SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 17, 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

641

KA 08-00027

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL SIERRA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 (David D. Egan, J.), rendered November 5, 2007. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree, vehicular manslaughter in the second degree, aggravated unlicensed operation of a motor vehicle in the first degree, driving while intoxicated (two counts), and a traffic infraction.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, manslaughter in the second degree (Penal Law § 125.15 [1]). Defendant initially pleaded guilty to the indictment with a sentencing commitment of a term of imprisonment of 4½ to 9 years. After County Court (Connell, J.) accepted the plea, the People expressed their disagreement with that sentence. Judge Connell determined that he would not abide by the sentencing commitment and recused himself. The case was then assigned to a different County Court Judge (Egan, J.), and defendant withdrew the plea. We reject defendant's contention that Judge Connell abused his discretion in refusing to abide by the sentencing commitment of the plea agreement. "The court . . . retains discretion in fixing an appropriate sentence up until the time of sentencing" (*People v Schultz*, 73 NY2d 757, 758) and, in view of Judge Connell's explanation for his determination not to abide by the sentencing commitment, we cannot conclude that he abused his discretion (*see generally id.*). Contrary to the further contention of defendant, he is not entitled to specific performance of the plea agreement. "The remedy of specific performance in the context of plea agreements applies where a defendant has been placed in a no-return position in reliance on the plea agreement . . ., such that specific performance is warranted as a matter of essential fairness" (*People v Herber*, 24 AD3d 1317, 1318, *lv*

denied 6 NY3d 814 [internal quotation marks omitted]). Upon our review of the record, we conclude that specific performance of the plea agreement is not warranted, and we reject defendant's further contention that media coverage of the plea withdrawal tainted the jury pool.

We further conclude that the contention of defendant that his statements to the police were obtained in violation of his right to counsel and were thus involuntary is without merit. Although defendant abandoned that contention by failing to seek a ruling on that part of his omnibus motion and failing to object to the admission in evidence of the statements at trial (*see People v Anderson*, 52 AD3d 1320, *lv denied* 11 NY3d 733), it may be raised for the first time on appeal (*see generally People v McLean*, 15 NY3d 117, 119; *People v Whetstone*, 281 AD2d 904, *lv denied* 96 NY2d 909). Inasmuch as the record establishes that defendant made an unequivocal request for counsel (*see generally People v Porter*, 9 NY3d 966, 967), we address that contention here (*see McLean*, 15 NY3d at 119, 121). Even assuming, arguendo, that defendant's indelible right to counsel had attached when he made the disputed statements (*see generally People v Ramos*, 99 NY2d 27, 32-33; *People v Casey*, 37 AD3d 1113, 1115, *lv denied* 8 NY3d 983), we conclude that the statements were spontaneous inasmuch as "they were in no way the product of an interrogation environment [or] the result of express questioning or its functional equivalent" (*People v Harris*, 57 NY2d 335, 342, *cert denied* 460 US 1047 [internal quotation marks omitted]; *see People v Rivers*, 56 NY2d 476, 480, *rearg denied* 57 NY2d 775; *People v Stoesser*, 53 NY2d 648, 650).

We reject the contention of defendant that the order permitting the chemical test of his blood was not obtained in compliance with Vehicle and Traffic Law § 1194 (3). Even assuming, arguendo, that the Assistant District Attorney and County Court (Bellini, J.) failed to comply with the requirements of Vehicle and Traffic Law § 1194 (3) (d) (2), we conclude that such noncompliance "was of no moment because there was the requisite substantial compliance with the requirements of the statute" (*People v Dombrowski-Bove*, 300 AD2d 1122, 1123). Defendant further contends that the application for the chemical test of his blood was insufficient because the witnesses who offered statements in support thereof were not placed under oath. We reject that contention. "[A]n application for a court-ordered blood test may contain hearsay and double hearsay statements that satisfy the *Aguilar-Spinelli* test[if] the application . . . disclose[s] that it is supported by hearsay and identif[ies] the source or sources of the hearsay" (*People v Freeman*, 46 AD3d 1375, 1377, *lv denied* 10 NY3d 840). "[T]he two-part *Aguilar-Spinelli* test requir[es] a showing that the informant is reliable and has a basis of knowledge for the information imparted" (*People v Monroe*, 82 AD3d 1674, 1675 [internal quotation marks omitted]; *see People v Ketcham*, 93 NY2d 416, 420) and, upon our review of the record, we conclude that the *Aguilar-Spinelli* requirements were satisfied here. Inasmuch as the application at issue was written rather than oral, defendant's contention that the application did not comply with the requirements of Vehicle and

Traffic Law § 1194 (3) (d) (3) is of no moment.

Contrary to defendant's further contention, Supreme Court (Egan, J.) properly admitted in evidence at trial the results of the chemical test of his blood. "It is well settled that a foundation establishing the reliability and accuracy of a machine used to measure blood alcohol content is a prerequisite to admitting the results of a blood alcohol test into evidence" (*People v Baker*, 51 AD3d 1047, 1048; *see People v Campbell*, 73 NY2d 481, 485). We conclude that the People established the requisite foundation for the admission of those results (*see generally Campbell*, 73 NY2d at 485; *Baker*, 51 AD3d at 1048-1049). We reject defendant's contention that the witness who testified regarding the test of defendant's blood was not qualified to testify with respect to the accuracy of the machine used to conduct that test (*cf. Campbell*, 73 NY2d at 484-486).

Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

642

KA 11-00262

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BARBARA J. HERSHEY, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered December 5, 2007. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of imprisonment of 2 to 6 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of manslaughter in the second degree (Penal Law § 125.15 [1]) for recklessly causing the death of her four-month-old step-grandson. 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. It is undisputed that the victim sustained subdural hematomas, retinal hemorrhaging and cerebral edema, commonly referred to as the triad symptoms indicative of Shaken Baby Syndrome (SBS). The People's expert witnesses testified that, in the absence of evidence of external trauma, those symptoms in a baby can be caused only by shaking the baby with great force. The People's experts further testified that there can be no "lucid interval" between the shaking and the baby's death or disability. Thus, because the victim lost consciousness while in the exclusive care of defendant, it was reasonable for the jury to conclude that defendant shook the victim, causing his death. Although defendant's experts challenged the validity of SBS, it cannot be said on this record that the jury failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495). " 'Where, as here, there was conflicting expert evidence concerning criminal responsibility, the jury was free to accept or reject in whole or in part the opinion of any expert' " (*People v Law*, 273 AD2d 897, 898, *lv denied* 95 NY2d 965), "at least in the absence of a serious flaw in the expert's

testimony" (*People v Irizarry*, 238 AD2d 940, 941, *lv denied* 90 NY2d 894 [internal quotation marks omitted]).

We further conclude that County Court properly allowed the prosecutor to cross-examine a defense expert concerning statements made by a defendant in another case in which that expert had previously testified. Because those statements were not testimonial in nature (*see generally Davis v Washington*, 547 US 813, 822), defendant's right to confront witnesses against her, as articulated by the Supreme Court in *Crawford v Washington* (541 US 36), was not violated by that line of questioning (*see generally People v Bradley*, 8 NY3d 124, 126). Defendant failed to preserve for our review her further contention that the prosecutor's use of those statements on cross-examination of the defense expert violated the rule against hearsay (*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]).

We agree with defendant, however, that the sentence is unduly harsh and severe. Defendant, who is 70 years old, has no prior criminal record and, as the People correctly concede, her crime was not intentional in nature. We note that the victim's parents supported defendant throughout the proceedings and, at sentencing, they pleaded with the court not to incarcerate her. The parents stated that a sentence of incarceration would only compound their tragedy and add to their grief. The court nevertheless sentenced defendant to the maximum punishment permitted by law, i.e., an indeterminate term of imprisonment of 5 to 15 years. Although we are cognizant that an innocent life has been lost at its infancy, we conclude that, under the circumstances of this case, an indeterminate term of imprisonment of 2 to 6 years is more appropriate. Thus, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), we modify the judgment accordingly.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

647

CAF 10-00514

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

IN THE MATTER OF ZACHARY T.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ALAN D.T., SR., RESPONDENT-APPELLANT.

MARY ANN BLIZNIK, CLARENCE, FOR RESPONDENT-APPELLANT.

PAULA A. CAMPBELL, BATAVIA, FOR PETITIONER-RESPONDENT.

LINDA M. JONES, ATTORNEY FOR THE CHILD, BATAVIA, FOR ZACHARY T.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 1, 2010 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that the subject child is a neglected child.

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

Memorandum: Respondent father appeals from an order that, inter alia, adjudicated the child who is the subject of this proceeding to be a neglected child. We conclude that Family Court properly determined following a fact-finding hearing that the father neglected the child by failing to protect him from being sexually abused by his older brother and his cousin. The child's older brother testified that the father was aware of their sexual activity but took no action to prevent it from continuing. That testimony was corroborated by sworn statements that the child made to a police investigator. Under the circumstances, the court properly concluded that petitioner established by a preponderance of the evidence that the sexual abuse to which the child was subjected was "a consequence of the failure of the [father] . . . to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368).

We reject the father's contention that the court erred in determining that the child was derivatively neglected as a result of the father's sexual abuse of his nephew, whose family shared a house with the father and his family during the relevant time period. We conclude that the father was the "functional equivalent of a parent in a familial or household setting" with respect to his nephew (*Matter of Yolanda D.*, 88 NY2d 790, 796), and that his nephew was therefore "the

legal responsibility of" the father within the meaning of Family Court Act § 1046 (a) (i).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

649

CA 11-00331

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

NIAGARA FALLS WATER BOARD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, DEFENDANT-APPELLANT.

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

HISCOCK & BARCLAY, LLP, BUFFALO (JAMES P. DOMAGALSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered May 5, 2010. The order, among other things, granted plaintiff's motion to compel and denied defendant's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, defendant's motion for summary judgment dismissing the second amended complaint is granted and plaintiff's motion to compel discovery is denied.

Memorandum: Plaintiff commenced this action seeking, inter alia, to recover funds allegedly owed to it pursuant to the terms of Resolution No. 2003-90 (Resolution), adopted by defendant's City Council, and pursuant to an Acquisition Agreement between the parties. The Acquisition Agreement provided that, inter alia, plaintiff was to purchase from defendant certain assets, including "all accounts receivable of [defendant] . . . in connection with its water, wastewater and stormwater related accounts." On a prior appeal and cross appeal, we modified an order granting in part defendant's pre-answer motion to dismiss the complaint and plaintiff's cross motion seeking leave to amend the complaint (*Niagara Falls Water Bd. v City of Niagara Falls*, 64 AD3d 1142). We concluded that Supreme Court should have denied the motion and granted the cross motion with respect to the first cause of action, for breach of contract. Accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every possible inference (*Daley v County of Erie*, 59 AD3d 1087), we agreed with plaintiff that it had alleged a cognizable breach of contract cause of action (*Niagara Falls Water Bd.*, 64 AD3d at 1143). We further concluded, however, that the remaining causes of action were either properly dismissed or should have been dismissed (*id.* at 1143-1144). Plaintiff subsequently filed and served a second amended complaint asserting a nearly identical

breach of contract cause of action.

Defendant appeals from an order that, inter alia, denied its motion for summary judgment dismissing the second amended complaint. Inasmuch as we are no longer constrained to accept plaintiff's allegations as true (*cf.* CPLR 3211; *Daley*, 59 AD3d 1087), we reverse. The Resolution, adopted prior to the date on which defendant assigned all accounts receivable to plaintiff, approved a grant to be paid from defendant's future revenue in satisfaction of the unpaid water bills of non-party Niagara Falls Memorial Medical Center (Memorial). Even assuming, arguendo, that the Resolution does not violate the constitutional prohibition against gifts to private entities (*see* NY Const, art VIII, § 1), we conclude that there is nothing in the Acquisition Agreement that requires defendant to pay all or part of Memorial's unpaid water bills. We reject plaintiff's contention that the Resolution created an encumbrance to the transfer of assets and accounts receivable required by the Acquisition Agreement. Indeed, there appears to be nothing in either the Acquisition Agreement or the Resolution that would prohibit plaintiff from seeking payment from Memorial for any unpaid water bills. Further, plaintiff failed to establish, beyond mere speculation, that further discovery was necessary (*see generally* CPLR 3212 [f]; *Heritage Hills Socy., Ltd. v Heritage Dev. Group, Inc.*, 56 AD3d 426, 427).

In view of our determination, plaintiff's motion to compel defendant to reply to its discovery demands is denied as academic.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

652

CA 10-02135

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

JASON PHILLIPS AND MARY BETH PHILLIPS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

HENRY B'S, INC., HENRY B. TURRI, INC.,
STEPHEN W. TURRI, INDIVIDUALLY AND AS OWNER
OF HENRY B'S, INC., HENRY B. TURRI, INC.,
DEFENDANTS-RESPONDENTS,
AND JON W. BUCHWALD, INDIVIDUALLY AND AS OWNER
OF PROPERTY AT 86 FALL STREET,
DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (MAUREEN G. FATCHERIC OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAMS & RUDDEROW, PLLC, SYRACUSE (MICHELLE ELLSWORTH RUDDEROW OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered July 27, 2010 in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Jon W. Buchwald, individually and as owner of property at 86 Fall Street, for summary judgment dismissing the complaint and all cross claims against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint against defendant Jon W. Buchwald, individually and as owner of property at 86 Fall Street, except to the extent that the complaint, as amplified by the bill of particulars, alleges that he had actual or constructive notice of a recurring dangerous condition that contributed to plaintiff's accident and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Jason Phillips (plaintiff) when, during the course of his employment as a mail carrier, he slipped and fell on a patch of black ice in a parking lot located behind the buildings at 84 and 86 Fall Street in the Village of Seneca Falls. Jon W. Buchwald, individually and as owner of property at 86 Fall Street (defendant), moved for summary judgment dismissing the complaint against him on the grounds that the accident did not occur on his property and that he did not create or have actual or constructive notice of the ice upon which plaintiff slipped. Supreme

Court denied the motion in its entirety. We agree with defendant that the court erred in denying that part of his motion seeking summary judgment dismissing the complaint against him insofar as it alleges, as amplified by the bill of particulars, that he had actual or constructive notice of the icy condition in the parking lot. We therefore modify the order accordingly. Defendant met his initial burden of demonstrating that he had neither actual notice of the icy condition in question nor constructive notice thereof, inasmuch as the black ice was not "visible and apparent" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837; *see Carpenter v J. Giadino, LLC*, 81 AD3d 1231, 1232-1233; *Mullaney v Royalty Props., LLC*, 81 AD3d 1312). Plaintiffs failed to raise a triable issue of fact in opposition to that part of the motion (*cf. Pugliese v Utica Natl. Ins. Group*, 295 AD2d 992; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We reject defendant's contention, however, that the court erred in denying that part of the motion seeking summary judgment dismissing the complaint against him insofar as it alleges, as amplified by the bill of particulars, that he had actual or constructive notice of a recurring dangerous condition on his property that may have contributed to the accident. "[A] plaintiff is not required to prove that the defendant[] knew or should have known of the existence of a particular defect where [he or she] had actual notice of a recurrent dangerous condition in that location" (*Hale v Wilmorite, Inc.*, 35 AD3d 1251, 1251-1252). Defendant failed to meet his initial burden with respect to the existence of such a condition because his own submissions demonstrated that there was " 'an ongoing and recurring dangerous condition . . . in the area of the accident [that he] routinely left unaddressed' " (*Knight v Sawyer*, 306 AD2d 849, 849; *see Anderson v Great E. Mall, L.P.*, 74 AD3d 1760, 1761). Indeed, defendant submitted evidence that he failed to replace a gutter downspout on his building that had been removed 10 years before the accident and that, as a result, water routinely drained from a hole in the gutter, traveled down stairs that sloped toward the parking lot, and then drained into the area where plaintiff fell.

Defendant further contends that the court should have denied the motion in its entirety because plaintiff's fall did not occur on his property. We reject that contention. The collective deposition testimony of the various eyewitnesses to the accident placed the location of plaintiff's fall approximately on the border between defendant's property and that owned by defendant Stephen W. Turri, individually and as owner of Henry B's, Inc. In any event, even assuming, arguendo, that plaintiff was on Turri's property when he fell, defendant may be held liable in the event that the dangerous condition on his property caused or contributed to the accident (*see Orr v Spring*, 288 AD2d 663, 665; *Hennessy v Palmer Video*, 237 AD2d 571).

Entered: June 17, 2011

Patricia L. Morgan
Clerk of the Court

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

662

KA 07-01369

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER JONES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK 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 April 27, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, criminal sexual act in the first degree (two counts), burglary in the second degree, sexual abuse in the first degree, unlawful imprisonment in the second degree and menacing in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]). Contrary to defendant's contention, County Court properly denied his post-trial motion pursuant to CPL 330.30 (2) seeking to set aside the verdict on the ground of juror misconduct without conducting a hearing (*cf. People v Rivera*, 304 AD2d 841). The moving papers did not contain the necessary "sworn allegations of all facts essential to support the motion" (CPL 330.40 [2] [e] [ii]). Indeed, defendant "do[es] not raise a question of outside influence but, rather, [he] seeks to impeach the verdict by delving into the tenor of the jury's deliberative processes" (*People v Drake*, 68 AD3d 1778, 1779, *lv denied* 14 NY3d 840 [internal quotation marks omitted]; *see People v Gerecke*, 34 AD3d 1260, 1262, *lv denied* 7 NY3d 925, 927).

The contention of defendant that the court erred in refusing to suppress his written statements to a detective is not preserved for our review inasmuch as that contention is based on a ground that was not raised before the suppression court (*see People v Brooks*, 26 AD3d 739, 740, *lv denied* 6 NY3d 846, 7 NY3d 810; *People v Zeito*, 302 AD2d 923, *lv denied* 99 NY2d 634). Further, defendant did not object to the trial testimony concerning those statements, and his post-trial motion pursuant to CPL 330.30 is insufficient to preserve his contention for

our review (*see generally People v Padro*, 75 NY2d 820, *rearg denied* 75 NY2d 1005, *rearg dismissed* 81 NY2d 989). 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]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

671

CA 11-00125

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

IN THE MATTER OF COMMUNICATION WORKERS OF AMERICA, LOCAL 1170, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF GREECE, RESPONDENT-RESPONDENT.

IN THE MATTER OF TOWN OF GREECE, PETITIONER-RESPONDENT,

V

CWA LOCAL 1170 (GOLD BADGE CLUB), ON BEHALF OF THOMAS SCHAMERHORN, RESPONDENT-APPELLANT.

PETER C. NELSON, PITTSFORD, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

COUGHLIN & GERHART, LLP, BINGHAMTON (PAUL J. SWEENEY OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered November 10, 2010 in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, vacated in part the arbitration award.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is granted in its entirety, the cross petition is denied and the arbitration award is confirmed.

