SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 19, 2010

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

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. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

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

1000.1
KA 09-00539
PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN NAGEL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered March 3, 2009. The judgment convicted defendant, after a jury trial, of criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the indictment is dismissed, and the matter is remitted to Cayuga County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him after a jury trial of criminal contempt in the first degree (Penal Law § 215.51 [a]), defendant contends that he was denied his right to due process when the District Attorney called him as a witness before the grand jury in the absence of his attorney. Under the unique circumstances presented here, we agree. Although defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]; *see generally People v Decker*, 51 AD3d 686, *affd* 13 NY3d 12), we exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *see generally People v Bunge*, 70 AD3d 710).

Defendant previously pleaded guilty to a drug felony and was sentenced to state prison, after working with the authorities as a confidential informant. Although defendant was represented by an attorney during the prior proceeding, the prosecutor procured defendant's attendance from state prison to testify before the instant grand jury without notifying that attorney, or indeed, without notifying defendant that he was to appear. After calling defendant to testify, the prosecutor stated that defendant was refusing to be sworn when defendant, inter alia, attempted to invoke his privilege against self-incrimination.

"As a matter of fairness, government ought not compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel . . . The legal rights which may be critically affected before the [g]rand [j]ury, and concerning which the witness should be entitled to consult with his lawyer, are several. First, the witness may be put in a position of determining whether to assert or waive his privilege against self[-]incrimination" (*People v Ianniello*, 21 NY2d 418, 424, *rearg denied* 20 NY2d 1040, *cert denied* 393 US 827). Second, it is well settled that "a witness appearing before a [g]rand [j]ury must be apprised of the extent of the immunity conferred by statute before a criminal contempt conviction may be had for the witness's refusal to testify" (*Matter of Matt v Larocca*, 71 NY2d 154, 161, *cert denied* 486 US 1007, *reh denied* 487 US 1250, *rearg dismissed* 78 NY2d 909; *see People v Rappaport*, 47 NY2d 308, 313, *cert denied* 444 US 964). Here, the prosecutor did not inform defendant that he would receive immunity from prosecution, despite the attempt by defendant to invoke his Fifth Amendment rights when he was asked to testify. Consequently, we agree that defendant was deprived of due process of law. We therefore reverse the judgment of conviction and dismiss the indictment.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1035

KA 07-01281

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOE CANNON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JOE CANNON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered May 2, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), defendant contends that County Court abused its discretion in denying his motion to withdraw the guilty plea. We reject that contention (*see generally People v Dozier*, 74 AD3d 1808). When defendant contended for the first time at sentencing that the plea was coerced, the court conducted an appropriate inquiry with respect to that contention and properly determined that it was a belated maneuver that had no foundation in truth (*see People v Frederick*, 45 NY2d 520, 525-525). Given defendant's unsubstantiated allegations of coercion, an evidentiary hearing was not required (*see People v Tinsley*, 35 NY2d 926, 927).

We have considered the contentions raised by defendant in his pro se supplemental brief and conclude that they are without merit.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1040

KA 07-01283

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOE CANNON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JOE CANNON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered May 2, 2007. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1131

CA 10-00563

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

ELAINE FLANDERA AND CHASTITY KINAHAN,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

AFA AMERICA, INC., ET AL., DEFENDANTS,
STEVEN ESSIG AND ESSIG APPRAISAL ASSOCIATES,
DEFENDANTS-APPELLANTS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

GARY J. PIEPLES, SYRACUSE, FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered September 9, 2009. The order denied in part the motion of defendants Steven Essig and Essig Appraisal Associates to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking dismissal of the first cause of action in its entirety with respect to plaintiff Chastity Kinahan and dismissing that cause of action in its entirety with respect to her and by denying that part of the motion seeking dismissal of the third cause of action and reinstating that cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages allegedly resulting from, inter alia, fraud, civil conspiracy, and deceptive business practices with respect to plaintiffs' purchases of properties as first-time home buyers with poor credit. Supreme Court previously granted the motion of Steven Essig and Essig Appraisal Associates (hereafter, defendants) to dismiss plaintiffs' complaint in a prior action. After plaintiffs commenced the instant action, defendants moved to dismiss the complaint on various grounds, and the court granted the motion in part. This appeal by defendants and cross appeal by plaintiffs ensued.

With respect to defendants' appeal, we conclude that the court properly denied the motion insofar as it sought to dismiss the complaint in its entirety pursuant to CPLR 3211 (a) (5), based on the doctrine of res judicata. The complaint filed in this action corrected some of the deficiencies in the complaint in the prior

action that warranted the court's dismissal thereof, i.e., the failure to allege facts with the requisite specificity (*see 175 E. 74th Corp. v Hartford Acc. & Indem. Co.*, 51 NY2d 585, 590 n 1; *Allston v Incorporated Vil. of Rockville Centre*, 25 AD2d 545; *cf. Marine Midland Bank-Western v Movable Homes*, 61 AD2d 1139).

Also contrary to the contention of defendants on their appeal, the court properly denied that part of their motion seeking dismissal of the first cause of action with respect to plaintiff Elaine Flandera for failure to state a cause of action insofar as it alleges fraud. "In determining whether a complaint fails to state a cause of action, a court is required to 'accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Daley v County of Erie*, 59 AD3d 1087, 1087, quoting *Leon v Martinez*, 84 NY2d 83, 87-88; *see generally* CPLR 3211 [a] [7]). Although appraisals or other assessments of market value "are akin to statements of opinion[,] which generally are not actionable" (*Stuart v Tomasino*, 148 AD2d 370, 372), an assessment of market value that is based upon misrepresentations concerning existing facts may support a cause of action for fraud (*see Rodin Props.-Shore Mall v Ullman*, 264 AD2d 367, 368-369; *see also Cristallina v Christie, Manson & Woods Intl.*, 117 AD2d 284, 294-295).

Here, plaintiffs alleged with the requisite specificity that defendants' appraisal of the property purchased by Flandera contained "several misrepresentations concerning the condition and qualities of the home, including, but not limited to: who owned the property, whether the property had municipal water, the type of basement and the status of repairs on the home" (*see generally* CPLR 3016 [b]). We thus conclude that plaintiffs stated a claim for fraud with respect to Flandera, inasmuch as they sufficiently pleaded the elements of a material misrepresentation of fact, scienter, justifiable reliance, and damages to support such a claim (*see Simmons v Washing Equip. Tech.*, 51 AD3d 1390, 1391-1392).

We agree with defendants, however, that the complaint fails to state a cause of action for fraud against them with respect to plaintiff Chastity Kinahan, and we therefore modify the order accordingly. The complaint fails to allege any material misrepresentations of fact upon which defendants' allegedly overvalued appraisal was based and is thus insufficient to state a cause of action by Kinahan for fraud (*see id.*). We have reviewed defendants' remaining contentions and conclude that they are without merit.

With respect to plaintiffs' cross appeal, we agree with plaintiffs that the court erred in granting that part of defendants' motion seeking dismissal of the third cause of action, alleging the violation of General Business Law § 349. We therefore further modify the order accordingly. Plaintiffs alleged sufficient facts establishing that defendants engaged in consumer-oriented conduct directed against the general public that was deceptive or misleading in a material way and that plaintiffs were injured thereby (*see Oswego*

Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 24-26; *Latiuk v Faber Constr. Co.*, 269 AD2d 820). We thus conclude that, "[a]t this early prediscovery phase, [plaintiffs'] allegations sufficiently plead [the] violation[] of General Business Law § 349" (*Skibinsky v State Farm Fire & Cas. Co.*, 6 AD3d 975, 976).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1152

KA 09-00275

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICK RIZZO, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered October 28, 2008. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree, burglary in the first degree, grand larceny in the third degree (two counts) and criminal mischief 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, burglary in the first degree (Penal Law § 140.30 [4]) and robbery in the second degree (§ 160.10 [1]). Defendant contends that the conviction is not supported by legally sufficient evidence because the uncorroborated admissions that he allegedly made to an acquaintance constitute the only evidence identifying him as a participant in the crimes. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Those admissions were sufficiently corroborated by, inter alia, the testimony of the victims and the police officers who responded to the scene of the crimes, inasmuch as they provided the requisite "additional proof that the offense[s] charged [had] been committed" (CPL 60.50; *see People v Chico*, 90 NY2d 585, 589-591; *People v Burrs*, 32 AD3d 1299, *lv denied* 7 NY3d 924). 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). Contrary to defendant's further contention, we conclude that County Court properly instructed the jury on accomplice liability inasmuch as "there was a reasonable view of the evidence to support the charge" (*People v Pierre*, 41 AD3d 289, 291, *lv denied* 9 NY3d 880; *see People v Kendricks*, 23 AD3d 1119, *lv denied* 6 NY3d 815).

Finally, the sentence is not unduly harsh or severe, and we

decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1155

CA 08-02659

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

THOMAS J. SMOLINSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW A. SMOLINSKI, DEFENDANT,
AND FORD MOTOR CREDIT COMPANY,
DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO, SHAUB, AHMUTY, CITRIN & SPRATT, LLP, LAKE SUCCESS (TIMOTHY R. CAPOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 1, 2008 in a personal injury action. The order and judgment denied the motion of defendant Ford Motor Credit Company to set aside a jury verdict and granted plaintiff judgment on the issue of liability.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the post-trial motion is granted in part, the verdict is set aside and a new trial is granted on liability.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a single-vehicle accident that also involved his brother, defendant Matthew A. Smolinski. Defendant Ford Motor Credit Company (Ford Credit) appeals from an order and judgment entered in plaintiff's favor following a bifurcated trial on liability. Contrary to the contention of Ford Credit, the record establishes that it was the owner and lessor of the vehicle leased to Matthew Smolinski, despite the fact that "Ford Credit Titling Trust" appears on the title to that vehicle (*see Taughrin v Rodriguez*, 254 AD2d 735). Thus, Ford Credit may properly be held vicariously liable for plaintiff's injuries pursuant to Vehicle and Traffic Law § 388 (*see generally Chilberg v Chilberg*, 13 AD3d 1089, 1091-1093).

We agree with Ford Credit, however, that Supreme Court erred in denying its post-trial motion seeking, inter alia, to set aside the verdict and that a new trial is warranted. We note at the outset that the conduct of both trial and appellate counsel for plaintiff and Ford Credit often fell short of the level of professionalism expected of officers of the court. There can be no doubt that the tactics

employed by counsel contributed to the undue length of this litigation, which involved two mistrials and resulted in an overly cumbersome record in excess of 13,000 pages (*see Laughing v Utica Steam Engine & Boiler Works*, 16 AD2d 294, 295). At different points in the litigation, the failure of plaintiff and Ford Credit to comply with discovery demands resulted in the other party's successful motion for an order to compel such discovery. Further, the voluminous briefs submitted on this appeal have done little to illuminate the narrow matter that this Court has been asked to decide and have at times obscured the issues and relevant facts. Indeed, some of the hyperbolic arguments made by Ford Credit in its briefs and with respect to various motions throughout the litigation are borderline frivolous, contradicted by the record or appear to have been made in an attempt to prolong the litigation process. We therefore reiterate "that when counsel in a close case resort to [unprofessional] practices to win a verdict, they imperil the very verdict [that] they . . . seek" (*Cherry Cr. Natl. Bank v Fidelity & Cas. Co.*, 207 App Div 787, 791).

Nevertheless, we agree with Ford Credit that reversal is warranted based on, inter alia, the misconduct of plaintiff's counsel during the last trial. In her summation, counsel for plaintiff improperly implied that Ford Credit's expert witnesses testified falsely for compensation (*see Nuccio v Chou*, 183 AD2d 511, 514-515, *lv dismissed* 81 NY2d 783; *Steidel v County of Nassau*, 182 AD2d 809, 814); repeatedly alleged that Ford Credit engaged in a conspiracy to cover up the facts (*see Calzado v New York City Tr. Auth.*, 304 AD2d 385; *Berkowitz v Marriott Corp.*, 163 AD2d 52, 54); and made numerous references to the resources that Ford Credit had as a large corporation (*see Kenneth v Gardner*, 36 AD2d 575). Further, plaintiff introduced extensive irrelevant and highly prejudicial evidence (*see Wylie v Consolidated Rail Corp.*, 229 AD2d 966, 967; *Escobar v Seatrain Lines*, 175 AD2d 741, 744). The only issue that the jury was asked to determine was who was driving the vehicle at the time of the accident: plaintiff, who was rendered a quadriplegic at the C6 level as a result of his injuries, or his brother. Plaintiff's counsel, however, elicited approximately 70 pages of trial testimony regarding plaintiff's life before the accident, including plaintiff's hobbies, high school and college athletic accomplishments, work history, and relationships with friends and family. "That evidence had no relevance to [the single] issue [at trial] and was calculated only to evoke sympathy or otherwise prejudice the jury in favor of plaintiff" (*Wylie*, 229 AD2d at 967). The improper nature of that evidence, as well as the misconduct of plaintiff's counsel during summation, "constitutes a pattern of behavior designed to divert the attention of the jurors from the issue[] at hand" (*Krumpek v Millfeld Trading Co.* [appeal No. 3], 272 AD2d 879, 881).

We further agree with Ford Credit that the court improperly excluded certain evidence of admissions by plaintiff that he was driving the vehicle at the time of the accident. "In a civil action[,] the admissions by a party of any fact material to the issue are always competent evidence against him [or her], wherever, whenever

or to [whomever] made" (*Reed v McCord*, 160 NY 330, 341). The first admission in question was memorialized in plaintiff's pre-hospital care report by a treating emergency medical technician (EMT). Generally, "[a] hearsay entry in a hospital record as to the happening of an injury is admissible at trial, even if not germane to diagnosis or treatment, if the entry is inconsistent with a position taken by a party at trial and there is evidence to connect the party to the entry" (*Berrios v TEG Mgt. Corp.*, 35 AD3d 775, 776; *see Coker v Bakkal Foods, Inc.*, 52 AD3d 765, 766, *lv denied* 11 NY3d 708). In pretrial sworn statements, the EMT stated that plaintiff said, "I went off the road" in response to her questions. Thus, "there is clear evidence connecting [plaintiff] to the entry" (*Preldakaj v Alps Realty of NY Corp.*, 69 AD3d 455, 456-457). No such clear evidence exists, however, with respect to a similar admission included in the hospital emergency room record, and thus that admission was properly excluded. Further, plaintiff's alleged admission to a police officer shortly after the accident should have been admitted in evidence. The court excluded that admission because the officer could not remember the exact wording used by plaintiff and because of the severity of the injuries for which plaintiff was undergoing treatment at the time. That was error inasmuch as those considerations go to the weight of the evidence, not the admissibility thereof (*see id.* at 456). "[I]t is . . . for the jury to determine whether or not the admissions were made, the facts and conditions [that] affect the probative value, and the value itself" (*Gangi v Fradus*, 227 NY 452, 458; *cf. Driscoll v New York City Tr. Auth.*, 262 AD2d 271).

We agree with Ford Credit that the court erred in permitting a witness to testify concerning statements made to Matthew Smolinski by an "older gentleman" whom the witness could not otherwise identify (*see generally Brereton v McEvoy*, 44 AD2d 594, 595). Inasmuch as the hearsay statements concerned the only matter at issue, i.e., who was driving the vehicle, those statements were improperly admitted in evidence (*see id.*). Finally, we have reviewed Ford Credit's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1161

CA 09-02424

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

THOMAS SIMMONS AND SIMM CORP.,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

WASHING EQUIPMENT TECHNOLOGIES,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANT.

