SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 29, 2011

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. JEROME C. GORSKI

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

179

KA 09-00992

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JENNIFER L. ORTMAN, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (NEAL P. MCCLELLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered May 5, 2009. The judgment convicted defendant, upon a jury verdict, of driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, a class E felony, leaving the scene of an incident without reporting and criminal mischief in the fourth degree (two counts).

Now, upon reading and filing the stipulation of discontinuance signed by defendant on March 29, 2011 and by the attorneys for the parties on March 25 and April 4, 2011,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

203

CAF 10-00236

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

IN THE MATTER OF DEAMARI W. AND LAKARIE W.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

HOWARD W., RESPONDENT-RESPONDENT.

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

KATHERINE GLADSTONE, ATTORNEY FOR THE CHILDREN, ROCHESTER, FOR DEAMARI W. AND LAKARIE W.

Appeal from an order of the Family Court, Monroe County (Maija C. Dixon, A.J.), entered January 20, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order dismissed the petition for termination of parental rights.

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

Memorandum: In this termination of parental rights proceeding, petitioner appeals from an order that dismissed its petition after a hearing. We take judicial notice of the fact that, subsequent to the entry of the order in this appeal, petitioner filed another petition also seeking to terminate the parental rights of respondent father, a finding of permanent neglect was entered on that petition, and the father's parental rights were terminated. Although the father filed a notice of appeal from the subsequent order, the appeal from that order was dismissed. Consequently, we dismiss this appeal as moot because the father's parental rights with respect to the children that are the subject of the instant petition have been terminated (*see generally Matter of Kim OO. v Broome County Dept. of Social Servs.*, 44 AD3d 1164; *Matter of Kila DD.*, 34 AD3d 1168; *Matter of Melody B.*, 234 AD2d 1005, *lv dismissed* 90 NY2d 888).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

277

CA 10-02188

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

ALAN G. JERGE AND LAUREL AND HARDY CAFÉ, INC.,
PLAINTIFFS-RESPONDENTS,

V ORDER

PENN-AMERICA GROUP, INC., PENN-STAR INSURANCE COMPANY, UNITED AMERICA INSURANCE GROUP, UNITED AMERICA INDEMNITY, LTD., DEFENDANTS-APPELLANTS, RONALD BRANIA, SR. AND DARLENE BRANIA, DEFENDANTS-RESPONDENTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUDITH TREGER SHELTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MUSCATO & SHATKIN LLP, BUFFALO (PAUL SHATKIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

MICHAEL G. COOPER, HAMBURG, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered June 2, 2010. The order, among other things, denied the motion of defendants Penn-America Group, Inc., Penn-Star Insurance Company, United America Insurance Group and United America Indemnity, Ltd. for summary judgment and granted that part of plaintiffs' cross motion seeking a declaration that those defendants are obligated to defend plaintiffs in the underlying action commenced by defendants Ronald Brania, Sr. and Darlene Brania.

Now, upon reading and filing the stipulation to withdraw appeal signed by the attorneys for the parties on March 24, 28 and 31, 2011,

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

289

CAF 10-00914

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

IN THE MATTER OF NICHOLAS J.R.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAMIE L.R., RESPONDENT-APPELLANT.

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

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

BERT R. DOHL, ATTORNEY FOR THE CHILD, SALAMANCA, FOR NICHOLAS J.R.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered April 8, 2010 in a proceeding pursuant to Family Court Act article 10. The order found that respondent had abused the subject child.

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

Memorandum: Respondent mother appeals from an order of fact-finding and disposition determining that she sexually abused her son. Contrary to the mother's contention, Family Court's findings of sexual abuse are supported by the requisite preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Matter of Colberdee C.*, 2 AD3d 1316). "A child's out-of-court statements may form the basis for a finding of [abuse] as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability" (*Matter of Nicholas L.*, 50 AD3d 1141, 1142; *see* § 1046 [a] [vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118; *Matter of Alston C.*, 78 AD3d 1660). Courts have "considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse" (*Colberdee C.*, 2 AD3d at 1316; *see Nicholas L.*, 50 AD3d at 1142), and "[t]he Legislature has expressed a clear 'intent that a relatively low degree of corroborative evidence is sufficient in abuse proceedings' " (*Matter of Jessica N.*, 234 AD2d 970, 971, *appeal dismissed* 90 NY2d 1008; *see Matter of Richard SS.*, 29 AD3d 1118, 1121). Here, the out-of-court statements of the child were sufficiently corroborated by the testimony of an evaluating psychologist who opined that the child's statements made both to the psychologist and to a caseworker for child protective services during

a videotaped interview were credible (*see* § 1046 [a] [vi]; *Matter of Annastasia C.*, 78 AD3d 1579; *see also Alston C.*, 78 AD3d at 1661). Furthermore, "[a]lthough 'repetition of an accusation by a child does not corroborate the child's prior account of [abuse]' . . ., 'the consistency of the child['s] out-of-court statements describing [the mother's] sexual conduct enhances the reliability of those out-of-court statements' " (*Matter of Yorimar K.-M.*, 309 AD2d 1148, 1149; *see Richard SS.*, 29 AD3d at 1121-1122; *Matter of Rhianna R.*, 256 AD2d 1184).

We reject the further contention of the mother that the court erred in precluding her from presenting certain evidence at the fact-finding hearing concerning the father's alleged corporal punishment of the child. Pursuant to Family Court Act § 1046 (b) (iii), "only competent, material and relevant evidence [may] be admitted" at a fact-finding hearing on an article 10 petition. "The terms material and relevant are generally used interchangeably and evidence is relevant when it logically renders the existence of a material fact more likely or probable than it would be without the evidence" (*Matter of Rockland County Dept. of Social Servs. v Brian McM.*, 193 AD2d 121, 124 [internal quotation marks omitted]). Although "[a]ny evidence tending to support the [mother's] position that the allegations of abuse were fabricated [is] relevant" (*Matter of Christopher L.*, 19 AD3d 597, 598; *see Rockland County Dept. of Social Servs.*, 193 AD2d at 124), here the evidence concerning the father's alleged corporal punishment of the child was not relevant with respect to the issue whether the mother sexually abused the child (*see Matter of Lauren R.*, 18 AD3d 761).

Finally, the mother contends that the court improperly delegated to a psychologist the authority to determine whether contact between the mother and the child should occur during therapy sessions. That provision appears in an order of protection that was annexed to and made a part of the order on appeal. "While we agree with the mother with respect to the merits of her contention . . ., we conclude that, because the order [of protection] has expired," the mother's contention is moot (*Matter of Leah S.*, 61 AD3d 1402).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

315

CA 10-02215

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

GLENEAGLES SHOPPING CENTER PLANO, TX. LIMITED PARTNERSHIP, PLAINTIFF-APPELLANT,

V ORDER

FITNESS EVOLUTION, L.P., JOSEPH S. MULROY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (BRIAN LAUDADIO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ELLENOFF GROSSMAN & SCHOLE LLP, NEW YORK CITY (RICHARD P. KAYE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered August 27, 2010. The order granted the motion of defendants Fitness Evolution, L.P. and Joseph S. Mulroy to dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 1, 2011,

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

348

KA 10-00464

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTOINE DAVIS, 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 (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 7, 2010. The judgment convicted defendant, upon a nonjury verdict, of attempted assault in the first degree, endangering the welfare of a child, menacing in the second degree and aggravated harassment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Contrary to defendant's contention, his conviction of attempted assault is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's conduct of dousing his intended victim in lighter fluid and threatening to burn her "went far beyond mere discussion of a crime . . . and beyond [threatening] to commit a crime . . ., and even beyond arming [himself] in preparation for a crime" (*People v Mahboubian*, 74 NY2d 174, 191; *see generally People v Adams*, 222 AD2d 1124, *lv denied* 87 NY2d 1016; *People v Johnson*, 186 AD2d 363, *lv denied* 81 NY2d 763). Viewing the evidence in light of the elements of the crime of attempted assault in the first degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict with respect to that count is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We also reject defendant's contention that reversal is warranted based upon the court's failure to make a sufficient inquiry whether defendant was aware of the potential risks associated with defense counsel's prior representation of a prosecution witness and whether defendant wished to proceed with defense counsel despite any potential conflict (*see generally People v Gomberg*, 38 NY2d 307, 313-314). "[D]efendant failed to meet his

burden of establishing that 'the conduct of his defense was in fact affected by the operation of the conflict of interest' " (*People v Smart*, 96 NY2d 793, 795, quoting *People v Alicea*, 61 NY2d 23, 31).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

404

CA 10-02274

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

JOHN F. SMITH AND LISA SMITH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARIJANE REILLY, DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (STEPHANIE M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA (STEPHANIE A. PALMER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered July 6, 2010 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by John F. Smith (plaintiff) when a dog owned by defendant ran into the road and collided with plaintiff's bicycle, causing plaintiff to be propelled over the handlebars. Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint. "[T]he owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" (*Collier v Zambito*, 1 NY3d 444, 446). In support of the motion, defendant submitted her own deposition testimony, in which she testified that the dog had a propensity to "bolt" from her residence and that she had observed the dog in and around the roadway on several occasions. Defendant's testimony "raise[s] an issue of fact whether defendant had actual or constructive notice that the dog was either vicious or likely to interfere with traffic" (*Sinon v Anastasi*, 244 AD2d 973; *cf. Roberts v Joller*, 39 AD3d 1224).

Even assuming, arguendo, that defendant met her initial burden on the motion, we conclude that plaintiffs raised a triable issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In opposition to the motion, plaintiffs submitted the affidavit of a witness who had observed the dog loose on a few occasions and averred that the dog "barks and runs for the

roadway." "[A]n animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities--albeit only when such proclivity results in the injury giving rise to the lawsuit" (*Collier*, 1 NY3d at 447). Thus, the evidence submitted by plaintiffs also raises a triable issue of fact whether defendant had notice of the dog's proclivity to act in a way that created the risk of harm to plaintiff that resulted in the accident.

All concur except SCUDDER, P.J., and SMITH, J., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent inasmuch as we conclude that Supreme Court erred in denying defendant's motion seeking summary judgment dismissing the complaint. It is well settled that the sole viable claim against the owner of a domestic animal that causes injury is for strict liability and, to establish such liability, there must be evidence that the animal's owner had notice of its vicious propensities. The Court of Appeals has often "restated [its] long-standing rule 'that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities. Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " (*Bard v Jahnke*, 6 NY3d 592, 596-597, quoting *Collier v Zambito*, 1 NY3d 444, 446 [internal quotation marks and citations omitted]; *see Petrone v Fernandez*, 12 NY3d 546, 550). Consequently, "a plaintiff cannot recover for injuries resulting from the presence of a dog in the highway absent evidence that the defendant was aware of the animal's vicious propensities or of its habit of interfering with traffic" (*Staller v Westfall*, 225 AD2d 885; *see Sinon v Anastasi*, 244 AD2d 973).

Here, contrary to the majority's conclusion, defendant established in support of the motion that she had no knowledge of any vicious propensities of the dog or its tendency to interfere with traffic. We have frequently stated that defendants in this type of case will meet "their initial burden by submitting evidence establishing that they lacked actual or constructive knowledge that . . . the . . . dog[] had a propensity to interfere with traffic on the road" (*Myers v MacCrea*, 61 AD3d 1385, 1386). "Here, defendant[] established that, although [her] dog had occasionally run into the road . . . , [she] knew of no incidents when it had ever charged or chased vehicles or impeded the flow of traffic. Nor had [she] received any complaints that the dog had ever interfered with traffic on the road in any way. [That] evidence was sufficient to shift to plaintiff the burden of raising a question of fact [with respect] to defendant[']s knowledge that the dog had previously interfered with traffic. However, plaintiff's evidence that the dog was occasionally allowed to run loose and would then sometimes go into the road is insufficient to raise a question of fact on [that] issue" (*Alia v Fiorina*, 39 AD3d 1068, 1069).

Contrary to the contention of plaintiffs and the majority's

conclusion, "[p]laintiffs failed to raise an issue of fact whether defendant[] had actual or constructive notice of the dog's propensity to interfere with vehicular traffic" (*Roberts v Joller*, 39 AD3d 1224, 1225 [internal quotation marks omitted]). "Proof that a dog roamed the neighborhood or occasionally ran into the road is insufficient [to raise a triable issue of fact], although proof that the dog had a habit of chasing vehicles or otherwise interfering with traffic could constitute a vicious propensity" (*Rigley v Utter*, 53 AD3d 755, 756). "At most, the evidence established that defendant[was] aware that the dog would run [to] the road from time to time. [We] conclude that, in the absence of evidence that defendant[] knew or should have known that [her] dog was vicious or had a propensity to interfere with vehicular traffic, there is no factual basis for a finding of negligence" (*Nilsen v Johnson*, 191 AD2d 930, 931). We therefore would reverse the order, grant the motion and dismiss the complaint.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

412

KA 06-01424

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY N. OTT, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Stephen R. Sirkin, J.), rendered April 5, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him after a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and assault in the first degree (§ 120.10 [1]), defendant contends that his case was improperly transferred between Supreme Court, Monroe County and Monroe County Court for hearing and trial purposes because there are no transfer orders in the record (*see* 22 NYCRR 200.14). Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Insofar as defendant contends that the matter was in fact pending in Supreme Court and that the Acting County Court Judge who presided over the suppression hearing lacked subject matter jurisdiction to do so, we conclude that defendant waived that contention. Although a contention that a judge lacks subject matter jurisdiction to preside over a matter may be raised for the first time on appeal (*see People v Correa*, 15 NY3d 213), "[g]iven that Supreme Court [and County Court] had the power to hear the case, the transfer error defendant alleges is the equivalent of an improper venue claim, which is not jurisdictional in nature and is waived if not timely raised . . . Because defendant did not object in the trial court to the (purported) transfer of [his] case to [County] Court, we may not

consider this . . . claim" (*People v Wilson*, 14 NY3d 895, 897). Contrary to defendant's contention, *People v Adams* (74 AD3d 1897) does not require a different result. There, the matter was transferred to a different judge in violation of, inter alia, the requirement set forth in 22 NYCRR 200.14 that the transfer must occur before the entry of the plea (*see id.* at 1899). Here, there was no postplea transfer, and thus "the 'essential nature' of the right to be sentenced as provided by law" was not implicated (*People v Fuller*, 57 NY2d 152, 156).

Because defendant on appeal raises a different ground for severance than that set forth in his pretrial motion for that relief, defendant failed to preserve for our review his present contention in support of severance (*see People v Hall*, 48 AD3d 1032, *lv denied* 11 NY3d 789; *People v Wooden*, 296 AD2d 865, *lv denied* 99 NY2d 541; *People v Reed*, 236 AD2d 866, *lv denied* 89 NY2d 1099). In any event, the record does not support defendant's present contention that the summation of his codefendant's attorney was inconsistent with his own defense and thus that "the core of each defense [was] in irreconcilable conflict with the other and [that] there [was] a significant danger, as both defenses [were] portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt" (*People v Mahboubian*, 74 NY2d 174, 184).

Contrary to the further contention of defendant, the trial judge did not violate Judiciary Law § 21 by allegedly issuing a decision on defendant's suppression motion without hearing the evidence in support of the motion. The Acting County Court Judge who presided over the *Wade* hearing expressly denied the codefendant's suppression motion but failed expressly to rule on defendant's suppression motion. It is well settled, however, that a court's failure to rule on a motion is deemed a denial thereof (*see e.g. People v Mason*, 305 AD2d 979, *lv denied* 100 NY2d 563; *People v Jackson*, 291 AD2d 930, *lv denied* 98 NY2d 677; *People v Virgil*, 269 AD2d 850, *lv denied* 95 NY2d 806). Consequently, defendant's suppression motion is deemed to have been denied by the Acting County Court Judge prior to the start of trial. Indeed, we note that the trial judge merely clarified that it was denied when he stated that he deemed the e-mail from the Acting County Court Judge denying the codefendant's motion to be a denial of defendant's motion as well.

We agree with defendant, however, that the sentence imposed on count one, charging him with murder in the second degree, must be vacated and the matter remitted for resentencing with respect to that count, "[b]ecause of the discrepancy between the sentencing minutes and the certificate of conviction" with respect to that count (*People v Ingram*, 263 AD2d 959, 960; *see People v Beard* [appeal No. 2], 41 AD3d 1251, *lv denied* 9 NY3d 920, 924; *People v Shand*, 280 AD2d 943, 944, *lv denied* 96 NY2d 834). We therefore modify the judgment accordingly, and we remit the matter to County Court for resentencing

on that count of the indictment.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

433.1

CA 10-02055

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

RACHEL T. BUCHANAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MATT DOMBROWSKI, INDIVIDUALLY, AND MAGRUDER'S RESTAURANT & PUB INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

SLIWA & LANE, BUFFALO (PAUL F. MURAK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RODGER P. DOYLE, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered May 26, 2010 in a personal injury action. The order granted those parts of plaintiff's motion seeking summary judgment on the issue of negligence and dismissal of the affirmative defenses of contributory negligence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of plaintiff's motion with respect to liability, including negligence, and those parts of plaintiff's motion seeking dismissal of the affirmative defenses that allege plaintiff's culpable conduct insofar as they are based on implied assumption of risk and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiff commenced this action to recover damages for injuries she sustained while she was a patron at defendant Magruder's Restaurant & Pub Inc. (Magruder's). According to plaintiff, she was flipped, head over heels, during a bar trick performed by Matt Dombrowski (defendant), the owner of Magruder's. Plaintiff moved for partial summary judgment on liability and for dismissal of defendants' affirmative defenses to the extent that defendants alleged plaintiff's contributory negligence, i.e., her own culpable conduct, and assumption of risk, both implied and primary. By the order in appeal No. 1, Supreme Court granted those parts of the motion with respect to defendants' negligence, rather than liability, and with respect to the affirmative defenses of contributory negligence. By the order in appeal No. 2, the court treated plaintiff's motion for leave to reargue as one for leave to renew her prior motion with respect to the affirmative defense of assumption of risk and, upon renewal, granted the prior motion with respect to that affirmative defense.

We begin by addressing the order in appeal No. 2. We agree with

defendants that the court erred upon renewal in granting plaintiff's prior motion insofar as it sought dismissal of the affirmative defense that alleges plaintiff's assumption of risk. We note at the outset that, contrary to plaintiff's contention, defendants raised the issue of implied assumption of risk in opposition to plaintiff's original motion and thus preserved their present contention for our review (*cf. Henner v Everdry Mktg. & Mgt., Inc.*, 74 AD3d 1776, 1777-1778).

We conclude on the record before us that there are triable issues of fact whether the doctrines of implied and primary assumption of risk may reduce or bar plaintiff's recovery. "Care must be taken to distinguish between two distinct doctrines of assumption of risk. The first[, i.e., implied assumption of risk,] is embraced within the CPLR article 14-A concept of 'culpable conduct attributable to the [plaintiff]' . . . It is akin to comparative negligence; it does not bar recovery, but diminishes recovery in the proportion to which it contributed to the injuries . . . [In contrast, however,] . . . 'primary' assumption of risk is not a measure of plaintiff's comparative fault, but a measure of the defendant's duty of care. Primary assumption of risk eliminates or reduces the tortfeasor's duty of care to the plaintiff and, in the former case, constitutes a complete bar to recovery" (*Lamey v Foley*, 188 AD2d 157, 162-163 [citations omitted]). Here, the court erred, upon renewal, in granting plaintiff's prior motion with respect to the affirmative defense of assumption of risk insofar as it concerns plaintiff's implied assumption of risk because the record contains evidence submitted by defendants that raises a triable issue of fact whether plaintiff engaged in "a voluntary encounter with a known risk of harm" (*Beadleston v American Tissue Corp.*, 41 AD3d 1074, 1076). Furthermore, "[u]nder the particular circumstances of this case, there are [triable] issues of fact as to whether the doctrine of primary assumption of . . . risk is applicable to" plaintiff's participation in a bar trick performed by defendant (*Berfas v Town of Oyster Bay*, 286 AD2d 466; *cf. Trupia v Lake George Cent. School Dist.*, 14 NY3d 392). We therefore reverse the order in appeal No. 2 insofar as appealed from, deny the motion upon renewal seeking dismissal of the affirmative defense of assumption of risk, and reinstate that affirmative defense.

With respect to the order in appeal No. 1, in support of the motion plaintiff submitted, inter alia, defendant's deposition testimony and other evidence establishing that plaintiff was free from contributory negligence (*see generally Hinds v Wal-Mart Stores, Inc.*, 52 AD3d 1218, 1218-1219; *Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760), and defendants failed to raise a triable issue of fact with respect to that issue (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although in their answer defendants expressly raised only plaintiff's culpable conduct in their affirmative defenses alleging contributory negligence, culpable conduct in fact includes both contributory negligence and implied assumption of risk (*see generally* CPLR 1411). Inasmuch as we have previously held that there is a triable issue of fact with respect to plaintiff's implied assumption of risk, we affirm the order in appeal No. 1 insofar as it grants that

part of plaintiff's motion with respect to contributory negligence only, and we modify the order by denying that part of the motion with respect to plaintiff's implied assumption of risk and reinstating that part of the defense.

Furthermore, because there is a triable issue of fact with respect to the defense of primary assumption of risk, the court erred in granting, by the order in appeal No. 1, that part of plaintiff's motion seeking partial summary judgment on the issue of defendants' negligence. With regard to that defense, primary " 'assumption of risk . . . is really a *principle of no duty*, or no negligence and so *denies the existence of any underlying cause of action*' " (*Morgan v State of New York*, 90 NY2d 471, 485). Thus, "when a plaintiff assumes the risk of participating in a sporting [or recreational] event, 'the defendant is relieved of legal duty to the plaintiff; and being under no duty, [the defendant] cannot be charged with negligence' " (*Cotty v Town of Southampton*, 64 AD3d 251, 254, quoting *Turcotte v Fell*, 68 NY2d 432, 438). We therefore further modify the order in appeal No. 1 by denying in its entirety that part of plaintiff's motion seeking partial summary judgment on liability.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

433.2

CA 10-02086

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

RACHEL T. BUCHANAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MATT DOMBROWSKI, INDIVIDUALLY, AND MAGRUDER'S RESTAURANT & PUB INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

SLIWA & LANE, BUFFALO (PAUL F. MURAK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RODGER P. DOYLE, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered September 15, 2010 in a personal injury action. The order, insofar as appealed from, granted plaintiff's motion, upon renewal, for summary judgment dismissing defendants' assumption of risk affirmative defense.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion upon renewal seeking dismissal of the affirmative defense of assumption of risk is denied and that affirmative defense is reinstated.

Same Memorandum as in *Buchanan v Dombrowski* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2011]).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

434

TP 10-02181

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

IN THE MATTER OF RIVAS COLON, PETITIONER,

V MEMORANDUM AND ORDER

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

RIVAS COLON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered November 1, 2010) to review three separate determinations of respondent. The determinations found after Tier III hearings that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding with respect to the determination dated April 19, 2010 is unanimously dismissed without costs, the determination dated April 20, 2010 is modified on the law by granting the petition in part, annulling that part of the determination finding that petitioner violated inmate rule 106.10 (7 NYCRR 270.2 [B] [7] [i]) and vacating the penalty and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule, the determination dated April 26, 2010 is confirmed without costs and the petition with respect to that determination is dismissed and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul three determinations that he violated various inmate rules as charged in three misbehavior reports. The first determination, dated April 19, 2010, was based on a misbehavior report alleging that defendant violated inmate rule 113.24 (7 NYCRR 270.2 [B] [14] [xiv] [drug use]). After petitioner commenced this proceeding, respondent issued an administrative order reversing the determination that defendant violated that inmate rule and directing that all references to the subject disciplinary proceeding be expunged. We therefore conclude that the proceeding insofar as it relates to the first determination should be dismissed as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

The second determination, dated April 20, 2010, was based on a

misbehavior report alleging that, during a pat frisk, a balloon containing an unknown substance was found in petitioner's pocket. When petitioner attempted to swallow the balloon, a struggle ensued between petitioner and the correction officer who was trying to stop him. During that struggle, petitioner bit the correction officer. As respondent correctly concedes, the determination that petitioner violated inmate rule 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusal to obey a direct order]) is not supported by substantial evidence. We conclude, however, that there is substantial evidence to support the determination that petitioner violated inmate rules 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]) and 100.11 (7 NYCRR 270.2 [B] [1] [ii] [assault on staff member]). The misbehavior report together with documentary evidence and the hearing testimony of the correction officer, an eyewitness and petitioner constituted substantial evidence that petitioner violated those inmate rules (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). Contrary to petitioner's contention, the record does not establish "that the Hearing Officer was biased or that the determination flowed from the alleged bias" *(Matter of Rodriguez v Herbert*, 270 AD2d 889, 890). Although petitioner further contends that the determination is arbitrary and capricious, he failed to raise that contention in his administrative appeal. He thus failed to exhaust his administrative remedies with respect thereto, and this Court has no discretionary power to reach that issue (*see Matter of Nelson v Coughlin*, 188 AD2d 1071, *appeal dismissed* 81 NY2d 834).

We therefore modify the second determination by granting the petition in part and annulling that part of the determination finding that petitioner violated inmate rule 106.10, and we direct respondent to expunge from petitioner's institutional record all references to the violation of that rule. Because a single penalty was imposed for all three violations charged, and the record fails to specify any relation between the violations and that penalty, we further modify the determination by vacating the penalty, and we remit the matter to respondent for imposition of an appropriate penalty on the remaining violations based on the first misbehavior report (*see Matter of Pena v Goord*, 6 AD3d 1106, 1106-1107).

The third determination, dated April 26, 2010, was based on a misbehavior report alleging, inter alia, that petitioner defecated on the floor and then swallowed a piece of a balloon that he retrieved from his feces. Correction officers found additional pieces of balloon in the feces. Contrary to petitioner's contention, the determination that petitioner violated inmate rules 113.23 (7 NYCRR 270.2 [B] [14] [xiii] [contraband]), 106.10 and 107.10 is supported by substantial evidence. The misbehavior report, together with documentary evidence and the testimony of a correction officer constitute substantial evidence supporting the determination (*see Matter of Mitchell v Phillips*, 268 AD2d 633). Petitioner further contends that he had insufficient notice that pieces of balloon were considered contraband. By failing to raise that contention during the hearing, however, defendant failed to preserve it for our review, and this Court has no discretionary power to reach that issue (*see Matter of Hamilton v Goord*, 32 AD3d 642, *lv denied* 7 NY3d 715). We therefore

confirm the third determination.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

435

KA 08-00834

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MORRIS B. YUSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered December 20, 2007. 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: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that his sentence is illegal because County Court imposed a five-year period of postrelease supervision. The People correctly concede that, although defendant did not preserve his contention for our review, preservation is not required inasmuch as defendant challenges the legality of his sentence (*see People v Ramsey*, 59 AD3d 1046, 1048, *lv denied* 12 NY3d 858; *People v Fuentes*, 52 AD3d 1297, 1300-1301, *lv denied* 11 NY3d 736; *People v Fomby*, 42 AD3d 894, 896). We nevertheless reject defendant's contention.

Defendant's plea of guilty to assault in the second degree, a class D violent felony, was in satisfaction of an indictment charging, inter alia, robbery in the first degree (Penal Law § 160.15 [4]) as an armed felony as defined in CPL 1.20 (41) (b). Consequently, defendant was sentenced pursuant to Penal Law § 70.02 (4). Inasmuch as none of the exceptions set forth in former section 70.45 (2) apply herein, the statute mandates the imposition of a five-year period of postrelease supervision (*see generally People v McCants*, 54 AD3d 445; *People v Hanley*, 43 AD3d 487; *People v McQuiller*, 19 AD3d 1043, 1045, *lv denied* 5 NY3d 808).

Entered: April 29, 2011

Patricia L. Morgan
Clerk of the Court

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

437

KA 08-01187

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

VICTOR M. CARBAJAL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered April 4, 2008. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree and driving while intoxicated, a class E felony.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

438

KA 10-01578

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

YVONNA BELLANTI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), rendered July 21, 2010. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

439

KA 10-00556

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SUSANNE HAUKE, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 15, 2009. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the fifth degree (two counts).