Memorandum: Petitioner-respondent, Communication Workers of America, Local 1170 (Union), appeals from an order that, inter alia, granted the cross petition (improperly denominated “petition”) of respondent-petitioner, Town of Greece (Town), seeking to vacate in part an arbitration award pursuant to CPLR 7511 (b) (1) (iii). The arbitrator sustained various disciplinary charges against the grievant, a Town police sergeant who is a Union member, and determined that “[t]he Town had just and sufficient cause to demote” the grievant. The arbitrator further determined, however, that a permanent demotion was unreasonable and arbitrary, and he thus converted that penalty to a demotion for a term of one year. The Union commenced this proceeding seeking to confirm the arbitration award pursuant to CPLR 7510, and the Town filed a cross petition

seeking to vacate the award in part on the ground that the award exceeded the scope of the arbitrator's authority (*see* CPLR 7511 [b] [1] [iii]).

We agree with the Union that Supreme Court erred in vacating that part of the arbitration award reducing the grievant's penalty to a demotion for a term of one year and remitting the matter "to the Town for reconsideration of the penalty to be imposed upon" the grievant. An award may be vacated on the ground that an arbitrator exceeded his or her power "only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336; *see Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City School Dist. of City of Buffalo*, 50 AD3d 1503, 1505, *lv denied* 11 NY3d 708; *Matter of North Country Community Coll. Assn. of Professionals [North Country Community Coll.]*, 29 AD3d 1060, 1061-1062, *lv denied* 7 NY3d 709). It is well established that "an arbitrator has broad discretion to determine a dispute and fix a remedy[] and that any contractual limitation on that discretion must be 'contained, either explicitly or incorporated by reference, in the arbitration clause itself' " (*Matter of State of New York [Dept. of Correctional Servs.] [Council 82, AFSCME]*, 176 AD2d 1009, 1010, *lv denied* 79 NY2d 756, quoting *Matter of Board of Educ. of Dover Union Free School Dist. v Dover-Wingdale Teachers' Assn.*, 61 NY2d 913, 915). "To exclude a substantive issue from arbitration, therefore, generally requires specific enumeration in the arbitration clause itself of the subjects intended to be put beyond the arbitrator's reach" (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308, *rearg denied* 62 NY2d 803).

Pursuant to the applicable collective bargaining agreement (CBA), "[t]he arbitrator shall confine himself [or herself] solely to the review of the determination of guilt or innocence of the grievant and determine whether or not the decision was based upon clear and convincing evidence. The arbitrator shall be precluded from any determination . . . with respect to the penalty imposed upon the grievant except where the penalty imposed is found to be unreasonable, arbitrary or capricious." Here, the arbitrator recognized that the CBA limited his "authority in passing on penalties for proven misconduct." He thus specifically found that "the penalty of a *permanent* demotion was unreasonable and arbitrary . . . because . . . [i]t is not supported by evidence that the grievant cannot competently perform the duties of sergeant . . . ."

We reject the contention of the Town that, although the CBA authorizes the arbitrator to determine that the imposed punishment is "unreasonable, arbitrary or capricious," it does not authorize the arbitrator to modify an imposed penalty or fashion a new penalty. The CBA specifically provides that, "where the penalty imposed is found to be unreasonable, arbitrary or capricious," the arbitrator may make a determination "with respect to the penalty imposed upon the grievant . . . ." The Town's contention that an arbitrator who determines that the imposed penalty is unreasonable, arbitrary or capricious must

remit the matter to the Town for the purpose of fashioning a different penalty conflicts with the provision in Article 19 of the CBA that "[t]he decision of the arbitrator shall be final and binding upon both parties to the dispute." In any event, we note that it is the arbitrator, not the trial court or this Court, that is "charged with the interpretation and application of the [CBA]" (*New York City Tr. Auth.*, 6 NY3d at 336; *see Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326-327). "[C]ourts may not set aside an award because [they] feel that the arbitrator's interpretation disregards the apparent, or even the plain, meaning of the words or resulted from a misapplication of settled legal principles" (*Rochester City School Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 582; *see Binghamton Civ. Serv. Forum v City of Binghamton*, 44 NY2d 23, 30). Here, "[a]lthough a different construction could have been accorded to the subject provision of the [CBA], . . . it cannot be stated that the arbitrator gave a completely irrational construction to the provision in dispute and, in effect, exceeded [his] authority by making a new contract for the parties" (*Matter of New York City Tr. Auth. v Local 100, Transp. Workers Union of Am.*, 127 AD2d 596, 597, *lv denied* 70 NY2d 604).

Further, although the CBA does not explicitly authorize an arbitrator to substitute an appropriate penalty upon determining that the penalty imposed by the Town is unreasonable, arbitrary or capricious, there is likewise no such "specifically enumerated limitation on the arbitrator's power" (*New York City Tr. Auth.*, 6 NY3d at 336; *see North Country Community Coll. Assn. of Professionals*, 29 AD3d at 1062). We therefore conclude that the arbitrator did not exceed his authority in modifying the grievant's penalty from a permanent demotion to a demotion for a term of one year.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

683

CAF 10-01308

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

IN THE MATTER OF GARY A. CLIME,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANGELA D. CLIME, RESPONDENT-APPELLANT.

JANE G. LAROCK, WATERTOWN, FOR RESPONDENT-APPELLANT.

FINOCCHIO & ENGLISH, SYRACUSE (MARK J. ENGLISH OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN A. SOVIE, ATTORNEY FOR THE CHILD, WATERTOWN, FOR KYLIE A.C.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered June 9, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded primary physical custody of the subject child to petitioner.

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

Memorandum: Respondent mother appeals from an order that, following a hearing, granted the petition seeking to modify the custody and visitation provisions of the judgment of divorce and awarded primary physical custody of the parties' child to petitioner father and visitation to the mother. The mother does not challenge Family Court's finding that a change in circumstances existed, and thus we need only address whether it was in the child's best interests to award primary physical custody to the father (*see Matter of Dubuque v Bremiller*, 79 AD3d 1743).

Contrary to the mother's contention, we conclude that the court's best interests determination is supported by a sound and substantial basis in the record and that the court did not abuse its discretion in awarding primary physical custody to the father (*see Matter of Deborah E.C. v Shawn K.*, 63 AD3d 1724, 1725, *lv denied* 13 NY3d 710; *Matter of Khaykin v Kanayeva*, 47 AD3d 817). The child split her time equally between the father and the mother, and the court found that both parties were equally fit and able to raise the child, that they were both able to provide the child with a stable and adequate home environment and that they could both provide for the child's emotional and intellectual development (*see generally Eschbach v Eschbach*, 56 NY2d 167, 172-173; *Fox v Fox*, 177 AD2d 209, 210). Inasmuch as the

child has no siblings and her age is such that any expressed desire concerning custody is of little significance, the court's determination was largely based upon its finding that the father was better able to provide for the child financially, which is supported by the record. Although both of the parties rely upon government benefits and loans for day-to-day support, the record demonstrates that the mother's financial stability is significantly dependent upon her live-in boyfriend, to whom she is not married or engaged to be married. The mother's boyfriend pays her housing costs, shares the cost of food and watches the child while the mother is at work. By contrast, the court determined that the father "seems to have a larger safety net." Indeed, the father lives in a home owned by his father and grandparents, and his parents live four miles away from the father, transport the child to and from preschool and take care of the child while the father is at school. In addition, the child's maternal great-grandparents live approximately 10-15 minutes away from the father.

The mother further contends that the court erred with respect to several issues of law. The mother's contention with respect to the majority of those alleged errors is not preserved for our review inasmuch as she failed to object to those errors or did not object on the grounds advanced on appeal (*see generally* CPLR 5501 [a] [3]). When the mother's attorney objected to several improper comments made by the father's attorney, the court sustained or otherwise appropriately addressed her objections and admonished the father's attorney. Further, inasmuch as the mother's contention is preserved for our review with respect to certain substantive issues, we note that the mother prevailed on numerous evidentiary objections.

The mother waived her contention that the court erred in proceeding without the originally-assigned Attorney for the Child, inasmuch as she consented to the substitution of a new Attorney for the Child (*see generally Delong v County of Chautauqua* [appeal No. 2], 71 AD3d 1580; *Matter of Patrick R.*, 216 AD2d 964). Further, the record establishes that the substitute Attorney for the Child reviewed the case file, interviewed the child, spoke with the originally-assigned Attorney for the Child and actively participated in the hearing. We thus conclude that the child's interests were fully protected by the substitute Attorney for the Child (*see Matter of Storch v Storch*, 282 AD2d 845, 848, *lv denied* 96 NY2d 718; *see generally Matter of Miller v Miller*, 220 AD2d 133, 136 n 2).

We have reviewed the remaining contentions of the mother and conclude that none warrants reversal of the order.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

689

CA 10-00432

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

WALDEMAR H. JURKOWSKI, BY EDWARD C. COSGROVE,
GUARDIAN OF HIS PERSON AND PROPERTY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHEEHAN MEMORIAL HOSPITAL, ET AL., DEFENDANTS,
AND BHAVANSA PADMANABHA, M.D.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

EDWARD C. COSGROVE, BUFFALO (PHILIP H. MAGNER, JR., OF THE FLORIDA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (SALLY J. BROAD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered December 29, 2009 in a medical malpractice action. The judgment, inter alia, dismissed the second amended complaint against defendant Bhavansa Padmanabha, M.D.

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

Memorandum: Plaintiff, Waldemar H. Jurkowski, by the guardian of his person and property, appeals from three judgments, each of which dismissed the second amended complaint in this medical malpractice action against one of the defendants. We note at the outset that we previously denied, with leave to renew at oral argument of the appeals, the motions of each defendant to dismiss the appeal from the judgment against that defendant based upon plaintiff's alleged failure to perfect the appeal by the deadline set by this Court. Defendants renewed their motions at oral argument and, upon further consideration, we adhere to our original decision to deny the motions.

We reject plaintiff's contention in each appeal that Supreme Court erred in denying his motion to set aside the jury verdict as against the weight of the evidence (*see generally* CPLR 4404 [a]). "A jury's verdict--particularly one rendered in favor of . . . defendant[s] in a negligence action--will not be disturbed unless the evidence is found to preponderate so heavily in favor of the losing party that 'the jury could not have reached its verdict on any fair interpretation of the evidence' " (*Monahan v Devaul*, 271 AD2d 895,

895-896; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746), and that is not the case here. According to plaintiff, defendants were negligent by, inter alia, allowing plaintiff to leave the emergency room of defendant Sheehan Memorial Hospital (Hospital) without an adequate understanding of the severity of his medical condition. The jury was presented with conflicting versions of the circumstances surrounding plaintiff's decision to leave the emergency room prior to receiving a diagnosis, and we decline to disturb the jury's resolution of the resulting credibility issues (*see Hall v Prestige Remodeling & Home Repair Serv.*, 192 AD2d 1098).

Contrary to plaintiff's further contention in each appeal, the court properly determined that the additional allegations in the "supplemental" bills of particulars, including the allegation that the Hospital and defendant Bhavansa Padmanabha, M.D. failed to physically restrain plaintiff from leaving the emergency room, are new and distinct theories of liability not previously raised (*see Barrera v City of New York*, 265 AD2d 516, 518; *Orros v Yick Ming Yip Realty*, 258 AD2d 387; *see generally* CPLR 3043 [b]). Thus, although labeled as "supplemental," they were actually amended bills of particulars. Inasmuch as the amended bills of particulars were served without leave of the court after the note of issue was filed, they were a nullity with respect to those newly alleged theories (*see Bartkus v New York Methodist Hosp.*, 294 AD2d 455; *Barrera*, 265 AD2d at 518). We also reject plaintiff's contention in each appeal that the court abused its discretion in denying plaintiff's motion to quash the subpoena of defendant Madan G. Chugh, M.D. concerning the testimony of the guardian of plaintiff's person and property (guardian). The guardian has the authority to make decisions regarding plaintiff's finances and medical treatment (*see generally* Mental Hygiene Law § 81.21 [a]; § 81.22 [a]), and he therefore is in a unique position to testify with respect to plaintiff's future care and plans (*see generally Kooper v Kooper*, 74 AD3d 6, 16-17).

We reject plaintiff's contention in appeal No. 3 that the court erred in granting the Hospital's motion for a directed verdict at the close of plaintiff's case with respect to the claims for direct negligence against the Hospital regarding its non-physician employees inasmuch as plaintiff failed to present evidence of negligence that was attributable to any of those employees (*see generally* CPLR 4401).

Finally, we have reviewed plaintiff's remaining contentions in each appeal and conclude that they are without merit.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

690

CA 10-00435

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

WALDEMAR H. JURKOWSKI, BY EDWARD C. COSGROVE,
GUARDIAN OF HIS PERSON AND PROPERTY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHEEHAN MEMORIAL HOSPITAL, ET AL., DEFENDANTS,
AND MADAN G. CHUGH, M.D., DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

EDWARD C. COSGROVE, BUFFALO (PHILIP H. MAGNER, JR., OF THE FLORIDA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN & TARANTINO, LLC, BUFFALO (JEFFREY A. WIECZKOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered January 11, 2010 in a medical malpractice action. The judgment, inter alia, dismissed the second amended complaint against defendant Madan G. Chugh, M.D.

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

Same Memorandum as in *Jurkowski v Sheehan Mem. Hosp.* ([appeal No. 1] ___ AD3d ___ [June 17, 2011]).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

691

CA 10-00436

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

WALDEMAR H. JURKOWSKI, BY EDWARD C. COSGROVE,
GUARDIAN OF HIS PERSON AND PROPERTY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHEEHAN MEMORIAL HOSPITAL, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

EDWARD C. COSGROVE, BUFFALO (PHILIP H. MAGNER, JR., OF THE FLORIDA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOSEPH V. MCCARTHY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered January 21, 2010 in a medical malpractice action. The judgment, inter alia, dismissed the second amended complaint against defendant Sheehan Memorial Hospital.

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

Same Memorandum as in *Jurkowski v Sheehan Mem. Hosp.* ([appeal No. 1] ___ AD3d ___ [June 17, 2011]).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

695

CA 11-00158

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

JEREMIAH BIGGS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID HESS, ANTHONY ALMEDA, DEFENDANTS,
AND ANTHONY BERNARDI, DOING BUSINESS AS TONY'S
CONSTRUCTION, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ALAN J. DEPETERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARCUS & CINELLI, LLP, WILLIAMSVILLE (BRIAN L. CINELLI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 4, 2010 in a personal injury action. The order, insofar as appealed from, denied the cross motion of defendant Anthony Bernardi, doing business as Tony's Construction, for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when the ladder on which he was standing slipped out from under him, causing him to fall. At the time of the accident, plaintiff was painting the interior of a garage on property owned by defendants David Hess and Anthony Almeda. Prior to plaintiff's accident, Almeda hired Anthony Bernardi, doing business as Tony's Construction (defendant), to demolish a house on the property and remove debris. According to plaintiff, the painting of the garage (hereafter, painting project) was part of a larger renovation project on the property, for which defendant was the general contractor, and defendant supervised and controlled the painting project.

We reject defendant's contention that Supreme Court erred in denying his cross motion for summary judgment dismissing the complaint against him. Defendant met his initial burden on the cross motion by submitting admissible evidence establishing that he was not the general contractor for the painting project, that he did not own the property where the accident occurred and that he did not supervise or control plaintiff's work (*see Uzar v Louis P. Ciminelli Constr. Co., Inc.*, 53 AD3d 1078, 1079; *see generally Zuckerman v City of New York*,

49 NY2d 557, 562). In opposition to the cross motion, however, plaintiff raised a triable issue of fact whether defendant was liable as a general contractor (*see generally Zuckerman*, 49 NY2d at 562). Plaintiff submitted an affidavit in which he averred, inter alia, that he overheard phone conversations between a coworker and defendant in which the coworker apprised defendant of their progress on the painting project and defendant provided instructions for completing the work. Although several of the statements in plaintiff's affidavit constitute hearsay, it is well established that " 'hearsay evidence may be considered in opposition to a motion for summary judgment,' provided that it is not the only proof relied upon by the opposing party" (*X-Med, Inc. v Western N.Y. Spine, Inc.*, 74 AD3d 1708, 1710). Here, plaintiff also averred that he spoke with defendant two days before the accident and, at that time, defendant gave plaintiff and his coworker permission to remove copper wire from the house before it was demolished and told plaintiff that "there was additional work he needed . . . done on the premises."

Contrary to the contention of defendant, plaintiff's statement in his affidavit that defendant told him, on the day of the copper removal, that he had "additional work" on the premises does not contradict plaintiff's deposition testimony that he learned of the painting project through his coworker. Indeed, plaintiff was not questioned at his deposition with respect to any conversations that he may have had with defendant on the day of the copper removal. We thus conclude that plaintiff's affidavit "is not merely an attempt to raise a feigned issue of fact" (*Schwartz v Vukson*, 67 AD3d 1398, 1400; *see Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

707

KA 10-00921

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL J. CALKINS, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (GARY MULDOON 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 March 18, 2010. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to dismiss the indictment is granted and the indictment is dismissed without prejudice to the People to re-present any appropriate charges under the sole count of the indictment to another grand jury.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal mischief in the third degree (Penal Law § 145.05 [2]), defendant contends that reversal is required based on errors committed by the prosecutor when instructing the grand jury with respect to the defense of justification. We agree. Although the prosecutor properly charged the grand jury regarding justification based on the use of physical force in defense of a person (*see* § 35.15) with respect to the charge of assault in the second degree (§ 120.05), the prosecutor failed to instruct the jury that such defense was also applicable to the charge of criminal mischief in the third degree (*see* § 35.00). We note that the grand jury voted not to indict defendant for assault but did indict him for criminal mischief. Although it is true that a grand jury "need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law" (*People v Calbud, Inc.*, 49 NY2d 389, 394), we conclude that defendant was exposed to the possibility of prejudice by the deficiencies in the prosecutor's charge regarding justification based on the use of physical force in defense of a person (*see People v Huston*, 88 NY2d 400, 409). That error was compounded by the fact that the prosecutor also failed to charge the grand jury regarding

justification based on the use of physical force in defense of premises (*see* § 35.20 [3]). In addition, the possibility of prejudice was increased by the failure of the prosecutor to inform the grand jury of defendant's request to call a witness to the incident giving rise to the charges (*see People v Butterfield*, 267 AD2d 870, 873, *lv denied* 95 NY2d 833; *People v Ali*, 19 Misc 3d 672, 674; *People v Andino*, 183 Misc 2d 290, 292-293).

