BEITER, PLAINTIFF-APPELLANT,

V ORDER

MARY ANNE BEITER, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

CERULLI, MASSARE & LEMBKE, ROCHESTER (EDWARD J. MASSARE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a second amended order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered April 14, 2008 in a divorce action. The second amended order, among other things, adjudged that certain retirement benefits of plaintiff are marital property.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Gartley v Gartley*, 15 AD3d 995, 996).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1359

KA 05-02286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT CARELOCK, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered September 1, 2005. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and attempted petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the third degree (Penal Law § 140.20) and attempted petit larceny (§§ 110.00, 155.25). Viewing the evidence in light of the elements of the crime of burglary as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The sentence is not unduly harsh or severe.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1360

KA 09-00468

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DYLAN M. BIANCO, DEFENDANT-RESPONDENT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO, FOR APPELLANT.

JOHN C. PUTNEY, MOUNT MORRIS, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Livingston County Court (Robert B. Wiggins, J.), entered January 6, 2009. The order dismissed the indictment.

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

Memorandum: On appeal from an order dismissing the indictment charging defendant with criminally negligent homicide (Penal Law § 125.10), the People contend that the evidence presented to the grand jury was legally sufficient to support that charge. We reject that contention.

In his statement to the police that was presented to the grand jury, defendant admitted that he and decedent had used heroin together the weekend before decedent's death. Defendant further stated that, the day before decedent's death, defendant observed that decedent was "wasted," and they went to defendant's house, where decedent "passed out." The following day, defendant drove decedent to defendant's place of employment and left him in the vehicle while defendant went to work. Upon thereafter checking on decedent during the course of the work day, defendant found that he was sleeping in the vehicle. Later that afternoon, defendant and decedent drove to a supermarket, and decedent waited in the vehicle while defendant went into the store. When defendant returned from the store, he observed that decedent looked "like he was getting sick." Defendant then drove decedent to decedent's own vehicle, where he helped decedent to sit in the passenger seat, and defendant drove decedent's vehicle to the parking lot of a fast food restaurant and left decedent there. Before leaving the parking lot, defendant threw into a dumpster a medicine bottle with methadone and used needles that he had obtained from decedent. Defendant further stated that, on his way to work the following morning, defendant observed decedent's vehicle parked where he had left it but that he did not stop because he did not see anyone

and he believed that decedent "would have gone with the police by [that time]." According to other evidence presented to the grand jury, however, decedent had died while in the vehicle, and the Coroner concluded that the cause of death was "[m]ixed drug intoxication."

The standard for reviewing the legal sufficiency of the evidence before the grand jury is " 'whether the evidence, viewed in the light most favorable to the People, if unexplained and uncontradicted, would be sufficient to warrant conviction by a trial jury' " (*People v Scerbo*, 59 AD3d 1066, 1067, *lv denied* 12 NY3d 821, quoting *People v Manini*, 79 NY2d 561, 568-569). Here, we conclude that defendant's actions were not a "*sufficiently direct cause*" of decedent's death to warrant the imposition of criminal liability (*People v Kibbe*, 35 NY2d 407, 413, *rearg denied* 37 NY2d 741). Decedent's death was attributed solely to a drug overdose, and the evidence presented to the grand jury established that decedent himself obtained the drugs, outside the presence of defendant, and that decedent did not use drugs in defendant's presence on the day in question (*cf. People v Galle*, 77 NY2d 953, 955-956).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1361

KA 05-01750

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE JAMES, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 14, 2005. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]). Defendant failed to preserve for our review his contention that the plea was not voluntarily entered (*see People v Jennings*, 8 AD3d 1067, 1068, *lv denied* 3 NY3d 676). "Although defendant's initial factual allocution may have negated an essential element of the crime, this case does not fall within the exception to the preservation rule because [Supreme Court] conducted the requisite further inquiry and defendant did not thereafter raise any further objections or move to withdraw his plea or to vacate the judgment of conviction" (*id.*; *see People v Lopez*, 71 NY2d 662, 666; *People v Petersen*, 60 AD3d 1365). The bargained-for sentence is not unduly harsh or severe.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1362

KAH 08-01538

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RAYMOND ALMODOVAR, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered April 2, 2008. The judgment dismissed the petition for a writ of habeas corpus.

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

Memorandum: Supreme Court properly dismissed the petition for a writ of habeas corpus. Petitioner's contentions could have been raised on direct appeal from the judgment of conviction or by way of a motion pursuant to CPL article 440, and thus habeas corpus relief is unavailable (*see People ex rel. Lanfair v Corcoran*, 60 AD3d 1351, *lv denied* 12 NY3d 714; *People ex rel. Mills v Poole*, 55 AD3d 1289, *lv denied* 11 NY3d 712). Habeas corpus relief also is unavailable because petitioner would not be entitled to immediate release from custody even in the event that his contentions had merit (*see People ex rel. Douglas v Vincent*, 50 NY2d 901, 903; *People ex rel. Gloss v Costello*, 309 AD2d 1160, 1160-1161, *lv denied* 1 NY3d 504).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1363

CAF 08-02262

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

IN THE MATTER OF THE ADOPTION OF KAYLA R.

LOWELL L.M., PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

SCOTT R., RESPONDENT-APPELLANT.

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

THOMAS D. WILLIAMS, BATAVIA, FOR PETITIONER-RESPONDENT.

Appeal from an order (denominated decision) of the Family Court, Genesee County (Eric R. Adams, J.), entered October 3, 2008 in an adoption proceeding. The order adjudged that the consent of respondent to the adoption of his child by petitioner is not required.

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

Memorandum: On appeal from an order determining that his consent to the adoption of his child by petitioner, the mother's husband, is not required pursuant to Domestic Relations Law § 111 (1) (d), respondent father contends that he was denied his right to effective assistance of counsel because his attorney did not challenge the constitutionality of section 111 (1) (d). We reject that contention, inasmuch as the failure to advance a challenge that has no merit does not constitute ineffective assistance of counsel (*see generally Matter of Hui H.*, 232 AD2d 248). In *Caban v Mohammed* (441 US 380, 392), the United States Supreme Court held that, where a parent has not "come forward to participate in the rearing of his [or her] child," the Equal Protection Clause does not preclude a state from withholding from that parent the privilege of vetoing the adoption of the child. Section 111 (1) (d) thereafter was amended in an effort to bring the statute into compliance with *Caban* (*see Matter of Raquel Marie X.*, 76 NY2d 387, 399, *cert denied* 498 US 984). The statute now provides that consent by the father of a child born out of wedlock who has been placed with the adoptive parents more than six months after the birth of the child is unnecessary only in the event that the father fails to "maintain[ ] substantial and continuous or repeated contact with the child." Thus, according to the United States Supreme Court, the statute is not unconstitutional (*see Lehr v Robertson*, 463 US 248, 267-268; *see also Raquel Marie X.*, 76 NY2d at 400). Furthermore, because the father's contact with the child is not as extensive as the mother's contact with the child, we conclude that the absence of a challenge by the father's attorney to the constitutionality of the

statute based on a claim of the denial of equal protection of the law as applied to the father also did not deprive him of meaningful representation. We note that the father's attorney properly attempted to demonstrate that the father in fact maintained substantial contact with the child, based on his payment of child support and his visits and communications with the child.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1366

CA 09-01017

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

IN THE MATTER OF THOMAS E. ROTHDIENER AND
VITO CARBONE, PETITIONERS-APPELLANTS,

V ORDER

STATE OF NEW YORK RACING AND WAGERING BOARD,
RESPONDENT-RESPONDENT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PETITIONERS-APPELLANTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered January 27, 2009. The order and judgment denied the petition and confirmed the arbitration award.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1367

CA 09-00332

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

JAMES O'DONNELL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO-DS ASSOCIATES, LLC,
DELTA SONIC CARWASH SYSTEMS, INC.,
AND BENDERSON DEVELOPMENT COMPANY,
DEFENDANTS-RESPONDENTS.

CANTOR, LUKASIK, DOLCE & PANEPINTO, P.C., BUFFALO (CHARLES H. COBB OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BENDER, CRAWFORD & BENDER, LLP, BUFFALO (THOMAS W. BENDER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered August 27, 2008 in a personal injury action. The order, insofar as appealed from, granted those parts of the cross motion of defendants for summary judgment dismissing the Labor Law § 240 (1) claim and the Labor Law § 241 (6) claim insofar as it is based on an alleged violation of 12 NYCRR 23-5.1 (d) (4).

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while he was attempting to raise a scaffold using a hand-operated hoisting mechanism. Plaintiff was turning the handle of the hoisting mechanism when the crank suddenly stopped, causing dislocation of his shoulder. As limited by his brief, plaintiff contends on appeal that Supreme Court erred in granting those parts of defendants' cross motion seeking summary judgment dismissing the Labor Law § 240 (1) claim and the Labor Law § 241 (6) claim insofar as it is based on an alleged violation of 12 NYCRR 23-5.1 (d) (4). We affirm.