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of two counts of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31), defendant contends that her monosyllabic responses to County Court's questions cast doubt upon the voluntariness of her plea. She further contends that the court failed to ascertain whether she knowingly and unlawfully sold a controlled substance and that, because she did not recite the elements of the offenses, there was no assurance that she understood the nature of the charges to which she was pleading guilty. Those contentions are actually challenges to the factual sufficiency of the plea allocution, and defendant failed to preserve her contentions for our review by moving to withdraw the plea or to vacate the judgment of conviction (*see People v Lopez*, 71 NY2d 662, 665; *People v Jamison*, 71 AD3d 1435, 1436, *lv denied* 14 NY3d 888; *People v Bailey*, 49 AD3d 1258, *lv denied* 10 NY3d 932). Contrary to defendant's further contention, this case does not fall within the narrow exception to the preservation requirement set forth in *Lopez* (71 NY2d at 666). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

440

KA 10-01076

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEODORE MCCOLLUM, DEFENDANT-APPELLANT.

JONES & MORRIS, VICTOR (MICHAEL A. JONES, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), dated March 23, 2010. The order denied defendant's petition to modify the determination that he is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order denying his petition pursuant to Correction Law § 168-*o* (2) seeking to modify the prior determination that he is a level three risk pursuant to the Sex Offender Registration Act (§ 168 *et seq*). "We agree with County Court that defendant failed to meet his 'burden of proving the facts supporting the requested modification by clear and convincing evidence' " (*People v Higgins*, 55 AD3d 1303, quoting § 168-*o* [2]; *see People v Cullen*, 79 AD3d 1677).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

442

KA 09-02655

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GERALD T. WEST, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered May 13, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree.

Now, upon reading and filing the stipulation discontinuing appeal signed by defendant on January 20, 2011 and by the attorneys for the parties on February 10 and March 10, 2011,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

443

KA 08-02471

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVEN R. TAYLOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered May 8, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b], [3]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [1]). Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to those counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The People presented evidence establishing that defendant was observed firing a .22 caliber revolver in the direction of a pizzeria and that a .22 caliber bullet, which could have been shot from that revolver, was recovered from the pizzeria. In addition, the People established that there were no bullet holes in the mailbox of the pizzeria prior to the incident. Thus, contrary to defendant's contention, we conclude that the jury could have reasonably inferred that, "at some point before the defendant's apprehension by the police and the concomitant recovery of the weapon, he possessed a firearm loaded with operable ammunition" (*People v Bailey*, 19 AD3d 431, 432, *lv denied* 5 NY3d 785).

By failing to request that the court charge criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [1]) as a lesser

included offense of criminal possession of a weapon in the second degree, defendant failed to preserve for our review his further contention that the court erred in failing to give such a charge (*see People v Alvarez*, 51 AD3d 167, 180, *lv denied* 11 NY3d 785; *People v Ware*, 303 AD2d 173, *lv denied* 100 NY2d 543). We reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to request that the court charge the jury with that lesser included offense (*see generally People v Caban*, 5 NY3d 143, 152). There is no reasonable view of the evidence that would allow the jury to conclude, without resorting to speculation, that defendant committed the lesser offense but not the greater (*see People v Laing*, 66 AD3d 1353, 1355, *lv denied* 13 NY3d 908; *see generally People v Butler*, 84 NY2d 627, 631-632, *rearg denied* 85 NY2d 858).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

445

CA 10-02128

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

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

V ORDER

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), AND NANCY ROSE STORMER, P.C., UTICA, FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered July 15, 2010 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the second amended petition, directed respondents to reimburse petitioner the sum of $3,582,807.37 and directed respondents to pay sanctions in the amount of $11,674.48.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating subparagraph (B) of the second decretal paragraph and vacating the third decretal paragraph and as modified the judgment is affirmed without costs (*see Matter of County of St. Lawrence v Daines*, 81 AD3d 212; *Matter of County of Niagara v Daines*, 79 AD3d 1702, 1705-1706).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

446

CA 10-02059

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

JONATHAN D. VANNEST, PLAINTIFF-APPELLANT,

V ORDER

SOUTH SHORE MARINA, LLC, DEFENDANT-RESPONDENT.

PORTER NORDBY HOWE LLP, SYRACUSE (ERIC C. NORDBY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (AMY M. VANDERLYKE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered July 8, 2010 in a personal injury 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.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

447

CA 10-01296

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

NICOLE HERNANDEZ, AS ADMINISTRATRIX OF THE ESTATE OF CHARLES M. LEE, JR., DECEASED, AND AS PARENT AND NATURAL GUARDIAN OF THE PERSON AND PROPERTY OF MATTHEW LEE, AN INFANT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF HAMBURG, MARK O. PATTON, INDIVIDUALLY AND DOING BUSINESS AS PATTON PLUMBING, MCALLISTER PLUMBING & HEATING, INC., AND SAED INC., DOING BUSINESS AS DOCTOR BACKFLOW PLUMBING, DEFENDANTS-RESPONDENTS.

STEPHEN M. HUGHES, BUFFALO, FOR PLAINTIFF-APPELLANT.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT SAED INC., DOING BUSINESS AS DOCTOR BACKFLOW PLUMBING.

LEWIS & LEWIS, P.C., BUFFALO (EMILY L. DOWNING OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF HAMBURG.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (KEVIN D. MCCARTHY OF COUNSEL), FOR DEFENDANT-RESPONDENT MCALLISTER PLUMBING & HEATING, INC.

LAW OFFICES OF TAYLOR & SANTACROSE, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANT-RESPONDENT MARK O. PATTON, INDIVIDUALLY AND DOING BUSINESS AS PATTON PLUMBING.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 2, 2010 in a wrongful death action. The order granted the motions and cross motion of defendants for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff, as administratrix of the estate of her son's father (decedent) and as parent and natural guardian of her son, commenced this Labor Law and common-law negligence action seeking damages for decedent's wrongful death and conscious pain and suffering as a result of a work-related accident. Decedent was killed when a trench that was being excavated as part of a residential sewer project (project) collapsed and crushed him.

Supreme Court properly granted the motion of defendant Town of Hamburg (Town) seeking summary judgment dismissing the amended complaint against it. The Town established that it did not have a special relationship with decedent based on its issuance of an excavation permit or its inspection of the work site (*see Garrett v Holiday Inns*, 58 NY2d 253, 261), and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The court also properly granted the motion of defendant McAllister Plumbing & Heating, Inc. (McAllister) seeking summary judgment dismissing the amended complaint against it. It is undisputed that McAllister obtained the excavation permit from the Town as a favor to the general contractor on the project, defendant Mark O. Patton, individually and doing business as Patton Plumbing, and that it had no further connection to the project. The court therefore properly determined that McAllister is not vicariously liable for the alleged negligence of Patton or of the excavation subcontractor, defendant Saed Inc., doing business as Doctor Backflow Plumbing (Saed) (*see Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 259-260).

We further conclude that the court properly granted the motions of the Town and McAllister, as well as the cross motion of Patton seeking summary judgment dismissing the amended complaint and any cross claims against him and the motion of Saed seeking summary judgment dismissing the amended complaint against it, on the ground that decedent's inexplicable decision to enter the unshored trench that was still being excavated was the sole proximate cause of his death. Defendants established that, "[b]ased on his training, prior practice[] and common sense, [decedent] knew or should have known" not to enter the unshored excavation (*Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1427), but that he nevertheless "chose for no good reason . . . to do so[] and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40). The uncertified, unsigned and heavily redacted Occupational Safety and Health Administration report submitted by plaintiff in opposition to the motions and cross motion is not in admissible form and is thus insufficient to defeat them. Plaintiff failed "to demonstrate [an] acceptable excuse for [her] failure to meet the strict requirement of tender in admissible form" (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1068).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

448

CA 10-01975

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

SHARON MCAFEE, PLAINTIFF-APPELLANT,

V ORDER

JAMES MCAFEE, DEFENDANT-RESPONDENT.

GERALD J. VELLA, SPRINGVILLE, FOR PLAINTIFF-APPELLANT.

ROSENTHAL, SIEGEL & MUENKEL, LLP, BUFFALO (JAMES P. RENDA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Larry M. Himelein, A.J.), entered December 30, 2009 in a divorce action. The order, among other things, denied plaintiff's motion to find defendant in contempt.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

449

CA 10-01698

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

JANE RENNIE BLAKE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH DARCY BLAKE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WATSON, BENNETT, COLLIGAN & SCHECHTER LLP, BUFFALO (KRISTIN L. ARCURI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, WILLIAMSVILLE (DENIS A. SCINTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 12, 2009 in a divorce action. The order directed defendant to pay the sum of $9,085 for counsel fees incurred by plaintiff.

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

Memorandum: In appeal No. 1, defendant appeals from an order granting in part the application of plaintiff's attorney for counsel fees and awarding him $9,085 and, in appeal No. 2, defendant appeals from an order denying the application of his attorney for counsel fees. Contrary to the contention of defendant in each appeal, Supreme Court did not abuse or improvidently exercise its discretion in rendering those orders.

" 'The award of reasonable counsel fees is a matter within the sound discretion of the trial court' " (*Dellafiora v Dellafiora*, 54 AD3d 715, 716; *see Panek v Panek*, 231 AD2d 959), and such awards are intended "to redress the economic disparity between the monied spouse and the non-monied spouse" (*O'Shea v O'Shea*, 93 NY2d 187, 190; *see Matter of William T.M. v Lisa A.P.*, 39 AD3d 1172). When exercising its discretionary power to award such fees, a court may consider all of the circumstances of a given case, including the financial circumstances of both parties, the relative merit of the parties' positions (*see Johnson v Chapin*, 12 NY3d 461, 467, *rearg denied* 13 NY3d 888; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881; *William T.M.*, 39 AD3d 1172), the existence of any dilatory or obstructionist conduct (*see Johnson*, 12 NY3d at 467; *Rados v Rados*, 133 AD2d 536), and "the time, effort and skill required of counsel" (*Panek*, 231 AD2d 959; *see Klepp v Klepp*, 44 AD3d 625).

Here, the record establishes that defendant's income was three times that of plaintiff and that significant periods of delay were occasioned by circumstances attributable to defendant. Contrary to defendant's contention, the record contains no evidence that plaintiff acted in bad faith or was otherwise unreasonable in her negotiations with defendant.

We have reviewed defendant's procedural challenges to the application of plaintiff's attorney in appeal No. 1, and we conclude that they lack merit (*see* 22 NYCRR 202.16 [k]).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

450

CA 10-01699

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

JANE RENNIE BLAKE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH DARCY BLAKE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WATSON, BENNETT, COLLIGAN & SCHECHTER LLP, BUFFALO (KRISTIN L. ARCURI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, WILLIAMSVILLE (DENIS A. SCINTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered July 15, 2010 in a divorce action. The order denied the quantum meruit application of defendant's attorney for counsel fees.

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

Same Memorandum as in *Blake v Blake* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2011]).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

451

CA 10-02129

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

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

V ORDER

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

WHITEMAN, OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), AND NANCY ROSE STORMER, P.C., UTICA, FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered May 3, 2010 in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the petition and directed respondents to reimburse petitioner the sum of $692,296.37.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating subparagraph (B) of the second decretal paragraph and as modified the judgment is affirmed without costs (*see Matter of County of St. Lawrence v Daines*, 81 AD3d 212; *Matter of County of Niagara v Daines*, 79 AD3d 1702, 1705-1706).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

453

CA 10-02373

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

THE TRAVELERS INDEMNITY COMPANY, PLAINTIFF,

V ORDER

ELLIOTT COMPANY, ELLIOTT TURBOMACHINERY CO., INC., CERTAIN UNDERWRITERS AT LLOYD'S LONDON, CERTAIN LONDON MARKET COMPANIES, DEFENDANTS-RESPONDENTS, CARRIER CORPORATION, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), AND MORGAN, LEWIS & BOCKIUS LLP, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

JONES DAY, PITTSBURGH, PENNSYLVANIA (MICHAEL H. GINSBERG, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ELLIOTT COMPANY AND ELLIOTT TURBOMACHINERY CO., INC.

MENDES & MOUNT, LLP, NEW YORK CITY (ALEXANDER J. MUELLER OF COUNSEL), AND MCDERMOTT & BRITT, P.C., SYRACUSE, FOR DEFENDANTS-RESPONDENTS CERTAIN UNDERWRITERS AT LLOYD'S LONDON AND CERTAIN LONDON MARKET COMPANIES.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 9, 2009. The order denied the motion of defendant Carrier Corporation for partial summary judgment against defendants Elliott Company and Elliott Turbomachinery Co., Inc.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

454

CA 10-02379

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

PAUL M. PREDMORE, AS TRUSTEE FOR DUANE M. KRULL REVOCABLE TRUST, PLAINTIFF-RESPONDENT,

V ORDER

STANLEY BANAZEK AND WILLIAM NEWMAN, DEFENDANTS-APPELLANTS.

EDWARD J. FINTEL, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GREEN & SEIFTER, ATTORNEYS, PLLC, SYRACUSE (JAMES L. SONNEBORN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered March 24, 2010. The order granted the motion of plaintiff for partial summary judgment and denied the cross motion of defendants for summary judgment.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

455

KA 08-01137

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KARON R. RUSSELL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered December 17, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree, attempted criminal possession of a weapon in the second degree (two counts), assault in the second degree, obstructing governmental administration in the second degree, harassment in the second degree and resisting arrest.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

456

KA 08-00830

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMEL WESTON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 18, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts), robbery 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 his guilty plea of, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [2]), defendant contends that the photo array identification procedure in which his accomplice was the witness was unduly suggestive (*see generally People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833). We reject that contention. Because "the subjects depicted in the photo array [were] sufficiently similar in appearance so that the viewer's attention [was] not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection," the photo array itself was not unduly suggestive (*People v Quinones*, 5 AD3d 1093, 1093, *lv denied* 3 NY3d 646). Likewise, the circumstances in which the police presented the photo array were not unduly suggestive. During his interview with the police, the accomplice indicated that he knew the perpetrator by his nickname, "Ratchet." Upon presenting the photo array, the police officer asked the accomplice to identify the man he knew as "Ratchet" if he could do so, but the officer neither told the accomplice that "Ratchet" was actually depicted in the photo array, nor did the officer instruct the accomplice that he was required to make an identification (*see People v Floyd*, 45 AD3d 1457, 1459, *lv denied* 10

NY3d 810, 811, 818).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

457

KA 08-00840

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANDRE SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a new sentence of the Onondaga County Court (William D. Walsh, J.), rendered January 30, 2008 imposed upon defendant's conviction of criminal sale of a controlled substance in the second degree. Defendant was resentenced pursuant to the 2005 Drug Law Reform Act upon his 1991 conviction.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

458

KA 10-00518

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. MAULL, ALSO KNOWN AS POOCHIE,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JAMES L. DOWSEY, III, WEST VALLEY (KELIANN M. ELNISKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered June 26, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). We agree with defendant that his plea was not knowingly, voluntarily and intelligently entered because County Court failed to advise him before he entered his plea that his sentence would include a period of postrelease supervision (*see People v Catu*, 4 NY3d 242, 245; *People v Antonetti*, 74 AD3d 1912). We therefore conclude that reversal is required, "notwithstanding the absence of a postallocution motion" (*People v Louree*, 8 NY3d 541, 545-546). In light of our determination, we need not address defendant's remaining contentions.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

459

KA 10-00400

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

COREY BONES, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered January 25, 2010. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

460

KA 08-01138

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KARON R. RUSSELL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered December 17, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (11 counts), attempted robbery in the first degree, and robbery in the second degree (4 counts).

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

461

KA 06-03762

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered July 19, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh 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 three years and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (*id.*). We note at the outset that, although the People contend that defendant failed to take an appeal from the judgment in appeal No. 2, we exercise our discretion in the interest of justice to treat the pro se notice of appeal in appeal No. 2 as valid, and we thus conclude that the appeal taken from the judgment entered upon the guilty plea is properly before us (*see* CPL 460.10 [6]; *People v Pinckney*, 197 AD2d 936).

Defendant contends with respect to appeal No. 1 that he was illegally stopped and searched and thus that County Court erred in refusing to suppress the drugs seized from defendant. We reject that contention. A police officer testified at the suppression hearing that, while he was in an unmarked police vehicle stopped at a traffic light at an intersection, he observed defendant walk to the driver's door of a parked vehicle, glance left and right, and place his hand on

the door handle. Defendant then walked to the passenger side of the vehicle, glanced left and right, and returned to the driver's side of the vehicle, again placing his hand on the door handle. After he glanced left and right for the third time, he then walked back to the passenger side and reached into the vehicle through the open window. Defendant turned around with his hands in his pockets and began to walk away from the vehicle. The officer approached defendant and asked him who owned that vehicle. Defendant initially responded that he owned the vehicle, but he could produce neither the vehicle registration nor any identification. The officer then ascertained that the vehicle was actually registered to a woman, whereupon defendant informed the officer that the vehicle was owned by a friend, but he could not so much as provide even the first name of that friend. The officer then searched defendant and found drugs in the front pocket of his pants.

We agree with the People that the officer had a " 'founded suspicion that criminal activity [was] afoot' " when he approached defendant and thus that his questioning of defendant was permissible (*People v Hollman*, 79 NY2d 181, 184). Based on defendant's responses to those questions, the officer then had probable cause to believe that defendant had committed a crime (*see People v Thurman*, 81 AD2d 548, 550). In view of the officer's authorization to arrest defendant at that time, the officer also was authorized to search defendant's person incident to a lawful arrest (*see generally People v Ralston*, 303 AD2d 1014, *lv denied* 100 NY2d 565).

We agree with defendant's further contention in appeal No. 1 that the period of five years of postrelease supervision (PRS) is illegal, because the maximum period of PRS permitted by statute in this case is three years (*see* § 70.45 [2] [d]). We therefore modify the judgment in appeal No. 1 by reducing the period of PRS to a period of three years (*see People v Gibson*, 52 AD3d 1227). Contrary to the further contention of defendant, the sentence as modified in appeal No. 1 and the sentence in appeal No. 2 are not unduly harsh or severe. In view of our determination that the sentence in appeal No. 1, as modified, is not unduly harsh or severe, we reject defendant's contention that the judgment in appeal No. 2 must be reversed on the ground that he pleaded guilty in appeal No. 2 based on the promise that the sentence in appeal No. 2 would run concurrently with the sentence in appeal No. 1 (*cf. People v Fuggazzatto*, 62 NY2d 862).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

462

KA 06-03763

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered August 9, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same Memorandum as in *People v Johnson* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2011]).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

464

KA 10-00519

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAVID L. MAULL, ALSO KNOWN AS POOCHIE,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JAMES L. DOWSEY, III, WEST VALLEY (KELIANN M. ELNISKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID L. MAULL, DEFENDANT-APPELLANT PRO SE.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered June 26, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

465

KA 10-01222

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DALE R. HORN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RICHARD J. SHERWOOD, LANCASTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered March 15, 2010. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

Now, upon reading and filing the stipulation discontinuing appeal signed by defendant and the attorneys for the parties on April 4, 2011,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

466

KA 10-02399

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DALE R. HORN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RICHARD J. SHERWOOD, LANCASTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered March 15, 2010. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

Now, upon reading and filing the stipulation discontinuing appeal signed by defendant and the attorneys for the parties on April 4, 2011,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

468

CA 10-01676

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

CHRISTINA L. HERDENDORF, PLAINTIFF-RESPONDENT,

V ORDER

GEICO INSURANCE COMPANY, DEFENDANT-APPELLANT.

CHRISTINA L. HERDENDORF, PLAINTIFF-RESPONDENT,

V

JESSE JANSKY AND GEICO INSURANCE COMPANY,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

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

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered March 18, 2010. The order granted the motion of plaintiff for leave to serve an amended complaint.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on March 9, 2011,

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

469

CA 10-01677

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

CHRISTINA L. HERDENDORF, PLAINTIFF-RESPONDENT,

V ORDER

GEICO INSURANCE COMPANY, DEFENDANT-APPELLANT.

CHRISTINA L. HERDENDORF, PLAINTIFF-RESPONDENT,

V

JESSE JANSKY AND GEICO INSURANCE COMPANY,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

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

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered June 4, 2010. The order denied the motion of defendants to dismiss plaintiff's amended complaint.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on March 9, 2011,

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

470

CA 10-02471

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

WILLIAM J. MAYER AND LISA A. MAYER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

HENRY HOANG, INDIVIDUALLY AND DOING BUSINESS
AS HENRY'S NAILS, DEFENDANT-RESPONDENT.

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

COHEN & LOMBARDO, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 25, 2010 in a personal injury action. The order, insofar as appealed from, granted the motion of defendant to compel plaintiffs to provide a supplemental bill of particulars and to compel a return deposition of plaintiff William J. Mayer.

It is hereby ORDERED that the order so appealed from is unanimously modified as a matter of discretion and on the law by denying defendant's motion with respect to a return deposition of plaintiff in part, vacating the third ordering paragraph and substituting therefor a directive that plaintiff submit to a further deposition that is limited to questions concerning the June 2007 motor vehicle accident and relevant questions deriving therefrom, in accordance with 22 NYCRR 221.2, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries allegedly sustained by William J. Mayer (plaintiff) when he fell from a ladder while removing a light fixture from the exterior of Henry's Nails, a business owned by defendant. Contrary to plaintiffs' contention, we conclude that Supreme Court did not abuse its discretion in granting that part of defendant's motion seeking to compel plaintiffs to serve a supplemental bill of particulars that included wage loss calculations to be verified by plaintiff, subject to preclusion of a claim for any such damages in the event of plaintiffs' failure to comply with that part of defendant's motion (*see* CPLR 3042 [d]).

We recognize that " '[t]he purpose of a bill of particulars is to amplify the pleadings, limit proof, and prevent surprise at trial; it

is not an evidence-gathering device' " (*Khoury v Chouchani*, 27 AD3d 1071, 1072). Nevertheless, we conclude that plaintiffs failed to provide an adequate response to defendant's demand for information concerning plaintiff's "time lost and loss of income sustained." In their bill of particulars, plaintiffs' response thereto was that the total amount of lost earnings was "unknown at the present time and will be supplemented in the future." Plaintiffs thereafter produced a computer printout that purported to show plaintiff's earnings from the year 2000 through the year 2008, when the accident occurred. After plaintiff's deposition and in response to a follow-up letter from defendant, plaintiffs refused to provide any additional information concerning lost earnings, stating merely that the bill of particulars would be supplemented "in accordance with the requirements of the CPLR." The record reflects, however, that plaintiffs had more than sufficient time to provide a calculation of plaintiff's lost wages, particularly in light of the fact that plaintiff had already returned to his "normal amount of activities" at the time of his deposition in 2010, and the fact that correspondence from plaintiffs' attorney following plaintiff's deposition did not indicate that plaintiffs lacked any information needed to calculate lost wages (*cf. Felock v Albany Med. Ctr. Hosp.*, 258 AD2d 772, 774). Moreover, defendant requested information only and not evidentiary material or expert proof. We further conclude that the court properly ordered that the supplemental bill of particulars be verified by plaintiff inasmuch as the record establishes that plaintiff's wife is not sufficiently "acquainted with the facts" within the meaning of CPLR 3020 (d).

Plaintiffs further contend that the court erred in granting that part of defendant's motion seeking to compel plaintiff to submit to a return deposition and "to answer all questions put to him including any questions previously asked at the prior deposition as well as questions regarding any of the issues inquired of by" defendant's attorney. Even assuming, arguendo, that defendant is correct that such part of the order is not appealable as of right (*see Roggow v Walker*, 303 AD2d 1003, 1003-1004; *Presti v Schalck*, 26 AD2d 793; *Brown v Golden*, 6 AD2d 766), we exercise our discretion to deem the notice of appeal with respect to that part of the order to be an application pursuant to CPLR 5701 (c) for permission to appeal, and we grant such permission (*see Roggow*, 303 AD2d at 1004). On the merits, we agree with plaintiffs that the court abused its discretion in imposing that broad requirement. Defendant took issue with only five of the questions that plaintiff refused to answer, and defendant concedes in his brief on appeal that plaintiff essentially answered two of those questions, which concerned whether plaintiff smokes cigarettes. With respect to the remaining questions, we conclude that plaintiff properly refused to answer questions concerning whether defendant supplied "any defective, unsafe or improper devices or materials which caused [plaintiff's] fall" or whether the work area appeared "to be unreasonably dangerous." It is well settled that a plaintiff at a deposition may not "be compelled to answer questions seeking legal and factual conclusions or questions asking him [or her] to draw inferences from the facts" (*Lobdell v South Buffalo Ry. Co.*, 159 AD2d 958; *see Barber v BPS Venture, Inc.*, 31 AD3d 897). Plaintiff also properly refused to answer the question whether he had "a calculation

as to any lost wages that [he] would claim as a result of this incident" inasmuch as such question primarily seeks a legal conclusion (*see generally Barber*, 31 AD3d 897; *Lobdell*, 159 AD2d 958). Further, a review of plaintiff's deposition transcript reflects that plaintiff properly answered all other fact-based questions concerning his lost wages (*see Schwartz v Marien*, 40 AD2d 1078).

We conclude, however, that the court properly granted that part of defendant's motion seeking to require plaintiff to answer questions concerning his June 2007 motor vehicle accident. At his deposition, plaintiff was directed by his attorney not to answer the question whether he "ever ma[de] a claim for bodily injury following a motor vehicle accident in June of 2007." Contrary to plaintiffs' contention, that question does not implicate the physician-patient privilege inasmuch as it does not request information concerning doctor-patient communications or medical diagnosis or treatment (*see* CPLR 4504 [a]; *see generally Carter v Fantauzzo*, 256 AD2d 1189, 1190). Further, plaintiff alleges that, as a result of the fall, he injured his back, hip, groin, pelvis, and elbow, areas that are commonly injured in motor vehicle accidents, and thus the question was reasonably calculated to lead to evidence that is "material and necessary" to the defense of the action (CPLR 3101 [a]; *see generally Orlando v Richmond Precast, Inc.*, 53 AD3d 534; *Rega v Avon Prods., Inc.*, 49 AD3d 329, 330). We therefore modify the order by denying defendant's motion with respect to a return deposition in part, vacating the third ordering paragraph and substituting therefor a directive that plaintiff submit to a further deposition that is limited to questions concerning the June 2007 motor vehicle accident and relevant questions deriving therefrom, in accordance with 22 NYCRR 221.2.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

471

CA 10-01743

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

PROGRESSIVE NORTHEASTERN INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FARMERS NEW CENTURY INSURANCE COMPANY,
DEFENDANT-RESPONDENT,
MEGAN R. LINDHURST, DEFENDANT-APPELLANT,
AND JAMES A. BLAZINA, DEFENDANT.

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

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (ERIN L. CODY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

KAPLAN, HANSON, MCCARTHY, ADAMS, FINDER & FISHBEIN, WILLIAMSVILLE (NICOLE B. PALMERTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered May 27, 2010. The order and judgment, inter alia, granted the motion of defendant Farmers New Century Insurance Company and the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that it is not required to provide coverage to any of the defendants in connection with a one-vehicle collision. The vehicle involved was owned by defendant Megan R. Lindhurst, who had purchased an automobile insurance policy from defendant Farmers New Century Insurance Company (Farmers). Defendant James A. Blazina, who had purchased an automobile insurance policy from plaintiff, was a passenger in that vehicle. Contrary to the contention of Lindhurst on appeal, Supreme Court properly granted the respective motion of Farmers and the cross motion of plaintiff for summary judgment and declared, inter alia, that neither insurer was obligated to provide coverage for the collision. "[A]n issue decided in a criminal proceeding may be given preclusive effect in a subsequent civil action" (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664). As a result of the one-car collision in question, Blazina was convicted of, inter alia, criminal mischief in the fourth degree due to his actions in turning the steering wheel of the vehicle driven by

Lindhurst when he had "no right to do so nor any reasonable ground to believe that he . . . ha[d] such right" (Penal Law § 145.00). Thus, the issues whether Blazina had a "reasonable belief" that he was entitled to use the vehicle, as required in order to qualify as an insured user under the Farmers policy, and whether he had "express or implied permission" to use the vehicle, as required in order to qualify for coverage under plaintiff's policy, have been conclusively resolved in the criminal proceeding with respect to both Lindhurst and Blazina (*see generally D'Arata*, 76 NY2d at 665). Contrary to Lindhurst's contention that plaintiff did not "definitively" disclaim coverage, we note that plaintiff was not required to provide "notice [of disclaimer] when there never was any insurance in effect" (*Zappone v Home Ins. Co.*, 55 NY2d 131, 138). In any event, an insurer will not be estopped from disclaiming coverage where, as here, it timely "reserve[d] its right to claim that the policy does not cover the situation at issue, while defending the action" (*O'Dowd v American Sur. Co. of N.Y.*, 3 NY2d 347, 355).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

472

CAF 10-00275

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

IN THE MATTER OF LIONEL T. VIEIRA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DIANE P. HUFF, RESPONDENT-APPELLANT.