Contrary to defendant's further contention, we conclude that the evidence is legally sufficient to support the conviction (*see generally 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), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Nevertheless, defendant's "conviction after trial does not cure defective [g]rand [j]ury proceedings" (*Huston*, 88 NY2d 400, 411; *see People v Connolly*, 63 AD3d 1703, 1704-1705; *People v Samuels*, 12 AD3d 695, 697). We therefore reverse the judgment, grant that part of defendant's omnibus motion seeking to dismiss the indictment and dismiss the indictment without prejudice to the People to re-present any appropriate charges under the sole count of the indictment to another grand jury (*see Connolly*, 63 AD3d at 1705).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

727

KA 10-00025

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON COLLINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered April 24, 2009. The judgment convicted defendant, upon a nonjury verdict, of predatory sexual assault against a child and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the mandatory surcharge to $250 and the crime victim assistance fee to $20 and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of predatory sexual assault against a child (Penal Law § 130.96) and endangering the welfare of a child (§ 260.10 [1]). Contrary to the contention of defendant, his rights to due process and equal protection were not denied when the People prosecuted him for predatory sexual assault against a child rather than rape in the first degree (§ 130.35 [4]; *see People v Lawrence*, 81 AD3d 1326, 1326-1327; *People v Vicaretti*, 54 AD2d 236, 239-240). "The fact that 'under certain circumstances the crimes of rape in the first degree and [predatory sexual assault against a child] may be identical . . . does not . . . amount to a denial of equal protection' or due process" (*Lawrence*, 81 AD3d at 1326), and we conclude that this is not an exceptional case requiring the People to exercise their broad discretion to charge the lesser crime (*see id.* at 1327; *see generally People v Urbaez*, 10 NY3d 773, 775; *People v Eboli*, 34 NY2d 281, 287-288). We further conclude that Supreme Court properly denied defendant's request to consider criminal sexual act in the first degree (§ 130.50 [4]) as a lesser included offense of predatory sexual assault against a child (*see generally People v Discala*, 45 NY2d 38, 41-42; *Lawrence*, 81 AD3d at 1326-1327).

Defendant failed to preserve for our review his contention that

Penal Law § 130.96 is unconstitutional (*see People v Almarez*, 19 AD3d 1005, *lv dismissed* 6 NY3d 773, *amended on rearg* 21 AD3d 1438, *lv denied* 6 NY3d 752) and, in any event, the record does not establish that the requisite notice was given to the Attorney General with respect to that contention (*see* Executive Law § 71 [3]; *Almarez*, 19 AD3d 1005). The further contention of defendant that the court violated *Apprendi v New Jersey* (530 US 466) is also unpreserved for our review (*see Lawrence*, 81 AD3d at 1326; *People v Phillips*, 56 AD3d 1168, *lv denied* 11 NY3d 928). In any event, that contention is without merit " 'because [the c]ourt did not increase the penalty for the crime of which defendant had been convicted based upon facts' " that it did not find (*Lawrence*, 81 AD3d at 1327).

We reject defendant's contention that the evidence is legally insufficient to establish that he engaged in " '[o]ral sexual conduct' " (Penal Law § 130.00 [2] [a]; *see* § 130.50 [4]; *see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to the contention of defendant, he was not denied a fair trial based on ineffective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). " '[D]efendant failed to demonstrate the lack of a strategic basis for the decision [of defense counsel not] to allow defendant to testify' " (*People v Riley*, 292 AD2d 822, 823, *lv denied* 98 NY2d 640), as well as his decision not to call certain witnesses to testify (*see People v Roman*, 60 AD3d 1416, 1417-1418, *lv denied* 12 NY3d 928; *see generally People v Benevento*, 91 NY2d 708, 712). Defendant also failed to demonstrate the lack of a strategic basis for defense counsel's failure to make a written motion pursuant to CPL 330.30 to set aside the verdict (*see generally People v Conte*, 71 AD3d 1448, 1449). "Contrary to defendant's contention, defense counsel's comments at the sentencing hearing were neither adverse to defendant's position, nor amounted to defense counsel becoming a witness against defendant" (*People v Loret*, 56 AD3d 1283, *lv denied* 11 NY3d 927; *cf. People v Lawrence*, 27 AD3d 1091). We have examined the remaining allegations of ineffective assistance of counsel raised by defendant and conclude that they lack merit. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally Baldi*, 54 NY2d at 147).

The sentence is not unduly harsh or severe. As the People correctly concede, however, the mandatory surcharge and crime victim assistance fee should have been based on the statute in effect at the time of the crimes (*see* Penal Law § 60.35 [1] [a] [former (i)]; *People v Smith*, 57 AD3d 1410, 1411). We therefore modify the judgment accordingly.

Entered: June 17, 2011

Patricia L. Morgan
Clerk of the Court

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

728

KA 08-00229

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAKEYMO HODGE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (MICHAEL D. MCCARTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered June 7, 2004. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (§§ 110.00, 220.39 [1]). Defendant contends in each appeal that his plea was not voluntarily, intelligently and knowingly entered because, inter alia, County Court failed to conduct a factual colloquy and failed to ensure that defendant understood his constitutional rights. Although defendant filed a pro se motion to withdraw his plea prior to sentencing, defendant voluntarily withdrew that motion before it was ruled upon by the court, and he did not thereafter move to vacate the judgments of conviction. Defendant therefore failed to preserve his 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). We conclude that this case does not fall within the rare exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666), "inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea" (*People v Lewandowski*, 82 AD3d 1602, 1602). In any event, to the extent that defendant's contention is actually a challenge to the factual sufficiency of the plea colloquy, we note that, "where, as

here, [the] defendant pleads guilty to a crime less than that charged in the indictment, a factual colloquy is not required" (*People v Harris*, 233 AD2d 959, *lv denied* 89 NY2d 1094).

Defendant's further contention in each appeal that he was deprived of effective assistance of counsel survives his plea only to the extent " 'that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance' " (*People v Fomby*, 42 AD3d 894, 895). Thus, although defendant contends that defense counsel was ineffective in several respects, only his contention that defense counsel failed to advise him properly with respect to his constitutional rights survives the plea, and that contention is belied by the record. Finally, the sentence in each appeal is not unduly harsh or severe.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

729

KA 08-00230

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAKEYMO HODGE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (MICHAEL D. MCCARTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered June 7, 2004. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Same Memorandum as in *People v Hodge* ([appeal No. 1] ___ AD3d ___ [June 17, 2011]).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

734.1

CA 11-00924

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

BRIAN S. DERMODY AND GINA V. DERMODY,
PLAINTIFFS-RESPONDENTS,

V ORDER

DARRYL D. TILTON, SANDRA J. TILTON,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

OHL & ALEXSON, HONEOYE (WAYNE I. OHL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE BROCKLEBANK FIRM, CANANDAIGUA (DEREK G. BROCKLEBANK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a decision of the Supreme Court, Ontario County (William F. Kocher, A.J.), dated November 12, 2010. The decision stated that the motion of defendants Darryl D. Tilton and Sandra J. Tilton for summary judgment is denied.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Pecora v Lawrence*, 28 AD3d 1136, 1137).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

734.2

CA 11-00925

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

BRIAN S. DERMODY AND GINA V. DERMODY,
PLAINTIFFS-RESPONDENTS,

V ORDER

DARRYL D. TILTON, SANDRA J. TILTON,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

OHL & ALEXSON, HONEOYE (WAYNE I. OHL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE BROCKLEBANK FIRM, CANANDAIGUA (DEREK G. BROCKLEBANK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a decision of the Supreme Court, Ontario County (William F. Kocher, A.J.), dated August 24, 2010. The decision concluded that plaintiffs' motion for summary judgment against defendants Darryl D. Tilton and Sandra J. Tilton should be granted.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Pecora v Lawrence*, 28 AD3d 1136, 1137).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

734

CA 10-02329

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

BRIAN S. DERMODY AND GINA V. DERMODY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DARRYL D. TILTON, SANDRA J. TILTON,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

OHL & ALEXSON, HONEOYE (WAYNE I. OHL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE BROCKLEBANK FIRM, CANANDAIGUA (DEREK G. BROCKLEBANK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered November 17, 2010. The order, inter alia, granted the motion of plaintiffs for summary judgment against defendants Darryl D. Tilton and Sandra J. Tilton.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the third ordering paragraph granting plaintiffs the right to use Coon Run for any purpose other than ingress, egress and general access and as modified the order is affirmed without costs.

Memorandum: Darryl D. Tilton and Sandra J. Tilton (collectively, defendants) appeal from an order that, inter alia, granted plaintiffs' motion for summary judgment on the second amended complaint against defendants and granted plaintiffs an easement by prescription over a portion of defendants' property. The property owned by plaintiffs is located north of defendants' property, and the only vehicular access to it is by way of Coon Run, a former public road running north and south between Tilton Road and Route 20A in the Town of Bristol. Plaintiffs commenced this action seeking an easement over Coon Run to access their property from Route 20A and an order enjoining defendants from interfering with their right to use that portion of Coon Run adjacent to defendants' property. We conclude that Supreme Court properly granted plaintiffs' motion for summary judgment to the extent that they sought a prescriptive easement.

"To establish a prescriptive easement one must prove by clear and convincing evidence . . . that the use was 'adverse, open and notorious, continuous and uninterrupted for the prescriptive period' "

of 10 years (*Beutler v Maynard*, 80 AD2d 982, 982-983, *affd* 56 NY2d 538, quoting *Di Leo v Pecksto Holding Corp.*, 304 NY 505, 512). Here, plaintiffs submitted evidence establishing that their predecessors in interest, including the individual who sold the property to plaintiffs, as well as the owners of other landlocked parcels in the area, had used Coon Run to access their properties and maintained it for that purpose for several decades after its use as a public road was discontinued. That evidence was sufficient to demonstrate that Coon Run was openly, notoriously and continuously used to access plaintiffs' property for the requisite 10-year period, thus giving rise to a presumption that the use was hostile and under claim of right (*see Kessinger v Sharpe*, 71 AD3d 1377, 1378). Thus, plaintiffs met their initial burden on the motion, and defendants' conclusory allegation that the prior use of Coon Run by other property owners in the area was permissive is insufficient to raise a triable issue of fact (*see generally id*. at 1378-1379; *Micheli v D'Agostino*, 169 AD2d 1010, 1011). Although defendants submitted the affidavit of Darryl Tilton's mother, Verna Tilton, in which she averred that her family had controlled access to Coon Run from Route 20A on a permissive basis, that statement was contradicted by her additional sworn statements, and we thus conclude that the submission of that affidavit constitutes an attempt to raise feigned issues of fact where none truly exists (*see Martin v Savage*, 299 AD2d 903). In any event, Verna Tilton did not specifically state that the use of Coon Run by plaintiffs' predecessors in interest was permissive in nature.

We agree with defendants, however, that the scope of the easement granted by the court is overbroad. It is well settled that, "in the case of a prescriptive easement, the right acquired is measured by the extent of the use" (*Mandia v King Lbr. & Plywood Co.*, 179 AD2d 150, 157; *see also Bremer v Manhattan Ry. Co.*, 191 NY 333, 338). Plaintiffs established only that their predecessors in interest had used and maintained Coon Run for the purpose of ingress and egress. Such limited use does not support the order insofar as it states that plaintiffs "shall be entitled to use the prescriptive easement . . . for the purposes of . . . improvement, construction, maintenance, general use and enjoyment, operating, repairing, and reconstructing a driveway for pedestrian and vehicular use, including the right to control the prescriptive easement area and any necessary and/or incidental improvements thereto, including the placement of utility services such as electric, telephone, gas, cable, water, sewer, and other utility service; and making the required excavations and construction therefore upon, over, across or below the land . . . . " We therefore modify the order accordingly.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

736

CA 10-02308

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

NANCY D. GILLESPIE AND PATRICK GILLESPIE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

INTER-CONTINENTAL HOTELS CORPORATION,
ET AL., DEFENDANTS,
AND GRAND HOTEL INTER-CONTINENTAL PARIS SNC,
DEFENDANT-APPELLANT.

HOWARD W. BURNS, JR., NEW YORK CITY, FOR DEFENDANT-APPELLANT.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered August 31, 2010 in a personal injury action. The order denied the motion of defendant Grand Hotel Inter-Continental Paris SNC to dismiss the amended complaint against it.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted and the amended complaint against defendant Grand Hotel Inter-Continental Paris SNC is dismissed.

Memorandum: In this personal injury action, defendant Grand Hotel Inter-Continental Paris SNC (Hotel) appeals from an order denying its pre-answer motion to dismiss the amended complaint against it. We agree with the Hotel that Supreme Court erred in denying the motion, and we therefore reverse.

Plaintiffs concede that the Hotel is a foreign corporation not authorized to do business in New York State. Consequently, they were required to comply with Business Corporation Law § 307 to effect service of the supplemental summons and amended complaint upon the Hotel (*see Reyes v Harris Press & Shear*, 256 AD2d 564). "The incontestable starting proposition in cases of this kind is that once jurisdiction and service of process are questioned, plaintiffs have the burden of proving satisfaction of statutory and due process prerequisites" (*Stewart v Volkswagen of Am.*, 81 NY2d 203, 207). "Business Corporation Law § 307 establishes a mandatory sequence and progression of service completion options to acquire jurisdiction over a foreign corporation not authorized to do business in New York . . . First, process must be personally served upon the Secretary of State

in the City of Albany or his or her deputy or authorized agent for service . . . Then, as is relevant here, notice of the service and a copy of the process must be [s]ent . . . to such foreign corporation by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state . . . in the jurisdiction of its incorporation, or if no such address is there specified, to its registered or other office there specified, or if no such office is there specified, to the last [known] address of such foreign corporation . . . The Court of Appeals has made clear that the precisely . . . delineated sequence set forth in the statute compels a plaintiff to proceed in a strict sequential pattern and that the failure to do so is a jurisdictional defect requiring dismissal" (*VanNorden v Mann Edge Tool Co.*, 77 AD3d 1157, 1158-1159 [internal quotation marks omitted]; *see* § 307 [b]; *Flick v Stewart-Warner Corp.*, 76 NY2d 50, 57, *rearg denied* 76 NY2d 846).

Consequently, "[p]laintiffs were obligated in the first instance to ascertain that there was no post office address specified for [the Hotel] to receive process or other registered or office address for [the Hotel] on file with the [French] equivalent of the Secretary of State *before* descending to the next level of notification options, i.e., mailing a copy of the process to 'the last address [of the Hotel] known to the plaintiff[s]' " (*Stewart*, 81 NY2d at 208, quoting Business Corporation Law § 307 [b] [2]). Inasmuch as plaintiffs failed to establish that they attempted to ascertain whether an address was on file with such a French official or body, they failed to meet their burden of establishing that they followed the mandatory sequence set forth in the statute. Failure to comply with section 307 is a jurisdictional defect, and thus dismissal of the amended complaint against the Hotel is required.

The Hotel's remaining contention is moot in light of our determination.

All concur except GORSKI, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent, inasmuch as I conclude that Supreme Court properly denied the pre-answer motion of defendant Grand Hotel Inter-Continental Paris SNC (Hotel) seeking to dismiss the amended complaint against it. As the majority states, " 'Business Corporation Law § 307 establishes a mandatory sequence and progression of service completion options to acquire jurisdiction over a foreign corporation not authorized to do business in New York' " (*VanNorden v Mann Edge Tool Co.*, 77 AD3d 1157, 1158, quoting *Stewart v Volkswagen of Am.*, 81 NY2d 203, 207; *see* § 307 [b]). The statute requires that "notice of the service and a copy of the process . . . be '[s]ent . . . to such foreign corporation by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state[, or with any official or body performing the equivalent function,] in the jurisdiction of its incorporation, or if no such address is there specified, to its registered or other office there specified, or if no such office is there specified, to the last [known] address of such foreign corporation' " (*VanNorden*, 77 AD3d at 1158, quoting § 307 [b]

[2]).

In support of its motion, the Hotel challenged the court's jurisdiction over it on the ground that plaintiffs' affidavit of compliance with Business Corporation Law § 307 was silent with respect to whether the address where plaintiffs sent the notice of service and a copy of the process was the one registered for that purpose with the French equivalent of the department of state. In opposition to the motion, plaintiffs submitted the affidavit of their attorney, who averred that, based on his research, the Paris address to which he sent the notice of service and a copy of the process was the address listed for the Hotel in the "official registry of French companies." Thus, contrary to the conclusion of the majority, plaintiffs submitted evidence establishing that they "attempted to ascertain whether an address was on file with [the appropriate] French official or body . . . ." Further, although it appears that the documents attached to the affidavit of plaintiffs' attorney were from a commercial enterprise providing information regarding companies listed in that French registry, rather than from the official registry itself, the Hotel makes no allegation in reply that the address to which plaintiffs sent the process is not "the post office address specified for the purpose of mailing process, on file . . . with an[] official or body performing the equivalent function" of the department of state (§ 307 [b] [2]). Thus, I conclude that plaintiffs met their burden of establishing "that the specified steps for gaining jurisdiction by service and notice were precisely followed in the delineated sequence set forth in the statute" (*Stewart*, 81 NY2d at 207-208). Notably, the procedures contained in Business Corporation Law § 307 are "calculated to assure that the foreign corporation[] in fact[] receives a copy of the process" (*Flick v Stewart-Warner Corp.*, 76 NY2d 50, 56, *rearg denied* 76 NY2d 846) and, here, there is no dispute that the Hotel actually received the process. I would therefore affirm.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

740

CA 11-00156

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

MERCHANTS MUTUAL INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE INSURANCE FUND,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (MARK M. CAMPANELLA OF COUNSEL), FOR DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered July 13, 2010. The order and judgment granted the motion of plaintiff for summary judgment, denied the cross motion of defendant New York State Insurance Fund for summary judgment and awarded money damages to plaintiff.

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, to recover funds from New York State Insurance Fund (defendant) based on defendant's alleged failure to indemnify Jerrick Waterproofing Co., Inc. (Jerrick Waterproofing), a third-party defendant in the underlying wrongful death action. Jerrick Waterproofing held an insurance policy issued by defendant that provided unlimited employer's liability coverage for employees subject to the Workers' Compensation Law, and Jerrick Waterproofing also held a commercial umbrella insurance policy issued by plaintiff that provided excess coverage upon the exhaustion of all other insurance policy limits. The plaintiff in the underlying wrongful death action sought damages for injuries sustained by the decedent, a construction worker employed by Jerrick Waterproofing, when he fell from scaffolding on a work site where T&G Contracting, Inc. (T&G) was the general contractor and Jerrick Waterproofing was a subcontractor. The wrongful death action against T&G and the owners of the property on which the accident occurred settled for approximately $2.2 million. All of the parties to the instant action contributed toward that settlement.