WARD NORRIS HELLER & REIDY LLP, ROCHESTER (JEFFREY J. HARRADINE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered February 3, 2009. The order, among other things, denied the cross motion of defendant Washing Equipment Technologies for summary judgment dismissing the remainder of the complaint and for summary judgment on the counterclaim.

It is hereby ORDERED that the cross appeal is unanimously dismissed and the order so appealed from is modified on the law by granting the cross motion in part and dismissing the breach of warranty causes of action against defendant Washing Equipment Technologies, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for breach of warranty and fraud arising out of their purchase of equipment used to recycle water for a car washing business. On a prior appeal, we modified an order denying defendants' motion to dismiss the amended complaint by granting the motion in part and dismissing the fraud cause of action against Washing Equipment Technologies (defendant) and the amended complaint against defendant Arthur J. North (*Simmons v Washing Equip. Tech.*, 51 AD3d 1390). We agree with defendant that Supreme Court erred in denying those parts of its cross motion seeking summary judgment dismissing the breach of warranty causes of action against it, and we therefore modify the order accordingly.

With respect to the cause of action for breach of express warranty, the representation in defendant's brochure that defendant could "provide a solution" for the lack of available sewers on

plaintiffs' property is of such a general nature that a reasonable consumer would not rely on it as a statement of fact regarding the water reclaim unit sold to plaintiffs by defendant (*see Anderson v Bungee Inter. Man. Corp.*, 44 F Supp 2d 534, 541; *see generally Serbalik v General Motors Corp.*, 246 AD2d 724, 725-726). Defendant also submitted evidence in support of the cross motion establishing that the water reclaim unit "remove[d] all particles above 5 micron and clean[ed] the water" to be used in the car wash and, when properly maintained, "treat[ed] 100% of the waste car wash water recovered for re-use" as asserted in the manufacturer's brochure (*see generally Simmons*, 51 AD3d at 1391; *Silverstein v Macy & Co., Inc.*, 266 App Div 5, 8). With respect to the cause of action for breach of implied warranty, defendant submitted evidence in support of its cross motion establishing that the water reclaim unit sold to plaintiffs was suitable for their particular purpose, i.e., use for a car wash in a high salt area (*see generally Saratoga Spa & Bath v Beeche Sys. Corp.*, 230 AD2d 326, 330-331, *lv dismissed and lv denied* 90 NY2d 979). We thus conclude that defendant established its entitlement to judgment as a matter of law dismissing the breach of warranty causes of action against it (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In opposition to defendant's cross motion, plaintiffs appear to concede that defendant is entitled to judgment as a matter of law dismissing the breach of warranty causes of action against it except insofar as the alleged breach of express warranty was based upon the assurance by defendant that it could "provide a solution" for the lack of available sewers on plaintiffs' property. In any event, we conclude that plaintiffs failed to raise a triable issue of fact in opposition to the cross motion with respect to either of the causes of action for breach of warranty (*see generally id.*).

Contrary to the further contention of defendant, however, we conclude that the court properly denied that part of its cross motion seeking summary judgment on the counterclaim, inasmuch as defendant failed to establish its entitlement to judgment as a matter of law with respect thereto (*see generally id.*). Finally, plaintiffs are not aggrieved by the order, and thus their cross appeal is dismissed (*see Weichert v Shea*, 186 AD2d 992; *see generally* CPLR 5511).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1163

CA 10-01021

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

ANDRE J. DESROSIERS AND YVETTE DESROSIERS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE AND ERIE COUNTY SEWER DEPARTMENT,
DEFENDANTS-APPELLANTS.

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (BRIAN R. LIEBENOW OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOOKER T. WASHINGTON, LOCKPORT, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Rose H. Sconiers, J.), entered July 23, 2009. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages they sustained as the result of a sewage backup on their property, allegedly caused by defendants' failure to clean, maintain and operate its sewer system in a proper manner. Employees of defendant County of Erie (County) performed routine maintenance of the main sewer line near plaintiffs' home, using a hydraulic flushing unit to flush out the sewer line. The hose of the flushing unit was inserted into the main sewer line through a manhole near the home. The County then "flush[ed] upstream, up against the flow of the sewer, to the next manhole," and any debris in the main sewer line was pulled back toward the manhole. The following day, plaintiffs' daughter discovered approximately one foot of sewage in the basement of plaintiffs' home and notified the County. Upon returning to the property, the County found no evidence of an obstruction in the main sewer line. Nevertheless, the County again flushed the sewer line upstream and downstream of plaintiffs' home as a precautionary measure.

We conclude that Supreme Court properly denied defendants' motion for summary judgment dismissing the amended complaint. Defendants met their initial burden on the motion by submitting the deposition testimony and affidavits of County employees establishing that, upon completion of the County's routine maintenance near plaintiffs' home, the main sewer line was flowing properly with no evidence of an obstruction (*see Briga v Town of Binghamton*, 8 AD3d 874, 874-875; *see*

generally Zuckerman v City of New York, 49 NY2d 557, 562). Further, when the County employees returned to the property the following day, they sprayed water into the lateral line on plaintiffs' property and did not observe any water flowing into the main sewer line from the lateral line. The County's Sanitary Engineer stated in an affidavit that such a result indicated that the blockage that caused the sewer backup was in the lateral line, which is plaintiffs' responsibility to maintain.

In opposition to the motion, however, plaintiffs raised a triable issue of fact whether the sewer backup that damaged their property was the result of defendants' negligence (*see generally Zuckerman*, 49 NY2d at 562; *cf. Briga*, 8 AD3d at 875). Plaintiff Andre J. DesRosiers testified at his deposition that he never had any problems with flooding in the basement prior to the time when the County performed the maintenance in question, and plaintiffs' daughter testified at her deposition that she discovered sewage in the basement the day after the County flushed the sewer system. Further, plaintiffs' plumber testified at his deposition that, when he removed the manhole cover in front of plaintiffs' home on the day after the County flushed the sewer system, he discovered that the main sewer line, not the lateral line, was blocked. The plumber stated that the main sewer line could have become blocked after it had been flushed uphill from the manhole in front of plaintiffs' home.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1175

KA 08-02131

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JON T. MAGLIOCCO, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 29, 2008. The judgment convicted defendant, upon his plea of guilty, of unlawful surveillance 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 guilty plea of unlawful surveillance in the second degree (Penal Law § 250.45 [3] [a]), defendant contends that County Court erred in imposing an enhanced sentence without affording him an opportunity to withdraw his plea. The record establishes that the court informed defendant during the plea proceeding that it would not be obligated to impose the promised sentence, pending its review of the presentence report, and at sentencing the court informed defendant that it was enhancing the sentence based upon that review. By failing to object to the enhanced sentence or to move to vacate his plea, defendant failed to preserve his contention for our review (*see People v VanDeViver*, 56 AD3d 1118, *lv denied* 11 NY3d 931, 12 NY3d 788). In any event, "there was no need for [the court] to afford defendant an opportunity" to withdraw the plea before imposing an enhanced sentence inasmuch as the court was not bound by the plea promise upon reviewing the presentence report (*People v Figgins*, 87 NY2d 840, 841). We further conclude that the enhanced sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1181

CA 10-01250

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF JANET HELLNER,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF WILSON CENTRAL SCHOOL DISTRICT, WILSON CENTRAL SCHOOL DISTRICT, MICHAEL S. WENDT, IN HIS CAPACITY AS SUPERINTENDENT OF WILSON CENTRAL SCHOOL DISTRICT, RESPONDENTS-RESPONDENTS, BOARD OF EDUCATION OF ORLEANS/NIAGARA BOARD OF COOPERATIVE EDUCATIONAL SERVICES, ORLEANS/NIAGARA BOARD OF COOPERATIVE EDUCATIONAL SERVICES AND DR. CLARK J. GODSHALL, IN HIS CAPACITY AS DISTRICT SUPERINTENDENT OF ORLEANS/NIAGARA BOARD OF COOPERATIVE EDUCATIONAL SERVICES, RESPONDENTS-RESPONDENTS-APPELLANTS.

JAMES R. SANDNER, LATHAM (ROBERT T. REILLY OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

HOGDSON RUSS LLP, BUFFALO (RYAN L. EVERHART OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

WAYNE M. VANVLEET, MEDINA, FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 11, 2009 in a proceeding pursuant to CPLR article 78. The judgment directed respondents Wilson Central School District and Orleans/Niagara Board of Cooperative Educational Services to place petitioner on their preferred hiring lists, subject to review of her qualifications, and otherwise denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to direct respondents to transfer her position as an occupational therapist from respondent Wilson Central School District (District) to respondent Orleans/Niagara Board of Cooperative Educational Services (BOCES) pursuant to Civil Service Law § 70 (2). Petitioner had been employed by the District for 14 years when, as a result of budget constraints, the District abolished her position and entered into a Cooperative

Services Agreement (Agreement) with BOCES for the provision of occupational therapy services. The collective bargaining unit of which petitioner was a member demanded petitioner be afforded the "transfer of a function" rights pursuant to section 70 (2), i.e., that the District certify petitioner's name to BOCES as the employee to be transferred and that BOCES offer petitioner the position of occupational therapist. Both the District and BOCES refused to do so, whereupon petitioner commenced this proceeding. Supreme Court denied the petition and instead directed the District and BOCES to place petitioner's name on their preferred hiring lists. Petitioner appeals and BOCES cross-appeals from the judgment.

We agree with petitioner that the Agreement for the provision of occupational therapy services previously provided to the District by petitioner constitutes the "transfer of a function" within the meaning of Civil Service Law § 70 (2). Respondents contend, however, that Education Law §§ 3014-a and 1950 exclusively govern the issue of employee transfer rights inasmuch as BOCES took over the occupational therapy program from the District. We reject that contention. Neither Education Law statute provides for any transfer rights for non-teaching positions, and thus respondents' contention is at odds with the decision of the Court of Appeals in *Matter of Vestal Empls. Assn. v Public Empl. Relations Bd.* (94 NY2d 409). In that case, the Court of Appeals expressly stated that the affected school district employee, who provided printing services and thus had a non-educational position (*see id.* at 413), nevertheless was "afforded certain protections upon the transfer of his functions pursuant to Civil Service Law § 70 (2)" (*id.* at 416). Contrary to respondents' contention, that statement in *Vestal* is not mere dictum but, rather, it is a necessary element of the Court's analysis in that case.

We also reject respondents' contention that affording petitioner transfer rights would violate various administrative provisions applicable to BOCES and the District. Based on the Court's decision in *Vestal* (94 NY2d at 416), we conclude that the transfer of occupational therapy services from the District to BOCES constitutes the transfer of a function pursuant to Civil Service Law § 70 (2) and thus that petitioner, as the employee whose function was transferred, is afforded certain affirmative rights upon the transfer. To the extent that the administrative provisions upon which respondents rely are inconsistent with section 70 (2), the statute controls (*see generally Matter of Harbolic v Berger*, 43 NY2d 102, 109). "[A]dministrative regulations are invalid if they conflict with a statute's provisions or are inconsistent with its design and purpose" (*Matter of City of New York v Stone*, 11 AD3d 236, 237).

Although we agree with petitioner that she is entitled to protections afforded by Civil Service Law § 70 (2), we are unable on the record before us to determine the scope of those protections. Unlike Education Law § 3014-a, which affords teachers with seniority the right to existing positions in BOCES in the event that their positions purportedly are transferred there, section 70 (2) requires the transfer only of "necessary . . . employees who are substantially engaged in the performance of the function to be transferred." In the

event that BOCES had sufficient staff to provide the required occupational therapy services when petitioner's position was transferred, petitioner thus would not be entitled to the relief that she seeks, i.e., immediate employment at BOCES in that position (*see Matter of De Pietro v Thom*, 213 NYS2d 853). The record is insufficient to enable us to determine whether BOCES had sufficient occupational therapy staff at the time of the Agreement, and we therefore reverse the judgment and remit the matter to Supreme Court for further proceedings on the petition to determine that issue. In addition, we direct that, upon remittal, petitioner must join as necessary parties other occupational therapists whose employment may be jeopardized as a result of the petition, although we reject respondents' contention that the court was required to dismiss the petition based on petitioner's failure to join those parties in the first instance (*see Matter of Basher v Town of Evans* [appeal No. 1], 112 AD2d 4; *Matter of Gill v Dutchess County Bd. of Coop. Educ. Servs.*, 99 AD2d 836, 837).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1187

CA 09-02269

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

VANESSA MOORE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL ORTOLANO, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

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

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

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered July 15, 2009 in a personal injury action. The order granted the motion of defendant Michael Ortolano for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she fell from the second-story porch of the apartment that she and her husband rented from defendants. The accident occurred when the porch railing collapsed while plaintiff and her husband were leaning against it, causing them to fall to the ground, and plaintiff alleged that defendants had actual or constructive notice of the defective condition of the porch railing and failed to maintain it in a proper manner. Supreme Court properly granted the motion of Michael Ortolano (defendant) seeking summary judgment dismissing the amended complaint against him. In support of the motion, defendant submitted the deposition testimony of plaintiff and her husband, both of whom acknowledged that they lived in the apartment for approximately four years prior to the accident and were unaware of any problems with the porch railing. Defendant also submitted evidence establishing that he had received no complaints with respect to the condition of the railing. We conclude that defendant thereby met his initial burden of establishing that he lacked actual or constructive notice of any alleged defect in the railing (*see generally Reynolds v Knibbs*, 73 AD3d 1456), and that plaintiff failed to raise a triable issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We further conclude that defendant met his burden of establishing that he properly maintained the porch, including the railing, and plaintiff failed to raise an issue of fact (*see generally id.*).

Plaintiff further contends that notice to defendant was not required because the doctrine of res ipsa loquitur applies. We reject that contention. The doctrine of res ipsa loquitur does not apply here because, inter alia, defendant was not in exclusive control of the instrumentality that allegedly caused plaintiff's injuries, i.e., the porch railing (*see Kambat v St. Francis Hosp.*, 89 NY2d 489, 494; *Brink v Anthony J. Costello & Son Dev., LLC*, 66 AD3d 1451, 1453). As noted, plaintiff and her husband were tenants of the apartment for approximately four years prior to the accident, and defendant established that he was an "out-of-possession landlord[] who did not exercise exclusive control over" the porch and its railing (*Richardson v Simone*, 275 AD2d 576, 578).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1191

KAH 09-02055

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MENTAL HYGIENE LEGAL SERVICE ON BEHALF OF
SHANNON MARTINEK, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DONALD SAWYER, PH.D., EXECUTIVE DIRECTOR OF
CENTRAL NEW YORK PSYCHIATRIC CENTER,
RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (DANA M. RAGSDALE OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Bernadette T. Romano, J.), entered August 14, 2009. The judgment denied and 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: In appeal No. 1, petitioner appeals from a judgment dismissing his petition seeking habeas corpus relief with respect to his civil commitment to Central New York Psychiatric Center pursuant to Mental Hygiene Law article 10 following his release from Livingston Correctional Facility. According to petitioner, he was not a detained sex offender within the meaning of article 10 when the proceeding pursuant to that article was commenced because he was not "a person who [was] in the care, custody, control, or supervision of an agency with jurisdiction" at that time (§ 10.03 [g]). Indeed, the record establishes that, at that time, petitioner was in fact illegally incarcerated for violating the terms of a period of postrelease supervision that had been improperly imposed after he had completed serving his determinate term of imprisonment. Petitioner thus is correct that the period of postrelease supervision, and thus the term of imprisonment resulting from his violation thereof, was a legal nullity (*see People v Williams*, 14 NY3d 198, 217, *cert denied* ___ US ___ [Oct. 4, 2010]; *People v Appleby*, 71 AD3d 1545). Nevertheless, we affirm the judgment in appeal No. 1 because, for the purposes of article 10, "[t]he legality of [petitioner's] custody is irrelevant"

(*People ex rel. Joseph II. v Superintendent of Southport Correctional Facility*, 15 NY3d 126, 134, *rearg denied* ___ NY3d ___ [Sept. 23, 2010]).