With respect to the Labor Law § 240 (1) claim, defendants established their entitlement to judgment as a matter of law, and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Labor Law § 240 (1) protects "workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured' " (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, quoting *Rocovich v*

Consolidated Edison Co., 78 NY2d 509, 514). The special hazards contemplated by the statute "do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity. Rather, [they] are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross*, 81 NY2d at 501). Here, plaintiff neither fell from a height nor was struck by an improperly hoisted or inadequately secured object (*see id.*). Defendants submitted in support of their cross motion the deposition testimony of plaintiff establishing that his shoulder injury occurred when the handle of the hoisting mechanism ceased responding to his application of force. The mere fact that the force of gravity acted upon the hoisting mechanism is insufficient to establish a valid section 240 (1) claim inasmuch as plaintiff's injury did not result from an elevation-related risk as contemplated by the statute (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 269-270; *Melo v Consolidated Edison Co. of N.Y.*, 92 NY2d 909, 911-912; *see generally Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491, *rearg denied* 87 NY2d 969).

With respect to the Labor Law § 241 (6) claim insofar as it is based on an alleged violation of 12 NYCRR 23-5.1 (d) (4), defendants met their initial burden on the cross motion by establishing that they did not violate that regulation, pursuant to which "[n]o scaffold shall be loaded in excess of the maximum load for which it is intended" (*see generally Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349; *Bockmier v Niagara Recycling*, 265 AD2d 897), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562). There is no evidence in the record establishing what materials were located on the specific section of scaffolding at issue at the time of plaintiff's accident and thus no factual basis upon which the weight of those materials could be estimated. The opinion of plaintiff's expert that the scaffold was overloaded at the time of the accident is based upon pure speculation and thus is insufficient to raise a triable issue of fact (*see Kretowski v Braender Condominium*, 57 AD3d 950, 952; *see generally Zuckerman*, 49 NY2d at 562).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1369

CA 09-01039

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

IN THE MATTER OF THE ARBITRATION BETWEEN
CACV OF COLORADO, LLC, PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

AND

LUCY J. NOWAK, RESPONDENT-APPELLANT.

MICHAEL W. RICKARD, II, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered July 15, 2008 in a proceeding pursuant to CPLR article 75. The order, among other things, granted the petition.

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

Memorandum: Petitioner commenced this CPLR article 75 proceeding seeking to confirm an arbitration award. Supreme Court granted the petition and denied respondent's motion seeking to dismiss the petition for lack of personal jurisdiction. We reverse. "[T]he incontestable starting proposition in cases of this kind is that once jurisdiction and service of process are questioned, [petitioner] ha[s] the burden of proving satisfaction of statutory and due process prerequisites" (*Matter of Country Side Sand & Gravel Inc. v Town of Pomfret Zoning Bd. of Appeals*, 57 AD3d 1501, 1502, quoting *Stewart v Volkswagen of Am.*, 81 NY2d 203, 207). We conclude that petitioner failed to meet that burden by its conclusory and unsubstantiated assertions that respondent was served with the notice of petition and verified petition. Indeed, petitioner failed to produce any evidence, such as an affidavit of service or a signed acknowledgment of receipt, demonstrating that respondent was properly served with the notice of petition and verified petition pursuant to CPLR 308 or CPLR 312-a. In light of our determination, we do not consider respondent's remaining contentions.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1370

CA 08-01573

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

IN THE MATTER OF THE ESTATE OF ALDONA K. MARRIOTT, DECEASED.

GAIL MARRIOTT, PETITIONER-RESPONDENT; ORDER

ROBERT W. MARRIOTT, OBJECTANT-APPELLANT;

KATHERINE P. HAWKRIDGE, ESQ., GUARDIAN AD LITEM FOR KEVIN MARRIOTT, A MINOR, RESPONDENT.

PETER M. HOBAICA, LLC, UTICA (GEORGE E. CURTIS OF COUNSEL), FOR OBJECTANT-APPELLANT.

MCMAHON AND GROW, ROME (DAVID C. GROW OF COUNSEL), FOR PETITIONER-RESPONDENT.

KATHERINE P. HAWKRIDGE, UTICA, FOR RESPONDENT.

Appeal from an order of the Surrogate's Court, Oneida County (David A. Murad, S.), entered June 18, 2008. The order, among other things, granted petitioner's motion for summary judgment dismissing the objections to the probate of the will.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1371

CA 09-00260

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

IN THE MATTER OF THE ARBITRATION BETWEEN
NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 2028, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

DANIEL M. GREGORY, BUFFALO (WAYNE R. GRADL OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICE OF WILLIAM E. GRANDE, KENMORE (WILLIAM E. GRANDE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 10, 2008 in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, granted respondent's cross motion to compel arbitration of a second grievance.

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

Memorandum: Petitioner commenced this proceeding seeking to confirm an arbitration award with respect to a grievance, and respondent moved to compel arbitration of a second grievance. Petitioner contended in opposition to respondent's motion that it was not seeking to stay arbitration of the second grievance but, rather, it merely sought a determination that the same arbitrator who decided the first grievance should also decide the second grievance. By the order in appeal No. 1, Supreme Court granted the petition and, with respect to respondent's motion, the court agreed with petitioner that the same arbitrator should decide both grievances. By the order in appeal No. 2, the court denied petitioner's motion that in effect sought leave to reargue respondent's motion in appeal No. 1. According to petitioner in appeal No. 2, the court should have denied respondent's motion to compel arbitration of the second grievance on the ground of res judicata. We conclude that both appeals by petitioner must be dismissed. Petitioner is not an aggrieved party with respect to appeal No. 1 because it obtained precisely the relief that it sought (*see* CPLR 5511; *Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488) and, with respect to appeal No. 2, petitioner in effect moved for leave to reargue, and no appeal lies from an order

denying that relief (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1372

CA 09-00261

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

IN THE MATTER OF THE ARBITRATION BETWEEN
NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 2028, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

DANIEL M. GREGORY, BUFFALO (WAYNE R. GRADL OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICE OF WILLIAM E. GRANDE, KENMORE (WILLIAM E. GRANDE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 26, 2009 in a proceeding pursuant to CPLR article 75. The order denied petitioner's motion for leave to reargue respondent's cross motion in appeal No. 1.

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

Same Memorandum as in *Matter of Niagara Frontier Transp. Auth. (International Longshoremen's Assn., Local 2028)* ([appeal No. 1] ___ AD3d ___ [Nov. 13, 2009]).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1377

TP 09-00975

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

IN THE MATTER OF JOHN E. KAZMIRSKI, PETITIONER,

V ORDER

VILLAGE OF WEEDSPORT, RESPONDENT.

KIRWAN LAW FIRM, P.C., EAST SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL), FOR PETITIONER.

RANDY J. RAY, BALDWINSVILLE, FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered April 13, 2009) to review a determination of respondent. The determination terminated petitioner from the position of police officer.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1378

KA 08-00883

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KEVIN BAKER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered March 19, 2008. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1379

KA 06-03659

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL WILLIAMS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered November 21, 2006. The judgment convicted defendant, upon a jury verdict, of unauthorized use of a vehicle 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 unauthorized use of a vehicle in the second degree (Penal Law § 165.06). Contrary to the contention of defendant, County Court did not abuse its discretion in denying his request for an adjournment to enable him to procure a witness (*see People v Moore*, 41 AD3d 1149, 1151, *lv denied* 9 NY3d 879, 992). Defendant failed to preserve for our review his further contention that he was denied a fair trial based on prosecutorial misconduct (*see* CPL 470.05 [2]). In any event, that contention lacks merit inasmuch as the alleged misconduct was not so egregious as to deprive defendant of a fair trial (*see People v Shaw*, ___ AD3d ___ [Oct. 2, 2009]; *see also People v Brent-Pridgen*, 48 AD3d 1054, 1055, *lv denied* 10 NY3d 860).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1381

KA 08-01733

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALFRED K. MCGRIGG, 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 an order of the Erie County Court (Sheila A. DiTullio, J.), entered September 4, 2008. 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.*) following a redetermination hearing conducted upon defendant's request, in accordance with *Doe v Pataki* (481 F3d 69). We reject the contention of defendant that, because he had been released from imprisonment for 10 years at the time of the redetermination hearing, County Court erred in assessing 15 points against him for being released from prison without supervision (*see People v Ferrara*, 38 AD3d 1302, *lv denied* 8 NY3d 815; *see generally* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 17 [2006]). Contrary to defendant's further contention, "the court did not abuse its discretion in determining that the fact that defendant had not been charged with a sex offense since his release from imprisonment on the underlying offense did not warrant a downward departure" (*People v Perkins*, 32 AD3d 1241, 1241, *lv denied* 7 NY3d 718).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1382