Defendant appeals from an order and judgment granting plaintiff's

motion for summary judgment on the complaint against defendant and awarding plaintiff damages in the amount of $600,000. We conclude that Supreme Court properly granted the motion. Contrary to its contention, defendant was obligated to provide unlimited coverage for the accident, despite an exclusion in its policy for liability assumed under a contract. Although T&G was granted summary judgment on its contractual indemnification cause of action against Jerrick Waterproofing in the underlying third-party action, T&G's common-law indemnification cause of action in that third-party action was still viable at the time of the settlement. "The fact that [T&G's] recovery against [Jerrick Waterproofing] could have been based upon a contract of indemnity does not preclude the existence also of a common-law right to indemnity" (*Aetna Cas. & Sur. Co. v Lumbermens Mut. Cas. Co.*, 136 AD2d 246, 248, *lv denied* 73 NY2d 701; *see O'Dowd v American Sur. Co. of N.Y.*, 3 NY2d 347, 353). Where, as here, "the facts of the case are such that the insured's liability exists on one theory as well as another and one of the theories results in liability within the coverage, the insured may avail itself of the coverage" (*Hawthorne v South Bronx Community Corp.*, 78 NY2d 433, 438).

Defendant further contends that the otherwise unlimited coverage provided by its policy was limited by language on the declarations page of the excess insurance policy issued by plaintiff, indicating that defendant's policy limit for bodily injury caused by an accident was $100,000. We reject that contention. An excess insurer may be bound by a misidentification of an underlying insurer's liability limit (*see generally Liberty Mut. Ins. Co. v Insurance Co. of State of Pa.*, 43 AD3d 666, 668). Here, however, the declarations page of the policy issued by plaintiff unambiguously excludes coverage in situations where the Workers' Compensation Law is applicable, and the language with respect to defendant's policy limit for bodily injury caused by an accident is applicable only to employees not subject to the Workers' Compensation Law. Thus, defendant was obligated to provide unlimited coverage to Jerrick Waterproofing with respect to its liability for decedent's accident, and the obligation of plaintiff to provide excess coverage was never triggered.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

748

KA 10-00389

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE HENDRICKS, ALSO KNOWN AS MAURICE SAVAGE, ALSO KNOWN AS "RICO," DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered November 19, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that County Court erred in accepting his plea without conducting a further inquiry into a possible justification defense. By failing to move to withdraw the plea or to vacate the judgment of conviction, however, defendant failed to preserve that contention for our review (*see People v Davis*, 37 AD3d 1179, *lv denied* 8 NY3d 983), and "[t]his is not one of those rare cases 'where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea' to obviate the preservation requirement" (*id.* at 1180-1181, quoting *People v Lopez*, 71 NY2d 662, 666). Although defendant initially stated during the plea colloquy that he shot the victim because the victim had threatened defendant's life, defendant explained upon further inquiry that he was operating a motor vehicle when he observed the victim walking down the street, whereupon defendant exited his car and chased the victim before shooting him in the foot while the victim was running away. Those further statements

by defendant negated any possibility of a viable justification defense.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

752

CAF 11-00204

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

IN THE MATTER OF PAUL A. BUTLER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARGARET E. HESS, RESPONDENT-APPELLANT.

LEONARD G. TILNEY, JR., LOCKPORT, FOR RESPONDENT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR PETITIONER-RESPONDENT.

ELISABETH M. COLUCCI, ATTORNEY FOR THE CHILD, BUFFALO, FOR KATHERINE B.

Appeal from an amended order of the Family Court, Erie County (Craig D. Hannah, A.J.), entered April 20, 2010 in a proceeding pursuant to Family Court Act article 6. The amended order, inter alia, continued joint custody and prohibited respondent from relocating from Western New York.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed on the law without costs, respondent's cross petition is granted, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioner father commenced this proceeding seeking to modify the parties' existing custody arrangement, pursuant to which the parties have joint custody with primary physical residence with respondent mother and visitation with the father. The father sought to prevent the mother from relocating with the child to Pennsylvania and also sought sole custody of the child. The mother filed a cross petition (improperly denominated "petition") in which she sought permission for the child to relocate with her to Pennsylvania, and she now contends on appeal that Family Court erred in denying her cross petition. We agree.

The record establishes that, pursuant to the existing arrangement, the father has visitation with the child on alternate weekends and Sunday overnights on the first Sunday of every month that does not fall within his regular access time. The mother remarried in December 2003, when the child was six years old, and the mother and the child began living with the mother's husband at that time. In December 2006, the mother lost her job as a result of budget cutbacks and, in July 2007, the mother's husband lost his job after his

position was eliminated. The mother's husband accepted a job in Pennsylvania in October 2007, which is the basis for the mother's cross petition seeking permission to relocate with the child to Pennsylvania to join her husband. After a hearing, the court, inter alia, denied the mother's cross petition and directed her not to relocate from Western New York, concluding that "there has been no showing by [the m]other of a real need for relocation to ensure the child[]'s best interests," and that the mother had "failed to show sufficient reasons to justify uprooting the child from the only area that she has ever known, . . . when clearly the proposed relocation would qualitatively affect her relation[ship] with the [f]ather."

We conclude that the mother established by the requisite "preponderance of the evidence that [the] proposed relocation would serve the child's best interests" (*Matter of Tropea v Tropea*, 87 NY2d 727, 741; *see Matter of Parish A. v Jamie T.*, 49 AD3d 1322, 1323; *Matter of Jennifer L.B. v Jared R.B.*, 32 AD3d 1174, 1175). While no single factor is determinative, the Court of Appeals in *Tropea* recognized that "economic necessity . . . may present a particularly persuasive ground for permitting the proposed move" (*id.* at 739; *see Matter of Thomas v Thomas*, 79 AD3d 1829). Here, the record reflects that the court did not adequately, if at all, consider the financial considerations underlying the requested relocation (*cf. Thomas*, 79 AD3d at 1830; *see generally Parish A.*, 49 AD3d at 1323-1324). It is undisputed that the mother requested permission to relocate because she and her husband lost their jobs within a relatively short period of time. The mother's husband testified that both his health insurance, which also covered the mother and the child, and his severance pay ran out in August 2007. After the mother's husband lost his job, he and the mother depleted their savings and their house was placed into foreclosure. The mother and her husband testified that they unsuccessfully attempted to locate jobs in Western New York and that the mother's husband accepted the job in Pennsylvania out of financial necessity.

Here, the court based its determination primarily on its conclusion that the relocation would "qualitatively affect" the child's relationship with the father. That was error, however, because "the need to 'give appropriate weight to . . . the feasibility of preserving the relationship between the . . . parent [without primary physical custody] and [the] child through suitable visitation arrangements' does not take precedence over the need to give appropriate weight to the economic necessity for the relocation" (*Matter of Cynthia L.C. v James L.S.*, 30 AD3d 1085, 1086, quoting *Tropea*, 87 NY2d at 740-741). In any event, the record establishes that the proposed relocation would not have a substantial impact on the visitation schedule. The mother and the husband testified that they would transport the child to and from Pennsylvania every other weekend, and they offered to pay for a hotel for the father in Pennsylvania on his off-weekends so that he could exercise additional access with the child. The mother further testified that the holiday access schedule would remain the same because she and her husband would be returning to Western New York at those times to visit with

their respective families, who reside there. In addition, the mother's husband purchased video conferencing equipment for his household and the father's household to enable the father and the child to communicate during the week and on the father's off-weekends. Thus, the mother established "the feasibility of preserving the relationship between the [father] and child through suitable visitation arrangements" (*Tropea*, 87 NY2d at 741; *cf. Matter of Webb v Aaron*, 79 AD3d 1761, 1761-1762).

We therefore reverse the amended order and grant the mother's cross petition, and we remit the matter to Family Court to fashion an appropriate visitation schedule. In light of our determination, there is no need to address the mother's further contention with respect to the court's sua sponte award of additional visitation to the father.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

758

CA 11-00246

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

DANIEL MARTINEZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PADDOCK CHEVROLET, INC., DEFENDANT-RESPONDENT.

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

SUGARMAN LAW FIRM, LLP, SYRACUSE (TIMOTHY J. PERRY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 19, 2010 in a personal injury action. The judgment dismissed the complaint upon a jury verdict of no cause of action.

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

Memorandum: Plaintiff appeals from a judgment dismissing his complaint in this personal injury action entered upon a jury verdict of no cause of action. The action arises from an automobile accident allegedly caused by faulty brakes in plaintiff's vehicle. Plaintiff had purchased the used vehicle from defendant approximately seven weeks prior to the accident and, according to plaintiff, defendant serviced the vehicle's brakes 10 days before the accident based on plaintiff's complaints about the brakes. The complaint, as amplified by the bill of particulars, alleged that defendant negligently inspected the vehicle upon sale and thereafter negligently repaired the vehicle's brakes.

Plaintiff contends that Supreme Court erred in giving an adverse inference charge at trial based upon plaintiff's failure to preserve the vehicle following the accident so that it could be inspected by defendant. We reject that contention. The vehicle was repossessed while at the collision shop for at least one month after the accident because plaintiff failed to make monthly payments to his lender. "New York courts . . . possess broad discretion to provide proportionate relief to the party deprived of . . . lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action" (*Ortega v*

City of New York, 9 NY3d 69, 76), "and an imposition of sanctions will not be disturbed [a]bsent a clear abuse of discretion" (*Merrill v Elmira Hgts. Cent. School Dist.*, 77 AD3d 1165, 1166 [internal quotation marks omitted]). Here, we perceive no abuse of the court's discretion in giving an adverse inference charge. While the vehicle was still in plaintiff's control at the collision shop following the accident, plaintiff contacted an attorney, thus indicating an awareness that the vehicle may be needed for litigation. Although plaintiff preserved the vehicle's rear brake hose, he failed to preserve the sway bar, which he claimed was defective. Moreover, as plaintiff's expert witness acknowledged, the photograph of the vehicle's brake line and sway bar admitted in evidence at trial was taken at the collision shop while the vehicle was lifted, which altered the positioning of the brake line and the sway bar and the space between them. In addition, defendant's expert testified that the photograph did not provide any indication of depth. We thus agree with the court that the photograph was not an adequate substitute either for the vehicle itself or for the sway bar, warranting the adverse inference charge.

Plaintiff further contends that the Honorable Timothy J. Walker, who was serving as an Acting Supreme Court Justice (hereafter, trial court), was precluded from giving an adverse inference charge because Justice Michalek had previously denied defendant's pretrial motion to dismiss the complaint on spoliation grounds. In denying the pretrial motion, Justice Michalek stated in his oral decision that, inter alia, defendant had not "demonstrated any prejudice." According to plaintiff, that ruling constituted the law of the case and barred the trial court from granting defendant's request for an adverse inference charge. We reject that contention. "The doctrine of law of the case applies to the same question in the same case" (*Tillman v Women's Christian Assn. Hosp.*, 272 AD2d 979, 980 [internal quotation marks omitted]), and whether dismissal is warranted on spoliation grounds is not the "same question" as whether an adverse inference charge at trial is appropriate (*id.*). Indeed, the pretrial ruling that dismissal was not warranted on spoliation grounds "was based on the facts and law presented by the parties in that procedural posture, and no more" (*191 Chrystie LLC v Ledoux*, 82 AD3d 681, 682), and that pretrial ruling did not bar the trial court from determining at a subsequent juncture of the litigation that a lesser sanction was appropriate (*see e.g. Rodriguez v 551 Realty LLC*, 35 AD3d 221). Nor does the doctrine of law of the case apply to the pretrial determination of Justice Michalek that defendant failed to demonstrate prejudice, inasmuch as the trial court's determination to the contrary was based on further evidence developed at trial, including the testimony of the expert witnesses (*see 191 Chrystie LLC*, 82 AD3d at 682).

We agree with plaintiff that the court erred in admitting in evidence a document from his employment file because it contained double hearsay and did not fall within an exception to the hearsay rule (*see generally Huff v Rodriguez*, 45 AD3d 1430, 1431-1432; *State Farm Mut. Auto. Ins. Co. v Langan*, 18 AD3d 860, 862–863). We conclude, however, that such error is harmless inasmuch as the hearsay

statements did not bear on the issue of defendant's negligence (*see Christopher v Coach Leasing, Inc.*, 66 AD3d 1522; *Evans v Newark-Wayne Community Hosp., Inc.*, 35 AD2d 1071). Finally, plaintiff's contention that the court erred in admitting evidence of his post-accident drug use 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: June 17, 2011

Clerk of the Court

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

761.2

CA 11-00440

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

MARCONE APW, LLC,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

SERVALL COMPANY, KARL P. ROSENHAHN AND
MARK J. CREIGHTON,
DEFENDANTS-APPELLANTS-RESPONDENTS.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO, JAECKLE FLEISCHMANN & MUGEL, LLP (B. KEVIN BURKE, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (JAMES D. DONATHEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 8, 2011. The order granted in part plaintiff's motion for an expanded preliminary injunction.

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

Memorandum: Plaintiff commenced this action against, inter alia, defendant Servall Company (Servall), its competitor in the wholesale appliance parts distribution business, seeking damages and a permanent injunction for, inter alia, defendants' alleged misappropriation of its confidential and proprietary information. Plaintiff alleges that its former employees, the two individual defendants, "copied and/or transferred [plaintiff]'s confidential and proprietary information" while they were still employed by plaintiff, and then used that information to solicit plaintiff's customers on behalf of Servall. Plaintiff moved for a temporary restraining order and preliminary injunction prohibiting defendants from, among other things, using its confidential and proprietary information, soliciting its customers, and further misappropriating plaintiff's information. Supreme Court issued an order (hereafter, initial order) that granted plaintiff's motion in part, enjoining defendants from using any information illegally obtained from plaintiff; enjoining them from further attempts to misappropriate plaintiff's information; directing them to return plaintiff's information; directing them to preserve the first set of daily backup tapes from its computer file servers that were created after this action was commenced; directing the individual defendants to turn over their personal computers and associated

storage devices to plaintiff's agents and to discontinue their use of any of Servall's computers and associated storage devices, with the option of an in camera review by the court in the event of a dispute concerning privileged documents; and directing defendants to preserve all documents related to this action. The court, however, denied that part of plaintiff's motion seeking to enjoin solicitation of customers "without prejudice to renew[] if and when [plaintiff] obtains direct evidence that [its] information has been unfairly used."

Thereafter, defendant Karl P. Rosenhahn and another former employee of plaintiff recanted certain statements contained in their sworn affidavits submitted in opposition to plaintiff's motion, thereby in effect admitting that Rosenhahn and other former employees of plaintiff used customer information obtained from plaintiff in the course of their employment with Servall. In addition, a forensic examination of the individual defendants' computers conducted pursuant to the initial order revealed that the individual defendants were in possession of, or had possessed and subsequently destroyed, numerous files and documents belonging to plaintiff. The files contained, inter alia, customer names and contact information, credit terms, sales data and rankings, pricing information, profit margins, accounts receivable information, sales notes, and warranty records. After that information came to light, plaintiff moved to expand the preliminary injunction in the initial order to enjoin defendants from soliciting or selling to any of plaintiff's "active customers," defined as the more than 3,000 customers to whom plaintiff made sales during the preceding year. By the order on appeal, the court granted plaintiff's motion only in part, enjoining Servall from soliciting 640 customers identified on a list that Servall had returned to plaintiff pursuant to the initial order. The court also enjoined Servall from making sales to customers it obtained between April 1, 2010 and August 31, 2010 "unless it can prove that it obtained th[ose] accounts without the use of plaintiff's [i]nformation." We affirm.

Addressing first defendants' appeal, we note the well-settled proposition that "[a] motion for a preliminary injunction is addressed to the sound discretion of the trial court[,] and the decision of the trial court on such a motion will not be disturbed on appeal, unless there is a showing of an abuse of discretion" (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216 [internal quotation marks omitted]; *see Doe v Axelrod*, 73 NY2d 748, 750). The party seeking the preliminary injunction must establish by clear and convincing evidence "(1) a likelihood of success on the merits, (2) irreparable injury in the absence of injunctive relief, and (3) a balance of equities in its favor" (*Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435; *see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839).

Here, we conclude that the court did not abuse its discretion in granting in part plaintiff's motion for an expanded preliminary injunction (*see generally Deloitte & Touche v Chiampou*, 222 AD2d 1026). As the court properly determined, plaintiff established a likelihood of success on the merits of its misappropriation and unfair competition causes of action (*see generally Eastern Bus. Sys. v*

Specialty Bus. Solutions, 292 AD2d 336, 338; *Laro Maintenance Corp. v Culkin*, 255 AD2d 560). Although defendants are correct that "customer lists" are not entitled to trade secret protection if such lists are "readily ascertainable from sources outside [plaintiff's] business" (*Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499; *see Riedman Corp. v Gallager*, 48 AD3d 1188, 1189), here the documents allegedly misappropriated by the individual defendants are not simply compilations of customer names and addresses or phone numbers. Rather, the documents contain detailed information about each customer, including the names of individual contact persons, customer-specific pricing information, credit terms and limits, and the customers' "class" rankings based upon their margin performance. Plaintiff established that such "information was compiled through considerable effort by [plaintiff] and its employees over several years and was not available to the public. The information also created a competitive advantage for [plaintiff] in servicing its current clients and creating new business" (*Eastern Bus. Sys.*, 292 AD2d at 337; *see Stanley Tulchin Assoc. v Vignola*, 186 AD2d 183, 185; *Giffords Oil Co. v Wild*, 106 AD2d 610, 611).

In any event, even assuming, arguendo, that the misappropriated information is not entitled to trade secret protection, we conclude that the court properly determined that injunctive relief is warranted on the alternative ground of breach of trust by the individual defendants in misappropriating plaintiff's proprietary information. As the Court of Appeals stated in *Leo Silfen, Inc. v Cream* (29 NY2d 387, 391-392), "[i]f there has been a physical taking or studied copying, the court may in a proper case enjoin solicitation, not necessarily as a violation of a trade secret, but as an egregious breach of trust and confidence while in plaintiffs' service" (*see generally Eastern Bus. Sys.*, 292 AD2d at 338; *Amana Express Intl. v Pier-Air Intl.*, 211 AD2d 606, 606-607). Here, the record is replete with evidence that the individual defendants stole and/or improperly retained thousands of documents belonging to plaintiff and thereafter used that information to compete against their former employer.

We further conclude that plaintiff established the requisite irreparable harm in the absence of the expanded injunctive relief granted by the court (*see generally Ingenuit, Ltd. v Harriff*, 33 AD3d 589, 590; *Eastern Bus. Sys.*, 292 AD2d at 337-338; *Stanley Tulchin Assoc.*, 186 AD2d at 186). With respect to irreparable harm, the court determined that defendants misappropriated "virtually all of [plaintiff]'s customer information" and utilized that information to establish a competing business in the northeastern United States. While the loss of sales over a finite period of time can be calculated and adequately remedied by an award of monetary damages (*see Eastman Kodak Co.*, 77 AD3d at 1436), the court properly determined that, without the expanded preliminary injunction, "plaintiff 'would likely sustain a loss of business impossible, or very difficult, to quantify' " (*Invesco Inst. [N.A.], Inc. v Deutsche Inv. Mgt. Ams., Inc.*, 74 AD3d 696, 697; *see generally Gundermann & Gundermann Ins. v Brassill*, 46 AD3d 615, 616-617; *Alside Div. of Associated Materials v Leclair*, 295 AD2d 873, 874). In support of the motion, plaintiff's

senior vice-president averred that, other than a few large national customers, the core of plaintiff's business is comprised of sales to small businesses such as appliance installers and repair persons, and that "[t]hese loyal customers take a great deal of time to develop." Indeed, defendants' own expert opined that the "real value" to the business is the relationship of a distributor with its customer, not a list of names. The loss of goodwill and damage to customer relationships, unlike the loss of specific sales, is not easily quantified or remedied by monetary damages (*see Gundermann*, 46 AD3d at 617; *Alside Div. of Associated Materials*, 295 AD2d at 874; *cf. Eastman Kodak Co.*, 77 AD3d at 1436).