In appeal No. 2, petitioner appeals from a judgment dismissing his petition for a writ of habeas corpus with respect to his commitment to the Livingston Correctional Facility. We conclude that the appeal must be dismissed as moot, inasmuch as petitioner was released from imprisonment there upon the commencement of his civil commitment (*see generally People ex rel. Hampton v Dennison*, 59 AD3d 951, *lv denied* 12 NY3d 711).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1192

KAH 09-02056

PRESENT: MARTOCHE, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
SHANNON MARTINEK, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MALCOLM CULLY, SUPERINTENDENT, LIVINGSTON
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (DANA M. RAGSDALE OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered April 10, 2009. The judgment dismissed the petition for a writ of habeas corpus.

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

Same Memorandum as in *People ex rel. Martinek v Sawyer* ([appeal No. 1] ___ AD3d ___ [Nov. 19, 2010]).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1201

KA 09-01628

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. CARLTON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Ontario County Court (Frederick G. Reed, J.), entered July 27, 2009. 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 affirmed without costs.

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in failing to set forth its findings of fact and conclusions of law, as required by Correction Law § 168-n (3). Although defendant is correct that the court failed to do so, we nevertheless conclude that the record before us is sufficient to enable us to make our own findings of fact and conclusions of law, thus rendering remittal unnecessary (*see People v Urbanski*, 74 AD3d 1882, *lv denied* 15 NY3d 707; *cf. People v Leopold*, 13 NY3d 923).

We reject the further contention of defendant that the court erred in assessing 20 points against him under the risk factor for his relationship with the victims and 25 points against him under the risk factor for drug or alcohol abuse. Based on the record before us, we conclude that the People established both of the disputed risk factors by the requisite clear and convincing evidence (*see* Correction Law § 168-n [3]). With respect to defendant's relationship with the victims, the case summary establishes that, when interviewed by the Board of Examiners of Sex Offenders, defendant stated that he was employed as a bus driver of mentally disabled women at the time of the underlying crimes and that he selected the three victims because he believed they were incapable of reporting his crimes. Such evidence establishes that defendant had a professional relationship with the three victims, thus justifying the assessment of 20 points with respect to that risk factor (*see generally People v Stein*, 63 AD3d 99,

101-102).

Further, with respect to defendant's history of drug and alcohol abuse, the presentence report establishes that defendant began drinking alcohol at age 11 and using marihuana at age 14 and that he used LSD and "angel dust" for a period of approximately seven years. Defendant also reported that he was addicted to cocaine, marihuana and alcohol. Those facts constitute clear and convincing evidence of defendant's history of drug and alcohol abuse, thus justifying the assessment of 25 points with respect to that risk factor (*see Urbanski*, 74 AD3d 1882, 1883; *see also People v Guitard*, 57 AD3d 751, *lv denied* 12 NY3d 704).

All concur except MARTOCHE and CENTRA, JJ., who dissent and vote to modify in accordance with the following Memorandum: We respectfully dissent because we conclude that, following a hearing pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), County Court erred in assessing 20 points against defendant under risk factor seven, for his relationship with the victims. Defendant was convicted of sexual crimes against three mentally disabled women when he was their bus driver. The risk assessment guidelines assess 20 points under risk factor seven "if the offender's crime (i) was directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization or (ii) arose in the context of a professional or avocational relationship between the offender and the victim and was an abuse of such relationship" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 12 [2006]). The risk assessment guidelines advise that, in each of those situations, "there is a heightened concern for public safety and need for community notification" (*id.*). Here, the court assessed 20 points against defendant after determining that defendant was in "an avocational profession."

Here, the first category under risk factor seven is not applicable. Defense counsel and the People agreed at the SORA hearing that the crimes were not directed at strangers, and there was no evidence that defendant became a bus driver to gain access to the victims to abuse them. With respect to the second category, we note that the risk assessment guidelines do not define a "professional or avocational relationship," but they provide that the second category "reaches health care providers and others who exploit a professional relationship in order to victimize those who repose trust in them. A dentist who sexually abuses his [or her] patient while the patient is anesthetized would fall squarely within [that] category" (Risk Assessment Guidelines and Commentary, at 12). We cannot agree with the majority that defendant had a professional relationship with the victims to justify the assessment of 20 points under risk factor seven. Black's Law Dictionary defines a "professional relationship" as "[a]n association that involves one person's reliance on the other person's specialized training . . . Examples include one's relationship with a lawyer, doctor, insurer, banker, and the like" (Black's Law Dictionary 1402 [9th ed 2009]). Although a passenger on a bus certainly places his or her trust in the bus driver and relies

to a certain extent on the bus driver's training, such a relationship or association is not akin to that of a health care provider and his or her patient. There is no indication that the victims here or their caretakers sought out defendant based on his bus driving skills, as would a person seeking the services of a health care provider or other such professional.

We disagree with the court to the extent that it concluded that defendant and the victims were in an avocational relationship. That term is not defined in the risk assessment guidelines, but "avocation" customarily refers to a hobby or occupation pursued outside of a person's regular work (*see* American Heritage Dictionary 124 [4th ed 2002]; Webster's Third New International Dictionary 151 [2002]; *see also Owen v R.J.S. Safety Equip.*, 169 AD2d 150, 155, *affd* 79 NY2d 967). While avocation is also defined as a person's regular employment (*see* American Heritage Dictionary 124; Webster's Third New International Dictionary 151), we cannot conclude that the term "avocational" relationship under risk factor seven encompasses that lesser-known definition. In the event that it did, there would be no need for the risk assessment guidelines to reference a "professional" relationship because all avocational relationships would encompass professional relationships.

Thus, we conclude that defendant should be assessed zero points under risk factor seven, thereby reducing his score to 100 points and rendering him a presumptive level two risk. We would therefore modify the order by determining that defendant is a level two risk.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1202

CAF 09-02635

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

IN THE MATTER OF BRODIE J. AND JAXON J.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, ORDER
PETITIONER-APPELLANT;

SIOBHAN S. AND STEPHEN J.,
RESPONDENTS-RESPONDENTS.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR PETITIONER-APPELLANT.

KRISTIN SPLAIN, CONFLICT DEFENDER, ROCHESTER (ANNEMARIE DILS OF COUNSEL), FOR RESPONDENT-RESPONDENT SIOBHAN S.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR RESPONDENT-RESPONDENT STEPHEN J.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered December 9, 2009 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition.

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

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1206

CAF 09-01359

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

IN THE MATTER OF JUDI PATTERSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL PATTERSON, RESPONDENT-RESPONDENT.

IN THE MATTER OF MICHAEL PATTERSON,
PETITIONER-RESPONDENT,

V

JUDI PATTERSON, RESPONDENT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

CARMEN J. VALVO, ATTORNEY FOR THE CHILD, ROME, FOR BRIANNA P.

Appeal from an order of the Family Court, Oneida County (Frank S. Cook, J.H.O.), entered March 17, 2009 in a proceeding pursuant to Family Court Act article 6. The order granted the parties joint legal child custody with Michael Patterson having primary physical custody and Judi Patterson having visitation.

It is hereby ORDERED that the order so appealed from is unanimously dismissed without costs as moot (*see Kelly F. v Gregory A.F.*, 34 AD3d 1277).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1217

KA 08-00488

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN MOORE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CHRISTINE M. COOK, SYRACUSE, 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 22, 2007. 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 reducing the period of postrelease supervision to a period of one year and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and sentencing him to a determinate term of imprisonment of six years plus five years of postrelease supervision (PRS). We conclude that the sentence is illegal insofar as the period of PRS exceeds two years (*see* Penal Law § 70.45 [2] [b]). " 'Although [that] issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180, *lv denied* 8 NY3d 983). We thus conclude that the judgment must be modified with respect to the period of PRS, and we modify the judgment by reducing the period of PRS to a period of one year (*see People v Gibson*, 52 AD3d 1227; *People v Ehrhardt*, 292 AD2d 790, *lv denied* 98 NY2d 675). The sentence as modified is not unduly harsh or severe.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1223

KA 08-00317

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN MOORE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

CALVIN MOORE, DEFENDANT-APPELLANT PRO SE.

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 22, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [former (2)]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]), defendant contends that County Court erred in admitting evidence that he was a drug dealer who had sold crack cocaine to both the victim and a key prosecution witness. We conclude that the evidence was properly admitted to establish the motive of defendant and his identity as the person who shot the victim, and that its probative value exceeded its prejudicial effect (*see People v Cordova-Diaz*, 55 AD3d 360, 361, *lv denied* 12 NY3d 782; *People v James*, 262 AD2d 500; *see generally People v Molineux*, 168 NY 264, 291-294). Defendant failed to preserve for our review his further contention that the court should have given a limiting instruction with respect to the *Molineux* evidence (*see People v Mosley*, 55 AD3d 1371, *lv denied* 11 NY3d 856), 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 the evidence is legally insufficient to support the conviction. The People

presented evidence establishing every element of the crimes charged and defendant's commission thereof. The fact that no one saw defendant fire the shot that killed the victim does not render the evidence legally insufficient, inasmuch as there was ample circumstantial evidence establishing defendant's identity as the shooter. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678). Indeed, the challenge by defendant to the legal sufficiency of the evidence is based primarily on his contention that the testimony of the main prosecution witness was incredible as a matter of law, and we reject that contention. Defendant is correct that the witness in question initially lied to the police concerning her knowledge of the murder and did not fully disclose her knowledge thereof until she was negotiating a plea deal on unrelated charges almost two years later. Nevertheless, we note that several important aspects of her trial testimony were otherwise corroborated, and it cannot be said that her testimony was "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925). We also note that defendant admitted to the police that, shortly after the murder was committed, he threw a handgun that he had owned into Alexandria Bay. We further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Finally, we conclude that the sentence is not unduly harsh or severe, and that the contentions raised by defendant in his pro se supplemental brief are without merit.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1229

CAF 09-02044

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF JAMES KOBEL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RITA HOLIDAY, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 11, 2009 in a proceeding pursuant to Family Court Act article 8. The order of protection directed respondent to refrain from offensive conduct against petitioner and the parties' child.

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

Memorandum: In this proceeding pursuant to article 8 of the Family Court Act, respondent mother contends that Family Court erred in determining, following a fact-finding hearing, that she committed a family offense. We reject that contention. We conclude that the court properly found that petitioner father met his burden of establishing by a preponderance of the evidence that the mother committed the family offense of reckless endangerment in the second degree (*see* Family Ct Act § 812 [1]; Penal Law § 120.20; *see generally Matter of Harrington v Harrington*, 63 AD3d 1618, *lv denied* 13 NY3d 705), thus warranting the issuance of an order of protection, by lurching her car forward and stopping within inches of the father and the parties' child. Contrary to the further contention of the mother, the court's assessment of the credibility of the witnesses is entitled to great weight, and the court was entitled to credit the testimony of the father over that of the mother (*see Matter of Scroger v Scroger*, 68 AD3d 1777, *lv denied* 14 NY3d 705).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1230

CAF 09-01387

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF ALSTON C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

FREDERICK C., RESPONDENT-APPELLANT.

SCHAVON R. MORGAN, MACHIAS, FOR RESPONDENT-APPELLANT.

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

MICHAEL J. SULLIVAN, ATTORNEY FOR THE CHILD, FREDONIA, FOR ALSTON C.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered June 15, 2009 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject child was abused and placed the child in the custody of petitioner until the completion of the next permanency hearing.

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

Memorandum: Respondent father contends on appeal that Family Court erred in relying upon his child's unsworn out-of-court statements in granting the petition seeking, inter alia, an adjudication that his child is abused, inasmuch as those statements were not corroborated. We reject that contention. "Any other evidence tending to support the reliability of the [child's] previous statements . . . shall be sufficient corroboration" (Family Ct Act § 1046 [a] [vi]; *see generally Matter of Nicole V.*, 71 NY2d 112, 117-118). Here, there was ample corroboration of the child's statements, i.e., statements made by the father to an investigator employed by the New York State Police as well as the testimony of a psychologist who determined that the contextual details of the child's statements were consistent with a description of actual events. The record does not support the further contentions of the father that he did not receive effective assistance of counsel (*see generally Matter of Howard v McLoughlin*, 64 AD3d 1147, 1148), and that the determination is not supported by the requisite preponderance of the evidence (*see* § 1046 [b] [i]; *Matter of Tammie Z.*, 66 NY2d 1, 3). We

have reviewed the father's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1233

CA 10-00891

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

MARTA CHAIKOVSKA AND CREEK VENTURES, LLC,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERNST & YOUNG, LLP, DEFENDANT-RESPONDENT.

FRANK T. GAGLIONE, P.C., AMHERST (FRANK T. GAGLIONE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (ROBERT J. LANE, JR., OF COUNSEL), AND ERNST & YOUNG, LLP, NEW YORK CITY, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered July 17, 2009 in an accounting malpractice action. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action to recover damages for, inter alia, accounting malpractice, alleging that defendant failed to discover fraud committed by the management of World Auto Parts, Inc. (World). Before the fraud was discovered, World bought and sold used automobile and truck parts, and it relied on a line of credit loan from the Chase Manhattan Bank (Chase) for funding, among other sources. The Chase loan was calculated based on a percentage of the value of World's accounts receivable and inventory, which were pledged as collateral for the loan. The loan was guaranteed by Marta Chaikovska (plaintiff), who was the Chief Executive Officer (CEO) of World as well as the owner of 85% of its stock. Plaintiff's husband was the president of World and owned 13% of its stock. Defendant was retained by World to provide audited financial statements of its inventory and accounts receivable according to generally accepted accounting procedures (GAAP).

Chase thereafter seized World's accounts receivable and inventory, the collateral for its loan, upon discovering that World's management had inflated the value thereof by approximately $5 million, and World's business was thereby terminated. Chase sold the assets of World to a newly formed company, World Parts, LLC (World Parts), which was made up of several of World's former managers and funded by a loan from plaintiff Creek Ventures, LLC (Creek), which is owned by plaintiff's husband. World assigned its assets to World Parts, as

well as World's right to recover from defendant for malpractice. World Parts quickly went bankrupt, and the right to recover from defendant was sold to Creek by the bankruptcy trustee.

Plaintiffs commenced this action, and this Court previously affirmed an order granting only in part defendant's motion to dismiss the complaint (*Chaikovska v Ernst & Young, LLP*, 21 AD3d 1324). Plaintiffs now appeal from a subsequent order granting defendant's motion for summary judgment dismissing the remainder of the complaint. We affirm.

Contrary to the contention of plaintiffs, Supreme Court properly granted defendant's motion on the ground that the doctrine of in pari delicto barred any recovery by them from defendant. That doctrine "is an equitable defense based on agency principles which bars a plaintiff from recovering where the plaintiff is itself at fault" (*Symbol Tech., Inc. v Deloitte & Touche, LLP*, 69 AD3d 191, 196). Here, in this action against a corporate auditor, the "New York [in pari delicto doctrine] immunizes [the] auditor if its client had top-level managers who knew of or participated in the financial wrongdoing that gave rise to the errors in the financial statements that the auditor certified as GAAP-compliant" (*Matter of American Intl. Group, Inc. v Greenberg*, 965 A2d 763, 816 [Del Chancery Ct 2009]). Also contrary to the contention of plaintiffs, the court properly applied the doctrine to both of them.