KA 05-01911

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JERMAINE BROWN, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered June 22, 2005. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]). Defendant failed to preserve for our review his contention that Supreme Court penalized him for exercising his right to trial by imposing a more severe sentence after trial than that offered as part of the plea bargain (*see People v Slater*, 61 AD3d 1328, 1329, *lv denied* 13 NY3d 749). In any event, that contention is without merit. "The imposition of a more severe sentence after trial than that offered to defendant pursuant to a plea offer that he rejected, without more, does not support the contention of defendant that he was penalized for exercising his right to go to trial" (*People v Jones*, 229 AD2d 980, 980, *lv denied* 89 NY2d 925), and the record contains no evidence that the sentence was " 'the product of vindictiveness' " (*Slater*, 61 AD3d at 1329). Defendant failed to preserve for our review his further contention that the evidence is legally insufficient to establish his intent to cause serious physical injury inasmuch as his motion for a trial order of dismissal was not specifically directed at that issue (*see People v Gray*, 86 NY2d 10, 19). Contrary to defendant's contention, the evidence is legally sufficient to establish that the victim sustained a serious physical injury (*see People v Thompson*, 224 AD2d 646, *lv denied* 88 NY2d 970;

see generally People v Bleakley, 69 NY2d 490, 495). Viewing the evidence in light of the elements of assault in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We reject the further contention of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). The remaining contentions of defendant, including those raised in his pro se supplemental brief, are not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1383

KA 06-00458

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JERMAINE BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JERMAINE BROWN, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (WENDY EVANS LEHMANN OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court, in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), entered January 5, 2006. The order denied the motion of defendant pursuant to CPL 440.10 to vacate the judgment of conviction in appeal No. 1.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1384

KA 08-00519

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CODY BACKUS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered January 2, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, burglary in the first degree and attempted robbery in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3] [felony murder]) and burglary in the first degree (§ 140.30 [2]), defendant contends that the felony murder count did not charge a "cognizable crime" under the circumstances of this case. Despite the language in which defendant frames his contention, we conclude that he is in effect contending that the felony murder count is duplicitous. Such a contention must be preserved for our review (*see People v Sponburgh*, 61 AD3d 1415, *lv denied* 12 NY3d 929; *People v Pyatt*, 30 AD3d 265, 265-266, *lv denied* 7 NY3d 869), and defendant failed to do so. We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant contends that preservation is not required in any event because the indictment was jurisdictionally defective. We reject that contention. "[A]n indictment is jurisdictionally defective only if it does not effectively charge the defendant with the commission of a particular crime" (*People v Iannone*, 45 NY2d 589, 600; *see People v Ray*, 71 NY2d 849) and, here, the count of the indictment that is the subject of defendant's challenge expressly charges defendant only with felony murder.

Inasmuch as defendant consented to the supplemental instruction given by Supreme Court in response to a jury note concerning telephone records, he "has waived his present challenge to the [supplemental]

instruction" (*People v Scott*, 60 AD3d 1396, 1397, *lv denied* 12 NY3d 821). Contrary to defendant's further contentions, we conclude that there is sufficient evidence corroborating the testimony of the accomplice (*see generally People v Breland*, 83 NY2d 286, 293-294; *People v Daniels*, 37 NY2d 624, 629-630), and that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject the further contention of defendant that he was denied effective assistance of counsel based, inter alia, upon defense counsel's failure to make certain motions or to interpose certain objections (*see generally People v Baldi*, 54 NY2d 137, 147). "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

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

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1386

CAF 08-01920

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

IN THE MATTER OF STEVEN G.

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

DAIRYN O., RESPONDENT,
AND STEVEN G., RESPONDENT-APPELLANT.

CHRISTINE M. COOK, SYRACUSE, FOR RESPONDENT-APPELLANT.

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

KELLY M. CORBETT, LAW GUARDIAN, FAYETTEVILLE, FOR STEVEN G.

Appeal from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered August 20, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, terminated the parental rights of respondent Steven G.

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 his child on the ground of permanent neglect, respondent father contends that he was not served with the neglect petition and thus did not receive notice of the underlying neglect proceeding, in which he was a "non-respondent parent." The record belies that contention. Family Court's "Order of Fact-Finding and Disposition and Permanency Hearing (Neglect)" indicates that the father was in fact served with a copy of the neglect petition with respect to the child as "a non-respondent parent" but that he did not appear. The father was subsequently served with the termination petition and appeared in response thereto.

The father did not, however, move to vacate the prior order in the underlying neglect proceeding pursuant to CPLR 5015 (a) (4) or to Family Court Act § 1061 (*see generally Matter of Ceirra L.*, 50 AD3d 1520; *Matter of Shaune TT.*, 251 AD2d 758). In any event, the conclusory assertion of the father that he was not notified of the neglect proceeding was insufficient to raise an issue of fact requiring a traverse hearing with respect to service of the neglect petition (*see Shaune TT.*, 251 AD2d 758).

We reject the further contention of the father that the court's assignment of counsel when he appeared in response to the petition seeking to terminate his parental rights was "late" and "constitutionally inadequate" inasmuch as the father had not previously appeared in the proceeding.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1388

CAF 08-02393

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

IN THE MATTER OF WAYNE E. YADDOW, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LISA M. BIANCO, RESPONDENT-RESPONDENT.

RICHARD P. FERRIS, UTICA, FOR PETITIONER-APPELLANT.

EDWARD G. KAMINSKI, UTICA, FOR RESPONDENT-RESPONDENT.

KRISTINE A. KIPERS, LAW GUARDIAN, NEW HARTFORD, FOR GABRIEL Y.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered October 22, 2008 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, granted the cross petition and petition of respondent awarding her sole physical custody of the parties' child.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and respondent's cross petition and petition are dismissed.

Memorandum: Petitioner father appeals from an order that, inter alia, granted the cross petition and petition of respondent mother seeking to modify the existing custody arrangement by awarding sole physical custody of the parties' child to the mother. As the father correctly contends, the mother failed to establish a significant change of circumstances sufficient to warrant Family Court to determine whether a change in custody was in the best interests of the child. The court determined that the fact that the father had begun to commute to an out-of-state college two days a week constituted a significant change of circumstances. We cannot agree, based on the record before us. The father testified that he continued to arrive home each night before dinner and that the commuting arrangement was only temporary. Indeed, there was no evidence that the father intended to relocate (*see Matter of Bjork v Bjork*, 23 AD3d 784, 785, *lv denied* 6 NY3d 707). We reject the additional contention of the mother that her having given birth to another child constitutes a significant change of circumstances. The separation of the parties' child from a half-sibling who was born following the joint custody order and who "never shared a household" with the half-sibling is not a factor to consider in determining whether there was a significant change of circumstances (*Matter of Chant v Filippelli*, 277 AD2d 741,

742).

Finally, even assuming, arguendo, that the mother established a significant change of circumstances, we nevertheless would conclude, based on the record before us, that a change in custody was not in the best interests of the child (*see generally Matter of Maher v Maher*, 1 AD3d 987, 988-989).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1392

CA 09-01091

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

BRIAN E. SIERSON AND KELLEY M. SIERSON,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JOHN J. GACEK AND JEANETTE I. KELLY,
DEFENDANTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JENNIFER L. NUHFER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF GUSTAVE J. DETRAGLIA, JR., ESQ., UTICA (GUSTAVE J. DETRAGLIA, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Oneida County (John W. Grow, J.), entered January 2, 2009 in a personal injury action. The amended order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

It is hereby ORDERED that the amended order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Brian E. Sierson (plaintiff) when the vehicle he was operating was rear-ended by a vehicle operated by defendant John J. Gacek and owned by defendants. 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). Supreme Court granted the motion only insofar as plaintiffs alleged that plaintiff sustained a serious injury with respect to the 90/180 category. We conclude that the court should have granted the motion in its entirety, thus determining that plaintiff did not sustain a serious injury with respect to the permanent loss of use, permanent consequential limitation of use or significant limitation of use categories, which were the remaining categories of serious injury set forth in the bill of particulars. Defendants met their burden on the motion "by establishing through competent medical evidence that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d)" under those three remaining categories (*Cullen v Treen*, 30 AD3d 1086, 1087; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562), and plaintiffs failed to raise an issue of fact by submitting the affidavits of plaintiff and plaintiff's neurologist. The affidavits

were “based solely on plaintiff’s subjective complaints of pain” and numbness (*Cullen*, 30 AD3d at 1087; *see Meyer v Carney*, 187 AD2d 931; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350). Furthermore, plaintiff’s neurologist “did not set forth the tests he conducted or their results to support his conclusions” that plaintiff sustained an injury to the pudendal nerve and that plaintiff would have difficulty conceiving children (*Burke v Carney*, 37 AD3d 1107, 1108).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1395

CA 09-01086

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

CHRISTOPHER JONES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HILL'S HEATING & AIR CONDITIONING, INC.,
DEFENDANT-RESPONDENT.