In addition, we conclude that the balance of the equities favor granting the expanded preliminary injunction (*see generally Destiny USA Holdings, LLC.*, 69 AD3d at 216). Here, there is no record support for Servall's contention that the expanded preliminary injunction will jeopardize its national operations. Notably, Servall's chief operating officer averred that "[o]ver 90% of Servall's business has nothing to do with the northeast region or customers there." With respect to its northeast operations, the expanded injunction only prohibits Servall from soliciting 640 customers on a list of prospective clients that defendants developed using plaintiff's proprietary information. Servall is thus free to solicit the remaining 3,000-plus customers served by plaintiff, as well as customers served by other competitors. With respect to that part of the injunction enjoining sales to accounts obtained during the time period that defendants possessed plaintiff's confidential and proprietary information, the order expressly allows Servall to make sales to those customers that Servall can prove it obtained without the use of plaintiff's information. To the extent that the expanded injunction may negatively impact Servall's business in the northeast, we note that defendants assumed such a risk by knowingly taking or "retain[ing]," a term used by Servall in its brief on appeal, plaintiff's confidential and proprietary information and using that information to its competitive advantage and plaintiff's detriment.

Finally, we reject the contention of plaintiff on its cross appeal that the injunction should be further expanded. In our view, the court struck the appropriate balance between prohibiting defendants from further exploiting the fruits of the misappropriated information and permitting defendants to compete fairly for customers in the northeast market.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

764

KA 10-00019

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEMUELE JACKSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEMUELE JACKSON, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 28, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of reckless endangerment in the first degree (§ 120.25). Defendant contends in each appeal, in his main brief and pro se supplemental brief, that Supreme Court abused its discretion in denying his motion to withdraw each guilty plea because it was not knowingly, voluntarily and intelligently entered. Although that contention survives defendant's valid waiver of the right to appeal (*see People v Wright*, 66 AD3d 1334, 1334, *lv denied* 13 NY3d 912), it is without merit. " 'The unsupported allegations of defendant that [his family] pressured him into accepting the plea bargain do not warrant vacatur of his plea' " (*People v James*, 71 AD3d 1465, 1465). Further, there is no indication in the record that defendant's ability to understand the plea proceeding was impaired based on his alleged failure to take required medication (*see generally People v Spikes*, 28 AD3d 1101, 1102, *lv denied* 7 NY3d 818). The waiver by defendant of the right to appeal does not bar his contention in his main brief in appeal No. 2 with respect to the severity of the sentence because "the record establishes that defendant waived his right to appeal before [Supreme]

Court advised him of the potential periods of imprisonment that could be imposed" (*People v Mingo*, 38 AD3d 1270, 1271). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Defendant also contends in his main brief in appeal No. 2 that the court erred in fixing the duration of the orders of protection imposed upon the conviction of reckless endangerment in the first degree, a class D felony. Although defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-317), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). As the People correctly concede, the orders of protection issued in favor of the victims of that crime exceed the maximum legal duration of the applicable version of CPL 530.13 (4) (ii) in effect at the time of sentencing, i.e., when the judgment was rendered. That version provided that the duration of an order of protection entered in connection with a felony conviction shall not exceed "three years from the date of the expiration of the maximum term of an indeterminate . . . sentence of imprisonment actually imposed" (*id.*). Moreover, the duration may not be applied to the aggregate sentence but, rather, " 'must be added to the maximum term of the sentence imposed' " for the count upon which the order of protection was based (*People v Harris*, 285 AD2d 980). Thus, the orders of protection at issue may not exceed three years from the expiration of the seven-year maximum term of the indeterminate sentence imposed upon defendant's conviction of reckless endangerment in the first degree. We therefore modify the judgment in appeal No. 2 by amending the orders of protection, and we remit the matter to Supreme Court to determine the jail time credit to which defendant is entitled and to specify in each order of protection an expiration date in accordance with the version of CPL 530.13 (former [4] [ii]) in effect when the judgment was rendered on October 28, 2009.

We reject defendant's further contention in his pro se supplemental brief that the court erred in refusing to allow him to substitute assigned counsel. " 'The decision to allow a defendant to substitute counsel is largely within the discretion' " of the court to which the application is made (*People v Kobza*, 66 AD3d 1387, 1388-1389, *lv denied* 13 NY3d 939). Here, there was no abuse of discretion inasmuch as defendant failed to show the requisite "good cause for substitution" (*People v Sides*, 75 NY2d 822, 824). Contrary to defendant's implicit contention, he "did not establish that there was a complete breakdown in communication with h[is] attorney" (*People v Botting*, 8 AD3d 1064, 1065, *lv denied* 3 NY3d 671). Finally, to the extent that defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel survives his guilty plea and valid waiver of the right to appeal in appeal Nos. 1 and 2 (*see People v Lewandowski*, 82 AD3d 1602, 1602-1603), we conclude that his contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404).

Entered: June 17, 2011

Patricia L. Morgan
Clerk of the Court

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

765

KA 10-00020

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEMUELE JACKSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEMUELE JACKSON, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHELLE L. CIANCIOSA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 28, 2009. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the orders of protection and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same Memorandum as in *People v Jackson* ([appeal No. 1] ___ AD3d ___ [June 17, 2011]).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

769

KA 07-02669

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN MAYS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT 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 (John J. Ark, J.), rendered November 29, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts) and robbery in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts each of robbery in the first degree (Penal Law § 160.15 [4]) and robbery in the second degree (§ 160.10 [1]), defendant contends that Supreme Court erred in allowing interaction between the prosecutor and the jurors during deliberations while a video recording was replayed. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]), however, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that, pursuant to *People v O'Rama* (78 NY2d 270), preservation of defendant's contention is not required. In *O'Rama*, the Court of Appeals "note[d] that the court's error in failing to disclose the contents of [a jury] note had the effect of entirely preventing defense counsel from participating meaningfully in this critical stage of the trial and thus represented a significant departure from the organization of the court or the mode of proceedings prescribed by law" (*id.* at 279 [internal quotation marks omitted]; *see People v Patterson*, 39 NY2d 288, 295, *affd* 432 US 197). Here, there was no significant departure from the organization of the court or the mode of proceedings prescribed by law (*see generally People v Wiggins*, 304 AD2d 322, 323, *lv denied* 100 NY2d 625; *People v Davis*, 260 AD2d 726, 729-730, *lv denied* 93 NY2d 968). As recognized by the Court of Appeals, "not every communication with a deliberating jury requires the participation of the court" (*People v Bonaparte*, 78 NY2d 26, 30),

and a ministerial communication concerning the scope of a request for a readback that is "wholly unrelated to the substantive legal or factual issues of the trial" does not violate *O'Rama* or CPL 310.30 (*People v Harris*, 76 NY2d 810, 812; *see People v Gruyair*, 75 AD3d 401, *lv denied* 15 NY3d 852). Here, the record establishes that the prosecutor's communications with the jury were "merely ministerial" (*People v Pichardo*, 79 AD3d 1649, 1652, *lv denied* 16 NY3d 835). "The [prosecutor] did not attempt to convey any legal instructions to the jury or to instruct [it] as to [its] duties and obligations . . .[, nor did the prosecutor] deliver any instructions to the jury concerning the mode or subject of [its] deliberations" (*Bonaparte*, 78 NY2d at 31). Thus, "[i]n the present case, unlike in *O'Rama* . . ., [any] error does not amount to a failure to provide counsel with meaningful notice of the contents of [a] jury note or an opportunity to respond" (*People v Kadarko*, 14 NY3d 426, 429).

All concur except FAHEY and MARTOCHE, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent. In our view, Supreme Court improperly delegated control of a critical portion of the proceedings to the prosecutor insofar as it allowed the prosecutor to fashion responses to juror questions and guide the jurors through the playback of video recordings. Consequently, we would reverse the judgment of conviction and grant defendant a new trial on those counts of the indictment of which he was convicted.

In 2007, defendant was tried with respect to a series of charges arising from two incidents of robbery that occurred in Monroe County during October and November of 2006. During deliberations, the jury was returned to the courtroom in response to a jury note. The note was not included in the record on appeal, and the transcript contains no discussion between the prosecutor and defense counsel, in the presence of defendant, concerning a proposed response to the note. Rather, the record reflects that the court determined that the jurors would have to return to the courtroom to review video recordings allegedly made during the robberies.

A playback of the video recordings was arranged, and the prosecutor ran the video playback machine and directly communicated with one juror concerning what the jurors wanted to see on the video recordings. Indeed, the court allowed the prosecutor to engage in a discussion with the jury about that footage. After playing one of the three surveillance videos, the prosecutor asked, "The next one?" and then stated, "There is another." When a juror asked whether it was possible to "freeze it when [the suspects] are together," the prosecutor did not consult with the court but unilaterally replied, "I'll see if I can do that. I may have to start from the beginning to get that for you." The prosecutor further stated, "I'll keep trying for you." Moreover, at one point during her exchange with the jury, the prosecutor asked, "Do you want to see it again?" No objection was made by defense counsel during the playback process.

Initially, we do not agree with the majority that preservation of defendant's contention is required. In our view, the interaction,

which was unaccompanied by any admonition by the court, " 'goes to the general and over-all *procedure* of the trial' " and is a mode of trial proceedings error for which preservation is not required (*People v Hawkins*, 11 NY3d 484, 492 n 2).

"Under CPL 310.30, upon a jury's request for reinstruction or information 'the court must direct that the jury be returned to the courtroom and, after notice to both the [P]eople and counsel for the defendant, and in the presence of the defendant, must give such requested information and instruction as the court deems proper' " (*People v Lykes*, 81 NY2d 767, 769, quoting CPL 310.30). "[A] court may not delegate the responsibility of communicating with the jury to non-judicial personnel, and generally may not communicate with the jury through a non-judicial intermediary" on matters that are not ministerial in nature, i.e., communications that do not concern information pertaining to the law or the facts of the case (*People v Moyler*, 221 AD2d 943, 943, *lv denied* 87 NY2d 905, *lv dismissed* 87 NY2d 923; *see People v Bonaparte*, 78 NY2d 26, 30; *People v Ahmed*, 66 NY2d 307, *rearg denied* 67 NY2d 647). "A violation of that rule cannot be waived or consented to by defendant, presents a reviewable question of law even in the absence of objection, and is not amenable to harmless error analysis" (*Moyler*, 221 AD2d at 944; *see Ahmed*, 66 NY2d at 310-311). Thus, it is reversible error when someone other than the court performs the judicial function of responding to the jury's request for information concerning a matter that is not ministerial in nature (*see People v Khalek*, 91 NY2d 838; *People v Cassell*, 62 AD3d 1021; *People v Flores*, 282 AD2d 688, 689).

In *Ahmed* (66 NY2d at 309-310), the defendant agreed to allow the court's law secretary to respond to notes from the deliberating jury. In determining that reversal was required, the Court of Appeals wrote that "[t]he failure of a judge to retain control of deliberations, because of its impact on the constitutional guarantee of trial by jury, also implicates the organization of the court or mode of proceedings prescribed by law . . ., and such failure represents a question of law for [appellate] review even absent timely objection" (*id.* at 310). In *Moyler* (221 AD2d at 944), preservation was not required in connection with the defendant's contention that the trial court delegated a judicial function to a court employee (*cf. People v Kelly*, 5 NY3d 116, 120-121; *People v Pichardo*, 79 AD3d 1649, 1651-1652, *lv denied* 16 NY3d 835). Likewise, here, someone other than the trial court was permitted to converse with the jury concerning trial exhibits, during deliberations and on the record, in the presence of the trial court.

In so concluding, we acknowledge that the Third Department held in *People v Davis* (260 AD2d 726, 729-730, *lv denied* 93 NY2d 968) that allowing the prosecutor to play a videotape for the jury in court and to show the foreperson how to run the VCR during deliberations was a delegation of a ministerial act and did not affect the organization of the court or the mode of proceedings prescribed by law. Here, however, the prosecutor more than merely operated the video playback machine inasmuch as she conversed with a juror during the playing of

the video recordings and gave verbal responses to juror requests to pause the playback and to replay certain portions of the video recordings. In addition, as previously noted, she asked jurors questions such as, "Do you want to see it again?" In other words, the prosecutor's conduct went beyond the playing of the video recordings and thus in our view cannot be considered to be a mere ministerial act.

With respect to the merits, we conclude that the prosecutor's exchange with the jury constitutes reversible error. CPL 310.10 explicitly requires that the court respond to juror requests for instruction and/or information during deliberations. The court allowed the prosecutor to fashion responses to juror questions and to guide the jurors through the playback of the video recordings. In our view, that amounted to "[t]he failure of [the trial] judge to retain control of deliberations" (*Ahmed*, 66 NY2d at 310) and, "by delegating his function, at least in part, to [the prosecutor], the trial judge deprived the defendant of his right to a trial by jury" (*id.* at 312).

This case more clearly requires reversal than *Ahmed* or *Moyler* because those cases involved the delegation of the court's function to a court employee who was neutral to the proceedings. Here, the delegation of duties was to the prosecutor, an advocate rather than a neutral party. The subtleties of advocacy are founded upon establishing a positive relationship with jurors, which is precisely why direct contact between attorneys and jurors during deliberations is strictly prohibited.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

778

CA 10-01399

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

JOHN T. GOWANS AND SHERRY BATCHELDER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

OTIS MARSHALL FARMS, INC., DOING BUSINESS AS
MARSHALL FARMS, DEFENDANT-RESPONDENT.

OTIS MARSHALL FARMS, INC., DOING BUSINESS AS
MARSHALL FARMS, THIRD-PARTY PLAINTIFF-APPELLANT,

V

GOWANS HOME IMPROVEMENT AND HAROLD GOWANS,
THIRD-PARTY DEFENDANTS-RESPONDENTS.

LAW OFFICES OF MARC JONAS, UTICA (RICHARD A. COHEN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CRAMER, SMITH & MILLER, P.C., SYRACUSE (LAUREN M. MILLER OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (GABRIELLE MARDANY HOPE OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS.

Appeals from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered April 12, 2010 in a personal injury action. The order and judgment denied the motion of plaintiffs for partial summary judgment on their claims pursuant to Labor Law § 240 (1) and § 241 (6), granted the cross motion of defendant-third-party plaintiff for partial summary judgment dismissing plaintiffs' claims pursuant to Labor Law § 200, § 240 (1) and § 241 (6), and granted the cross motion of third-party defendants for summary judgment dismissing the third-party complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying those parts of the cross motion of defendant-third-party plaintiff for summary judgment dismissing the Labor Law § 240 (1) and § 241 (6) claims and reinstating those claims and by denying the cross motion of third-party defendants for summary judgment dismissing the third-party complaint and reinstating the third-party complaint and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for

injuries sustained by John T. Gowans (plaintiff) when he allegedly fell through a hay hole in a barn owned by defendant-third-party plaintiff, Otis Marshall Farms, Inc., doing business as Marshall Farms (Otis). We agree with plaintiffs that Supreme Court erred in granting those parts of the cross motion of Otis for summary judgment dismissing the Labor Law § 240 (1) and § 241 (6) claims, and we therefore modify the order and judgment accordingly. We note at the outset that the court also granted that part of the cross motion of Otis for summary judgment dismissing the Labor Law § 200 claim, but plaintiffs failed to address that issue in their brief on appeal and thus are deemed to have abandoned any contention with respect thereto (*see Olson v Pyramid Crossgates Co.*, 291 AD2d 706, 708; *Ciesinski v Town of Aurora*, 202 AD2d 984).

The record establishes that, at the time of plaintiff's accident, his brother was taking measurements on the upper level of a barn owned by Otis, and that such measurements were "necessary and incidental" to the replacement of rotting carrier beams (*Bagshaw v Network Serv. Mgt.*, 4 AD3d 831, 832; *see Mannes v Kamber Mgt.*, 284 AD2d 310, *lv dismissed* 97 NY2d 638). It is undisputed that plaintiff and his brother were partners of third-party defendant Gowans Home Improvement, the construction company hired to perform the replacement job (*cf. Gibson v Worthington Div. of McGraw-Edison Co.*, 78 NY2d 1108, 1109; *Fabrizio v City of New York*, 306 AD2d 87, 87-88). Plaintiff's brother had been instructed to cover the hay hole through which plaintiff allegedly fell while ascending to the upper level of the barn in order to speak to his brother.

We agree with plaintiffs that the court erred in determining that plaintiff was not entitled to the protection of the Labor Law at the time of the accident, inasmuch as "[i]t is not necessary that an employee be actually working on his [or her] assigned duties at the time of the injury" (*Reeves v Red Wing Co.*, 139 AD2d 935, 936; *see Boncore v Temple Beth Zion*, 299 AD2d 953, 954). Indeed, "the relevant inquiry here is not whether the plaintiff picked up a tool to effect a repair, but whether he had been hired to take any part in the repair work" (*Campisi v Epos Contr. Corp.*, 299 AD2d 4, 8). "It is no defense to [the plaintiff's] recovery under [the] Labor Law . . . that it was not necessary for the plaintiff to be [at the location where his brother was taking the measurements] at the time of the accident in order to speak to his [brother]," who was his coworker (*Birbilis v Rapp*, 205 AD2d 569, 570; *see Hagins v State of New York*, 81 NY2d 921, 923), and thus plaintiff was entitled to the protections afforded by Labor Law § 240 (1) and § 241 (6).

We reject plaintiffs' further contention, however, that the court erred in denying their motion for partial summary judgment on the Labor Law § 240 (1) and § 241 (6) claims. Plaintiff has no recollection of the accident, and there were no witnesses who observed it. In any event, there is a triable issue of fact with respect to the cause of plaintiff's injuries because the record contains conflicting expert affidavits on that issue, rendering summary judgment inappropriate (*see generally Selmensberger v Kaleida Health*,

45 AD3d 1435, 1436). Otis submitted the affidavit of a biomedical engineer who opined that plaintiff's injuries were not consistent with the six-foot fall through an unguarded hay hole alleged by plaintiff to have occurred, while plaintiffs submitted the affidavit of plaintiff's treating neurosurgeon, who opined that plaintiff sustained a severe head injury as a result of falling from a height of approximately six feet or more (*see generally* § 240 (1); § 241 (6); 12 NYCRR 23-1.7 [b] [1] [i]).