Creek, "as assignee[] [of World Part's rights], acquired no greater rights than those of the assignor and took subject to all defenses and counterclaims defendant[] possessed against the assignor[]" (*Caprara v Charles Ct. Assoc.*, 216 AD2d 722, 723; *see Madison Liquidity Invs. 119, LLC v Griffith*, 57 AD3d 438, 440). Inasmuch as "the misconduct of managers acting within the scope of their employment will normally be imputed to the corporation" (*Symbol Tech., Inc.*, 69 AD3d at 196), the fraud perpetrated by World's managers is imputed to World, and in turn to World Parts and then to Creek, both of which acquired no greater rights than that of World and thus may not recover from defendant based on the doctrine of in pari delicto.

The same reasoning applies with respect to Chaikovska. The record establishes that World's managers, who were the agents of World and thus of Chaikovska as its CEO, were aware that they were fraudulently altering the corporate books to obtain funding for World. It is well settled that "knowledge acquired by an agent acting within the scope of his [or her] agency is imputed to his [or her] principal and the latter is bound by such knowledge although the information is never actually communicated to [the principal]" (*Center v Hampton Affiliates*, 66 NY2d 782, 784). Thus, knowledge of the fraud is imputed to Chaikovska.

Contrary to plaintiffs' further contention, the "adverse interest" exception to the doctrine of in pari delicto does not apply under the circumstances presented here. As the Court of Appeals "emphasized in *Center*, for the adverse interest exception to apply,

the agent 'must have *totally abandoned* [the] principal's interests and be acting *entirely* for his [or her] own or another's purposes,' not the corporation's" (*Kirschner v KPMG LLP*, ___ NY3d ___, ___ [Oct. 21, 2010], quoting *Center*, 66 NY2d 784-785). "So long as the corporate wrongdoer's fraudulent conduct enables the business to survive——to . . . raise funds for corporate purposes——this test is not met" (*id.*). Here, the purpose of the fraudulent conduct by World's management was to provide a basis for Chase to continue to loan money to World, and thus the adverse interest exception does not apply.

We have considered plaintiffs' remaining contentions and conclude that none affects our decision herein.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1241

CA 10-01158

PRESENT: LINDLEY, J.P., SCONIERS, PINE, AND GORSKI, JJ.

M&T BANK CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEMSTONE CDO VII, LTD, ET AL., DEFENDANTS,
AND DEUTSCHE BANK SECURITIES, INC.,
DEFENDANT-APPELLANT.

MILBANK, TWEED, HADLEY & MCCLOY LLP, NEW YORK CITY (THOMAS A. ARENA OF COUNSEL), FOR DEFENDANT-APPELLANT.

KORNSTEIN VEISZ WEXLER & POLLARD, LLP, NEW YORK CITY (DANIEL J. KORNSTEIN OF COUNSEL), AND HODGSON RUSS LLP, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered May 5, 2010 in a breach of contract action. The order, among other things, granted in part and denied in part plaintiff's motion to compel production of documents.

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

Memorandum: Plaintiff commenced this action to recover damages for, inter alia, breach of contract arising from its purchase of certain mortgage-backed securities from defendants. Defendant Deutsche Bank Securities, Inc. (DBSI) contends on appeal that Supreme Court erred in granting those parts of plaintiff's motion to compel DBSI to produce documents concerning certain types of securities, inasmuch as DBSI had previously provided those documents to the New York State Attorney General (AG) in connection with the AG's investigation of possible fraud in the preparation, packaging and marketing of those types of securities. We affirm. Contrary to the contention of DBSI, the court neither abused nor improvidently exercised its discretion in directing DBSI to provide plaintiff with copies of the documents in question, particularly in view of the fact that CPLR 3101 (a) is to be interpreted liberally in favor of disclosure (*see generally Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745-746). We conclude in addition that the documents sought were material and necessary to the prosecution of the action (*see generally Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407). Furthermore, although "the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Andon*, 94 NY2d at 747 [internal quotation marks omitted]), DBSI has failed to

establish that any special burden arises from providing plaintiff with electronic copies of the documents previously supplied to the AG.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1245

KA 07-00445

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK W. STUBBS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 20, 2006. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: On appeal from a judgment convicting him following a jury trial of robbery in the second degree (Penal Law § 160.10 [2] [b]), defendant contends that Supreme Court erred in admitting evidence with respect to a prior robbery committed by defendant in 1993 and a prior attempted robbery committed by defendant in 1997 (hereafter, prior crimes). We agree. We reject the contention of the People that the evidence was properly admitted to establish the identity of defendant based on his modus operandi (*see generally People v Molineux*, 168 NY 264, 293-294, 313-317). We conclude that defendant's method of committing the prior crimes, i.e., traveling to a retail establishment as a passenger in a motor vehicle and threatening the cashier at that establishment with the use of a nonexistent gun, "was not 'sufficiently unique to be probative on the issue of identity' " (*People v Pittman*, 49 AD3d 1166, 1167, quoting *People v Beam*, 57 NY2d 241, 252). Although the prior crimes and the robbery at issue herein were similar to the extent that they were committed on the same road, albeit in different political subdivisions, that fact alone does not render the modus operandi unique. As the Court of Appeals has held, " 'the naked similarity of . . . crimes proves nothing' " (*People v Robinson*, 68 NY2d 541, 549, quoting *Molineux*, 168 NY at 316). In addition, we conclude that the prejudicial effect of the evidence concerning the prior crimes outweighed its probative value (*see generally People v Hudy*, 73 NY2d 40, 55, *abrogated on other grounds by Carmell v Texas*, 529 US 513).

We reject the further contention of the People that the error in admitting evidence of the prior crimes is harmless. Although an employee of the store in question stood "face to face" with the perpetrator, she was not asked to identify defendant at trial, and she acknowledged that she informed the police that she was 90% certain that an individual other than defendant was the perpetrator. Another prosecution witness who observed the perpetrator and spoke to him prior to the crime was unable to identify defendant at trial. Thus, although there was strong circumstantial evidence connecting defendant to the robbery, it cannot be said that such proof was overwhelming and that there is no significant probability that defendant would have been acquitted but for the evidence concerning the prior crimes (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

In light of our decision, we need not address defendant's remaining contention.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1249

KA 09-01203

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS W. RICHARDSON, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 8, 2009. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the probation component of the split sentence of incarceration and probation previously imposed upon his conviction of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and sentencing him to a determinate term of incarceration based on his admission that he violated the terms of his probation. Defendant contends that County Court's deferral of sentencing on the violation petition constituted an illegal period of interim probation and that the court thereafter erred in enhancing the sentence based on a violation of that period of interim probation. That contention is not preserved for our review inasmuch as defendant did not object to the enhanced sentence and failed to move to withdraw his admission or to vacate the judgment revoking the probation component of the split sentence (*see generally People v Hamdy*, 46 AD3d 1383, *lv denied* 10 NY3d 765; *People v Brandel*, 20 AD3d 927, *lv denied* 5 NY3d 826; *People v Avery*, 205 AD2d 411, *affd* 85 NY2d 503). In any event, we reject that contention. "The defendant's voluntary participation in a drug program pending sentencing did not amount to [an] illegal [period of] interim probation" (*People v Black*, 266 AD2d 399, 399), and the court properly enhanced the sentence after defendant failed to successfully complete that program and was rearrested in violation of the terms of his probation (*see People v Munize*, 251 AD2d 429, *lv denied* 92 NY2d 928; *see also Hamdy*, 46 AD3d 1383). The sentence is not unduly harsh or severe. The remaining contentions of defendant 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]).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1254

CAF 10-00430

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

IN THE MATTER OF SHONDELL R. BUTLER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KELLY J. EWERS, RESPONDENT-RESPONDENT.

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

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-RESPONDENT.

KELLY M. CORBETT, ATTORNEY FOR THE CHILD, FAYETTEVILLE, FOR DYLON E.

Appeal from an order of the Family Court, Onondaga County (David J. Roman, J.H.O.), entered February 9, 2010 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' 10-year-old son. The father was sentenced in 2002 to an aggregate prison term of 27b years to life based upon his conviction of arson in the first degree and two counts of intimidating a witness in the third degree and his unrelated conviction of arson in the second degree. Although we agree with the father that Family Court failed to apply the proper burden of proof in denying his petition (*see Matter of Lonobile v Betkowski*, 261 AD2d 829), we nevertheless conclude that the record is sufficient to enable us to determine that visitation would not be in the best interests of the child (*see Matter of Moses v Rachal S.*, 273 AD2d 928; *Matter of Rogowski v Rogowski*, 251 AD2d 827).

The record demonstrates that the father failed to establish a meaningful relationship with the child (*see Matter of Bougor v Murray*, 283 AD2d 695). The father has been incarcerated since the child was two years old, and his last visit with the child took place when the child was three or four years old. The father subsequently waited at least five years to file a petition for visitation, when the child was nine years old (*see id.* at 696). The child has no memory of the father, and he indicated that he would not recognize his father if they were in the same room (*see Matter of Vann v Vann*, 205 AD2d 897, *lv denied* 84 NY2d 805). In addition, given his lengthy prison

sentence, the father "will remain in prison until long after the child[] reach[es] the age of majority" (*id.* at 898; *see Matter of David S. v Nicole U.*, 31 AD3d 1206, 1207). The record further establishes that the child suffers from severe car sickness, and visiting the father in prison would require the child to travel 2½ to 3 hours each way with his paternal relatives, with whom he has no relationship (*see Matter of Ellett v Ellett*, 265 AD2d 747; *Rogowski*, 251 AD2d 827; *Matter of Davis v Davis*, 232 AD2d 773).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1264

CA 09-02505

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

SPAULDING LAKE CLUB, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HAIBO JIANG, ALSO KNOWN AS JIM YING,
DEFENDANT-APPELLANT.

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

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered September 22, 2009. The order, inter alia, granted plaintiff's motion for partial summary judgment on the first cause of action in the complaint.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a permanent injunction ordering defendant, a member of plaintiff, to remove a Greco-Roman-style gazebo and two statues from defendant's property in the Spaulding Lake development (development). Plaintiff is a not-for-profit corporation comprised of owners of property within the development and formed for purposes including enforcement of the "Declaration of Protective Covenants, Restrictions, Easements, Charges and Liens–Spaulding Lake" (Declaration). The Declaration requires that owners of lots in the development seek approval before making modifications or improvements to their property.

We conclude that Supreme Court properly granted plaintiff's motion for partial summary judgment on the first cause of action seeking a permanent injunction. It is well settled that, "[s]o long as the board [of directors of a homeowners' association] acts for the purposes of the [homeowners' association], within the scope of its authority and in good faith, courts will not substitute their judgment for [that of] the board[]" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538; *see Forest Close Assn., Inc. v Richards*, 45 AD3d 527, 529; *Matter of Irene v Cathedral Park Tower Bd. of Mgrs.*, 273 AD2d 816, *lv denied* 95 NY2d 764). Pursuant to the Declaration, plaintiff may reject proposed improvements based on its "objection to the . . . style of architecture" or because the improvement is

"inharmonious or incompatible with the general plan of improvement" of the development. Here, plaintiff rejected defendant's proposal because, inter alia, the installation of the statues and gazebo were incompatible with the prevailing style of architecture in the development and the gazebo would interfere with the view of Spaulding Lake. Thus, contrary to defendant's contention, plaintiff acted within the scope of its authority when it rejected defendant's proposal to install the statues and gazebo (*see generally Levandusky*, 75 NY2d at 537-538; *Forest Close Assn., Inc.*, 45 AD3d at 528-529).

Contrary to his further contention, defendant "failed to present evidence of bad faith . . . or other misconduct" on the part of plaintiff in rejecting his proposal (*Irene*, 273 AD2d at 817). There is no evidence that defendant was "deliberately single[d] out . . . for harmful treatment" inasmuch as no other homeowners were permitted to install similar statues or gazebos on their properties (*Levandusky*, 75 NY2d at 540). The contention of defendant that plaintiff failed to follow its own procedures in rejecting his proposal is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, that contention is without merit because plaintiff's moving papers contained unrefuted evidence that plaintiff complied with the provision of the Declaration requiring that the proposal be forwarded to plaintiff's architectural standards committee for review.

Finally, we conclude that plaintiff established as a matter of law that it would be irreparably harmed by the continued presence of the statues and gazebo on defendant's property, and defendant failed to raise a triable issue of fact in opposition (*see Forest Close Assn., Inc.*, 45 AD3d at 529; *Lattingtown Harbor Prop. Owners Assn., Inc. v Agostino*, 34 AD3d 536, 538).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1270

KA 09-01889

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM CLOYD, DEFENDANT-APPELLANT.

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

JASON L. COOK, DISTRICT ATTORNEY, PENN YAN (ALLISON O'NEILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered September 1, 2009. 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 a plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]). Although the contention of defendant that his guilty plea was not knowing, voluntary and intelligent survives his valid waiver of the right to appeal, defendant failed to preserve that contention for our review by moving to withdraw his plea or to vacate the judgment of conviction (*see People v King*, 20 AD3d 907, *lv denied* 5 NY3d 829). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666). Even assuming, arguendo, that defendant's factual allocution at the initial plea proceeding may have negated an essential element of the crime, we conclude that County Court rectified any deficiency in the allocution by conducting the requisite further inquiry when defendant appeared before the court a second time in connection with the plea. During that second appearance, the court ensured that defendant understood the nature of the charges and that the plea was intelligently entered (*see id.*), based on the admissions of defendant that he had sexual contact with a child less than 11 years old, that he touched the victim in her "sexual area," and that he did so for the purpose of sexual gratification (*see* § 130.00 [3]; § 130.65 [3]).

To the extent that the contention of defendant concerning ineffective assistance of counsel survives his guilty plea and his waiver of the right to appeal (*see People v Nichols*, 32 AD3d 1316, *lv*

denied 8 NY3d 848, 988; *People v Fifield*, 24 AD3d 1221, 1222, *lv denied* 6 NY3d 775), we conclude that defendant's contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1281

CAF 09-01809

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

IN THE MATTER OF ALICIA ROCCO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LARRY ROCCO, RESPONDENT-RESPONDENT.

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

DIANE M. MARTIN-GRANDE, ROME, FOR RESPONDENT-RESPONDENT.

MARK P. MALAK, ATTORNEY FOR THE CHILDREN, CLINTON, FOR KARANN R. AND CHARLIZE R.

Appeal from an order of the Family Court, Oneida County (Brian M. Miga, J.H.O.), entered May 11, 2009 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded primary physical custody of the parties' children to respondent father.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following Memorandum: On appeal from an order awarding primary physical custody to respondent father and visitation to petitioner mother, the mother contends that Family Court erred in failing to set forth its findings of fact and the reasons for its custody determination. We agree. It is well established that the court is obligated "to set forth those facts essential to its decision" (*Matter of Graci v Graci*, 187 AD2d 970, 971; *see* CPLR 4213 [b]; Family Ct Act § 165 [a]). Here, the decision underlying the order on appeal merely recites in a conclusory manner that the court considered the testimony and exhibits presented, which is insufficient to meet the requirements of CPLR 4213 (b) (*see Graci*, 187 AD2d at 971). Although the court made limited "findings" on the record, i.e., that both parties were "nice people" and "good parents" and that they would each be awarded "substantial quality parenting time with these children," those conclusory statements do not enable us to provide effective appellate review of the court's custody determination (*see id.*; *see also Matter of Jose L. I.*, 46 NY2d 1024, 1026). We note that, although the record is sufficient to enable this Court to make its own findings of fact (*see Matter of Williams v Tucker*, 2 AD3d 1366, *lv denied* 2 NY3d 705), we decline to do so. Rather, we conclude under the circumstance of this case, involving an initial award of custody, that "[e]ffective appellate review . . . requires that

appropriate factual findings be made by the trial court——the court best able to measure the credibility of the witnesses" (*Giordano v Giordano*, 93 AD2d 310, 312). We therefore reverse the order and remit the matter to Family Court for that purpose and a new determination if the court deems it appropriate upon making the requisite findings (*see generally Matter of Wagner v Wagner*, 222 AD2d 1039, 1040).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1297

KA 00-00272

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK E. WALKER, DEFENDANT-APPELLANT.