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

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

ROBERT L. GOSPER, ATTORNEY FOR THE CHILD, CANANDAIGUA, FOR BENJAMIN H.

Appeal from an order of the Family Court, Ontario County (Craig J. Doran, J.), entered January 27, 2010 in a proceeding pursuant to Family Court Act article 6. The order granted custody of the parties' child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the condition imposed on any future application by respondent to modify her visitation and as modified the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order that modified an order pursuant to which the parties had joint custody of the child, with primary physical placement with the mother. By the order on appeal, Family Court granted sole legal and physical custody of the parties' child to petitioner father, directed that the mother's visitation with the child be supervised, and further directed the mother to obtain mental health counseling before filing an application to modify her visitation. Based on the record before us, we conclude that the court properly determined that the father established a change in circumstances reflecting " 'a real need for change to ensure the best interest[s] of the child' " (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417). We further conclude that the award of sole legal and physical custody to the father is in the best interests of the child, upon considering the appropriate factors to warrant that award (*see generally Eschbach v Eschbach*, 56 NY2d 167, 174; *Fox v Fox*, 177 AD2d 209). We note in particular that the mental health expert who evaluated the mother testified that she suffered from a delusional disorder and was not likely to benefit from therapy because she was not able to recognize alternative possibilities and explanations for her delusions, nor was she able to form a trusting bond with her

therapist. Although we agree with the mother that the court erred in awarding temporary custody of the parties' child to the father during the course of the evidentiary hearing, that error is of no moment under the circumstances of this case inasmuch as the record of the hearing upon its completion fully supports the court's determination (*see Matter of Darryl B.W. v Sharon M.W.*, 49 AD3d 1246, 1247).

We further reject the mother's contention that the court erred in directing that her visitation be supervised. Supervised visitation is a matter left to the sound discretion of the court and will not be disturbed where, as here, there is a sound and substantial basis in the record to support such visitation (*see Matter of Chilbert v Soler*, 77 AD3d 1405, 1406, *lv denied* 16 NY3d 701). Nor did the court abuse its discretion in directing that the parties agree to a visitation schedule, taking into consideration the availability of the person supervising visitation (*cf. Matter of William B.B. v Susan D.D.*, 31 AD3d 907, 908). We note in any event that the court indicated that it would assign a visitation schedule in the event that the parties could not reach an agreement.

Finally, we agree with the mother that the court lacked the authority to condition any future application for modification of her visitation on her participation in mental health counseling (*see Matter of Bray v DeStevens*, 78 AD3d 1564, 1565; *Matter of Hameed v Alatawaneh*, 19 AD3d 1135, 1136), and we therefore modify the order accordingly.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

473

CA 10-02309

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

RONALD KIMBALL, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAWRENCE E. NORMANDEAU, JR., ET AL., DEFENDANTS,
RONALD MATTESON AND DONNA MATTESON,
DEFENDANTS-RESPONDENTS.

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

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered September 22, 2010 in a personal injury action. The order granted in part the motion of defendants Ronald Matteson and Donna Matteson for leave to serve interrogatories on and to depose plaintiff.

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

Memorandum: In this action to recover damages for personal injuries allegedly arising from exposure to lead paint, plaintiff appeals from an order that, inter alia, granted the motion of Ronald Matteson and Donna Matteson (defendants) to the extent that it sought leave to serve certain interrogatories and to depose plaintiff. Contrary to plaintiff's contention, Supreme Court properly directed him to submit to both discovery devices. Although CPLR 3130 permits a party to serve written interrogatories upon any other party without leave of court, CPLR 3130 (1) provides in relevant part that, "[i]n the case of an action to recover damages for personal injury . . . predicated solely on a cause or causes of action for negligence, a party shall not be permitted to serve interrogatories on and conduct a deposition of the same party pursuant to rule 3107 without leave of court." Pursuant to "the clear and unambiguous language of CPLR 3130 (1), leave of court [to serve interrogatories and to depose plaintiff] was not required in this instance [because] the action is not solely predicated upon negligence" (*LaJoy v State*, 48 AD3d 1022, 1023). Rather, the complaint alleges, inter alia, that defendants breached the warranty of habitability within the meaning of Real Property Law § 235-b, thus placing this action outside the ambit of CPLR 3130. Indeed, we note that plaintiff repeatedly states in his brief on appeal that defendants breached their "contractual and statutory" duty

to provide lead-free housing, thereby further establishing that this action is not encompassed by CPLR 3130 because it is not based solely upon negligence (*see Friedler v Palyompis*, 24 AD3d 501; *Charlotte Lake Riv. Assoc. v American Ins. Co.*, 68 AD2d 151).

Furthermore, even assuming, arguendo, that this action is predicated solely upon negligence, we conclude that plaintiff failed to establish that the court abused its discretion in granting defendants leave both to serve interrogatories and to depose plaintiff. In opposing the motion, plaintiff failed to establish that the requests for information are unduly burdensome, or that they may cause "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]; *see Kooper v Kooper*, 74 AD3d 6, 10).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

474

CA 10-02362

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

ROBERT J. BARONE AND DONNA BARONE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SUSAN RAYNOR PHILLIPS, ALSO KNOWN AS SUSAN RAYNOR, ALSO KNOWN AS SUSAN WATKINS, ALSO KNOWN AS SUSAN PHILLIPS, AND PATRICK PHILLIPS,
DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR, BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered October 8, 2010 in a personal injury action. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Robert J. Barone (plaintiff) while attempting to run away from a dog allegedly owned and/or harbored by defendants, who were plaintiffs' neighbors. According to plaintiffs, the dog was barking and ran directly from defendants' property toward plaintiff on his property. Plaintiff believed that the dog would bite him and therefore ran to his house, but in doing so he tripped over the threshold of his front door and injured his knee. We agree with defendants that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. It is well settled that "the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" (*Collier v Zambito*, 1 NY3d 444, 446; *see Petrone v Fernandez*, 12 NY3d 546, 550). "[A]n animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities--*albeit only when such proclivity results in the injury giving rise to the lawsuit*" (*Collier*, 1 NY3d at

447 [emphasis added]).

Here, defendants met their initial burden by establishing that they had no knowledge of any vicious propensity on the part of their dog, i.e., they had not seen their dog chasing any person on any occasion, nor had they heard of any such event (*see Rose v Heaton*, 39 AD3d 937, 938). In response, plaintiffs presented no evidence suggesting that the dog had a propensity to run at people and thus failed to raise a triable issue of fact to defeat the motion (*see Pollard v United Parcel Serv.*, 302 AD2d 884, 884; *cf. Lewis v Lustan*, 72 AD3d 1486, 1487). To the extent that plaintiffs presented evidence that the dog had propensities to engage in other behavior that might endanger people, we conclude that such evidence was insufficient to raise an issue of fact to defeat the motion because those propensities did not "result[] in the injury giving rise to the lawsuit" (*Collier*, 1 NY3d at 447; *see Farnham v Meder*, 72 AD3d 1574, 1576).

All concur except GORSKI, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent because, in my view, Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint. As noted by the majority, plaintiffs commenced this action seeking damages for injuries sustained by Robert J. Barone (plaintiff) when he fell while being chased by a barking dog allegedly under the control of defendants. As the majority correctly states, defendants may be held liable for the harm caused by the dog if they knew or should have known of the dog's vicious propensities, and those propensities resulted in the injury giving rise to this action (*see Collier v Zambito*, 1 NY3d 444, 446-447). Evidence of a vicious propensity, however, is not limited to dangerous or ferocious behavior, but such evidence also includes "a proclivity to act in a way that puts others at risk of harm" (*id.* at 447), including a known tendency to attack or to jump up on others, even in playfulness (*see Pollard v United Parcel Serv.*, 302 AD2d 884). In opposition to defendants' motion, plaintiffs submitted evidence that the dog previously had knocked down a small child in the presence of defendant Patrick Phillips, and had a history of being "wild" and running onto plaintiffs' property, resulting in multiple complaints from plaintiff to city officials. Thus, contrary to the conclusion of the majority, plaintiff presented evidence sufficient to raise a triable issue of fact whether defendants had knowledge that the dog had a propensity to act in a manner that gave rise to plaintiff's injuries.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

475

CA 10-00935

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

RICHIE VARGAS, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 111449.)

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR CLAIMANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered July 2, 2009 in a personal injury action. The order granted the motion of defendant for summary judgment and dismissed the claim.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

479

CA 10-02353

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

RICHARD MULLEN, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 116118.)

RICHARD MULLEN, CLAIMANT-APPELLANT PRO SE.

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

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered August 13, 2010. The order granted the motion of defendant to dismiss the amended claim and dismissed the amended claim.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

480

KA 08-01038

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WESLEY KIRKLAND, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered March 27, 2008. The appeal was held by this Court by order entered December 30, 2009, decision was reserved and the matter was remitted to Erie County Court for further proceedings (68 AD3d 1794). The proceedings were held and completed (Sheila A. DiTullio, J.).

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

481

KA 08-02107

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARLON BOATMAN, DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

Appeal from a new sentence of the Onondaga County Court (William D. Walsh, J.), rendered September 2, 2008 imposed upon defendant's conviction of criminal possession of a controlled substance in the second degree. Defendant was resentenced pursuant to the 2005 Drug Law Reform Act upon his 2003 conviction.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

482

KA 10-00175

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM HENDERSON, ALSO KNOWN AS WILLIAM A. HENDERSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 16, 2009. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a class D felony.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

483

KA 10-01267

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM TUTTLE, JR., DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered March 15, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

484

KA 09-02347

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES ELLIOTT, ALSO KNOWN AS JAMES E. ELLIOTT,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered October 23, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

485

KA 10-02133

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JACOB J. MERCER, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), dated July 21, 2010. The order granted, without prejudice, 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 omnibus motion seeking to dismiss the indictment is denied, the indictment is reinstated and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the indictment charging him with robbery in the first degree (Penal Law § 160.15 [3]). County Court concluded that the People presented legally insufficient evidence with respect to the identity of the perpetrator. We agree with the People that reversal is required.

"In the context of a motion to dismiss an indictment, the sufficiency of the People's presentation 'is properly determined by inquiring whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury' " (*People v Galatro*, 84 NY2d 160, 163). The People must establish "that the accused committed the crime charged by presenting legally sufficient evidence establishing all of the elements of the crime . . .[,] and the court is not to weigh the proof or examine its adequacy" (*id*. at 164).

"A person is guilty of robbery in the first degree when he [or she] forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or [she] . . . [u]ses or threatens the immediate use of a dangerous instrument" (Penal Law § 160.15 [3]). Here, the evidence before the grand jury

established that a man stole condoms from a grocery store and brandished a knife at two store employees while fleeing the crime scene. Based on the robbery report and description of the perpetrator from the two store employees, the police located defendant shortly after the robbery in the vicinity of the store. The officers arrested him and seized the condoms from his person. A knife matching the description provided by one of the store employees was found in proximity to the location where defendant was apprehended. At the police station, defendant admitted robbing the store, and one of the store employees identified the knife recovered by the police as the knife that was used in the robbery. Although the store employees never identified defendant as the perpetrator, the circumstantial evidence, when viewed as a whole, was sufficient for the grand jury to infer that defendant was the perpetrator and that the store employees and the police officers were testifying with respect to the same individual (*see People v Ngor Yip*, 118 AD2d 472, 473-474). We therefore conclude that the evidence before the grand jury was legally sufficient to support a prima facie case of robbery in the first degree (*see People v Woelfle*, 64 AD3d 1166, 1167-1168, *lv denied* 14 NY3d 846; *Ngor Yip*, 118 AD2d at 473-474).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

486

KA 09-02521

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BARRY K. VERHOW, DEFENDANT-APPELLANT.

ROBERT TUCKER, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

BARRY K. VERHOW, DEFENDANT-APPELLANT PRO SE.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Wayne County Court (John B. Nesbitt, J.), dated September 29, 2009. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL article 440.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the sentence is set aside and the matter is remitted to Wayne County Court for further proceedings in accordance with the following Memorandum: As defendant contends and the People correctly concede, County Court erred in denying defendant's pro se motion pursuant to CPL article 440 insofar as it sought to set aside the sentence imposed upon his conviction of burglary in the first degree (Penal Law § 140.30 [2]) and sexual abuse in the first degree (§ 130.65 [1]) and in failing to proceed with resentencing pursuant to Penal Law § 70.85 (*cf. People v Rucker*, 67 AD3d 1126, 1127-1128). It is undisputed that, at the time of the plea, defendant was not advised of the period of postrelease supervision and the sentence was imposed without a period of postrelease supervision. Defendant moved both to set aside the sentence and to vacate the judgment of conviction (*cf. People v Capers*, 68 AD3d 427; *People v Jordan*, 67 AD3d 1406, 1407). "The . . . legislative history [of section 70.85] indicates that it was . . . intended, in part, to avoid the need to vacate guilty pleas under [*People v Catu* (4 NY3d 242)] when defendants are not properly advised of mandatory terms of postrelease supervision" (*Rucker*, 67 AD3d at 1127; *see People v Williams*, ___ AD3d ___ [Mar. 25, 2011]; Governor's Approval Mem, Bill Jacket, L 2008, ch 141, at 13-14). The court may resentence a defendant pursuant to the statute when his or her qualifying determinate sentence "is again before the court pursuant to [Correction Law § 601-d] or otherwise, for consideration of whether to

resentence" (§ 70.85). We conclude that Penal Law § 70.85 is applicable where, as here, the defendant seeks to set aside his or her sentence and to vacate the judgment of conviction, inasmuch as the matter is before the court for consideration of a resentence (*cf. People v Grimm*, 69 AD3d 1231, 1232 n 2, *lv denied* 14 NY3d 888). Pursuant to section 70.85, "the court may . . .[,] only on consent of the district attorney, re-impose the originally imposed determinate sentence of imprisonment without any term of post[]release supervision, which then shall be deemed a lawful sentence" (*see generally People v Russ*, 68 AD3d 1703). In the event that the District Attorney refuses to consent to the imposition of the original sentence without a period of postrelease supervision, we conclude that the court must grant the alternative relief sought by defendant and vacate the judgment of conviction inasmuch as the court failed to advise defendant of the period of postrelease supervision at the time of the plea (*see Catu*, 4 NY3d at 244-245; *Grimm*, 69 AD3d at 1232; *cf. Williams*, ___ AD3d at ___), thereby returning defendant to his "status before the constitutional infirmity occurred" (*People v Hill*, 9 NY3d 189, 191, *cert denied* 553 US 1048). We therefore reverse the order, set aside the sentence and remit the matter to County Court for further proceedings pursuant to Penal Law § 70.85 and, if necessary based on the response of the District Attorney, for further proceedings on the indictment.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

487

KA 09-00588

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ORLANDO LUGO-ROSADO, 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 (Patrick J. Cunningham, J.), rendered August 9, 1991. The judgment convicted defendant, upon a jury verdict, of conspiracy 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 on count four of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of conspiracy in the second degree (Penal Law § 105.15). We agree with defendant that reversal is required. County Court's instructions to the jury on reasonable doubt unconstitutionally diminished the People's burden of proof, and defendant was thereby deprived of a fair trial (*see People v Docen-Perez*, 197 AD2d 865; *People v Towndrow*, 187 AD2d 194, 195-196, *lv dismissed* 81 NY2d 1021; *People v Geddes*, 186 AD2d 993; *see generally Victor v Nebraska*, 511 US 1, 5, *reh denied* 511 US 1101; *Sullivan v Louisiana*, 508 US 275, 280-281). In light of our determination, we need not address defendant's remaining contentions.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

500

CA 10-02321

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

RUSSELL J. ROCKWOOD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES LABATE AND LOIS LABATE,
DEFENDANTS-APPELLANTS.

MITCHELL GORIS & STOKES, LLC, CAZENOVIA (MARK D. GORIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HANCOCK & ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered May 20, 2010 in a personal injury action. The order denied defendants' motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a motorcycle accident when he attempted to avoid hitting defendants' dog, which had entered the road. Supreme Court denied defendants' motion seeking summary judgment dismissing the complaint. That was error. It is well established that the negligence of the owners of a domestic animal is not a basis for liability for injuries caused by the animal (*see Petrone v Fernandez*, 12 NY3d 546, 550). Liability may be established only if the owners knew or should have known that the animal had a vicious propensity (*see Collier v Zambito*, 1 NY3d 444, 446), which includes a propensity to interfere with traffic (*see Myers v MacCrea*, 61 AD3d 1385).

It is undisputed that, on the date of the accident, defendant Lois LaBate closed the gate on the six-foot chain link fence surrounding defendants' yard but failed to secure it and that the dog pushed open the gate and ran down the 100-foot driveway and into the road. In support of their motion, however, defendants established that the dog had never been unrestrained outside of the confines of their yard prior to that date. Further, defendants submitted plaintiff's deposition testimony that he lived one-quarter mile from defendants' house and that he passed defendants' house at least twice per day and had never seen the dog prior to the date of the accident. We therefore conclude that defendants established their entitlement to

judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We further conclude that plaintiff failed to raise a triable issue of fact whether the dog had a propensity to interfere with traffic based upon defendant's testimony that the dog ran inside the confines of the yard and went to the fence to "follow noise." "In view . . . of the absence of any evidence that the dog . . . exhibited a . . . propensity [to interfere with traffic] prior to the incident involving the . . . plaintiff, no triable issue was raised" (*Bernstein v Penny Whistle Toys, Inc.*, 40 AD3d 224, 224, *affd* 10 NY3d 787; *see Myers*, 61 AD3d 1385; *see generally Petrone*, 12 NY3d at 550). We therefore reverse the order, grant the motion and dismiss the complaint.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

501

CA 10-02492

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

FERNANDO VAZQUEZ, PLAINTIFF-RESPONDENT,

V ORDER

MAIN STREET, USA REAL ESTATE GROUP A, LLC,
DEFENDANT-APPELLANT.

KNYCH & WHRITENOUR, LLC, SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, OSWEGO (DOUGLAS M. MCRAE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered March 11, 2010 in a personal injury action. The order, among other things, granted plaintiff's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs for reasons stated in the decision at Supreme Court.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

505

KA 09-00980

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRACEY ROBBINS, ALSO KNOWN AS REGINA ROBINSON,
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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered December 10, 2008. The judgment convicted defendant, upon her plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]). Prior to sentencing, defense counsel retracted defendant's pro se motion to withdraw her plea of guilty before it was decided and, at the time of sentencing, defendant appeared with new defense counsel, who again retracted the pro se motion to withdraw the plea before it was decided. Defendant thus has abandoned her present challenge concerning that retracted motion (*see People v Mower*, 97 NY2d 239, 246; *see also People v Drennan*, 81 AD3d 1279). As the People correctly concede, defendant's waiver of the right to appeal does not encompass her challenge to the severity of the sentence because defendant entered the waiver before being advised of the maximum sentence she could receive (*see People v Rizek* [appeal No. 1], 64 AD3d 1180, *lv denied* 13 NY3d 862; *People v Martinez*, 55 AD3d 1334, 1335, *lv denied* 11 NY3d 927; *cf. People v Lococo*, 92 NY2d 825, 827). Contrary to defendant's contention, however, the period of postrelease supervision imposed by Supreme Court is not unduly harsh or severe.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

506

KA 10-00325

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS AQUINO, ALSO KNOWN AS THOMAS A. AQUINO,
DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), rendered November 10, 2008. The order directed defendant to pay restitution in the amount of $5,850.67.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the amount of restitution ordered is vacated, and the matter is remitted to Genesee County Court for a new hearing in accordance with the following Memorandum: Defendant appeals from an order of restitution arising from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). We reverse the order for the same reason as that set forth in our decision in *People v Bunnell* (59 AD3d 942, *amended* 63 AD3d 1671, 1727), i.e., that County Court erred in delegating its responsibility to conduct a restitution hearing to its court attorney. We add only that, "[a]s a general rule, a defendant may not appeal as of right from a restitution order in a criminal case . . . [but, h]ere, however, the court bifurcated the sentencing proceeding by severing the issue of restitution for a separate hearing," thereby obviating the need for defendant to seek leave to appeal from the instant restitution order (*People v Brusie*, 70 AD3d 1395, 1396; *see* CPL 450.10 [2]; *People v Russo*, 68 AD3d 1437 n 2). We further note that, although defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]), preservation is not required inasmuch as defendant's essential "right to be sentenced as provided by law" is implicated (*People v Fuller*, 57 NY2d 152, 156; *see Bunnell*, 63 AD3d at 1727). We therefore reverse the order and remit the matter to County Court for a new hearing to determine the amount of restitution in compliance with Penal Law § 60.27.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

507

KA 08-02218

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERT ELLISON, ALSO KNOWN AS ROBERT ELLISON, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 18, 2008. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

508

KA 10-00313

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL D. BAILEY, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (HEATHER A. PARKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered November 19, 2009. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a class D felony (two counts) and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

509

KA 10-01621

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER M. HOWARD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 2, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

511

KA 09-00027

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD E. MCCARTHY, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Spencer J. Ludington, A.J.), rendered February 21, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted aggravated murder and arson in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted aggravated murder (Penal Law §§ 110.00, 125.26 [1]) and arson in the third degree (§ 150.10 [1]). We reject defendant's contention that his waiver of the right to appeal is invalid. County Court "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439, *lv denied* 15 NY3d 920, quoting *People v Lopez*, 6 NY3d 248, 256; *see People v McKeon*, 78 AD3d 1617). Defendant's further contention that his plea was not knowing, intelligent and voluntary " 'because he did not recite the underlying facts of the crime[s] but simply replied to County Court's questions with monosyllabic responses is actually a challenge to the factual sufficiency of the plea allocution,' which is encompassed by the valid waiver of the right to appeal" (*People v Simcoe*, 74 AD3d 1858, 1859, *lv denied* 15 NY3d 778, quoting *People v Bailey*, 49 AD3d 1258, 1259, *lv denied* 10 NY3d 932; *see People v Grimes*, 53 AD3d 1055, 1056, *lv denied* 11 NY3d 789). Defendant's challenge to the sufficiency of the factual allocution is unpreserved for our review inasmuch as he did not move to withdraw the plea or to set aside the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665). In any event, there is no merit to defendant's challenge because "there is no requirement that defendant recite the underlying facts of the crime to which he [or she] is

pleading guilty" (*Bailey*, 49 AD3d at 1259).

The valid waiver by defendant of the right to appeal does not encompass his challenge to the amount of restitution ordered inasmuch as that amount was not included in the terms of the plea agreement (*see People v Straw*, 70 AD3d 1341, *lv denied* 14 NY3d 844; *cf. People v Butler*, 81 AD3d 1465; *People v Thomas*, 77 AD3d 1325, 1326). Defendant failed to preserve his challenge to the amount of restitution for our review, however, by failing to object to that amount at the time of sentencing or requesting a hearing on that issue (*see People v Jorge N.T.*, 70 AD3d 1456, 1457, *lv denied* 14 NY3d 889; *People v Hannig*, 68 AD3d 1779, 1780, *lv denied* 14 NY3d 801), and we decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, defendant contends that the imposition of restitution was illegal because the New York State Police Department was not a "victim" within the meaning of the restitution statute (Penal Law § 60.27). We agree with defendant that his contention concerning the alleged illegality of the restitution portion of the sentence is not precluded by his waiver of the right to appeal, nor is preservation required with respect to that contention (*see People v Pump*, 67 AD3d 1041, 1042, *lv denied* 13 NY3d 941; *People v Long*, 27 AD3d 302, *lv denied* 6 NY3d 850; *People v Casiano*, 8 AD3d 761, 762). Nonetheless, we conclude that there is no merit to defendant's contention. Penal Law § 60.27 defines the term victim in relevant part as "the victim of the offense" (§ 60.27 [4] [b]). The term offense includes "the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction or that is contained in any other accusatory instrument disposed of by any plea of guilty by the defendant to an offense" (§ 60.27 [4] [a]). Here, defendant drove his vehicle head-on into a marked police vehicle operated by a police sergeant, causing significant damage to the police vehicle. Thus, "the restitution did not reimburse the police for the normal operating costs of law enforcement that are voluntarily incurred . . .; instead, it covered the cost of repairing a police [vehicle] that was damaged as a direct result of defendant's criminal conduct" (*People v Barnett*, 237 AD2d 917, 918, *lv denied* 90 NY2d 855; *see People v Cruz*, 81 NY2d 996, 997-998).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

512

KA 10-01151

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY J. THOMPSON, DEFENDANT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered April 19, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a forged instrument 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 attempted criminal possession of a forged instrument in the second degree (Penal Law §§ 110.00, 170.25). We reject defendant's contention that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256). County Court " 'expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not conflate that right with those automatically forfeited by a guilty plea' " (*People v Porter*, 55 AD3d 1313, *lv denied* 11 NY3d 899). Although the further contention of defendant that his guilty plea was not knowingly and voluntarily entered survives his valid waiver of the right to appeal (*see People v Bland*, 27 AD3d 1052, 1052-1053, *lv denied* 6 NY3d 892), defendant failed to preserve his contention for our review by failing to move to withdraw his plea or to vacate the judgment of conviction (*see People v Smith*, 48 AD3d 1171, *lv denied* 10 NY3d 964; *Bland*, 27 AD3d at 1052-1053). This case does not fall within the narrow exception to the preservation doctrine (*see People v Lopez*, 71 NY2d 662, 666; *Smith*, 48 AD3d at 1171).

Defendant failed to preserve for our review his further contention concerning the failure to comply with the procedural requirements set forth in CPL 400.21 (*see People v Pellegrino*, 60 NY2d 636, 637; *People v Vega*, 49 AD3d 1185, 1186, *lv denied* 10 NY3d 965). In any event, defendant waived strict compliance with the statute by

admitting his commission of the prior felony conviction in open court (*see Vega*, 49 AD3d at 1186; *People v Harris*, 233 AD2d 959, *lv denied* 89 NY2d 1094).

We have reviewed defendant's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

514

KA 08-00656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN D. HOBBY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered January 31, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). We reject defendant's contention that his plea was coerced by the threat of federal prosecution and thus that Supreme Court abused its discretion in denying his motion to withdraw his plea on that ground (*see People v Mason*, 56 AD3d 1201, 1202, *lv denied* 11 NY3d 927). Defendant admitted during the plea allocution that he committed the offense and "did not claim either that he was innocent or that he had been coerced" into pleading guilty (*People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). The fact that the possibility of a federal prosecution may have influenced defendant's decision to plead guilty is insufficient to establish that the plea was coerced (*see generally People v McDonnell*, 302 AD2d 619, *lv denied* 100 NY2d 540).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

515

CAF 10-00148

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

IN THE MATTER OF RICHANDA J. BULSON,
PETITIONER-RESPONDENT,

V ORDER

DAVID R. GRINNELL, RESPONDENT-APPELLANT.

PAUL M. DEEP, UTICA, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered March 18, 2010 in a proceeding pursuant to Family Court Act article 4. The order found respondent to be in willful violation of an order of support.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

516

CAF 10-00838

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

IN THE MATTER OF ALEX A.C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MARIA A.P., RESPONDENT-APPELLANT.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

GERALD M. DRISCOLL, ATTORNEY FOR THE CHILD, OLEAN, FOR ALEX A.C.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered March 4, 2010 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent violated an order of protection and committed her to six months in jail.