Finally, we agree with Otis that the court erred in granting the cross motion of third-party defendants for summary judgment dismissing the third-party complaint. The record establishes that there are triable issues of fact whether plaintiff's brother, and therefore third-party defendants, were negligent in either failing to cover the hay hole or in failing to turn on available lights (*see generally Torrillo v Kiperman*, 183 AD2d 821, 821-822). We therefore further modify the order and judgment accordingly.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

784.1

CA 11-00020

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

SUSAN J. MILLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

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

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

THE BRIAN O'CONNELL, JR. LAW FIRM, PLLC, OLEAN (BRIAN O'CONNELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered October 22, 2010 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained while skiing at a resort operated by defendant Win-Sum Ski Corp. The accident occurred while plaintiff was riding a chairlift (hereafter, lift) with her 14-year-old son. Her son's snowboard became entangled with her skis as plaintiff and her son approached the lift's unloading area and he panicked, exiting the lift as it reached the point at which skiers typically unloaded and pulling plaintiff from the lift to the ground in the process. Defendants did not stop the lift until plaintiff had fallen. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff assumed the risks associated with the sport of skiing, and they contended in the alternative that any alleged negligence on defendants' part merely furnished the occasion for the accident. We agree with plaintiff that Supreme Court properly denied the motion.

Addressing first defendants' contention that the court erred in denying the motion because plaintiff assumed the risks associated with the sport of skiing, we note that, "[u]nder the doctrine of primary assumption of risk, a person who voluntarily participates in a sporting activity generally consents, by his or her participation, to those injury-causing events, conditions, and risks [that] are inherent in the activity" (*Cotty v Town of Southampton*, 64 AD3d 251, 253; *see*

generally Morgan v State of New York, 90 NY2d 471, 482-486; *Turcotte v Fell*, 68 NY2d 432, 438-440). As a general matter, an experienced skier assumes the risk of injury caused by, inter alia, variations in terrain and weather conditions that are incidental to the furnishing of a ski area, i.e., the conditions that generally flow from participation in that sport (*see Sontag v Holiday Val., Inc.*, 38 AD3d 1350; *Painter v Peek'N Peak Recreation*, 2 AD3d 1289; *see also* General Obligations Law § 18-101).

"On the other hand, the defendant[s] generally [have] a duty to exercise reasonable care to protect athletic participants from 'unassumed, concealed or unreasonably increased risks' " (*Lamey v Foley*, 188 AD2d 157, 164, quoting *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658; *see Morgan*, 90 NY2d at 485), and a plaintiff will not be held to have assumed those risks that are "over and above the usual dangers that are inherent in the sport" (*Morgan*, 90 NY2d at 485; *see Cotty*, 64 AD3d at 255-257; *Lamey*, 188 AD2d at 164). While "there is undoubtedly some risk of injury inherent in entering, riding and exiting from a chairlift at a ski resort" (*Morgan v Ski Roundtop*, 290 AD2d 618, 620 [hereafter, *Ski Roundtop*]), the use of such a device "is not of such magnitude to eliminate all duty of care and thereby insulate the owner from claims of . . . negligent maintenance and operation of the lift . . . since such negligence may unduly enhance the level of the risk assumed" (*id.*).

Here, defendants met their initial burden on the motion by establishing that plaintiff was a veteran skier familiar with the lift at issue and, indeed, had once fallen while unloading from a lift. The burden thus shifted to plaintiff "to submit evidence sufficient to raise an issue of fact whether defendant[s] created a dangerous condition over and above the usual dangers inherent in the sport of [downhill skiing]" (*Sontag*, 38 AD3d at 1351 [internal quotation marks omitted]). Guiding our conclusion in this case that the court properly denied defendants' motion is the decision of the Third Department in *Ski Roundtop.* There, the injured plaintiff was hurt after she disembarked from a lift and skied into a nearby plywood wall while attempting to avoid a skier who had been seated in the row of chairs immediately in front of the plaintiff and who had fallen in the unloading area (*id.* at 619). The "[p]laintiffs' major claim against [the cross-moving] defendants [was] that their lift operator was not properly trained and that he negligently failed to stop the lift so that [the] plaintiff could remain seated while the fallen skier exited the unload ramp" (*id.*). In denying the cross motion of those defendants for summary judgment dismissing the complaint on the basis of assumption of risk, the Third Department reasoned that there were issues of fact whether the operator was properly trained and was negligent in exercising his discretion not to stop the lift (*id.* at 620).

Here, the lift operator failed to stop the lift and prevent the release of plaintiff into the unloading area, resulting in plaintiff's injuries. Plaintiff's deposition testimony demonstrates that plaintiff and her son were frantically attempting to untangle

plaintiff's skis from the snowboard as the lift approached the unloading area, and that plaintiff's son yelled to her that he was unable to do so. Plaintiff's expert relied on that testimony as well as other evidence in concluding that the top lift attendant had sufficient time in which to observe plaintiff's distress and to engage in what defendants' night lift operation supervisor characterized as the exercise of judgment to slow or stop the lift. According to plaintiff's expert, once braked the lift would have come to a stop almost immediately, which would have enabled plaintiff and her son to exit the lift in a safe and controlled manner.

We reject defendants' alternative contention in support of the motion, i.e., that any alleged negligence on the part of the lift operator merely furnished the occasion for the accident. " 'As a general rule, issues of proximate cause are for the trier of fact' " (*Bucklaew v Walters*, 75 AD3d 1140, 1142). Even assuming, arguendo, that defendants met their initial burden with respect to that alternative contention (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), we conclude that the foregoing evidence raises triable issues of fact whether the alleged failure to operate the lift in a safe manner was a proximate cause of the accident (*see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784, 829).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

785

OP 11-00353

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

IN THE MATTER OF MICHAEL C. GREEN, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF MONROE COUNTY, PETITIONER-PLAINTIFF,

V OPINION AND ORDER

HONORABLE JOHN DEMARCO, A JUDGE OF THE COUNTY COURT, COUNTY OF MONROE, STATE OF NEW YORK, ELLIS MECHALLEN, CRIMINAL DEFENDANT, AND FERNANDO LOPEZ, CRIMINAL DEFENDANT, RESPONDENTS-DEFENDANTS.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), PETITIONER-PLAINTIFF PRO SE.

PHILLIPS LYTLE LLP, BUFFALO (TIMOTHY W. HOOVER OF COUNSEL), FOR RESPONDENT-DEFENDANT HONORABLE JOHN DEMARCO, A JUDGE OF THE COUNTY COURT, COUNTY OF MONROE, STATE OF NEW YORK.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR RESPONDENT-DEFENDANT ELLIS MECHALLEN, CRIMINAL DEFENDANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DONALD M. THOMPSON OF COUNSEL), FOR RESPONDENT-DEFENDANT FERNANDO LOPEZ, CRIMINAL DEFENDANT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) seeking to prohibit the conducting of certain proceedings.

It is hereby ORDERED that the petition/complaint is unanimously granted in part without costs by prohibiting respondent-defendant Honorable John DeMarco from contemporaneously conducting a suppression hearing and bench trial on the indictment regarding respondent-defendant Fernando Lopez, the petition/complaint insofar as it seeks relief regarding respondent-defendant Ellis Mechallen is dismissed as moot, the petition/complaint insofar as it seeks relief in the nature of mandamus to review is denied, and

> It is ORDERED, ADJUDGED and DECREED that respondent-defendant Honorable John DeMarco shall not, even with the consent of a defendant, commence a trial prior to the determination of pretrial motions as required by CPL 710.40

(3).

Opinion by SCUDDER, P.J.: Petitioner-plaintiff (hereafter, petitioner) commenced this original hybrid CPLR article 78 proceeding/declaratory judgment action seeking three forms of relief: a judgment pursuant to CPLR 7803 (3), mandamus to review, concluding that the determination of respondent-defendant Honorable John DeMarco (hereafter, respondent) to conduct, contemporaneously, the suppression hearings and bench trials in the criminal matters involving respondents-defendants Ellis Mechallen and Fernando Lopez was, inter alia, in violation of lawful procedure; a judgment pursuant to CPLR 7803 (2), a writ of prohibition, prohibiting respondent from conducting such joint proceedings; and a judgment pursuant to CPLR 3001 declaring that conducting the joint hearings/trials is in violation of CPL 710.40 (3), which requires that a court determine pretrial suppression motions prior to the commencement of a trial. The matters concerning Mechallen and Lopez were stayed pursuant to CPLR 7805 pending the outcome of this proceeding. We note at the outset, however, that Mechallen subsequently withdrew her suppression motion and the bench trial was conducted. Contrary to the contentions of petitioner and Mechallen, we conclude that the allegations in the petition with respect to Mechallen are moot, and those parts of the petition/complaint seeking relief with respect to her therefore should be dismissed. We further conclude that petitioner is not entitled to relief in the nature of mandamus to review pursuant to CPLR 7803 (3), inasmuch as the actions of respondent do not constitute an administrative action made in the exercise of discretion (*see generally Kraham v Mathews*, 305 AD2d 746, *lv denied* 100 NY2d 512), and thus that part of the petition/complaint seeking that relief should be denied.

The issues properly before us are whether a writ of prohibition should be issued prohibiting respondent from conducting a joint suppression hearing and bench trial in the matter involving respondent-defendant Fernando Lopez and whether petitioner is, in addition, entitled to declaratory relief to that effect.

Writ of Prohibition

CPL 710.40 (3) provides that, "[w]hen a motion is made before trial, the trial may not be commenced until determination of the motion." Petitioner alleges that, if respondent is permitted to proceed with a joint suppression hearing/trial in the Lopez matter in contravention of CPL 710.40 (3), the People will be denied the right to appeal from an order granting the suppression motion inasmuch as their right to appeal is limited to appeal from suppression orders that are entered prior to trial (*see* CPL 450.20 [8]). The issue before us therefore is whether respondent's determination to conduct, contemporaneously, the suppression hearing and bench trial in the Lopez matter contravenes CPL 710.40 (3) and thus is in excess of respondent's authorized powers in a matter over which he has jurisdiction (*see* CPLR 7803 [2]).

It is axiomatic that relief in the nature of a writ of

prohibition "is available . . . to prevent a court from exceeding its authorized powers in a proceeding over which it has jurisdiction [only where] . . . petitioner has established a clear legal right to that relief" (*Matter of Pirro v Angiolillo*, 89 NY2d 351, 355-356 [internal quotation marks omitted]; *see Matter of Rush v Mordue*, 68 NY2d 348, 352-353). Whether to grant the extraordinary remedy of a writ prohibiting respondent from conducting suppression hearings and bench trials contemporaneously is left to the sound discretion of this Court (*see Rush*, 68 NY2d at 354). Simply stated, if petitioner has a clear legal right to relief and respondent is exceeding his authorized powers in this matter, then this Court has the discretion to grant a writ of prohibition (*see Pirro*, 89 NY2d at 355-356; *Matter of Holtzman v Goldman*, 71 NY2d 564, 569). In making our determination, we may consider factors that include the gravity of harm and whether respondent's actions may be adequately corrected by other means at law or in equity (*see Pirro*, 89 NY2d at 359; *Rush*, 68 NY2d at 354).

Addressing first whether petitioner, on behalf of the People, has a clear legal right to require respondent to comply with CPL 710.40 (3), we conclude that he does. As previously noted, petitioner alleges that the joint hearing/trial is in contravention of CPL 710.40 (3) and that, in the event that respondent grants the suppression motion of Lopez in the course of that joint proceeding, the People will be prohibited from appealing from the suppression order because it was not entered prior to trial (*see* CPL 450.20 [8]; *see generally People v Garofalo*, 71 AD2d 782, *appeal dismissed* 49 NY2d 879). Although the "appealability or nonappealability of an issue is not dispositive" (*Holtzman*, 71 NY2d at 570), in both *Pirro* and *Holtzman* the Court of Appeals determined that the respective District Attorneys who challenged the failure of the trial judge to comply with a statute, and who lacked the right to appeal from the resulting orders, had a clear legal right to relief. In *Pirro*, the court improperly altered a sentence after service of the sentence had begun in contravention of CPL 430.10 (*see Pirro*, 89 NY2d at 358-359) and, in *Holtzman*, the court improperly dismissed the indictment when the People were unable to proceed on the scheduled trial date because they were unable to locate a witness. In both cases, in which the People lacked a statutory right to appeal from the respective orders, the Court of Appeals determined that the extraordinary relief of a writ of prohibition was appropriate.

Although the instant record reflects that respondent had proposed to petitioner that he would require criminal defendants to consent to a mid-trial adjournment of a joint hearing/trial in the event that the People sought to appeal from an adverse suppression ruling, we conclude that respondent "cannot rejigger the language or specific prescriptions of CPL 450.20 (8) . . . without trespassing on the Legislature's domain and undermining the structure of article 450 of the CPL—the definite and particular enumeration of all appealable orders" (*People v Laing*, 79 NY2d 166, 172). We therefore conclude that petitioner has a clear legal right to seek relief in the nature of a writ of prohibition.

We must therefore consider whether respondent has acted in excess of his authority in a matter over which he has jurisdiction by ordering that the suppression hearing and the bench trial be conducted contemporaneously. Petitioner concedes that there have been occasions when the People have consented to a court conducting a joint suppression hearing/trial. He alleges, however, that respondent may not deviate from the statutory mandate of CPL 710.40 (3) over the objection of the People and that, by doing so, respondent has acted in excess of his authorized powers in a matter over which he has jurisdiction (*see* CPLR 7803 [2]). According to respondent, however, he has properly exercised his discretion in scheduling the joint hearing/trial with the consent of Lopez. Respondent further alleges that the determination to conduct joint suppression hearings/trials with the consent of the defendant has been approved by this Court. Although this Court has declined to reverse the respective judgments of conviction in two prior appeals where the court utilized a joint hearing/trial procedure (*see People v Mason*, 305 AD2d 979, *lv denied* 100 NY2d 563; *People v Yousef*, 236 AD2d 868, *lv denied* 90 NY2d 860, 866), there are notable distinctions between those cases and the instant matter. In *Mason* and *Yousef*, the People did not object to the use of the joint hearing/trial and the respective defendants, who had consented to the procedure, contended on appeal that the court had erred in utilizing it. In other words, both defendants sought to have their proverbial cake and eat it too. Here, however, the People objected to respondent's use of a joint hearing/trial as being in violation of CPL 710.40 (3), and respondent overruled the objection, thereby foreclosing the People from exercising their right to appeal pursuant to CPL 450.20 (8) from a potential determination suppressing evidence that is vital to the prosecution of Lopez. We therefore conclude that, by refusing to comply with the requirements of CPL 710.40 (3), respondent exceeded his authority in a proceeding over which he has jurisdiction (*see Pirro*, 89 NY2d at 355; *cf. Matter of Oglesby v McKinney*, 7 NY3d 561, 565).

Declaratory Relief

Petitioner also seeks declaratory relief determining the rights of the parties with respect to whether respondent may properly conduct joint suppression hearings/bench trials over the objection of the People. As the Court of Appeals has noted, "[l]awsuits against judges should not be common, but there are times . . . where they are necessary to resolve important issues that could otherwise never reach an appellate court" (*Oglesby*, 7 NY3d at 565). We conclude that this matter presents such a scenario. The record establishes that the joint hearing/trial is commonly utilized in various courts in Monroe County, including respondent's court, both with and without the consent of the People. Indeed, it is undisputed that in addition to the criminal matters that are the subject of this proceeding, there is at least one other matter pending in respondent's court in which he has directed that the suppression hearing and the bench trial be conducted contemporaneously. Thus, based upon the record before us, it can be assumed that the issue presented here will recur in other prosecutions and that respondent will decide the issue in the same way provided that he has the consent of the defendant (*see id.*; *Matter of*

Morgenthau v Erlbaum, 59 NY2d 143, 152, *cert denied* 464 US 993). We therefore conclude that declaratory relief is proper.

Conclusion

Accordingly, we conclude that those parts of the petition/complaint seeking to prohibit respondent from conducting, contemporaneously, the suppression hearing and trial in the matter involving Lopez and seeking a declaration of the rights of the parties herein should be granted, and that a judgment should be entered declaring that respondent shall not, even with the consent of a defendant, commence a trial prior to the determination of pretrial motions as required by CPL 710.40 (3).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

792

KA 10-00392

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL P. SHAY, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, 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 (Frederick G. Reed, A.J.), rendered November 2, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, criminal mischief in the third degree, assault in the third degree, menacing in the second degree and coercion in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant's contention, the evidence is legally sufficient to support the burglary conviction inasmuch as the People established that he entered or remained unlawfully in the victim's apartment with the intent to commit a crime therein (*see id.*; *see generally People v Bleakley*, 69 NY2d 490, 495). The victim of the burglary testified at trial that she told defendant that he "needed to leave" her apartment, where he had been residing with her permission for no longer than a week. The victim further testified that, on the night of the incident, she told defendant "to go away," but he pushed open the door and forced his way into the apartment and assaulted her. We thus conclude that the evidence is legally sufficient to permit the inferences that defendant was not licensed or privileged to enter the victim's apartment on the date in question (*see* § 140.00 [5]; *see generally People v Graves*, 76 NY2d 16, 20; *People v Bonney*, 69 AD3d 1116, 1119-1120, *lv denied* 14 NY3d 838; *People v Maycumber*, 8 AD3d 1071, *lv denied* 3 NY3d 678), and that he entered with the intent to assault the victim. The evidence is also legally sufficient to support the inference that defendant entered the premises knowing that his permission with respect thereto had been revoked (*see generally Maycumber*, 8 AD3d at 1072; *People v Dela Cruz*, 162 AD2d 312, 313, *lv denied* 76 NY2d 892). Viewing the evidence in light of the elements of the crime of burglary in the second degree as

charged to the jury (*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).

Defendant failed to preserve for our review his further contention that County Court penalized him for exercising his right to a trial by imposing a longer term of incarceration than that offered during plea negotiations (*see People v Brink*, 78 AD3d 1483, 1485, *lv denied* 16 NY3d 742, 828; *People v Lombardi*, 68 AD3d 1765, *lv denied* 14 NY3d 802). In any event, that contention is without merit. Upon our review of the record, we perceive " 'no retaliation or vindictiveness against the defendant for electing to proceed to trial' " (*People v Dorn*, 71 AD3d 1523, 1524; *see People v Brown*, 67 AD3d 1427, *lv denied* 14 NY3d 839). Finally, the sentence is not unduly harsh or severe.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

798

CA 11-00209

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

LUCILLE M. BURKE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RYAN D. MORAN AND MARY E. MORAN,
DEFENDANTS-RESPONDENTS.