JAMES S. HINMAN, ROCHESTER, 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 (Stephen R. Sirkin, A.J.), rendered January 14, 2000. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), assault in the first degree (two counts), grand larceny in the fourth degree (two counts), robbery in the second degree, and attempted robbery in the second degree (two counts).

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

Memorandum: On a prior appeal, we affirmed the judgment convicting defendant of, inter alia, robbery in the first degree (Penal Law § 160.15 [1], [3]; *People v Walker*, 292 AD2d 791, *lv denied* 98 NY2d 656). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel had failed to raise an issue on appeal that may have merit, i.e., that defendant was denied his right to be present at his *Sandoval* hearing (*People v Walker*, 50 AD3d 1629; *see People v Dokes*, 79 NY2d 656, 660-662), and we vacated our prior order. We now consider the appeal de novo.

Contrary to the contention of defendant, we conclude that he failed to satisfy his burden of coming forward with substantial evidence establishing his absence from the *Sandoval* hearing (*see People v Foster*, 1 NY3d 44, 48; *People v Carter*, 44 AD3d 677, 678, *lv denied* 9 NY3d 1031; *People v Valentine*, 7 AD3d 275, *lv denied* 3 NY3d 682). The court reporter's failure to document defendant's presence or lack thereof is insufficient to satisfy defendant's burden of rebutting the presumption of regularity that attaches to judicial proceedings (*see Foster*, 1 NY3d at 48; *see also People v Andrew*, 1 NY3d 546). We note that Supreme Court addressed defendant following its *Sandoval* determination, thereby establishing defendant's presence in the courtroom for at least a portion of the proceedings, and the record establishes the presence of defendant during the later

proceedings on his motion to modify the court's *Sandoval* ruling. We further conclude that a reconstruction hearing is unnecessary. "Reconstruction hearings should not be routinely ordered where, as here, the record is simply insufficient to establish facts necessary to meet the defendant's burden of showing that he [or she] was absent from a material stage of the trial" (*Foster*, 1 NY3d at 49; *see Valentine*, 7 AD3d 275).

All concur except LINDLEY, J., who votes to reverse in accordance with the following Memorandum: I respectfully dissent. As noted by the majority, we previously granted defendant's motion for a writ of error coram nobis on the ground that defendant's appellate counsel failed to raise a possibly meritorious issue, i.e., whether defendant was denied the right to be present during the *Sandoval* hearing (*People v Walker*, 50 AD3d 1629). In my view, reversal is required upon our de novo review of defendant's appeal.

It is unclear from the trial transcript whether defendant was present in the courtroom when the *Sandoval* hearing commenced, or during any portion thereof. At the outset of the proceedings that day, defense counsel stated that she had "just went back to see [defendant]" and that defendant was not dressed for trial because the jail personnel had lost his trial clothing. After a brief discussion with respect to obtaining other clothing for defendant, Supreme Court stated, "I didn't come here today to spend my day waiting for clothes. Trust me. Any *Sandoval*?" The *Sandoval* hearing then commenced. Following argument from defense counsel both for the codefendant and defendant, the court ruled from the bench that the prosecutor would be permitted to question defendant concerning two misdemeanor convictions, for menacing and petit larceny, but not concerning his three felony convictions, which the court deemed to be too remote. The record reflects that, shortly after rendering its decision, the court addressed both defendant and the codefendant on the record with respect to their right to be present for sidebar discussions during voir dire. Thus, although it is clear that defendant was present in the courtroom at some point on the day of the *Sandoval* hearing, it is not possible to ascertain from the trial transcript whether defendant was present for the *Sandoval* hearing, or whether he entered the courtroom following the hearing.

As the majority correctly notes, a "presumption of regularity attaches to judicial proceedings [that] may be overcome only by substantial evidence" (*People v Foster*, 1 NY3d 44, 48), and I agree with the majority that "the court reporter's failure to document defendant's presence or lack thereof is insufficient to satisfy defendant's burden of rebutting the presumption of regularity that attaches to judicial proceedings . . . ." Here, however, the transcript indicates that defendant was not present when the court decided to proceed with the *Sandoval* hearing in his absence, and there is "significant ambiguity in the record" whether defendant entered the courtroom before the hearing commenced (*id.* at 49). Thus, because the record is ambiguous on the issue whether defendant was present for the *Sandoval* hearing, and because the *Sandoval* ruling was "not wholly

favorable" to defendant (*People v Favor*, 82 NY2d 254, 267, *rearg denied* 83 NY2d 801), in my view we should hold the case, reserve decision, and remit the matter to Supreme Court for a reconstruction hearing (*see People v Michalek*, 82 NY2d 906, 907). At the reconstruction hearing, defendant would have the burden of overcoming the presumption of regularity by substantial evidence (*see People v Cruz*, 14 NY3d 814, 816).

I cannot agree with the People's alternative contention that, even if defendant was absent during the *Sandoval* hearing, reversal is not required because he was present when the court revisited the issue after the People rested and the court then modified its prior *Sandoval* ruling. The modification of the *Sandoval* ruling occurred during an off-the-record conference at which defendant was present, when defense counsel asked the court to reconsider its *Sandoval* ruling with respect to the menacing conviction. At the conclusion of the conference, the court only slightly modified its ruling by precluding the prosecutor from questioning defendant concerning the underlying facts of that conviction. There is no indication in the record before us that defense counsel also asked the court to revisit its ruling with respect to the petit larceny conviction or that the court in fact did so, and thus it cannot be said that the court conducted a de novo *Sandoval* hearing in defendant's presence. Upon remittal, in the event that the court determines at the reconstruction hearing that defendant was not present for the initial *Sandoval* hearing, the court should determine whether there was any discussion of the petit larceny conviction when the court reconsidered its initial *Sandoval* ruling.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1303

CA 09-02583

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

W. JAMES CAMPERLINO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF MANLIUS MUNICIPAL CORPORATION, VILLAGE OF MANLIUS, DEFENDANTS-RESPONDENTS, BENITA ROGERS, FRANK HEATH, CHRISTINE WARFIELD SMITH, EVAN SCOTT SMITH, KERI SEAGRAVES, DAVID ALTHOFF, MARY ANN CALO, MICHAEL J. CALO, DR. DAVID FEIGLIN, SHARON A. LINDBERG, JEROME A. LINDBERG, CAROL ILACQUA, DAVID SAMUEL, AND TROOP D VETERANS, INC., INTERVENORS-DEFENDANTS-RESPONDENTS.

SHULMAN CURTIN GRUNDER & REGAN, P.C., SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, SYRACUSE (DAVID M. CAPRIOTTI OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF MANLIUS MUNICIPAL CORPORATION.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR DEFENDANT-RESPONDENT VILLAGE OF MANLIUS.

NEIL M. GINGOLD, FAYETTEVILLE, FOR INTERVENORS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 5, 2009. The judgment, among other things, granted the cross motions of defendants Town of Manlius Municipal Corporation and Village of Manlius for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking a declaration that the property he purchased from Allied Chemical Corporation (Allied) located east of Sweet Road in defendant Town of Manlius Municipal Corporation (Town) was not subject to restrictive covenants contained in a 1981 agreement (agreement) between Allied and the Town. That agreement resulted from Allied's application for the creation of a natural resource removal district with respect to property that Allied owned in Lots 84, 85, 95, and 96 in the Town. Allied's property in those four lots consisted of approximately 350 acres located both east and west of Sweet Road.

The Town granted Allied's application for the creation of a natural resource removal district upon the condition that Allied would extend its quarrying operation only into Lots 84 and 95 and that they would create a 500 foot buffer area on the Seneca Turnpike and Sweet Road sides of the excavation area. All of the property in Lot 84 was located west of Sweet Road, as was the excavation area and the 500 foot buffer. In addition, Allied and its successors were not to make any "new or different use" of the "Manlius Lands" after quarrying operations ceased, but they were to leave that property as it was unless they received written approval to do otherwise from the Town Board after a public hearing. The agreement contained restrictive covenants implementing those conditions, and it defined Allied's Manlius Lands in Exhibit A. With the exception of one clause referring to "any other real property located on said Lot 96 in the Town of Manlius, now owned by the parties of the first part" (hereafter, disputed clause), all of the property described in Exhibit A was located west of Sweet Road.

We reject the contention of plaintiff that Supreme Court erred in denying that part of his motion for summary judgment with respect to his property in Lot 96 east of Sweet Road. We note at the outset that the contentions of plaintiff with respect to his motion are not encompassed by the notice of appeal. "Nevertheless, inasmuch as there is no indication on this record that [defendants are] prejudiced by that omission, we exercise our discretion 'to reach beyond' the scope of [the] notice of . . . appeal and address the merits of [those] issue[s]" (*Matter of Manufacturers & Traders Trust Co. [Small]*, 42 AD3d 936, 937, quoting *McSparron v McSparron*, 87 NY2d 275, 282). In support of the motion, plaintiff submitted extrinsic evidence consisting of an opinion letter from his attorney, an affidavit by the surveyors who created a map of the excavation and buffer areas, the research results of a title insurance company indicating that the disputed clause was contained in the deed transferring the property to Allied's predecessor, and an affidavit of Allied's attorney. Those documents support plaintiff's contention that the parties to the agreement never intended the restrictive covenants to include the property east of Sweet Road. We conclude, however, that the disputed clause references property east of Sweet Road and, despite its confusing reference to "parties of the first part," it is not reasonably susceptible of more than one interpretation with respect to the property it described (*see Thompson v McQueeney*, 56 AD3d 1254, 1257; *see also Kibler v Gillard Constr., Inc.*, 53 AD3d 1040, 1042; *Jellinick v Naples & Assoc.*, 296 AD2d 75, 78). Thus, the disputed clause is not ambiguous, and we may not consider plaintiff's extrinsic evidence (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162; *Crystal Run Newco, LLC v United Pet Supply, Inc.*, 70 AD3d 1418, 1420; *Niagara Falls Water Bd. v City of Niagara Falls*, 48 AD3d 1039). "[P]rovisions in a contract are not ambiguous merely because the parties interpret them differently" (*Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352).

We reject plaintiff's further contention that the court erred in granting the cross motions of the Town and defendant Village of

Manlius (Village) seeking partial summary judgment declaring that all of plaintiff's property in Lot 96 is subject to the restrictive covenants. The Town and Village established their entitlement to judgment as a matter of law inasmuch as the disputed clause in Exhibit A unambiguously includes such property, and plaintiff failed to raise a triable issue of fact concerning an ambiguity that would warrant consideration of extrinsic evidence to determine the parties' intent (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

With respect to those parts of the motion of plaintiff concerning its property in Lots 85 and 95 east of Sweet Road, we agree with plaintiff that the agreement is susceptible of different interpretations. Exhibit A does not describe any property east of Sweet Road except for the disputed clause, yet the agreement incorporates two Town resolutions describing the Manlius Lands in terms of all 350 acres owned by Allied in the Town. We therefore consider the extrinsic evidence submitted by plaintiff to determine the parties' intent (*see Whitebox Convertible Arbitrage Partners, L.P. v Fairfax Fin. Holdings, Ltd.*, 73 AD3d 448, 451-452; *cf*. *Howard Carr Cos., Inc. v Tech Val. Plaza, LLC*, 74 AD3d 1534). That evidence, however, "does not provide a basis for discerning the intent of the parties [to the agreement] as a matter of law" regarding the applicability of the restrictive covenants to plaintiff's property in Lots 85 and 95 east of Sweet Road (*Science Applications Intl. Corp. v State of New York*, 60 AD3d 1257, 1259). Thus, we conclude that plaintiff has not established his entitlement to judgment as a matter of law and, in any event, the submissions by the Town and the Village raised a triable issue of fact with respect to whether the property in those two lots east of Sweet Road is subject to the restrictive covenants (*see generally Zuckerman*, 49 NY2d at 562).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1312

CA 10-01023

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

REMODELING CONSTRUCTION SERVICES,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MINTER, DEFENDANT-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (RALPH C. LORIGO OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBERT KIRBY, BUFFALO, PARTNER OF PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula M. Feroleto, J.), entered November 25, 2009 in a breach of contract action. The order denied defendant's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for summary judgment dismissing the amended complaint and dismissing the amended complaint, and by granting that part of the motion for summary judgment on liability with respect to the first counterclaim and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order denying his motion for summary judgment dismissing the amended complaint and for summary judgment on his counterclaims in this action for breach of a construction contract. The parties entered into a written contract whereby plaintiff agreed to rebuild a house owned by defendant that had been destroyed by fire. The total contract price was $96,000, payable in draws pursuant to a payment schedule. Approximately 13 months after the contract was signed, the project was not completed, and plaintiff's principals refused to perform any further work unless defendant paid them an additional draw of $10,571.34. At that time, defendant had paid plaintiff more than $70,000. Defendant paid plaintiff only an additional $5,550, and plaintiff's principals refused to complete the project, prompting defendant to terminate the contract. Plaintiff thereafter filed a mechanic's lien on the property and commenced this breach of contract action. In his answer, defendant asserted counterclaims for, inter alia, breach of contract and willful exaggeration of the mechanic's lien pursuant to Lien Law § 39-a.

We conclude that Supreme Court erred in denying those parts of defendant's motion for summary judgment dismissing the amended complaint and for summary judgment on liability with respect to the

first counterclaim, for plaintiff's breach of contract, and we therefore modify the order accordingly. In support of his motion, defendant submitted evidence, including photographs, establishing that plaintiff had not yet installed the drywall inside the house at the time it refused to perform any more work unless it was paid additional funds. According to the draw schedule as modified by plaintiff, the drywall installation was a prerequisite to payment of the fifth draw. Thus, plaintiff was entitled to payment of only the first four draws, which total $62,400. It is undisputed that plaintiff had been paid $77,435 when its principals refused to perform any more work. We therefore conclude that defendant established his entitlement to judgment as a matter of law inasmuch as plaintiff breached the contract by refusing to perform its work pursuant to the contract after its wrongful demand for payment was rejected by defendant (*see generally Hudson Iron Works v Beys Specialty Contr.*, 262 AD2d 360, 361-362, *lv denied* 94 NY2d 754; *Sarnelli v Curzio*, 104 AD2d 552, 553, *appeal dismissed* 64 NY2d 756).