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

Memorandum: Respondent mother appeals from an order finding that she willfully violated an order of protection and committing her to a jail term of six months. The commitment was stayed for a period of one year on the condition that the mother not violate the order of protection. We reject the mother's contention that Family Court violated Family Court Act § 1041 (a) by making findings of fact with respect to a violation petition that was not timely served.

In August 2009, petitioner filed a neglect petition alleging that the subject child had been maltreated and was in danger of physical, mental, and emotional harm due to the mother's drug use, involvement in violent crime, and willingness to continue an abusive relationship with the child's father. The court thereafter issued temporary orders removing the child from the custody of the mother, requiring the mother to stay away from the child, and ordering the mother to prohibit any contact between the child and the father. At a hearing in November 2009, petitioner offered to return custody of the child to the mother provided that she have no contact with the father and that she prohibit any contact between the child and the father. The mother agreed to those conditions, and the court issued an order of

protection to that effect. Five days later, petitioner sought to restore the matter to the calendar on the ground that the mother had violated the order of protection, and a hearing on the previously filed neglect petition ensued. The mother was present and represented by counsel, and a police officer testified on behalf of petitioner that, on November 6, 2009, he stopped a vehicle containing the mother, the father, and the subject child. During the pendency of the neglect proceedings, petitioner filed an amended neglect petition that reiterated the prior allegations and included the additional allegation that the mother, the father, and the child were together on November 6, 2009, in violation of the order of protection. The same day, petitioner also filed a violation petition, alleging that the mother willfully violated the November 5, 2009 order of protection both by having contact with the father and by allowing the father to have contact with the child on November 6, 2009. The mother was served with the violation petition when the hearing on the neglect petition resumed on November 23, 2009 and, at the conclusion of that hearing, which became in effect a combined neglect/violation hearing, the court found that the mother willfully violated the order of protection. The record thus establishes that the mother had notice of petitioner's allegation that she violated the order of protection, that the mother was present during the neglect/violation hearing, and that she was served with the violation petition at the continued neglect hearing prior to the issuance of the court's findings of fact. We therefore conclude that, contrary to the mother's contention, the court did not violate her due process right to notice or her statutory rights pursuant to Family Court Act § 1041 (a) (*see generally Matter of Anita J.F.*, 267 AD2d 1044, *lv denied* 94 NY2d 762).

The mother further contends that the court lacked the authority under Family Court Act § 1072 to commit her to a jail term because the November 5, 2009 order was not an "order of supervision." We agree with petitioner, however, that the mother's contention is moot inasmuch as the commitment portion of the order has expired by its own terms (*see generally Matter of Lomanto v Schneider*, 78 AD3d 1536, 1537; *Matter of Johnson v Boone*, 289 AD2d 938). We therefore dismiss the mother's appeal from that part of the order.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

517

CAF 10-02043

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

IN THE MATTER OF LEPORIA L.L.,
RESPONDENT-APPELLANT.

WAYNE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

TRACEY L. FOX, ATTORNEY FOR THE CHILD, SODUS, FOR RESPONDENT-APPELLANT.

DANIEL M. WYNER, COUNTY ATTORNEY, LYONS (DANIEL C. CONNORS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered April 13, 2010 in a proceeding pursuant to Family Court Act article 3. The order adjudicated respondent a juvenile delinquent.

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

Memorandum: Respondent appeals from an order adjudicating him to be a juvenile delinquent based on the finding that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). After a dispositional hearing, Family Court placed respondent in the custody of the New York State Office of Children and Family Services for placement in a limited secure facility (*see* Family Ct Act § 353.3 [3] [b]). Contrary to respondent's contention, "the evidence presented at the hearing, when viewed in the light most favorable to the presentment agency . . ., is legally sufficient to prove beyond a reasonable doubt that respondent committed the acts alleged in the petition" (*Matter of Zachary R.F.*, 37 AD3d 1073; *see Matter of Shakirrah C.*, 66 AD3d 1492).

We reject respondent's further contention that the court failed to consider the least restrictive available alternative in placing him in a limited secure facility (*see* Family Ct Act § 352.2 [2] [a]). "The court has broad discretion in determining the appropriate disposition in juvenile delinquency cases" (*Matter of Richard W.*, 13 AD3d 1063, 1064), and here the court did not abuse that discretion. Indeed, "the record establishes that the disposition ordered by the court is 'the least restrictive available alternative . . . which is consistent with the needs and best interests of the respondent and the need for protection of the community' " (*Matter of Brendon H.*, 43 AD3d

1283, 1284, quoting § 352.2 [2] [a]).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

519

CA 10-02378

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

JASON A. BRUBAKER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARIANNE M. HOUSEKNECHT, DEFENDANT-RESPONDENT.

COLLINS & BROWN, LLC, BUFFALO (LUKE A. BROWN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA (WILLIAM BOLTREK, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 21, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment on the issue of comparative negligence.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when the vehicle he was driving was rear-ended by a vehicle driven by defendant. Plaintiff moved for partial summary judgment determining that defendant was negligent and that plaintiff was free from comparative negligence. Contrary to plaintiff's contention, Supreme Court properly granted the motion only with respect to the issue of defendant's negligence. "Viewing the evidence in the light most favorable to the nonmoving party, as we must . . ., we conclude that there are issues of fact that preclude summary judgment" with respect to the issue of plaintiff's comparative negligence, i.e., whether plaintiff's own conduct or the alleged failure of his brake lights to function contributed to the accident (*Russo v YMCA of Greater Buffalo*, 12 AD3d 1089, 1089, *lv dismissed* 5 NY3d 746; *see Chilberg v Chilberg*, 13 AD3d 1089, 1090; *see generally Ramadan v Maritato*, 50 AD3d 1620).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

520

CA 10-01952

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

SENECA PIPE & PAVING CO., INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SOUTH SENECA CENTRAL SCHOOL DISTRICT,
ET AL., DEFENDANTS,
AND FREDERICO CONSTRUCTION COMPANY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

CAMARDO LAW FIRM, P.C., AUBURN (KEVIN M. COX OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Seneca County (David Michael Barry, J.), entered July 9, 2009 in a breach of contract action. The order denied damages to plaintiff.

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

Memorandum: Plaintiff commenced this action seeking damages arising from the alleged breach by defendant Frederico Construction Company (Frederico) of its agreement with plaintiff, pursuant to which plaintiff was to remove concrete supports and debris from a hole in which certain buried storage tanks had been removed from a construction site, fill in the hole, and grade the area surrounding it. Plaintiff was also the principal site work contractor on the same project and, pursuant to its contract with defendant South Seneca Central School District (School District), performed similar fill and grading work on the area encompassing the buried tanks. Supreme Court previously granted plaintiff's cross motion for partial summary judgment on the issue of liability against Frederico and ordered a trial on damages, noting that "the determination of damages at trial shall take [into] account [the] excavation and backfill [work that] plaintiff was required to perform under [its] site work contract" with the School District. In appeal No. 1, plaintiff appeals from an order determining, following a bench trial, that it failed to prove its damages and, in appeal No. 2, plaintiff appeals from an order denying its post-trial motion seeking leave to amend the second amended complaint to add a cause of action for an account stated.

Plaintiff contends in appeal No. 1 that the court erred in determining that it failed to prove the damages that it sustained from Frederico's breach of its agreement with plaintiff. We reject that

contention. " 'On a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence' " (*Treat v Wegmans Food Mkts., Inc.*, 46 AD3d 1403, 1404; *see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495, *rearg denied* 81 NY2d 835). At the trial on damages, plaintiff's principal testified that plaintiff hired a subcontractor to remove the concrete supports for the storage tanks, but plaintiff failed to submit any evidence establishing the amount that plaintiff paid to the subcontractor to perform that work. Similarly, as the court specifically noted in its order directing the instant trial on damages, plaintiff was paid to fill and grade the same area pursuant to its own contract with the School District. At trial, however, plaintiff established the amount of material that it trucked into the area but failed to differentiate between the material that was necessitated by the contract with the School District and the material that was required solely to complete the agreement with Frederico. Consequently, the court's determination that plaintiff failed to prove its damages from Frederico's breach of its agreement with plaintiff is supported by a fair interpretation of the evidence.

Contrary to plaintiff's further contention, the court properly denied its post-trial motion seeking leave to amend the second amended complaint to add a cause of action for an account stated inasmuch as the proposed cause of action is plainly without merit (*see generally Barrows v Alexander*, 78 AD3d 1693). "An account stated represents an agreement between the parties reflecting an amount due on a prior transaction . . . An essential element of an account stated is an agreement with respect to the amount of the balance due" (*Cameron Eng'g & Assoc., LLP v JMS Architect & Planner, P.C.*, 75 AD3d 488, 489). Thus, "[w]here either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails" (*M & A Constr. Corp. v McTague*, 21 AD3d 610, 611-612). Here, plaintiff concedes that Frederico asked for a break-down of one of the invoices that plaintiff sent to Frederico for payment on their agreement. Plaintiff also submitted evidence establishing that Frederico paid parts of one invoice related to other dealings with plaintiff but declined to pay the part of that invoice that is relevant here. Because the evidence presented at trial establishes that there was a dispute regarding the amount due, the court "properly determined that the plaintiff failed to establish the requisite elements for recovery on a theory of [an] account stated" (*Ludemann Elec., Inc. v Dickran*, 74 AD3d 1155, 1156; *see generally Hull v City of N. Tonawanda*, 6 AD3d 1142, 1142-1143; *Erdman Anthony & Assoc. v Barkstrom*, 298 AD2d 981).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

521

CA 10-01953

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

SENECA PIPE & PAVING CO., INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SOUTH SENECA CENTRAL SCHOOL DISTRICT,
ET AL., DEFENDANTS,
AND FREDERICO CONSTRUCTION COMPANY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

CAMARDO LAW FIRM, P.C., AUBURN (KEVIN M. COX OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Seneca County (David Michael Barry, J.), entered October 23, 2009 in a breach of contract action. The order denied the motion of plaintiff to amend its complaint to add an account stated cause of action and for a new trial on damages.

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

Same Memorandum as in *Seneca Pipe & Paving Co., Inc. v South Seneca Cent. School Dist.* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2011]).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

522

CA 10-02439

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

FRANK ABASCIANO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK DANDREA, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS, CHESWORTH, O'BRIEN, JOHNSTONE, WELCH & LEONE, LLP, ROCHESTER (ROBERT S. LENI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered June 29, 2010. The order, inter alia, denied the motion of defendant for leave to reargue, granted the cross motion of plaintiff and directed that the subject property be listed for sale.

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

Memorandum: On appeal from an order directing the sale of partnership property, defendant's sole contention is that plaintiff improperly commenced this partnership dissolution action by failing to file a summons, thereby depriving Supreme Court of jurisdiction. We conclude that defendant's jurisdictional challenge is not properly before us, and we therefore dismiss the appeal.

"The power of an appellate court to review a judgment [or order] is subject to an appeal being timely taken" (*Hecht v City of New York*, 60 NY2d 57, 61; *see Kline v Town of Guilderland*, 289 AD2d 741, 742). CPLR 5501 (a) (1) provides that "[a]n appeal *from a final judgment* brings up for review . . . any non-final judgment or order which necessarily affects the final judgment" ([emphasis added]; *see Weierheiser v Hermitage Ins. Co.*, 17 AD3d 1133, 1134). However, an appeal from a nonfinal order or an intermediate order does not bring up for review prior nonfinal orders (*see Meltzer v Meltzer*, 63 AD3d 703; *Joseph Davis Indus. Servs. v Sicoli & Massaro*, 289 AD2d 984; *Baker v Shepard*, 276 AD2d 873, 874). For purposes of CPLR 5501 (a) (1), "a final order is one that disposes of all causes of action between the parties in an action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters" (*Town of Coeymans v Malphrus*, 252 AD2d 874, 875).

Plaintiff commenced this action by order to show cause and verified complaint in November 2008. Shortly thereafter, defendant cross-moved for, inter alia, dismissal of the action based upon plaintiff's failure to file and serve a summons with the verified complaint, contending that such failure deprived the court of jurisdiction. Specifically, defendant contended that "[p]laintiff has failed to secure the jurisdiction of this Court by properly commencing an action." The court issued an order in December 2008 that did not address defendant's cross motion, and thus the cross motion was deemed denied (*see Brown v U.S. Vanadium Corp.*, 198 AD2d 863). Defendant did not take an appeal from that order.

In response to a motion in March 2009 by plaintiff seeking the appointment of an accountant pursuant to Partnership Law § 74 to conduct an accounting "for the purpose of winding up the parties' dissolved partnership," defendant cross-moved for, inter alia, "a specific finding from the Court as to whether it finds that the papers filed previously are, in fact, a Verified Complaint and if so, find whether a Summons was filed and served. If the Court so finds, the cross motion is to dismiss this action for lack of proper jurisdiction and service." Defendant sought various forms of relief in the alternative. In an April 2009 order, the court granted plaintiff's motion and denied defendant's cross motion in its entirety. With respect to the summons issue, the court ruled that, "insofar as the Court's prior [2008 order] did not grant the defendant's previous application for dismissal of this action due to the indicated absence of a summons, said previous application was deemed denied as a matter of law." Defendant also did not take an appeal from that order.

Thereafter, the parties both filed several motions and cross motions concerning the dissolution and winding up of the partnership, and the court issued at least three further orders. The instant appeal is from an order entered in June 2010 that, inter alia, denied defendant's motion for leave to reargue/renew with respect to a March 2010 order concerning the appointment of the accountant and the results of the accounting and granted plaintiff's cross motion, directing that the property and all materials thereon "be listed for sale immediately."

As previously noted, defendant's sole contention on the appeal from that order is that this action was not properly commenced and that the court therefore lacks jurisdiction. Although defendant's notice of appeal states that "this appeal is taken from the entirety of th[e] order [entered June 29, 2010], *together with all orders previously entered*" (emphasis added), we have no authority to review the court's prior orders, including those denying defendant's cross motions to dismiss the action for failure to file a summons. The order from which the appeal was taken cannot be deemed a "judgment" to enable us to undertake such a review pursuant to CPLR 5501 (a) (1), nor does it appear from the record that a final judgment has been entered (*see Bruenn v Pawlowski*, 292 AD2d 856).

Further, the order before us on this appeal does not constitute a "final order" within the meaning of CPLR 5501 (a) (1), i.e., it "did

not dispose of all the factual and legal issues raised in this action" (*Town of Coeymans*, 252 AD2d at 875). The complaint contains four causes of action, for dissolution of the partnership, quantum meruit, unjust enrichment, and breach of fiduciary duty, while the order before us on this appeal simply directed that "the subject subdivision property, with all related building materials located thereon and the corresponding engineering plans, is . . . to be listed for sale immediately."

We thus conclude that the propriety of the orders denying defendant's cross motions for dismissal of the action based upon the failure of plaintiff to file a summons is not properly before us because defendant failed to take an appeal from those orders (*see Bruenn*, 292 AD2d at 857), nor are those orders reviewable on this appeal from a nonfinal order, which does not bring up for review prior nonfinal orders (*see Meltzer*, 63 AD3d 703; *Joseph Davis Indus. Servs.*, 289 AD2d at 985). Inasmuch as defendant fails to challenge any aspect of the order on appeal, we dismiss the appeal as abandoned (*see Town of Coeymans*, 252 AD2d at 875).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

528

TP 10-02372

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF STEPHEN D. PUMP, PETITIONER,

V ORDER

EKPE D. EKPE, SUPERINTENDENT, WATERTOWN CORRECTIONAL FACILITY, RESPONDENT.

STEPHEN D. PUMP, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Jefferson County [Hugh A. Gilbert, J.], entered November 2, 2010) to review determinations of respondent. The determinations found after Tier II hearings that petitioner violated various inmate rules.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

530

KA 09-01935

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

NICHOLAS J. MCGOUGH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered March 27, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of marihuana in the third degree (three counts).

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

531

KA 10-01258

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIEN FREDENDALL, DEFENDANT-APPELLANT.

ADAM H. VAN BUSKIRK, AURORA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (HEATHER M. DESTEFANO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Mark H. Fandrich, A.J.), entered May 10, 2010. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that the assessment of 15 points against him under the risk factor for drug or alcohol abuse is not supported by the requisite clear and convincing evidence (*see generally* § 168-n [3]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 15 [2006]). Defendant's two prior convictions of driving while ability impaired, which arose from arrests for driving while intoxicated and were "alcohol-related offenses," warrant a finding that defendant has a history of alcohol abuse, despite the fact that those convictions "predated the underlying offense by several years" (*People v Goodwin*, 49 AD3d 619, 620, *lv denied* 10 NY3d 713, *rearg denied* 11 NY3d 761). Defendant failed to preserve for our review his further contention that he was improperly assessed 30 points under the risk factor for age of the victims based on the fact that some of his victims, i.e., children depicted in the child pornography he possessed, were 10 years old or younger (*see generally People v Smith*, 17 AD3d 1045, *lv denied* 5 NY3d 705). Finally, we reject defendant's contention that County Court abused its discretion in denying his request for a downward departure, inasmuch as defendant failed to present "clear and convincing evidence of the existence of special circumstances warranting a downward departure" (*People v Marks*, 31 AD3d 1142, 1143,

lv denied 7 NY3d 715).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

532

KA 10-00699

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY C. LAMAR, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered February 1, 2010. 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 facts, the indictment is dismissed and the matter is remitted to Orleans County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [1]). Contrary to defendant's contention, we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678; *People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), however, we agree with defendant that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Where, as here, a different finding from that reached by the jury would not have been unreasonable, we must " 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*id.*), and then we must "decide[] whether the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*Danielson*, 9 NY3d at 348).

The indictment alleged that defendant and the codefendant, "each being aided by the other," acted in concert to forcibly steal property from the victim. County Court instructed the jury that the People were required to prove that defendant forcibly stole property from the victim and that he was aided in doing so by another person actually present. The court's charge thus cast defendant as the principal and

the codefendant as the person who aided in the robbery. The court refused to instruct the jury on accessorial liability, thereby taking "the question of accessorial liability . . . out of the case" (*People v Dlugash*, 41 NY2d 725, 731).

The evidence, however, failed to establish that defendant acted as the principal in the robbery. Rather, the evidence supported two equally strong inferences that defendant acted as the principal or that the codefendant acted as such. Despite the absence of evidence making either inference stronger than the other, the jury assigned more weight to the inference that defendant acted as the principal. Consequently, we conclude that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495).

In view of our determination, we need not address defendant's remaining contentions.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

534

KA 06-00414

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS WORTH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BETH A. RATCHFORD, ROCHESTER, FOR DEFENDANT-APPELLANT.

DOUGLAS WORTH, DEFENDANT-APPELLANT PRO SE.

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

Appeal from an order of the Supreme Court, Monroe County (Joseph D. Valentino, J.), entered January 9, 2006 pursuant to the 2005 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 1994 conviction of criminal sale of a controlled substance in the second degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from an order denying his application for resentencing upon his 1994 conviction of criminal sale of a controlled substance in the second degree and criminal possession of a controlled substance in the third degree, pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1). We reject defendant's contention that Supreme Court erred in failing to conduct a hearing on his application. Where a person qualifies to apply for DLRA-2 resentencing, "[t]he court shall offer an opportunity for a hearing and bring the applicant before it" (L 2005, ch 643, § 1; *see generally People v Williams*, 45 AD3d 1377). Here, however, defendant was serving a sentence for violent felony offenses, and thus he was precluded from applying for resentencing (*see* L 2005, ch 643, § 1; Correction Law § 803 [1] [d]).

In appeal No. 2, defendant appeals from an order denying his motion pursuant to CPL 440.20 to set aside the sentence of imprisonment of 2a to 7 years imposed upon his 1990 conviction of attempted burglary in the second degree. We agree with defendant that the indeterminate sentence was illegal because the court failed to sentence him as a second felony offender (*see People v Motley* [appeal

No. 3], 56 AD3d 1158, 1159). Because defendant is serving two consecutive indeterminate sentences for his 1990 and 1994 convictions with an aggregate maximum term of life in prison, we agree with him that the legality of the 1990 sentence cannot be considered moot (*see generally People v Curley*, 285 AD2d 274, 276, *lv denied* 97 NY2d 607). We therefore reverse the order, grant the motion and set aside the sentence, and we remit the matter to Supreme Court for the filing of a predicate felony statement and resentencing in accordance with the law (*see* CPL 440.20 [4]; *People v Ruddy*, 51 AD3d 1134, 1135, *lv denied* 12 NY3d 787; *People v McCants*, 15 AD3d 892). We note, however, that there is no evidence in the record before us that defendant was promised a specific term of imprisonment of 2a to 7 years as a part of the plea agreement. Thus, we reject defendant's contention that his plea must be vacated based on the court's inability to comply with the plea agreement. Rather, if any specific sentence was promised as part of the plea agreement, the sentencing court has the discretion to impose that sentence or to afford defendant an opportunity to withdraw his plea (*see generally People v Selikoff*, 35 NY2d 227, 239-241, *cert denied* 419 US 1122).

We have reviewed the contentions of defendant in his pro se supplemental brief and conclude that, to the extent that they have not been addressed by our decision herein, they are outside the scope of the instant appeals.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

535

KA 09-01449

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS WORTH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BETH A. RATCHFORD, ROCHESTER, FOR DEFENDANT-APPELLANT.

DOUGLAS WORTH, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Joseph D. Valentino, J.), entered June 19, 2009. The order denied the motion of defendant to vacate his sentence pursuant to CPL 440.20.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is granted, the sentence is set aside and the matter is remitted to Supreme Court, Monroe County, for the filing of a predicate felony statement and resentencing.

Same Memorandum as in *People v Worth* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2011]).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

536

KA 10-00825

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DUSTIN M. MOORE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Cattaraugus County Court (Larry M. Himelein, J.), entered December 8, 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 unanimously modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Based upon the total risk factor score of 80 points on the risk assessment instrument, defendant was presumptively classified as a level two risk. County Court thereafter determined that an upward departure was warranted and classified defendant as a level three risk. We reject defendant's contention that the court erred in assessing points against him under the risk factor for drug or alcohol abuse, inasmuch as the case summary established that defendant had a history of drug and alcohol abuse (*see People v Carlton*, 78 AD3d 1654, 1655, *lv denied* 16 NY3d 782). Indeed, defendant admitted that he began using marihuana at approximately age 12 and crack or cocaine at age 17 and that he had experimented with hallucinogenic mushrooms and had been addicted to painkillers.

The People correctly concede, however, that the court erred in assessing 15 points against defendant under the risk factor for his supervision after being released from prison and that defendant should have been assessed no more than 5 points under that risk factor. As a result of that error, the total risk factor score should have been 70 and thus defendant should have been presumptively classified as a

level one risk. We nevertheless conclude that an upward departure from that risk level is warranted because defendant acknowledged that he is unable to control his sexual urges, and the record establishes that defendant would be unlikely to obtain the necessary treatment if it is not mandated (*see generally People v Hueber*, 81 AD3d 1466; *People v Mallaber*, 59 AD3d 989, *lv denied* 12 NY3d 710). We therefore modify the order by determining that defendant is a level two risk pursuant to SORA.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

537

CAF 10-01326

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF CAYDEN L.R.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

JAYME R., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

MARYBETH D. BARNET, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

CARACCIOLI & NELSON, PLLC, WATERTOWN (ANNALISE M. DYKAS OF COUNSEL), FOR PETITIONER-RESPONDENT.

SETH BUCHMAN, ATTORNEY FOR THE CHILD, THREE MILE BAY, FOR CAYDEN L.R.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered May 18, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Memorandum: Respondent father appeals from an order terminating his parental rights pursuant to Social Services Law § 384-b (4) (c) on the ground of mental retardation. We conclude that petitioner established by clear and convincing evidence that the father is "presently and for the foreseeable future unable, by reason of . . . mental retardation, to provide proper and adequate care for [his] child" (*id.*; *see Matter of Josh M.*, 61 AD3d 1366; *Matter of Christine Marie R.* [appeal No. 1], 302 AD2d 992, *lv denied* 100 NY2d 503). Petitioner presented the testimony of two psychologists "who each testified that the father is mildly mentally retarded, which is a life-long condition, and that his mental retardation rendered him incapable of providing proper and adequate care for his child . . .[, and t]he father presented no evidence to the contrary" (*Josh M.*, 61 AD3d at 1366). The father contends that terminating his parental rights was not in the best interests of the child because the termination did not free the child for adoption. We reject that contention. Social Services Law § 384-b "does not prohibit termination of parental rights when the [child is] not freed for adoption" (*Matter of Peter GG.*, 33 AD3d 1104, 1105). Contrary to the further contention of the father, we conclude that Family Court properly denied him post-termination contact "inasmuch as he failed to establish that such contact would be in the best interests of the

child[ ]" (*Matter of Diana M.T.*, 57 AD3d 1492, 1493, *lv denied* 12 NY3d 708). We have considered the father's remaining contentions and conclude that they are without merit.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

540

CAF 09-01386

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF TYLER W.

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

MARTHA W., RESPONDENT-APPELLANT.

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

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

MARLENE A. ATTARDO, ATTORNEY FOR THE CHILD, FAIRPORT, FOR TYLER W.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered May 26, 2009 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, ordered that the permanency goal for the child is permanent placement with a fit and willing relative.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Clancy v Paganini*, 45 AD3d 682).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

541

CAF 09-00644

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

IN THE MATTER OF LAUREN KELSO CANADY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GERRY BINETTE, RESPONDENT-APPELLANT.

SUSAN GRAY JONES, CANANDAIGUA, FOR RESPONDENT-APPELLANT.

PETER O. EINSET, ATTORNEY FOR THE CHILD, GENEVA, FOR JAYNE E.C.

Appeal from an order of the Family Court, Ontario County (Maurice E. Strobridge, J.H.O.), entered March 19, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the petition for leave to relocate to Louisiana.

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

Memorandum: Respondent father appeals from an order that, inter alia, granted petitioner mother permission for the parties' child to relocate with her to Louisiana. We affirm. We agree with Family Court that the mother met her burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests (*see Matter of Cynthia L.C. v James L.S.*, 30 AD3d 1085).

The father contends that the mother's petition should have been denied because his financial circumstances preclude him from traveling to Louisiana to visit the child. We reject that contention. The father pays minimal child support, leaving the mother as the only financial source for the child's health care, child care, and education. The mother's income potential was limited in the states closest to New York for various reasons, including the highly specialized nature of her work. The mother testified that the jobs that were available closer to or in New York were temporary, whereas the position she obtained in Louisiana was permanent, year-round, paid a generous salary and offered excellent benefits. Thus, inasmuch as "the record establishes that [the father] has no 'accustomed close involvement in the [child's] everyday life' " (*id.* at 1086, quoting *Tropea v Tropea*, 87 NY2d 727, 740), "the need to 'give appropriate weight to . . . the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements' does not take precedence over the need to give

appropriate weight to the economic necessity for the relocation" (*id*., quoting *Tropea*, 87 NY2d at 740-741).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

543

CA 10-02006

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

JOANN KRIEGER AND HERBERT KRIEGER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VICKY COGAR AND JEFF COGAR,
DEFENDANTS-RESPONDENTS.

O'BRIEN BOYD, P.C., WILLIAMSVILLE (STEPHEN BOYD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 16, 2010 in a personal injury action. The order, upon reargument, granted defendants' cross motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Joann Krieger (plaintiff) in an accident involving defendants' six-day-old colt. When Vicky Cogar (defendant) attempted to place a halter on the colt, the animal backed into the stall door and knocked plaintiff, who was standing outside of the door, to the ground. We conclude that Supreme Court properly granted defendants' motion for leave to reargue their prior cross motion for summary judgment dismissing the complaint and, upon reargument, granted the cross motion.