GROSSMAN & CIVILETTO, NIAGARA FALLS, HOGAN WILLIG, AMHERST (AMANDA L. LOWE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURGIO, KITA & CURVIN, BUFFALO (JAMES P. BURGIO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 16, 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 modified on the law by denying the motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the permanent consequential limitation and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and reinstating the claim for economic loss in excess of basic economic loss, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving was rear-ended by a vehicle operated by defendant Ryan D. Moran and owned by defendant Mary E. Moran. Defendants initially moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) and thereafter, in their reply papers, sought dismissal of plaintiff's claim for economic loss in excess of her basic economic loss. According to her bill of particulars, plaintiff sustained a serious injury under the permanent loss of use, permanent consequential limitation of use, significant limitation of use, and the 90/180-day categories of serious injury. Plaintiff has abandoned her contention with respect to permanent loss of use, and we conclude that Supreme Court erred in granting those parts of defendants' motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. We therefore modify the order accordingly.

Defendants met their initial burden on the motion by submitting an expert's affirmation establishing as a matter of law that there was no objective confirmation of plaintiff's pain and that she had not sustained "any objective injury which would have disabled her for more than 90 out of 180 days following the motor vehicle accident" or any objective injury that would constitute a "permanent consequential limitation of use of a body organ or member," or a "significant limitation of use of a body function or system" (*see Herbst v Marshall* [appeal No. 2], 49 AD3d 1194, 1195). Defendants also submitted evidence indicating with respect to plaintiff's cervical spine that she had a "voluntary restriction of rotation," "essentially normal" neurological examinations and "advanced degenerative disc disease."

In opposition to defendants' motion, however, plaintiff raised triable issues of fact with respect to the permanent consequential limitation and significant limitation of use categories of serious injury by submitting an expert affidavit and medical records demonstrating an objective basis for the reduced range of motion in her neck and containing a "numeric percentage of [her] loss of range of motion" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350; *see Howard v Robb*, 78 AD3d 1589; *Feggins v Fagard*, 52 AD3d 1221, 1223-1224; *Moore v Gawel*, 37 AD3d 1158). Nevertheless, we agree with defendants that the court properly granted that part of defendants' motion regarding the 90/180–day category of serious injury. With respect to that category, plaintiff failed to raise an issue of fact whether she was unable to perform substantially all of the material acts that constituted her usual and customary daily activities during the requisite period of time (*see Licari v Elliott*, 57 NY2d 230, 236; *Parkhill v Cleary*, 305 AD2d 1088, 1089-1090).

Finally, we conclude that the court further erred in granting that part of defendants' motion seeking to dismiss plaintiff's claim for economic loss in excess of basis economic loss, inasmuch as defendants moved for that relief for the first time in their reply papers (*see Clearwater Realty Co. v Hernandez*, 256 AD2d 100, 102; *Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625-626). We therefore further modify the order accordingly.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

799

CA 10-02402

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

JAMES R. BYRNES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CLYDE SATTERLY, M.D., DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

FRANK A. BERSANI, JR., SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, SYRACUSE (DANIELLE MIKALAJUNAS FOGEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered August 31, 2010 in a medical malpractice action. The judgment awarded costs and disbursements to defendant Clyde Satterly, M.D.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs and a new trial is granted.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as the result of the alleged malpractice of Clyde Satterly, M.D. (defendant) in prescribing medication that caused plaintiff to develop neuroleptic malignant syndrome. He now appeals from a judgment entered in defendant's favor, the jury having found that defendant was not negligent in the care and treatment of plaintiff and that he provided appropriate information to plaintiff before obtaining plaintiff's consent to the use of the medication.

We agree with plaintiff that Supreme Court erred in precluding his expert from testifying with respect to the theory that defendant was negligent in failing to monitor plaintiff after prescribing the medication at issue. Plaintiff asserted in his expert disclosure statement that the expert would testify, inter alia, concerning "the *treatment* rendered to plaintiff by defendant . . . in prescribing Zyprexa," which encompasses monitoring the effect of the drug on plaintiff (emphasis added). Thus, the proposed "testimony 'was not so inconsistent with the information and opinions contained [in the expert disclosure statement], nor so misleading, as to warrant preclusion of the expert testimony' " (*Neumire v Kraft Foods*, 291 AD2d 784, 786, *lv denied* 98 NY2d 613). Further, in light of the allegations in the complaint that defendant was negligent in failing to monitor plaintiff's medication and condition, defendant "cannot

claim either surprise or prejudice" arising from the alleged inadequacy of plaintiff's expert disclosure statement (*Ruzycki v Baker*, 9 AD3d 854, 855). "Because the court precluded plaintiff from introducing any evidence on a theory that might have resulted in a different verdict," we conclude that a new trial is required (*Maldonado v Cotter*, 256 AD2d 1073, 1074).

All concur except SCUDDER, P.J., and SMITH, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent because we cannot agree with the majority that Supreme Court abused its discretion in precluding plaintiff's expert from rendering an opinion that exceeded the scope of the expert disclosure statement plaintiff provided to defendants during pretrial discovery and thus that reversal on the law is warranted (*see e.g. McColgan v Brewer*, ___ AD3d ___ [May 12, 2011]; *Neumire v Kraft Foods*, 291 AD2d 784, 786, *lv denied* 98 NY2d 613). Nor can it be said that the court improvidently exercised its discretion so as to warrant reversal in the exercise of our discretion (*see e.g. Ryan v St. Francis Hosp.*, 62 AD3d 857, *lv denied* 13 NY3d 708; *LaFurge v Cohen*, 61 AD3d 426, *lv denied* 13 NY3d 701).

The expert disclosure requirements of CPLR 3101 (d) are "intended to provide timely disclosure of expert witness information between parties for the purpose of adequate and thorough trial preparation" (*Silverberg v Community Gen. Hosp. of Sullivan County*, 290 AD2d 788, 788; *see McColgan*, ___ AD3d at ___), and "trial courts are 'vested with broad discretion in addressing expert disclosure issues' " (*McColgan*, ___ AD3d at ___). We acknowledge that the extremely generalized allegations set forth in the complaint included allegations that Clyde Satterly, M.D. (defendant), inter alia, failed "to properly and adequately treat plaintiff's condition"; failed "to provide and afford proper and careful medical care"; and failed "to properly monitor plaintiff's condition during the course of treatment." The bill of particulars, however, narrowed the scope of the alleged malpractice to events occurring on May 10, 2006, the date on which defendant prescribed Zyprexa, which is the drug that allegedly caused plaintiff to develop, inter alia, neuroleptic malignant syndrome. In the bill of particulars, plaintiff limited his theories of negligence to those that related to the initial prescribing of Zyprexa. It is well established that "[t]he purpose of a bill of particulars is to amplify the pleadings, limit proof, and prevent surprise at trial" (*Mayer v Hoang*, 83 AD3d 1516, 1517 [internal quotation marks omitted]; *see Lamb v Rochester Gen. Hosp.*, 130 AD2d 963). We thus conclude that, by limiting the theories of negligence in the bill of particulars, plaintiff abandoned the generalized, boilerplate allegations in the complaint that were not related to the initial prescribing of Zyprexa.

In his expert witness disclosure, plaintiff stated that the subject matter of the expert's testimony would relate, inter alia, to "the treatment rendered to plaintiff . . . *in prescribing* Zyprexa" (emphasis added); "the lack of adequate warnings regarding the risks of taking Zyprexa"; "the lack of informed consent"; and "the standard

of care for physicians prescribing Zyprexa and [defendant's] deviation from the standard of care." Thus, the expert's opinions were to be limited to purported errors in the initial prescribing of the drug. At trial, however, plaintiff's attorney sought to elicit opinions on theories of negligence not advanced in either the bill of particulars or the expert witness disclosure. We therefore conclude that the court properly precluded plaintiff's expert from testifying with respect to those additional theories of liability (*see e.g. Ryan*, 62 AD3d 857; *LaFurge*, 61 AD3d 426; *Desert Storm Constr. Corp. v SSSS Ltd. Corp.*, 18 AD3d 421, 422; *Lidge v Niagara Falls Mem. Med. Ctr*. [appeal No. 2], 17 AD3d 1033, 1035). Contrary to the position of the majority, we conclude that the proposed testimony was in fact so inconsistent with the theories of malpractice advanced in the bill of particulars and expert witness disclosure that preclusion was warranted on the ground that plaintiff misled defendant to believe that his theories of malpractice were limited to acts or omissions occurring in the initial prescribing of Zyprexa (*cf. Stevens v Atwal* [appeal No. 2], 30 AD3d 993, 994-995; *Neumire*, 291 AD2d at 786; *Maldonado v Cotter*, 256 AD2d 1073, 1074; *Andaloro v Town of Ramapo*, 242 AD2d 354, 355, *lv denied* 91 NY2d 808). There is no indication in the record before us that defendant was alerted to the additional theories plaintiff sought to introduce at trial. Allowing plaintiff to introduce such evidence concerning those additional theories therefore would have resulted "in a significant and impermissible change of the theory of plaintiff's case . . ., thereby significantly prejudicing defendant" (*Conroe v Barmore-Sellstrom, Inc.*, 12 AD3d 1121, 1123).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

802

CA 11-00247

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

JAMES ENGLERTH AND HOLLI ENGLERTH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PENFIELD CENTRAL SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.

FARACI LANGE, LLP, ROCHESTER (KATHRYN K. LEE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, ROCHESTER (PATRICK B. NAYLON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 28, 2010 in a personal injury action. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by James Englerth (plaintiff) when he allegedly slipped and fell on an icy condition in a parking lot owned by defendant. Defendant thereafter moved for summary judgment dismissing the complaint on the grounds that it did not have actual or constructive notice of the condition. In addition, defendant contended that there was a storm in progress, thus precluding liability on its part, and that it did not create the condition. Supreme Court erred in granting defendant's motion. Even assuming, arguendo, that defendant met its initial burden with respect to actual notice of the icy condition, we conclude that plaintiffs raised an issue of fact concerning such notice (*see generally Ruic v Roman Catholic Diocese of Rockville Ctr.*, 51 AD3d 1000, 1001; *Tortorella v New York City Tr. Auth.*, 291 AD2d 445, 446). Although defendant submitted evidence that it did not have constructive notice of the icy condition by submitting plaintiff's deposition testimony in which plaintiff testified that the condition was not visible and apparent (*see Mullaney v Royalty Props., LLC*, 81 AD3d 1312; *Wright v Rite-Aid of NY*, 249 AD2d 931), plaintiffs raised an issue of fact with respect to such notice by submitting the sworn statement of a witness who observed "ice with water on top of the ice" near the area of

plaintiff's fall (*see Conklin v Ulm*, 41 AD3d 1290; *Pugliese v Utica Natl. Ins. Group*, 295 AD2d 992, 992-993). In addition, there is an issue of fact whether the alleged condition formed prior to commencement of the storm in progress and was therefore a preexisting hazard, rather than the product of a storm in progress for which defendant would have no liability (*see Hayes v Norstar Apts., LLC*, 77 AD3d 1329; *Schuster v Dukarm*, 38 AD3d 1358), and whether defendant created the condition.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

804.3

CA 10-01418

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

MARCIA A. WILD, THOMAS F. HORN, AS CO-EXECUTORS OF THE ESTATE OF MARGUERITE HORN, DECEASED, AND JOSEPH HORN, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CATHOLIC HEALTH SYSTEM, DOING BUSINESS AS MERCY HOSPITAL OF BUFFALO, ET AL., DEFENDANTS, BUFFALO EMERGENCY ASSOCIATES, LLP AND RAQUEL MARTIN, D.O., DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from a judgment of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered April 6, 2010 in a medical malpractice action. The judgment awarded plaintiffs money damages against defendants Buffalo Emergency Associates, LLP and Raquel Martin, D.O.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting that part of the post-trial motion to set aside the verdict and for a new trial with respect to the award of damages for loss of consortium only, and as modified the judgment is affirmed without costs and a new trial is granted on that element of damages only unless plaintiffs, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to reduce the award of damages for loss of consortium to $200,000, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Marguerite Horn (decedent) was treated at defendant Catholic Health System, doing business as Mercy Hospital of Buffalo (Mercy Hospital), after her husband, plaintiff Joseph Horn, discovered that she was unresponsive. Although decedent regained consciousness, she again became unresponsive when she suffered a seizure while at Mercy Hospital. After decedent developed respiratory problems, defendant Raquel Martin, D.O., the emergency room physician treating decedent, concluded that decedent needed to be intubated. Following two unsuccessful attempts by Dr. Martin to place an endotracheal tube in decedent’s throat, Dr. Martin directed at least two other persons to attempt to place the tube. When those attempts failed, an anesthesiologist was summoned, and he successfully intubated decedent.

At some point during the intubation procedure, Dr. Martin and others observed a subcutaneous emphysema under decedent's skin, but it was not until several days later that physicians discovered that decedent's esophagus had been perforated during the intubation procedure. The perforation could not be repaired, and a feeding tube therefore was inserted into decedent's stomach. As a result, decedent was never again able to consume solid foods or liquids normally.

Decedent and her husband commenced this medical malpractice action against multiple defendants seeking damages for the perforated esophagus and the injuries related thereto. Following decedent's death from causes unrelated to the alleged malpractice, plaintiffs Marcia A. Wild and Thomas F. Horn were substituted as plaintiffs in their capacity as co-executors of decedent's estate. The matter proceeded to trial and the jury, having found that only Dr. Martin was negligent, awarded $500,000 for decedent's pain and suffering and $500,000 for her husband's derivative cause of action.

We reject the contention of Dr. Martin and her partnership, defendant Buffalo Emergency Associates, LLP (collectively, defendants), that Supreme Court exhibited bias in favor of plaintiffs or abused its "broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary" (*Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1132, *lv denied* 11 NY3d 708 [internal quotation marks omitted]). We agree with defendants, however, that the court erred in permitting plaintiffs to attempt to impeach defendants' expert during plaintiffs' cross-examination of that expert by playing an instructional DVD that he had helped to edit and finance, inasmuch as the expert testified that he did not accept the DVD as authoritative (*see Winiarski v Harris* [appeal No. 2], 78 AD3d 1556, 1557-1558). Under the circumstances of this case, however, we conclude that the error does not warrant reversal (*see id*.).

Defendants further contend that the court erred in charging the jury with respect to proximate cause and, although we agree, we conclude that the error is harmless. The claims against defendants fell into two categories. The first category was that Dr. Martin was negligent during the intubation procedure, thereby causing the perforated esophagus (commission theories), and the second category was that she failed to chart or to follow up on the perforation, thereby causing a delay in the diagnosis of the perforation and depriving decedent of some possibility that the perforation could be repaired and the feeding tube avoided (omission theories). The claims against the other defendants were all based on their failure to diagnose and to treat the perforated esophagus.

In instructing the jury on causation, the court used only the loss of chance instruction (*see generally* 1 NY PJI3d 2:150, at 846-848 [2011]; *Jump v Facelle*, 275 AD2d 345, 346, *lv dismissed* 95 NY2d 931, *lv denied* 98 NY2d 612; *Cannizzo v Wijeyasekaran*, 259 AD2d 960, 961). As defendants correctly conceded at oral argument of this appeal, that instruction was entirely appropriate for the omission theories (*see*

e.g. Goldberg v Horowitz, 73 AD3d 691, 694; *Flaherty v Fromberg*, 46 AD3d 743, 745-746; *Jump*, 275 AD2d at 346; *Stewart v New York City Health & Hosps. Corp.*, 207 AD2d 703, 704, *lv denied* 85 NY2d 809; *cf. Cannizzo*, 259 AD2d at 961). We agree with defendants, however, that it was not an appropriate instruction for the commission theories. With respect to those theories, the issue was whether the negligent act was a substantial factor in bringing about the injury, i.e., the perforated esophagus. The standard charge on proximate cause found in PJI 2:70 conveys the proper legal standard for the commission theories of negligence and should have been given (*see* 1 NY PJI 2:150, at 816).

Under the circumstances of this case, the error in the jury charge on proximate cause does not warrant reversal. Pursuant to CPLR 2002, "[a]n error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced" (*see e.g. Stalikas v United Materials*, 306 AD2d 810, 811, *affd* 100 NY2d 626; *Murdoch v Niagara Falls Bridge Commn.*, 81 AD3d 1456, 1457-1458, *lv denied* ___ NY3d ___ [June 9, 2011]; *cf. Gagliardo v Jamaica Hosp.*, 288 AD2d 179, 180). Here, no substantial right of defendants was prejudiced. Even if the court had given the correct charge on causation for the commission theories, we conclude that the result would have been the same. Under the commission theories, "a finding of negligence necessarily entailed a finding of proximate cause" inasmuch as it is undisputed that decedent's esophagus was perforated during the intubation procedure (*Young v Gould*, 298 AD2d 287, 288; *see Ahr v Karolewski*, 32 AD3d 805, 806-807; *Brenon v Tops Mkts.* [appeal No. 2], 289 AD2d 1034, 1034-1035, *lv denied* 98 NY2d 605; *Stanton v Gasport View Dairy Farm*, 244 AD2d 893, 894). Thus, if the jury found that defendant was negligent based on one or more of the omission theories, then the instruction was proper and there was no error. On the other hand, if the jury found that defendant was negligent based on one or more of the commission theories, then the error in the charge is harmless.

Even assuming, arguendo, that the error insofar as it concerned the commission theories is not harmless, we nevertheless would not reverse the judgment based on that error. Although defendants' attorney conceded at oral argument of this appeal that the instruction on causation was proper for the omission theories, he contended that reversal was nevertheless required because the jury returned only a general verdict, and it therefore was unclear whether the verdict was based on the omission or commission theories. We agree with defendants that reversal generally is required when a general verdict sheet has been used and there is an error affecting only one theory of liability. Under those circumstances, appellate courts are forced to engage in speculation to determine whether the error affected the jury's verdict (*see generally Davis v Caldwell*, 54 NY2d 176, 179-180; *Cohen v Interlaken Owners*, 275 AD2d 235, 237; *Hanratty v City of New York*, 132 AD2d 596; *Jasinski v New York Cent. R.R.*, 21 AD2d 456, 462-463). Here, however, reversal is not required because defendants, as the parties asserting an error resulting from the use of the general verdict sheet, failed to request a special verdict sheet or to object to the use of the general verdict sheet (*see Suria v Shiffman*, 67 NY2d

87, 96-97, *rearg denied* 67 NY2d 918; *Kahl v Loffredo*, 221 AD2d 679, 679-680). Thus, we agree with the contention of plaintiffs' attorney at oral argument of this appeal that defendants may not now rely on the use of the general verdict sheet as a basis for reversal.

Finally, we agree with defendants that the award of $500,000 to decedent's husband for loss of consortium deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]). Based on the evidence presented at trial, we conclude that an award of $200,000 is the maximum amount that the jury could have awarded. We therefore modify the judgment accordingly, and we grant a new trial on damages for loss of consortium only, unless plaintiffs, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to reduce that award to $200,000, in which event the judgment is modified accordingly.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

812

CA 11-00179

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

USHCP REAL ESTATE DEVELOPMENT, INC.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW MITRANO,
DEFENDANT-RESPONDENT-APPELLANT.