In opposition to the motion, plaintiff failed to submit any admissible evidence and thus failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff's only submission was an unsworn letter written by one of plaintiff's principals, generally denying that plaintiff had breached the contract. "An unsworn statement is not competent evidence capable of raising a triable issue of fact" (*Municipal Testing Lab., Inc. v Brom*, 38 AD3d 862, *appeal dismissed and lv dismissed* 8 NY3d 1004; *see J.K. Tobin Constr. Co., Inc. v David J. Hardy Constr. Co., Inc.*, 64 AD3d 1206, 1207). In any event, that letter does not address the issue of drywall installation, nor does it specify which tasks plaintiff performed pursuant to the contract that would entitle it to payment of more than $77,435. We note that, during oral argument on the motion, the court placed plaintiff's principals under oath and allowed them to respond orally to the motion, but nothing said by either principal at that time raised a triable issue of fact sufficient to defeat the motion (*see generally Zuckerman*, 49 NY2d at 562). Although the court stated in its bench decision that, in denying the motion, it considered the amended complaint inasmuch as it was verified, the allegations therein are general in nature and do not dispute the specific allegations made by defendant in support of his motion (*see e.g. Kowalski v Knox*, 293 AD2d 892; *Zagorodynuk v Price Costco Wholesale Corp.*, 256 AD2d 574). Finally, plaintiff's contention that the dispute is subject to arbitration is raised for the first time on appeal and thus is not preserved for our review (*see Matter of City of Buffalo v Buffalo Police Benevolent Assn.*, 280 AD2d 895).

We further conclude, however, that the court properly denied that part of the motion with respect to damages under the first counterclaim. Defendant's own submissions raise a triable issue of fact whether the costs defendant incurred to complete the construction were reasonable (*cf. Hudson Iron Works*, 262 AD2d at 362; *see generally American Std. v Schectman*, 80 AD2d 318, 321, *lv denied* 54 NY2d 604). Finally, the court properly denied those parts of the motion for

summary judgment on the second and third counterclaims pursuant to Lien Law § 39-a inasmuch as defendant failed to establish its entitlement to judgment as a matter of law with respect thereto (*see generally Zuckerman*, 49 NY2d at 562).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1313.1

CAF 10-01087

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

IN THE MATTER OF AARON M. NICHOLS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TINA L. NICHOLS-JOHNSON, RESPONDENT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

VIVIAN CLARA STRACHE, ATTORNEY FOR THE CHILDREN, BATH, FOR MONTANA N., MICHAELA N., AND KEEGAN M.N.

Appeal from an order of the Family Court, Steuben County (Timothy K. Mattison, J.H.O.), entered May 6, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, modified a previous order of custody.

It is hereby ORDERED that the order so appealed from is unanimously vacated without costs and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following Memorandum: Respondent paternal grandmother appeals from an order granting the petition seeking to modify a prior order of custody and visitation by awarding petitioner father primary physical custody of his three children with visitation to the grandmother. The Attorney for the Children has submitted new information, obtained during the pendency of this appeal, indicating that the father no longer wishes to pursue the petition. Although that information is not included in the record on appeal, we may "take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining [the father's] fitness and right to [primary physical custody] of [the children]" (*Matter of Michael B.*, 80 NY2d 299, 318; *see also Matter of Shad S.*, 67 AD3d 1359; *Matter of Chow v Holmes*, 63 AD3d 925). We therefore vacate the order and remit the matter to Family Court for further proceedings.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1320

KA 08-01837

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

ERIC C. EAST, DEFENDANT-RESPONDENT.

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

FIANDACH & FIANDACH, ROCHESTER (EDWARD L. FIANDACH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (John J. Connell, J.), dated June 18, 2007. The order granted the motion of defendant to dismiss the indictment.

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

Memorandum: The People appeal from an order granting that part of the omnibus motion of defendant seeking to dismiss the indictment against him. In granting the motion, County Court agreed with defendant that the People failed to comply with Vehicle and Traffic Law § 1194 (2) (f) and thus improperly presented evidence to the grand jury concerning his refusal to submit to a chemical test. We agree with the People that reversal is required. Defendant is correct that the court properly concluded that the failure of the People to comply with Vehicle and Traffic Law § 1194 (2) (f) precluded them from presenting to the grand jury evidence of defendant's refusal to submit to a chemical test (*see People v Boone*, 71 AD2d 859, 859-860; *see generally People v Thomas*, 46 NY2d 100, 108, *appeal dismissed* 444 US 891). Nevertheless, it is well established that "dismissal of an indictment under CPL 210.35 (5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (*People v Carey*, 241 AD2d 748, 751, *lv denied* 90 NY2d 1010; *see People v Sheltray*, 244 AD2d 854, 855, *lv denied* 91 NY2d 897), and there were no such instances here. The admissible evidence presented to the grand jury established, inter alia, that the vehicle driven by defendant was weaving between lanes at a high rate of speed, that defendant failed several field sobriety tests, and that his eyes

were bloodshot and his speech was slurred. Defendant also admitted that he had "[m]aybe a little" too much to drink. We thus conclude that the admissible evidence was legally sufficient to support the indictment (*see generally People v Velasquez*, 65 AD3d 1266, 1266-1267, *lv denied* 13 NY3d 911; *People v Silvestri*, 34 AD3d 986; *People v Lundell*, 24 AD3d 569, 570).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1325

CA 10-00569

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

HOWLETT FARMS, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE FESSNER AND WAYNE FESSNER, DOING BUSINESS AS F & W FARMS, DEFENDANT-APPELLANT.

BABCOCK & DAVIES, PLLC, MENDON (JEFFREY J. BABCOCK OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVIDSON FINK, LLP, ROCHESTER (DAVID L. RASMUSSEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered May 22, 2009 in a breach of contract action. The order and judgment awarded plaintiff money damages upon a jury verdict.

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

Memorandum: Plaintiff commenced this breach of contract action seeking damages for defendant's failure to deliver corn pursuant to a June 2006 futures contract, and defendant asserted a counterclaim for breach of contract based on plaintiff's failure to pay the sum of approximately $24,000 to defendant that was due under a February 2006 futures contract. After a trial, the jury found that defendant breached the June 2006 contract and awarded plaintiff $15,700 in damages. The jury further found that, although plaintiff breached the February 2006 contract, defendant sustained no damages as a result of that breach.

Contrary to the contention of defendant, we conclude that Supreme Court properly denied his CPLR 4401 motion seeking to dismiss the complaint at the close of proof based upon plaintiff's alleged failure to establish a prima facie case. In determining such a motion, "the evidence must be viewed in the light most favorable to the nonmovant, [which] must be accorded 'every favorable inference which may properly be drawn from the evidence' " (*Fernandes v Allstate Ins. Co.*, 305 AD2d 1065, 1065; *see Szczerbiak v Pilat*, 90 NY2d 553, 556). Here, the June 2006 contract provided that plaintiff would purchase 10,000 bushels of corn for $2.57 per bushel, with a shipment date of February/March 2007 and a payment date of April 30, 2007. According to the trial testimony of plaintiff's president, defendant orally informed

plaintiff in December 2006 that he refused to deliver the corn pursuant to that contract. Plaintiff's president also identified a January 2007 letter from the attorney for defendant advising plaintiff that "no further shipments will be forthcoming and any outstanding contracts not yet performed are hereby terminated" until specified issues set forth in the letter were resolved. In addition, a portion of defendant's deposition transcript was admitted in evidence at trial, in which defendant testified that he advised plaintiff's president in December 2006 that he would not deliver the corn that was the subject of the June 2006 contract because plaintiff had failed to pay an amount due under a separate contract. Thus, viewing that evidence in the light most favorable to plaintiff, as we must in the context of defendant's motion, we conclude that plaintiff made out a prima facie case for breach of contract based on the theory of anticipatory repudiation (*see generally American List Corp. v U.S. News & World Report*, 75 NY2d 38, 44; *Long Is. R.R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 463).

The challenges by defendant to the jury charge are unpreserved for our review inasmuch as defendant failed to raise those challenges in his objection to the charge at trial (*see* CPLR 4110-b; *Fitzpatrick & Weller, Inc. v Miller*, 21 AD3d 1374, 1375; *Donaldson v County of Erie*, 209 AD2d 947, 948). "Where, as here, the charge is not fundamentally flawed, [defendant's] 'failure to object to the charge at trial and before the jury retire[d] precludes [our] review' of [defendant's present challenges]" (*Fitzpatrick & Weller, Inc.*, 21 AD3d at 1375; *see Kilburn v Acands, Inc.*, 187 AD2d 988, 989). Defendant likewise failed to preserve for our review his present challenges to the verdict sheet (*see Mangaroo v Beckman*, 74 AD3d 1293, 1295; *Halbreich v Braunstein*, 13 AD3d 1137, 1138, *lv denied* 5 NY3d 704). Contrary to defendant's further contention, any error in the supplemental jury charge on substantial performance is of no moment inasmuch as the charge, when viewed as a whole, adequately conveyed the relevant legal principles to the jury (*see generally Garris v K-Mart, Inc.*, 37 AD3d 1065, 1066; *Tojek v Root*, 34 AD3d 1210, 1211).

Finally, defendant contends that the order and judgment does not adequately reflect the verdict because the court therein dismissed his counterclaim for breach of contract. We reject that contention. As previously noted, the jury found that, although plaintiff breached the February 2006 contract, defendant sustained no damages as a result of that breach. It is well settled that defendant had to establish damages as a necessary element of his counterclaim for breach of contract (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055), and thus it was properly dismissed.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1326

CA 10-01189

PRESENT: MARTOCHE, J.P., SCONIERS, GREEN, AND PINE, JJ.

JOHN F. LARSEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DEBORAH A. ROTOLO, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

ROSSI AND MURNANE, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

RALPH W. FUSCO, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered November 19, 2009 in a personal injury action. The order, insofar as appealed from, directed defendant Deborah A. Rotolo to pay the fees and expenses of counsel for plaintiff to accompany plaintiff to an independent medical exam.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion of defendant Deborah A. Rotolo is granted in part by vacating the first ordering paragraph.

Memorandum: Supreme Court erred in denying that part of the motion of Deborah A. Rotolo (defendant) seeking a determination that she is not obligated to pay the fees of plaintiff's attorney in the amount of $450 representing his travel costs to accompany plaintiff to a medical examination to be conducted on behalf of defendant pursuant to CPLR 3121, and in further ordering defendant to pay an additional $20 "for gas and tolls." " 'In New York the 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, quoting *Umfrey v NeMoyer*, 184 AD2d 1047, 1048).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1336

KA 09-02114

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GORDON N. PAUL, DEFENDANT-APPELLANT.

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

GERALD L. STOUT, DISTRICT ATTORNEY, WARSAW (DONALD G. O'GEEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered October 5, 2009. The judgment convicted defendant, upon a jury verdict, of rape 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 following a jury trial of rape in the first degree (Penal Law § 130.35 [1]), defendant contends that reversal is required because the People failed to give notice of their intent to offer evidence at trial of two prior bad acts allegedly committed by defendant (*see generally People v Ventimiglia*, 52 NY2d 350). That evidence consisted of the testimony of the victim that defendant was the subject of a sexual harassment complaint at work, and that, one week before he raped her, defendant insisted that she show him her breasts. As defendant correctly concedes, his contention is unpreserved for our review inasmuch as he did not object to the testimony in question (*see* CPL 470.05 [2]). In any event, we conclude that, although the People should have obtained an advance ruling on the admissibility of the evidence, the error is harmless because the proof of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see People v McCleary*, 181 AD2d 1029, *lv denied* 80 NY2d 835; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant also failed to preserve for our review his contention that the court erred in admitting hearsay evidence that improperly bolstered the victim's testimony (*see* CPL 470.05 [2]). In any event, the majority of that evidence was admissible under the prompt outcry and excited utterance exceptions to the rule against hearsay, and any error in admitting the remaining evidence in question is harmless (*see People v Stanley*, 161 AD2d 1146, *lv denied* 76 NY2d 865; *see generally*

Crimmins, 36 NY2d at 241-242). The further contention of defendant that he was denied a fair trial based on prosecutorial misconduct is unpreserved for our review inasmuch as defendant did not object to any of the alleged instances of misconduct (*see People v Glenn*, 72 AD3d 1567, *lv denied* 15 NY3d 805). In any event, it cannot be said that the conduct of the prosecutor constituted such a "pattern of egregious or frequent misconduct to warrant the 'ill-suited remedy' of reversal for prosecutorial misconduct" (*People v Thompson*, 224 AD2d 950, 951, *lv denied* 88 NY2d 886, quoting *People v Galloway*, 54 NY2d 396, 401). Finally, we reject the contention of defendant that he was denied effective assistance of counsel. The evidence, the law and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1337

KA 09-01580

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WYLIE JACKSON, 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 (PATRICK B. SHANAHAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 23, 2009. The judgment convicted defendant, upon a jury verdict, of attempted robbery in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish defendant's identity as the perpetrator (*see generally People v Bleakley*, 69 NY2d 490, 495). Here, two witnesses testified during the trial that they observed defendant commit the crimes and that they were able to view his face immediately before he committed them. 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 further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to the contention of defendant, "[t]he police had reasonable suspicion to stop and detain [him] for a showup identification procedure 'based on the totality of the circumstances, including a radio transmission providing a general description of the perpetrator[],' " the proximity of defendant to the site of the attempted robbery, the brief period of time between the attempted robbery and the discovery of defendant near the crime scene, and the observation by the officer of defendant, who matched that description (*People v Owens*, 39 AD3d 1260, 1261, *lv denied* 9 NY3d 849; *see People*

v Casillas, 289 AD2d 1063, 1063-1064, *lv denied* 97 NY2d 752). In addition, "[t]he police had probable cause to arrest defendant after the victim identified him during the showup identification procedure" (*People v Dumbleton*, 67 AD3d 1451, 1452, *lv denied* 14 NY3d 770; *see People v Mobley*, 58 AD3d 756, *lv denied* 12 NY3d 785). Contrary to defendant's further contention, " 'the showup identification procedure, which was conducted in geographic and temporal proximity to the crime, was not unduly suggestive' " (*People v Austin*, 73 AD3d 1471, *lv denied* 15 NY3d 771; *see e.g. People v Judware*, 75 AD3d 841, 843, *lv denied* 15 NY3d 853; *People v Parris*, 70 AD3d 725, 726). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1341

KA 08-00351

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT S. HERMAN, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (MARK C. CURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered August 6, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in granting his application to proceed pro se. We reject that contention. It is well settled that a defendant in a criminal case has the right to represent himself (*see* NY Const, art I, § 6; CPL 210.15 [5]). A defendant may invoke that right "provided: (1) the request is unequivocal and timely asserted[;] (2) there has been a knowing and intelligent waiver of the right to counsel[;] and (3) the defendant has not engaged in conduct [that] would prevent the fair and orderly exposition of the issues" (*People v McIntyre*, 36 NY2d 10, 17; *see People v Tabor*, 48 AD3d 1096). Here, defendant's request to proceed pro se was timely inasmuch as it was made "prior to the prosecution's opening statement" (*McIntyre*, 36 NY2d at 18), and the request was clearly unequivocal. Also, prior to granting the request, the court engaged in the requisite "searching inquiry" to ensure that defendant's waiver of the right to counsel was knowing, voluntary and intelligent (*People v LaValle*, 3 NY3d 88, 106), and defendant did not engage in any conduct that disrupted the trial.