Agriculture and Markets Law § 108 (7) characterizes horses, which include colts, as domestic animals, and it is well settled "that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities . . . Vicious propensities include the 'propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " (*Collier v Zambito*, 1 NY3d 444, 446; *see Bard v Jahnke*, 6 NY3d 592, 596-597). In *Collier* (1 NY3d at 447), the Court of Appeals held that "an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of

harm, can be found to have vicious propensities--albeit only when such proclivity results in the injury giving rise to the lawsuit." Once it is established that the owner of the animal in question had knowledge of its vicious propensity, the owner becomes strictly liable for any resulting injuries (*see Bard*, 6 NY3d at 597). "The Court of Appeals has explicitly 'reject[ed] the notion that a negligence cause of action survives *Collier* and *Bard*' " (*Farnham v Meder*, 72 AD3d 1574, 1575, quoting *Petrone v Fernandez*, 12 NY3d 546, 550), "and it has held that the 'owner's liability is determined *solely* by application of the rule articulated in *Collier*' " (*id.*, quoting *Bard*, 6 NY3d at 599 [emphasis added]).

Here, defendants brought the colt to their property no more than two days before the incident, and they acknowledged that the colt had exhibited "skittish" or nervous behavior. Defendant Jeff Cogar testified at his deposition that skittish behavior was the common response of a horse after being transported to a new location, and defendant testified at her deposition that she was aware of the colt's tendencies to avoid human contact and seek the protection of his mother. The colt's repeated avoidance behavior, however, does not constitute a "proclivity to act in a way that puts others at risk of harm," which is required for a finding of vicious propensity (*Collier*, 1 NY3d at 447). Further, there is no evidence in the record that the colt's avoidance behavior was " 'abnormal to its class,' " another necessary characteristic of vicious behavior for the purpose of establishing liability (*Bard*, 6 NY3d at 597 n 2; *see* Restatement [Second] of Torts § 509 [1]). Indeed, plaintiffs' expert witness stated in his affidavit that a week-old colt would have a natural inclination to exhibit avoidance behavior, e.g., the placement of a halter on its face.

Entered: April 29, 2011 Patricia L. Morgan
Clerk of the Court

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

545

CA 10-02393

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

JOSEPH D. BURGDORF,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH G. KASPER, 1660 GRAND ISLAND BOULEVARD, INC., BRIDAL VEIL TOURS, INC., PHYLLIS I. KASPER, DOING BUSINESS AS ALGIERS MOTEL,
DEFENDANTS-RESPONDENTS-APPELLANTS,
ET AL., DEFENDANTS.

THE WOLFORD LAW FIRM LLP, ROCHESTER (DAVID C. PILATO OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

MARK R. UBA, WILLIAMSVILLE (CHRISTINE D. UBA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 10, 2010. The order, among other things, denied those parts of plaintiff's motion and defendants' cross motion seeking partial summary judgment, and granted that part of defendants' cross motion seeking a stay.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion for partial summary judgment on liability with respect to the second cause of action and those parts of defendants' cross motion for partial summary judgment dismissing the third and fourth causes of action insofar as they pertain to business entities that are not operated by defendant Kenneth G. Kasper and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action for, inter alia, breach of a settlement agreement and a consulting agreement (collectively, agreements) between plaintiff and defendant Kenneth G. Kasper. Plaintiff moved for, inter alia, partial summary judgment seeking declarations that defendants owed him $420,000 in installment payments pursuant to the consulting agreement, 7.5% of gross revenue of "[d]efendants and any other person or business entity with whom . . . Kenneth G. Kasper is connected, directly or indirectly, doing business at [the premises in question]," excluding commissions on hotel referrals, and 50% of the hotel referral commissions paid to "[d]efendants and any other person or business entity with whom . . . Kenneth G. Kasper is connected, directly or indirectly, doing business

at the [p]remises . . ., regardless of whether [Kenneth] Kasper actually received such revenue." Plaintiff also sought a declaration that Kenneth Kasper is connected " 'directly or indirectly,' within the meaning of the terms of the [c]onsulting [a]greement, with at least two business entities that have done business, or are doing business, at the [p]remises . . . ." Defendants cross-moved for partial summary judgment seeking a declaration that the agreements do not require defendants to pay plaintiff a portion of the revenues of unrelated businesses on the premises that are not owned or operated by Kenneth Kasper and seeking a stay of the action pursuant to CPLR 2201 pending the resolution of a federal criminal proceeding against Kenneth Kasper. Plaintiff appeals and defendants cross-appeal from an order that, inter alia, denied those parts of the motion and cross motion for partial summary judgment and granted that part of the cross motion seeking a stay.

We note at the outset that, although the parties sought declaratory relief in the motion and cross motion, there is no need to grant declaratory relief where the issues concern the merits of the breach of contract causes of action (*see generally James v Alderton Dock Yards*, 256 NY 298, 305, *rearg denied* 256 NY 681; *Harris v Town of Mendon*, 284 AD2d 988). Contrary to plaintiff's contention on appeal, Supreme Court properly denied those parts of his motion for partial summary judgment with respect to defendants' liability for percentages of the gross revenue and hotel referral payments from business entities that are not operated by Kenneth Kasper (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). "It is 'elementary' that 'clauses of a contract should be read together contextually in order to give them meaning' " (*Diamond Castle Partners IV PRC, L.P. v IAC/InteractiveCorp*, 82 AD3d 421, ___ [Mar. 3, 2011]). Read together, we conclude that the agreements provide that plaintiff is entitled to a percentage of the gross revenues produced by businesses "operated by [Kenneth] Kasper" on the premises. Although the consulting agreement provides plaintiff with a percentage of gross revenues of, inter alia, business entities "with [which Kenneth] Kasper is connected, directly or indirectly," that phrase is defined by the settlement agreement as businesses that are "operated by [Kenneth] Kasper." "[I]t is a cardinal rule of construction that a court adopt an interpretation that renders no portion of the contract meaningless" (*Diamond Castle Partners IV PRC, L.P.*, 82 AD3d at ___ [internal quotation marks omitted]; *see Green Harbour Homeowners' Assn., Inc. v G.H. Dev. & Constr., Inc*., 14 AD3d 963, 965). Moreover, "where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect" (*HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [internal quotation marks omitted]). To define the agreements in the manner suggested by plaintiff would render that portion of the settlement agreement regarding businesses "operated by [Kenneth] Kasper" meaningless (*see Diamond Castle Partners IV PRC, L.P.*, 82 AD3d at ___). For the same reasons, we conclude that the court properly denied that part of plaintiff's motion seeking an accounting to permit plaintiff to calculate the amounts allegedly owed to him pursuant to the consulting agreement (*see id*.).

Inasmuch as plaintiff is not entitled to gross revenue payments or hotel referral payments arising from business entities that are not operated by Kenneth Kasper, we agree with defendants on their cross appeal that the court erred in denying those parts of their motion for partial summary judgment dismissing the third cause of action, alleging a breach of the agreements with respect to gross revenue payments, and the fourth cause of action, alleging a breach of the agreements with respect to hotel referral payments, insofar as those causes of action pertain to business entities that are not operated by Kenneth Kasper. We therefore modify the order accordingly. Contrary to plaintiff's contention, the affirmation of defendants' attorney was properly used "as the vehicle for the submission of acceptable attachments [that] provide 'evidentiary proof in admissible form,' " including the agreements (*Zuckerman*, 49 NY2d at 563; *see Matter of Perceptron, Inc. [Vogelsong]*, 34 AD3d 1215; *Grossberg Tudanger Adv. v Weinreb*, 177 AD2d 377, 378).

We conclude, however, that the court erred in denying that part of plaintiff's motion seeking partial summary judgment on liability with respect to the second cause of action, alleging a breach of the agreements based on defendants' failure to pay him installment payments, and we therefore further modify the order accordingly. Plaintiff established his entitlement to judgment as a matter of law with respect to that part of the motion, and defendants offered no evidence in opposition (*see generally Zuckerman*, 49 NY2d at 562).

We reject plaintiff's further contention on his appeal that the court erred in granting that part of defendants' cross motion for a stay of the action. "[A] motion pursuant to CPLR 2201 seeking to stay a civil action pending resolution of a related criminal action is directed to the sound discretion of the trial court" (*Britt v International Bus Servs.*, 255 AD2d 143, 144; *see Peluso v Red Rose Rest., Inc.*, 78 AD3d 802; *Britt v Buffalo Mun. Hous. Auth.*, 63 AD3d 1593). Here, the court did not abuse its discretion in granting that part of defendants' cross motion for a stay because both this action and the pending criminal proceeding are " 'sufficiently similar such that the goals of preserving judicial resources and preventing an inequitable result are properly served' " in granting a stay (*Finger Lakes Racing Assn. v New York Racing Assn.*, 28 AD3d 1208, 1209).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

546

CA 10-02520

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GORSKI, AND MARTOCHE, JJ.

RENEE HYDE, INDIVIDUALLY AND AS PARENT AND
NATURAL GUARDIAN OF RACHAEL HYDE, AN INFANT,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NORTH COLLINS CENTRAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL MENARD, HAMBURG, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered October 7, 2010 in a personal injury action. The order, insofar as appealed from, denied defendant's motion for summary judgment with respect to the issue of assumption of risk.

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

Memorandum: Plaintiff, individually and as parent and natural guardian of her daughter, commenced this action seeking damages for injuries sustained by her daughter when she slid into second base during a junior varsity softball game. We conclude that Supreme Court properly denied that part of defendant's motion to dismiss the complaint based on the theory of assumption of risk. "[B]y 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). A plaintiff is deemed to have assumed the risk where the "injury-causing events . . . are known, apparent or reasonably foreseeable consequences of the participation" (*Turcotte v Fell*, 68 NY2d 432, 439). If the plaintiff fully comprehends the risks of the activity or the risks are " 'perfectly obvious, [then the] plaintiff has consented to them and [the] defendant has performed its duty' " (*Morgan*, 90 NY2d at 484, quoting *Turcotte*, 68 NY2d at 439). It is not necessary that the injured plaintiff foresee the exact manner in which the injury occurs, as long as he or she was " 'aware of the potential for injury of the mechanism from which the injury results' " (*Curtis v Town of Inlet*, 32

AD3d 1311, 1312, quoting *Maddox v City of New York*, 66 NY2d 270, 278). Awareness of the risk must be " 'assessed against the background of the skill and experience of the particular plaintiff' " (*Morgan*, 90 NY2d at 486). Although even a plaintiff who is a novice is expected to appreciate the obvious risks inherent in a sport (*see Griffin v Lardo*, 247 AD2d 825, *lv denied* 91 NY2d 814), there are several factors that must be taken into account, including the age of the plaintiff and the plaintiff's skill and experience (*see Kroll v Watt*, 309 AD2d 1265; *see also Rivera v Glen Oaks Vil. Owners, Inc.*, 41 AD3d 817, 820, *lv denied* 9 NY3d 817).

"Generally, the issue of assumption of risk is a question of fact for the jury" (*Lamey v Foley*, 188 AD2d 157, 164). Here, plaintiff's daughter had some prior experience playing softball and understood that sliding was part of the game, although she testified at the General Municipal Law § 50-h hearing that she was never taught how to slide and had never attempted to slide in practice. She further testified that no more than five minutes were spent discussing the topic in practice. Immediately before the game at issue, the umpire informed plaintiff's daughter that if it was a close play and the runner did not slide or was not on the ground, she would be called out. Plaintiff's daughter had observed her teammates on other teams slide and get injured, but she had never seen any of them suffer a serious injury. Under those circumstances, we conclude that there is a question of fact whether, based on her experience, plaintiff's daughter was aware of and appreciated the risks of sliding (*see Taylor v Massapequa Intl. Little League*, 261 AD2d 396, 397-398).

Defendant contends for the first time on appeal that the negligent hiring claim should have been dismissed, and thus that contention is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

547

KA 07-01781

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DORSEY JAMES, ALSO KNOWN AS JAMES DORSEY,
DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Anthony F. Aloi, J.), entered February 22, 2007 pursuant to the 2005 Drug Law Reform Act. The order granted defendant's application for resentencing upon defendant's 2006 conviction of criminal possession of a controlled substance in the second degree and specified the sentence that would be imposed.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

548

KA 10-00606

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFFORD TULLOCH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered February 25, 2010. The judgment convicted defendant, after a nonjury trial, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction except as it pertains to the element of physical or constructive possession of the controlled substance found on the floor of the back seat of the patrol car in which defendant was transported to the police station (*see People v Gray*, 86 NY2d 10, 19), and we conclude that the evidence is legally sufficient to establish that element (*see generally People v Bleakley*, 69 NY2d 490, 495). The bag of cocaine upon which the conviction of possession is based was discovered immediately after defendant was removed from that patrol car. The two arresting officers testified at trial that they had thoroughly searched the back of the patrol car a few hours prior to defendant's arrest and had found no contraband there, that defendant was the only person who had been in the back seat following their earlier search and that, while they were transporting defendant, they observed that he was making strange movements in the back seat of the patrol car, including crouching down and extending his legs. Given that testimony, we conclude that there is a "valid line of reasoning and permissible inferences" that could lead County Court to find that defendant possessed the cocaine found in the patrol car (*id.*; *see People v Glover*, 23 AD3d 688, 689, *lv denied* 6 NY3d 776; *see generally People v*

McCoy, 266 AD2d 589, 591-592, *lv denied* 94 NY2d 905).

Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, we reject defendant's contention that the sentence is unduly harsh and severe, particularly in view of defendant's lengthy criminal history and the fact that the sentence imposed was below the maximum sentence permitted by statute (*see* Penal Law § 70.70 [3] [b] [iii]).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

549

KA 10-01174

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE HARRISON, DEFENDANT-APPELLANT.

SCOTT P. FALVEY, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered May 13, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and 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 imposed on each count to a period of two years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). As the People correctly concede, County Court erred in imposing three-year periods of postrelease supervision for those counts, which are class B drug felonies (*see* § 70.45 [2] [b]; § 70.70 [2] [a]). We therefore modify the judgment by reducing the period of postrelease supervision imposed on each count to a period of two years (*see e.g. People v Norman*, 66 AD3d 1473, 1474, *lv denied* 13 NY3d 940), the maximum period allowed. The sentence as modified is not unduly harsh or severe.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

551

KA 08-00885

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JANELL THOMPSON, DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered October 31, 2007. The judgment convicted defendant, after a nonjury trial, of wilful violation of health laws (four counts) and falsifying business records in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting her following a nonjury trial of four counts of wilful violation of health laws (Public Health Law § 12-b; *see* § 2803-d [7]) and two counts of falsifying business records in the second degree (Penal Law § 175.05 [1]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

553

KA 10-01492

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JASON L., DEFENDANT-RESPONDENT.

THOMAS E. MORAN, DISTRICT ATTORNEY, ROCHESTER (VICTOR D. ROWCLIFFE OF COUNSEL), FOR APPELLANT.

THE PARRINELLO LAW FIRM, LLP, ROCHESTER (BRUCE F. FREEMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an adjudication of the Livingston County Court (Robert B. Wiggins, J.), rendered April 13, 2010. Defendant was adjudicated a youthful offender upon his plea of guilty to burglary in the first degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: The People purport to appeal from a sentence imposing a term of incarceration upon defendant's plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]), after County Court found that defendant was a youthful offender. The People contend that the court abused its discretion in granting defendant youthful offender status and that, as a result, the sentence imposed is invalid as a matter of law. We conclude that the appeal must be dismissed. "CPL 450.30 (2) authorizes the People to appeal from a sentence that is invalid as a matter of law" (*People v Cosme*, 80 NY2d 790, 792), but that statute does not authorize the People to appeal from a youthful offender finding (*see generally People v Calderon*, 79 NY2d 61, 63-64, 67). Indeed, upon finding that an individual is a youthful offender, "the court must direct that the conviction be deemed vacated and replaced by a youthful offender finding[,] and *the court must sentence the defendant* pursuant to section 60.02 of the penal law" (CPL 720.20 [3] [emphasis added]). "[T]he youthful offender finding and the youthful offender sentence imposed thereupon constitute a 'youthful offender adjudication' " (*Calderon*, 79 NY2d at 65). Here, the People do not allege that the sentence of incarceration of 1a to 4 years is illegal. Rather, "in the guise of challenging the sentence imposed, the People are in essence attacking the validity of the defendant's underlying [youthful offender finding,] . . . [which CPL 450.30 (2)] does not permit them to do"

(*Cosme*, 80 NY2d at 792).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

554

KA 10-00184

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTIAN KENDRA, ALSO KNOWN AS KENDRA CHRISTIAN,
DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered December 8, 2009. The judgment convicted defendant, after a nonjury trial, of assault in the second degree (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her following a nonjury trial of two counts of assault in the second degree (Penal Law § 120.05 [2], [9]) and one count of endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review her contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). Furthermore, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant correctly concedes that she failed to preserve for our review her contention that the conviction of endangering the welfare of a child is barred by the merger doctrine (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Smith*, 262 AD2d 1063, *lv denied* 93 NY2d 1027).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

556

KA 10-00758

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARYL L. BURTON, DEFENDANT-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered January 25, 2010. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts), attempted assault in the second degree, assault in the second degree (three counts), criminal sexual act in the first degree (two counts), rape in the first degree and criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of sexual abuse in the first degree (Penal Law § 130.65 [1]) and one count of attempted assault in the second degree (§§ 110.00, 120.05 [1]) arising from an incident involving one complainant, and three counts of assault in the second degree (§ 120.05 [2]), two counts of criminal sexual act in the first degree (§ 130.50 [1]), and one count each of rape in the first degree (§ 130.35 [1]), and criminal sale of a controlled substance in the third degree (§ 220.39 [2]) arising from separate incidents involving another complainant. Contrary to defendant's contention, County Court properly denied his motion seeking to sever the three counts of the indictment involving one complainant from the counts involving the other complainant. "The charges were properly joined pursuant to CPL 220.20 (2) (b) on the ground that the defendant's modus operandi with respect to each of the sexual assaults demonstrated a distinctive pattern" (*People v Hussain*, 35 AD3d 504, 505, *lv denied* 8 NY3d 946; *see People v Comfort*, 31 AD3d 1110, 1112, *lv denied* 7 NY3d 847). "In any event, [certain] offenses [involving each complainant] also were 'the same or similar in law' (CPL 200.20 [2] [c]), and defendant failed to show good cause for severance" (*People v Fontanez*, 278 AD2d 933, 935, *lv denied* 96 NY2d 862; *see People v Cornell*, 17 AD3d 1010, 1011, *lv denied* 5 NY3d 805; *People v Lovett*, 303 AD2d 952, *lv denied*

100 NY2d 584).

We also reject defendant's contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). Contrary to defendant's further contention, the court was authorized to direct that the sentence imposed for attempted assault in the second degree run consecutively with the sentences imposed for sexual abuse in the first degree. Although the attempted assault and sexual abuse " 'took place over a continuous course of activity, they constituted separate and distinct acts,' " and neither crime was a material element of the other (*People v Smith*, 269 AD2d 778, 778, *lv denied* 95 NY2d 804). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

557

CA 10-01745

PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, AND GREEN, JJ.

ALTSHULER SHAHAM PROVIDENT FUNDS, LTD.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GML TOWER LLC, ET AL., DEFENDANTS,
THE PIKE COMPANY, INC., THE HAYNER HOYT
CORPORATION AND SYRACUSE MERIT ELECTRIC,
A DIVISION OF O'CONNELL ELECTRIC CO., INC.,
DEFENDANTS-RESPONDENTS.

HANCOCK & ESTABROOK, SYRACUSE, AND TROUTMAN SANDERS, LLP, NEW YORK CITY, D'AGOSTINO, LEVINE, LANDESMAN & LEDERMAN, LLP, SPECIAL APPELLATE COUNSEL, NEW YORK CITY (BRUCE H. LEDERMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GILBERTI STINZIANO HEINTZ & SMITH PC, SYRACUSE, HAHN LOESER & PARKS LLP, CLEVELAND, OHIO (TIMOTHY M. BITTEL, OF THE OHIO AND FLORIDA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-RESPONDENT THE HAYNER HOYT CORPORATION.

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR DEFENDANT-RESPONDENT THE PIKE COMPANY, INC.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF COUNSEL), FOR DEFENDANT-RESPONDENT SYRACUSE MERIT ELECTRIC, A DIVISION OF O'CONNELL ELECTRIC CO., INC.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 20, 2010. The order granted the motions of defendants The Pike Company, Inc., The Hayner Hoyt Corporation and Syracuse Merit Electric, a Division of O'Connell Electric Co., Inc., for summary judgment.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court (*Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, 28 Misc 3d 475). We add only that we do not address plaintiff's contention that the 2007 Loan Agreement was a preliminary agreement that expired before the mortgage at issue was filed. That contention is raised for the first time on appeal and " 'could have been obviated

or cured by factual showings or legal countersteps' " in Supreme Court (*Oram v Capone*, 206 AD2d 839, 840).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

559

CA 10-02405

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

BARRY HARRIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EASTMAN KODAK COMPANY, DEFENDANT-RESPONDENT.

CHARLES A. HALL, ROCHESTER, FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, ROCHESTER (TIMOTHY P. WELCH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered August 10, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment on the issue of liability.

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

Memorandum: Plaintiff commenced this Labor Law action seeking damages for injuries he sustained when he fell from a scaffold that was equipped with wheels. The accident occurred while plaintiff was removing a pipe that was attached to and ran parallel with the ceiling of the building on which he was working. The pipe fell when plaintiff cut through a bracket that was suspending the pipe and, according to plaintiff's bill of particulars, the scaffold "shifted and/or moved to the right causing plaintiff to fall from it to the left about 10 feet down headfirst." Plaintiff moved for partial summary judgment on liability under Labor Law § 240 (1) and § 241, and defendant cross-moved for summary judgment dismissing the Labor Law § 241 claim. Supreme Court denied the motion and cross motion.

We note at the outset that defendant did not take a cross appeal from the order and thus its present contention that the court erred in denying its cross motion is not properly before us (*see generally* CPLR 5515 [1]; *Zeman v Falconer Elecs., Inc.*, 55 AD3d 1240, 1241). With respect to plaintiff's motion, we conclude that the court properly denied the motion inasmuch as plaintiff failed to meet his "initial burden of establishing as a matter of law that the injury was caused by the lack of enumerated safety devices, the proper placement and operation of which would have prevented the pipe from falling on plaintiff and plaintiff from falling off the [scaffold]" (*Sniadecki v Westfield Cent. School Dist.*, 272 AD2d 955). It is undisputed that the scaffold neither collapsed nor tipped and plaintiff, the only

witness to the accident, testified at his deposition both that the pipe did not strike him and that he was unsure whether the scaffold moved or shifted, which is contrary to the statement in his bill of particulars that the scaffold "shifted and/or moved to the right." In addition, the record does not establish whether the pipe struck the scaffold and whether the scaffold was equipped with a safety railing. Thus, plaintiff failed to meet his burden of establishing his entitlement to judgment on liability as a matter of law with respect to the alleged Labor Law violations. Finally, plaintiff's further contention that there should have been another safety device to prevent the pipe from falling and striking either the scaffolding or plaintiff 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).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

560

CA 10-01230

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

STATE OF NEW YORK, PLAINTIFF-RESPONDENT,

V ORDER

TERRY KEAR, JERRY MICHAEL KEAR, AS ADMINISTRATOR OF THE ESTATE OF DONALD KEAR, DECEASED, SANDBURG OIL CO., INC., DEFENDANTS-RESPONDENTS, AND GRIFFITH OIL CO., INC., DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (AMANDA R. INSALACO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

PHILLIPS LYTLE LLP, BUFFALO (KEVIN M. HOGAN OF COUNSEL), FOR DEFENDANT-RESPONDENT SANDBERG OIL CO., INC.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered March 18, 2010. The order denied the motion of defendant Griffith Oil Co., Inc. for summary judgment dismissing the complaint and cross claims against it.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

562

CA 10-02522

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

GINNETTE HORAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 22, 2010 in a personal injury action. The order granted the motion of defendant 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 tripped over a pothole in a road owned and maintained by defendant. Contrary to plaintiff's contention, Supreme Court properly granted defendant's motion for summary judgment dismissing the amended complaint. Pursuant to Town Law § 65-a (1), a town may be liable for a dangerous highway condition if it had either prior written notice or constructive notice of the dangerous condition. Town of Tonawanda Code (Town Code) § 68-2 (A) provides, however, that defendant may be liable only if it had prior written notice of the dangerous condition. In support of its motion, defendant established as a matter of law that it lacked prior written notice of the pothole, but it failed even to address whether it lacked constructive notice thereof. Plaintiff thus contends that defendant failed to meet its initial burden on the motion.

As plaintiff correctly notes, Highway Law § 139 (2), which applies to counties, contains provisions that are similar to Town Law § 65-a (1), and it is well established that a county's local law containing a notice requirement "must be interpreted in conjunction with Highway Law § 139 (2) to permit an action against the [c]ounty based on constructive notice of a dangerous highway condition" (*Tanner W. v County of Onondaga*, 225 AD2d 1074, 1074; *see Napolitano v Suffolk County Dept. of Pub. Works*, 65 AD3d 676, 677; *DeHoust v Aakjar*, 290 AD2d 927, 927-928, *lv dismissed* 98 NY2d 692; *see generally Carlino v*

City of Albany, 118 AD2d 928, 929-930, *lv denied* 68 NY2d 606). The rationale underlying those cases is that a county's local law cannot supersede a general state law (*see DeHoust*, 290 AD2d at 928; *see generally* NY Const, art IX, § 3 [d] [1]; *Kamhi v Town of Yorktown*, 74 NY2d 423).

Nevertheless, Municipal Home Rule Law § 10 (1) (ii) (d) (3), which is also a general state law, specifically permits a town, as opposed to a county (*see* § 10 [1] [ii] [b]), to amend or supersede through its local laws any provision of the Town Law relating to the property of the town "notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law . . . ." Because the Legislature has not expressly prohibited defendant from enacting a more restrictive notice requirement than that contained in Town Law § 65-a (1), defendant was entitled to do so (*see Bacon v Arden*, 244 AD2d 940, 940-941; *Canzano v Town of Gates*, 85 AD2d 878, 879; *see generally Walker v Town of Hempstead*, 190 AD2d 364, 369-370, *affd* 84 NY2d 360). The notice provisions of Town Code § 68-2 (A) are thus valid and, contrary to plaintiff's contention, defendant was not required to establish that it lacked constructive notice of the pothole in order to establish its entitlement to summary judgment dismissing the amended complaint.

Contrary to plaintiff's further contention, defendant was not required to establish that it did not create the dangerous condition through an affirmative act of negligence in order to establish its entitlement to summary judgment. There are two recognized exceptions to the prior written notice rules, i.e., "where the locality created the defect or hazard through an affirmative act of negligence . . . and where a 'special use' confers a special benefit upon the locality" (*Amabile v City of Buffalo*, 93 NY2d 471, 474). Where, as here, there is a prior written notice provision, a municipal defendant meets its initial burden by establishing that it did not receive prior written notice of the allegedly dangerous condition, and the burden then shifts to the plaintiff to raise a triable issue of fact whether one of the exceptions applies (*see Gold v County of Westchester*, 15 AD3d 439, 440). The affirmative negligence exception, relied upon by plaintiff in this case, is "limited to work by the [locality] that immediately results in the existence of a dangerous condition" (*Bielecki v City of New York*, 14 AD3d 301, 301), and does not apply to conditions that develop over time, such as the pothole in question (*see Torres v City of New York*, 39 AD3d 438; *Gold*, 15 AD3d at 440). We thus conclude that plaintiff failed to raise a triable issue of fact whether the affirmative negligence exception applies.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

563

CA 10-02269

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

ELLICOTT GROUP, LLC, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

STATE OF NEW YORK EXECUTIVE DEPARTMENT OFFICE OF GENERAL SERVICES, DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, BUFFALO (KENNETH W. AFRICANO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John M. Curran, J.), entered January 19, 2010 in a declaratory judgment action. The judgment granted the motion of plaintiff for summary judgment declaring that the prevailing wage clause that defendant sought to be included in a proposed lease is not authorized by the Labor Law and that defendant violated the separation of powers doctrine by insisting on the inclusion of that clause and permanently enjoined defendant from mandating that the clause be included in the lease.