EDWIN R. SCHULMAN, ROCHESTER (MICHAEL A. ROSENHOUSE OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

WILLIAM J. MACDONALD, ROCHESTER, FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered August 27, 2010. The order denied plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiff's motion for partial summary judgment on liability and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for an inquest on damages.

Memorandum: In this action for breach of an express warranty, plaintiff appeals and defendant cross-appeals from an order denying plaintiff's motion for summary judgment and defendant's cross motion for summary judgment dismissing the complaint. This action arises out of defendant's assignment of a promissory note and mortgage to plaintiff. As part of the assignment, defendant expressly warranted that the principal balance of the note was $378,092.87. The amount of the warranty was set forth not only in the assignment, but also in an allonge and a "Lost Note Affidavit" signed by defendant. Shortly after closing, defendant notified plaintiff's attorney that, in calculating the principal balance of the note, defendant neglected to provide a credit to the mortgagor in the amount of $5,000 based on a prepayment he had made. Plaintiff thereafter commenced this action seeking damages in the amount of $24,920.22, the difference between the principal balance of the note initially warranted by defendant and the revised principal balance subsequently alleged by defendant to be due, following closing.

We conclude that Supreme Court erred in denying plaintiff's motion to the extent that it seeks partial summary judgment on liability and we therefore modify the order accordingly. On the

record before us, there is no dispute that defendant expressly warranted that the principal balance of the note was more than the amount actually due thereunder. Plaintiff also established that its sole shareholder relied on defendant's representations concerning the principal balance due as part of the parties' agreement. Indeed, in the "Lost Note Affidavit" provided to plaintiff prior to closing, defendant stated that he understood that plaintiff, in purchasing the note and mortgage, was relying on the facts asserted in the affidavit with respect to the principal balance due, i.e., the amount warranted by defendant before the closing. Plaintiff therefore established all elements of a cause of action for breach of express warranty (*see CBS Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 503-504), and in response defendant failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Defendant contends that plaintiff is not entitled to recover based on defendant's breach of express warranty because plaintiff could have determined the correct amount due on the note if it had exercised due diligence during the parties' negotiations. We reject that contention. As the Court of Appeals has explained, a warranty " 'is intended precisely to relieve the promisee of any duty to ascertain the [warranted] fact for [itself]; *it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past*' " (*CBS Inc.*, 75 NY2d at 503). Thus, even assuming, arguendo, that plaintiff could have discovered prior to closing that the principal balance was less than the amount warranted, we conclude that the potential for such a discovery is not a defense to this action.

With respect to damages, we conclude that plaintiff established as a matter of law that the mortgagor made $45,000 in prepayments on the mortgage, as well as scheduled payments of $5,170.08 every month prior to assignment of the promissory note and mortgage, with the exception of July 2009, when he made a partial payment of $1,400. Plaintiff's sole shareholder stated in his affidavit that those payments were reflected in records provided to him by defendant, and defendant failed to raise an issue of fact with respect thereto. Indeed, defendant disputed only the principal amount due as calculated by plaintiff but did not specifically challenge any of plaintiff's assertions regarding payments made by the mortgagor. We further conclude, however, that plaintiff failed to establish as a matter of law that, based on the schedule of payments set forth above, the principal balance of the note at closing was $24,920.22 less than the amount warranted by defendant, as alleged in the complaint. It is unclear from the record how that amount was calculated by plaintiff, and we therefore remit the matter to Supreme Court for an inquest on that narrow issue (*see generally Puntillo Assoc. v Land*, 222 AD2d 425, 426).

Entered: June 17, 2011

Patricia L. Morgan
Clerk of the Court

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

813

CA 11-00080

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

PATRICIA SMART, AS ADMINISTRATRIX OF THE ESTATE OF MARILYN LOUISE CUYLER, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD ZAMBITO, DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (MAUREEN G. FATCHERIC OF COUNSEL), FOR DEFENDANT-APPELLANT.

STANLEY LAW OFFICES, LLP, SYRACUSE (KEITH R. YOUNG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered March 30, 2010 in a personal injury action. The order denied defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff, as administratrix of the estate of Marilyn Louise Cuyler (decedent), seeks to recover damages in this action for injuries allegedly sustained by decedent when she fell on a set of exterior stairs at defendant's residence. We agree with defendant that Supreme Court erred in denying his motion for summary judgment dismissing the complaint. Defendant met his initial burden on the motion by establishing as a matter of law that decedent was unable to specify what caused her to fall "without engaging in speculation," and plaintiff failed to raise a triable issue of fact (*Bolde v Borgata Hotel Casino & Spa*, 70 AD3d 617, 618). Indeed, at her deposition decedent did not testify consistently concerning the cause of her fall, and there were no eyewitnesses. Although in this circumstantial evidence negligence case plaintiff is not required to " 'exclude every other possible cause' of the accident but defendant's negligence . . ., [plaintiff's] proof must render those other causes sufficiently 'remote' or 'technical' to enable the jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744; *see generally Rosenberg v Schwartz*, 260 NY 162, 166). Here, summary judgment in defendant's favor is appropriate because " 'it is just as likely that the accident could have been caused by

some other factor [unrelated to any alleged negligence on defendant's part], such as a misstep or loss of balance[, and thus] any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation' " (*McGill v United Parcel Serv., Inc.*, 53 AD3d 1077, 1077; *see Bolde*, 70 AD3d at 618; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434). Decedent's deposition testimony establishes that " 'it is just as likely' " that she fell due to dizziness or loss of balance or by some other nonnegligent factor (*McGill*, 53 AD3d at 1077). "Negligence [by the defendant] cannot be presumed from the mere happening of an accident . . . Negligence must be proven" (*Mochen v State of New York*, 57 AD2d 719, 720).

Finally, we reject plaintiff's contention that the alleged violations of the building code require denial of defendant's motion inasmuch as plaintiff failed to establish that the building code relied upon by her expert applied to the subject stairway. Specifically, plaintiff's expert relied upon the building code applicable at the time of the accident in 2007, while the stairway was constructed in the early 1990s, and the expert failed to "offer concrete proof of the existence of the relied-upon standard as of the relevant time" (*Hotaling v City of New York*, 55 AD3d 396, 398, *affd* 12 NY3d 862; *see generally Trimarco v Klein*, 56 NY2d 98).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

816

CA 10-02268

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

LUANNE DELZER AND JEFFREY FEUERSTEIN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JILL M. ROZBICKI, DEFENDANT-RESPONDENT.

ARTHUR J. RUMIZEN, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

THOMAS A. STEFFAN, ALDEN, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, Jr., J.), entered November 4, 2010. The order granted defendant's motion for summary judgment and dismissed the complaint.

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

Memorandum: In this action seeking to impose a constructive trust on certain real property, plaintiffs contend that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint. We reject that contention. We note at the outset that defendant in fact sought dismissal of the complaint pursuant to CPLR 3211, but plaintiffs in opposition characterized defendant's motion as one "for summary judgment," and the court treated it as such. We therefore do the same, inasmuch as plaintiffs have thereby waived any objection to such treatment by their own characterization of the motion (*cf.* CPLR 3211 [c]). On the merits, it is well settled that "[a] constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*Potter v Davie*, 275 AD2d 961, 963; *see Sharp v Kosmalski*, 40 NY2d 119, 121). "In order to invoke the court's equity powers, plaintiff[s] must show a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, a breach of the promise, and defendant's unjust enrichment" (*Potter*, 275 AD2d at 963; *see Scivoletti v Marsala*, 97 AD2d 401, 402, *affd* 61 NY2d 806). In support of her motion, defendant acknowledged the confidential relationship but established as a matter of law that there was no promise, no transfer in reliance on the alleged promise, no breach of the alleged promise, and no unjust enrichment on defendant's part, and plaintiffs failed to raise a

triable issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

819

KA 08-01036

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

DAMIEN WARREN, DEFENDANT-APPELLANT.

MICHAEL L. D'AMICO, BUFFALO, 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 (Shirley Troutman, J.), rendered February 23, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Opinion by PERADOTTO, J.: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), following a simultaneous bench trial for one codefendant (bench trial codefendant) and a jury trial for defendant and a second codefendant. Defendant contends that, in allowing the bench trial codefendant to incriminate defendant before the jury by testifying on his own behalf in front of the jury rather than merely before County Court, as twice requested by defendant, the court violated his rights to due process and a fair trial. We agree with defendant that the judgment should be reversed and that he is entitled to a new trial.

Defendant and three codefendants were charged by joint indictment with murder in the second degree (Penal Law §§ 20.00, 125.25 [1]) and criminal possession of a weapon in the second degree (§§ 20.00, 265.03 [former (2)]). Thereafter, one codefendant pleaded guilty to reckless endangerment in the second degree in exchange for testifying on behalf of the prosecution, and defendant and his two remaining codefendants proceeded to trial. Approximately one week before the trial, the bench trial codefendant waived his right to a jury trial and elected to proceed by a bench trial. Defendant requested that the bench trial be severed from the jury trial. Alternatively, defendant requested that the bench trial codefendant testify outside the presence of the jury in the event that he elected to testify in his own defense. The court denied both the request for severance and the alternative

request. After the People, defendant and his jury trial codefendant rested, counsel for the bench trial codefendant indicated that his client intended to testify on his own behalf. Defendant's attorney then renewed his request that the bench trial codefendant's testimony be taken outside the presence of the jury. Counsel for defendant contended, inter alia, that the issue of that codefendant's guilt or innocence was not before the jury and that the proof had closed with respect to defendant. The court again denied defendant's request and, in his testimony in the presence of the jury, the bench trial codefendant implicated defendant in the shooting and exculpated himself and the remaining jury trial codefendant. The jury convicted defendant of both counts charged in the indictment and acquitted the remaining codefendant. Thereafter, the court acquitted the bench trial codefendant.

We agree with defendant that he was deprived of a fair trial based on the manner in which the court conducted the simultaneous bench and jury trial, i.e., by denying his requests that the bench trial codefendant testify on his own behalf outside the presence of the jury, inasmuch as his testimony incriminated defendant (*see generally People v Cardwell*, 78 NY2d 996; *People v Mahboubian*, 74 NY2d 174, 186; *People v McGriff*, 219 AD2d 829). Although it is unusual to conduct a simultaneous bench and jury trial, such a procedure is within a trial court's discretion provided that the procedure does not prejudice any of the defendants (*see People v Amato*, 173 AD2d 714, 715-716, *lv denied* 78 NY2d 919, 961, *cert denied* 502 US 1058; *see also People v Fleming*, 76 AD3d 582, *lv denied* 15 NY3d 893; *People v Wallace*, 153 AD2d 59, 64-67, *lv denied* 75 NY2d 925; *see generally People v Ricardo B.*, 73 NY2d 228, 233-234). A simultaneous bench and jury trial is, in essence, a "partial form of severance" (*Ricardo B.*, 73 NY2d at 233; *see Wallace*, 153 AD2d at 65), and the use of that procedure "is to be evaluated under standards for reviewing severance motions generally . . ., which require a showing of prejudice to entitle a defendant to relief" (*People v Irizarry*, 83 NY2d 557, 560 [internal quotation marks omitted]; *see People v Singh*, 266 AD2d 569, *lv denied* 94 NY2d 907). Severance is required where, among other things, "the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury [or the court, in a bench trial,] to infer [a] defendant's guilt" (*Mahboubian*, 74 NY2d at 184).

Here, we conclude that the court erred in denying defendant's requests that the jury be excused during the testimony of the bench trial codefendant, "[t]he logistics of [which] . . . were minimal," inasmuch as at that time the People, defendant and his jury trial codefendant had rested, and thus the proof had closed with respect to the two defendants tried by the jury (*Wallace*, 153 AD2d at 65). There is no question that "[t]he essence or core of the defenses [of defendant and the bench trial codefendant were] in conflict" (*People v Nixon*, 77 AD3d 1443, 1444 [internal quotation marks omitted]; *see Mahboubian*, 74 NY2d at 184; *McGriff*, 219 AD2d at 829-830; *People v Sanders*, 162 AD2d 327, 328, *lv denied* 76 NY2d 944), and that the

testimony of the bench trial codefendant thus should not have been presented to the jury. The court's decision to allow such testimony is particularly egregious in view of the fact that such testimony was obviously damaging to defendant, was not properly a part of the jury trial and was easily severable from the evidence presented at the jury trial. According to defendant, he did not shoot the victim. The bench trial codefendant, however, testified that he was sitting on a porch down the street during the shooting and that he saw defendant chase the victim through the park and shoot the victim multiple times. That testimony of the bench trial codefendant was critical to his defense in light of the fact that a nonparty witness to the shooting testified that it was the bench trial codefendant, not defendant, who was in the park when the shooting took place. Thus, it is difficult to imagine a more classic case in which the defenses of defendant and the bench trial codefendant "were antagonistic at their crux" (*Mahboubian*, 74 NY2d at 186; *see People v Kyser*, 26 AD3d 839, 840). The jury should not have heard the defense set forth by the bench trial codefendant inasmuch as only the court, not the jury, was the trier of fact with respect to that codefendant.

Moreover, under the procedure employed by the court, the People in essence received a windfall witness, and in effect a second prosecutor, i.e., counsel for the bench trial codefendant (*see Cardwell*, 78 NY2d at 998; *Nixon*, 77 AD3d at 1444), after resting their case against the two jury trial defendants. That witness implicated defendant in the murder and corroborated the testimony of the codefendant who pleaded guilty to reckless endangerment in the second degree and testified for the People. Notably, the prosecutor repeatedly referenced the testimony of the bench trial codefendant during his summation to the jury, emphasizing that, although he was not the People's witness, he had corroborated the People's proof. There is thus no question that the testimony of the bench trial codefendant was prejudicial to defendant (*see McGriff*, 219 AD2d at 829-830).

Accordingly, we conclude that the judgment should be reversed and that defendant is entitled to a new trial.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court

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

820

CA 11-00325

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

IN THE MATTER OF THE APPLICATION OF
PETITIONER/CONDEMNOR NEW YORK STATE URBAN
DEVELOPMENT CORPORATION, DOING BUSINESS AS
EMPIRE STATE DEVELOPMENT CORPORATION,
PETITIONER-APPELLANT, TO ACQUIRE IN FEE
SIMPLE CERTAIN REAL PROPERTY CURRENTLY
OWNED BY FALLSITE, LLC, AND KNOWN AS:

MEMORANDUM AND ORDER

232 SIXTH STREET, CITY OF NIAGARA FALLS
700 RAINBOW BLVD., CITY OF NIAGARA FALLS
231 SIXTH STREET, CITY OF NIAGARA FALLS
626 RAINBOW BLVD., CITY OF NIAGARA FALLS
701 FALLS STREET, CITY OF NIAGARA FALLS

SITUATED IN THE COUNTY OF NIAGARA, STATE OF
NEW YORK AND HAVING, RESPECTIVELY; THE FOLLOWING
TAX SECTIONS, BLOCKS, AND LOTS:

159.09-2-25.122
159.09-2-25.112
159.09-2-25.121
159.09-2-25.111
159.09-2-25.211

TOGETHER WITH ALL COMPENSABLE INTERESTS THEREIN
CURRENTLY OWNED BY FALLSITE, LLC, FALLSVILLE
SPLASH, LLC AND ANY OTHER CONDEMNEES WHO ARE
CURRENTLY UNKNOWN.

FALLSITE, LLC AND FALLSVILLE SPLASH, LLC,
RESPONDENTS-RESPONDENTS.

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE OF COUNSEL), FOR PETITIONER-APPELLANT.

JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered January 10, 2011. The order directed the parties to appear at a conference to discuss potential hearing dates.

It is hereby ORDERED that the order so appealed from is unanimously vacated on the law without costs and the matter is remitted to Supreme Court, Niagara County (Kloch, Sr., A.J.), for further proceedings in accordance with the following Memorandum: In this condemnation proceeding, petitioner appeals from an order of Supreme Court (Boniello, III, J.) directing the parties to appear for a scheduling conference with respect to respondents' motion to vacate a stipulated vesting order signed by Justice Boniello in July 2006. Pursuant to the vesting order, respondents surrendered title to the condemned property in return for an advance payment of $17 million, while reserving their right to receive additional compensation under EDPL 304 (A) (3). Respondents later sought additional compensation, and the matter proceeded to trial before a different justice, i.e., Acting Supreme Court Justice Kloch, Sr. Following a 17-day trial, Justice Kloch ruled that the advance payment exceeded the property's value by $120,523.55. Respondents thereafter moved before Justice Boniello to vacate the vesting order, alleging, inter alia, that they were fraudulently induced to stipulate to that order. Petitioner contends on appeal that the motion should have been made to Justice Kloch, who presided over the lengthy valuation trial, rather than to Justice Boniello. We agree.

Although a motion to vacate an order should generally be made to the justice who signed the order (*see* CPLR 2221 [a]), an exception exists where the Rules of the Chief Administrator of the Courts provide otherwise (*see* CPLR 2221 [b]). Here, the Uniform Rules for the New York State Trial Courts (specifically the rule entitled "Individual assignment system [IAS]; structure)," as promulgated by the Chief Administrator of the Courts, provide that, once a judge is assigned to a case, that judge becomes the " 'assigned judge' with respect to that matter and, except as otherwise provided in [22 NYCRR 202.3] (c), . . . shall conduct all further proceedings therein" (22 NYCRR 202.3 [b]). None of the exceptions set forth in subdivision (c) are applicable here. The IAS rules further provide that "[a]ll motions shall be returnable before the assigned judge" (22 NYCRR 202.8 [a]). By the adoption of the IAS, "the CPLR 2221 requirement of referral of motions to a Judge who granted an order on a prior motion has been modified to provide for consistency with the mandate of the [IAS] that all motions in a case shall be addressed to the assigned Judge" (*Ministry of Christ Church v Mallia*, 129 AD2d 922, 923, *lv dismissed* 70 NY2d 746; *see also Billings v Berkshire Mut. Ins. Co.*, 133 AD2d 919, 919-920, *lv dismissed* 70 NY2d 1002; *Dalrymple v Martin Luther King Community Health Ctr.*, 127 AD2d 69, 72-73).

We are unable to discern from the record before us why this case was referred to Justice Kloch rather than Justice Boniello when respondents sought additional compensation. Having presided over the case without objection for several years, however, we are compelled to conclude that Justice Kloch became and remains the IAS judge. Unlike Justice Boniello, whose involvement with the case was limited to having signed the stipulated vesting order in July 2006, Justice Kloch is intimately familiar with the underlying facts relevant to the vacatur motion (*see Dalrymple*, 127 AD2d at 72). In fact, almost all of the issues raised in the vacatur motion were raised in a post-trial

motion brought before Justice Kloch, who had yet to render a decision thereon when respondents filed the instant motion before Justice Boniello. Under the circumstances, we conclude that the order on appeal must be vacated, and we remit the matter to Justice Kloch as the IAS justice to determine respondents' motion.

Patricia L. Morgan

Entered: June 17, 2011

Clerk of the Court