ADORANTE, TURNER & ASSOC., CAMILLUS (ANTHONY P. ADORANTE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DIRK J. OUDEMOOL, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered February 13, 2009 in a breach of contract action. The order denied plaintiff's motion seeking an award of attorney's fees.

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

Memorandum: Plaintiff appeals from an order denying his motion seeking an award of attorney's fees. We affirm. Plaintiff commenced this action seeking damages for, inter alia, defendant's alleged breach of a contract pursuant to which defendant was to install heating and air conditioning equipment in plaintiff's residence. Although the contract is not included in the record on appeal, we note that Supreme Court's decision indicates that the contract contains a clause providing that attorney's fees in a certain amount would be added to the balance owed under the contract in the event that the unpaid balance was referred to an attorney for collection. Following a nonjury trial, the court, inter alia, dismissed the claim for breach of contract but awarded plaintiff damages in the amount of $1,500 on plaintiff's claim for breach of implied warranty.

"[T]he general rule is that each litigant is required to absorb the cost of his [or her] own attorney's fees . . . in the absence of a contractual or statutory liability" (*Widewaters Prop. Dev. Co., Inc. v Katz*, 38 AD3d 1220, 1222 [internal quotation marks omitted]). Plaintiff contends, however, that he is entitled to an award of attorney's fees on the breach of implied warranty claim pursuant to General Obligations Law § 5-327 (2), which provides in relevant part that, when a consumer contract states that the seller may recover attorney's fees incurred as the result of the breach of any contractual obligation by the buyer, "it shall be implied that the . .

. seller . . . shall pay the [buyer's] attorney's fees . . . incurred as the result of a breach of any contractual obligation" by the seller. Here, we conclude that the statute is inapplicable because plaintiff was awarded damages only on its claim for breach of implied warranty, which is distinct from plaintiff's claim for breach of contract (*see generally Simmons v Washing Equip. Tech.*, 51 AD3d 1390, 1391; *Furia v Furia*, 116 AD2d 694, 695).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1396

CA 08-00575

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

IN THE MATTER OF MITCHELL KALWASINSKI,
PETITIONER-APPELLANT,

V ORDER

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

MITCHELL KALWASINSKI, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered January 28, 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.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1400

TP 09-01052

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF DESIRAE WESCOTT, PETITIONER,

V MEMORANDUM AND ORDER

DAVID A. HANSELL, COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, AND LAURA CEROW, COMMISSIONER, JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

LEGAL AID SOCIETY OF MID-NEW YORK, INC., WATERTOWN (TERRENCE J. WHELAN OF COUNSEL), FOR PETITIONER.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT DAVID A. HANSELL, COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE.

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, Jefferson County [Joseph D. McGuire, J.], entered May 20, 2009) to review a determination of respondent David A. Hansell, Commissioner, New York State Office of Temporary and Disability Assistance. The determination suspended petitioner's public assistance benefits for a certain period of time based upon petitioner's failure to comply with mandated treatment.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the determination to suspend her public assistance benefits for 45 days based upon her failure to comply with the requirements of an alcohol and substance abuse rehabilitation program. We conclude that the determination is supported by substantial evidence (*see Matter of Sorokina v Hansell*, 45 AD3d 1388, *appeal dismissed* 10 NY3d 806; *Matter of Heaney v Wing*, 249 AD2d 1004, 1005; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181). The Jefferson County Department of Social Services, the local district (Local District) serving petitioner, determined that petitioner was unable to work by reason of her need for treatment for alcohol or substance abuse and referred her to a program in the Local District (*see* Social Services Law § 132 [4] [c]). Petitioner did not complete that program, however, and instead decided to enroll in a program in another district. Contrary to the

contention of petitioner, she did not show the requisite good cause for her failure to complete the designated program (*see* § 132 [4] [f]). The Local District was authorized to select the program that would meet her rehabilitation needs (*see* § 132 [4] [c]), and petitioner could have established good cause for failing to complete the program if, inter alia, the Local District agreed with her that she was in need of a different program and the Local District determined that another program was appropriate (*see* 18 NYCRR 351.2 [i] [2] [iv] [a]). Here, inasmuch as petitioner never informed the Local District that she was enrolling in a different program, it cannot be said that the Local District agreed with petitioner that she was in need of a different program or determined that the other program was appropriate.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1401

KA 07-02521

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES L. RIVERS, DEFENDANT-APPELLANT.

AARON A. LOURIDAS, SCHENECTADY, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered October 2, 2007. The judgment convicted defendant, upon a nonjury verdict, of burglary in the second degree, petit larceny and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]) and resisting arrest (§ 205.30). We reject defendant's contention that the People impermissibly changed their theory of the case at trial (*cf. People v Roberts*, 72 NY2d 489, 497; *People v Orso*, 270 AD2d 947, *lv denied* 95 NY2d 856). Further, we conclude that the evidence is legally sufficient to support the conviction of burglary and resisting arrest (*see generally People v Bleakley*, 69 NY2d 490, 495), and that, viewing the evidence in this nonjury trial in light of the elements of those crimes (*see People v Danielson*, 9 NY3d 342, 349), the verdict with respect to them is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject the further contention of defendant that he was denied effective assistance of counsel based on the failure of defense counsel to advise Supreme Court (John J. Brunetti, A.J.) that it had not ruled on defendant's CPL 30.30 motion after the filing of a superseding indictment. Inasmuch as defendant's allegations in support of the motion "did not on their face indicate a clear entitlement to a dismissal of the charges under CPL 30.30" (*People v Lomax*, 50 NY2d 351, 357; *see* CPL 210.45 [5]), the court did not err in summarily denying the motion. Thus, although " '[i]t is well settled that a failure of [defense] counsel to assert a meritorious statutory speedy trial claim is, by itself, a sufficiently egregious error to

render a defendant's representation ineffective' " (*People v Manning*, 52 AD3d 1295, 1295), here defense counsel was not ineffective in failing to pursue a motion that had no chance of success (*see generally People v Caban*, 5 NY3d 143, 152; *People v Jackson*, 64 AD3d 1248, 1250, *lv denied* 13 NY3d 745).

Contrary to defendant's contention, the court properly refused to preclude the oral admissions that were the subject of the CPL 710.30 notice served by the People after the superseding indictment was filed. Those admissions were not referenced in the CPL 710.30 notice that was served in connection with the original indictment, but the record establishes that the People filed the superseding indictment out of necessity after the court dismissed two counts of the original indictment. We thus reject defendant's contention that the People attempted to circumvent the requirements of CPL 710.30 by filing the superseding indictment (*cf. People v Capolongo*, 85 NY2d 151, 165; *see generally People v Jackson*, 245 AD2d 964, *lv denied* 91 NY2d 926; *People v Littlejohn*, 184 AD2d 790, *lv denied* 81 NY2d 842). Finally, the sentence is not unduly harsh or severe.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1402

KA 08-00539

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JANUARY M. DELANEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (TRACEY A. BRUNECZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered April 9, 2007. The judgment convicted defendant, upon her plea of guilty, of robbery in the second degree.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1403

KA 09-01006

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JANUARY M. DELANEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (TRACEY A. BRUNECZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered April 9, 2007. The judgment convicted defendant, upon her plea of guilty, of robbery in the third degree.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1404

KA 08-01019

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY M. JONES, DEFENDANT-APPELLANT.

SCHLATHER, STUMBAR, PARKS & SALK, ITHACA (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered November 14, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree (two counts), criminal possession of a weapon in the third degree, endangering the welfare of a child (two counts), criminally using drug paraphernalia in the second degree (four counts) and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We reject the contention of defendant that he was entitled to specific performance of the original plea agreement. The record establishes that "defendant did not perform any services for the prosecutor under the terms of the original plea agreement[,] and [that he] did not suffer any detriment in reliance upon [that] agreement[]" (*People v German*, 153 AD2d 588, 588, *lv denied* 75 NY2d 813; *cf. People v McConnell*, 49 NY2d 340, 347). The sentence is not unduly harsh or severe.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1405

KA 08-01796

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER HARZYNSKI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered June 24, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1406

KA 08-01678

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER HARZYNSKI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered June 24, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1407