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

Opinion by CENTRA, J.: At issue in this appeal is whether defendant, State of New York Executive Department Office of General Services (OGS), had the authority to include a provision in a lease agreement requiring plaintiff to pay prevailing wages to certain workers regardless of whether the statutory requirements of the prevailing wage law applied. We conclude that OGS did not have that authority because the exercise of its executive power unlawfully impinged upon a legislative function, and we thus conclude that the judgment should be affirmed.

Prevailing Wage Law

"Our State Constitution provides that laborers, workers and mechanics engaged in 'any public work' cannot 'be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used' " (*Matter of New York Charter School Assn. v Smith*, 15 NY3d 403, 407-408, quoting NY Const, art I, § 17). Articles 8 and

9 of the Labor Law implement this constitutional mandate. Labor Law § 220 (2) provides in relevant part that "[e]ach contract to which the state or a public [entity] . . . is a party, and any contract for public work entered into by a third party acting in place of, on behalf of and for the benefit of such public entity pursuant to any lease, permit or other agreement between such third party and the public entity, and which may involve the employment of laborers, workers or mechanics shall contain a stipulation that no laborer, worker or mechanic . . . shall be permitted or required to work more than eight hours in any one calendar day or more than five days in any one week." Subdivision (3) (a) provides that the wages to be paid to a laborer, worker or mechanic "upon such public works" shall not be less than the prevailing rate of wages.

Thus, "[i]n general, Labor Law § 220 requires that certain contracts involving the employment of laborers, workers or mechanics on a public work project provide for the payment of the prevailing wage rate" (*New York Charter School Assn.*, 61 AD3d 1091, 1093, *affd* 15 NY3d 403). In order for the prevailing wage law to apply, two conditions must be met: "(1) the public agency must be a party to a contract involving the employment of laborers, work[ers], or mechanics, and (2) the contract must concern a public works project" (*Matter of Erie County Indus. Dev. Agency v Roberts*, 94 AD2d 532, 537, *affd for the reasons stated* 63 NY2d 810; *see New York Charter School Assn.*, 15 NY3d at 408).

Labor Law article 9 sets forth the prevailing wage requirement for building service employees for building service work (*see* § 230 [1]; § 231 [1]). Building service work is defined as work performed by a building service employee (*see* § 230 [2]), and a building service employee is defined as "any person performing work in connection with the care or maintenance of an existing building . . . for a contractor under a contract with a public agency . . .[,] the principal purpose of which is to furnish services through the use of building service employees" (§ 230 [1]). The definition of building service employees encompasses such occupations as building cleaners, groundskeepers, window cleaners, and garbage collectors (*id.*). We have held that the prevailing wage requirement of Labor Law article 9 applies to private buildings "as long as the work is being done pursuant to a public work contract" (*Feher Rubbish Removal, Inc. v New York State Dept. of Labor, Bur. of Pub. Works*, 28 AD3d 1, 5-6, *lv denied* 6 NY3d 711).

Facts and Procedural History

OGS, which enters into leases with private landlords for building and office space for various state agencies, learned that the New York State Department of Labor (DOL) was investigating certain leasing projects of state agencies to determine whether prevailing wages were being paid on those projects. OGS attempted to resolve the ambiguity with the DOL, but "questions persisted because many of the cases addressing the issue of whether prevailing wages must be paid on projects that potentially involve 'public work' are very fact specific." To be consistent and to remedy any uncertainty, OGS adopted a policy whereby all of its standard lease agreements would

include a prevailing wage law clause. In other words, when soliciting bids from prospective landlords, OGS required that they agree to a clause in the proposed lease agreement that required them to pay the prevailing wage "in instances where the work is being done to benefit the State and public funds are being expended." OGS admitted that the clause would require the payment of prevailing wages "even where such work might not meet the technical definition of 'public work.' "

Plaintiff is a private entity that owns approximately 11 office buildings in downtown Buffalo and regularly submits bids for lease agreements with OGS. OGS issued a Request for Information to prospective landlords for the lease of, inter alia, approximately 23,000 square feet of space to the New York State Workers' Compensation Board (WCB). OGS notified plaintiff and other prospective landlords that the WCB lease would include a prevailing wage clause requiring the landlord to pay the prevailing wage for work such as alteration and construction performed on behalf of the public entity, and for work performed by service employees such as janitors on behalf of the public entity. Specifically, the prevailing wage clause provided:

> "In relation to all work performed by laborers, workmen, or mechanics involving alteration, renovation, reconstruction, repair, rehabilitation, construction, or demolition performed on behalf of a public agency (entity) under this Lease/License Agreement, or in relation to all building service work as defined in Article 9 of the New York State Labor Law, performed on behalf of a public agency (entity) under this Lease/License Agreement, the Landlord/Licensor shall abide by the provisions of Articles 8 and/or 9 of the New York State Labor Law. The Landlord/Licensor agrees that the wages to be paid to any building service employee (including, but not limited, to watchmen, guards, doormen, building cleaners, porters, janitors, gardeners, groundskeepers, stationary firemen, elevator operators and starters, window cleaners and occupations relating to the collection of garbage or refuse and to the transportation of office furniture and equipment, and the transportation and delivery of fossil fuel), or to any worker, laborer, or mechanic, shall not be less than the prevailing wage for the locality in which the work is to be performed. The Landlord/Licensor shall contact the New York State Department of Labor to obtain the appropriate prevailing wage schedule, upon execution of the herein Lease/License Agreement."

Plaintiff submitted its bid and agreed, under protest, to the inclusion of the prevailing wage clause. OGS notified plaintiff that it was awarded the WCB lease.

Plaintiff commenced this declaratory judgment action seeking a declaration that OGS lacked statutory authority to mandate that the prevailing wage be paid for work on privately owned property leased by OGS for the WCB. Plaintiff also sought a permanent injunction restraining OGS from imposing the prevailing wage requirement in the WCB lease. Plaintiff asserted that the lease agreement did not involve public work, and that the prevailing wage requirement in the Labor Law therefore did not apply. Plaintiff further asserted that OGS exceeded its authority and violated the separation of powers doctrine by mandating that the prevailing wage clause be included in the lease.

In its answer, OGS asserted that it acted in accordance with its statutory authority under the Public Buildings Law when it included the prevailing wage clause in the lease. OGS further asserted that, in doing so, it did not violate the separation of powers doctrine.

Plaintiff moved for summary judgment seeking various forms of relief. In granting the motion, Supreme Court declared that the prevailing wage clause in the proposed WCB lease agreement was not statutorily authorized by articles 8 or 9 of the Labor Law, and further declared that OGS violated the separation of powers doctrine by insisting on the inclusion of the prevailing wage clause. The court also permanently enjoined OGS from mandating that the clause be included in the WCB lease. As previously noted, we conclude that the judgment should be affirmed.

Analysis

In order for articles 8 and 9 of the Labor Law to apply here, there must be a public works contract (*see Erie County Indus. Dev. Agency*, 94 AD2d at 537, *affd for the reasons stated* 63 NY2d 810; *Feher Rubbish Removal, Inc.*, 28 AD3d at 5-6). In moving for summary judgment, plaintiff met its initial burden of establishing that the lease agreement did not involve public work (*see Matter of 60 Mkt. St. Assoc. v Hartnett*, 153 AD2d 205, 207, *affd* 76 NY2d 993), and thus established that OGS was not authorized under articles 8 and 9 of the Labor Law to include the prevailing wage provision in the WCB lease. OGS does not contend that the lease agreement involves a public works project. Rather, it contends that, regardless of whether the lease agreement would be subject to articles 8 and 9 of the Labor Law, OGS is authorized by Public Buildings Law § 3 (12) to require plaintiff to pay prevailing wages. That statute authorizes the Commissioner of OGS to lease buildings and office space for state agencies "upon such terms and conditions as he or she deems most advantageous to the state" (*id.*). OGS contends that the prevailing wage clause "is simply a contractual term that OGS seeks to include in plaintiff's lease because doing so is in the public interest and thus within its contracting authority under Public Buildings Law § 3 (12)." We agree with plaintiff, however, that OGS may not include the prevailing wage clause in the WCB lease because OGS is thereby violating the separation of powers doctrine.

The legislative, executive, and judicial branches constitute the

structure of our representative system of government (*see* NY Const, art III, § 1; art IV, § 1; art VI, § 1). The " 'separate grants of power to each of the coordinate branches of government' imply that each branch is to exercise power within a given sphere of authority" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 821, *cert denied* 540 US 1017). "Respect for this structure and the system of checks and balances inherent therein requires that none of these branches be allowed to usurp powers residing entirely in another branch" (*Subcontractors Trade Assn. v Koch*, 62 NY2d 422, 427).

OGS, as an administrative body, usurped the role of the legislative body by adopting a policy mandating the inclusion of the prevailing wage clause in all leases. In *Under 21, Catholic Home Bur. for Dependent Children v City of New York* (65 NY2d 344, 353), the Court of Appeals held that the Mayor of the City of New York violated the separation of powers doctrine by promulgating an executive order prohibiting employment discrimination by city contractors on the basis of " 'sexual orientation or affectional preference.' " The Court held that the executive was thereby impermissibly usurping the legislative function by enacting social policies not adopted by the Legislature and that the Mayor's attempt "to broaden the class of persons protected from discrimination by private employers, . . . however commendable, is an enactment of policy which the City Charter leaves to the City Council" (*id.* at 359). In addition, in *Boreali v Axelrod* (71 NY2d 1, 6), the Court of Appeals held that the Public Health Council, an administrative body, usurped the role of the Legislature by promulgating a comprehensive code to govern tobacco smoking in areas that were open to the public. The Legislature had been unable "to reach an acceptable balance" with respect to the policy on the problem of second-hand smoke, and thus the administrative agency made its own policy decision and enacted regulations (*id.*). The Court held that the administrative agency violated the separation of powers doctrine "when it used the [broad enabling] statute as a basis for drafting a code embodying its own assessment of what public policy ought to be" (*id.* at 9).

Likewise in this case, OGS usurped the role of the Legislature in making its policy decision that prevailing wages should be paid even for work that was not public work. It is for the Legislature, not OGS, to define the parameters of when prevailing wages should be paid. "[T]he separation of powers 'requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies' " (*Saratoga County Chamber of Commerce*, 100 NY2d at 821-822, quoting *Bourquin v Cuomo*, 85 NY2d 781, 784). Indeed, the Legislature made a substantive amendment to Labor Law § 220 (2) in 2007 (*see* L 2007, ch 678, § 1). In addition, the Legislature passed an amendment to article 9 of the Labor Law in 2010 (*see* 2010 NY Senate Bill 8379-A), although it was vetoed by the Governor. Clearly, this is an area of the law that continues to evolve, and it is the role of the Legislature to make any such changes, not the role of an administrative agency.

Conclusion

Accordingly, we conclude that the judgment should be affirmed.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

564

CA 10-02404

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

ROBERT M. BURGIO, AS ADMINISTRATOR OF THE ESTATE OF RANDALL P. BURGIO, DECEASED, AND ASHLEY C. BURGIO AND JILLIAN M. BURGIO, AS DISTRIBUTEES OF THE ESTATE OF RANDALL P. BURGIO, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF LOCKPORT, ROGER F. LAROACH, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

WEBSTER SZANYI LLP, BUFFALO (RYAN G. SMITH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (CHARLES S. DESMOND, II, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 5, 2010 in a personal injury and wrongful death action. The amended order directed plaintiffs to provide disclosure responses.

It is hereby ORDERED that said appeal insofar as it concerns various financial documents pertaining to decedent's estate is unanimously dismissed and the amended order is modified on the law by directing plaintiffs either to provide defendants with further particulars concerning defendants' failure to maintain the vehicle in question and the nature of any defect, unsafe condition, or lack of necessary safety equipment, or to provide a sworn statement that they do not now possess the information required for the further particulars, in which event they shall serve a supplemental bill of particulars to defendants within 90 days of service of the order of this Court with notice of entry if they obtain such information during the course of disclosure, and as modified the amended order is affirmed without costs.

Memorandum: On appeal from an amended order directing plaintiffs to comply with certain disclosure requests, defendants contend that Supreme Court erred in failing to provide more specific directives with respect to the requests for various financial documents pertaining to decedent's estate. We conclude on the record before us that Supreme Court provided defendants with all of the relief requested with regard to those financial documents and defendants thus are not aggrieved by that part of the amended order (*see generally*

CPLR 5511; *Pramco III, LLC v Partners Trust Bank*, 52 AD3d 1224, 1225). We therefore dismiss the appeal from that part of the amended order.

We agree with defendants, however, that they are entitled to further particularization concerning plaintiffs' allegation that they failed to maintain the motor vehicle that collided with decedent's motor vehicle, as well as their allegation that defendants' vehicle was "defective, unfit, unsafe, in a state of disrepair, and lacking necessary safety equipment." Although defendants are correct that plaintiffs failed to object to the numerous demands by defendants for such information, we nevertheless review the propriety of the demands, and we conclude that the demands were not palpably improper (*see Community Dev. Assn. v Warren-Hoffman & Assoc.*, 4 AD3d 755; *Kern v City of Rochester*, 261 AD2d 904, 905). To the extent that plaintiffs contend that they presently lack sufficient knowledge to respond to those demands, we conclude that plaintiffs must provide a sworn statement to that effect and to furnish a supplemental bill of particulars to defendants if and when they obtain such information during the course of disclosure (*see Laukaitis v Ski Stop*, 202 AD2d 554, 555; *Hughes v General Motors Corp.*, 106 AD2d 703, 703-704; *see generally Mahar v Fichte*, 298 AD2d 948). We therefore modify the amended order accordingly.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

565

CA 11-00027

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

NANCY WOLTZ, AS ADMINISTRATRIX OF THE ESTATE
OF JOANNE WOLTZ, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

JEANETTE L. FIGUEROA, M.D., JOSEPH A.
PARIS, M.D., DON A. COLLURE, M.D., KALEIDA
HEALTH, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANTS-APPELLANTS DON A. COLLURE, M.D. AND KALEIDA HEALTH.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JENNIFER L. NOAH OF COUNSEL), FOR DEFENDANTS-APPELLANTS JEANETTE L. FIGUEROA, M.D. AND JOSEPH A. PARIS, M.D.

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

Appeals from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered May 17, 2010 in a medical malpractice and wrongful death action. The order denied the motions of defendants Jeanette L. Figueroa, M.D., Joseph A. Paris, M.D., Don A. Collure, M.D., and Kaleida Health for summary judgment.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

566

CA 10-02087

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

ROBERT C. OAKES AND JANICE L. OAKES,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

BIELER ENTERPRISES, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

GREGORY S. OAKES, PARISH, FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

MACKENZIE HUGHES LLP, SYRACUSE (RYAN T. EMERY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Oswego County (James W. McCarthy, J.), entered August 3, 2010. The order and judgment awarded plaintiffs money damages upon an inquest.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We add only that, contrary to defendant's contention, the court did not abuse its discretion in permitting the licensed real estate broker called by plaintiffs to testify as an expert with respect to the damages sustained by them based on the loss of use of their property (*see generally Steinbuch v Stern*, 2 AD3d 709, 710). Further, we note that the court did not err in assessing those damages based upon the testimony of plaintiffs' expert, which was not challenged by any opposing expert testimony presented by defendant (*see Matter of Lawrence v 5 Harrison Assoc.*, 295 AD2d 131, 132).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

567

KA 09-00278

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK M. FARO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FREDERICK M. FARO, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered November 26, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). To the extent that defendant contends in his main and pro se supplemental briefs that he was denied his statutory right to a speedy trial pursuant to CPL 30.30, that contention is forfeited by his plea of guilty (*see People v O'Brien*, 56 NY2d 1009, 1010; *People v Tracey*, 13 AD3d 1174, *lv denied* 4 NY3d 836). Although the further contention of defendant in his main and pro se supplemental briefs that he was denied his constitutional right to a speedy trial survives the guilty plea (*see People v Allen*, 86 NY2d 599, 602; *People v Woodruff*, 9 AD3d 896, *lv denied* 3 NY3d 713; *People v Robinson*, 1 AD3d 1019, *lv denied* 2 NY3d 745), it must be preserved for our review (*see People v Mayo*, 45 AD3d 1361, 1362). Even assuming, arguendo, that the brief reference to CPL 30.20 in defendant's omnibus motion was sufficient to preserve that contention for our review, we conclude that it is without merit. Upon consideration of the factors set forth in *People v Taranovich* (37 NY2d 442, 445), we conclude that the seven-month delay at issue, the majority of which was at the request of defendant or with his consent, did not violate defendant's right to a speedy trial.

The sentence is not unduly harsh or severe. We have considered

the remaining contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

568

KA 10-00558

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DIETRICH WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered February 4, 2010. 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.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

569

KA 08-02026

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ADAM J. WELSHER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), rendered January 17, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

571

KA 07-01844

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY WILLIAMS, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered June 27, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

572

KA 10-01435

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID W. NEWBOULD, DEFENDANT-APPELLANT.

M THOMAS SCOTT & ASSOCIATES, GRAND ISLAND (MARY THOMAS SCOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered May 17, 2010. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]), defendant contends that the plea was involuntary because County Court failed to inform him that his sentence would be served consecutively to any previously imposed term of incarceration. By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve that contention for our review (*see People v Tantao*, 41 AD3d 1274, *lv denied* 9 NY3d 882; *People v Aguayo*, 37 AD3d 1081, *lv denied* 8 NY3d 981). In any event, that contention is without merit because defendant failed to establish that he had an undischarged sentence to which the sentence imposed upon his grand larceny conviction would be served consecutively (*cf. People v Morbillo*, 56 AD3d 694, *lv denied* 12 NY3d 786, 788; *People v Bobo*, 41 AD3d 129, *lv denied* 9 NY3d 873).

Defendant further contends that defense counsel was ineffective because he failed to preserve for our review defendant's contention with respect to the voluntariness of the plea. " 'Deprivation of appellate review . . . does not per se establish ineffective assistance of counsel' . . . but, rather, a defendant must also show that his or her contention would be meritorious upon appellate review" (*People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922). Here, defendant failed to make such a showing because his contention

regarding the voluntariness of the plea is without merit.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

573

KA 10-01146

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GARY D. LITZENBERGER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Eric R. Adams, A.J.), entered October 21, 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 unanimously affirmed without costs.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

578

CA 11-00017

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

ROBIN GODLEWSKI, AS PARENT AND NATURAL GUARDIAN OF KRISTEN GODLEWSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CARTHAGE CENTRAL SCHOOL DISTRICT AND DIANE GIBEAU, DEFENDANTS-RESPONDENTS.

STANLEY LAW OFFICES, LLP, SYRACUSE (PAUL STYLIANOU OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), dated April 8, 2010 in a personal injury action. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff, as parent and natural guardian of her daughter, commenced this action seeking damages for injuries allegedly sustained by her daughter when she fell out of her seat in a school bus owned by defendant Carthage Central School District and operated by defendant Diane Gibeau. We agree with plaintiff that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint. Defendants cannot establish their entitlement to summary judgment dismissing the complaint by pointing to alleged gaps in plaintiff's proof (*see generally Orcutt v American Linen Supply Co.*, 212 AD2d 979). Even assuming, arguendo, that defendants met their initial burden on the motion, we conclude that plaintiff raised triable issues of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In opposition to the motion, plaintiff submitted, inter alia, the deposition testimony of her daughter that the bus was traveling at an unsafe speed and that the accident occurred when the bus made a sudden turn at that speed (*see DiSalvatore v New York City Tr. Auth.*, 45 AD3d 402). Further, "[a]lthough there are some inconsistencies between the affidavits submitted by plaintiff[] in opposition to the motion and [the] deposition testimony [of her daughter], we reject defendant[s'] contention under the circumstances of this case that those affidavits [and that deposition testimony] are

an attempt to raise feigned issues of fact . . . Any such inconsistencies present credibility issues to be resolved at trial" (*Dietzen v Aldi Inc. [New York]*, 57 AD3d 1514, 1514).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

582

CA 10-02338

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

VICKI JEWETT AND JOHN JEWETT,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

M.D. FRITZ, INC., DOING BUSINESS AS THE
BURGUNDY ROOM RESTAURANT & LOUNGE,
DEFENDANT-APPELLANT-RESPONDENT,
BARZMAN, KASIMOV & VIETH, D.D.S., P.C.,
B.K.V. REALTY CO., LLC, DEFENDANTS-RESPONDENTS,
AND R.M.F. HOLDING CORPORATION,
DEFENDANT-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LAW OFFICES OF TAYLOR & SANTACROSE, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, BUFFALO (PATRICK J. MCCARTHY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeals and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 2, 2010 in a personal injury action. The order denied the cross motion of defendant M.D. Fritz, Inc., doing business as The Burgundy Room Restaurant & Lounge, and the motion and cross motion of R.M.F. Holding Corporation for summary judgment and granted the motion of defendants Barzman, Kasimov & Vieth, D.D.S., P.C., and B.K.V. Realty Co., LLC 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 for injuries sustained by Vicki Jewett (plaintiff) when she slipped and fell on ice in the parking lot of a plaza owned by defendant B.K.V. Realty Co., LLC (BKV Realty). Defendant Barzman, Kasimov & Vieth, D.D.S., P.C. (BKV Dentistry) was the commercial tenant of the plaza. The plaza's parking lot is bordered on one side by a restaurant that is owned by defendant R.M.F. Holding Corporation (RMF Holding) and leased by defendant M.D. Fritz, Inc., doing business as The Burgundy

Room Restaurant & Lounge (Burgundy Room). According to plaintiffs, the parking lot where plaintiff fell was negligently maintained, and defendants created the dangerous condition. Plaintiffs further alleged that RMF Holding and the Burgundy Room had actual or constructive notice of a dangerous or defective condition inasmuch as they permitted water to drain by artificial means, i.e., a downspout attached to the side of the Burgundy Room, into the plaza's parking lot and the water subsequently froze to form an icy condition in the parking lot.

Supreme Court denied RMF Holding's motion for summary judgment on its cross claim against the Burgundy Room and for summary judgment dismissing the complaint against it, as well as its cross motion for summary judgment dismissing the complaint and all cross claims against it, denied the Burgundy Room's cross motion for summary judgment dismissing the complaint and all cross claims against it and granted the motion of BKV Realty and BKV Dentistry for summary judgment dismissing the complaint and all cross claims against them. We affirm.

We reject the contention of RMF Holding on its appeal that the court erred in denying its motion with respect to its cross claim against the Burgundy Room inasmuch as there is a triable issue of fact with respect to the scope of the lease between RMF Holding and the Burgundy Room, i.e., whether it was the intent of the parties to include as part of the leased premises the downspout in question. Reading the lease and the rider to the lease together, we conclude there is an ambiguity with respect to the scope of the Burgundy Room's duty to indemnify RMF Holding that should be determined by the trier of fact (*see Kirby's Grill v Westvale Plaza*, 272 AD2d 978). We further conclude that there is a triable issue of fact whether RMF Holding retained control of the roof, exterior walls and structural walls of the premises, and thus may be liable as an out-of-possession landlord (*see Young v Moran Props.*, 259 AD2d 1037).

We reject the contentions of RMF Holding and the Burgundy Room on their appeals that the court erred in denying those parts of their motion and cross motions for summary judgment dismissing the complaint and all cross claims against them. Although those defendants demonstrated that plaintiff could not identify what specifically caused her to fall, they are unable to establish their entitlement to judgment as a matter of law by noting the gaps in plaintiffs' proof (*see Atkins v United Ref. Holdings, Inc.*, 71 AD3d 1459). Finally, we reject plaintiffs' contention on their cross appeal that the court erred in granting the motion of BKV Dentistry and BKV Realty for summary judgment dismissing the complaint and all cross claims against them. Those defendants met their initial burden of establishing that they did not have actual or constructive knowledge of the icy condition allegedly created by the downspout (*see Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857), and plaintiffs failed to raise a triable issue of fact in opposition (*see generally*

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

584

CA 10-02303

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

IN THE MATTER OF NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, PETITIONER-APPELLANT,

V ORDER

TOWN OF NIAGARA ASSESSOR, TOWN OF NIAGARA BOARD OF ASSESSMENT REVIEW, TOWN OF NIAGARA AND COUNTY OF NIAGARA, RESPONDENTS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, ALBANY (MARK D. LANSING OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 3, 2010 in proceedings pursuant to CPLR article 78 and RPTL article 7. The judgment denied the petitions and awarded respondents statutory costs.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

585

CA 10-01957

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

IN THE MATTER OF THE ESTATE OF SALVATORE J. SCAMACCA, DECEASED.

FRANK SCAMACCA AND SALVATORE SCAMACCA, AS EXECUTORS OF THE ESTATE OF SALVATORE J. SCAMACCA, DECEASED, PETITIONERS-APPELLANTS,

ORDER

V

DOLORES LEON, RESPONDENT-RESPONDENT.

STEINER & BLOTNIK, BUFFALO (CRAIG BEIDEMAN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

Appeal from a decree of the Surrogate's Court, Erie County (Barbara Howe, S.), entered January 15, 2010. The decree denied and dismissed the petition.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

587.1

CA 11-00157

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

EUGENE MARGERUM, ANTHONY HYNES, JOSEPH FAHEY, TIMOTHY HAZELET, PETER KERTZIE, PETER LOTOCKI, SCOTT SKINNER, THOMAS REDDINGTON, TIMOTHY CASSEL, MATTHEW S. OSINSKI, MARK ABAD, BRAD ARNONE, AND DAVID DENZ, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF FIRE, AND LEONARD MATARESE, INDIVIDUALLY AND AS COMMISSIONER OF HUMAN RESOURCES FOR CITY OF BUFFALO, DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered November 29, 2010. The order, inter alia, granted those parts of plaintiffs' motion seeking partial summary judgment on liability against defendants City of Buffalo and City of Buffalo Department of Fire.

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

Memorandum: Plaintiffs, 13 firefighters employed by defendant City of Buffalo Department of Fire (Fire Department), commenced this action alleging that defendants discriminated against them by allowing promotional eligibility lists created pursuant to the Civil Service Law to expire solely on the ground that plaintiffs, who were next in line for promotion, were Caucasian. On a prior appeal, we determined that Supreme Court erred in granting plaintiffs' cross motion for partial summary judgment on liability but that the court properly denied defendants' motion to dismiss the complaint (*see Margerum v City of Buffalo*, 63 AD3d 1574). Shortly after our decision therein, the United States Supreme Court decided a similar employment discrimination case, *Ricci v DeStefano* (___ US ___, ___, 129 S Ct 2658, 2677), in which it concluded that, "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to

disparate-impact liability if it fails to take the race-conscious, discriminatory action." The Court further stated that "[a]n employer may defend against [such] liability by demonstrating that the practice is 'job related for the position in question and consistent with business necessity' " (*id.* at 2673). We thereafter denied the motion of defendants for leave to renew their motion to dismiss the complaint and the cross motion of plaintiffs for leave to renew their motion for partial summary judgment on liability (*see Margerum v City of Buffalo*, 66 AD3d 1502).

Plaintiffs subsequently moved for partial summary judgment on liability before Supreme Court, and defendants cross-moved for summary judgment dismissing the complaint. The court, inter alia, granted those parts of plaintiffs' motion on liability with respect to defendant City of Buffalo and the Fire Department (collectively, City defendants). We affirm. We agree with the court that the City defendants did not have a strong basis in evidence to believe that they would be subject to disparate-impact liability if they failed to take the race-conscious action, i.e., allowing the eligibility lists to expire, inasmuch as the examinations in question were job-related and consistent with business necessity (*see Ricci*, ___ US at ___, 129 S Ct at 2678). Thus, the City defendants failed to meet the standard set forth in *Ricci*, and plaintiffs are entitled to summary judgment on liability against them (*see Matter of Buffalo Professional Firefighters Assn., Inc., IAFF Local 282 [City of Buffalo]*, 79 AD3d 1737).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

587

CA 10-02504

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

DAVID STEPHAN, PLAINTIFF-APPELLANT,

V ORDER

LIBERTY MUTUAL FIRE INSURANCE COMPANY
AND NANCY HESS-KOLLER, DEFENDANTS-RESPONDENTS.