We reject the contention of defendant that his deficient representation of himself demonstrated that his waiver of the right to counsel was not knowing, voluntary and intelligent. Although the performance of defendant at trial was far from flawless, "respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes

open" (*People v Duffy*, 299 AD2d 914, *lv denied* 99 NY2d 628 [internal quotation marks omitted]), and that is the case here. Based on our review of the record before us, we reject the further contention of defendant that the proceedings resulted in a "travesty of justice" such that he was denied his right to due process (*McIntyre*, 36 NY2d at 18).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1346

CA 10-00885

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

MARGARET LARSON, AS PARENT AND NATURAL GUARDIAN OF KATIE L. DESAUTELS, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CUBA RUSHFORD CENTRAL SCHOOL DISTRICT AND KARI FEUCHTER, DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (SUSAN E. VAN GELDER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JEFFREY FREEDMAN ATTORNEYS AT LAW, BUFFALO (EDWARD J. MURPHY, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (James E. Euken, A.J.), entered July 15, 2009 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries sustained by her daughter when she fell while performing a stunt during cheerleading practice. Following discovery, defendants moved for summary judgment dismissing the complaint based on the doctrine of primary assumption of the risk. We conclude that Supreme Court properly denied the motion. As defendants correctly contend, it is well established that, "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks [that] are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484). In addition, cheerleading is the type of athletic activity to which the doctrine of primary assumption of the risk applies (*see e.g. Williams v Clinton Cent. School Dist.*, 59 AD3d 938; *Sheehan v Hicksville Union Free School Dist.*, 229 AD2d 1026). That doctrine does not, however, shield defendants from liability for "exposing plaintiff['s daughter] to unreasonably increased risks of injury" (*Sheehan*, 229 AD2d 1026).

Defendants met their initial burden of establishing that the action is barred based on assumption of the risk by plaintiff's daughter, inasmuch as they submitted evidence demonstrating that she

voluntarily participated in the stunt and that the risk of falling during the stunt was obvious. Nevertheless, plaintiff raised a triable issue of fact sufficient to defeat the motion (*see Ballou v Ravena-Coeymans-Selkirk School Dist.*, 72 AD3d 1323, 1325-1326; *Sheehan*, 229 AD2d 1026). Plaintiff presented evidence with respect to the inexperience of defendant Kari Feuchter as a cheerleading coach, as well as her alleged failure to utilize proper coaching techniques and to monitor the activities of the team members during practice. In our view, that evidence was sufficient to raise a triable issue of fact whether Feuchter "failed to provide proper supervision of the cheerleading activities, thereby exposing plaintiff['s daughter] to unreasonably increased risks of injury" (*Sheehan*, 229 AD2d 1026; *see Muller v Spencerport Cent. School Dist.*, 55 AD3d 1388; *Garman v East Rochester School Dist.*, 46 AD3d 1354). It will thus be for the trier of fact to determine whether the doctrine of primary assumption of risk bars plaintiff's claims.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1347

CA 10-00579

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

DOMINICK P. VITALE, JR., AS EXECUTOR OF THE ESTATE OF ANNAMAE L. VITALE, DECEASED, AND AS ASSIGNEE OF SALVATORE MATTINA, AND DOMINICK P. VITALE, INDIVIDUALLY AND AS ASSIGNEE OF SALVATORE MATTINA, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MIDROX INSURANCE COMPANY, DEFENDANT-RESPONDENT.

HOGAN WILLIG, AMHERST (ERIC B. GROSSMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WALSH, ROBERTS & GRACE, BUFFALO (THOMAS E. ROBERTS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 3, 2009 in a breach of contract action. The order, insofar as appealed from, granted defendant an offset of $25,000.

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

Memorandum: Plaintiffs commenced this action pursuant to Insurance Law § 3420 (a) (2) seeking, inter alia, to recover payment on a default judgment that they obtained against defendant's insured, Salvatore Mattina, in the underlying personal injury action. Plaintiffs contend that Supreme Court erred in denying in part their motion for partial summary judgment and in granting in part defendant's cross motion for summary judgment by reducing its liability by $25,000, the amount of the settlement paid by Latina-Niagara Importing Co., Inc. (Latina), a codefendant in the underlying action. We reject that contention. Although we agree with plaintiffs that defendant was not entitled to such an offset based on Mattina's "equitable share of the damages" under CPLR article 14 inasmuch as Mattina defaulted in the underlying action (General Obligations Law § 15-108 [a]; *see generally Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 292), the court properly "allowed an offset pursuant to section 15-108 (a) in the amount of plaintiff[s'] settlement with [Latina]" (*Garcea v Battista*, 53 AD3d 1068, 1070).

Entered: November 19, 2010

Patricia L. Morgan
Clerk of the Court

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

1351

CA 09-01676

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

SANDRA HILTS, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

FF THOMPSON HEALTH SYSTEM, INC., DOING BUSINESS AS THOMPSON HEALTH, VALLEY VIEW FAMILY PRACTICE ASSOCIATES, LLP, KATHRYN R. VANGELDER, N.P., DEFENDANTS-RESPONDENTS, AND ROBERT J. OSTRANDER, M.D., DEFENDANT-RESPONDENT-APPELLANT. (APPEAL NO. 1.)

PEGALIS & ERICKSON, LLC, LAKE SUCCESS (GERHARDT M. NIELSEN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HIRSCH & TUBIOLO, P.C., ROCHESTER (CHRISTOPHER S. NOONE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered June 23, 2009 in a medical malpractice action. The order granted in part and denied in part the motion of defendants for summary judgment.

It is hereby ORDERED that said appeal and cross appeal are unanimously dismissed without costs (see *Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1352

CA 10-00031

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

SANDRA HILTS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FF THOMPSON HEALTH SYSTEM, INC., DOING BUSINESS AS THOMPSON HEALTH, VALLEY VIEW FAMILY PRACTICE ASSOCIATES, LLP, KATHRYN R. VANGELDER, N.P., AND ROBERT J. OSTRANDER, M.D., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

PEGALIS & ERICKSON, LLC, LAKE SUCCESS (GERHARDT M. NIELSEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HIRSCH & TUBIOLO, P.C., ROCHESTER (CHRISTOPHER S. NOONE OF COUNSEL), FOR DEFENDANT-RESPONDENT ROBERT J. OSTRANDER, M.D.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered December 14, 2009 in a medical malpractice action. The order granted plaintiff's motion for leave to reargue and, upon reargument, granted the motion of defendants for summary judgment with respect to treatment received by plaintiff prior to September 20, 2003.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of defendants' motion seeking summary judgment dismissing the complaint against defendants Valley View Family Practice Associates, LLP, Kathryn R. VanGelder, N.P. and Robert J. Ostrander, M.D. insofar as it is based on their acts of negligence occurring prior to September 20, 2003 and reinstating the complaint against those defendants to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action on March 20, 2006 alleging, inter alia, that defendants failed to diagnose an aneurysm of her middle cerebral artery, which ruptured on October 31, 2003. Plaintiff first visited defendant Valley View Family Practice Associates, LLP (Valley View) with respect to her headaches in November 1996, and defendant Robert J. Ostrander, M.D., her primary care physician, diagnosed her with daily chronic headache disorder and prescribed Amitriptyline. That was the last time that Dr. Ostrander saw plaintiff concerning her headaches. Over the next seven years, however, plaintiff visited Valley View approximately 12 times, and she usually saw defendant Kathryn R. VanGelder, N.P. On many of those visits, the headaches plaintiff experienced or her

Amitriptyline prescription were discussed. The last time plaintiff visited Valley View concerning her headaches prior to her ruptured aneurysm was on January 3, 2001. Following that appointment, plaintiff continued to receive prescriptions for Amitriptyline from Valley View, and she also had an office visit with VanGelder on May 3, 2003. While the main focus of that visit was an unrelated sinus condition, the office notes indicate that plaintiff's headaches were discussed, and a long term medicine log was created, with Amitriptyline being the only drug noted therein.

Defendants moved for summary judgment dismissing the complaint. Supreme Court granted that part of the motion seeking summary judgment dismissing the complaint against defendant FF Thompson Health System, Inc., doing business as Thompson Health. In addition, the court granted those parts of the motion seeking summary judgment dismissing as time-barred the complaint against Dr. Ostrander, Valley View and VanGelder (hereafter, defendants-respondents) insofar as it is based on their acts of negligence occurring prior to September 20, 2003, 2½ years prior to the date on which the action was commenced (*see* CPLR 214-a). Plaintiff thereafter moved for leave to "reargue and renew" her opposition to those parts of the motion concerning acts of negligence by defendants-respondents prior to September 20, 2003. We agree with plaintiff that the court, upon granting her motion, erred in adhering to its prior determination with respect to those acts of negligence.

Although defendants-respondents established their entitlement to judgment as a matter of law, plaintiff raised a triable issue of fact whether the continuous treatment doctrine operates to toll the statute of limitations (*see e.g. Simons v Bassett Health Care*, 73 AD3d 1252, 1254; *Bonanza v Raj*, 280 AD2d 948). The continuous treatment doctrine tolls the statute of limitations " 'when the course of treatment [that] includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint' " (*McDermott v Torre*, 56 NY2d 399, 405). The doctrine applies where the plaintiff submits evidence establishing "that some of [his or] her return visits to defendants were contemplated by both plaintiff and defendants[] and that defendants treated plaintiff for symptoms indicating the existence of" an undiagnosed condition (*Green v Varnum*, 273 AD2d 906, 907; *see Bonanza*, 280 AD2d 949). "Where, in a case such as this, it is alleged that a medical practitioner fails to properly diagnose a condition, the continuous treatment doctrine may apply as long as the symptoms being treated indicate the presence of that condition" (*Simons*, 73 AD3d at 1254).

In opposition to the motion, plaintiff submitted an affidavit from an expert physician establishing that her complaints of headaches dating back to her office visit with Dr. Ostrander in 1996 were related to the aneurysm she sustained in 2003, and that the failure of defendants-respondents to order additional diagnostic tests that would have disclosed the aneurysm constituted a departure from the accepted standard of medical care. We reject the contention of defendants-respondents that plaintiff's visits were sporadic and not indicative of a course of continuous treatment, inasmuch as plaintiff submitted

evidence in opposition to the motion establishing that at least "some of her return visits to defendants[-respondents concerning her headaches] were contemplated by both plaintiff and defendants[-respondents]" (*Green*, 273 AD2d at 907). In addition, defendants-respondents frequently prescribed medication for plaintiff's headaches (*see Stilloe v Contini*, 190 AD2d 419, 421-422). Although they contend that there were significant gaps in those prescriptions, plaintiff stated that she continually took her medication as directed, and her allegation that she sometimes received medication not reflected by actual prescription scripts is supported by notes in the records of defendants-respondents.

We therefore modify the order by denying those parts of defendants' motion seeking summary judgment dismissing the complaint against defendants-respondents insofar as it is based on their acts of negligence occurring prior to September 20, 2003 and reinstating the complaint against defendants-respondents to that extent.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1358

KA 09-01945

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STACY D. BRYAN, DEFENDANT-APPELLANT.

DEL ATWELL, EAST HAMPTON, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN SILLEMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered August 3, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1]), defendant contends that his waiver of the right to appeal is invalid because the plea agreement did not include a specific sentencing promise. We reject that contention, inasmuch as the record establishes that County Court properly informed defendant of the sentencing range before he waived his right to appeal (*see People v Hidalgo*, 91 NY2d 733, 737). Also without merit is the contention of defendant that his waiver of the right to appeal is invalid on the ground that it was not reduced to writing (*see People v Nicholson*, 6 NY3d 248, 257). To the extent that the contention of defendant that he was denied effective assistance of counsel survives the plea and the waiver of the right to appeal (*see People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), we conclude that it is without merit (*see generally People v Ford*, 86 NY2d 397, 404). We note in particular that the plea agreement negotiated by defense counsel significantly reduced defendant's exposure to incarceration at sentencing, inasmuch as defendant was allowed to plead guilty to a class E nonviolent felony offense, as opposed to the class D violent felony offense charged in the indictment. Finally, the valid waiver by defendant of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256).

Entered: November 19, 2010

Patricia L. Morgan
Clerk of the Court

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

1375

CA 09-01710

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

MELODY BARROWS AND TIMOTHY BARROWS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JAMES ALEXANDER AND PETER CATALANO,
INDIVIDUALLY AND DOING BUSINESS AS
ALEXANDER & CATALANO, LLP, ALEXANDER &
CATALANO, LLC, ALEXANDER & CATALANO, LLP
AND ALEXANDER & CATALANO, LLC,
DEFENDANTS-RESPONDENTS.

S. ROBERT WILLIAMS, PLLC, SYRACUSE (MICHELLE RUDDEROW OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, PC, SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered June 8, 2009 in a legal malpractice action. The order denied plaintiffs' motion for leave to amend their complaint.

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

Memorandum: In this legal malpractice action, plaintiffs appeal from an order denying their motion for leave to amend the complaint to assert a cause of action under Judiciary Law § 487, pursuant to which they would be entitled to recover treble damages from an attorney who "[i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . ." In support of their motion, plaintiffs alleged that Peter Catalano (defendant), who represented plaintiffs in the underlying personal injury action, engaged in deceitful conduct during the course of this malpractice action, both with respect to plaintiffs and Supreme Court. We conclude that the court properly denied the motion inasmuch as the proposed amendment is patently lacking in merit (*see generally Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198, *rearg granted* 41 AD3d 1324). Section 487 applies only "to an attorney acting in his or her capacity as an attorney, not to a party who is represented by counsel and who, incidentally, is an attorney" (*Oakes v Muka*, 56 AD3d 1057, 1058), and here defendant was not acting in his capacity as an attorney in the context of this legal

malpractice action (*see Gelmin v Quicke*, 224 AD2d 481, 482-483). Plaintiffs' reliance on *Kurman v Schnapp* (73 AD3d 435) is misplaced because the record in that case establishes that the defendant was acting in his capacity as an attorney when he engaged in the alleged deceitful conduct.

Finally, the contention of plaintiffs that the court erred in denying their motion for summary judgment is not properly before us because plaintiffs failed to take an appeal from the order denying that motion.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1376.1

CA 10-00771

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL MATTER, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR PETITIONER-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (JEFFREY T. LACEY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 30, 2010 in a proceeding pursuant to Mental Hygiene Law article 10. The order and judgment dismissed the petition.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following Memorandum: In appeal No. 1, the State of New York (State) appeals from an order and judgment dismissing its petition pursuant to Mental Hygiene Law article 10, seeking a determination that Michael Matter is a sex offender who requires civil commitment. In appeal No. 2, respondent, the Commissioner of the State Office of Mental Health (OMH), appeals from a judgment granting the petition of Michael Matter seeking a writ of habeas corpus and directing his release from its custody.

Matter had been incarcerated since 1997, and the Department of Correctional Services (DOCS) calculated his maximum expiration date to be June 6, 2008. On June 2, 2008, the State commenced the proceeding in appeal No. 1, and Matter was transferred to the custody of OMH upon his release from the custody of DOCS. Matter thereafter moved to dismiss the petition in the proceeding in appeal No. 1 and, as noted, he commenced the proceeding in appeal No. 2 seeking a writ of habeas corpus directing his release from the custody of OMH. According to Matter, his imprisonment was based on a miscalculated sentence and he therefore was not a lawfully detained sex offender within the meaning of Mental Hygiene Law § 10.03 (g) (1) and was not subject to the State's jurisdiction when the article 10 petition was filed. Supreme

Court erred in granting the relief sought by Matter in both appeals. Even assuming, arguendo, that Matter's sentence was improperly calculated by DOCS, rendering his imprisonment unlawful at the time the article 10 proceeding was commenced, we conclude that the court erred in dismissing the petition in appeal No. 1 and in granting the petition in appeal No. 2. The Court of Appeals has made it clear that, for the purposes of article 10, "[t]he legality of [a prisoner's] custody is irrelevant" (*People ex rel. Joseph II. v Superintendent of Southport Correctional Facility*, 15 NY3d 126, 134, *rearg denied* 15 NY3d 847; *see People ex rel. Martinek v Sawyer* [appeal No. 1], ___ AD3d ___ [Nov. 12, 2010]). The Court of Appeals in *Joseph II.* held that prisoners were within the coverage of the statute, which was read as "applying to offenders actually imprisoned, even if the procedure that led to their imprisonment was flawed" (*id.* at 133). Thus, the Court specifically rejected the argument that "custody" implied "lawful custody" (*id.* at 133-134). The Court noted that article 10 can be applied "to those whose imprisonment resulted from a procedural error" (*id.* at 135).