KA 08-01687

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMINIQUE HOLLEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered July 24, 2008. The judgment convicted defendant, after a nonjury trial, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting her after a nonjury trial of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). Defendant made only a general motion for a trial order of dismissal and thus failed to preserve for our review her contention that the evidence is legally insufficient to establish her constructive possession of the cocaine found in the apartment where the police executed a search warrant (*see People v Gray*, 86 NY2d 10, 19; *People v Alejandro*, 60 AD3d 1381, *lv denied* 12 NY3d 850). In any event, defendant's contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). The evidence established that defendant was in the apartment when the search warrant was executed, and the police found women's clothing and bills from the gas company addressed to defendant at that apartment. We thus conclude that the evidence is legally sufficient to establish defendant's constructive possession of the cocaine (*see People v Patterson*, 13 AD3d 1138, 1139, *lv denied* 4 NY3d 801). The trier of fact was entitled to discredit the testimony of defendant that she had moved out of the apartment a few weeks earlier and had simply left behind some "old clothes" and other "garbage stuff" (*see generally People v Young*, 197 AD2d 874, 874-875, *lv denied* 82 NY2d 854). Contrary to defendant's further contention,

viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1408

KA 06-02823

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIUS BROWN, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered August 17, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [former (4)]), defendant contends that Supreme Court erred in refusing to suppress the gun found on his person and his statements to the police on the ground that he was unlawfully detained. Contrary to defendant's contention, we conclude that the police officer had a founded suspicion that criminal activity was afoot and thus was justified, based on a common-law right of inquiry, in ordering defendant to stop walking away from him (*see generally People v Bora*, 83 NY2d 531, 534-536; *People v De Bour*, 40 NY2d 210, 223). The People therefore sustained their burden at the suppression hearing "of going forward to show the legality of the police conduct in the first instance" (*People v Di Stefano*, 38 NY2d 640, 652). We further conclude that defendant's flight when approached by the officer, in conjunction with the attendant circumstances, gave rise to the requisite reasonable suspicion justifying police pursuit (*see People v Martinez*, 59 AD3d 1071, 1072, *lv denied* 12 NY3d 856).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1409

KA 09-00162

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAMMY L. NIELSEN, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRENTON P. DADEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered January 16, 2009. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35). Defendant failed to preserve for our review her contention that the evidence is legally insufficient to support the conviction inasmuch as her motion for a trial order of dismissal was not " 'specifically directed' at the alleged error[s]" asserted on appeal (*People v Gray*, 86 NY2d 10, 19). 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). We reject the contention of defendant that she was denied a fair trial based on the failure of the People to disclose prior to trial that they had made assurances to one of their witnesses that he would not be prosecuted for tax evasion. Even assuming, arguendo, that those assurances constituted *Brady* material, we agree with Supreme Court that defendant was "given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during [her] case," and thus reversal is not required (*People v Cortijo*, 70 NY2d 868, 870; *see People v Tillman*, 261 AD2d 854, *lv denied* 93 NY2d 980). The court properly denied defendant's motion to dismiss the indictment based upon the alleged insufficiency of the prosecutor's opening statement. "The prosecutor stated the nature of the charge[] and the facts that he expected to prove in support of them[,] and thus his opening statement was

adequate" (*People v Dennee*, 291 AD2d 888, *lv denied* 98 NY2d 650; *see generally People v Kurtz*, 51 NY2d 380, 384, *cert denied* 451 US 911). The record does not support defendant's contention that the court improperly assumed the function or appearance of an advocate during the trial (*see People v Wager*, 19 AD3d 263, *lv denied* 5 NY3d 811). Finally, the incarceration portion of the sentence is not unduly harsh or severe.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1410

KAH 08-02375

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
EDMUND WILLIAMS, PETITIONER-APPELLANT,

V ORDER

MICHAEL CORCORAN, SUPERINTENDENT, CAYUGA
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered September 4, 2008 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1412

CAF 07-02385, CAF 07-02386

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF ANDREW P., DEREK P., AND KALLEA P.

---------- ORDER

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

SANDRA W. AND SCOTT W., RESPONDENTS-APPELLANTS.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT SANDRA W.

PAUL A. NORTON, CLINTON, FOR RESPONDENT-APPELLANT SCOTT W.

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Oneida County (James R. Griffith, J.), entered July 19, 2007 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed Kallea P. in the care and custody of petitioner.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1413

CAF 07-02690, CAF 08-00419

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

IN THE MATTER OF FRANCIS S., TEQUILAROSE H. AND JESSEJAMES H.

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

WENDY H. AND JEREMY H., RESPONDENTS-APPELLANTS.

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-APPELLANT JEREMY H.

CHRISTINE M. COOK, SYRACUSE, FOR RESPONDENT-APPELLANT WENDY H.

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

SUSAN B. MARRIS, LAW GUARDIAN, MANLIUS, FOR FRANCIS S., TEQUILAROSE H. AND JESSEJAMES H.

Appeals from an order of the Family Court, Onondaga County (Martha E. Mulroy, J.), entered January 15, 2008 in a proceeding pursuant to Family Court Act article 10. The order placed respondents' children in the custody of petitioner.

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

Memorandum: Respondent parents each appeal from an order that, inter alia, placed their children in the custody of petitioner. We dismiss the appeals as moot inasmuch as the order has since expired by its own terms and was superseded by an order entered in July 2008 following a permanency hearing (*see Matter of Giovanni K.*, 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715). We conclude that the exception to the mootness doctrine does not apply herein (*see Matter of Sasha M.*, 43 AD3d 1401).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1414

CA 09-01087

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

WILLIAM JOHNSON, PLAINTIFF,

V MEMORANDUM AND ORDER

UNIFIRST CORPORATION, DEFENDANT.

UNIFIRST CORPORATION, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

DERRICK CORPORATION, THIRD-PARTY
DEFENDANT-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (MICHAEL L. AMODEO OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered March 6, 2009 in a personal injury action. The order denied the motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when, during the course of his employment as a welder for third-party defendant, Derrick Corporation (Derrick), the uniform he was wearing caught fire. The uniform was rented by Derrick from defendant-third-party plaintiff, UniFirst Corporation (UniFirst), which commenced the third-party action against Derrick seeking contractual indemnification.

Supreme Court erred in denying Derrick's motion for summary judgment dismissing the third-party complaint. Pursuant to Workers' Compensation Law § 11, a third-party action for indemnification against an employer for injuries sustained by its employee in a work-related accident is barred unless the employee sustains a grave injury or the claim for indemnification is "based upon a provision in a written contract entered into prior to the accident or occurrence by

which the employer had expressly agreed to contribution to or indemnification of the . . . person asserting the cause of action for the type of loss suffered" (*see Rodrigues v N & S Bldg. Contrs., Inc*., 5 NY3d 427, 429-430). It is undisputed that plaintiff did not sustain a grave injury within the meaning of the statute, and Derrick established as a matter of law that its written contract with UniFirst containing the indemnification provision had expired and thus was not in effect at the time of plaintiff's accident (*see LaFleur v MLB Indus., Inc*., 52 AD3d 1087, 1088; *Guijarro v V.R.H. Constr. Corp*., 290 AD2d 485, 486).

UniFirst may not rely upon the automatic renewal provision of the written contract, i.e., the Customer Service Agreement, because UniFirst did not comply with its statutory obligation to provide timely written notice to Derrick "calling [its] attention" to that provision (General Obligations Law § 5-903 [2]; *see NYDIC/Westchester Mobile MRI Assoc. v Lawrence Hosp*., 242 AD2d 686, 688, *lv denied* 91 NY2d 807). We reject the further contention of UniFirst that General Obligations Law § 5-903 (2) does not apply herein. The Customer Service Agreement, which provides that UniFirst must clean, inspect, repair and deliver uniforms to Derrick, in fact constitutes an agreement for "service, maintenance or repair to or for . . . personal property" within the meaning of the statute, thus rendering applicable the notice of renewal provision (*id.*; *see NYDIC/Westchester Mobile MRI Assocs*., 242 AD2d at 687; *Telephone Secretarial Serv. v Sherman*, 28 AD2d 1010, 1011). Contrary to the further contention of UniFirst, Derrick did not waive its statutory right to timely written notice based on its course of dealing with UniFirst. Were we to allow Derrick to waive the benefit of the statute through its course of dealing, we would effectively "nullify the only purpose of [section 5-903 (2)], which is to render such [automatic renewal provisions unenforceable] unless the statutory notice is given" (*Boyd H. Wood Co. v Horgan*, 291 NY 422, 425).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1417

CA 09-00642

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

JUSTIN M. MASSEY, PLAINTIFF-APPELLANT,

V ORDER

JOHN D. MONETTE, DEFENDANT-RESPONDENT.

RIVETTE & RIVETTE, P.C., SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (MARK R. SCHLEGEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered September 22, 2008 in a personal injury action. The order granted the motion of defendant for summary judgment and denied the cross motion of plaintiff for partial summary judgment.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1418

CA 09-01055

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

ISABELLA MENDOLA, INDIVIDUALLY AND AS ADMINISTRATRIX OF ESTATE OF ARLENE E. RUSSELL, DECEASED, FRANCIS INDELICATO AND BARBARA IPPOLITO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION, ET AL., DEFENDANTS,
AND DAVID P. HUGHES, M.D., DEFENDANT-APPELLANT.

RICOTTA & VISCO, BUFFALO (BETSY FINNERTY OF COUNSEL), FOR DEFENDANT-APPELLANT.

VINAL & VINAL, BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered January 27, 2009 in a medical malpractice action. The order denied the motion of defendant David P. Hughes, M.D. for summary judgment.