HOGAN WILLIG, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (ANDREA SCHILLACI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 15, 2010. The order granted defendants' motion to dismiss the complaint.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

589

KA 10-00727

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONY L. SPENCER, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, 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 (Thomas G. Leone, J.), rendered October 8, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (four counts) and criminal possession of a controlled substance in the third degree (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of four counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Contrary to defendant's contention, County Court properly granted the People's request to amend the indictment to delete language identifying the buyer as an undercover police officer. That amendment "did not change the theory of the prosecution, nor did it 'otherwise tend to prejudice the defendant on the merits' " (*People v Brink*, 31 AD3d 1139, 1140, *lv denied* 7 NY3d 865, quoting CPL 200.70 [1]; *see People v Waxter*, 268 AD2d 899, 900; *People v Brown*, 196 AD2d 428, 429-430, *lv denied* 82 NY2d 804). We further conclude that the court's imposition of consecutive sentences is not unduly harsh or severe.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

591

KA 10-01111

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY A. BROWN, DEFENDANT-APPELLANT.

MICHAEL F. DONNELLY, SYRACUSE, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered April 19, 2010. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of rape in the third degree (Penal Law § 130.25 [2]), defendant contends that County Court improperly considered prior criminal charges that did not result in convictions when it imposed sentence and thus that the sentence is illegal. Defendant's valid waiver of the right to appeal does "not encompass the right to challenge the legality of the sentencing procedure on appeal" (*People v Nicholson*, 237 AD2d 973, 974, *lv denied* 90 NY2d 908), nor is preservation required to challenge the legality of a sentence (*see generally People v Samms*, 95 NY2d 52, 56). Nevertheless, the record does not support defendant's contention.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

593

KA 10-01015

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW P. SHUBERT, DEFENDANT-APPELLANT.

LAW OFFICES OF MAURICE J. VERRILLO, P.C., ROCHESTER (MAURICE J. VERRILLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered May 11, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted 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 upon his plea of guilty of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [4]), defendant contends that his waiver of the right to appeal was not knowing and voluntary. Even assuming, arguendo, that the waiver of the right to appeal is invalid (*see generally People v Lopez*, 6 NY3d 248, 256-257), we nevertheless conclude that none of defendant's contentions on appeal requires reversal or modification. Contrary to defendant's contention, the sentence is not unduly harsh or severe. In addition, by failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his further contentions that the plea allocution was factually insufficient (*see People v Lopez*, 71 NY2d 662, 665), and that the plea was not knowing and voluntary (*see People v Cruz*, 81 AD3d 1300). In any event, the record establishes that those contentions are without merit. Finally, to the extent that defendant's contention that he was denied effective assistance of counsel is not forfeited by his plea of guilty (*see People v Brown*, 63 AD3d 1650), that contention also is without merit (*see generally People v Ford*, 86 NY2d 397, 404). Defense counsel obtained an advantageous plea offer and requested several breaks during the plea proceeding in order to address defendant's questions and concerns. Indeed, defendant assured County Court that he was satisfied with the

representation that he received from defense counsel.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

594

KA 08-00132

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE T. LESTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered November 19, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that County Court erred in limiting his cross-examination of a prosecution witness. Defendant failed to preserve that contention for our review (*see People v George*, 67 NY2d 817, 818-819; *People v Rookey*, 292 AD2d 783, *lv denied* 98 NY2d 701), and in any event it is without merit. "It is well settled that [t]he scope of cross-examination is within the sound discretion of the trial court" (*People v Bryant*, 73 AD3d 1442, 1443, *lv denied* 15 NY3d 850 [internal quotation marks omitted]). Here, the court did not abuse its discretion because there was no good-faith basis for the question at issue (*see People v Baker*, 294 AD2d 888, 889, *lv denied* 98 NY2d 708) and, moreover, the court's refusal to allow defendant to ask the prosecution witness that single question cannot be said to have affected the outcome of the trial (*see Bryant*, 73 AD3d at 1443).

We further reject defendant's contention that the court erred in permitting an investigating officer to testify concerning an out-of-court statement made by an unidentified witness. That out-of-court statement was properly admitted because it was offered "not for [its] truth, but for the fact [that it was] made" (*People v Mastin*, 261 AD2d 892, 894, *lv denied* 93 NY2d 1022). As the court properly explained in its limiting instruction to the jury, the testimony of the investigating officer that is challenged by defendant was admitted "for the 'nonhearsay purpose of completing the narrative of events and

explaining police actions' " (*People v Vazquez*, 28 AD3d 1100, 1101, *lv denied* 9 NY3d 965; *see People v Tosca*, 98 NY2d 660). In any event, any error with respect to the admission of that testimony is harmless (*see Vazquez*, 28 AD3d at 1101).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

595

KA 07-01561

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH B. KILBURY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered March 2, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the first degree (two counts), sexual abuse in the first degree (three counts), rape in the third degree (two counts), endangering the welfare of a child, sexual abuse in the second degree (two counts) and sexual abuse in the third degree (three counts).

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 two counts each of rape in the first degree (Penal Law § 130.35 [1]), rape in the third degree (§ 130.25 [2]), and sexual abuse in the second degree (§ 130.60 [2]), three counts each of sexual abuse in the first degree (§ 130.65 [1]) and sexual abuse in the third degree (§ 130.55), and one count of endangering the welfare of a child (§ 260.10 [1]), defendant contends that he was denied effective assistance of counsel. We reject that contention (*see generally People v Baldi*, 54 NY2d 137, 147). Specifically, the fact that defense counsel did not move pursuant to CPL 200.20 (2) (c) to sever the two counts of the indictment stemming from an incident in 1998 from the 11 counts stemming from an incident in 2001 against the same victim does not constitute ineffective assistance of counsel. "Defendant has not shown that a [severance] motion, if made, would have been successful and thus has failed to establish that defense counsel was ineffective in failing to make such a motion" (*People v Borcyk*, 60 AD3d 1489, 1490, *lv denied* 12 NY3d 923). We reject defendant's further contention that defense counsel was ineffective in failing to call an expert witness on the subject of child sexual abuse accommodation syndrome. "Defendant has not demonstrated that such testimony was available, that it would have assisted the jury in its

determination or that he was prejudiced by its absence" (*People v Castricone*, 224 AD2d 1019, 1020; *see People v Brandi E.*, 38 AD3d 1218, 1219, *lv denied* 9 NY3d 863). We agree with defendant, however, that defense counsel should have objected to a prosecutorial comment on summation that had the potential to deflect the attention of the jurors from the issues of defendant's guilt or innocence and to "cause them instead to focus on protecting the victim and correcting an alleged error in the child protective system" (*People v Ballerstein*, 52 AD3d 1192, 1194). Nevertheless, we conclude that the failure of defense counsel to object to that isolated comment, which "was not so egregious or improper as to deny defendant a fair trial" (*People v Walker*, 50 AD3d 1452, 1453, *lv denied* 11 NY3d 795, 931), did not render defense counsel ineffective (*see generally Baldi*, 54 NY2d at 147). With respect to the remaining instances of alleged ineffective assistance advanced by defendant, we conclude that he has failed to establish " 'the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712).

Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, [we] must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, quoting *Bleakley*, 69 NY2d at 495). Although an acquittal would not have been unreasonable given the inconsistencies in the victim's testimony, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495). We further conclude that the sentence is not unduly harsh or severe.

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of two counts of endangering the welfare of a child and one count of sexual abuse in the second degree and was sentenced as a second felony offender. The certificate of conviction must therefore be amended to reflect that defendant was convicted of one count of endangering the welfare of a child and two counts of sexual abuse in the second degree and that he was sentenced as a second violent felony offender (*see People v Martinez*, 37 AD3d 1099, 1100, *lv denied* 8 NY3d 947).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

596

KA 07-00531

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ORLANDO HERNANDEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered December 11, 2006. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]). Although County Court was required to sentence defendant to a five-year period of postrelease supervision based upon his status as a second felony offender (*see* § 70.45 [former (2)]; *People v Motley* [appeal No. 3], 56 AD3d 1158, 1159), at the plea the court informed defendant only that he would be sentenced to the "minimum" period of postrelease supervision. Because the court failed to specify the period of postrelease supervision or the permissible range of postrelease supervision prior to imposing sentence, reversal is required (*see People v Thomas*, 68 AD3d 1445, 1446-1447). We reject the People's contention that defendant was required to preserve his challenge to the voluntariness of the plea based on the court's failure, prior to sentencing, to advise him of the period of postrelease supervision to be imposed or the parameters thereof (*see People v Boyd*, 12 NY3d 390, 393; *People v Louree*, 8 NY3d 541, 545-546). "When a defendant is not made aware of mandatory postrelease supervision—or the specific duration or range of that component of postrelease supervision—prior to the imposition of sentence, the voluntariness of the plea may be challenged on appeal even absent preservation of the issue by postallocution motion" (*People v Lee*, 80

AD3d 1072, 1073; *see People v Murray*, 15 NY3d 725).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

597

KA 09-02442

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRIAN COLLINS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered November 18, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

598

TP 10-01858

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

IN THE MATTER OF ANNE N. ZICKL, PETITIONER,

V MEMORANDUM AND ORDER

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

LAW OFFICES OF RANDOLPH P. ZICKL, BATAVIA (RANDOLPH P. ZICKL OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Genesee County [Michael F. Griffith, A.J.], entered September 8, 2010) to review a determination of respondent. The determination applied a net available monthly income of $292.28 toward the cost of petitioner's institutional care.

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

Memorandum: Petitioner, a patient in a skilled nursing facility, commenced this CPLR article 78 proceeding seeking to annul the determination that she is obligated to apply her net available monthly income in the amount of $292.28 to her institutional care, rather than to the needs of her spouse who resides in the community. As a preliminary matter, we note that the matter was improperly transferred to this Court inasmuch as the petition alleges only that the determination is arbitrary and capricious and does not raise an issue of substantial evidence (*see* CPLR 7804 [g]). Nevertheless, we review the merits of petitioner's contention in the interest of judicial economy (*see Matter of Burgin v Keane*, 19 AD3d 1127).

The underlying facts are not in dispute. In the fair hearing conducted by respondent, petitioner relied upon *Matter of Balzarini v Suffolk County Dept. of Social Servs.* (55 AD3d 187, *revd* 16 NY3d 135), before that case was reversed by the Court of Appeals. In relying on the decision of the Second Department, petitioner contended that the recurring monthly expenses of her spouse exceeding the "Medicaid minimum monthly maintenance needs allowance" may be considered to be exceptional circumstances that result in significant financial distress within the meaning of 18 NYCRR 360-4.10 (a) (10). Those

recurring monthly expenses of petitioner's spouse included mortgage payments, real property taxes, credit card payments and the cost of utilities. In reversing the decision in *Balzarini*, however, the Court of Appeals held "that 'exceptional circumstances' causing 'significant financial distress' within the meaning of the joint federal-state Medicaid program do not encompass everyday living expenses in excess of the 'minimum monthly maintenance needs allowance' . . ., an amount deemed sufficient by Congress for an individual to live in the community after his or her spouse residing in a nursing home becomes eligible for Medicaid" (*id*. at 138-139; *see Matter of Schachner v Perales*, 85 NY2d 316, 325). Thus, we confirm the determination.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

599

CAF 10-01710

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

IN THE MATTER OF CHEYENNE M.

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

CHARLIE M., RESPONDENT-APPELLANT,
AND MELANIE M., RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered July 15, 2010 in a proceeding pursuant to Family Court Act article 10. The order granted petitioner’s motion for summary judgment.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

601

CAF 10-00596

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

IN THE MATTER OF WILLIAM C.B.

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

JUDY B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

CHARLES J. GREENBERG, BUFFALO, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered February 2, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order terminating her parental rights with respect to her son on the ground of mental illness. Contrary to the mother's contention, we conclude that petitioner met its burden of demonstrating by clear and convincing evidence that she is "presently and for the foreseeable future unable, by reason of mental illness . . ., to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4] [c]; *see Matter of Anthony C.*, 280 AD2d 1000). The mother's further contention in appeal No. 1 that Family Court erred in failing to conduct a separate dispositional hearing is unpreserved for our review and, in any event, that contention lacks merit (*see Matter of Keyarei M.*, 71 AD3d 1510, *lv denied* 14 NY3d 712).

In appeal No. 2, the mother appeals from an order denying her pro se motion seeking to vacate the order in appeal No. 1. To the extent that the motion was based upon newly discovered evidence, the mother failed to show that such evidence could not have been discovered previously by the exercise of due diligence, or that it would have altered the outcome of the proceeding (*see Matter of Catapano*, 17 AD3d 673, 674). Nor did the mother demonstrate that she was deprived of

effective assistance of counsel, the alternative ground alleged by the mother for vacatur (*see generally Matter of Leo UU.*, 288 AD2d 711, 713, *lv denied* 97 NY2d 609).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

602

CAF 10-00597

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

IN THE MATTER OF WILLIAM C.B.

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

JUDY B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CHARLES J. GREENBERG, BUFFALO, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Patricia A. Maxwell, J.), entered February 4, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order denied the motion of respondent to vacate the order terminating her parental rights.

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

Same Memorandum as in *Matter of William C.B.* ([appeal No. 1] ___ AD3d ___ [Apr. 29, 2011]).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

603

CAF 10-00916

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

IN THE MATTER OF THOR C.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CAROL C., RESPONDENT-APPELLANT.

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

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

SCHAVON R. MORGAN, ATTORNEY FOR THE CHILD, MACHIAS, FOR THOR C.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered March 29, 2010 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected the subject child.

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, Cattaraugus County, for a new fact-finding hearing on the issue of respondent's alleged neglect of her son.

Memorandum: Respondent mother appeals from an order that, inter alia, adjudged that she neglected her son. We agree with the mother that Family Court violated her right to due process by refusing to permit her to testify during the fact-finding phase of the proceeding (*see Matter of Patricia C.*, 63 AD3d 1710, 1711; *Matter of Barbara R.*, 66 AD2d 800). "The right to be heard is fundamental to our system of justice . . . [and p]arents have an equally fundamental interest in the liberty, care and control of their children" (*Matter of Jung [State Commn. on Jud. Conduct]*, 11 NY3d 365, 372-373). The court's order was based on, inter alia, a prior order in which it found that the mother neglected her son's three siblings based in part on her failure to take appropriate action with respect to those children when she was informed that one of them had been sexually abused by their father, and we affirmed that prior order (*Matter of Annastasia C.*, 78 AD3d 1579, *lv denied* ___ NY3d ___ [Mar. 31, 2011]). The mother's son, however, was not a subject of the proceeding resulting in that prior order, and the mother therefore should have been afforded an opportunity to be heard in response to the new evidence offered by petitioner in the instant proceeding (*see Patricia C.*, 63 AD3d at

1711).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

604

CA 10-02139

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

MICHAEL SELAK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CLOVER MANAGEMENT, INC. AND CALDWELL BUILDING LLC, DEFENDANTS-RESPONDENTS.

CLOVER MANAGEMENT, INC. AND CALDWELL BUILDING LLC, THIRD-PARTY PLAINTIFFS,

V

INNOVATIVE MECHANICAL SERVICES, INC., THIRD-PARTY DEFENDANT.

CANTOR, LUKASIK, DOLCE & PANEPINTO, BUFFALO, LAWRENCE A. SCHULZ, ORCHARD PARK, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered January 11, 2010 in a personal injury action. The order, among other things, granted defendants' motion for summary judgment dismissing plaintiff's complaint.

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, as amplified by plaintiff's response to defendants' interrogatories and plaintiff's bill of particulars, insofar as it alleges a violation of Labor Law § 200 and common-law negligence and reinstating those parts of the complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while working at premises owned by defendant-third-party plaintiff Caldwell Building LLC and managed by defendant-third-party plaintiff Clover Management, Inc. (Clover). Clover contracted with third-party defendant, plaintiff's employer, to change the HVAC system from heating to cooling, and plaintiff was on the premises on the date of his injury in order to replace the filters in the system. The HVAC system was located on the roof of the building, and a hatch located in the ceiling provided access to the roof. Plaintiff was to access the system by means of an 11-foot ladder that was secured to the wall at

the top of the stairwell where the hatch was located. Plaintiff was injured when he fell from the ladder, went over a three-foot-high guard railing that was located approximately 2½ feet behind the ladder, and fell into the stairwell and onto the concrete stairs one story below. As limited by his brief, plaintiff contends that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint, as amplified by plaintiff's response to defendants' interrogatories and plaintiff's bill of particulars, insofar as it alleges the violation of Labor Law §§ 200 and 240 (1), and common-law negligence.

Contrary to plaintiff's contention, the court properly determined that he was engaged in routine maintenance at the time of his injury and thus that he was not engaged in an enumerated activity protected by Labor Law § 240 (1) inasmuch as he was ascending the ladder in order to replace the filters in the HVAC unit (*see Wicks v Trigen-Syracuse Energy Corp.*, 64 AD3d 75, 78-79; *cf. Panek v County of Albany*, 99 NY2d 452, 455). Plaintiff's employer testified at his deposition that the filters were changed two to four times per year, and thus defendants established that the filters required replacement as a result of normal wear and tear (*see Abatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53; *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528; *cf. Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1728-1729; *Buckmann v State of New York*, 64 AD3d 1137, 1139), and plaintiff failed to raise an issue of fact whether that activity was protected under Labor Law § 240 (1) (*cf. Pieri*, 74 AD3d at 1728-1729; *Pakenhan v Westmere Realty LLC*, 58 AD3d 986, 987-988).

We agree with plaintiff, however, that the court erred in granting those parts of defendants' motion for summary judgment dismissing the complaint, as amplified by plaintiff's response to defendants' interrogatories and plaintiff's bill of particulars, insofar as it alleges a violation of Labor Law § 200 and common-law negligence. We therefore modify the order accordingly. "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law" (*Lombardi v Stout*, 80 NY2d 290, 295). Defendants, however, may be liable for common-law negligence or the violation of Labor Law § 200 if they "had actual or constructive notice of the allegedly dangerous condition on the premises which caused the . . . plaintiff's injuries, regardless of whether [they] supervised plaintiff's work" (*Konopczynski v ADF Constr. Corp.*, 60 AD3d 1313, 1314 [internal quotation marks omitted]; *see McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582). Here, defendants established that the ladder was properly secured to the wall and that plaintiff's action in carrying the filters caused him to fall from the ladder. Nevertheless, plaintiff's injuries were caused by falling over the three-foot-high guard railing to the concrete stairs below. Thus, even assuming, arguendo, that defendants established as a matter of law that they kept their premises in a reasonably safe condition, we conclude that plaintiff raised an issue of fact whether his injuries "resulted from a hazardous condition at the work site[, i.e., the three-foot-high

guard railing located approximately 2½ feet directly behind the 11-foot ladder], rather than from the manner in which the work [was] being performed" (*McCormick*, 78 AD3d at 1582). Furthermore, inasmuch as Clover's employee who managed the building had accessed the roof from the ladder on several prior occasions, we conclude that plaintiff raised an issue of fact whether defendants had constructive notice of the alleged dangerous condition (*see Kobel v Niagara Mohawk Power Corp.*, ___ AD3d ___ [Apr. 1, 2011]; *Konopczynski*, 60 AD3d at 1315; *cf. Militello v New Plan Realty Trust*, 16 AD3d 1092).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

606

CA 10-02497

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

RUSTIN R. HOWARD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BIOWORKS, INC., DEFENDANT-APPELLANT.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (STEVEN E. COLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered March 11, 2010 in a breach of contract action. The order granted the motion of plaintiff for summary judgment on the issue of liability and otherwise denied the motion of plaintiff and the cross motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this breach of contract action alleging that defendant failed to pay him deferred compensation in the amount of $19,800 for prior services that he performed in accordance with the parties' written agreement. Pursuant to the agreement, defendant was obligated to pay plaintiff that sum "only at a time or times determined by [defendant's] Board of Directors . . . in its sole and absolute discretion, after consideration of [its] liquidity and financial performance." The agreement also provided in relevant part that, "[a]s a material part of the consideration for this agreement [for deferred compensation]," plaintiff agreed to release, inter alia, defendant and its officers from "all claims or causes of action" that plaintiff had or may have in the future by reason of his employment with defendant. It is undisputed that defendant has not yet satisfied the obligation owed to plaintiff.

Plaintiff thereafter moved for summary judgment on the complaint, seeking the amount of $19,800 plus interest for deferred compensation, and defendant cross-moved for summary judgment dismissing the complaint. We conclude that Supreme Court properly granted that part of plaintiff's motion for summary judgment on liability only, inasmuch as there is an issue of fact with respect to the amount of damages, and denied defendant's cross motion. The record establishes as a matter of law that there was an anticipatory repudiation of the agreement by defendant, based on defendant's " 'overt communication of

intention' not to perform" agreed-upon obligations (*Tenavision, Inc. v Neuman*, 45 NY2d 145, 150; *see generally Long Is. R.R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 463-464; *Ryan v Corbett*, 30 AD3d 1062, 1063). Indeed, the record establishes that, when plaintiff inquired whether defendant intended to satisfy the obligation in question, he was informed in writing by defendant's president that, upon considering the matter, "the Board did not believe that paying [plaintiff the amount allegedly due] was a proper use of corporate funds." Furthermore, the Board issued a resolution providing that "after consideration of the applicable six-year contract statute of limitations . . . this account should be removed from the liability section of this corporation's balance sheet." We thus conclude that defendant thereby unequivocally communicated its intent not to perform under the agreement (*see Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 462-463; *Tenavision, Inc.*, 45 NY2d at 150; *see generally O'Connor v Sleasman*, 14 AD3d 986, 987-988). Our conclusion is further supported by the fact that the record contains an affidavit of defendant's president asserting "that it was unlikely that [defendant] would ever make payments to plaintiff under [the a]greement." Plaintiff is therefore entitled to damages for total breach (*see Long Is. R.R. Co.*, 41 NY2d at 463).

Contrary to defendant's further contentions, we conclude that the doctrine of anticipatory repudiation applies to the agreement in question. The agreement was bilateral in nature, rather than unilateral (*id.* at 463-464), and was not for the payment of money only, inasmuch as plaintiff agreed to release all claims he may have had against defendant in consideration for the deferred compensation (*id.* at 466). "The question is whether, at the time of the repudiation, there existed some dependency of obligation . . . If the obligations are interdependent, a claim may lie to recover money payable in the future" (*id.*). Defendant's reliance on *Sodus Mfg. Corp. v Reed* (94 AD2d 932) is misplaced. In that case, the defendants had no "future obligations under the contract" at issue because the defendant promisor died, effectively terminating her contractual obligations to perform services and to refrain from competing with one of the plaintiffs (*id.* at 933).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

609

CA 10-01807

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

FS KIDS, LLC, DOING BUSINESS AS BUDWEY'S FOOD MARKET, MASK FOODS, INC., VALU HOME CENTERS, INC., KBLM FOODS, INC., DOING BUSINESS AS BLASDELL JUBILEE, KDJB FOODS, INC., DOING BUSINESS AS SAVE-A-LOT LACKAWANNA, GAIGE & SON GROCERY, INC., DOING BUSINESS AS CORNING JUBILEE, TJ'S MARKET, INC., DOING BUSINESS AS HORSEHEADS JUBILEE, BB&T SUPERMARKETS INC., DOING BUSINESS AS ATTICA JUBILEE, BNR-LARSON, LLC, DOING BUSINESS AS CORFU IGA, AND GIFT EXPRESS OF NEW YORK, INC., DOING BUSINESS AS THE MARKET IN THE SQUARE, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AS THEY, AS FORMER EMPLOYEE MEMBERS/PARTICIPANTS IN THE WHOLESALE AND RETAIL WORKERS' COMPENSATION TRUST OF NEW YORK, PLAINTIFFS-APPELLANTS,

ORDER

V

COMPENSATION RISK MANAGERS, LLC, DEFENDANT-RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (ERIC M. SOEHNLEIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered August 4, 2009 in a breach of contract action. The order, among other things, denied plaintiffs' motion to supplement the record.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on March 30, 2011,

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

Entered: April 29, 2011

Patricia L. Morgan
Clerk of the Court

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

611

KA 08-00653

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHASE SINCLAIR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered February 20, 2008. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [5]). Contrary to defendant's contention, County Court "properly set forth on the record its determination that defendant should not be afforded youthful offender status . . .[,] as well as its reasons for that determination" (*People v Smith*, 21 AD3d 1342, 1342). The court explicitly stated at sentencing that it was denying defendant youthful offender treatment as a result of his violation of the condition of the plea agreement that he would not be arrested before sentencing, and we conclude that the court properly exercised its discretion in making that determination (*see People v Hall*, 38 AD3d 1289; *see also People v Eberling*, 256 AD2d 1217, *lv denied* 93 NY2d 852; *People v Bailey*, 215 AD2d 769, *lv denied* 86 NY2d 840). We decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Randleman*, 60 AD3d 1358, *lv denied* 12 NY3d 919; *People v Martinez*, 55 AD3d 1334, *lv denied* 11 NY3d 927). The enhanced sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

612

KA 09-01801

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMAR O. ADGER, DEFENDANT-APPELLANT.

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

LAMAR O. ADGER, DEFENDANT-APPELLANT PRO SE.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 17, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [3]). We agree with defendant that his waiver of the right to appeal is invalid inasmuch as County Court's "single reference to [the] right to appeal is insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, *lv denied* 98 NY2d 767; *see People v Springstead*, 57 AD3d 1397, *lv denied* 12 NY3d 788; *People v Newman*, 21 AD3d 1343). Thus, defendant's contention that the court erred in refusing to suppress certain physical evidence on the ground that it was illegally seized is not encompassed by the invalid waiver of the right to appeal. That contention, however, is raised for the first time on appeal and thus is not preserved for our review (*see generally People v Howard*, 71 AD3d 1443, *lv denied* 15 NY3d 751; *People v Dumbleton*, 67 AD3d 1451, *lv denied* 14 NY3d 770; *People v Buckman*, 66 AD3d 1400, 1401, *lv denied* 13 NY3d 937), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Even assuming, arguendo, that defendant's general challenge to the stop and subsequent search was sufficient to preserve his present contention that the seizure of certain physical evidence was unlawful, defendant correctly concedes that he abandoned that contention before the

suppression court (*see generally People v Anderson*, 52 AD3d 1320, 1321, *lv denied* 11 NY3d 733; *People v Smith*, 13 AD3d 1121, 1122, *lv denied* 4 NY3d 803).

We reject the contention of defendant in his pro se supplemental brief that the court failed to make an appropriate inquiry into his complaints concerning defense counsel and in response to his request for substitution of counsel. Defendant "did not establish a serious complaint concerning defense counsel's representation and thus did not suggest a serious possibility of good cause for substitution [of counsel]" (*People v Randle* [appeal No. 2], 21 AD3d 1341, 1341, *lv denied* 6 NY3d 757 [internal quotation marks omitted]; *see People v Velasquez*, 66 AD3d 1460, *lv denied* 13 NY3d 938, 942; *People v Moore*, 41 AD3d 1149, 1150-1151, *lv denied* 9 NY3d 879, 992). In any event, we conclude that the court made the requisite " 'minimal inquiry' " into defendant's reasons for requesting new counsel (*People v Porto*, 16 NY3d 93, 100; *see People v Russell*, 55 AD3d 1314, 1315, *lv denied* 11 NY3d 930; *People v Washington*, 38 AD3d 1339, 1340, *lv denied* 9 NY3d 870). "[T]he court afforded defendant the opportunity to express his objections concerning [defense counsel], and the court thereafter reasonably concluded that defendant's . . . objections had no merit or substance" (*People v Singletary*, 63 AD3d 1654, *lv denied* 13 NY3d 839 [internal quotation marks omitted]).

Defendant further contends in his pro se supplemental brief that he was denied effective assistance of counsel. To the extent that defendant's contention is not forfeited by the plea (*see People v Santos*, 37 AD3d 1141, *lv denied* 8 NY3d 950), it involves matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL 440.10 (*see People v Cobb*, 72 AD3d 1565, 1567, *lv denied* 15 NY3d 803; *People v Slater*, 61 AD3d 1328, 1329-1330, *lv denied* 13 NY3d 749; *People v Lawrence*, 27 AD3d 1120, *lv denied* 6 NY3d 850).

Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

615

KA 10-00826

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONATO NAPPI, DEFENDANT-APPELLANT.

CHRISTOPHER J. PELLI, UTICA (SIMONE M. SHAHEEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN H. CRANDALL, SR., DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered March 15, 2010. The judgment convicted defendant, upon a jury verdict, of 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 upon a jury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's challenge to the legal sufficiency of the evidence before the grand jury "is not properly before us on this 'appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence' " (*People v McCullough*, ___ AD3d ___, ___ [Apr. 1, 2011]). We reject defendant's further contention that the integrity of the grand jury was impaired inasmuch as the People have no duty "to present all evidence in their possession that is favorable to [defendant]" (*People v Lancaster*, 69 NY2d 20, 26, *cert denied* 480 US 922; *see also People v Bean*, 66 AD3d 1386, *lv denied* 14 NY3d 769).

Defendant contends that County Court erred in allowing his wife, a prosecution witness, to give certain testimony because it violated the marital privilege (*see* CPLR 4502 [b]; CPL 60.10; *People v Fediuk*, 66 NY2d 881, 883). We reject that contention inasmuch as defendant's words and actions at issue were in furtherance of a criminal enterprise (*see generally People v Smythe,* 210 AD2d 887, *lv denied* 85 NY2d 943; *People v Watkins*, 63 AD2d 1033, 1034, *lv denied* 45

NY2d 785, *cert denied* 439 US 984). In any event, any error with respect to that testimony is harmless inasmuch as the proof of defendant's guilt was overwhelming and there is no significant probability that he would have been acquitted but for the error (*see People v Marinaccio*, 15 AD3d 932; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Defendant further contends that reversal is required because the evidence at trial with respect to the date of the offense was at variance with the date alleged in the indictment. We reject that contention. "An indictment must contain . . . [a] statement in each count that the offense charged therein was committed on, *or on or about*, a designated date, or during a designated period of time" (CPL 200.50 [6] [emphasis added]). Here, the indictment alleged that the offense occurred "on or about the 5th day of January, 2009." Although evidence was presented at trial with respect to defendant's conduct during a period of time prior to that date, reversal is not required because "[t]he time of the offense is not a material element of the offense and the variance is relatively minor" (*People v Davis*, 15 AD3d 920, 921, *lv denied* 4 NY3d 885, 5 NY3d 787).

The court properly refused to suppress the gun and ammunition that was seized from defendant's residence by his parole officer. A defendant's parole officer may conduct a warantless search where "the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty" (*People v Huntley*, 43 NY2d 175, 181). We conclude that the parole officer's search of the residence was rational and reasonably related to the performance of his duty of preventing "parole violations for the protection of the public from the commission of further crimes" (*id.*; *see People v Maynard*, 67 AD3d 1391, *lv denied* 14 NY3d 890; *People v Johnson*, 54 AD3d 969, 970). The parole officer had a rational and reasonable basis to believe a gun would be located in the residence based on the information given to him by defendant's wife (*see People v Felder*, 272 AD2d 884, *lv denied* 95 NY2d 905), and the fact that police officers assisted after the gun was found by obtaining a warrant to search the remainder of the premises did not render the initial search by the parole officer a police operation (*see Johnson*, 54 AD3d at 970).

Contrary to defendant's contention, the court properly precluded defendant from cross-examining a prosecution witness concerning certain collateral matters. "The trial court has broad discretion to limit the scope of cross-examination when the questions . . . concern collateral issues" (*People v Francisco*, 44 AD3d 870, 870, *lv denied* 9 NY3d 1033; *see People v Neal*, 294 AD2d 869, *lv denied* 98 NY2d 700). Likewise, the court properly precluded defendant from calling certain witnesses to testify inasmuch as that testimony would also have concerned collateral matters. A defendant may not " 'introduce extrinsic evidence on a collateral matter solely to impeach [the] credibility' " of a witness (*People v Simmons*, 21 AD3d 1275, *lv denied* 6 NY3d 781, quoting *People v Alvino*, 71 NY2d 233, 247). Defendant failed to preserve for our review his further contention that the prosecutor engaged in misconduct by introducing evidence of his prior bad acts despite the fact that no *Molineux* hearing had been

conducted inasmuch as he never objected to the evidence on that ground (*see People v Fyffe*, 249 AD2d 938, *lv denied* 92 NY2d 897; *People v Thomas*, 226 AD2d 1071, *lv denied* 88 NY2d 995). The majority of defendant's additional contentions regarding alleged instances of prosecutorial misconduct are also unpreserved 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]). We have considered defendant's remaining contentions, including his contention with respect to prosecutorial misconduct insofar as it is preserved for our review, and we conclude that they are without merit.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

616

KA 08-00858

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC J. MCGINNIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered March 13, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that County Court erred in refusing to suppress, inter alia, the weapon seized by the police from his vehicle. "We note at the outset that, although the court issued a bench decision with respect to [those parts of] defendant's omnibus motion [seeking to suppress the weapon found in his vehicle and his statements to the police,] the exception set forth in CPL 710.70 (2) allowing appellate review with respect to orders that finally den[y] a motion to suppress evidence is not applicable because defendant pleaded guilty before the court issued such an order" (*People v Ellis*, 73 AD3d 1433, 1433-1434, *lv denied* 15 NY3d 851 [internal quotation marks omitted]; *see People v Leary*, 70 AD3d 1394, *lv denied* 14 NY3d 889). In any event, we conclude that defendant's contention is without merit. The record of the suppression hearing establishes that the police officer who pulled over defendant's vehicle for a traffic infraction had a founded suspicion that criminal activity was afoot, and thus he was justified in asking for defendant's consent to search the vehicle (*see People v Lowe*, 79 AD3d 1676; *see also People v Simmons*, 79 AD3d 431; *People v Ward*, 22 AD3d 368, *lv denied* 6 NY3d 782). At the time the police officer asked defendant for his consent, he was aware of defendant's criminal background and had observed defendant leaving in the vehicle from a known drug location at a high rate of speed. Further,

defendant lied about the location from where he was driving. Contrary to defendant's further contention, the record also establishes that he voluntarily consented to the search of the vehicle (*see People v Caldwell*, 221 AD2d 972, *lv denied* 87 NY2d 920; *see generally People v Gonzalez*, 39 NY2d 122, 128).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

617

KA 10-01579

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES KURKOWSKI, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered June 22, 2010. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [4] [reckless assault]), defendant contends that County Court erred in considering assault in the second degree as a lesser included offense of assault in the first degree (§ 120.10 [1] [intentional assault]). We reject that contention. Inasmuch as "the result and underlying conduct of [reckless assault] and [intentional assault are] identical and the only distinction between the two crimes [is] the mental state of the defendant, it is, within the meaning of CPL 1.20 [37] and CPL 300.50, impossible to commit the latter without concomitantly committing the former" (*People v Green*, 56 NY2d 427, 432, *rearg denied* 57 NY2d 775). Thus, contrary to defendant's further contentions, the conviction is not jurisdictionally defective and defense counsel was not ineffective in failing to object to the court's consideration of the lesser included offense. Although we agree with defendant that the court failed to comply with CPL 320.20 (5) because it did not notify the parties that it intended to consider a lesser included offense until after summations, we conclude that such error is harmless (*see People v Harvey*, 249 AD2d 951; *People v Kloska*, 191 AD2d 587; *see generally People v Crimmins*, 36 NY2d 230, 241-242). The theory of the defense was that defendant was not the perpetrator, a theory that applies equally to the offenses of assault in the first degree and assault in the second degree (*see Harvey*, 249 AD2d 951; *People v Peterkin*, 195 AD2d 1015, *lv denied* 82 NY2d 758). Further,

the court offered defense counsel the opportunity to reopen summations for the purpose of addressing the lesser included offense, thus alleviating any possible prejudice to defendant (*see Harvey*, 249 AD2d 951; *Peterkin*, 195 AD2d 1015).

Finally, we conclude that the sentence is not unduly harsh or severe, particularly in light of the serious nature of defendant's conduct and the severe and permanent injuries sustained by the victim.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

620

CAF 10-00705

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

IN THE MATTER OF NICHOLAS B. AND JORDAN B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ELEANOR J., RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, FOR RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR NICHOLAS B. AND JORDAN B.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered March 12, 2010 in a proceeding pursuant to Social Services Law § 384-b. The order terminated respondent's parental rights and freed the subject children for adoption.

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

Memorandum: Respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the children who are the subject of this proceeding on the ground of permanent neglect. We note at the outset that the mother's notice of appeal is premature because it was filed prior to the entry of the order from which the appeal is taken (*see Matter of Danial R.B. v Ledyard M.*, 35 AD3d 1232; *Spano v County of Onondaga*, 170 AD2d 974, *lv denied* 77 NY2d 809, *lv dismissed* 77 NY2d 989). We nevertheless address the merits of the appeal in the exercise of our discretion and in the interest of judicial economy (*see* CPLR 5520 [c]; *Danial R.B.*, 35 AD3d 1232; *Spano*, 170 AD2d 974).

Contrary to the mother's contention, petitioner established by clear and convincing evidence that it exercised diligent efforts to strengthen the mother's relationship with the children (*see generally Matter of Star Leslie W.*, 63 NY2d 136, 142; *Matter of Thomas JJ.*, 20 AD3d 708, 709-710). Petitioner further established that, despite those efforts, the mother "failed substantially and continuously or repeatedly to . . . plan for the future of the child[ren] although . . . able to do so" (*Star Leslie W.*, 63 NY2d at 142; *see Thomas JJ.*, 20 AD3d at 710-711). Although petitioner provided referrals for mental

health services and encouraged the mother to maintain a clean home, the mother did not comply with the requirements that she consistently attend mental health counseling and provide a clean home (*see Matter of Toyie Fannie J.*, 77 AD3d 449; *Matter of Kyle K.*, 49 AD3d 1333, 1335, *lv denied* 10 NY3d 715). Her failure to satisfy those requirements demonstrates her unwillingness " 'to correct the conditions that led to the placement of the children in the custody of petitioner' " (*Kyle K.*, 49 AD3d at 1335).

Contrary to the mother's further contention, petitioner established by a preponderance of the evidence that termination of her parental rights was in the children's best interests (*see Star Leslie W.*, 63 NY2d at 147-148). At the time of the dispositional hearing, the children had been in foster care for approximately six years. Even after her parental rights were terminated, the mother made little progress in complying with the required mental health services, and her limited progress was not enough to warrant any additional delay in providing the children with a stable home (*see Matter of Mikia H.*, 78 AD3d 1575, *lv dismissed in part and denied in part* 16 NY3d 760; *Matter of Melissa DD.*, 45 AD3d 1219, 1221, *lv denied* 10 NY3d 701). Moreover, a suspended judgment was not warranted because "there was no evidence that [the mother] had a realistic, feasible plan to care for the children" (*Toyie Fannie J.*, 77 AD3d 449). We have considered the mother's remaining contention and conclude that it does not warrant reversal of the order.

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

621

CAF 10-00294

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

IN THE MATTER OF JASON L. BROTHERS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HEATHER L. CHAPMAN, RESPONDENT-APPELLANT.

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

ANTHONY CASALE, GLOVERSVILLE, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Herkimer County (Anthony J. Garramone, J.H.O.), entered December 15, 2009 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint custody of their child and granted petitioner primary physical custody.

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

Memorandum: Respondent mother appeals from an order that, inter alia, granted in part the father's cross petition seeking to modify a prior order of custody and visitation by awarding him primary physical custody of the parties' child and visitation to the mother. "Although Family Court erred in failing 'to set forth those facts essential to its decision' . . ., 'the record is sufficiently complete for us to make our own findings of fact in the interests of judicial economy and the well-being of the child[ ]' " (*Matter of Williams v Tucker*, 2 AD3d 1366, 1367, *lv denied* 2 NY3d 705). Based on our review of the record, we conclude that the court properly modified the prior order of custody and visitation.

"It is well settled that '[a] party seeking a change in an established custody arrangement must show a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child' " (*Matter of Moore v Moore*, 78 AD3d 1630, 1630, *lv denied* 16 NY3d 704; *see Matter of Maher v Maher*, 1 AD3d 987, 988-989). "[A]mong the factors to consider in determining whether a change of primary physical custody is warranted are the quality of the home environment and the parental guidance the custodial parent provides for the child . . ., the ability of each parent to provide for the child's emotional and intellectual development . . ., the financial status and ability of each parent to provide for the child . . ., the relative fitness of the respective parents, and the length of time the

present custody arrangement has been in effect" (*Matter of Kristi L.T. v Andrew R.V.*, 48 AD3d 1202, 1204, *lv denied* 10 NY3d 716 [internal quotation marks omitted]; *see Maher*, 1 AD3d at 989).

With respect to the first of those factors, including the quality of the home environment, the evidence presented at the hearing establishes that the mother has repeatedly changed residences. Indeed, on one occasion, the mother returned to and left her estranged husband within the period of one weekend. Further, at the time of the hearing, the mother resided with a paramour who, based on testimony presented at the hearing, has a significant history of domestic violence and irrational behavior (*see Matter of Stacey L.B. v Kimberly R.L.*, 12 AD3d 1124, *lv denied* 4 NY3d 704). In contrast, the evidence adduced at the hearing established that the father had a stable home life.

With respect to the second factor, i.e., the ability of each parent to provide for the child's emotional and intellectual development, the record of the hearing established that the mother was cognizant of the need to improve her parenting skills inasmuch as she began attending parenting classes approximately two months before the hearing. Her transient lifestyle, however, resulted in the child attending three different schools within only a few years. Although we agree with the court that the father should take a greater role in the child's education, the record of the hearing established that he made arrangements for daycare and schooling in anticipation of obtaining physical custody of the child, and he provided books and toys for the child, spent time playing with him and took him to the park.

With respect to the third factor, i.e., the financial status and ability of each parent to provide for the child, the evidence presented at the hearing demonstrated that the father has a steady income. The evidence further demonstrated, however, that the mother had been unemployed for several years and that her income consisted only of public assistance.

With respect to the fourth factor, i.e., the relative fitness of the respective parents and the length of time the present custody arrangement has been in effect, the evidence presented at the hearing established that the mother is a caring parent but that she is committed to living with a paramour she knows to be potentially dangerous and who has a history of domestic violence. The father, however, has provided a safe home environment for the child.

We further conclude that the mother failed to preserve for our review her contention that the court erred in considering certain police reports regarding her current paramour (*see generally Matter of Matthews v Matthews*, 72 AD3d 1631, 1632, *lv denied* 15 NY3d 704). In any event, any such error is harmless inasmuch as we engaged in an independent review of the record and did not rely on those reports in reaching our determination (*see generally id.*). Even assuming, arguendo, that we agree with the mother that the court erred in considering certain probation reports that were not admitted in

evidence, we conclude that such error is also harmless inasmuch as we did not consider those probation records in reaching our determination (*see generally id.*).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

622

CAF 10-00706

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

IN THE MATTER OF RUSSELL A. FERRELL, SR.,
PETITIONER-RESPONDENT,

V ORDER

SUSAN L. FERRELL, RESPONDENT-APPELLANT.

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

VIVIAN CLARA STRACHE, ATTORNEY FOR THE CHILDREN, BATH, FOR DANIEL F. AND ELIZABETH F.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered March 4, 2010 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded custody of the subject children to petitioner.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

625

CA 10-02403

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

GENEVIEVE SCOVAZZO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, DEFENDANT-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (MARK DELLA POSTA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 8, 2010 in a personal injury action. The order denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she sustained when she tripped and fell on the cover of a shut-off valve for a water main, which was allegedly above the grade of a sidewalk in defendant Town of Tonawanda (Town). Supreme Court erred in denying the Town's motion for summary judgment dismissing the complaint. The Town established its entitlement to judgment as a matter of law by submitting evidence in admissible form that prior written notice of the allegedly defective condition was not given to the Town Clerk or Town Superintendent of Highways, as required by section 68-2 of the Code of the Town of Tonawanda (*see* Town Law § 65-a [2]; *see also Hall v City of Syracuse*, 275 AD2d 1022; *Wisnowski v City of Syracuse*, 213 AD2d 1069). In opposition to the motion, plaintiff failed to raise a triable issue of fact whether such prior written notice was given (*see generally Wohlars v Town of Islip*, 71 AD3d 1007, 1008-1009). Although plaintiff sought to demonstrate that an exception to the prior written notice requirement applied by attempting to raise a triable issue of fact whether the Town "created the defect or hazard through an affirmative act of negligence" (*Amabile v City of Buffalo*, 93 NY2d 471, 474), plaintiff did not raise that theory of liability in her notice of claim, amended notice of claim or complaint. Thus, she is not permitted to raise it for the first time in opposition to defendant's motion for summary judgment (*see Semprini v Village of Southampton*, 48 AD3d 543, 544; *Keeler v*

City of Syracuse, 143 AD2d 518; *see generally Hogan v Grand Union Co.*, 126 AD2d 875).

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

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

630

CA 09-02487

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

CYNTHIA THORPE, AS PARENT AND NATURAL GUARDIAN IN HER REPRESENTATIVE CAPACITY ONLY, OF ALYSSA THORPE, AN INFANT, PLAINTIFF-RESPONDENT,

V ORDER

GEORGE JAMES CHAPELSKY, JUDY ANN CHAPELSKY, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

O'CONNELL AND ARONOWITZ, ALBANY (MARK G. RICHTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered November 23, 2009 in a personal injury action. The order denied the motion of defendants George James Chapelsky and Judy Ann Chapelsky for summary judgment.

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

Patricia L. Morgan

Entered: April 29, 2011

Clerk of the Court

MOTION NO. (55/01) KA 99-05510. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DUDLEY HARRIS, DEFENDANT-APPELLANT. -- Motion for reargument and for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (296/03) KA 99-02239. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY J. PACE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND GREEN, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (678/05) KA 04-00781. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES E. LUNDERMAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, GORSKI, AND MARTOCHE, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (1630/09) KA 07-02570. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAYMOND T. TOWNSEND, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: FAHEY, J.P., PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (779/10) KA 03-02419. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSE GUTIERREZ, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND LINDLEY, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (1130/10) CA 10-00097. -- THOMAS E. DOMBROWSKI,

PLAINTIFF-APPELLANT, V RAYMOND W. BULSON, DEFENDANT-RESPONDENT. -- Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (1287/10) CA 10-00545. -- HAHN AUTOMOTIVE WAREHOUSE, INC., PLAINTIFF-APPELLANT-RESPONDENT, V AMERICAN ZURICH INSURANCE COMPANY AND ZURICH AMERICAN INSURANCE COMPANY, DEFENDANTS-RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: SMITH, J.P., PERADOTTO, CARNI, SCONIERS, AND GORSKI, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (1429/10) KA 08-01266. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NACHE AFRIKA, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (1464/10) CA 10-01450. -- IN THE MATTER OF THE ARBITRATION BETWEEN BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION, INC., IAFF LOCAL 282, PETITIONER-RESPONDENT, AND CITY OF BUFFALO, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND GORSKI, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (1484/10) CA 10-01081. -- ROBIN CUSTODI AND JOHN CUSTODI,

PLAINTIFFS-APPELLANTS, V TOWN OF AMHERST, ET AL., DEFENDANTS, PETER MUFFOLETTO AND SUSAN MUFFOLETTO, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, GREEN, AND MARTOCHE, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (1505/10) CA 10-00401. -- WILLIAM E. BURKHART, JR., PLAINTIFF-APPELLANT-RESPONDENT, V STEVEN V. MODICA, J. MICHAEL WOOD, CHAMBERLAIN, D'AMANDA, OPPENHEIMER AND GREENFIELD, LLP, DEFENDANTS-RESPONDENTS, AND MERCURY PRINT PRODUCTIONS, INC., DEFENDANT-RESPONDENT-APPELLANT. -- Motion for reargument, leave to appeal to the Court of Appeals, and other relief denied. PRESENT: CENTRA, J.P., SCONIERS, GREEN, AND GORSKI, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (1523/10) CA 10-01320. -- CUSTOM TOPSOIL, INC. AND 1070 SENECA STREET, INC., PETITIONERS-PLAINTIFFS-RESPONDENTS, V CITY OF BUFFALO, RESPONDENT-DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (1542/10) KA 09-01050. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KUMAR S. JONES, ALSO KNOWN AS QUMAR JONES, ALSO KNOWN AS JESUS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, GREEN, AND GORSKI, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (22/11) CA 10-01784. -- SMALL BUSINESS LOAN SOURCE, LLC,

PLAINTIFF-APPELLANT, V 4 DOGS OF SYRACUSE, LLC, ET AL., DEFENDANTS. JOSEPH A. KESSLER, NON-PARTY RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GREEN, AND GORSKI, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (48/11) CA 10-00928. -- IRIC BURTON, PLAINTIFF-APPELLANT, V ANDREW C. MATTELIANO, M.D., NIAGARA FRONTIER TRANSPORTATION AUTHORITY AND DONALD J. JACOB, M.D., DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, GREEN, AND MARTOCHE, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (92/11) CA 10-01993. -- IN THE MATTER OF ROBERT P. MEEGAN, JR., INDIVIDUALLY AND AS PRESIDENT OF BUFFALO POLICE BENEVOLENT ASSOCIATION, AND BUFFALO POLICE BENEVOLENT ASSOCIATION, PETITIONERS-RESPONDENTS, V BYRON W. BROWN, AS MAYOR OF CITY OF BUFFALO, H. MCCARTHY GIPSON, AS COMMISSIONER OF POLICE, AND CITY OF BUFFALO, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (113/11) CAF 10-00512. -- IN THE MATTER OF JALEEL E.F. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; CHERYL S. (DECEASED), RESPONDENT, AND ERNEST F., RESPONDENT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, GREEN, AND GORSKI, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (137/11) CA 10-01273. -- DELIRIS DIAZ, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF THE INFANT, JOSE MARQUEZ-DIAZ, PLAINTIFF-APPELLANT, V LITTLE REMEDIES CO., INC., MEDTECH HOLDINGS, INC., MEDTECH PRODUCTS, INC., PRESTIGE BRANDS, INC., AND PRESTIGE BRANDS HOLDINGS, INC., DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (155/11) KA 08-01558. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V C.W. POOLE, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CARNI, SCONIERS, GREEN, AND GORSKI, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (158/11) CAF 10-00390. -- IN THE MATTER OF VONDAJIA P.G., TONAJIA L.L.G., CIERRA C.C., AND PRECIOUS G.K. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT, SUSAN S.G., RESPONDENT-APPELLANT. -- Motion for reargument is granted in part and, upon reargument, the memorandum and order entered February 10, 2011 (81 AD3d 1317) is amended by deleting the ordering paragraph and substituting the following ordering paragraph "that the order so appealed from is unanimously modified on the law by vacating that part of the ordering paragraph with respect to Vondajia P.G. and as modified the order is affirmed without costs and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum:"; deleting the phrase "and the Attorney for the Child on behalf of Vondajia P.G." from the second sentence

of the memorandum and adding the phrase “with respect to the three youngest children” to the end of that sentence; deleting the word “children’s” from the third sentence of the memorandum and adding the phrase “of the three youngest children” to the end of that sentence; and adding the following sentence as the last sentence of the memorandum “We modify the order, however, by vacating those parts terminating the mother’s parental rights with respect to Vondajia P.G. and freeing that child for adoption, and we remit the matter to Family Court for a new dispositional hearing to determine that child’s best interests”. PRESENT: SMITH, J.P., CARNI, SCONIERS, GREEN, AND GORSKI, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (168/11) CA 10-01354. -- CHARLES L. DAVIS, PLAINTIFF-APPELLANT, V RUSSELL FIRMAN, M.D., EMERGENCY MEDICINE PHYSICIANS OF CORTLAND COUNTY, PLLC, CORTLAND MEMORIAL HOSPITAL AND LYNN CUNNINGHAM, M.D., DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: SMITH, J.P., SCONIERS, GREEN, AND GORSKI, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (190/11) CA 10-01282. -- J.N.K. MACHINE CORPORATION, PLAINTIFF-RESPONDENT, V TBW, LTD., WOOLSCHLAGER, INC. AND BERNARD C. WOOLSCHLAGER, DEFENDANTS-APPELLANTS. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GORSKI, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (225/11) CAF 10-00103. -- IN THE MATTER OF SHIRLEY A.S. ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; SHARI D.S.,

RESPONDENT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., FAHEY, LINDLEY, GREEN, AND MARTOCHE, JJ. (Filed Apr. 29, 2011.)

MOTION NO. (358/11) CA 10-02232. -- CAROL H. GRIECO, AS EXECUTRIX OF THE ESTATE OF JOHN P. GRIECO, DECEASED, PLAINTIFF-APPELLANT-RESPONDENT, V KALEIDA HEALTH, JANIERIO D. ALDRIDGE, M.D., BUFFALO THORACIC SURGICAL ASSOCIATES, P.C., IAN M. BROWN, R.P.A.C., TAMMY B. ERVOLINA, R.P.A.C., ROBERT J. GAMBINO, R.P.A.C., DEFENDANTS-RESPONDENTS-APPELLANTS, AND THOMAS J. CUMBO, M.D., DEFENDANT-RESPONDENT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, GORSKI, AND MARTOCHE, JJ. (Filed Apr. 29, 2011.)

KA 09-02117. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY CASSATA, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Steuben County Court, Joseph W. Latham, J. - Grand Larceny, 4th Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

KA 09-02643. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT A. HARRIS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Erie County Court, Thomas P. Franczyk, J. - Burglary, 3rd Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

KA 07-00321. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TONY L. IVEY, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon a guilty plea of assault in the second degree and was sentenced to a determinate term of imprisonment of four years and five years postrelease supervision. Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38), and has submitted an affirmation in which he concludes that there are no nonfrivolous issues that can be raised on appeal. The record reflects that defendant moved prior to sentencing to withdraw his plea, claiming, inter alia, that the plea was coerced. We conclude that a nonfrivolous issue exists as to whether the court erred in denying defendant's motion without conducting a hearing. Therefore, we relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Monroe County Court, John J. Connell, J. - Assault, 2nd Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

KA 09-02285. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL MOSS, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon a guilty plea of failing to register a change of address as a sex offender (Corrections Law § 168-f [4]), and was sentenced to a definite sentence of

imprisonment of one year. Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). However, upon our review of the record we conclude that a nonfrivolous issue exists as to whether Supreme Court improperly imposed an enhanced sentence without affording defendant an opportunity to withdraw his plea. Therefore, we relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Supreme Court, Erie County, John L. Michalski, A.J. - Failure to Register as Sex Offender). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

KA 07-00417. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V QUENTIN A. NOWLIN, DEFENDANT-APPELLANT. -- Counsel's motion to be relieved of assignment granted and appeal dismissed as abandoned. (Appeal from Judgment of Monroe County Court, Roy W. King, A.J. - Assault, 3rd Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

KA 09-00482. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PATRICIA A. PERRYMAN, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, Craig J. Doran, J. - Felony Driving While Intoxicated). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

KA 10-00549. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PATRICIA A. PERRYMAN, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County Court, Craig J. Doran, J. - Violation of Probation). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

KA 10-01641. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM ROGERS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Yates County Court, W. Patrick Falvey, J. - Attempted Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

KA 10-01642. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM ROGERS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Yates County Court, W. Patrick Falvey, J. - Attempted Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

KA 08-01184. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERRY STEWARD, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d

38 [1979]). (Appeal from Judgment of Monroe County Court, Elma A. Bellini, J. - Manslaughter, 1st Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

KA 10-00824. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V COUREY A. WILLIAMS, ALSO KNOWN AS COUREY HUNTER, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Erie County Court, Shirley Troutman, J. - Criminal Possession of a Weapon, 2nd Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)

KA 09-02380. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT M. WILLIAMS, ALSO KNOWN AS MARQUISH M. JOHNSON, JR., DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Erie County Court, Thomas P. Amodeo, J. - Unauthorized Use of a Motor Vehicle, 2nd Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND GREEN, JJ. (Filed Apr. 29, 2011.)