We conclude that *Joseph II.* is dispositive of these appeals. *Joseph II.* renders Matter subject to the State's article 10 jurisdiction. Thus, his habeas corpus petition and motion to dismiss the article 10 proceeding should have been denied.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1376.2

KAH 10-00772

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MICHAEL MATTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL F. HOGAN, PH.D., COMMISSIONER, NEW
YORK STATE OFFICE OF MENTAL HEALTH,
RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (JEFFREY T. LACEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 30, 2010 in a proceeding pursuant to CPLR article 70. The judgment, inter alia, granted the petition for a writ of habeas corpus and discharged petitioner from the custody of the New York State Office of Mental Health.

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

Same Memorandum as in *Matter of State of New York v Matter* ([appeal No. 1] ___ AD3d ___ [Nov. 19, 2010]).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1376

CA 09-00021

PRESENT: MARTOCHE, J.P., CENTRA, CARNI, LINDLEY, AND PINE, JJ.

MARK BECK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SPINNER'S RECREATIONAL CENTER, INC., DOING BUSINESS AS ISLAND FUN CENTER, MIK-JEN, INC., DOING BUSINESS AS ISLAND FUN CENTER, BRIAN JUDGE, AND KEVIN JUDGE, DEFENDANTS-RESPONDENTS.

SHAW & SHAW, P.C., HAMBURG (CHRISTOPHER M. PANNOZZO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (PHILIP M. GULISANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered December 10, 2008 in a personal injury action. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting plaintiff's post-trial motion and setting aside the verdict with respect to damages for past and future pain and suffering and as modified the judgment is affirmed without costs, and a new trial is granted on damages for past and future pain and suffering only unless defendants, within 30 days of service of the order of this Court with notice of entry, stipulate to increase the award of damages for past pain and suffering to $30,000 and for future pain and suffering to $60,000, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when an employee of respondent Spinner's Recreational Center, Inc., doing business as Island Fun Center, was refueling a go-cart that had stalled and both the go-cart and plaintiff caught fire. Plaintiff jumped from the go-cart and rolled on the ground in an attempt to extinguish the fire. According to plaintiff, he sustained burn injuries as well as injuries to his cervical spine. At the commencement of the trial on the issue of damages, Supreme Court informed the jury that "the question of liabilities has already been established." Following the trial on damages, the jury awarded plaintiff, inter alia, $15,000 for past pain

and suffering, covering approximately three years, and $20,000 for future pain and suffering, covering 35.4 years. Plaintiff contends that Supreme Court erred in denying his post-trial motion, in which he asserted that the awards for past and future pain and suffering are inadequate. We agree.

Although defendants did not dispute causation insofar as it related to the burn injuries, they contended that the incident did not cause plaintiff's spinal injuries. Contrary to plaintiff's contention, we conclude based on the evidence presented at trial that the jury was entitled to credit the testimony of defendants' expert over that of plaintiff's experts in determining that the spinal injuries were not caused by the incident (*see generally Sisson v Alexander*, 57 AD3d 1483, 1484, *lv denied* 12 NY3d 709).

With respect to the burn injuries, plaintiff sustained first and second degree burns to approximately three to four percent of his neck, back and chest. Plaintiff testified that, immediately after the incident, he was in "unbearable" pain, but he was treated at a local hospital where he was given pain medication and his burns were dressed. Plaintiff was released within hours, but he returned several days later for removal of the dead skin. In removing the skin, a nurse scrubbed plaintiff's neck with a steel-bristled brush for "approximately 15 to 20 minutes." Plaintiff again testified that the pain was "unbearable." It is undisputed that plaintiff developed several keloids in the area of the burns, although photographs taken shortly before trial and admitted in evidence at trial establish that cortisone shots had reduced the size of the keloids. At trial, plaintiff testified that the burn areas were still painful, that they were sensitive to touch and cold weather, and that there was a general tightness in the burn area. He also testified that the scars caused him embarrassment when his neck was exposed. Based on our review of the record of the trial on damages, we conclude that the awards for past and future pain and suffering deviate materially from what would be reasonable compensation (*see* CPLR 5501 [c]; *Paruolo v Yormak*, 37 AD3d 794). We therefore modify the judgment accordingly, and we grant a new trial on damages for past and future pain and suffering only unless defendants, within 30 days of service of the order of this Court with notice of entry, stipulate to increase the award of damages for past pain and suffering to $30,000 and for future pain and suffering to $60,000, in which event the judgment is modified accordingly.

Finally, plaintiff failed to preserve for our review his contention that the jury was substantially confused as a result of the court's response to a jury note during deliberations (*see* CPLR 4110-b; *Kayser v Sattar*, 57 AD3d 1245, 1247; *Wagner Trading Co. v Walker Retail Mgt. Co.*, 307 AD2d 701, 704). Although " 'this Court may order a new trial in its discretion upon an unpreserved error in a jury instruction when that error is fundamental' " (*Kayser*, 57 AD3d at

1247), we conclude that there was no fundamental error here (*cf. id.* at 1247-1248; *Wagner Trading Co.*, 307 AD2d at 704).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1380

KA 08-02243

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT BULLOCK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered September 29, 2008. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). The contention of defendant that his plea was not knowingly, voluntarily and intelligently entered is actually a challenge to the factual sufficiency of the plea allocution (*see People v Hendrix*, 62 AD3d 1261, *lv denied* 12 NY3d 925). Defendant failed to preserve that contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665-666) and, in any event, his contention lacks merit. Defendant's monosyllabic responses to County Court's questions did not render the plea invalid (*see Hendrix*, 62 AD3d 1261; *see also People v VanDeViver*, 56 AD3d 1118, *lv denied* 11 NY3d 931, 12 NY3d 788). Moreover, " 'there is no requirement that a defendant personally recite the facts underlying his or her crime[]' " during the plea colloquy (*People v Madison*, 71 AD3d 1422, 1423, *lv denied* 15 NY3d 753; *see People v Bailey*, 49 AD3d 1258, *lv denied* 10 NY3d 932) and, here, "[t]he record establishes that defendant confirmed the accuracy of [the court's] recitation of the facts underlying the crime" (*People v Whipple*, 37 AD3d 1148, *lv denied* 8 NY3d 928).

Entered: November 19, 2010

Patricia L. Morgan
Clerk of the Court

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

1381

KA 03-01234

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AKILI NIX, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 29, 2003. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]). In his omnibus motion papers, defendant sought to suppress his statements to the police alleging, inter alia, that there was a *Payton* violation and that his arrest pursuant to an arrest warrant issued for an unrelated charge was a "sham" or pretext to circumvent his constitutional rights. At the suppression hearing, however, the prosecutor stated that he had discussed the scope of the hearing with defense counsel based on the concerns of the prosecutor that he would have to call the arresting officers as witnesses. The prosecutor then informed the court that defense counsel had said, "that's not part of his motion." Defense counsel did not object to the prosecutor's statements, and the only witnesses who testified at the suppression hearing were the two officers who took defendant's written statement after defendant had been taken into custody. Indeed, defense counsel's cross-examination of those two officers focused on the circumstances surrounding defendant's statements while in custody. Because defendant failed to seek a ruling on those parts of his omnibus motion concerning the alleged *Payton* violation and pretextual arrest or to object to the admission of his statements in evidence at trial, we conclude that defendant abandoned his contentions that Supreme Court erred in refusing to suppress his statements to the police on those grounds (*see People v Anderson*, 52 AD3d 1320, 1321, *lv denied* 11 NY3d 733).

In any event, those contentions lack merit. With respect to his contention that there was a *Payton* violation, defendant relies on the holding of the United States Supreme Court in *Steagald v United States* (451 US 204, 211-216) that a valid arrest warrant for one individual may not justify the search of the premises of a third party. Here, defendant was arrested in the home of a third party, and he contends that the police officers were not authorized to enter the home because they did not have a search warrant for the premises or the consent of the homeowner (*see generally* CPL 120.80 [4]; 690.50; *Steagald*, 451 US at 208-209; *People v Hernandez*, 218 AD2d 167, 172, *lv denied* 88 NY2d 936, 1068). "[T]he holding of *Steagald* [,however,] protects only the homeowner whose premises are searched, *not* the suspect who is legally arrested on the homeowner's premises . . . To hold otherwise would create the absurd situation in which a suspect . . . has greater rights in someone else's home than in his or her own home" (*Hernandez*, 218 AD2d at 172-173; *see Commonwealth v Stanley*, 498 Pa. 326, 333 n 4, 446 A2d 583, 586 n 4).

With respect to the contention of defendant that his arrest on an unrelated charge was a "sham" or pretext, we conclude that his arrest pursuant to an outstanding arrest warrant for a lesser charge "cannot be characterized as a sham merely because, after he was taken into custody, the police were more interested in questioning him about a different and graver crime" (*People v Clarke*, 5 AD3d 807, 810, *lv denied* 2 NY3d 796, 797 [internal quotation marks omitted]; *see People v Hampton*, 44 AD3d 1071, *lv denied* 10 NY3d 840; *People v Cypriano*, 73 AD2d 902).

Contrary to the further contention of defendant, the court's *Sandoval* ruling does not constitute an abuse of discretion (*see People v Grady*, 40 AD3d 1368, 1370, *lv denied* 9 NY3d 923; *People v Carter*, 34 AD3d 1342, *lv denied* 8 NY3d 844). We conclude that the contention of defendant that the court erred in denying his motion for a mistrial is moot inasmuch as it involves only the counts upon which he was acquitted (*see generally People v Fronjian*, 22 AD3d 244, *lv denied* 6 NY3d 776; *People v Smith*, 9 AD3d 745, 746 n, *lv denied* 3 NY3d 742). Contrary to defendant's further contention, "[t]he court's charge adequately conveyed the elements of burglary in the [second] degree, including the requirement of contemporaneous intent" (*People v Salgado*, 273 AD2d 860, 861, *lv denied* 95 NY2d 892; *see* CJI2d[NY] Penal Law § 140.25 [2]; *cf. People v Gaines*, 74 NY2d 358, 363). Finally, the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495) and, 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).

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court

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

1388

CAF 09-02105

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

IN THE MATTER OF JOSEPH G., III,
RESPONDENT-APPELLANT.

ONEIDA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

CHARLES PLOVANICH, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

LINDA M.H. DILLON, COUNTY ATTORNEY, UTICA (RAYMOND F. BARA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered September 21, 2009 in a proceeding pursuant to Family Court Act article 3. The order placed respondent in the care and custody of the New York State Office of Children and Family Services.

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 upon the finding that he committed an act that, if committed by an adult, would constitute the crime of manslaughter in the first degree (Penal Law § 125.20 [2]). After a dispositional hearing, Family Court determined that respondent required a restrictive placement (*see* Family Ct Act § 353.5 [1]), and the court ordered an initial placement in the custody of the New York State Office of Children and Family Services for a period of three years (*see* § 353.5 [5] [a] [i]). We reject respondent's contention that the court abused its discretion in ordering a restrictive placement. The court properly considered the seriousness of the crime, respondent's need for extensive treatment, the need to protect the community in light of respondent's inability to cope with stressful situations, and the aggressive behavior of respondent toward himself and others (*see* § 353.5 [2]; *Matter of Dwayne J.R.*, 60 AD3d 1467; *Matter of Christopher QQ.*, 40 AD3d 1183). We thus conclude that "[t]he order of disposition 'reflects an appropriate balancing of the needs of appellant and the safety of the community' " (*Matter of Noel M.*, 240 AD2d 231).

Entered: November 19, 2010

Patricia L. Morgan
Clerk of the Court

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

1394

CA 10-01249

PRESENT: CENTRA, J.P., CARNI, SCONIERS, AND PINE, JJ.

GREECE CENTRAL SCHOOL DISTRICT, PLAINTIFF,

V MEMORANDUM AND ORDER

TETRA TECH ENGINEERS, ARCHITECTS & LANDSCAPE ARCHITECTS, P.C., DOING BUSINESS AS THOMAS ASSOCIATES ARCHITECTS & ENGINEERS, FORMERLY KNOWN AS THOMAS ASSOCIATES, ARCHITECTS & ENGINEERS, P.C., DEFENDANT.

TETRA TECH ENGINEERS, ARCHITECTS & LANDSCAPE ARCHITECTS, P.C., DOING BUSINESS AS THOMAS ASSOCIATES ARCHITECTS & ENGINEERS, FORMERLY KNOWN AS THOMAS ASSOCIATES, ARCHITECTS & ENGINEERS, P.C., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

CHRISTA CONSTRUCTION LLC, THIRD-PARTY DEFENDANT-APPELLANT,
ET AL., THIRD-PARTY DEFENDANTS.

ERNSTROM & DRESTE, LLP, ROCHESTER (THEODORE M. BAUM OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

L'ABBATE, BALKAN, COLAVITA & CONTINI, LLP, GARDEN CITY (MARIE ANN HOENINGS OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered November 12, 2009 in an action for professional malpractice and breach of contract. The order, among other things, denied third-party defendant Christa Construction LLC's motion to dismiss third-party plaintiff's action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of third-party defendant Christa Construction LLC and dismissing the third-party complaint against it, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, damages based on the negligent performance of architectural and related services by defendant-third-party plaintiff (hereafter, defendant) and defendant's breach of a contract with plaintiff.

Defendant commenced a third-party action alleging, inter alia, that third-party defendant Christa Construction LLC (Christa) breached its contract with plaintiff as the construction manager on the project at issue and that defendant is a third-party beneficiary of that contract. We agree with Christa that Supreme Court erred in denying its motion to dismiss the third-party complaint against it, and we therefore modify the order accordingly.

Although the contract between Christa and plaintiff required Christa to perform services for defendant, such as consulting, providing recommendations on budget matters and reviewing change requests, it also provided that nothing contained in the contract "shall create a contractual relationship with or a cause of action in favor of a third party against either [plaintiff] or [Christa]." That unambiguous language is sufficient to negate any intent to permit the contract's enforcement by third parties, and thus it cannot be said that defendant was a third-party beneficiary of that contract (*see Adelaide Prods., Inc. v BKN Intl. AG*, 38 AD3d 221, 226; *Laur & Mack Contr. Co. v Di Cienzo*, 274 AD2d 960, *lv denied in part and dismissed in part* 96 NY2d 895; *Nepco Forged Prods. v Consolidated Edison Co. of N.Y.*, 99 AD2d 508). Also, based on the unambiguous language of the contract between Christa and plaintiff, we agree with Christa that defendant was not in the "functional equivalent of privity" to that contract (*see IMS Engrs.-Architects, P.C. v State of New York*, 51 AD3d 1355, 1357, *lv denied* 11 NY3d 706). In any event, whether defendant was in the "functional equivalent of privity" to the contract is irrelevant where, as here, the third-party complaint fails to assert a cause of action for negligent misrepresentation (*see Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 105, *lv dismissed* 13 NY3d 900; *Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311, 312; *see generally Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 424).

In light of our determination, we need not address Christa's remaining contention.

Patricia L. Morgan

Entered: November 19, 2010

Clerk of the Court