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

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by Arlene E. Russell (decedent) when she fell while exiting her hospital room. Supreme Court properly denied the motion of David P. Hughes, M.D. (defendant) seeking summary judgment dismissing the complaint against him. We note at the outset that the action has been discontinued with respect to another defendant who moved along with defendant for summary judgment. Defendant met his initial burden on the motion by establishing that he was not negligent in treating decedent (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325). In opposition to the motion, however, plaintiffs raised an issue of fact by submitting evidence that defendant failed to determine whether decedent required protection against falling, inasmuch as she sought treatment for dehydration and had been prescribed medication with potential side effects, including dizziness and disorientation. Plaintiffs also submitted the affirmation of a physician and the affidavit of a registered nurse, each of whom stated that decedent was not properly

monitored.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1419

CA 09-01020

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND GORSKI, JJ.

COOLING TOWER SPECIALTIES, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

YARO ENTERPRISES, INC., DEFENDANT-APPELLANT.

LAFAY, BYRNE & LAFAY, P.C., ROCHESTER (ANTHONY P. LAFAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (CHARLES D. STEINMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered November 6, 2008 in a breach of contract action. The judgment was entered upon an order granting the motion of plaintiff seeking summary judgment granting the relief sought in the complaint and dismissal of the counterclaims.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying those parts of the motion seeking summary judgment granting the relief sought in the complaint and dismissal of the counterclaim for breach of contract and reinstating that counterclaim and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking payment for repairs made by it to a cooling tower owned by defendant, and defendant asserted counterclaims for fraud and breach of contract. According to plaintiff, defendant agreed to pay for the repairs pursuant to a written estimate setting forth the costs "per cell" of material and labor. Supreme Court erred in granting that part of plaintiff's motion seeking summary judgment granting the relief sought in the complaint. "When the language of a contract is ambiguous, its construction presents a question of fact [that] may not be resolved by the court on a motion for summary judgment" (*DiLorenzo v Estate Motors, Inc.*, 22 AD3d 630, 631). Here, plaintiff's own submissions in support of the motion establish that the phrase "per cell" is ambiguous (*see id.*). The court also erred in granting that part of plaintiff's motion seeking dismissal of defendant's counterclaim for breach of contract pursuant to CPLR 3211. Defendant's allegations are sufficient to state a counterclaim for breach of contract based upon plaintiff's allegedly inadequate performance in making the repairs that were the subject of the contract (*see Wiernik v Kurth*, 59 AD3d

535, 537). We therefore modify the judgment accordingly. The court, however, properly granted that part of the motion seeking summary judgment dismissing the counterclaim for fraud "because that [counterclaim] arises out of the same facts that serve as the basis for the breach of contract [counterclaim] and may not be independently asserted" (*Dec v Auburn Enlarged School Dist.*, 249 AD2d 907, 908).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1422

KA 08-01681

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMMETT BAKER, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, 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 (Thomas G. Leone, J.), rendered July 17, 2008. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (six counts) and course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of six counts of sexual abuse in the first degree (Penal Law § 130.65 [3]) and one count of course of sexual conduct against a child in the first degree (§ 130.75 [1] [a]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence by failing to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant further contends that County Court committed reversible error in refusing to charge the jury on the issue of joinder of offenses (*see* 1 CJI[NY] 5.39, at 239). Although we agree with defendant that the court erred in denying his request for that charge, we conclude that the error is harmless. The evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted had that charge been given (*see generally People v Brian*, 84 NY2d 887, 889; *People v Crimmins*, 36 NY2d 230, 241-242).

Defendant failed to preserve for our review his contention that counts four and six, charging defendant with sexual abuse in the first degree with respect to the same victim, were multiplicitous (*see*

People v Dann, 17 AD3d 1152, 1153, *lv denied* 5 NY3d 761). In any event, we conclude that defendant's contention lacks merit (*see id.*). Defendant also failed to preserve for our review his challenge to the court's *Sandoval* ruling (*see People v Miller*, 59 AD3d 1124, 1125, *lv denied* 12 NY3d 819), and we decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's contention that the evidence before the grand jury was legally insufficient with respect to counts two and three of the indictment "is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence" (CPL 210.30 [6]; *see People v Lee*, 56 AD3d 1250, 1251, *lv denied* 12 NY3d 818). The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1427

KA 08-01753

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HAROLD J. RIVERA, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered October 16, 2007. The judgment convicted defendant upon his plea of guilty of, inter alia, criminal possession of a controlled substance in the third degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on August 4, 2009 and by the attorneys for the parties on August 4 and 18, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1428

KA 09-00750

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL D. ROSE, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (BROOKS T. BAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered October 20, 2008. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the motion seeking to suppress all evidence obtained as the result of the stop of defendant's vehicle is granted, the indictment is dismissed, and the matter is remitted to Steuben County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle & Traffic Law § 1192 [3]; § 1193 [1] [c] [i]), defendant contends that County Court erred in determining that the stop of his vehicle was lawful and thus erred in refusing to suppress all evidence obtained as the result of that stop. We agree.

In support of their contention that the stop was valid, the People mistakenly rely on *People v Ingle* (36 NY2d 413), in which the Court of Appeals held that the stop of a vehicle is lawful provided that it is "not the product of mere whim, caprice, or idle curiosity . . . [and is] based upon 'specific and articulable facts' " (*id.* at 420, quoting *Terry v Ohio*, 392 US 1, 21). As defendant correctly contends, however, in the time since *Ingle* "the Court of Appeals has made it 'abundantly clear' . . . that 'police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or where 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' . . . or where the police have 'probable cause to believe that the driver . . .

has committed a traffic violation' " (*People v Washburn*, 309 AD2d 1270, 1271; *see People v Robinson*, 97 NY2d 341, 348-349; *People v Spencer*, 84 NY2d 749, 752-753, *cert denied* 516 US 905; *People v White*, 27 AD3d 1181).

Here, the People do not contend that the stop was made pursuant to a traffic check or was based on the officer's reasonable suspicion that defendant had committed a crime. Thus, the stop was valid only if it was supported by probable cause to believe that defendant had committed a traffic violation. At the suppression hearing, the police officer who stopped defendant's vehicle testified that, as he was traveling behind defendant's vehicle on a divided highway, he observed defendant flash his high beams while there was a vehicle approaching from the opposite direction. The officer then stopped defendant's vehicle based on his belief that defendant had violated Vehicle and Traffic Law § 375 (3). The officer testified that he understood that statute to mean that a driver is not allowed to flash his or her high beams "for particularly no reason at an oncoming vehicle." Section 375 (3) actually provides in relevant part that, "whenever a vehicle approaching from ahead is within [500] feet . . ., the headlamps, if of the multiple beam type . . . shall be operated so that dazzling light does not interfere with the driver of the approaching vehicle . . . ." The mere flashing of lights, alone, does not constitute a violation of the statute (*see People v Meola*, 7 NY2d 391, 397; *People v Hines*, 155 AD2d 722, 724, *lv denied* 76 NY2d 736; *People v Lauber*, 162 Misc 2d 19, 20).

The People presented no testimony at the hearing concerning the distance between defendant's vehicle and the oncoming vehicle, and there was no evidence that defendant's flashing of the high beams interfered in any way with the driver of the approaching vehicle. Indeed, because the officer mistakenly believed that flashing of the high beams for no particular reason was unlawful irrespective of the distance between vehicles, the officer did not concern himself with the distance of the approaching vehicle. Thus, the stop of defendant's vehicle was based on a mistake of law. "Where the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal" (*Matter of Byer v Jackson*, 241 AD2d 943, 944-945; *see People v Smith*, 1 AD3d 965; *see also People v Gonzalez*, 88 NY2d 289, 295).

We therefore reverse the judgment, vacate defendant's guilty plea, grant that part of the omnibus motion seeking to suppress all evidence obtained as the result of the stop of defendant's vehicle, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1429

KA 07-00547

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. HARRINGTON, DEFENDANT-APPELLANT.

DAVID M. KAPLAN, PENFIELD, FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered January 18, 2007. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence by failing to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Contrary to the implicit contention of defendant, he did not preserve his challenge for our review by his post-trial motion pursuant to CPL 330.30 (*see People v Mills*, 28 AD3d 1156, 1157, *lv denied* 7 NY3d 903). In any event, defendant's challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Great deference is accorded to the jury's resolution of credibility issues . . ., and it cannot be said herein that the jury failed to give the evidence the weight it should be accorded" (*People v McKinnon*, 15 AD3d 842, 842, *lv denied* 4 NY3d 888).

Defendant also failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct (*see People v Cox*, 21 AD3d 1361, 1363-1364, *lv denied* 6 NY3d 753), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We

reject the further contention of defendant that he was denied effective assistance of counsel. Viewing the evidence, the law and the circumstances of the case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1430

KA 08-00369

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE COTTON, DEFENDANT-APPELLANT.

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

MAURICE COTTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered February 4, 2008. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of various crimes, the most serious of which was attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). 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). We further reject defendant's contention that the indictment was jurisdictionally defective (*see generally People v Ray*, 71 NY2d 849), and we conclude that defendant waived his right to seek dismissal of the indictment on speedy trial grounds (*see People v Woody*, 24 AD3d 1300, *lv denied* 7 NY3d 852). We agree with defendant, however, that Supreme Court erred in denying his challenge for cause to a prospective juror inasmuch as the statements of the prospective juror did not establish an unequivocal assurance of impartiality (*see People v Arnold*, 96 NY2d 358, 363-364). Because defendant exhausted his peremptory challenges and was forced to excuse that juror for cause, reversal is required (*see People v Papineau*, 19 AD3d 1149, 1150). In view of our determination granting a new trial, we do not address the remaining contentions of defendant, including those raised in his pro se

supplemental brief.

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1431

KA 07-00442

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDY J. DUMBLETON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered August 23, 2006. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that the police lacked probable cause to arrest him at the time that he was placed in handcuffs. At the suppression hearing, defendant contended only that he had been arrested without probable cause, without specifying that the arrest occurred when he was placed in handcuffs. Defendant's present contention therefore is unpreserved for our review (see CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed to preserve for our review his additional contention that the police lacked reasonable suspicion to place him in handcuffs in the attic and to hold him for a showup identification prior to arresting him (*see* CPL 470.05 [2]). In any event, that contention lacks merit (*see People v Cash J.Y.*, 60 AD3d 1487, 1489, *lv denied* 12 NY3d 913). The information known to the police when they placed defendant in handcuffs and held him for a showup identification "supported a reasonable suspicion of criminal activity . . .[, i.e.,] that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v William II*, 98 NY2d 93, 98 [internal quotation marks omitted]; *see People v Booth*, 61 AD3d 1330, 1331). "Indeed, in conducting the showup identification, 'the police diligently pursued a minimally intrusive means of investigation likely to confirm or dispel suspicion quickly, during which time it was

necessary to detain the defendant' " (*Booth*, 61 AD3d at 1331). We note in addition that "a 'defendant's flight may be considered in conjunction with other attendant circumstances' in determining whether reasonable suspicion justifying a seizure exists" (*People v Pines*, 99 NY2d 525, 527). The police had probable cause to arrest defendant after the victim identified him during the showup identification procedure (*see People v Santiago*, 41 AD3d 1172, 1174, *lv denied* 9 NY3d 964; *People v Williams*, 30 AD3d 980, 981, *lv denied* 7 NY3d 852).

Defendant failed to preserve for our review his contention that there was not a sufficient foundation for the admission of dog tracking evidence (*see* CPL 470.05 [2]), 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]).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1434

KAH 08-02636

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
VARSEY JOHNSON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered December 5, 2008 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that the indictment underlying his conviction is jurisdictionally defective because, although he is named as the sole defendant in the indictment, his name is not specifically mentioned in the sole count thereof. Supreme Court properly dismissed the petition. "Petitioner could have raised his challenge to the . . . indictment on his direct appeal from the judgment of conviction or by way of a motion pursuant to CPL 440.10, and thus habeas corpus relief is not available" (*People ex rel. Lanfair v Corcoran*, 60 AD3d 1351, *lv denied* 12 NY3d 714; *see People ex rel. Lewis v Graham*, 57 AD3d 1508, *lv denied* 12 NY3d 705; *People ex rel. Curry v Girdich*, 290 AD2d 912, *lv denied* 98 NY2d 602). In any event, petitioner's contention is without merit (*see Lewis*, 57 AD3d 1508).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1438

CA 09-00787

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

KENNETH GORDON, ET AL., PLAINTIFFS-APPELLANTS,

V ORDER

PRESBYTERY OF WESTERN NEW YORK AND PRESBYTERIAN CHURCH (U.S.A.), A CORPORATION, DEFENDANTS-RESPONDENTS.

BROWN & KELLY, LLP, BUFFALO (LISA T. SOFFERIN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JOSEPH S. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT PRESBYTERY OF WESTERN NEW YORK.

LAW OFFICES OF MICHAEL PILARZ, BUFFALO (MICHAEL PILARZ OF COUNSEL), FOR DEFENDANT-RESPONDENT PRESBYTERIAN CHURCH (U.S.A.), A CORPORATION.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John M. Curran, J.), entered January 8, 2009 in a declaratory judgment action. The judgment, among other things, denied plaintiffs' motion for summary judgment.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1439

CA 09-01092

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

MARY HUFFMAN, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

DAVID DOYLE AND JOYCE DOYLE,
DEFENDANTS-APPELLANTS-RESPONDENTS.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (LAUREN E. DILLON OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

NICHOLAS, PEROT, SMITH, BERNHARDT & ZOSH, P.C., AKRON (CRAIG H. BERNHARDT OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 23, 2009 in a personal injury action. The order denied the motion of defendants and the cross motion of plaintiff for summary judgment.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1443

CA 09-00220

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

IRIC BURTON, PLAINTIFF-APPELLANT,

V ORDER

ADRIENNE Y. PORTER, DEFENDANT-RESPONDENT.

FRANK FALZONE, BUFFALO, FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (VICTOR WRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 1, 2008 in a personal injury action. The order, among other things, denied plaintiff's motion for permission to proceed as a poor person pursuant to CPLR 1101.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1444.1

CA 09-01199

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

IN THE MATTER OF MICHAEL J. MIMASSI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF WHITESTOWN ZONING BOARD OF APPEALS
AND CODES ENFORCEMENT OFFICER PHILIP HUSTED,
ACTING IN HIS OFFICIAL CAPACITY,
RESPONDENTS-RESPONDENTS.

LAW OFFICES OF LEON R. KOZIOL, UTICA (LEON R. KOZIOL OF COUNSEL), FOR PETITIONER-APPELLANT.

WILLIAM P. SCHMITT, TOWN ATTORNEY, UTICA, FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Norman I. Siegel, A.J.), entered April 2, 2009 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents and dismissed the petition.

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

Memorandum: Petitioner owns property located in the Town of Whitestown (Town) in a zoning district that does not permit multifamily dwellings pursuant to the Town's current Zoning Code (Code). When petitioner purchased the property, a farmhouse located there had been converted into a three-family dwelling prior to the passage of the current Code and was thus permitted to remain as a preexisting nonconforming use. Petitioner subsequently converted a preexisting barn into eight apartment units, whereupon respondent Codes Enforcement Officer issued an "order to remedy violation," ordering the removal of the tenants from the barn. The order stated that petitioner was in violation of the Code and that a building permit had to be obtained before multifamily apartment units were constructed. Petitioner appealed to respondent Town of Whitestown Zoning Board of Appeals (ZBA), which affirmed the order to remedy violation. The ZBA determined that the construction of the barn apartment units violated the Code and that the units were not entitled to nonconforming use status. Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the ZBA and to vacate the order to remedy violation. We conclude that Supreme Court properly granted respondents' motion to dismiss the petition.

Contrary to the contention of petitioner, his use of the barn as a multifamily dwelling constitutes a violation of the Code, which prohibits the expansion of a preexisting nonconforming use (§ 200-29 [C], [E] [1]), and thus the ZBA's determination is not arbitrary and capricious (*see generally Matter of Conway v Town of Irondequoit Zoning Bd. of Appeals*, 38 AD3d 1279, 1280). Petitioner's reliance on the definition of "multifamily dwelling" in the Code is misplaced inasmuch as petitioner has failed to take into account the ordinances addressing the issue of a nonconforming use. Petitioner further contends that his constitutional rights were violated by respondents' selective enforcement of the Code and that the court erred in failing to conduct a hearing on the issue of selective enforcement, i.e., discrimination. We reject that contention. "Petitioner[] failed to make a showing by extrinsic evidence of clear and intentional discrimination sufficient to raise an issue of fact requiring a trial" (*Matter of Glatt v Town of Williamstown*, 11 AD3d 1017, 1018). Petitioner's "vague and conclusory statements" that other property owners have violated the Code but have not been subjected to the same penalties are inadequate to meet that burden (*Matter of Cannon v Urlacher*, 155 AD2d 906, 907). The further contention of petitioner that he has "a retaliation claim under the First Amendment" is raised for the first time on appeal and is therefore not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1447

KA 07-02356

PRESENT: SMITH, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE J. SINGLETON, DEFENDANT-APPELLANT.

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

WILLIE J. SINGLETON, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (CATHERINE A. WALSH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered October 17, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [7]). We agree with defendant that County Court erred in limiting his cross-examination of the victim with respect to the victim's prior arrest for rape and conviction of sexual abuse (*see People v Grant*, 222 AD2d 1057, *lv denied* 87 NY2d 1020; *People v Batista*, 113 AD2d 890, 891, *lv denied* 67 NY2d 648). We conclude, however, "that there is no reasonable possibility that the error might have contributed to defendant's conviction and that it [is] thus harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237; *see also Grant*, 222 AD2d 1057; *Batista*, 113 AD2d at 892). Defendant failed to preserve for our review his further contention that the court penalized him for asserting his right to trial by imposing a greater sentence than that offered during plea negotiations (*see People v Thomas*, 60 AD3d 1341, 1342-1343, *lv denied* 12 NY3d 921). In any event, that contention is without merit, and the sentence is not unduly harsh or severe (*see People v Jacobson*, 60 AD3d 1326, 1329, *lv denied* 12 NY3d 916). We reject the contention of defendant in his pro se supplemental brief that the evidence of physical injury is legally insufficient to support the conviction (*see People v Gerecke*, 34 AD3d 1260, 1261, *lv denied* 7 NY3d 925, 927; *People v Stapleton*, 33 AD3d 464, *lv denied* 7 NY3d 904). The further contention of defendant in his pro se supplemental brief that the court failed to comply with the requirements of CPL 200.60 is not preserved for our review (*see*

People v Santiago, 244 AD2d 263, *lv denied* 91 NY2d 879; *People v Reid*, 232 AD2d 173, *lv denied* 90 NY2d 862), 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]).

Entered: November 13, 2009 Patricia L. Morgan
Clerk of the Court

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

1448

KA 08-02128

PRESENT: SMITH, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEFFREY C. SNYDER, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., CONFLICT DEFENDERS, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Livingston County Court (Dennis S. Cohen, J.), rendered August 21, 2008. Defendant was resentenced upon his conviction of course of sexual conduct against a child in the first degree.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1462

CA 08-02622

PRESENT: SMITH, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

KAREN MCGRATH AND STEVEN FOLEY,
PLAINTIFFS-RESPONDENTS,

V ORDER

TOWN OF IRONDEQUOIT, DEFENDANT-APPELLANT.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. TUOHEY, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 28, 2008. The order granted the motion of plaintiffs to take the oral deposition of a nonparty witness.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see* CPLR 3101 [d] [1] [iii]; *Brooklyn Floor Maintenance Co. v Providence Washington Ins. Co.*, 296 AD2d 520, 521-522).

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

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

1464

CA 09-01454

PRESENT: SMITH, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ.

IN THE MATTER OF LVI ENVIRONMENTAL SERVICES, INC., PETITIONER-APPELLANT, AND GRAMERCY GROUP, INC., INTERVENOR-PETITIONER,

V ORDER

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, INDIVIDUALLY AND DOING BUSINESS AS EMPIRE STATE DEVELOPMENT CORPORATION, AND CAMBRIA CONTRACTING, INC., RESPONDENTS-RESPONDENTS.

ERNSTROM & DRESTE, LLP, ROCHESTER (KEVIN F. PEARTREE OF COUNSEL), FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE URBAN DEVELOPMENT CORPORATION, INDIVIDUALLY AND DOING BUSINESS AS EMPIRE STATE DEVELOPMENT CORPORATION.

GATES & ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR RESPONDENT-RESPONDENT CAMBRIA CONTRACTING, INC.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (William P. Polito, J.), entered July 2, 2009 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, dismissed the petition of petitioner LVI Environmental Services, Inc.

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

Entered: November 13, 2009

Patricia L. Morgan
Clerk of the Court

MOTION NO. (511/89) KA 09-01741. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL PITTMAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND PINE, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (121/91) KA 09-01579. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL J. HILL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PERADOTTO, J.P., CARNI, GORSKI, AND PINE, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (832/98) KA 07-02682 -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAWRENCE JOHNSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND GREEN, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (1230/99) KA 98-05449. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EMMANUEL JOHNSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (750/01) KA 00-00093. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSEPH LEE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis dismissed. PRESENT: SCUDDER, P.J., HURLBUTT, CENTRA, GREEN, AND PINE, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (702/04) KA 01-02017. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V MILTON LEE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, GREEN, AND PINE, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (465/07) KA 04-01132. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLOVERIOUS THOMAS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: MARTOCHE, J.P., CENTRA, GREEN, AND GORSKI, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (7/08) KA 06-00538. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RANDY HALL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND PINE, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (241/08) KA 07-00049. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLIFFORD K. PICKETT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, in failing to argue that County Court erred in ordering restitution inasmuch as it was not part of the plea bargain. Upon our review of the trial court proceedings, we conclude that the issue may have merit. Therefore, the order of March 14, 2008 is vacated and this Court will consider the appeal de novo (*see People v LeFroise,* 151 AD2d 1046). Defendant is directed to perfect his appeal on or before January 12, 2010.

PRESENT: SCUDDER, P.J., MARTOCHE, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (631/08) KA 07-00224. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LARRY YOUNG, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., MARTOCHE, PERADOTTO, PINE, AND GORSKI, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (990/08) KA 06-02982. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RASHEID K. LOTT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND GORSKI, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (777/09) KA 05-02579. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JASON L. WRIGHT, DEFENDANT-APPELLANT. -- Motion for reargument or reconsideration denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (890/09) CA 08-02611. -- PULVER ROOFING COMPANY, INC., PLAINTIFF-APPELLANT, V SBLM ARCHITECTS, P.C., DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., SMITH, FAHEY, CARNI, AND GREEN, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (952/09) KA 08-00142. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V TODD A. KENDALL, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Nov. 13, 2009.)

MOTION NO. (992/09) CA 09-00459. -- STEPHEN DIMARCO, PLAINTIFF-APPELLANT, V PATRICK J. BOMBARD, INDIVIDUALLY AND AS A MEMBER OF BOMBARD BUICK PONTIAC GMC TRUCK, LLC, BOMBARD CAR CO., INC., BOMBARD BUICK PONTIAC GMC TRUCK, LLC, AND BOMBARD PONTIAC OLDSMOBILE GMC TRUCK, LLC, DEFENDANTS-RESPONDENTS. (ACTION NO. 1.) STEPHEN DIMARCO, PLAINTIFF-APPELLANT, V PATRICK J. BOMBARD, INDIVIDUALLY AND AS A MEMBER OF 100 MAIN STREET, LLC, 100 MAIN STREET, LLC, BOMBARD CAR CO., INC., AND BOMBARD BUICK PONTIAC GMC TRUCK, LLC, DEFENDANTS-RESPONDENTS. (ACTION NO. 2.) -- Motion for reargument granted and, upon reargument, the memorandum and order entered October 2, 2009 (___ AD3d ___) is amended by adding the following sentence as the last sentence of the memorandum: "Even assuming, arguendo, that the affidavit of plaintiff's attorney, which purports to outline the terms of the stipulation, constitutes a sufficient record upon which we may review plaintiff's contention that the court erred in vacating the settlement agreement, we would nevertheless affirm." PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Nov. 13, 2009.)

KA 09-00209. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAFAYETTE MELTON, DEFENDANT-APPELLANT. -- Motion to dismiss appeal granted. Memorandum: Appeal unanimously dismissed and matter remitted to Erie County Court to vacate the judgment of conviction and dismiss the

indictment either sua sponte or on application of either the District Attorney or counsel for defendant (*see People v Matteson,* 75 NY2d 745). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ. (Filed Nov. 13, 2009.)

KA 08-00838. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRANDON CAVALIER, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Livingston County Court, Dennis S. Cohen, J. - Violation of Probation). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, CENTRA, AND PERADOTTO, JJ. (Filed Nov. 13, 2009.)

KAH 08-02377. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. DERICK GRAMLING, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- Order unanimously affirmed without costs. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, CENTRA, AND PERADOTTO, JJ. (Filed Nov. 13, 2009.)

KA 08-01774. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY LEE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Erie County Court, Michael L. D'Amico, J. - Attempted Robbery, 1st Degree). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, CENTRA, AND PERADOTTO, JJ. (Filed Nov. 13, 2009.)

KA 08-01775. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY LEE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Erie County Court, Michael L. D'Amico, J. - Forgery, 2nd Degree). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, CENTRA, AND PERADOTTO, JJ. (Filed Nov. 13, 2009.)

KAH 09-00049. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. KEVIN MARTIN, PETITIONER-APPELLANT, V WILLIAM HULIHAN, SUPERINTENDENT, MID-STATE CORRECTIONAL FACILITY RESPONDENT-RESPONDENT. -- Appeal dismissed without costs as moot. Counsel's motion to be relieved of assignment granted. (Appeal from Order of Supreme Court, Oneida County, John W. Grow, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, CENTRA, AND PERADOTTO, JJ. (Filed Nov. 13, 2009.)

KA 07-00720. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL A. ZAYAS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Monroe County, Joseph D. Valentino, J. - Criminal Possession of a Weapon, 3rd Degree). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, CENTRA, AND PERADOTTO, JJ. (Filed Nov. 13, 2009.)